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# RESTRAINING THE SECOND AMENDMENT IN THE ERA OF THE INDIVIDUAL RIGHT: ADOPTING A MODIFIED SOUTH AFRICAN GUN CONTROL MODEL

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## ABSTRACT

*In New York State Rifle & Pistol Association v. Bruen, the Supreme Court announced a novel historical test for judging the constitutionality of firearm laws. In combination with its earlier decisions in District of Columbia v. Heller and McDonald v. City of Chicago, the Court has created an onerous burden on federal and state legislatures attempting to regulate civilian firearm ownership. Given Heller's individual right ruling, McDonald's incorporation, and Bruen's historical precedent requirement, it is clear that designing a restrictive firearm ownership system based on models that have proven successful in other Western countries is not possible, as most, if not all, of these would run afoul of these precedents. South Africa's firearm licensing system, on the other hand, can provide a useful starting point for creating a framework that states can adopt. South Africa has significant private firearm ownership, its licensing system is not unduly restrictive, and it has proven successful in reducing gun violence. This Note therefore proposes adopting a version of South Africa's firearm licensing system modified to survive judicial review in the United States. This Model Act likely represents close to the most restrictive licensing system that can pass judicial review following Bruen and might prove similarly effective in reducing gun violence in the United States.*

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*There is almost no political question in the United States that is not resolved sooner or later into a judicial question.*

—Alexis de Tocqueville<sup>1</sup>

## INTRODUCTION

The United States is in many ways an odd country, and there are few things more quintessentially American than the sheer quantity of firearms and relative frequency of mass shootings in this country. Presently, the United States has about 120 guns for every 100 citizens,<sup>2</sup> and a higher rate of gun violence than any other wealthy, developed country.<sup>3</sup> The tragic reality is that the gun control debate in the United States is never untimely. In light of the level of gun violence and ready availability of firearms in the United States, one solution seems simple: restrict access to firearms. After all, there is evidence that this approach can be successful.<sup>4</sup> However, since the Second Amendment<sup>5</sup> has been interpreted to protect a broad, individual right to keep and bear arms,<sup>6</sup> and any realistic prediction of the foreseeable future provides little reason to expect that the Second Amendment will be repealed, designing a perfect gun control statute from scratch is simply not an option. Moreover, our federal governmental structure further restricts our options. Promulgating a comprehensive, federal regulatory scheme that does not run afoul of the individual rights in, or the structural aspects of, the Constitution is infeasible.

Apart from the legal constraints on gun control, political, cultural, and economic roadblocks abound. Firearms are a prominent aspect of modern American culture,<sup>7</sup> and many Americans enjoy firearm ownership for safe,

1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 257 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (1835).

2. *Global Firearms Holdings*, SMALL ARMS SURV. (Mar. 29, 2020), <https://www.smallarmssurvey.org/database/global-firearms-holdings> [<https://perma.cc/6UY8-GCHP>].

3. *Gun Violence in the US Far Exceeds Levels in Other Rich Nations*, BLOOMBERG (May 26, 2022, 5:00 PM), <https://www.bloomberg.com/graphics/2022-us-gun-violence-world-comparison> [<https://perma.cc/TQF9-U8TY>]. In addition to issues of gun violence, a high proportion of firearm ownership is closely associated with firearm suicide rates. See Michael Siegel & Emily F. Rothman, *Firearm Ownership and Suicide Rates Among US Men and Women, 1981–2013*, 106 AM. J. PUB. HEALTH 1316, 1319 (2016) (finding a correlation between state-level firearm ownership and suicide rates of 0.71 among men and 0.49 among women).

4. See S. Chapman, P. Alpers, K. Agho & M. Jones, *Australia's 1996 Gun Law Reforms: Faster Falls in Firearm Deaths, Firearm Suicides, and a Decade Without Mass Shootings*, 12 INJ. PREVENTION 365, 366 (2006).

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

6. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2121 (2022).

7. MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 166 (2014); B. Bruce-Briggs, *The Great American Gun War*, 45 PUB. INT. 37, 41 (1976).

legitimate purposes like self-defense, hunting, and sport shooting.<sup>8</sup> Additionally, the United States firearms market is a \$28 billion industry with significant lobbying strength.<sup>9</sup> Suffice it to say, there are significant constraints within which any regulatory structure must fit. Fortunately, however, it is not necessary to start from scratch. Foreign practices that have proven effective can be tailored to our constitutional constraints to develop a model gun control act for the several states to adopt. In particular, this Note proposes a distinctive approach: start with South Africa's Firearms Control Act of 2000<sup>10</sup> and modify it to create an act that satisfies the U.S. Constitution and serves the policy goals of reducing access to firearms by those who would misuse them while keeping them available to responsible citizens. The purpose of this act is to provide a framework for the states to create a comprehensive firearm licensing system that can survive judicial review under current Second Amendment doctrine.<sup>11</sup> This Model Act serves as a starting point for responsible firearm regulation in the era of the individual right and does not purport to be the final word on the Second Amendment question.

