RECALIBRATING *BRUEN*: THE MERITS OF HISTORICAL BURDEN-SHIFTING IN SECOND AMENDMENT CASES

KEVIN G. SCHASCHECK II*

After Bruen, the prevailing assumption was that the Second Amendment framework shifted radically for all gun laws. Courts throughout the country have already invalidated key gun safety statutes while applying the new test. However, such holdings fail to grapple with the full weight of Second Amendment doctrines. A proper application of the doctrine in toto will result in no significant changes to the constitutionality of the vast majority of gun laws after Bruen.

This Article explains the underdeveloped interaction between two principal Second Amendment doctrines– presumptions of legal validity and historical analyses. That interaction, framed in its simplest terms, is that the presumption acts either conclusively or as a burden-shifting device when considering historical evidence. By making explicit the procedural assumptions in Second Amendment cases, courts applying a historical burden-shifting approach will reduce the political pressures inherent in the doctrine and maintain the constitutionality of most gun safety laws.

* Kevin Schascheck is currently serving as a federal law clerk. No view expressed herein reflects the opinion or written work of the judge for whom he is clerking. He is a graduate of the University of Virginia School of Law '22. Gratitude for invaluable support, comments, and friendship is owed to the Honorable Matthew W.E. Bradley, Charles Barzun, Bob Buchanon, Chloe Fife, Julia Hesse, JP Jaillet, Rachel Slepoi, Lawrence Solum, Cathy Hwang, and Catherine Ward.

INTRODUCTION

What are the precise contours of the Second Amendment? Despite the fact that the Amendment was ratified in 1791,[1] modern understanding of gun rights and gun safety is still in its relative youth. *District of Columbia v. Heller*, the case which decided that the Second Amendment created an individual right to keep and bear arms, was only decided in 2008.[2] Further, in 2010 the Supreme Court held that the Second Amendment applied against the states.[3] In the 2022 term,[4] the Supreme Court issued *New York*

1. Nicholas J. Dilley, *"Constitutional Amendments" Series – Amendment II – "The Right to Keep and Bear Arms,"* NAT'L ARCHIVE: THE REAGAN LIBR. EDUC. BLOG (Aug. 1, 2022), https://reagan.blogs.archives.gov/2022/08/01/constitutional-amendments-series-amendment-ii-the-right-to-keep-and-bear-arms/ [https://perma.cc/UAN7-XGGS].

2. District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

3. McDonald v. Chicago, 561 U.S. 742, 791 (2010) (plurality opinion).

4. This was the same term that the Court overturned *Roe*, struck down a vaccine mandate, and allowed Texas's SB8 law to go into effect. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Amy Howe, *Fractured Court Blocks Vaccine-or-Test Requirement for Large Workplaces but Green-Lights Vaccine Mandate for Health Care Workers*, SCOTUSBLOG (Jan. 13, 2022, 4:41 PM), https://www.scotusblog.com/2022/01/

State Rifle & Pistol Association, Inc. v. Bruen.[5] *Bruen*, in striking down New York's licensing regime, announced a new history-and-tradition test for analyzing Second Amendment claims.[6] Commentators have queried as to what extent the opinion upsets the framework of Second Amendment jurisprudence post-*Heller*.[7] Accordingly, it is necessary to explain the current state of Second Amendment doctrine and propose a framework for addressing the hard questions courts face as they interpret the Second Amendment.

Settling on a framework for Second Amendment claims is doctrinally, socially, and politically important. Guns are now the second leading cause of death among children and adolescents, defined as persons one to nineteen years old.[8] The United States currently has the highest number of firearms per capita.[9] Polling on the broader issue of gun control is divided and advocacy spending has increased in recent years.[10] The same year that *Bruen* was issued, one court even went so far as to find unconstitutional the federal law disarming domestic abusers.[11] In 2023, the Fifth Circuit held that a restraining order for domestic violence is not a sufficient constitutional basis for disarmament,[12] and the Supreme Court's grant of certiorari in that case may further uproot doctrinal and scholarly development post-*Bruen*. Another court has found that the federal law

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fractured-court-blocks-vaccine-or-test-requirement-for-large-workplaces-but-green-lights-vaccine-mandate-for-health-care-workers/ [https://perma.cc/NMM5-YS76]; Amy Howe, *Court Leaves Texas' Six-Week Abortion Ban in Effect and Narrows Abortion Providers' Challenge*, SCOTUSBLOG (Dec. 10, 2021, 2:11 PM), https://www.scotusblog.com/2021/12/court-leaves-texas-six-week-abortion-ban-in-effect-and-narrows-abortion-providers-challenge/ [https://perma.cc/63SD-VP35].

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

6. *See infra* Part I.

7. *See, e.g.*, Theresa Inacker, *From Constitutional Orphan to Treasured Heirloom: The Second Amendment is No Longer a Second-Class Right*, SCOTUSBLOG (July 11, 2022, 4:30 PM), https://www.scotusblog.com/2022/07/from-constitutional-orphan-to-treasured-heirloom-the-second-amendment-is-no-longer-a-second-class-right/ [https://perma.cc/K6BU-534D]; Lisa Vicens & Samuel Levander, *The Bruen Majority Ignores Decision's Empirical Effects*, SCOTUSBLOG (July 8, 2022, 1:14 PM), https://www.scotusblog.com/2022/07/the-bruen-majority-ignores-decisions-empirical-effects/ [https://perma.cc/X9B5-ECJH]; David Kopel, *Restoring the Right to Bear Arms, New York State Rifle and Pistol Association v. Bruen*, VOLOKH CONSPIRACY (Aug. 9, 2022, 12:19 PM), https://reason.com/volokh/2022/08/09/cato-supreme-court-review-explains-doctrine-and-background-of-new-supreme-court-rules-for-the-second-amendment/ [https://perma.cc/357Y-2KW5]; Strict Scrutiny, *How SCOTUS Gutted Our Gun Laws* (June 23, 2022), https://crooked.com/podcast/how-scotus-gutted-our-gun-laws/ [https://perma.cc/Z2NU-3V2F].

8. Rebecca M. Cunningham et. al., *The Major Causes of Death in Children and Adolescents in the United States*, 379 NEW ENG. J. MED. 2468, 2469 (2018).

9. *Mass Shootings: America's Challenge for Gun Control Explained in Seven Charts*, BBC NEWS, https://www.bbc.com/news/world-us-canada-41488081 [https://perma.cc/SGA2-Z387].

10. *Id.*

11. *See, e.g.*, United States v. Perez-Gallan, PE:22-CR-00427-DC, 2022 U.S. Dist. LEXIS 204758, at *26–27, *30 (W.D. Tex. Nov. 10, 2022).

12. United States v. Rahimi, 61 F.4th 443, 452 (5th Cir. 2023).

against possession of a firearm with an obliterated serial number is unconstitutional, making those firearms harder to track in criminal cases.[13] For the foregoing reasons, few doctrinal changes are as polarizing and politically salient as those that occur in the Second Amendment context.

Doctrinally, *Bruen*'s attempted elucidation of the Second Amendment begets more confusion than clarity.[14] At a minimum, the Court disapproved of means-end tests to evaluate the constitutional validity of gun regulations.[15] In other words, *Bruen* states that none of the considerations in the preceding paragraph can be relevant to the inquiry. The Court replaced the tiers of scrutiny analysis, which would allow considerations of issues such as the safety of children, with a newly minted test that requires litigants to justify modern gun regulations with textual arguments and historical analogues where the *government* bears the burden of showing historical analogues. The analogical method itself is a core competency of lawyering—but requiring a specifically historical analogue is a product of the history-and-tradition jurisprudence that has become increasingly popular with the Court.[16] The *Bruen* test proceeds first by asking if the law at issue burdens conduct textually protected by the Second Amendment. If the conduct is protected, the *government* must justify its law with historical analogues, or so it appears at first blush.

But this doctrinal development creates puzzles. First, and most importantly, there is the doctrinal puzzle. *Bruen* fails to account for how its test interacts with another key doctrine in Second Amendment law—the presumptively lawful categories. The Supreme Court has previously stated that the Second Amendment does "nothing" to upset certain presumptively lawful categories of gun regulations.[17] That analysis of presumptively lawful categories of gun regulations has never been repudiated by the court.[18] Hundreds, if not thousands, of cases have cited to the famous

13. United States v. Price, No. 2:22-cr-00097, 2022 U.S. Dist. LEXIS 186571, at *14–16 (S.D.W. Va. Oct. 12, 2022).

14. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (June 23, 2022).

15. *Id.* at 2127 (explaining that the Court's holdings in *Heller* and *McDonald* "do not support applying means-end scrutiny in the Second Amendment context").

16. Still, even if the methodology of *Bruen* seems to be a departure from constitutional norms, the results need not be. *Bruen* has understandably caused an outcry among progressives who believe that *Bruen* will upend most gun safety laws. It could, but it should not with a proper application of *Bruen*.

17. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008). This Article is not the first to analyze presumptively lawful categories of gun laws, but it is the first to offer a comprehensive framework after *Bruen*. *See* Symposium, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1386 (2009).

18. The meaning of "presumptively lawful" has been interpreted in numerous ways by lower courts, but the vast majority agree that it is binding. Lycurgan, Inc. v. Jones, No. 14-CV-548, 2015 U.S. Dist. LEXIS 201224, at *31 (S.D. Cal. Nov. 19, 2015) (explaining that if a challenged law is presumptively lawful, then "the inquiry ends"); NRA of Am, Inc. v. Swearingen, 545 F. Supp. 3d 1247, 1268 (N.D. Fla. 2021) (explaining that "presumptively lawful" means outside the protection of the Second Amendment); Teixeira v. Cnty. of

language in *Heller* which established that the opinion would do "nothing"[19] to disturb certain categories of lawful regulations.[20]

Despite the fact that the Court did not explain how the historical analogue and presumptively lawful doctrines interact, at least five justices in *Bruen* were clear that the presumptively lawful doctrine remains good law.[21] But how does the presumption of lawfulness work? It must come in *somewhere* in *Bruen*'s two steps. The question is whether it comes in at *Bruen*'s textual analysis, its historical analysis, or both.

The problem is that if the presumption only applies to the textual inquiry, the presumption could be routinely defeated because the text of the Second Amendment is relatively broad. But in *Heller*, the Court indicated that the presumptively lawful doctrine would be robust.[22] To be most effective, the presumptively lawful doctrine should come into play for the historical analysis component of the test. The most administrable way to effectuate that role would be a burden-shifting framework whereby the plaintiffs challenging a gun regulation must show that certain historical facts are directly contrary to the law at issue.

Bruen stated that the burden of showing historical analogues for modern gun laws was on the government.[23] One might think that if the

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Alameda, No. 12-cv-03288-WHO, 2013 U.S. Dist. LEXIS 128435, at *23 (N.D. Cal. Sept. 9, 2013) (explaining that presumptively lawful means surviving facial challenges); United States v. White, No. 07-00361-WS, 2008 U.S. Dist. LEXIS 60115, at *2 (S.D. Ala. Aug. 6, 2008) (holding that felon bans were presumptively lawful and therefore constitutional); United States v. One Palmetto State Armory Pa-15 Machinegun, 115 F. Supp. 3d 544, 567–68 (E.D. Pa. 2015) (holding that a ban on machine guns was part of the "presumptively lawful" category and therefore constitutional absent evidence to the contrary); United States v. Lewis, No. 2008-45, 2008 U.S. Dist. LEXIS 103631, at *7 (V.I. Dec. 24, 2008) (holding that regulations on guns around schools was part of the presumptively lawful category of "sensitive places" and therefore constitutional, but noting that this could mean only that they would survive any level of scrutiny); United States v. Edge, No. 3:11-cv-301, 2012 U.S. Dist. LEXIS 15002, at *8 (W.D.N.C. Feb. 8, 2012) (holding that felon possession bans were presumptively lawful and therefore facially constitutional); United States v. Lunsford, No. 2:10-cr-00182, 2011 U.S. Dist. LEXIS 4753, at *11 (S.D.W. Va. Jan. 18, 2011) (stating skepticism of as-applied challenges); United States v. Smith, 742 F. Supp. 2d 855, 863 (S.D.W. Va. 2010) (stating that if a law is presumptively lawful, it may be upheld "on that basis alone"); United States v. Chester, 847 F. Supp. 2d 902, 912 (S.D.W. Va. 2012) (holding that Section 922(g)(9) is a ban on commercial sale to dangerous persons and therefore constitutional); United States v. Conrad, 923 F. Supp. 2d 843, 852 (W.D. Va. 2013) (holding that 922(a)(6) was a ban on commercial sale of firearms to dangerous persons but potentially implicating both Steps 1 and 2 in the presumptively lawful analysis).

19. *Heller*, 554 U.S. at 626–27.

20. This was confirmed through Lexis searches. The Shepard's Report reveals that over 1,500 opinions have cited the relevant headnote, HN20. *Shepard's Report for* District of Columbia v. Heller, LEXIS+ (last visited July 28, 2023) (narrowed by HN20), https://plus.lexis.com/api/permalink/3ad6cf03-efb0-4270-8bec-4f48c34b7c73/?context=1530671 [https://perma.cc/8FH4-M8AX].

21. *See infra* Part I.

22. *See Heller*, 554 U.S. at 627 n.26. As explained in Part II, *Heller* viewed its holding as not reaching broad categories of gun laws because they were presumptively lawful.

23. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2135 (2022).

court envisioned the government as bearing the burden to demonstrate a historical tradition of firearms regulations, then the government would *always* bear the burden. But as explained above, the historical analogue part of the test is the most administrable way for the burden to have a meaningful effect on case outcomes in the way that *Heller* envisioned.

Second, there is the historical puzzle. The Court did not clearly explain how to apply the historical analogue analysis, regardless of who bears the burden. How many analogues are enough? Which laws are similar enough? How should lower courts consistently and fairly determine the evidentiary weight of laws from certain historical periods as opposed to others?

I propose an answer to both puzzles that maintains the effect of the presumptively lawful categories, sketches a framework for drawing historical boundaries, and reduces the political tension in Second Amendment cases going forward. Similarly, I argue that under a proper reading, *Bruen* will not create a radical shift in results because the presumptively lawful categories are broad and binding. Proper applications of *Bruen*, taken with the Court's other Second Amendment precedents, should generally uphold rather than strike down the vast majority of gun safety regulations. The fact that the Court opted for a historical test, rather than a harsher strict scrutiny standard, makes it clear that the Court did not foresee that its test would invalidate most or even many gun regulations.

I offer the first comprehensive burden-shifting framework for the historical inquiry in the Second Amendment context, concluding that if a gun law is presumptively lawful, the category to which it belongs qualifies as a historical analogue. Once the court is persuaded that the gun law can rationally be classified, as part of one of the presumptively lawful categories, the court may then decide whether the presumption is conclusive or if it is rebuttable. If it is conclusive, the inquiry ends. If it is rebuttable, the party challenging the constitutionality of the law at issue must rebut the presumption by showing substantial and successful historical litigation against analogous historical laws. To rebut the government's argument that a law is presumptively lawful, the party challenging a law could argue that while a law could rationally be described as belonging to a presumptively lawful category of gun regulations, such as are outlined in Part II, the *effect* and *substance* of the law might be better characterized as something significantly different than that. In that event, the law would not merit inclusion in the category under a more scrutinizing analysis.

Assuming the government persuades the court that the law at issue is in a presumptively lawful category, then the analogue test's burden should shift to the challenger. To meet that burden, and therefore render the law unconstitutional, the challenger could point to historical evidence that such laws were deemed protected by the Second Amendment or successful historical litigation against relevantly similar laws throughout history. In sum, if the party defending a gun regulation successfully claims that the law

at issue is presumptively lawful, the party challenging the law must demonstrate that relevantly similar laws have been successfully litigated against during the seventeenth, eighteenth, and nineteenth centuries.

This Article proceeds by (i) analyzing the doctrinal history of the Second Amendment framework, (ii) explaining puzzles in the new Second Amendment doctrine, and (iii) expounding upon the practical and procedural application of the presumptively lawful framework.

I conclude that a proper application of *Bruen* and the presumptively lawful doctrine would not significantly expand the scope of the Second Amendment right, nor would it create a "regulatory straightjacket"[24] that would render unconstitutional the current public safety framework around weapons. Importantly, I argue that the new Second Amendment regime, as described herein, should be almost as favorable to gun regulations as the previous framework.

I. DOCTRINAL EVOLUTION OF THE SECOND AMENDMENT

The text of the Second Amendment states "[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."[25] One could be forgiven for finding this text ambiguous. Until *Heller*, however, the Supreme Court never found laws regulating the possession of firearms to be unconstitutional.[26] In *United States v. Miller*, the Court held that a federal law banning the possession of sawed-off shotguns was constitutional because such weapons would not have been used in militia service at the time the Bill of Rights was ratified.[27] The Court clearly stated that the Second Amendment protected the right to use firearms for militia service. The Court went so far as to say that the "obvious purpose" was to "assure the continuation and render possible the effectiveness of such forces."[28]

After *Heller*, courts analyzed Second Amendment claims under a two-step test commonly known as the *Marzzarella* framework.[29] Under that framework, the test first asked whether the regulation at issue burdened the core of the Second Amendment right and, if yes, queried whether it survived intermediate scrutiny, a constitutional test which asks whether the regulation at issue directly advances an important governmental interest.[30]

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24. *Id.* at 2133.