South Africa's gun control system may be a surprising basis for a new federal gun control law in the United States; its intentional homicide rate far surpasses ours.<sup>12</sup> However, South Africa has seen a steady decrease in gunshot-related deaths since it adopted the Firearms Control Act of 2000.<sup>13</sup> The United States could see a reduction in its gunshot-related deaths by adopting a similar model. In any case, the large-scale empirical questions over the efficacy of various gun control systems are beyond the scope of this Note. The Note instead focuses on how we might adapt a comprehensive, firearms licensing scheme to our constitutional framework. South Africa's model is an excellent starting point because it restricts access to especially dangerous firearms while providing individuals the opportunity to own

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8. Lydia Saad, *What Percentage of Americans Own Guns?*, GALLUP (Nov. 13, 2020), <https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx> [https://perma.cc/B27Z-KY9R] ("Thirty-two percent of U.S. adults say they personally own a gun, while a larger percentage, 44%, report living in a gun household.").

9. Elizabeth MacBride, *America's Gun Business Is \$28B. The Gun Violence Business Is Bigger*, FORBES (Nov. 25, 2018, 5:00 AM), <https://www.forbes.com/sites/elizabethmacbride/2018/11/25/americas-gun-business-is-28b-the-gun-violence-business-is-bigger> [https://perma.cc/B2L2-UWUS].

10. Firearms Control Act 60 of 2000 JSRSA (S. Afr.) (updated through 2014).

11. This Note proposes a model act for the states to adopt—rather than a proposed federal statute—because the amount of state and local law enforcement cooperation that would have to be demanded would be at risk of violating the anti-commandeering doctrine. See *Printz v. United States*, 521 U.S. 898, 929 (1997).

12. See *Victims of Intentional Homicide*, U.N. OFFICE ON DRUGS AND CRIME <https://dataunodc.un.org/dp-intentional-homicide-victims> [https://perma.cc/2T6S-7XJQ].

13. R. Matzopoulos, P. Groenewald, N. Abrahams & D. Bradshaw, *Where Have All the Gun Deaths Gone?*, 106 S. AFR. MED. J. 589, 590 (2016).

firearms for self-defense, which the U.S. Supreme Court has said is the core right of the Second Amendment.<sup>14</sup> The Firearms Control Act of 2000 also does not completely prohibit ownership of AR-15's and other similar firearms. This is important because a law completely banning AR-15's and similar rifles could be in danger of being declared unconstitutional and setting an even more cumbersome precedent.<sup>15</sup> Additionally, other potential solutions devised to completely side-step the Supreme Court's latest precedents are not only unlikely to succeed beyond perhaps the short term, but, if successful, could also create a worrying trend whereby state governments could close off its courts to citizens seeking to vindicate their constitutional rights. California, for instance, has created a one-way fee-shifting penalty that allows government defendants to recover costs from a plaintiff who loses on *any* claim in a case challenging a state or local firearm regulation, but never allows a plaintiff to recover attorneys' fees from the government, even if the plaintiff wins on *every* claim.<sup>16</sup> If held constitutional,<sup>17</sup> this fee-shifting statute would chill future lawsuits by citizens seeking enforcement of their right to bear arms and would, at the very least, force them into a federal forum, unduly burdening the district courts.<sup>18</sup> This has implications far beyond the gun control debate and could threaten other enumerated constitutional rights.<sup>19</sup> Such jerry-rigging of procedural laws bearing on a constitutional right is bad policy that could encourage other states to similarly attempt to sabotage any constitutional right it wishes to infringe.<sup>20</sup> Rather than venturing down this destructive path, it is more effective to work within governing caselaw to achieve legitimate policy goals like gun safety and gun violence prevention.<sup>21</sup> Even if many or

14. See *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

15. See *Miller v. Bonta*, No. 19-cv-01537, 2023 U.S. Dist. LEXIS 188421, at \*97 (S.D. Cal. Oct. 19, 2023) (declaring California's assault weapons ban unconstitutional).

16. Act of July 22, 2022, ch. 146, 2022 Cal. Stat. 15 (codified at CAL. CIV. PROC. CODE § 1021.11(a) (West 2022)); see also Complaint for Declaratory, Injunctive, or Other Relief at 1, *Miller v. Bonta*, 646 F. Supp. 3d 1218 (S.D. Cal. 2022).

17. At present, a federal district court has enjoined enforcement of this fee-shifting statute. *Miller v. Bonta*, 646 F. Supp. 3d 1218, 1227 (S.D. Cal. 2022); *S. Bay Rod & Gun Club, Inc. v. Bonta*, 646 F. Supp. 3d 1232, 1235 (S.D. Cal. 2022).

18. If this practice of closing off state courts to claims the legislature does not want them to hear becomes widespread, federal courts would be unduly burdened with 42 U.S.C. § 1983 claims for rights the states do not want to respect.

19. See *Miller v. Bonta*, 646 F. Supp. 3d 1218, 1224 (S.D. Cal. 2022) ("The principal defect of § 1021.11 is that it threatens to financially punish plaintiffs and their attorneys who seek judicial review of laws impinging on federal constitutional rights. Today, it applies to Second Amendment rights. Tomorrow, with a slight amendment, it could be any other constitutional right . . .") (footnotes omitted).

20. See *Whole Woman's Health v. Jackson*, 595 U.S. 30, 65 (2021) (Sotomayor, J., concurring in part) ("[S]tate courts cannot restrict constitutional rights or defenses that our precedents recognize . . . Such actions would violate a state officer's oath to the Constitution.").

21. A more dangerous exercise in legislative draftsmanship is to enact new statutes that criminalize ownership of commonly owned weapons like the AR-15. See, e.g., 720 ILL. COMP. STAT. 5/24-1.9(b)

all of the Supreme Court's recent Second Amendment cases were incorrectly decided, they remain binding precedent.<sup>22</sup> Thus, a detailed look at the Court's recent Second Amendment precedents is necessary to develop a statutory scheme that will survive judicial review.

Part I begins with a breakdown of the Supreme Court's recent Second Amendment jurisprudence from *Heller* through *Bruen*, analyzing the various doctrines articulated in these cases. Part I ends with a summary of the constitutional limitations that the model gun control statute must satisfy. Part II summarizes the salient points of South Africa's Firearms Control Act of 2000. Part III provides the full text of the Model Firearms Control Act. Part IV argues that this Model Act is likely to be upheld by the Court.

## I. CONSTITUTIONAL LIMITATIONS OF GUN CONTROL

Second Amendment jurisprudence has been rather scant from its ratification in 1791 until the *Heller* decision in 2008, when the Amendment took on its modern meaning.<sup>23</sup> Before the swell in revisionist legal scholarship that began in the 1960s, "[t]here was no more settled view in constitutional law than that the Second Amendment did not protect an individual right to own a gun."<sup>24</sup> Yet, the Second Amendment is now interpreted to protect a broad, individual right to own a firearm for self-defense.<sup>25</sup> Because of this recent, dramatic shift in case law, an investigation into the Court's modern Second Amendment jurisprudence is required to create a model gun control act that is likely to survive judicial review.

### A. THE TRILOGY OF MODERN SECOND AMENDMENT JURISPRUDENCE

In a trilogy of cases—*District of Columbia v. Heller*,<sup>26</sup> *McDonald v. City of Chicago*,<sup>27</sup> and *New York State Rifle & Pistol Association v.*

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(2023). Acts such as these are not only unlikely to survive judicial review but could also create sweeping precedent severely limiting how a future Supreme Court might approach the Second Amendment question. In fact, within days, three lawsuits were filed in federal and state court, challenging the law as unconstitutional. See Mitch Smith, *Illinois Passed a Sweeping Ban on High-Powered Guns. Now Come the Lawsuits.*, N.Y. TIMES (Jan. 20, 2023), <https://www.nytimes.com/2023/01/20/us/illinois-gun-ban-second-amendment.html> [https://perma.cc/X7P7-4CKV].

22. As any realist would point out, we have no choice but to adhere to precedent in the Second Amendment context at least until the composition of the Supreme Court changes dramatically. At minimum, two of the six conservative Supreme Court Justices (Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett) would have to be replaced to provide a chance to overrule *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), or *N.Y. State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022).

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

24. WALDMAN, *supra* note 7, at 97.

25. See *Heller*, 554 U.S. 570; *McDonald*, 561 U.S. 742; *Bruen*, 142 S. Ct. 2111.

26. *Heller*, 554 U.S. at 570.

27. *McDonald*, 561 U.S. at 742.

*Bruen*<sup>28</sup>—the Supreme Court established a broad, individual right to keep and bear arms, irrespective of any militia service, effective against both the federal and state governments. This broad protection of firearm ownership is built on four main principles: (1) the individual right approach, (2) the pre-existing right doctrine, (3) the common use doctrine, and (4) incorporation. To shape a gun control scheme to fit within controlling Supreme Court precedent, these four doctrines flowing from this trilogy of cases must be mapped out and understood.

### 1. The Necessity of an Individual Right

Before the Court would have an opportunity to incorporate the Second Amendment to the states, it had to lay some precedential groundwork to convert the Second Amendment into a right that could be incorporated. To a large extent, finding an *individual* right to keep and bear arms for the purpose of self-defense without any militia service requirement was a prerequisite to incorporating the right. Prior to *Heller*, scholars and jurists had proposed three main approaches to interpreting the Second Amendment.<sup>29</sup> First, the “collective right” approach argued that the right to keep and bear arms protected the right of the states to arm and organize militias.<sup>30</sup> Second, the “limited individual right” or “sophisticated individual right” approach suggested that the right to keep and bear arms does protect an individual right, but only to the extent that individuals participate in a well-regulated militia.<sup>31</sup> Third, the unmodified “individual right” approach embraced the idea that the Second Amendment protects an individual’s right to keep and bear arms irrespective of any participation in a well-regulated militia, essentially reading the prefatory clause out of the amendment.<sup>32</sup>

Throughout pre-*Heller* Second Amendment case law and scholarship, the individual right approach was overwhelmingly disfavored.<sup>33</sup> From

28. *Bruen*, 142 S. Ct. at 2121.

29. See David A. Lieber, Comment, *The Cruikshank Redemption: The Enduring Rationale for Excluding the Second Amendment from the Court’s Modern Incorporation Doctrine*, 95 J. CRIM. L. & CRIMINOLOGY 1079, 1080–81 (2005).

30. *Id.* at 1080.

31. *Id.* at 1080–81.

32. *Id.* at 1081.