25. U.S. CONST. amend. II.

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

27. *Miller*, 307 U.S. at 178.

28. *Id.*

29. United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

30. *Id.* at 97–98 (adopting the same scrutiny and terminology as that applied in First Amendment cases such as Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

More than a decade later, the Court revisited the Second Amendment in *Bruen*.[31] The Court adopted a text and history approach to Second Amendment claims. However, the Court did not clearly explain how to conduct the historical analysis or how to maintain the presumptively lawful doctrine that at least five members of the Court endorsed.

A. *Heller*'s Impact

In *District of Columbia v. Heller*, a police officer challenged a District of Columbia law that "generally prohibit[ed] the possession of handguns," criminalized carrying "an unregistered firearm," prohibited the registration of handguns, and required a "trigger-lock … as it prohibits the use of 'functional firearms within the home.'"[32]

Prior to affirming the D.C. Circuit, *Heller* changed the emphasis of Second Amendment jurisprudence from the militia to the individual. According to *Heller*, "*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons."[33] The Court held that the Second Amendment protected an individual's right to keep and bear arms, with the following two caveats.[34]

First, *Heller* identified several presumptively lawful categories of gun regulations, analyzed further in Part III, without explaining how that presumption would work in practice. [35] The Court explained that "nothing" in its opinion "should be taken to cast doubt on longstanding prohibitions" within the Second Amendment context on "the possession of firearms by felons," "[the possession of firearms by] the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," and laws which impose "conditions and qualifications on the commercial sale of arms." The Court further explained that these "presumptively lawful" measures were only examples, and not an "exhaustive" list.[36] While this caveat was dicta in *Heller*, it is dicta that was endorsed by at least five justices in *Bruen*,[37] viewed as essential to the

31. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).
32. District of Columbia v. Heller, 554 U.S. 570, 574–76 (2008).
33. *Id.* at 623.
34. *Id.* at 595.
35. *Id.* at 626–27, 627 n.26.
36. *Id.*
37. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022). The majority says its opinion is "[in] keeping with *Heller*[.]" *Id.* at 2126. The concurrence affirms the dicta more explicitly. *Id.* at 2162 (Kavanaugh, J., concurring) (openly stating that "[p]roperly interpreted, the Second Amendment allows a 'variety' of gun regulations"). The dissent is equally clear. *Id.* at 2189 (Breyer, J., dissenting) (claiming that these "regulations were 'consistent' with the Second Amendment"). These are sufficient to explain away any counterargument that *Bruen* refers to presumptively protected conduct, as that can only be true where *Heller*'s categories are inapplicable based on the Kavanaugh concurrence and the dissent.

Second Amendment framework after *Heller*, and treated as binding by lower courts.[38]

Second, *Heller* declined to specify how rigorous the analysis of the law in question needed to be but expressly declined to adopt rational basis review, the lowest level of constitutional scrutiny.[39] The Court did not make clear what the appropriate level of scrutiny was for Second Amendment cases. *Heller* only indicated that rational basis review would be inappropriate under the Second Amendment. As the majority stated, if all that was required to survive a Second Amendment challenge was that the law had a rational basis, "the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."[40] Accordingly, while it was clear from *Heller* that the first question to answer in Second Amendment cases was whether the Second Amendment right itself was burdened, it was unclear what courts should do *after* that initial step.

In the related *Heller* case ("*Heller II*"), the Court settled on intermediate scrutiny and burden shifting to apply the presumptively lawful doctrine.[41] Intermediate scrutiny, unlike some other factual inquiries analyzed below, does not entail burden-shifting to the plaintiffs. Instead, the government has the burden to show that laws survive intermediate scrutiny, meaning that the law at issue directly advances an important governmental interest.[42] Importantly, *Heller II* was one of the first cases to acknowledge the presumptively lawful categories as a burden-shifting device, albeit only at the textual step. Under the *Marzzarella* framework, courts analyzing Second Amendment claims must first ask whether the core of the Second Amendment right is burdened, and if yes, then whether the law at issue survives intermediate scrutiny.[43]

Heller II serves as a reminder that the government bears the burden in intermediate scrutiny cases.[44] But it should be noted as a preview of Part IV that the fact that the government bears the burden in intermediate scrutiny cases is a feature of the tiers of scrutiny framework, rather than of

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38. *See, e.g.*, United States v. Rozier, 598 F.3d 768, 771 n.6 (11th Cir. 2010).

39. *Heller*, 554 U.S. at 628 n.27.

40. *Id.*

41. *See* Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011).

42. *Id.* at 1258. *But see infra* Part V (discussing how the government's duty to bear the burden is altered after *Bruen*).

43. United States v. Marzzarella, 614 F.3d 85, 89, 97 (3d Cir. 2010). Similarly unclear from *Heller* was the question of whether the interest in weapon-carrying for self-defense applied equally outside the home. *Heller* cites Justice Wilson's interpretation of the Pennsylvania Constitution's arms-bearing right as applying to the right of self-defense of the person or home. Many of the historical references in *Heller* to the right to bear arms seemed to include a home component, and *Heller* was unclear how significant that component was until *Bruen*, where the Supreme Court established the right to bear arms for self-defense unequivocally present outside of the home. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2134–35 (2022).

44. *Heller*, 670 F.3d at 1258, 1262.

the Second Amendment framework.[45] The intermediate scrutiny test was routinely employed after *United States v. Marzzarella*.[46]

B. The *Marzzarella* Framework

After *Heller*, the stage was set for lower courts to adopt a framework to implement the new Second Amendment regime. In *United States v. Marzzarella*, the Third Circuit recognized that while *Heller* rejected the rational basis test for Second Amendment claims, it did not set out with specificity the applicable level of scrutiny.[47] The court explained that the proper analysis for Second Amendment claims consisted of two steps. At the first step ("Step One"), the court must decide whether the law at issue burdens the core of the Second Amendment right,[48] and at the second step ("Step Two"), the court must determine whether the law survives intermediate scrutiny.[49]

In addition to creating a Second Amendment framework post-*Heller*, *Marzzarella* discussed the precise meaning of "presumptively lawful." The court explained that the phrase "could have different meanings under newly enunciated Second Amendment doctrine"[50]—a statement which is no less true after *Bruen* than after *Heller*. The court further stated that presumptively lawful could mean that at Step One, the conduct falls entirely outside the scope of the Second Amendment.[51] Alternatively, presumptively lawful could mean that regulations survive any standard of

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45. The question of which party bears burdens at which steps is now a more salient question than ever in the Second Amendment context. *Bruen* states that the government bears the burden of demonstrating that a regulation is consistent with the Second Amendment. *Bruen*, 142 S. Ct. at 2129–30. But there is an open question of what this means in presumptively lawful categories. *Bruen* explains that it is "keeping with *Heller*." *Id.* at 2126. This means that the presumptively lawful doctrine, whatever it may mean exactly, still has a doctrinal bite.

46. *Marzzarella*, 614 F.3d at 97.

47. *Id.* at 95–96; *see also* Roland K. Weekley, *This Powder Keg is About to Explode: The Lack of Standards in Reviewing Second Amendment Cases*, 10 ALB. GOV'T L. REV. 496, 501 (2017).

48. This step is generally not significant. It mostly functions as a locating step, in the sense that it is merely to say that a Second Amendment issue, broadly speaking, is implicated—but it is more significant when discussing laws that incidentally or minimally burden gun rights.

49. *Marzzarella*, 614 F.3d at 97. "The first question is 'whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.' This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny." United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010) (citations omitted).

50. *Marzzarella*, 614 F.3d at 91.

51. *Id.*

scrutiny.[52] The court went with the former reading, that the challenged law regulated conduct outside the protection of the Second Amendment, because in the court's view, it would make the most sense of the Supreme Court's endorsement of *prohibitions* on felon possession, the emphasis on "lawful purposes," and laws "forbidding" the carrying of firearms in sensitive places.[53]

After concluding that "presumptively lawful" categories did doctrinal work at Step One—defining the core of the Second Amendment right by describing the law as within the plain meaning of the Second Amendment—the court decided that the felon-in-possession law would survive either intermediate or strict scrutiny.[54] The level of scrutiny depended on the burden the law imposed on the right.[55] However, the court stated that intermediate scrutiny was the most appropriate level of analysis, noting that its decision was not "free from doubt."[56] This too should make sense, as the Supreme Court had not fully clarified the scope of the right and the exact role of the presumptively lawful analysis. The presumptively lawful categories will receive further and separate clarification in Section D of this Part.

For now, it is sufficient to say for purposes of *Marzzarella's* practical contribution that the Second Amendment test consisted of two steps—at Step One, the question was whether the regulation at issue burdened the right, and at Step Two, the question was whether it survived intermediate scrutiny. Such was the general framework from 2010[57] until the *Bruen* decision in 2022.[58] Within this framework, courts continued to split over the precise meaning of "presumptively lawful." Some courts have given the doctrine nearly no weight at all.[59] Other courts have understood presumptively lawful to mean a form of burden shifting at Step One.[60]

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52. *Id.*

53. *Id.* at 91–92.

54. *Id.* at 101.

55. *Id.* at 96–97.

56. *Id.* at 97.

57. *Id.*; N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

58. *See* NRA of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 194–95 (5th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Worman v. Healey, 922 F.3d 26, 33 (1st Cir. 2019); Libertarian Party of Erie Cnty. v. Cuomo, 970 F.3d 106, 127–28 (2d Cir. 2020); Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J., 910 F.3d 106, 117 (3d Cir. 2018); Harley v. Wilkinson, 988 F.3d 766, 769 (4th Cir. 2021); Kanter v. Barr, 919 F.3d 437, 441–42 (7th Cir. 2019) (en banc); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); United States v. Class, 930 F.3d 460, 463 (D.C. Cir. 2019).

59. For a post-*Bruen* example, *see generally* Antonyuk v. Hochul, 1:22-CV-0986, 2022 U.S. Dist. LEXIS 201944, at *33 n.12 (N.D.N.Y. Nov. 7, 2022) (relying on a narrow construction of the broad presumptively lawful language in *Heller* in the context of characterizing schools as sensitive places).

60. *See* Heller v. District of Columbia, 670 F.3d 1244, 1253 (D.C. Cir. 2011) ("A plaintiff may rebut this presumption by showing the regulation does have more than a de

Others have found that it means that regulated conduct is entirely outside the scope of the Second Amendment.[61] While these are the common views of presumptively lawful, still others are possible. For instance, in a post-*Bruen* world, it could simply mean that the historical analogue test as described in this Part is less rigorous or that reliance on a general historical tradition is sufficient. Alternatively, it could mean that the burden of the historical analogue test shifts to the party challenging the law, as explained in Part III. However, before settling on the best interpretation, it is necessary to understand the *Bruen* framework and the presumptively lawful categories themselves.

C. The *Bruen* Framework

In *Bruen*, the Court took up the question of whether New York's "may-issue" regime was constitutionally permissible. This Section explains the majority's approach, the limiting concurrences, and doctrinal development after the decision by lower courts.

1. The Majority Opinion

The petitioners in the *Bruen* case sued Bruen, the superintendent of the New York State Police, and a New York Supreme Court justice.[62] New York's "may-issue" regime operated as follows. The state of New York conditioned issuance of a license to carry on "a citizen's showing of some additional special need."[63] New York criminalized possession of "'any firearm' without a license, whether inside or outside the home, punishable by up to four years in prison or a $5,000 fine for a felony offense, and one year in prison or a $1,000 fine for a misdemeanor."[64] Particularly salient to the Court was the fact that if a license applicant wished to possess a firearm at home, the applicant needed to "convince a 'licensing officer'—usually a judge or law enforcement officer—that, among other things, he is of good moral character, has no history of crime or mental illness, and that 'no good cause exists for the denial of the license.'"[65]

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minimis effect upon his right."); United States v. Trinidad, No. 21-398, 2022 U.S. Dist. LEXIS 190225, at *9 (D.P.R. 2022) (explaining that, at least at Step One after *Bruen*, "[i]t is not clear whether he bears the burden of showing that his conduct falls within the scope of the Second Amendment[,]" thus deciding the case before it reached Step Two).

61. *See* Lycurgan, Inc. v. Jones, No. 14-CV-548, 2015 U.S. Dist. LEXIS 201224, at *31 (S.D. Cal. Nov. 19, 2015) (explaining that if a challenged law is presumptively lawful, then "the inquiry ends"); NRA of Am, Inc. v. Swearingen, 545 F. Supp. 3d 1247, 1268 (N.D. Fla. 2021) (explaining that "presumptively lawful" means outside the protection of the Second Amendment).

62. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2125 (2022).

63. *Id.* at 2122.

64. *Id.*

65. *Id.* at 2122–23.

In striking down the "may-issue" licensing regime, *Bruen* instructs us that the *Marzzarella* two-step regime was "one step too many"[66] and proceeds to utilize a new test, albeit one that also has two steps. As a reminder, the *Marzzarella* two-step required courts to first assess whether the core of the right was burdened and, if so, to apply intermediate scrutiny. *Bruen*'s effect is that the intermediate scrutiny step is replaced by the historical analogue step explained below.

Step One under *Bruen* is similar to Step One under *Marzzarella*. First, courts must consider whether the regulation at issue regulates conduct protected by the "plain text" of the Second Amendment.[67] If the regulation at issue does regulate protected conduct, then the burden is on the government to show a "relevantly similar" historical analogue[68] for the modern law. Historical analogues present at least two questions. The first is from when and where historical analogues may come. What are the precise geographical or temporal restrictions on the pool of analogues litigators may pull from? Next, once the pool is defined, courts must answer the question of what qualifies as a "relevantly similar" analogue.

Bruen provides some guidance on these questions. Regarding the pool from whence analogues may be drawn, they may come from broad geographical[69] and temporal[70] pools of laws.[71] Geographically, *Bruen* considers examples from the various colonies, states, and territories.[72] Temporally, *Bruen* analyzes laws from the Statute of Northampton (1328) to post-Reconstruction laws, though it seems that the most, but not *only*,

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66. *Id.* at 2127. *Bruen* continues to employ a two-step test despite its statement to the contrary.

67. *Id.* at 2126.

68. *Id.* at 2132.

69. *See generally id.*; *but see* Florida v. Jardines, 569 U.S. 1, 8 (2013) (quoting McKee v. Gratz, 260 U.S. 127, 136 (1922)) (explaining in the context of the Fourth Amendment rights that a "license may be implied from the habits of the country" despite English common law). This emphasis on localism is more appropriate for the Fourth Amendment than the Second Amendment, given its emphasis on custom and property, but it serves as a rare counterexample to the notion that constitutional norms should be standardized by Article III courts.

70. *See infra* Part III. As a primer, what I coin as the "temporal pool" refers merely to the relevant time periods to consider when analyzing the constitutionality of gun laws. As Part IV will explain, the two main questions are about whether 1791 or 1868 would be a more instructive reference point and to what extent the meaning of the Second Amendment can be liquified (clarified) via subsequent interpretation and adjudication.

71. *See Bruen*, 142 S. Ct. at 2154 (analyzing historical analogues and rejecting them as uninstructive where they would contradict earlier meaning). Whether an analogue is instructive is different from whether it may be analyzed. *Bruen*'s analysis of territorial and late-19th century analogues should put to bed any notion that they may not be relied upon, even if they must still be similar. Liquidation does not serve to contradict legal text; it serves to fill genuinely open interpretive gaps in the meaning of that text. As text is quite indeterminate, there is a large field of questions that liquidation may serve to answer.

72. *Id.* at 2154. *Bruen* claims to weigh analogues from territories and cities less heavily, but it is unclear how much that discount existed in the case and whether, in practice, it will exist at all—particularly in cases that are not outliers in the way *Bruen* is.

persuasive timeframe is the period from before the Founding Era (1791) and potentially leading up to the period after the Reconstruction Era (1868), depending on the role liquidation plays.[73] Liquidation is the idea that constitutional meanings may be clarified by subsequent practice. The general pool of analogues will likely range, depending on the court, from the 1600s to the late 1800s.

Regarding what qualifies as a sufficient analogue, the historical analogues must have been generally unchallenged,[74] had a roughly identifiable duration,[75] and may even be quite few in number.[76] The historical analogue inquiry can take into account differences in scenarios between the relevant historical periods and modern laws.[77] Crucially, as the opinion makes clear, requiring an analogue is not the same as requiring a "historical twin."[78] Neither, however, is it searching for any common feature whatsoever. Unhelpfully, *Bruen* only explains what it means by this by saying that "a green truck and a green hat are relevantly similar if one's metric is 'things that are green.'"[79] They are not, however, relevantly similar if the metric is "things you can wear."[80]

It is unclear what exactly would qualify as such an artificial similarity in the gun regulation context, and *Bruen* makes clear that it does not seek to "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment."[81] Despite this lack of clarity, *Bruen* reemphasizes that "self-defense is the 'central component' of the Second Amendment right."[82] In practice, *Bruen* tells us that courts may "at least"[83] consider the "how" and the "why" of historical analogues which regulate guns—though it should be clear that this list of metrics is not exhaustive.[84] Moreover, when analyzing these factors, if the

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73. *See id.*

74. *Id.* at 2137. This emphasis on challenges can similarly bolster the notion of liquidation. If a group of persons makes a rule and a derivative rule follows with which the group takes no issue, it would stand to reason that the group viewed the derivative rule as consistent with the overarching rule.