33. From 1888, when law review articles began to be indexed, to 1960, no law review articles concluded that the Second Amendment guaranteed an individual right. WALDMAN, *supra* note 7, at 97. The first law review article to argue otherwise, published in 1960, was a student-written note which concluded that the Second Amendment provided a “right of revolution” that the Southern States availed themselves of during the Civil War. Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 387–88 (1960). Between 1970 and 1989, however, twenty-five articles endorsing the individual right were written, at least sixteen of which were written by lawyers who had represented or been employed by the National Rifle Association (“NRA”) or other gun rights organizations. Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A*

ratification until 2001, no federal appellate court had ever endorsed the individual right approach to the Second Amendment,<sup>34</sup> and the first case to adopt this approach, *United States v. Emerson*,<sup>35</sup> did so only in dictum.<sup>36</sup> Shortly following *Emerson*, then Attorney General John Ashcroft issued a memorandum to all United States Attorneys stating that the individual right approach reflects the correct understanding of the Second Amendment, reversing the Department of Justice's longstanding policy regarding Second Amendment interpretation.<sup>37</sup> Had the Court endorsed the collective right approach in *Heller*, as it had 132 years earlier,<sup>38</sup> the right to bear arms would essentially be a right *belonging* to the states, making incorporation nonsensical as a state could not meaningfully infringe its own right.<sup>39</sup> Alternatively, had the Court endorsed the limited individual right in *Heller*, a subsequent decision incorporating that right would only prevent states from disarming individuals serving in its own militias, which would provide no protection to anyone outside the National Guard.<sup>40</sup> Thus, it was necessary for the Court to find an individual right to keep and bear arms in the Second Amendment, independent of any militia service, to meaningfully incorporate that amendment against the states.

## 2. The Pre-Existence Doctrine: Finding the Individual Right in Text and History

In finding a free-standing, individual right to bear arms in the Second Amendment, the Court relied on the notion of some constitutional rights having pre-existed the ratification of the clauses protecting them.<sup>41</sup>

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*Primer*, 76 CHI.-KENT L. REV. 3, 8 (2000).

34. See Lieber, *supra* note 29, at 1097–98.

35. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *abrogated by* *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023).

36. *Id.* at 260; Lieber, *supra* note 29, at 1081.

37. Memorandum from Attorney General John Ashcroft to All United States' Attorneys (Nov. 9, 2001), <https://www.justice.gov/archives/ag/attorney-general-memorandum-regarding-5th-circuit-united-states-court-appeals-decision-united> [<https://perma.cc/T6NT-XKH5>]; Lieber, *supra* note 29, at 1081.

38. *United States v. Cruikshank*, 92 U.S. 542, 549 (1875), *overruled in part by* *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

39. Possession of a right implies the possession of an option. See *Right*, BLACK'S LAW DICTIONARY (11th ed. 2019). It therefore follows that a decision to not exercise a right is unassailable. Thus, incorporating the "collective right" of a state to arm its own militias would be nonsensical, since it would have a concomitant right to *not* arm its militias.

40. See Lieber, *supra* note 29, at 1080–81, 1120.

41. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) ("[T]he Second Amendment, like the First and Fourth Amendments, codified a pre-existing right."). Although the Court did not cite any authority for this proposition, this quote from *Heller* has been parroted by numerous cases and law review articles, but there is a paucity of literature or case law substantively discussing the idea that the First and Fourth Amendments codified a pre-existing right. The discussion of the pre-existence and codification of the rights enshrined in the First and Fourth Amendments scarcely goes deeper than to quote *Heller*, and possibly to analogize the First Amendment to the Second. See, e.g., David B. Kopel, *The First Amendment*



According to the Court, the Second Amendment did not create a new right but constitutionalized a pre-existing right.<sup>42</sup> This pre-existence argument relies on the proposition that the framers of the Second Amendment intended to codify a right to bear arms that already existed in English law<sup>43</sup> and simply wished to create a stronger protection for it. The Court purported to find a textual basis for this conclusion, stating that “[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’”<sup>44</sup>

The *Heller* Court began its historical analysis by stating that “[t]he Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause.”<sup>45</sup> The prefatory clause states “[a] well regulated Militia, being necessary to the security of a free State . . . .” The operative clause states that “the right of the people to keep and bear arms shall not be infringed.”<sup>46</sup> The Court asserted that the prefatory clause announces only the amendment’s justification, and does not limit the scope of the operative clause.<sup>47</sup> After its explication, the Court concluded that the prefatory clause “fits perfectly” with an operative clause understood to grant an individual right to keep and bear arms because the pre-constitutional history showed that tyrants had eliminated militias not by banning them but by disarming them.<sup>48</sup>

The Court supported its individual right approach through a sort of reverse incorporation argument limited to “analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment.”<sup>49</sup> Although many of the state constitutions had more

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*Guide to the Second Amendment*, 81 TENN. L. REV. 417, 419 (2014) (“[T]he Supreme Court has strongly indicated that First Amendment tools should be employed to help resolve Second Amendment issues.”); *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 837 F.3d 678, 711 (6th Cir. 2016) (Sutton, J., concurring in part) (“The First Amendment offers a useful analogy [to the Second Amendment].”); *United States v. Marzzarella*, 614 F.3d 85, 96–97 (3d Cir. 2010) (applying a sliding scale test to the Second Amendment whereby the stringency of the standard varies according to the degree to which the statute burdens the right), *abrogated by* *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

42. *Heller*, 554 U.S. at 592 (“[T]his is not a right granted by the Constitution. Neither is it in any manner dependent on that instrument for its existence. The second amendment declares that it shall not be infringed . . . .”) (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)).

43. *See id.* at 593–94.

44. *Id.* at 592. Even if it is assumed that the text of the amendment implies a pre-existing right, it is not clear that this right comes from old English and Colonial law. An at least equally plausible explanation is that the Second Amendment confirms that the federal government does not have the power to disarm state militias. *See* THE FEDERALIST NO. 46 (James Madison).

45. *Heller*, 554 U.S. at 577.

46. *Id.* at 579–98; U.S. CONST. amend. II.