75. *Id.* at 2155. This requirement is more about not showing an enduring tradition to the contrary. This comports with the theme of liquidation as a clarifying tool, rather than a contradicting one.

76. *Id.* at 2133 ("Although the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited[,] . . . we are also aware of no disputes regarding the lawfulness of such prohibitions.").

77. *Id.* at 2132.

78. *Id.* at 2133.

79. *Id.* at 2132 (citing Symposium, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 254 (2017)).

80. *Id.*

81. *Id.* at 2132–33.

82. *Id.* at 2133 (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

83. *Id.*

84. *Id. Bruen* points to *at least* two metrics. This leaves open the possibility for analogizing to presumptively lawful categories, adopting a sliding scale approach between the "how" and "why," taking "hows" from some statutes and "whys" from others and using

problem is one that has *not* generally persisted since the relevant time period, then the analysis will be more flexible.[85] This, too, will be addressed in Part III.

2. The Limiting Concurrences

Bruen's impact on Second Amendment jurisprudence cannot be understood without giving the three concurrences from Justices Kavanaugh and Roberts, Alito, and Barrett their due. These concurrences are significant for the insights they provide into the doctrinal and practical meaning of *Bruen*, at least as far as the limitations of Second Amendment doctrine as it relates to obtaining five votes on the current court.[86] As Justice Holmes once said, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[87]

Justice Kavanaugh's concurrence emphasizes two key points. First, Justice Kavanaugh explained, *Bruen* should not be taken to mean that the "shall-issue" regimes employed in 43 states at the time of the decision are unconstitutional.[88] Second, he emphasized that the Second Amendment is "neither a regulatory straitjacket nor a regulatory blank check."[89] He continues: "[p]roperly interpreted, the Second Amendment allows a 'variety' of gun regulations," is not unlimited, and retains the non-exhaustive list of presumptively lawful categories outlined in *Heller*.[90]

Indeed, courts are already citing to *Bruen's* concurrences to explain the continued vitality of the presumptively lawful categories. As one example of many, in *Dykes v. Broomfield*, the court cited to the same concurrence to explain that *Bruen* is "limited in scope."[91] More

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both, meaning that as long as one can find a how or why even separately in two gun statutes, one can justify the regulation.

85. *See* Antonyuk v. Hochul, 1:22-CV-0986, 2022 U.S. Dist. LEXIS 201944, at *120–21 (N.D.N.Y. Nov. 7, 2022).

86. Thomas B. Bennett et al., *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817 (2018) (explaining the importance of pivotal concurrences). This assumes that Justice Jackson, like Justice Breyer, endorses the presumptively lawful categories. Even if she does not, the majority explicitly endorses *Heller* such that it also implicitly endorsed the presumptively lawful categories by reference to *Heller*.

87. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897).

88. *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring).

89. *Id.* at 2162.

90. *Id.*

91. Dykes v. Broomfield, No. 11-cv-04454-SI, 2022 U.S. Dist. LEXIS 165189, at *8–9 (N.D. Cal. Sept. 13, 2022). Similarly, in *Clifton*, the court cited in dicta to Kavanaugh's concurrence to explain that in its view, presumptively lawful meant that the relevant regulations would survive any test under the Second Amendment. Clifton v. United States Dept. of Just., 615 F. Supp. 3d 1185, 1201 (E.D. Cal. 2022) ("[T]he undersigned strongly believes that § 922(g)(4) would be upheld by the Supreme Court, regardless of any new, as of yet undefined and unapplied, interpretation methods developed in light of the decision in *Bruen*."). To the extent that law is what is recognized by legal officers, the *Bruen*

significantly, *Oregon Firearms* cited Justice Kavanaugh's concurrence in explaining that the modern issue of mass shootings is relevant to the meaning of the Second Amendment.[92]

Even if one were to argue that the Kavanaugh concurrence is *merely* a concurrence and that lower courts are in error for relying on them, [93] the presumptively lawful categories are still good law based on *Heller* and *McDonald*, where the categories also appeared.[94] In addition to Justice Kavanaugh and Justice Roberts, the three dissenters also recognized the doctrinal importance of the presumptively lawful categories.[95] Whatever the presumptively lawful doctrine means, it must play a role in Second Amendment jurisprudence.[96]

Moreover, as Part I.D. demonstrates, the presumptively lawful categories solidified into binding law among the circuit courts.[97] Even if *Heller*'s categories are not deemed holdings under the predictive theory of law and are merely dictum according to the three common theories of holdings—*ratio decidendi*, legally salient factual characteristics, and legislative holdings—presumptively lawful categories have still become binding in many circuit-level cases.[98]

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concurrences and *Heller* dicta appear to be binding. *See* H.L.A. HART, CONCEPT OF LAW 99, 104 (Paul Craig, 3d ed. 2012) ("[T]o do justice to their [rules'] distinctive, internal aspect we need to see the different ways in which the law-making operations of the legislator, the adjudication of the court, the exercise of private or official powers, and other 'acts-in-the-law' are related to secondary rules . . . [T]o assert the validity of a rule is to predict that it will be enforced by courts or some other official action taken.").

92. *See* Or. Firearms Fed'n, Inc. v. Brown, No. 2:22-cv-01815-IM, 2022 U.S. Dist. LEXIS 219391, at *21–22, *31 (D. Or. Dec. 6, 2022).

93. Concurrences are, of course, generally not binding. *See Marks v. United States*, 430 U.S. 188 (1977).

94. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

95. *Bruen*, 142 S. Ct. at 2189 (Breyer, J., dissenting) ("Like Justice Kavanaugh [and Chief Justice Roberts], I understand the Court's opinion today to cast no doubt on that aspect of *Heller*'s holding.").

96. Courts have noted that *Bruen* clarified rather than overruled *Heller*. *See* In re Austin Bruce Jeffreys, No. 3:21-00216, 2022 U.S. Dist. LEXIS 198706 (S.D.W. Va. Nov. 1, 2022) (reiterating our understanding that the presumptively lawful categories are still good law); *see also* United States v. Riley, No. 1:22-cr-163, 2022 U.S. Dist. LEXIS 187709 (E.D. Va. Oct. 13, 2022); *but see* United States v. Charles, MO:22-CR-00154-DC, 2022 U.S. Dist. LEXIS 180375 (W.D. Tex. Oct. 3, 2022) (concluding that *Bruen* displaced the presumptively lawful framework); United States v. Collette, MO:22-CR-00141-DC, 2022 U.S. Dist. LEXIS 173822 (W.D. Tex. Sept. 25, 2022).

97. *See, e.g.*, Gould v. Morgan, 907 F.3d 659, 667 (1st Cir. 2018); United States v. Jimenez, 895 F.3d 228, 235 (2d Cir. 2018); Folajtar v. Att'y Gen. of the United States, 980 F.3d 897, 900–01 (3d Cir. 2020).

98. *See, e.g.*, Gould v. Morgan, 907 F.3d 659, 667–68 (1st Cir. 2018); United States v. Jimenez, 895 F.3d 228, 235 (2d Cir. 2018); Folajtar v. Att'y Gen. of the United States, 980 F.3d 897, 900–01 (3d Cir. 2020). *See also* Lawrence B. Solum, *The Supreme Court. in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155 (2006); *Legal Theory Lexicon 005: Holdings*, LEGAL THEORY LEXICON (last revised Jan. 29, 2023), https://lsolum.typepad.com/legal_theory_lexicon/2003/10/legal_theory_le_2.html [https://perma.cc/CWX7-RBEH].

The two other concurrences represent the minimalist reading of *Bruen* and the open scholarly questions regarding the proper pool of historical analogues. Justice Alito wrote to respond to the dissent and argued that, from a policy perspective, gun regulations like the New York law at issue did not prevent the Buffalo shooting.[99] Justice Alito's concurrence declines to address the fact that at least one state surrounding New York has a more permissive gun regime,[100] meaning that guns could come in from out of state, it nevertheless clarifies that the holding "decides nothing about who may lawfully possess a firearm," the "requirements that must be met to buy a gun," or the "kinds of weapons that people may possess."[101] Nor, according to the concurrence, does the holding disturb anything the Court said in *Heller* about restrictions on possession and carrying.

Justice Barrett wrote separately to note that there are two ongoing debates which had not been resolved by *Bruen*. The first was whether 1791 or 1868 was the more appropriate period for interpreting the meaning of the Second Amendment.[102] The second was whether and to what extent the practice of constitutional "liquidation," or practice post-ratification, can inform the meaning of the constitutional provisions at issue.[103] Both of these questions are addressed more fully in Part III.

In review, prior to *Bruen*, courts engaged in a two-step analysis called the *Marzzarella* framework. The *Marzzarella* analysis considered whether the core of the Second Amendment was burdened at Step One, and if so, the court would generally apply intermediate scrutiny at Step Two. Then, *Bruen* replaced the Step Two intermediate scrutiny test with a historical analogue test. Importantly, a majority of justices in *Bruen* endorsed the presumptively lawful categories.

3. Doctrinal Development After Bruen

Generally, the answer to Step One (whether the core of the right is burdened) does not provoke litigation in the way that Step Two (the

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99. *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring).

100. Parties on both sides of the fun debate agree that Pennsylvania clearly has less restrictive gun regulations than New York. *See Gun Safety Policies Save Lives*, EVERYTOWN RSCH. & POL'Y, https://everytownresearch.org/rankings/ [https://perma.cc/ZFB6-2QEF]; *Annual Gun Law Scorecard*, GIFFORDS L. CTR., https://giffords.org/lawcenter/resources/scorecard/ [https://perma.cc/GKD6-NNAU]; *Freedom in the 50 States: Guns*, CATO INST., https://www.freedominthe50states.org/guns [https://perma.cc/J9Q5-MAKT]. While the gun that was used was legal in New York, the high-capacity magazine which drastically worsened the attack "would have had to have been purchased elsewhere." Peter Nickeas et al., *How the 18-Year-Old Suspect Legally Obtained Guns Before the Buffalo Mass Shooting*, CNN (May 18, 2022, 8:22 AM), https://www.cnn.com/2022/05/17/us/buffalo-mass-shooting-guns-suspect/index.html [https://perma.cc/7TBG-EAJA].

101. *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring).

102. *Id.* at 2163 (Barrett, J., concurring).

103. *Id.* at 2162–63.

historical analogue test) does. Lower courts have split on how to apply *Bruen*'s analogue test.[104] Some courts have fashioned the test such that it requires something closer to a twin than merely a relevantly similar analogue.[105] Other courts have concluded that citing a general historical tradition is sufficient.[106] One court has, even post-*Bruen*, taken into account modern policy considerations that *Bruen* rejected as it related to intermediate scrutiny but presumably allowed at the new Step Two (the analogue inquiry).[107] An example of each follows.

The least permissive application of *Bruen*'s analogue test was done by *Antonyuk v. Hochul*,[108] where a New York court analyzed an otherwise presumptively lawful category, "sensitive places," while giving little to no effect to the presumptively lawful doctrine and imbuing the analogue test with additional requirements.[109] Under the *Antonyuk* view, factors that render historical analogues insufficient include (1) low population coverage, (2) whether those analogues are less burdensome than the modern analogue they are used to justify, (3) whether modern laws make exceptions for those tasked "with the duty to keep the peace," and (4) whether modern laws "tread[] too close to infringing on one's First Amendment right to participate in congregate religious services."[110] The opinion gives little weight, if any, to the presumptively lawful doctrine.

The most permissive application of *Bruen*'s historical analogue test has allowed reliance on general historical traditions. In *United States v. Jackson*, the court found that "reliance on general historical tradition to satisfy [the government's] burden" is permissible.[111] Still other courts have found, post-*Bruen*, that where a law is presumptively lawful, the analysis ends, and the law is constitutional.[112]

Other courts have used historical perspectives on policy. In *Oregon Firearms Federation v. Brown*, the court explained that with the modern

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104. *See, e.g.*, Antonyuk v. Hochul, 1:22-CV-0986, 2022 U.S. Dist. LEXIS 201944 (N.D.N.Y. Nov. 7, 2022); United States v. Jackson, 622 F. Supp. 3d 1063 (W.D. Ok. 2022); Or. Firearms Fed'n, Inc. v. Brown, No. 2:22-cv-01815-IM, 2022 U.S. Dist. LEXIS 219391 (D. Or. Dec. 6, 2022).

105. *See Antonyuk*, 2022 U.S. Dist. LEXIS 201944, at *29 (conducting a thorough analysis of potential analogues to determine whether plaintiffs have standing and whether defendants are proper).

106. *See Jackson*, 622 F. Supp. 3d at 1067.

107. *See Or. Firearms Fed'n*, 2022 U.S. Dist. LEXIS 219391, at *19–21, *34, *36 ("Post-*Bruen* Framework for Assessing the Constitutionality of Firearms Regulations").

108. *See Antonyuk*, 2022 U.S. Dist. LEXIS 201944, at *14.

109. In fairness to *Antonyuk*, the court suggested that laws regulating government buildings may not require courts to "engage in the same level of historical analysis as for other types of firearm regulations." United States v. Marique, No. 8:21-po-02263-AAQ, 2022 U.S. Dist. LEXIS 229608, at *9 (D. Md. Dec. 14, 2022).

110. *Antonyuk*, 2022 U.S. Dist. LEXIS 201944, at *180–82.

111. *Jackson*, 622 F. Supp. 3d at 1067.

112. United States v. Tilotta, No. 3:19-cr-04768-GPC, 2022 U.S. Dist. LEXIS 156715, at *15 (S.D. Cal. Aug. 30, 2022); Morehouse Enters. v. BATFE, No. 3:22-cv-116, 2022 U.S. Dist. LEXIS 151356, at *26–27 (D.N.D. Aug. 23, 2022).

dangers of gun violence, "large capacity magazines also implicated unprecedented societal concerns."[113] Additionally, historical practices "necessary to the public peace, safety, and good order" are to be instructive justifications for the modern law.[114] Under *Oregon Firearms*, the analogue inquiry could be the history-and-tradition equivalent of intermediate scrutiny. Intermediate scrutiny, explained above, asks whether the law at issue directly advances an important governmental interest.[115] The reason that the *Oregon Firearms* case represents a "historical intermediate scrutiny" view is because it discusses the policies of historical regulations in a way that, if it had been discussing modern regulations, might look like an intermediate scrutiny analysis.[116]

Part III and the Conclusion will argue that the *Antonyuk* approach is incorrect and that there is an important procedural step created by the presumptively lawful doctrine, regardless of whether the *Oregon Firearms* approach is adopted.

But, prior to analyzing the burden-shifting effect of the presumptively lawful doctrine, it is necessary to understand the contours of presumptively lawful categories themselves. This is because the procedural effect can only occur in one of the presumptively lawful categories, as the effect relies on the existence of a presumption, and that existence may only be determined by a court finding that a law does, in fact, fall into one of the presumptively lawful categories.

D. The Presumptively Lawful Categories

Bruen did not create the presumptively lawful categories—*Heller* did. The categories developed after *Heller* along with the doctrine, and they have continued to do so after *Bruen*.[117] There are arguably at least six categories of presumptively lawful categories—felon bans, mental illness bans, sensitive places bans, regulations on the commercial sale of guns, the law-abiding citizen framework, and the dangerous and unusual weapons category.[118] Some of the doctrinal vocabulary used to describe various categories is outdated—but for the sake of clarity, I rely on the same language upon which courts have relied.[119]

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113. *See* Or. Firearms Fed'n, Inc. v. Brown, No. 2:22-cv-01815-IM, 2022 U.S. Dist. LEXIS 219391, at *34 (D. Or. Dec. 6, 2022).

114. *Id.* at *36 (quoting Presser v. Ill, 116 U.S. 252, 268 (1886)).

115. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126–27 (2022).

116. *See Or. Firearms*, 2022 U.S. Dist. LEXIS 219391. Modern intermediate scrutiny tests are no longer allowed under *Bruen*. However, backwards-looking intermediate scrutiny tests likely are. As *Bruen* states clearly, courts may consider the historical "*how*" and *"why*." The "*why*" opens the door for considering historical reasons to adopt gun laws.

117. *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

118. *Id.*

119. *See id.*

Bans on felon purchase and possession are over-litigated, and therefore, the case law is especially illuminating on that front.[120] The other categories are, relatively speaking, doctrinally poor.[121] For example, the law-abiding citizen framework especially has generally been under analyzed, or only analyzed as a rhetorical matter, and therefore one key contribution of this Article is to clarify what precisely may fall into each doctrinal category.[122] Once the reader understands the presumptively lawful categories, the reader may then understand how broad the effects of burden-shifting would be throughout the doctrine.

As a reminder, the Court in *Heller* explained that "nothing" in its opinion "should be taken to cast doubt on longstanding prohibitions" within the Second Amendment context on "the possession of firearms by felons," "[the possession of firearms by] the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," and laws which impose "conditions and qualifications on the commercial sale of arms." The Court further explained that these "presumptively lawful" measures were only examples and not an "exhaustive" list.[123]

This text has had a diverse application prior to *Bruen*. Some courts have held that the presumptively lawful categories are a safe harbor for gun regulations, as they would fall outside the scope of the Second Amendment.[124] Other judges have reasoned in the opposite direction by stating that the presumption is impliedly rebuttable in the context of an as-applied challenge.[125] *Heller II*, for example, indicated that burden shifting would be appropriate at Step One, defining the core of the right, but did not make any such indication at Step Two based on broader doctrinal restrictions regarding burden requirements for intermediate scrutiny.[126] Regardless of the *substantive* upshot of the presumptively lawful framework, for example, how strict the analogue test is, the *procedural* upshot is clear. At minimum, courts have recognized a burden-shifting component at some point in the analysis, which is likely accompanied by a substantive component.

The utility in locating the burden-shift at the history-and-tradition part of the analysis is that it puts a procedural thumb on the scale in an otherwise indeterminate area of the law. Repeatedly, *Bruen* emphasizes that

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120. James S. Rollins, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the "Virtuous,"* 25 TEX. REV. LAW & POL. 245, 251, 288–89 (2021) (discussing the significant impact of bans on felon purchases in Second Amendment litigation).

121. *Id.*

122. *Id.* at 268.

123. *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

124. Weekley, *supra* note 47.

125. *See* Pena v. Lindley, 898 F.3d 969, 1005 (9th Cir. 2018) (Bybee, J., concurring).

126. *See* Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011); *see also* discussion *infra* Section I.A.

the Second Amendment is neither a regulatory "straitjacket" nor a "blank check."[127] Presumably, there is a lot of doctrinal space between those two extremities. As Part III shows, that space need not remain empty.

1. Felons, Mental Illness, and "Lawful Persons"

The vast majority of existing cases that rely on the presumptively lawful categories are felon possession cases litigating the constitutionality of various sections of the Gun Control Act.[128] Bans based on mental illness, though less litigated, fare similarly.[129] Generally, these cases are challenges to the federal felon sale and possession statute.[130] Almost always, judges write opinions upholding the constitutionality of felon sale and possession statutes, though some have questioned whether it is constitutional as applied to felonies that are not inherently dangerous, such as mail fraud.[131] The constitutionality of such laws has been upheld based on two arguably separate doctrinal points regarding the Second Amendment: that the Second Amendment protects law-abiding citizens and that bans on possession by regulations are presumptively lawful, though it is unclear whether these are necessarily different points.[132] As was affirmed through *Bruen*, the Second Amendment only protects "law-abiding" persons' right to bear guns.[133] This

127. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022). Moreover, Justice Alito says that the opinion does "nothing" to decide who may lawfully possess arms, what requirements must be met to buy a gun, what weapons may be possessed, or serve to disturb "anything" in *Heller* or *McDonald* about restrictions that may be imposed on possession or carrying. *Id.* at 2157 (Alito, J., concurring). Similarly, Justice Kavanaugh, joined by Justice Roberts, explained that a "variety of regulations" will survive—noting this in conjunction with his emphasis on presumptively lawful regulations. *Id.* at 2162 (Kavanaugh, J., concurring).

128. Alexander C. Barrett, *Taking Aim at Felony Possession,* 93 B.U. L. REV. 163, 164 (2013) (discussing the prevalence of felony possession case law). Prior to continuing, it is worth pausing to note the disparate impacts of the law generally along with the rhetoric law uses—and this is no exception. While this Article explains a post-*Bruen* framework for burden-shifting that will likely aid gun safety, it does so with the caveat that the law must acknowledge and remedy inequities generally, particularly racial ones. These inequities are more likely to burden Black and Brown persons—accordingly, prosecutorial measures to combat gun violence should be implemented with care and consideration for impacts on minorities. To the extent this Article uses phrases like "felon bans" or "bans on the mentally ill," it is, for the avoidance of doubt, conformity with the terminology used by courts rather than an endorsement of the terms.

129. Zachary S. Halpern, *Under Fire: Evaluating As-applied Challenges to Disarming the Involuntarily Committed*, 62 B.C. L. REV. E. SUPP. 1, 13 (2013). *But see generally* Matter of Colihan v. State of New York, 181 N.Y.S.3d 359 (N.Y. App. Div. 2022) (granting Petitioner's appeal to strike mental illness documentation from his record, therefore granting him the ability to purchase a firearm).

130. *See* 18 U.S.C. § 922 (2023). This statute does not only regulate felon sale and possession, but these topics represent a significant amount of the case law.

131. Kanter v. Barr, 919 F.3d 437, 451–52 (7th Cir. 2019) (Barrett, J., dissenting).

132. *Id*. at 441, 447.

133. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

is likely distinct from the presumptively lawful nature of felon possession bans based on case law.

These categories would seem to overlap to the point that it is not worth making a distinction—but that fails to recognize the difference between *unlawful* and *felonious* conduct. While the felon possession category seems clear enough as a general rule, the law-abiding citizen requirement is less clear. Again, "law-abiding citizen" means something more than merely a well-behaved member of the body politic. It means that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for *lawful* purposes."[134] With this clarity, "law-abiding" more likely than not creates an entirely separate form of presumptively lawful gun regulations. This category, properly interpreted, means that courts may also consider whether (i) the weapons regulated are typically used by law-abiding citizens, (ii) whether they are used for law-abiding purposes, and (iii) whether there is a reason to believe that there is unlawful intent. This could be relevant at Step One *or* Step Two of the newly-enunciated test. Again, Step One considers the plain text of the Second Amendment, and Step Two considers historical analogues.[135] *Rahimi*, the pending Supreme Court case involving disarmament for those with domestic violence restraining orders, may clarify whether the distinction between felonious and unlawful is material or merely rhetorical—or it may not. Either way, the way courts and statutes discuss felonious *and* unlawful conduct, as in *Rahimi* and the statute it interprets, creates room for a valid doctrinal expansion.

In response, some may take issue with the purposivist element because the plain meaning of "law-abiding" does not clearly extend to an analysis of an individual's purposes. But the designation of various persons as unlawful, as words such as criminal, felon, or tortfeasor do, almost always has a conduct or a purpose element, or most likely both.[136] Accordingly, it makes more sense of the phrase "lawful-person" to analyze it in light of the person's conduct and purpose.

If it is correct, that one presumptively lawful category of gun regulations are those laws that regulate guns used by lawful persons for typically lawful purposes, then there are major implications for what kinds of regulations might be presumptively lawful which would otherwise not fit neatly into the felon ban, sensitive places, commercial sale, or dangerous

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134. United States v. Raheem, No. 3:20-cr-61-RGJ, 2022 U.S. Dist. LEXIS 188987, at *7 (W.D. Ky. Oct. 17, 2022) (emphasis added). *See also* United States v. Bryant, 711 F.3d 364, 369 (2d Cir. 2013) (describing the right as limited to use for "lawful purpose[s]); SARAH HERMAN PECK, CONG. RSCH. SERV., R44618, POST-*HELLER* SECOND AMEND. JURIS. 17 (2019).

135. SARAH HERMAN PECK, CONG. RSCH. SERV., R44618, POST-*HELLER* SECOND AMENDMENT JURISPRUDENCE 3, 46 (2019).

136. *Id.* at 12, 31. *See also* Michael Ulrich, *Second Amendment Realism*, 43 CARDOZO L. REV. 1379, 1385, 1410 (2022).

and unusual weapons categories.[137] Take, for instance, a law which requires that guns have a safety button. This is not a felon ban, a sensitive place ban, or a dangerous and unusual gun regulation. It is more likely than not a regulation on the commercial sale of guns, as commerce can never be divorced from manufacturing.[138] But it most certainly is a regulation for lawful purposes.

A safety button law would be a regulation on lawful purposes because, typically, the law views negligence, recklessness, and purposeful harm as *outside* the scope of lawful purposes.[139] Safety buttons are, at maximum, a *de minimis* infringement on the usage of arms, taking only a split second to switch on and off.[140] To possess lethal weapons without safety buttons seems to be at minimum a form of negligence and may even be reckless. It would be negligent because, under a simple tort analysis, the cost is low and the risks and probabilities of harm are astronomically high.[141] Note that this is not a form of the intermediate scrutiny means-end testing jettisoned by *Bruen*, but rather, it is a doctrinal analysis of the meaning of "law-abiding" with regard to case law and generally accepted legal principles.

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137. "Law-abiding" may be a rhetorical framing rather than a doctrinal category. The hypotheticals above address the reasons and consequences of the framing as something more than merely rhetorical. *See* Ulrich, *supra* note 137, at 1411 ("The theoretical framing of the law-abiding citizen has rhetorical force but is disconnected from the reality of gun violence. It ignores the ability of the average citizen to distinguish who is and will remain a law-abiding citizen. This framing also fails to recognize that the presence of firearms can create more harmful violence from everyday occurrences like road rage, arguments, and fights. Not to mention that the average person's assessment and judgment in any given situation is inevitably going to be imbued with biases. When dealing with lethal weapons, these decisions have deadly consequences."). However, the concept of "Second Amendment Realism" suggests that the language of the Second Amendment "limits the state to reactive measures," requiring them to wait until a person "pulls the trigger" before acting. *Id*. at 1413. This Article, on the other hand, presents that this reading is not the most accurate depiction of the phrase, as some ex ante regulations directly target actions that can *only* be deemed unlawful by a reasonable jurist, such as negligence. *Id.* at 1410–11.

138. *See* PECK, *supra* note 134, at 37. The point of regulating commerce is generally the same as the point of regulating manufacturing. Both, particularly in the gun context, are consumer protection issues. While citizens have the right to bear arms, the state has the responsibility to protect those consumers, as well as those who may be impacted by those consumers.

139. *See generally* Jennifer Kim & Christ Nicols, *America's Gun Violence Epidemic: A Colossal, But Correctable, System Failure*, 77 N.Y.U. ANN. SURV. AM. L. 199 (2022).

140. *See* Ingrid M. Evans and Allen Rostron, *Litigating Against the Firearm Industry*, 84 AM. JUR. TRIALS 109, 149–51 (2002).

141. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) ("[I]f the probability (of a consummated tort) be called P; the injury, L; and the burden [of safeguards against the aforementioned injury] B; liability depends upon whether B is less than L multiplied by P: ie., whether B < PL."). *See also* United States v. Daniels, 610 F. Supp. 3d 892, 896 (S.D. Miss. 2022) ("This observation comports with the Supreme Court's statements that the Second Amendment, as a threshold matter, covers only ordinary and responsible law-abiding citizens.").

The upshot is that if various forms of possession, use, bearing, purchase, or other similar verbiage of a certain weapon would constitute common law negligence, then it would be presumptively lawful to regulate them. Depending on how wide the net is cast for the "law-abiding" category, serialization requirements,[142] age restrictions, material regulations, storage regulations, and safety regulations would become presumptively lawful. However, the broad nature of presumptively lawful categories would have limits. This category would obviously not include statutory per se negligence, as this would give legislatures the power to shrink the Second Amendment's boundaries via statute by declaring that, for instance, to own a gun at all is negligent, and therefore, gun ownership could be called a per se negligent category and incompatible with the "law-abiding" requirement.[143] This would be foreign to constitutional norms.[144] Nor would it include good-cause statutes, as established by *Bruen*.[145] Finally, it would also not include blanket handgun bans, though more tailored ones could be appropriate.[146] The balance struck between accepting common law negligence as a baseline metric for a law-abiding purpose but *not* statutory negligence comports with *Bruen's* injunction that the Second Amendment is neither a "regulatory blank check nor a regulatory straightjacket" per the risks of per se negligence and constitutional rights.[147]

It may be tempting to fold the above-mentioned items into the dangerous and unusual weapons category. However, this is not the cleanest fit, as there may be weapons which are minimally more dangerous than others or are quite common and would therefore be rejected from the category because of their commonality, such as handguns. Moreover, weapons which are common and no more dangerous than other weapons may, nevertheless, be more likely than others to be used for unlawful purposes. Consider, for instance, sawed off shotguns or deserialized guns.[148] Accordingly, it is still reasonable to break out the "law-abiding" category as its own analytical concept. Before continuing, it should be noted that the Fifth Circuit views the lawful person category quite narrowly, as it has held unconstitutional a statute that prevented someone with a domestic violence restraining order as part of the "law-abiding,

142. "Serialization" refers simply to the fact that the gun requires a traceable serial number. *See* FIREARMS - GUIDES - IMPORTATION & VERIFICATION OF FIREARMS, AMMUNITION - FIREARMS VERIFICATION OVERVIEW | BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, https://www.atf.gov/firearms/firearms-guides-importation-verification-firearms-ammunition-firearms-verification-overview [https://perma.cc/DGJ8-T3AL].

143. *See* U.S. v. Bryant, 711 F.3d 364, 369 (2d Cir. 2013).

144. *Id.* For instance, Congress could not pass a law declaring that text messages are not speech, and therefore, text messages are exempt from First Amendment protections.

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

146. *See* District of Columbia v. Heller, 554 U.S. 570, 625 (2008).

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

148. *Heller*, 554 U.S. at 622.

responsible" citizens covered by *Bruen* and *Heller*.[149] But this is an outlier that failed to grapple with the binding presumptively lawful doctrine and accordingly cannot be easily reconciled, if at all, by doctrines endorsed by both the circuits and the Supreme Court.[150]

2. Sensitive Places

Bruen references *Heller's* discussion of longstanding laws forbidding the carrying of firearms in sensitive places. According to *Bruen*, examples, though not an exhaustive list, of sensitive places include schools, government buildings, "legislative assemblies, polling places, and courthouses."[151]

Before continuing, it should be noted that *Bruen* is not a "sensitive places" case. *Bruen* makes clear that its facts do not constitute a sensitive places case because it cannot be fairly said that the entire island of Manhattan is a sensitive place.[152] The concern is that, if this were allowable, entire cities would be outside the scope of the Second Amendment. While this is a reasonable interpretation of sensitive places that may be endorsed with a shift in jurisprudence, the current status of the sensitive-places doctrine is that it must be able specific places, such as buildings or fairs, rather than about entire geographical areas.[153] As *Bruen* states:

> [W]e do think respondents err in their attempt to characterize New York's proper-cause requirement as a "sensitive-place" law." In their view, "sensitive places" where the government may lawfully disarm law-abiding citizens include all "places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." Brief for Respondents 34. It is true that people sometimes congregate in "sensitive places," and it is likewise true that law enforcement professionals are usually presumptively available in those locations. But expanding the category of "sensitive places" simply to all places of public congregation that are not isolated from law enforcement defines the category of "sensitive places" far too broadly. Respondents' argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss

149. United States v. Rahimi, 61 F.4th 443, 451 (5th Cir. 2023).

150. *Bruen*, 142 S. Ct. at 2131. *See also* Kanter v. Barr, 919 F.3d 437, 443 (7th Cir. 2019).

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

152. *Id.* at 2134.

153. *See id.* (implying that a greater degree of specificity than merely referencing an entire city would be required).

> in detail below. See Part III–B, infra. Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a "sensitive place" simply because it is crowded and protected generally by the New York City Police Department.[154]

Sensitive places, then, deal with targeted categories which are still sufficiently general. For instance, courthouses and polling places are general categories, but they are more targeted than merely designating buildings, without more, as sensitive places. In other words, it is permissible to ban weapons at *all schools* in Manhattan, but not simply Manhattan generally.[155] At a minimum, weapons around and in sensitive places are justifiably regulated because the "misuse of arms may prevent the operation of courts and other institutions of a free government."[156] This notion finds early historical analogues in Roman and English history.[157] Some, but not all, of these statutes differentiate between concealed and open carry in public cases with the element of *in terrorem populi*, or to the terror of the people.[158] Essentially, those interpretations of the early English statutes required that the carrying of arms or armor cause terror amongst the persons in the respective sensitive places.[159]

But the statutes went even further than merely regulating arms in the presence of government officials or functions, and some, as mentioned, were not always interpreted with the *in terrorem populi* element.[160] It also regulated "force" that tended to generally breach the peace and applied "everywhere, not just in the presence" of officials.[161] More specifically, it targeted areas where there would be large public gatherings, such as in fairs and markets.[162] *Bruen* found this unpersuasive because of the statute's age—1313 was a long time ago.[163] It is challenging to square this with the Court's affinity for even older legal landmarks, for example, the Magna Carta (1215), which was cited by the Court fifty-six times in the nineteenth century and 103 times in the twentieth century.[164]

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154. *Id.* at 2133.

155. Litigation developing in New York addresses this issue, but as this Article will explain, the relevant cases have missed the mark.

156. David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 211 (2018).

157. *See id.* at 208–09, 211–12.

158. *See id.* at 221.

159. *See id.* at 227.

160. *Id.* at 212–14.

161. *Id.* at 214.

162. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2139, 2144 (2022).

163. *Id.* at 2119 (stating that "not all history is created equal"). If not all history is created equal—can the history-and-tradition method effectively function as a tool of judicial restraint?

164. *See* Stephen J. Wermiel, *Magna Carta in Supreme Court Jurisprudence*, 15.1 INSIGHTS ON L. & SOC'Y 30–31 (2014).