47. *Heller*, 554 U.S. at 577–78.

48. *Id.* at 598.

49. *Id.* at 600–01; *see* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 381 (2011).

individualistic wording,<sup>50</sup> the Court did not take this to conclude that the Second Amendment was materially different from its state analogues. To the contrary, the Court used the more individual rights-focused arms-bearing provisions of state constitutions—and state supreme court decisions interpreting those provisions—to read the Second Amendment as conferring a broad individual right.<sup>51</sup> Pennsylvania’s Declaration of Rights of 1776 read “the people have a right to bear arms *for the defence of themselves* and the state . . . .”<sup>52</sup> and Vermont’s 1777 Declaration of Rights contained a nearly identical provision.<sup>53</sup> The Court further supported its argument by describing roughly contemporaneous state analogues.

Between 1789 and 1820, nine States adopted Second Amendment analogues. Four of them—Kentucky, Ohio, Indiana, and Missouri—referred to the right of the people to “bear arms in defence of themselves and the State.” Another three States—Mississippi, Connecticut, and Alabama—used the even more individualistic phrasing that each citizen has the “right to bear arms in defence of himself and the State.” Finally, two States—Tennessee and Maine—used the “common defence” language of Massachusetts.<sup>54</sup>

The Court noted that the decision of at least seven of these nine states to unequivocally protect an individual right to bear arms is strong evidence that the framers of the Second Amendment conceived of the right to bear arms as an individual right.<sup>55</sup>

The Court next sought precedential support for its individual right interpretation.<sup>56</sup> The Court first cited *Nunn v. State*, an 1846 case in which the Georgia Supreme Court struck down a ban on carrying pistols openly, stating that the Second Amendment protects “the natural right of self-

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50. *Heller*, 554 U.S. at 600–03. Even at the time *Heller* was being decided, the vast majority of states recognized an individual right to keep and bear arms. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 192 (2006) (concluding forty-four states recognize an individual right to bear arms); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686, 711 (2007) (concluding that forty-two states protect an individual right to bear arms).

51. *Heller*, 554 U.S. at 600–03.

52. *Id.* at 601; PA. CONST. of 1776, art. I, cl. 13, *amended by* PA. CONST. art. I, § 21 (emphasis added).

53. *Heller*, 554 U.S. at 601; VT. CONST. of 1777, ch. I, cl. XV, *amended by* VT. CONST. ch I, art. XVI.

54. *Heller*, 554 U.S. at 602–03 (citations omitted).

55. *Id.* at 603. Contrary to the Court’s conclusion, however, the inclusion of language clearly protecting an individual right to bear arms in state constitutional analogues to the Second Amendment might be indicative of a structural difference between state and federal governments. The federal right to bear arms could simply prevent the federal government from disarming state militias while states might be best understood to have the right to arm and disarm their own militias and citizens as they see fit. For further discussion on the incorporation issue, which is by its very nature intertwined with the individual right issue, see *infra* Section I.A.4.

56. *Id.* at 600–01.

defense.”<sup>57</sup> The *Heller* Court noted that the Georgia Supreme Court “perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right.”<sup>58</sup> In further support of its position, the Court cited *State v. Chandler*, an 1850 case in which the Louisiana Supreme Court held that United States constitution guaranteed citizens the right to carry arms openly.<sup>59</sup> In response to the dissent’s reliance on *Aymette v. State*, an 1840 decision in which the Tennessee Supreme Court adopted a limited individual right approach for its own state constitutional right to bear arms,<sup>60</sup> the Court reasoned that more important than this decision was the Tennessee Supreme Court’s later decision in *Andrews v. State*.<sup>61</sup> In *Andrews*, the Tennessee Supreme Court concluded that its state constitutional right to bear arms protected the right to bear arms for personal self-defense, overruling *Aymette*.<sup>62</sup>

Turning to its own precedents, the Court asked whether any of its prior decisions foreclosed its ultimate conclusion in *Heller*. The Court began with its decision in *United States v. Cruikshank*,<sup>63</sup> in which the Court vacated a white mob’s convictions for depriving black militia men of their right to bear arms, holding that the Second Amendment “means no more than that it shall not be infringed by Congress.”<sup>64</sup> The *Heller* Court reasoned that there was

57. *Nunn v. State*, 1 Ga. 243, 251 (1846).

58. *Heller*, 554 U.S. at 612. Despite what the *Heller* Court and Tennessee Supreme Court’s wording might suggest, it is important to note that the “English right” in question is not easily analogized to the Second Amendment. Importantly, the right to bear arms for self-defense in the pre-constitutional English right contains clearer limiting language and was a concession by the English Crown and subject to the will of parliament. See Bill of Rights 1689 1 W. & M., 2d sess. c. 2, § 7; see also 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*130 (William Carey Jones ed., Claitor’s Publ’g Div. 1976) (1765).

59. *State v. Chandler*, 5 La. Ann. 489, 490 (1850).

60. *Aymette v. State*, 21 Tenn. 154, 161 (1840) (“[W]e must understand the expressions as . . . relating to public, and not private, to the common, and not the individual, defence.”).

61. *Andrews v. State*, 50 Tenn. 165 (1871).