Nevertheless, it is clear that there are old historical analogues for banning the carrying of weapons in public places that are not limited to government functions. But what of more modern analogues? *Bruen* indicates that laws from the 1660s on are the most instructive.[165] For instance, one early Pennsylvania statute indicates that carrying of firearms anywhere that was unowned by the individual carrying the arm could require licensure—and other colonies had similar statutes.[166]

Yet again, it is important to clarify that the exact role of the sensitive places doctrine, like the rest of the presumptively lawful categories, is still under-litigated. Accordingly, it could mean that these categories are outside the textual scope of the Second Amendment, the burden is lower at Step One or Step Two, or something else entirely. As will be explained in Part III, the best answer is that the doctrine includes burden-shifting.

The first major significant sensitive places battle took place in New York after *Bruen*. In *Antonyuk v. Hochul*,[167] a federal district court analyzed the sensitive locations section, among other sections, of New York's newly modified gun regime. The court found that carrying in "behavioral health, or chemical dependance care or services" was covered by the plain text of the Second Amendment and proceeded to Step Two and placed the burden of showing an analogue on the state.[168] The court explained that (1) the analogues presented covered a low portion of the population, (2) they were not proportionately burdensome, and (3) gun violence and the medical profession existed in the eighteenth and nineteenth centuries, and accordingly, the analogues were insufficient and various regulations were invalid.[169] This example demonstrates, as always, that law is the art of

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165. *See Bruen*, 142 S. Ct at 2140 ("As in *Heller*, we consider this history "between the [Stuart] Restoration [in 1660] and the Glorious Revolution [in 1688] to be particularly instructive.").

166. *See* Kopel & Greenlee, *supra* note 156 (citing 1721 Pa. Laws 254, 256, "If any person or persons shall presume to carry any gun, or hunt on any enclosed or improved lands of any of the inhabitants of this province, other than his own, unless he shall have license or permission from the owner of such lands, or shall presume to fire a gun on or near any of the king's highways, and shall be thereof convicted, either upon view of any justice of the peace within this province, or by the oath or affirmation of any one or more witnesses, before any justice of the peace, he shall, for every such offence, forfeit the sum of forty shillings"). For further reading on sensitive places and the vast number of historical analogues related thereto, see *Hesse & Schascheck*, *The Expansive Sensitive Places Doctrine, The Limited Right to 'Keep and Bear' Arms Outside the Home (DRAFT) at* https://papers.ssrn.com /sol3/papers.cfm?abstract_id=4500140.

167. *See* Antonyuk v. Hochul, 1:22-CV-0986, 2022 U.S. Dist. LEXIS 201944, at *29–37 (N.D.N.Y. Nov. 7, 2022).

168. *See id.* at *31.

169. *See id.* at *44. (explaining that the laws did not address a different problem from one that existed at the Founding because "certainly the medical profession existed in 18th and 19th century America; and certainly, gun violence existed in 18th and 19th century America."). Notably, this does not take into account the differences between Founding era weapons and modern weapons, culture, or other important contexts.

perfecting lenses.[170] The survival of sensitive places regulations, as with most laws, will therefore adjust the wideness or narrowness of any given lens.

The court further analyzed the ban on carrying in churches. It acknowledged that such a ban was not analogous because the historical analogues (1) covered a low portion of the population, (2) were less burdensome than the modern regulation, (3) did not make exceptions for those tasked "with the duty to keep the peace," and (4) the modern law "treads too close to infringing on one's First Amendment right to participate in congregate religious services."[171]

The court concluded similarly that there were not sufficient analogues for bans in public parks,[172] zoos,[173] airports,[174] certain forms of transportation, bars, theaters, large assemblies, private property, and public businesses, but that there were sufficient analogues for "'libraries' and 'public playgrounds,'" and schools.[175]

It is unclear what work the presumptively lawful nature of sensitive places analysis is doing in *Antonyuk*. It may affect, in a limited way, the textual inquiry or the burden placed on the state, but it is unclear based on the relatively few references to the doctrine.[176] Regarding historical analogues, the case also appears to be an outlier. It seems that the analysis is significantly more demanding than what would be expected in light of the fact that *Bruen* requires an analogue, not a historic *twin*.[177] Nevertheless, I reference the case as (i) a resource full of analogues and (ii) the most in-depth analysis, despite its flaws, of the sensitive places inquiry thus far.[178]

Courts typically do not read cases like statutes.[179] But cases, like statutes, need to be read somehow. *Antonyuk*'s view of a sensitive place simply cannot comport with the common-sense meaning of the phrase.[180]

It is odd that, although the presumptively lawful categories are still good law, as established above, *Antonyuk* sometimes treats this category of

170. *See id.* at *120–21.

171. *Id.* at *181–82.

172. *Id.* at *185–86.

173. *Id.* at *192–93.

174. *Id.* at *199–201.

175. *Id.* at *194. The court also extended this reasoning to nurseries.

176. *See id.* at *31 n.12. The court appears to favor a textual view based on scope, but the court did not linger on this point.

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

178. *See generally Antonyuk*, 2022 US Dist. LEXIS 201944. This is a product of the extensiveness of New York's regulatory regime and the organized nature of the opinion. This Article nevertheless explains why the opinion's methodology ignores key doctrinal points regarding the presumptively lawful standard at Part V.

179. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016).

180. *See generally Antonyuk*, 2022 US Dist. LEXIS 201944 at *6, *31 n.12. Where a doctrine labels a place as sensitive, it is apparent that the court should ask to *what* the place is sensitive. Under this view, a large number of crowded, dangerous, or otherwise risky places would be fair called sensitive.

gun regulations in roughly the same way it would treat any other. Effectively, the court seems to have taken it upon itself to remove sensitive places from the categories altogether. In fact, the government's burden in *Antonyuk* seems even higher, because the court reads *Bruen*'s analogue requirement more like the "twin" requirement expressly rejected in *Bruen*.[181] After all, *Bruen* indicates that the number of historical analogues can be quite low.[182] Moreover, *Bruen* does not disavow the presumptively lawful categories—the opinion even references the applicable doctrine from *Heller*.[183]

3. Commercial Sales

Heller explained that "laws imposing conditions and qualifications on the commercial sale of arms" are presumptively lawful.[184] Intuitions about the meaning of presumptively lawful commercial sale regulations are predictably split. Some say that the right to buy implies a right to sell, whereas others have determined the opposite.[185] Meanwhile, some courts have said that conditions on sale are an exception to the Second Amendment.[186] At least one has said that even if there is an implied right to sell, it need not be a right to sell commercially.[187] In effect, such a reading indicates that the presumption is conclusive rather than rebuttable.[188] But this need not be a result of the presumption, at least in the context of

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

182. *Id.* at 2134 (explaining that although there were relatively few historical records of sensitive place laws, the court was unaware of those laws being challenged). This is particularly interesting in the burden-shifting context considered in Part V. The court explained that it was unaware of challenges to these types of laws. But it would not make sense to expect the government to provide evidence of those challenges, as they would be disincentivized to do so from the beginning. Notably, this text is consistent with the burden-shifting approach explained in Part V. As implied in the same Part, it would also not make sense to only shift the burden of finding challenges to presumptively lawful categories of regulations, as doing so would ignore the overarching point of the categories themselves).

183. *Id.* (discussing Kopel and Greenlee, *supra* note 156).

184. *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

185. David B. Kopel, *Does the Second Amendment Protect Firearms Commerce? Defending the Right to Sell and Trade Arms*, 127 HARV. L. REV. F. 230 (2014).

186. *See* Teixeira v. Cnty. of Alameda, No. 3:21-00216, 2013 U.S. Dist. LEXIS 128435, at *23 (N.D. Cal. Sept. 9, 2013) (explaining that presumptively lawful means surviving facial challenges); Lycurgan v. Jones, No. 14-CV-548 JLS (BGS), 2015 U.S. Dist. LEXIS 201224, *30 (S.D. Cal. Nov. 19, 2015) (explaining that if a challenged law is presumptively lawful, then "the inquiry ends"); Bauer v. Harris, 94 F. Supp 3d. 1149, 1155 (E.D. Cal. 2015); United States v. Tilotta, No. 3:19-cr-04768-GPC, 2022 U.S. Dist. LEXIS 156715, *13 (S.D. Cal. Aug. 30, 2022); Morehouse Enters., LLC v. BATFE, No. 3:22-cv-116, 2022 U.S. Dist. LEXIS 151356, *27 (D.N.D. Aug. 23, 2022).

187. *See* Lycurgan v. Jones, No. 14-CV-548, 2015 U.S. Dist. LEXIS 201224, at *32–33 (S.D. Cal. Nov. 19, 2015).

188. *But see* Pena v. Lindley, 898 F.3d 969, 1005 (9th Cir. 2018) (Bybee, J., dissenting).

commercial sale, because nothing in the text of the Second Amendment protects the right to sell weapons.[189]

The counterargument is that with constitutional rights, it is intuitive to think that entitlement to a right implies an entitlement to access that right. For instance, in the First Amendment context, the right to speak cannot be utilized if the state prevents the would-be speaker from opening her mouth.[190] But this idea is not the end of the debate. Rights, whether it is intuitive to think so or not, do not *always* carry implied access rights or remedies, particularly when those access rights or remedies are deemed prophylactic.[191]

An example from the same term as *Bruen*—the Supreme Court's ruling in *Vega v. Tekoh*— supports this point.[192] There, the Court concluded that Terence Tekoh had been questioned by law enforcement without being informed of his *Miranda* rights.[193] Tekoh was given a verdict of "not guilty."[194] This means, pragmatically, that the only way for Tekoh to have made use of his *Miranda* rights would be a civil suit under §1983, as there would be no other remedy for the violation of his rights under the Fifth Amendment. Justice Alito, writing for the majority, rejected the use of §1983 to vindicate that right as an unwarranted "extension" of *Miranda*'s prophylactic purpose.[195]

Similar ideas spring up in federal courts doctrines. For instance, in *Cannon*, the Supreme Court reiterated that remedies do not always accompany rights.[196] Similarly, Justice Scalia wrote in a concurrence that

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189. *See Lycurgan*, 2015 U.S. Dist. LEXIS 201224, at *32–33. That is not to say that a presumption cannot be conclusive. It can. The law is no stranger to conclusive presumptions, and the word presumption should not be taken to render the reading implausible. Indeed, another word for "conclusive presumption" may simply be a rule, and no issue is taken with that concept.

190. Weekley, *supra* note 47, at 504–05 ("Many courts rely on First Amendment jurisprudence to guide their Second Amendment analysis. Since the *Heller* Court repeatedly referenced the First Amendment doctrine, the Fourth Circuit agreed 'with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment.").

191. *See generally* Vega v. Tekoh, 142 S. Ct. 2095 (2022).

192. *Id.* at 2098.

193. *Id.* at 2108.

194. *Id.*

195. *Id*. at 2107–08. The Court indicates that the purpose of the Fifth Amendment and *Miranda* is preventing self-incrimination. In framing the issue that way, the Court seems to view the Fifth Amendment as a right only belonging to those who have actually committed crimes. *But see* Matthew L. Schwarz, *The Fifth Amendment is a Right for Innocent People, Too*, BOISE SCHILLER FLEXNER LLP (Jan. 10, 2010), https://www.lexology.com/library/detail.aspx?g=45dcdb09-8295-456e-b6ba-66ab3dd7b6ed [https://perma.cc/6K8Y-46Q3]. Some courts have indicated that the right to keep and bear does entail a right to buy certain items. *See* Duncan v. Becerra, 970 F. 3d 1133 (9th. Cir. 2020) (stating "without a magazine, many weapons would be useless").

196. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 677–78 (1979) (explaining the *Cort* factors, including "(1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member, (2) whether there is any indication of legislative intent to

the *Bivens* doctrine of implied constitutional remedies is "a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."[197] While Section 1983 certainly allows litigants to sue for validation of certain constitutional rights, it does not follow that the Second Amendment prohibition on infringement will find remedies lurking around every corner, particularly for the outer penumbras of the right such as regulations on commercial sale. This will be especially relevant in cases where courts must decide whether "keep and bear" implies a greater panoply of rights.[198] At least one court has rejected that notion, stating that the right to bear arms "does not necessarily give rise to a corresponding right to sell a firearm."[199] The presumptively lawful category of restrictions on commercial sale is likely even broader, for instance, a waiting period could qualify as a condition on the commercial sale of the arm in the most straightforward reading of the phrase.[200]

4. Dangerous and Unusual Weapons

Dangerous and unusual weapons may be regulated under the Second Amendment.[201] Dangerous and unusual means that the weapon at issue must be *both* dangerous *and* unusual.[202] The best indication of what counts as a regulation on dangerous and unusual weapons is the federal machine gun ban.[203] As *McDonald* affirmed, the notion that the National Firearm Act's restrictions on machine guns could be unconstitutional would be a "startling" reading of Supreme Court precedent.[204]

Dangerous weapons also include those weapons that are likely to be used by criminals—again speaking to an overlap between the various presumptively lawful categories. For instance, the National Firearms Act covers "such modern and lethal weapons…as could be used readily and

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create a private remedy, (3) whether implication of such a remedy is consistent with the underlying purposes of the legislative scheme, and (4) whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States.").

197. *See* Correctional Services Corp., v. John E. Malasko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

198. U.S. CONST. amend II.

199. *See* United States v. Chafin, 423 F. App'x 342, 344 (4th Cir. 2011); s*ee also* United States v. Tilotta, No. 3:19-cr-04768-GPC, 2022 U.S. Dist. LEXIS 156715, at *15 (S.D. Cal. Aug. 30, 2022) (explaining that "the ordinary meaning of 'keep and bear' does not include 'sell or transfer'").

200. *But see* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV 849, 882 (2015).

201. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162 (2022) (Kavanaugh, J., concurring); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES 148 (1769).

202. *See* District of Columbia v. Heller, 554 U.S. 570, 721 (2008).

203. *See* 18 U. S. C. §922(o).

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

efficiently by criminals and gangsters."[205] While we know relatively little about this category, we know that common pistols are not dangerous and unusual weapons for doctrinal purposes.[206] Dangerous and unusual weapons may also cover weapons with defective materials or functions. One possible example of this is *United States v. Reyna,* where the court placed a heavy emphasis on the "functionality" of weapons.[207] While the court focused more on the fact that *Heller* highlighted the important self-defense function of handguns, maximums often imply minimums. This means that some weapons may be so dysfunctional, dangerous, or poor in functional utility that they may be of little to no value to self-defense altogether. Similarly, banning most weapons that have one sort of function (but not all weapons) may leave that self-defense function intact.[208] This "functionalist" approach is underdeveloped in the doctrine.[209]

Describing anything as dangerous and unusual presents ancillary considerations, which, as mentioned above, is addressed in Part III. For instance, what is the relevant geographical area to measure whether a weapon is unusual? Is it the world, the country, the state, or the county? Do time periods matter, as Justice Breyer's *Heller* dissent indicates?[210] If a new, lethal weapon is invented and becomes widely available, does Congress need to ban it *immediately* to prevent it from becoming a usual rather than unusual weapon?

Finally, it is worth noting that the answers to these questions, like with sensitive places, have been under-litigated and underdeveloped.[211] Bear in mind too that, under the *Marzzarella* framework, the regulation of anything which is unusual or dangerous would likely have survived intermediate scrutiny.[212] Therefore, the doctrinal work that the category of

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205. *See* United States v. Holton, No. 3:21-CR-0482-B, 2022 U.S. Dist. LEXIS 200327, at *6-7 (N.D. Tex. Nov. 3, 2022).

206. *Heller*, 554 U.S. at 627. The Court held that the pistol regulation was unconstitutional despite its endorsement of dangerous and unusual weapons prohibitions. This means that the Court did *not* view pistols as dangerous and unusual.

207. *See* United States v. Reyna, No. 3:21-CR-41, 2022 U.S. Dist. LEXIS 225896, at *13-14 (N.D. In. Dec. 15, 2022).

208. *Id.* at *12.

209. Joseph Blocher, *Bans,* 129 YALE L.J. 308, 324, 356 (2019) (expounding upon the "functionalist" approach).

210. *Heller*, 554 U.S. at 685 (Breyer, J., dissenting).

211. *See* United States v. Marzzarella, 614 F.3d 85, 97 (2010).

212. This is not a defect in the manner in which courts applied intermediate scrutiny. The statistical significance of the failure rate of challenges under intermediate scrutiny is important. *See* George A. Mocsary, *A Close Reading of an Excellent Distant Reading of Heller in the Courts*, 68 DUKE L.J. ONLINE 41, 53 (2018). But the high failure rate likely has more to do with the fact that there is a fairly direct link between regulating weapons and saving lives, which lines up neatly with the intermediate scrutiny test. Recall that under intermediate scrutiny, the question is whether the law at issue furthers an important governmental interest in a way that is substantially related to that interest. *See Intermediate Scrutiny*, CORNELL LAW SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny [https://perma.cc/YZQ4-LDWF].

dangerous and unusual weapons could be doing is, like with most of this area of law, undefined.

5. Summary

Let's rehearse the doctrine thus far. After *Bruen*, the test is a new two-step regime where the evaluating court asks whether the conduct regulated is covered by the plain text of the Second Amendment. If the answer is yes, then the government must show a historical analogue. Similarly clear is that the presumptively lawful categories envisioned by *Heller* are good law and, further, are a necessary component to securing a majority of the Supreme Court as of 2022. Lastly, the analogue inquiry is more or less strict depending on whether the modern problem addressed by the statute is similar to ones that existed in previous centuries. The framing of this issue may either come down to a judge's political preferences, as a results-driven approach from either side of the gun rights debate will be aided significantly by the benefit of careful framing,[213] or it could be driven by a fair, procedural tie-breaker, such as the presumptively lawful doctrine. But how does that presumptively lawful doctrine actually get integrated into the *Bruen* test? In Part II, I explain the analogue inquiry, which will have implications for both challengers and defenders of gun laws per Part III. In Part III, I will explain the presumptively lawful doctrine's interaction with the *Bruen* analogue test. The emphasis of that explanation is on procedure. However, the emphasis on the procedural bite to the test should not be taken to imply that a substantive bite is nonexistent.[214]

II. *BRUEN*'S PUZZLES

Bruen leaves open at least two major questions. First, when conducting the historical analysis, which history is relevant and how similar do historical analogues have to be to modern laws? Which states have history that is worth considering? Second, if the new test involves looking to the plain text of the Second Amendment and then historical analogues, how can courts meaningfully apply the presumptively lawful doctrine to vindicate the tests set out by both *Heller* and *Bruen*?

213. *See, e.g.*, United States v. Perez-Gallan, PE:22-CR-00427-DC, 2022 U.S. Dist. LEXIS 204758, at *14, *26–27 (W.D. Tex. Nov. 10, 2022) (explaining that "the leap of faith is whether the colonies considered domestic abusers a 'threat to *public safety*'" and that "even in the late nineteenth century, many states still adhered to the belief that without serious violence, the government should not interfere in familial affairs").

214. An example of a substantive bite would be the proposition that presumptively lawful regulations are entirely outside the text of the Second Amendment.

A. The Geographical and Temporal Pools for Relevantly Similar Analogues

Bruen instructs litigators to rely on historical analogues to justify laws when the law at issue implicates the plain text of the Second Amendment.[215] It is unclear what exactly the Court intends for lower courts to do when analyzing historical analogues. The two main questions, which can be subdivided into many parts, are (i) how large is the pool from which analogues may be drawn and (ii) once drawn, what makes an analogue "relevantly similar?"[216] This Part describes the pool in terms of geographical and temporal elements. It proceeds to clarify the forgiving analysis that makes the best sense of the analogical inquiry.

1. The Temporal Pool

Justice Barrett's concurrence is particularly interested in exploring the limits of the temporal pool from which analogues may be drawn: "To name just a few unsettled questions: How long after ratification may subsequent practice illuminate original public meaning?"[217] As Justice Barrett explained, this illumination, also known as *liquidation*, queries whether and for how long practice after ratification can clarify its ambiguities and flesh out indeterminate gaps. Next, Justice Barrett wrote, "Second and relatedly, the Court avoids another 'ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868' or when the Bill of Rights was ratified in 1791."[218] While the concurrence makes clear that the question was irrelevant for *Bruen* because the law at issue, according to Justice Barrett, found support in neither period, it is still a question that will be of serious concern to lower courts attempting to apply *Bruen*.

The reason these questions matter is because advocates of gun safety regulation, as a general matter, will argue for 1868 as the proper reference point for determining the content of the Second Amendment.[219] The opposite side will argue that 1791 is the proper reference point for determining the content of the Second Amendment.[220] This will likely have less to do with whether one period is more friendly to gun regulations and more to do with expanding the pool of available analogues. Similarly, whether the meaning of a legal text can be liquidated after the fact allows

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215. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133, 2156 (2022).

216. *Id.* at 2132, 2179.

217. *Id.*

218. *Id.*

219. *See* Mark Smith, *Attention Originalists: The Second Amendment was Adopted in 1791, Not 1868*, 31 HARV. J. OF L. & PUB. POL'Y PER CURIAM 1, 1–2 (2022).

220. *See* United States v. Bullock, No. 18-CR-165, 2023 WL 4232309, at *27 (S.D. Miss. June 28, 2023).

still greater opportunities to rely on analogical support for modern regulations.[221]

Of the liquidation and historical reference point questions above, the reference point question is the more important. This is because if gun safety advocates only succeed with the liquidation point but not the reference point, then the analogue pool is significantly smaller. A victory on liquidation may add some time to 1791, but a victory on using 1868 as a relevant timeframe would add *at least* seventy-seven years to the pool. The argument for relying only on 1791 is simple. The Second Amendment was ratified in 1791, and therefore, its meaning was fixed at that time.[222]

However, the majority's opinion cited to Professor Lash's theory of "respeaking" the Bill of Rights through the Fourteenth Amendment.[223] Prior to evaluating whether the Fourteenth Amendment was respoken, Lash provides examples of other parts of the Constitution that were respoken. For instance, the Eleventh Amendment respoke the "original opening language of Article III and invest[ed] those 1787 words with a 1795 meaning."[224] Similarly, the Thirteenth Amendment respoke the Northwest Ordinance with a new 1865 meaning.[225] In the same vein, the second sentence of §1 of the Fourteenth Amendment states that the states shall not abridge the "privileges or immunities" of citizens or deprive "any person of life, liberty, or property" nor deny any person equal protection.[226]

When new amendments are added to the Constitution, it means that old amendments cannot be read without looking to new amendments that could affect their meaning.[227] Amendments leave an indelible mark on their older constitutional siblings, and it is not the role of courts to ignore new constitutional language which structurally and textually alters the meaning of older ones.[228]

Regarding the Second Amendment, the textual and structural argument for that change is clear. As Lash states, the very meaning of the Bill of Rights had to change in order for incorporation to exist in the first place, because the initial meaning of the Bill of Rights was steeped in

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221. *See* Hanson v. District of Columbia, No. 22-2256, 2023 WL 3019777, at *16 (D.D.C. Apr. 20, 2023).

222. *See Bullock,* 2023 WL 4232309, at *27.

223. Kurt Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 4, 1440, 1441 (2022) ("When the people adopted the Fourteenth Amendment, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings."). This is not the only view of incorporation, and the majority in *Bruen* also references others.

224. *Id.* at 1444.

225. *Id.* at 1445.

226. U.S. CONST. amend. XIV, § 1.

227. *See* Lash, *supra* note 223, at 1448; *but see* District of Columbia v. Heller, 554 U.S. 570, 614 (2008).

228. *See* William J. Brennan Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

federalism and states' rights.[229] It is therefore easy to reject the simple counterargument that incorporation only applied old rules to new entities. Even the text of the First Amendment, for example, specifies that the applicable limits were on *Congress*.[230] Importantly—the substantive changes wrought by the Fourteenth Amendment upon the Bill of Rights, according to Lash, applies equally to the states and to the federal government, because "Americans adopted their *current* Bill of Rights in 1868 . . . after decades of public debate over the cruelty and injustice of slavery, the need to secure equal rights, and the importance of marginalized voices in the creation and enforcement of fundamental rights."[231]

Incorporation, then, is not just about applying old rules to states—it is about applying respoken rules to states. Anything less would be an acontextual reading of the Bill of Rights that would ignore the significant nature of the Fourteenth Amendment, as well as the substantive nature of incorporation itself. Incorporation has a substantive component because it alters our view of Federalism in the sense that the Bill of Rights was a *federalist* constraint on the central government, rather than a universally applicable set of rules.[232] Beyond the ahistorical notion that the Bill of Rights was not respoken by the Fourteenth Amendment—the original public meaning of the Fourteenth Amendment was clear. It was understood that the text of the Fourteenth Amendment spoke to the rights of "national citizenship."[233] Again speaking to the relevance of the First Amendment as a paradigm, the meaning of the First Amendment in 1791 was far different to the meaning of the First Amendment in 1868.[234]

Liquidation, on the other hand, is agnostic about the correct starting period for determining the content of a legal text.[235] Instead, liquidation is the concept that, whatever the correct time frame may be, practices and adjudications after that timeframe may serve to illuminate the meaning of the text.[236] Liquidation finds its doctrinal roots in the Federalist Papers, where James Madison wrote that post-textual discussions and adjudications clarify the indeterminacies of language. He observed that laws are considered "obscure and equivocal until their meaning be liquidated and ascertained" by discussions and adjudications.[237] Because "no language is

229. *See* Lash, *supra* note 223, at 1448.

230. *Id.*

231. *Id.* at 1453.

232. *See* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

233. Lash, *supra* note 223, at 1448–49 n.46 ("This new understanding did not involve an abandonment of federalism, it reconceptualized federalism as a constitutional principle advancing national liberty. Republican abolitionists, for example, embraced federalism and used its principles to deny federal power to pass the Fugitive Slave Acts and secure the right of northern states to oppose slavery.").

234. *Id.* at 1449.

235. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 60 (2019).

236. *Id.* at 16–17.

237. THE FEDERALIST NO. 37 (James Madison).

so copious as to supply words and phrases for every complex idea, or so correct" as to not include many redundancies, the nuanced meaning of words in a given context is clarified over time.[238]

If one is not convinced by the clear endorsement of liquidation by the Federalist Papers, one need only consider the fact that the Supreme Court itself has found this idea persuasive across the centuries of American jurisprudence. In *McCulloch v. Maryland*, the Court analyzed the question of whether Congress had the power to incorporate a bank.[239] In deciding this question, the Court opined, "The principle now contested was introduced at a very early period of our history, has been recognised [*sic*] by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation."[240] The case also contemplates that such a practice may be "put at rest" by the continued course of action of the state.[241] Scholars have also pointed to more recent cases such as *Noel Canning*.[242] In *Noel Canning*, the Supreme Court stated that it was "hesitant to disturb" a reading of the Constitution that had been reinforced by centuries of history.[243] This may indicate that liquidation may not only exist, but may exist into virtual perpetuity. After all, indeterminacies do not contain sunset clauses, so why should the interpretive methods that resolve them?

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238. *Id.* ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.").

239. McCulloch v. Maryland, 17 U.S. 316, 401 (1819).

240. *Id.*

241. *Id.*

242. Baude, *supra* note 235, at 49–50. At these pages, the article also questioned whether individual rights may be viewed differently under a liquidation framework, but explained that Founding era thought did not necessarily reflect that intuition. *See id.* (citing Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 253–54, 268–80 (2017) (arguing that with democratic consent governments could restrain natural rights in service of the public good); *see also* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 86–87 (2017) (reviewing RANDY E. BARNETT, OUR REPUBLICAN CONST.: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016) ("In short, natural rights called for good government, not necessarily less government.")).

243. NLRB v. Noel Canning, 573 U.S. 513, 556 (2014).

As a pragmatic matter, *Bruen* indicates that the relevant time period is approximately from the 1660s to the late nineteenth century.[244] While it "cautions" against placing too much weight on certain times, it analyzes them regardless—and such a caution contains significant open questions, as Justice Barrett's concurrence points out.[245]

2. The Geographical Pool

One of *Bruen*'s new puzzles is the determination of the proper geographical pool of analogues.[246] Under *Bruen*, all locations are not created equal. *Bruen* is skeptical of western territories,[247] but it fails to explain how much, and by what method, the geographical element of an analogue should discount its value. The opinion criticizes the localized nature of certain rules but does not explain what counts as sufficiently general.[248] It states that too few inhabitants justifies skepticism and that a lack of subjection to judicial scrutiny can as well.[249] Moreover, the territorial traditions analyzed by *Bruen* were short-lived.[250] *Antonyuk*, described in Part II, amplifies what it calls the "discount[s]" of certain pools of analogues by *Bruen*.[251] But until the Court explains how much those laws should be discounted and reconciles that with its liquidation-curious approach, this advice should largely be disregarded as uninstructive. Until the viability of *Bruen* is considered under a *Ramos* analysis,[252] courts will, unfortunately, be forced to struggle with this and related issues.

3. The Meaning of "Relevantly Similar"

In general, however, there are multiple possible methods to analyze whether analogues are relevantly similar. Courts may opt to only compare the modern law and the analogue. Alternatively, one case has analogized modern regulations to presumptively lawful categories to justify them, nearly comporting with the broader procedural theme addressed in Part III.[253] Even the historical impossibility (or lack of necessity) of modern

244. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2140, 2154 (2022).

245. *Id.* at 2163 (Barrett, J., concurring).

246. Geographical pools are not unknown to constitutional law. *See* United States v. Andrews, No. 12CR100-1, 2014 U.S. Dist. LEXIS 153491, at *1 (N.D.W. Va. Oct. 28, 2014).

247. *Bruen*, 142 S. Ct. at 2154.

248. *Id.*

249. *Id.* at 2155.

250. *Id.*

251. Antonyuk v. Hochul, 1:22-CV-0986, 2022 U.S. Dist. LEXIS 201944, at *61–62 (N.D.N.Y. Nov. 7, 2022)

252. Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring). The *Ramos* factors are applicable to the question of whether a precedent merits overruling.

253. *See* United States v. Kays, 624 F. Supp. 3d 1262, 1266 (W.D. Okla. 2022) ("Despite faint historical support of regulations prohibiting domestic violence offenders

laws may be considered.[254] The rhetoric chosen by lawyers and judges is incredibly important in obtaining a finding that a certain analogue is relevantly similar.[255] Finally, the nature and history of the problem to be cured by the historical analogue and its modern equivalents are relevant in determining the similarity of the analogue.[256]

While the first point needs little explanation, the point on rhetoric bears repeated emphasis. As mentioned above, modern regulations will live or die based on how they are framed and how analogues are framed.[257] *Bruen* demonstrates the risk of framing being led by political intuitions.[258] Based on political intuitions alone, some courts may view regulations as more or less burdensome on rights. For instance, a regulation which requires licensing fees may be characterized as "exorbitant"—while another court may simply view a fee as a reasonable cost of exercising a right.[259] Similarly, a regulation on commercial sale may offend some judges who believe that the right to keep and bear conveys an implied right to buy.[260] Other courts may be entirely content to construe the text of the Second Amendment narrowly or employ a broader view of analogues.[261] But perhaps most commonly, courts note that *Bruen* provides less flexibility for problems which have existed since the Founding.[262] There is a clear analytical difference between describing a societal problem as domestic abuse (which can certainly be said to have existed at the Founding) and

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from the Second Amendment's protections, in *Jackson*, the Court concluded that the government satisfied its burden…as domestic violence misdemeanants can logically be viewed as 'relevantly similar to felons' who should be 'denied weapons for the same reasons.'"). The court then said that "using the same reasoning, the Court arrives at an identical conclusion here." *Id.* at 1267.

254. *See* United States v. Slye, No. 22-mj-144, 2022 WL 9728732, at *2–3 (W.D. Pa. October 6, 2022).

255. *See, e.g.*, United States v. Perez-Gallan, PE:22-CR-00427, 2022 WL 16858516, at *6, *11 (W.D. Tex. Nov. 10, 2022) (explaining that "the leap of faith is whether the colonies considered domestic abusers a 'threat to *public safety*'" and that "even in the late nineteenth century, many states still adhered to the belief that without serious violence, the government should not interfere in familial affairs."); *cf. Kays*, 624 F. Supp. 3d at 1266–67 (viewing domestic violence more broadly as similar to felon bans). How broadly or narrowly (1) historical analogues and (2) modern problems are framed can be dispositive.

256. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131–33 (2022).

257. *See Kays*, 624 F. Supp. 3d at 1266–67 (analogizing domestic violence to felon bans).

258. In *Bruen*, the Court was split 6-3. 142 S. Ct. at 2121.

259. Antonyuk v. Bruen, 624 F. Supp. 3d 210, 217–18, 254 n.42 (N.D.N.Y. 2022) (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2138 n.9 (2022)).

260. *But see* United States v. Tilotta, No. 3:19-cr-04768-GPC, 2022 U.S. Dist. LEXIS 156715, at *5 (S.D. Cal. Aug. 30, 2022).

261. For instance, the Conclusion explains that presumptively lawful categories have the effect of eliminating the need for the burden of production and shift the burden of persuasion to plaintiffs challenging gun laws.

262. Antonyuk v. Hochul, 1:22-CV-0986, 2022 U.S. Dist. LEXIS 201944, at *60 (N.D.N.Y. Nov. 7, 2022) ("[C]ertainly the medical profession existed in 18th and 19th century America; and certainly gun violence existed in 18th and 19th century America.").

describing a problem as domestic abuse, accompanied by all of the modern technologies that enable it to be more harmful, such as social media.[263]

Most importantly, and perhaps an extension of the third point above, is *Bruen*'s notion that modern problems require modern solutions. Bruen states that "when a challenged regulation addresses a general societal problem that has persisted since the eighteenth century" the absence of a historical regulation that addresses that problem is evidence for the modern law's unconstitutionality.[264] It is also critical whether the earlier generation addressed the same problem through different means.[265] This too emphasizes the importance of describing problems. If a court merely describes a problem as "crime" or "gun violence," then obviously the problem is quite old and finding analogues will not be a challenge. But if a court describes problems with the specificity that they merit—the same specificity that courts now expect legislatures enacting gun safety laws to do with the "how" and "why" analysis of *Bruen*,[266]then courts too must be prepared to put in the analytical work expected of their coequal branches of government. Otherwise, like in *Antonyuk*,[267] courts will turn the Second Amendment into a "regulatory straightjacket" contrary to the explicit instructions of the Supreme Court.