62. *Id.* at 178–79. However, the relevant state constitutional provision reads: “[T]he citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.” TENN. CONST. art. I, § 26. This is notable because the text of the Tennessee Constitution’s arms-bearing provision is manifestly different from the text of the Second Amendment. The *Andrews* court itself held—on anti-incorporation grounds—that the Second Amendment does not protect a right to bear arms for self-defense against state infringement. *Andrews*, 50 Tenn. at 175, 178–79. In other words, Tennessee’s counterpart to the Second Amendment protected an individual right where the Second Amendment did not. This indicates that the *Andrews* court considered the Second Amendment to be not only meaningfully different from, but also narrower than, its state counterpart. *Id.*; see also *Simpson v. State*, 13 Tenn. 356, 360 (1833) (construing the state constitution to protect an individual right to bear arms); cf. *State v. Reid*, 1 Ala. 612, 616 (“[T]he act, ‘To suppress the evil practice of carrying weapons secretly,’ [does not] trench upon the [Alabama] constitutional rights of the citizen.”).

63. *United States v. Cruikshank*, 92 U.S. 542 (1875), *overruled in part by* *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

64. *Id.* at 553.

no claim in *Cruikshank* that the defendants had violated the victims' right to carry arms in a militia, and that the *Cruikshank* Court's discussion made little sense if it was speaking of a collective rather than an individual right.<sup>65</sup> The Court rests this argument on the *Cruikshank* Court's conclusion that " 'the people [must] look for their protection against any violation by their fellow-citizens of the rights it recognizes' to the States' police power."<sup>66</sup>

The *Heller* Court next turned to *United States v. Miller*,<sup>67</sup> reasoning that it not only failed to foreclose the possibility of an individual right, but also "positively suggests" it.<sup>68</sup> *Miller* considered whether a law prohibiting the unregistered possession of a short-barreled shotgun ran afoul of the Second Amendment.<sup>69</sup> In concluding that it did not, the *Miller* Court announced its interpretation of the Second Amendment's purpose.

In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.<sup>70</sup>

The Court reasoned that the *Miller* Court's basis for concluding that the Second Amendment did not apply was not that the Second Amendment failed to protect non-military use, but that it did not protect the type of firearm at issue.<sup>71</sup> Before announcing its "common use" doctrine, however, the Court acknowledged some limitations on the individual right to bear arms, such as the historical precedence for prohibiting the public carry of "dangerous and unusual weapons."<sup>72</sup>

### 3. Market Share as Constitutionality: The Common Use Doctrine

With the individual right in hand, the *Heller* Court turned to the law at issue, which totally banned handgun possession in the home and required any lawfully owned firearm to be disassembled and bound by a trigger lock.<sup>73</sup> In determining that the law was unconstitutional, the Court began by concluding that "the inherent right to self-defense has been central to the

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65. *District of Columbia v. Heller*, 554 U.S. 570, 620 (2008).

66. *Id.* (quoting *Cruikshank*, 92 U.S. at 553) (alteration in original).

67. *United States v. Miller*, 307 U.S. 174 (1939), *abrogated by* *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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

69. *Miller*, 307 U.S. at 175–76.

70. *Id.* at 178.

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

72. *Id.* at 627 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*149 (William Carey Jones ed., Claitor's Publ'g Div. 1976) (1765) ("The offense of *riding* or *going armed* with dangerous or unusual weapons is a crime against the public peace . . .")).

73. *Id.* at 628.

Second Amendment right.”<sup>74</sup> True enough, there is no serious doubt that the right to self-defense predates the constitution as part of the common law<sup>75</sup> and continues to exist in the United States today.<sup>76</sup> The right to bear arms to effectuate this defense of life and limb also existed in England prior to the ratification of the U.S. Constitution, at least by statute, as a “public allowance, under due restrictions, of the natural right of resistance and self-preservation . . . .”<sup>77</sup> Although the statutory right to bear arms for self-defense in England was considered less fundamental than the right to self-defense in general,<sup>78</sup> and was a concession by the Crown that presupposed an omnipotent legislature—a feature clearly absent from our constitutional scheme—the Court has insisted on the centrality of individual self-defense to the right to bear arms.<sup>79</sup>

The purported centrality of self-defense to the Second Amendment, combined with the individual right approach, allowed the Court to announce a new, sweeping doctrine in *Heller*. The Court reasoned that “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to “keep” and use for protection of one’s home and family,’ would fail constitutional muster.”<sup>80</sup> It noted that few laws in our nation’s history have come close to the restriction the District of Columbia has imposed and several of those laws have been struck down.<sup>81</sup> Because handguns have been overwhelmingly chosen by the American people as their preferred arm for

74. *Id.*

75. *See, e.g.,* BLACKSTONE, *supra* note 58.

76. *See* RESTATEMENT (SECOND) OF TORTS §§ 63–68 (AM. L. INST. 1965). It would be a novel legal principle indeed to compel citizens to allow themselves to be victimized by an aggressor.

77. BLACKSTONE, *supra* note 58, at \*144; *see* Bill of Rights 1689 1 W. & M., 2d sess. c. 2, § 7.

78. *Compare* BLACKSTONE, *supra* note 58 (“Both the life and limbs of a man are of such high value, in the estimation of law of England, that it pardons even homicide if committed *se defendendo* (in self-defense), or in order to preserve them.”), *with* BLACKSTONE, *supra* note 58, at \*144 (“The . . . last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law.”) (emphasis added).