B. On the Question of Burdens

Bruen is a case which, when read in conjunction with the presumptively lawful doctrine, proposes a problem regarding burdens. Before *Bruen*, presumptively lawful could mean different things. For felons, it meant that they were entirely outside the scope of the Second Amendment.[268] For law-abiding persons, it could mean the opposite, or it could mean, as argued below, that an analysis of the *purpose* of the person and weapon is required.[269] Sensitive places and dangerous and unusual weapons are mostly under-litigated.[270] Restrictions on commercial sale are either per se or rebuttably constitutional, depending on the court.[271] What is

263. United States v. Guthery, No 22-cr-00173, 2023 U.S. Dist. LEXIS 54072 , at *7 (E.D. Cal. Mar. 29, 2023).

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

265. *Id.*

266. *Id.* at 2133.

267. *See generally Antonyuk*, 2022 U.S. Dist. LEXIS 201944, at *60–85.

268. United States v. Raheem, No. 20-CR-61, 2022 WL 10177684, at *3 (W.D. Ky. Oct. 17, 2022).

269. *Id.*

270. Carina Bentata & Mark A. Frassetto, *NYSRPA v. Bruen and the Future of the Sensitive Places Doctrine: Rejecting the Ahistorical Government Security Approach*, 63 B.C. L. REV. E. SUPP. I-60, 61 (2022).

271. *Compare* Pena v. Lindley, 898 F.3d 969, 1005 (9th Cir. 2018) (identifying that restrictions on commercial sale may be rebuttable depending on imposed conditions), *with* Weekley, *supra* note 47, at 500–01 (noting interpretations of *Heller* suggest listed restrictions are outside Second Amendment's scope).

needed to make sense of the entire Second Amendment framework given the important role presumptively lawful categories play is a unifying doctrinal application of those categories. While the substantive application of presumptively lawful may not be reconcilable from court to court, the procedural application should be.

In *Bruen*, the majority states that it is the government's burden to show a relevantly similar historical analogue for modern gun regulations.[272] If the government fails to provide such analogues, the courts are not required to sift the historical record for such analogues and are entitled to decide the cases on the historical facts before them.[273] Already, post-*Bruen* courts have decided cases against the government for failure to carry their burden at Step Two, the historical analogue inquiry.[274]

The presumptively lawful doctrine necessarily includes a procedural component. This is because the word "presumptively" is derivative of "presumption." The legal definition of presumption includes burden-shifting.[275] Recognizing that there is a procedural component to the doctrine is nothing more than a matter of consulting a legal dictionary, as is concluding that the procedural effect involves burden-shifting. But dictionaries do not make law—courts do.

1. Confronting the Procedural Tension

Since *Heller*, courts have recognized that a procedural component to the presumptively lawful doctrine exists. In *Heller II*, recall that the court employed the pre-*Bruen* two step test which consisted of asking whether the core of the right was burdened and, if so, whether the regulation at issue survived intermediate scrutiny.[276] The court concluded that, based on the presumptively lawful categories from *Heller*, the burden shifted to the plaintiffs to show that the core of the right was violated.[277] The burden did not shift to the plaintiffs for intermediate scrutiny, but that is a feature of constitutional law generally rather than the *Heller* framework in

272. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022).

273. *Id.* at 2150.

274. *See* United States v. Price, No. 22-cr-00097, 2022 WL 6968457, at *5–7 (S.D.W. Va. 2022).

275. A presumption generally indicates burden-shifting. *See Presumption*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A presumption shifts the burden of production or persuasion to the opposing party."). This does not undermine the possibility that the presumptively lawful categories have a substantive bite as well, as "[m]ost presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence." *Id.; see also* Nat'l Rifle Ass'n of Am., Inc. v. Swearingen, 545 F. Supp. 3d 1247, 1268 (N.D. Fla. 2021) (agreeing that there is a procedural aspect in the form of burden-shifting to presumptively lawful categories).

276. *See* District of Columbia v. Heller, 670 F.3d 1244, 1252–53 (D.C. Cir. 2011).

277. *Id.* at 1253.

particular.[278] This is because when courts apply intermediate scrutiny, the government bears the burden.[279]

United States v. Trinidad provides another example of a court implicitly recognizing the procedural possibilities of the new Second Amendment regime.[280] As the court states, after *Bruen*, "It is not clear whether he [the challenging party] bears the burden of showing that his conduct falls within the scope of the Second Amendment. Either way, he has not provided us with sufficient facts to find that the Second Amendment covers his conduct."[281] While one may think this only applies to Step One, whether the plain text covers the amendment—recall also that the plain text is broad. Therefore, the real test of whether the Second Amendment covers conduct is whether the law that burdens itself is constitutional after the *entire* analysis, not only the textual analysis. *United States v. Banuelos* provides a succinct explanation of why the presumptively lawful analysis must come in at the historical step of *Bruen*. "*Bruen*'s first step does not contemplate the actor or subject."[282] Given that the *possession* of a firearm is "presumptively constitutional," the court stated that "[h]ow his prior felony might impact his Second Amendment right to possess a firearm is more properly assessed under step two's historical traditional analysis."[283]

Courts have held that plaintiffs challenging gun laws bear the burden at Step One under the old and new test.[284] Step Two, at a first

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278. It is true that the government must generally justify the constitutionality of its laws when they infringe on fundamental rights. But when only the outer penumbra of a right is implicated, the government need not bear the burden of showing its law is constitutional. Consider, for instance, the wide variety of laws that receive rational basis review yet could be impliedly linked to fundamental rights. While the text of the Second Amendment is broad, only a portion of the right need be considered "fundamental" under the current law. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

279. David L. Hudson, Jr., *Substantial Government Interest*, THE FIRST AMEND. ENCYCLOPEDIA (2019), https://www.mtsu.edu/first-amendment/article/1615/substantial-government-interest#:~:text=Intermediate%20scrutiny%20means%20that%20the,burden%20more%20speech%20than%20necessary [https://perma.cc/FAU5-BPFA].

280. *See* United States v. Trinidad, No. 21-398, 2022 U.S. Dist. LEXIS 190225, at *3 (D.P.R. Oct. 17, 2022).

281. *Id. See also* Or. Firearms Fed'n, Inc. v. Brown, No. 22-CV-01815, 2022 U.S. Dist. LEXIS 219391, *12 (D. Or. Dec. 6, 2022). While the court does not suggest burden shifting post TRO, the court demonstrates, if nothing else, that *Bruen*'s impact of placing the burden on the government is less than universal.

282. United States v. Banuelos, No. 22-CR-00903, 2022 U.S. Dist. LEXIS 229948, at *3 (W.D. Tex. Nov. 10, 2022).

283. *Id.*; *see also* United States v. Marique, No. 21-po-02263, 2022 U.S. Dist. LEXIS 229608, at *8 (D. Md. Dec. 20, 2022) ("As this [sensitive places] case can be disposed of under prong two of the test in *Bruen*, I need not determine whether the plain text of the Second Amendment includes a right to carry firearms onto federal campuses like NIH.").

284. *Compare* Heller v. District of Columbia, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (longstanding regulations are presumptively lawful, but "[a] plaintiff may rebut this presumption by showing the regulation does have more than a de minimis effect on his right."), *with* Trinidad, 2022 U.S. Dist. LEXIS 190225, at *3 (the challenger "has not provided us with sufficient facts to find that the Second Amendment covers his conduct.").

glance, would seem to always be the government's burden.[285] As *Bruen* states, "This Second Amendment standard accords with how we protect other constitutional rights . . . '[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.'"[286] But First Amendment cases frequently require plaintiffs to prove more than the simple fact that their right was burdened. For instance, plaintiffs sometimes have to prove that the defendant's actions would having a chilling effect, which means that the regulation at issue deterred protected conduct,[287] that the plaintiff's protected activity was a substantial or motivating factor in the defendant's restriction of it,[288] or that religious beliefs are sincerely held.[289] These may all speak to the full scope of the right at issue, but *Bruen* states that Step One only looks to the plain text of the Second Amendment.[290] Clearly, then, if *Bruen* analogizes Second Amendment scrutiny to the way courts analyze First Amendment cases, it would seem valid to ask who bears the burden but for *Bruen*'s statement that the government does.[291]

At least one court has implicitly recognized the possibility of a historical burden-shifting approach. In *Hanson v. District of Columbia*,[292] the plaintiffs challenged a ban on LCM (large capacity magazines). The court first recognized that the "burden is on the government to identify a historical analogue."[293] After finding the government's history sufficient,[294] the court addressed a historical argument in the plaintiff's reply brief, which argued that "the subsequent repeal of some of these state regulations undercuts the District's reliance on this history."[295] The court stated in response that "Plaintiffs [did] not explain why the decision of some states to

285. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022).

286. *Id.* (citing United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 816 (2000)).

287. *See* 9TH CIR. MANUAL OF MODEL CIV. JURY INSTRUCTIONS § 9.11 PARTICULAR—FIRST AMEND.—"CITIZEN" PLAINTIFF (9TH CIR. JURY INSTRUCTIONS COMM. 2017). *See also* Doe v. Bonta, No. 22-CV-10, 2023 U.S. Dist. LEXIS 6254 , *7 (S.D. Cal. Jan. 12, 2023) ("A 'chilling effect' on the exercise of a constitutional right occurs when a person seeking to engage in constitutionally protected activity is deterred from doing so by government regulations not specifically prohibiting the protected activity.").

288. *See* 9TH CIR. MANUAL OF MODEL CIV. JURY INSTRUCTIONS § 9.11 PARTICULAR—FIRST AMEND.—"CITIZEN" PLAINTIFF (9TH CIR. JURY INSTRUCTIONS COMM. 2017).

289. United States v. Quaintance, 608 F.3d 717, 719 (10th Cir. 2010).

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

291. *Id.* (explaining that "[Under] *Heller*… when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify [a firearm] regulation, the government … must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation."). While a careful reader may note the word presumption here, recall again that this presumption does not implicate the presumptively lawful categories from *Heller* which *Bruen* is "keeping with."

292. Hanson v. District of Columbia, Civil Action No. 22-2256 (RC), 2023 U.S. Dist. LEXIS 68782 (Dist. D.C. Apr. 20, 2023).

293. *Id*. at *36.

294. *Id.* at *48.

295. *Id*. at *56.

'devise solutions to social problems that suit local needs and values' is anything more than permissible 'experimentation with reasonable firearms regulations…under the Second Amendment."[296] The court further stated that "Plaintiffs have not suggested that any repeal was related to constitutional infirmity. The Court has conducted independent research on this question and did not find anything suggesting this was the reason, either."[297] This case operates as evidence that (i) the state may satisfy the historical analogue test (even if it is not via a presumptively lawful category) and that (ii) plaintiffs may have an opportunity to rebut that history.[298]

This is an easy and effective way for courts to apply the presumptively lawful doctrine, as opting to not do so would run counter to *Heller*, *McDonald*, and *Bruen*'s affirmation of the doctine[299] and Justice Kavanaugh's pivotal concurrence in *Bruen*. Moreover, it is possible that requiring the state to prove a consistent analogue with presumptively lawful regulations (rather than that the known analogues are inconsistent) would be insufficient to vindicate regulations based on *Bruen*'s temporal limitations, as predicted by Justice Breyer and *United States v. Minter*.[300] Lastly, and most importantly, the presumptively lawful doctrine will be rendered extinct by courts if it does not apply beyond Step One (determining the textual core of the right). This is because the text of the Second Amendment is broad. While the text of the Second Amendment clearly does not reference commerce, it does state a broad proposition of keeping and bearing that is hard to square with bans on possession by felons and those with mental illness.[301] If the presumption is only that the text does not cover felons and persons with mental illness, a broad reading of the text could encompass those groups—meaning the presumption would be unlikely to be rebutted. For the doctrine to have a meaningful effect and be recognized as good law, the analysis cannot end there.

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296. *Id*.

297. *Id*.

298. *See also* Del. State Sportsmen's Ass'n, Inc. v. Del. Dept. of Safety & Homeland Security, Civil Action No. 22-951-RGA, 2023 U.S. Dist. LEXIS 51322, *8 (D. Del. Mar. 27, 2023) (considering and rejecting contrary historical viewpoints from plaintiffs); NRA v. Bondi, 61 F.4th 1317, 1330 (11th Cir. 2023) (finding that "laws prohibiting the sale of arms to minors went virtually 'unchallenged' [] from their enactment through the middle of the nineteenth century."). The significance of the statement from the Eleventh Circuit in *Bondi* is that whether a law was historically challenged is relevant. The government will never be incentivized to find such history—only the parties challenging the law will be incentivized to search for historical challenges. If *Bondi*'s analysis means that historical challenges matter, then burden-shifting is the only way to align incentives to discover such challenges.

299. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

300. *See id.* at 2189 (Breyer, J., dissenting) (explaining that the Court was striking down a law that had a longer historical pedigree than at least three of the four types of presumptively lawful firearms regulations).

301. *See* Carlton F. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1374–78 (2008).

2. Confronting the Political Tension

Bruen is an exercise in sartorialism. As mentioned, the framing element of Second Amendment claims pursuant to *Bruen* opens up potentials for political pitfalls. Framing problems as having existed during the Founding era is more likely to result in a finding that the Framers did not have an on-point law that addressed the issue, whereas framing gun issues with their modern context will allow for a significantly looser analogical inquiry.[302] On the other hand, framing the role of analogues broadly will better serve to uphold modern regulations, whereas narrow framings will sever the justifying link between the historical law and the modern one.[303] It therefore follows that the progressive approach will be to frame the problems that modern gun laws address narrowly, tailoring them to specifically modern issues or old issues with modern twists. Meanwhile, the conservative approach will be to frame historical problems broadly, such that if they even remotely existed during the Founding era, the lack of laws addressing them will be fatal to modern regulations. In sum, the "balls and strikes" called by courts will likely be determined by their political dispositions towards history.[304] The test will likely always include an element of subjective tailoring.

An example of a broad framing of the historical problem is *United States v. Perez Gallan*.[305] In *Perez Gallan*, the court questioned what the founders would have thought of domestic violence. It noted that domestic violence, and violence generally, is not a modern problem at all.[306] But noting that violence is not a distinctly modern problem fails to grapple with the fact that old problems can have new and cruel twists.

The better framework recognizes that modern twists on old issues call for a tailored application of old rules. Most problems are, in fact, variants of older ones—and tailoring the analysis to new versions of old problems is the best way to vindicate the notion that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to

302. *See Bruen's Ricochet: Why Scored Live-Fire Requirements Violate the Second Amendment*, 136 HARV. L. REV. 1412, 1425–28 (2023).

303. *Compare* United States v. Escobar-Temal, No. 22-CR-00393, 2023 U.S. Dist. LEXIS 107133 , *5–6 (M.D. Tenn. June 21, 2023) (finding 18th century Pennsylvania law sufficiently analogous to 18 U.S.C. § 922(g)), *with* United States v. Bullock, No 18-CR-165, 2023 U.S. Dist. LEXIS 82889 , *27, 29 (D.S.C. May 10, 2023) (interpreting *Bruen* narrowly and finding the 18th century Pennsylvania law "hopelessly vague" and inappropriate as a historical analog for 18 U.S.C. § 922(g)).

304. For general empirical analyses on the Second Amendment up to 2018, see Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433 (2018).

305. United States v. Perez-Gallan, PE:22-CR-00427-DC, 2022 U.S. Dist. LEXIS 204758, at *13 (W.D. Tex. Nov. 10, 2022).

306. *Id.* at *10.

the various crises of human affairs."[307] *Oregon Firearms* provides one such example of this analysis. In *Oregon Firearms*, the court concluded that in an era of mass-shootings, "large capacity magazines also implicated unprecedented societal concerns."[308] Moreover, the same court found historical practices "necessary to the public peace, safety, and good order" to be instructive justifications for the modern law.[309] Recognizing that gun violence issues are complicated, change over time, and therefore merit a more permissive analysis under *Bruen*, will avoid the risk of an overactive judiciary in the Second Amendment context. But the primary procedural method to address the political tension is the burden-shifting device, as it gives both sides of the gun rights debate a stake in both how to analyze historical analogues and which history is relevant.

III. THE PRACTICAL APPLICATION OF THE BURDEN-SHIFTING DEVICE

There are a few possible ways to give the presumptively lawful doctrine effect. This Article has already established that it would not make much sense for the doctrine to apply only to the textual analysis step.[310] Similarly, it is possible that the doctrine could mean a lower level of historical evidence is required—but as the historical analogue test is already so unclear—how can courts subtract an unknown from an unknown?

A. Giving the Presumptively Lawful Doctrine Effect After *Bruen*

I propose that for the presumptively lawful doctrine to be vindicated, there must be three steps to analyzing Second Amendment claims. Prior to continuing—recall that *Bruen* is clear about the fact that New York's gun regulation does *not* present a presumptively lawful case and is therefore not instructive on what to do in such cases.[311] In a Dworkinian sense, *Heller*, *McDonald*, and *Bruen* represent easy rather than hard cases for the Court—and they should be viewed as such.[312] They are outliers. Recall also that with presumptions, "the existence of one fact is presumed from proof of another" and that true presumptions create an inference that is "mandatory unless rebutted."[313]

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307. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022) (citing McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316 (1819)).

308. *See* Or. Firearms Fed'n, Inc. v. Brown, No. 2:22-cv-01815-IM, 2022 U.S. Dist. LEXIS 219391, at *13 (D. Or. Dec. 6, 2022).

309. *Id.* at *14.

310. *See Bruen*, 142 S. Ct. at 2126–27.