79. *See* District of Columbia v. Heller, 554 U.S. 570, 628 (2008); N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2125 (2022). There is, however, significant historical evidence to the contrary. *See* William Carey Jones, Annotation, BLACKSTONE, *supra* note 58, at \*144 n.20 (“The constitutional right to bear arms in this country does not mean the right to bear them for individual defense . . . .”); Andrews v. State, 50 Tenn. 165, 197 (1871); United States v. Cruikshank, 92 U.S. 542, 591–92 (1875), *overruled in part by* McDonald v. City of Chicago, 561 U.S. 742 (2010); THE FEDERALIST No. 46 (James Madison) (describing the rationale for the Second Amendment in terms of militia service); *see also* WALDMAN, *supra* note 7, at 6 (explaining that keeping arms for English militia service was not an individual right but a duty); *see generally* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487 (2004).

80. *Heller*, 554 U.S. at 628–29 (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (2007)); *see also* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 182–83 (1995).

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

self-defense, a complete prohibition of its use runs afoul of the individual right to bear arms for the very purpose of self-defense.<sup>82</sup> This common use doctrine begs the question: If it is unconstitutional to outright ban firearms in common use for self-defense, how would the Court approach bans on classes of arms which are not in common use because they were banned before they could get into common use?<sup>83</sup> The Court did not address this question,<sup>84</sup> noting that it did not undertake an analysis of the full scope of the Second Amendment.<sup>85</sup> However, the Court stated that nothing in its opinion “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>86</sup> In fact, the Court noted that the measures it listed are presumptively lawful and that its list was inexhaustive.<sup>87</sup> This is an important concession by the Court because by noting that its list of presumptively lawful measures was inexhaustive, the Court indicated that it might be open to other presumptively lawful restrictions to the right to bear arms, so long as there is a historical precedent that is satisfactory in the Court’s view.

#### 4. Incorporation

The Supreme Court would of course go on to conclude in *McDonald v. City of Chicago* that the right to bear arms is “deeply rooted in this Nation’s history and tradition”<sup>88</sup> and incorporate the Second Amendment in full.<sup>89</sup> In so doing, it relied heavily on *Heller*’s individual right approach and common use doctrine, arguing that history and precedent pointed “unmistakably” to the conclusion that the Second Amendment is “deeply rooted” in our “history and tradition.”<sup>90</sup> Just as in *Heller*, the Court argued that the right to bear arms

82. *Id.*

83. For instance, the National Firearms Act has capped the market of machine guns by only allowing the lawful possession and transfer of machine guns lawfully owned prior to May 19, 1986. 27 C.F.R. § 479.105(b) (2023). This imposed market cap means that machine guns no longer have the chance to get into common use. It is not clear whether the *Heller* decision means that such a law is unconstitutional.

84. It is true, however, that if the Second Amendment was intended to protect an individual right to bear arms for the purpose of self-defense—as indeed the Court has held—there must be some allowance made for citizens to keep and bear modern weapons. If citizens could only keep and bear arms in use at the time the Amendment was ratified, the right would be meaningless today.

85. *Heller*, 554 U.S. at 626–27.

86. *Id.*

87. *Id.* at 627 n.26.

88. *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

89. *Id.* at 791.

90. *Id.* at 767–70.

for self-defense was as fundamental as the broader right self-defense.<sup>91</sup> In incorporating the individual right to the states, the Court had another perfect occasion to utilize the doctrine of reverse incorporation<sup>92</sup> to adopt a standard of review based on how state supreme courts have analyzed their own constitutions' arms-bearing provisions that the Court saw as analogous to the Second Amendment. Most states recognize an individual right to keep and bear arms but allow "reasonable regulations" restricting that right.<sup>93</sup> Despite the states' far greater experience in drafting and reviewing gun laws, the Supreme Court left the decision over what standard applied to Second Amendment cases to another day, eventually settling on *Bruen*'s historical test.<sup>94</sup>

The confluence of the individual right approach, the common use doctrine, and incorporation has opened many long-standing state firearms laws to constitutional scrutiny, even before *Bruen* was decided. California, for instance, has prohibited the purchase, sale, and manufacture of high-capacity magazines<sup>95</sup> since 2000,<sup>96</sup> and by popular initiative in 2016 expanded the prohibition to make possession of high-capacity magazines a felony offense, regardless of the date the magazine was acquired.<sup>97</sup> This new law gave rise to protracted but groundbreaking litigation. In *Duncan v. Becerra*,<sup>98</sup> the outright ban on possession of high-capacity magazines was ruled unconstitutional as a Fifth Amendment taking without just compensation and as violative of the Second Amendment because it imposed a substantial burden on the right to self-defense and the right to keep and bear arms.<sup>99</sup> The district court enjoined the statute, and its decision was affirmed on appeal by the Ninth Circuit,<sup>100</sup> but was later reversed on

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91. *Id.* at 768. Confusingly, the Court stated that "by 1765, Blackstone was able to assert that the right to keep and bear arms was 'one of the fundamental rights of Englishmen.'" *Id.* (quoting *Heller*, 554 U.S. at 594). This is a quote from *Heller*, but not from Blackstone, who in fact listed the right to bear arms as an auxiliary right, not a fundamental one. See BLACKSTONE, *supra* note 58, at \*144 ("The . . . last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defense . . .") (emphasis added).

92. See Blocher, *supra* note 49.

93. *Id.* at 383; Winkler, *supra* note 50, at 686–87.

94. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129–30 (2022).

95. California defines high-capacity or "large capacity magazines" as "any ammunition feeding device with the capacity to accept more than 10 rounds . . ." CAL. PENAL CODE § 16740 (West 2012). The terms "high-capacity magazine" and "large-capacity magazine" are used interchangeably in this Note.