311. *Id.* at 2133–34.

312. *See* Ronald Dworkin, Law's Empire 124–36 (1986).

313. John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Crim. L.*, 88 YALE L.J. 1325, 1335 (1979). This is not to say that how

The way to best vindicate the procedural component of the presumptively lawful doctrine, established herein, is to shift the burden at Step Two (the historical analogue inquiry) of the new test.[314] Shifting the burden of proof to the plaintiffs in Second Amendment cases opens new, but easy, questions. For instance, how will the presumption actually affect the burden? While we normally think of a presumption as shifting the burden to the opponent to disprove the presumption itself,[315] that is not the most sensible explanation of the presumption at issue here. This is because the presumption is of *lawfulness*. Shifting the burden to the challenger to rebut the presumption of lawfulness does little, because that is the reason for analyzing the law in question in the first place. Instead, to decide whether a law is actually lawful, courts should proceed in three steps. The second two steps, rather than only addressing *Bruen*'s historical question, address the question of history as viewed by *Heller* by both offering a test to decide whether a given law is part of the presumptively lawful categories and then, if the law at issue is, how to rebut the presumption. I offer both a

courts should handle presumptions is an easy question. *See* Charles L. Barzun, *Rules of Weight*, 85 NOTRE DAME L. REV. 5, 1974–75 (2008).

314. There are cases indicating to the contrary. *See* Range v. Att'y Gen. United States, 53 F.4th 262, 271 (3d Cir. 2022) (vacated). As I show, this fails to give the presumptively lawful doctrine its full effect in the procedural context. It is worth noting that the Third Circuit in *Range* upheld the law at any rate, meaning that giving the doctrine its full effect would not have been outcome determinative. *Id.* at 285. Separately, the reader should note that *Range* recognizes that even laws *protecting* gun rights throughout history cut in favor of modern gun laws because such historical analogues demonstrate that the state had *legislative discretion* to regulate arms. *Id.* at 271."Amici offer a few statutes that purportedly prove legislatures' inability to disarm non-violent offenders, but these laws confirm our view. Specifically, Amici cite a 1785 Massachusetts law that forbid tax collectors and sheriffs from embezzling tax revenue. Amicus Br. 32 (citing 1785 Mass. Laws 516). Although the statute permitted estate sales to recover embezzled funds, 'the necessities of life—including firearms—could not be sold.' *Id.* Likewise, Amici discuss a 1650 Connecticut law exempting weapons from execution in civil actions and four statutes providing similar protections for militia arms. *Id*. at 33 (citing The Public Records of the Colony of Connecticut, Prior to the Union with New Haven Colony, May 1665, at 537 (J. Hammond Trumbull ed., 1850); 1 Stat. 271, § 1 (1792); Archives of Maryland Proceedings and Acts of the General Assembly of Maryland, at 557 (William Hand Browne ed., 1894); An Act for Settling the Militia ch. XXIV (1705), 3 Statutes at Large: Being a Collection of all the Laws of Virginia from the First Session of the Legislature, in the Year 1619 335, 339 (William W. Hening ed., 1823); An Act for the Settling and Better Regulation of the Militia ch. II (1723), 4 Statutes at Large: Being a Collection of all the Laws of Virginia from the First Session of the Legislature, in the Year 1619 118, 121 (William W. Hening ed., 1820). But Amici place more weight on those laws than they can rightly bear. The fact that legislatures did not always exercise their authority to seize the arms of individuals who violated the law does not show that legislatures never could do so. Rather, these laws underscore legislatures' power and discretion to determine when disarmament is warranted. And, as detailed above, Range and Amici's contention that legislatures lacked the authority to disarm non-violent individuals 'flatly misreads the historical record.' Heller, 554 U.S. at 603." *Id.* at 283–84.

315. *See Presumption*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A presumption shifts the burden of production or persuasion to the opposing party.").

test for the category itself *and* a means for applying the category once shown.

First, courts must determine whether the plain text of the Second Amendment is implicated by the law at issue. More often than not, this will be a straightforward analysis of nothing other than the text.

Second, the government bears the burden of persuasion to demonstrate that a given law can rationally be classified as part of a presumptively lawful category. The party challenging the law may counter this claim by arguing, among other things, that the specific law at issue has an effect which is far greater than the category itself. For instance, if Congress declared tomorrow that being born in the United States is a felony, then it would not be allowed to pass a follow-up law stripping all persons convicted of felonies of guns because that would be a regulation which, in substance if not form, goes significantly beyond the reasonable boundaries of the category itself. If the law is presumptively lawful, then the court may end the analysis there *substantively* by saying that presumptively lawful means irrebuttably lawful. But if the court believes that the presumption of lawfulness is rebuttable, further analysis is required—and thus the procedural effect of the presumptively lawful doctrine will come into play.

But as mentioned, it is not sufficient to say that burden-shifting can only apply to the presumption itself, such that if something is presumptively lawful, the burden shifts to the other party to rebut that presumption and show it is unlawful. To frame the analysis in that way would leave the parties only with conclusory claims against each other, because whether the law at issue is lawful, or *constitutional*, is why the parties are there in the first place. Moreover, breaking the presumptively lawful analysis into several steps acknowledges the fact that in many cases, parties will litigate whether a given law is part of the categories as such (prompting the court to ask whether the law is substantially similar to the category) and then, assuming the analysis does not end there, providing the plaintiffs an opportunity to rebut the presumption. If the court decides the presumption is rebuttable, a third step is required.

That third step is as follows: if the party defending the law convinces the court that the law at issue can be rationally categorized as part of the presumptively lawful category, and if the court further concludes that the presumption is rebuttable, a third and final step is required to avoid a conclusory analysis. Because the entire point of the argument is deciding whether the presumptively lawful law is, in fact, lawful—the presumption will have the procedural effect of shifting the analogical burden to the party challenging the law. To challenge the law, the challenging party would then show that it has been successfully litigated against throughout history or historically understood as within the protection of the Second Amendment. As *Bruen* states when describing one presumptively lawful category, sensitive places, while "the historical record yields relatively few eighteenth

and nineteenth-century 'sensitive places'…we are also aware of no disputes regarding the lawfulness of such prohibitions."[316] This language, combined with the procedural effect of the presumptively lawful doctrine explained herein, represents *Bruen*'s unintentional foresight on the best way to apply the procedural aspect of the doctrine in light of the new test. While the Court does say that courts *can* use historical analogies to regulations of sensitive places,[317] it would still not make sense of the presumptively lawful doctrine to require sensitive place analogies. This would make the category no different than any other gun regulation for analytical purposes.

Aside from squaring *Heller* and *Bruen,* there are at least two pragmatic reasons to adopt this approach. First, it gives certain categories of important gun safety regulations a constitutional chance. Per *Heller*, that is both a pragmatic and doctrinal concern.[318] Second, and much more significantly, it lowers the political stakes involved in judicial analysis of the issue. The reason is that, as it pertains to the temporal and geographical pools for analogues, both sides of the gun rights debate will have a stake in a larger or smaller pool of analogues from which to draw. This is because in cases which are not presumptively lawful, parties defending the law at issue will want the largest possible pool from whence to draw analogues. On the other hand, in cases which are presumptively lawful, parties challenging the law at issue will want the largest possible pool from whence to draw historical challenges to that law. This reduces the partisan motivations, real or suspected, that may motivate the outer limits of the historical pools.

In sum, it is not an open question of whether presumptively lawful categories have previously had a procedural effect. Clearly, they have been interpreted as such by courts under the ancient régime and the new one.[319] To claim that the procedural effect should *not* be realized in the historical analogue step would require, then, an explanation that when the Supreme Court wrote "presumptively lawful" in *Heller*, what it really meant was presumptively lawful, but *only* as it pertains to defining the text of the Amendment. This is because if there is no effect as it relates to analogues, or if it is not an irrefutable presumption, the doctrine does not work. If the doctrine does not work, an explanation would be required of how this could be a reasonable reading of *Heller*, when the *Heller* opinion explains that such categories of laws would not be called into question by the modern understanding of the Second Amendment. Given the broad nature of the holding in *Heller*, these two notions would be irreconcilable under *Bruen*'s text-oriented approach. In other words, presumptively lawful *may* have a

316. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022). The historical record does, in fact, yield many examples of sensitive places. *See* Kopel & Greenlee, *supra* note 156.

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

318. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

319. David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U.L.J. 193, 214 (2017).

procedural effect at Step One of *Bruen*, but it *must* have a procedural effect if courts reach the historical analogue inquiry.[320] The procedural effect will consist of analogizing the law at issue to the category in which it may reside. If a court views the demonstrated presumption as conclusive, the inquiry ends, and the law is constitutional. If the presumption is not conclusive, the presumptively lawful categories will function as a burden-shifting device, requiring the challenging party to show successful historical litigation against the law.

B. Addressing Counterarguments

There will be objections to this claim from both the legal right and the legal left. This may be a surprise, as the Article clearly stakes its burden-shifting thesis on principles and applications that will be favorable to gun regulations. Arguments from both sides of the aisle will be addressed in turn.

The legal right will likely argue that this transforms the Second Amendment into a "regulatory blank check" by requiring plaintiffs to prove too much.[321] The legal left will argue that the presumptively lawful framework has already been determined to mean entirely outside the scope of the Second Amendment by many courts without any burden-shifting analysis, as evidenced by felon cases.[322] The presence of both of these counterarguments indicates that this approach is precisely how to accord with the twin principles of the Second Amendment referenced by *Bruen*—that it is neither a "regulatory straightjacket" nor a "blank check."

The argument from the left is that courts would be better off to decide Second Amendment questions on narrow textual grounds, avoiding the historical inquiry altogether. That argument may be addressed both doctrinally and pragmatically. First, the currently binding textual reading of the Second Amendment is and will continue to be broad until the jurisprudential winds shift at the Supreme Court.[323] Assuming that many

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320. This naturally depends on whether the reader agrees with the claim that presumptively lawful has a procedural component. This is a matter of consulting the meaning of the word itself. *See Presumption*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A presumption shifts the burden of production or persuasion to the opposing party . . ."). This does not undermine the possibility that the presumptively lawful categories have a substantive bite as well, as "[m]ost presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence." *Id.* As courts have held per Parts II and III, it would be challenging at best to persuasively state that there is no procedural component to the presumptively lawful categories.

321. *See* Darrell A.H. Miller & Joseph Blocher, *Manufacturing. Outliers*, 2022 SUP. CT. REV. 49, 63 (2022).

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

323. *See* Billy Clark, *Second Amendment Challenges Following the Supreme Court's Bruen Decision*, GIFFORD'S L. CTR. TO PREVENT GUN VIOLENCE (June 21, 2023), https://giffords.org/lawcenter/memo/second-amendment-challenges-following-the-supreme-courts-bruen-decision/ [https://perma.cc/M46C-HF6T].

places could be characterized as presumptively lawful for Second Amendment purposes, this would set a precedent allowing per se rules against the vindication of constitutional rights beyond the Second Amendment. Such an approach should be avoided for its impact on other aspects of constitutional law, and again, has seemed to regress even in the First Amendment context.[324] It should be noted, however, that while this article argues for the procedural bite of presumptively lawful categories in the context of burden-shifting, presumptively lawful categories can also have a substantive bite that approaches, but is not exactly, a per se rule. For instance, a ban on the commercial sale of all guns except for thirty seconds after midnight would likely not be upheld,[325] but the burden would still be on those challenging the regulation which did not fall into one of the presumptively lawful categories.[326] Nor does this foreclose the possibility that the *text* of the Second Amendment allows for a per se rule, for instance, the conclusion that the word 'sell' is not present in the text of the Amendment, and therefore is unprotected.[327]

Pragmatically, however, whether a substantive per se rule is created, either by the presumptively lawful doctrine or the text of the Second Amendment itself, will likely be of reduced significance if this Article's approach is adopted in its entirety. This is because even if plaintiffs can challenge any burden on Second Amendment claims, the vast majority of gun laws will fall into the presumptively lawful categories outlined in Part III in one way or another.[328] Then, the challenging party will still bear the burden of showing litigation against this category of gun laws throughout the eighteenth and nineteenth century, or, alternatively, the complete absence of a historical analogue. This is *not* requiring them to in fact prove a negative, as proving a negative means that a person is asked to prove "the non-existence of that for which no evidence of any kind exists."[329] This means that a person would have to prove that something does not exist with no tools whatsoever. But plainly, that is not the case here, and suggesting that it is would run counter to legal practice.

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324. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942); *cf.* Snyder v. Phelps, 562 U.S. 443, 460 (2011). What is appropriate for one right is not always appropriate for another. Nevertheless, it is worth proceeding with caution to the extent that understandings of fundamental rights are linked.

325. *See* David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 HARV. J. ON LEGIS. 303, 332 n.146 (2016).

326. Burden-shifting, again, is not foreign to the Second Amendment. *See* Beers v. Att'y Gen. United States, 927 F.3d 150, 155 (3d Cir. 2019) (explaining that for certain as-applied Second Amendment challenges, the plaintiff had the burden of distinguishing their circumstances from those of persons who were historically-barred from possession by showing conviction as a minor or that the they were no more dangerous than the average citizen).

327. Teixeira v. Cnty. of Alameda, 873 F.3d 670, 682–83 (9th Cir. 2017).

328. *See* Kopel & Greenlee, *supra* note 319, at 215.

329. Nathaniel Branden, *What is the Objectivist View of Agnosticism?*, 2 THE OBJECTIVIST NEWSLETTER 4 (1963).

This is not the case for burden-shifting because analogues *do* exist. There is a finite pool of analogues in the world, and *Bruen* tasks litigators with discovering them. Neither party is tasked with proving that the analogues themselves do not exist. Instead, parties are tasked with collecting the relevant analogues and explaining why analogues are or are not relevantly similar. Nowhere in this formula is any party, regardless of who bears the burden, asked to prove a negative.

Even if this did count as proving a negative in an alternate world of philosophy, it would run counter to legal practice because parties are required to demonstrate that cases do or do not exist which support their propositions all the time.[330] Analogues, in this sense, are just another form of evidence that parties are required to submit to courts for evaluation. Unless those opposed to burden-shifting on the faulty grounds of "proving a negative" also oppose litigation methodology, the argument is plainly inconsistent with the common understanding of the legal project. In sum, this means a fair deal for both plaintiffs and defendants. Both parties carry incentives to research analogues to achieve better answers, and both parties take mutual responsibility for the joint project of litigating a case.

The incentive to find the best result also addresses the argument from the right—which is that originalism is the legal philosophy of correct constitutional answers.[331] If the government always bears the burden during the analogical inquiry, it is only the government that has an incentive to do historical research. The plaintiffs would merely have to say "No, that's insufficient" to every historical analogue that the government presents. Currently, plaintiffs are *disincentivized* from research analogues because any marginal analogue could sink their case and the historical record offered to courts will be unlikely to tell the full story.[332] But by shifting the burden, both sides will have an incentive to research historical statutes and challenges. Plaintiffs will bear the burden of ethically finding and providing evidence that the presumptively lawful categories would have been rejected by historically analogous challenges to those categories. If the law at issue is not presumptively lawful, then only the government will bear the burden. If originalists and traditionalists are not results-oriented, this should be viewed as compelling.

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330. *See* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745–47 (1993).

331. *See* André Leduc, *The Ontological Foundations of the Debate over Originalism*, 7 WASH. U. JURIS. REV. 263, 275 (2015).

332. United States v. Perez-Gallan, PE:22-CR-00427-DC, 2022 U.S. Dist. LEXIS 204758, at *13 (W.D. Tex. Nov. 10, 2022). As the court noted, it is possible that Court A and B could decide issues of constitutional law entirely differently based on how good someone from the government is at research. Providing both parties an incentive to research will reduce this disparity, though the precise delta is an empirical question that need not be predicted here.

CONCLUSION

Some cases become famous for their recognition that law is more than black words on white paper. These cases secure their places in our constitutional constellation for their invaluable contributions to our legal economy. Other cases do just the opposite and become infamous for their cruelty or anachronism. Still others, finding themselves in neither camp, simply do more to obscure than clarify the law. These are far from the only categories of case law, but they are certainly the ones which are most discussed.

Bruen undoubtedly falls in the last category. In future decades, it may even be ripe for a *Ramos* analysis.[333] Between *Heller*, *McDonald*, *Marzzarella*, and *Bruen*, the framework has shifted dramatically throughout the years, and the actual effects of *Bruen* are, as yet, mostly unlitigated. These cases have not left us without guidance. While the doctrines may seem unclear and dangerous in their potential, it is up to courts to illuminate those dark doctrinal caverns with the presumptively lawful standard.

If courts apply the presumptively lawful analysis in the form of burden-shifting, then *Bruen* may yet survive to form a workable, procedurally sound, and pragmatic test that achieves the twin aims of the Second Amendment: that it should be neither a "regulatory straightjacket nor a regulatory blank check."[334] Most importantly, it will properly allow states to protect the lives of their citizens pursuant to their duties as holders of police powers. There is no loftier goal than this for the judiciary.[335]

333. Ramos v. Louisiana, 140 S. Ct. 1390 (2020). The *Ramos* factors are applicable to the question of whether a precedent merits overruling.

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

335. *See* Hennington v. Georgia, 163 U.S. 299, 303–04 (1896).