96. See CAL. PENAL CODE § 32310 (West 2012 & Supp. 2020).

97. *Id.*; Safety for All Act, 2016 Cal. Legis. Serv. Prop. 63, § 6.1 (West), adding CAL. PENAL CODE § 32310(c)–(d) (Supp. 2020).

98. *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019), *rev'd sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *vacated*, 142 S. Ct. 2895 (2022) (mem.).

99. *Id.* at 1185–86.

100. *Duncan v. Becerra*, 970 F.3d 1133, 1141 (9th Cir. 2020), *vacated sub nom. Duncan v. Bonta*, 142 S. Ct. 2895 (2022).

rehearing en banc.<sup>101</sup> The Supreme Court then vacated the judgement and remanded the case to the Ninth Circuit for further consideration in light of its decision in *Bruen*.<sup>102</sup> On remand from the Ninth Circuit, the District Court once again held California's high-capacity magazine ban unconstitutional, but stayed its order enjoining enforcement while the California Attorney General appealed the decision.<sup>103</sup> It therefore remains to be seen how the latest Supreme Court precedent will affect this high-capacity magazine ban, but it suffices to say that the law in this area remains very much in flux.

### 5. The Third Act: Applying *Heller* to Public Carry Licensing

Building on the bedrock of the individual right principle, the common use doctrine, and the Second Amendment's incorporation, the Court recently expanded the Amendment's protections with its historical precedence doctrine. At issue in *Bruen* was a New York law that made it a crime to possess a firearm without a license.<sup>104</sup> New York's provision for licenses to carry firearms outside the home for self-defense was particularly stringent. An applicant could not obtain that license without a showing of "proper cause."<sup>105</sup> New York courts have defined "proper cause" as requiring an applicant to "demonstrate a special need for self-protection distinguishable from that of the general community"<sup>106</sup> such as evidence "of particular threats, attacks or other extraordinary danger to personal safety." Living or working in a high-crime area was considered insufficient to demonstrate proper cause.<sup>107</sup>

To evaluate the constitutionality of the New York law, the *Bruen* Court began by clarifying the test for Second Amendment challenges. The Court noted that the circuit courts had coalesced around a two-part test that combined a historical inquiry with means-end scrutiny, but it rejected this approach.<sup>108</sup> The Court instead leaned on its historical approach from *Heller* and specifically rejected any interest balancing test,<sup>109</sup> settling on the

101. *Duncan v. Bonta*, 19 F.4th 1087, 1096 (9th Cir. 2021) (en banc), *vacated*, 142 S. Ct. 2895 (2022).

102. *Duncan v. Bonta*, 142 S. Ct. 2895, 2895 (2022).

103. *Duncan v. Bonta*, No. 17-cv-1017, 2023 U.S. Dist. LEXIS 169577 (S.D. Cal. Sept. 22, 2023), *appeal docketed*, No. 23-55805, 2023 U.S. App. LEXIS 25723 (9th Cir. Sept. 28, 2023).

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

105. *Id.* at 2123 (citing N.Y. PENAL LAW. § 400.00(2)(f) (McKinney 2022)). Without this showing of "proper cause," an applicant may only obtain a "restricted" license to carry a firearm for such purposes as "hunting, target shooting, or employment." *Id.*

106. *Klenosky v. N.Y.C. Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980), *abrogated by* *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

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

108. *Bruen*, 142 S. Ct. at 2125–26.

109. *Id.* at 2127 ("Heller and McDonald do not support applying means-end scrutiny in the Second



following standard:

When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."<sup>110</sup>

In applying this test, the Court stated that it would consider whether historical precedent from before, during, and relatively shortly after the founding demonstrates a "comparable tradition of regulation."<sup>111</sup> When comparing modern firearm laws and regulations to historical precedents, it is of course necessary to reason by analogy to determine whether the two are relatively similar.<sup>112</sup> Although the *Bruen* Court did not provide an exhaustive list of features that would render historical precedents relatively similar to modern laws, it provided two metrics: "how and why the regulations burden a law-abiding citizen's right to armed self-defense."<sup>113</sup> Thus, for a historical precedent to support the constitutionality of a modern regulation, there must be (1) a comparable burden and (2) that burden must be comparably justified.<sup>114</sup> For instance, there have long been prohibitions on carrying arms in sensitive places such as legislative assemblies, schools, and courthouses, so laws prohibiting carrying arms in such places, or even in newly defined sensitive places, are presumptively constitutional, so long as the sensitive place is analogous to those historically designated as such.<sup>115</sup> New York's

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Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."); *id.* at 2131 ("The Second Amendment 'is the very *product* of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense.") (emphasis in original) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

110. *Id.* at 2129–30 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10 (1961)). The Court's quotation of *Konigsberg* here is misleading. The Court in *Konigsberg* compared the Second Amendment's "unqualified command" with the restrictive reading of the right to bear arms in *United States v. Miller*, 307 U.S. 174 (1938) as an analogy for how the right to free speech is similarly not absolute, despite the First Amendment's "unqualified terms." *Konigsberg*, 366 U.S. at 49 n.10 (1961). The Court in *Bruen*, however, uses this quote as a semantic justification for a more expansive reading. This test dashed hopes that the Court would adopt a reasonableness standard that states have largely applied to their own Second Amendment analogues. See Blocher, *supra* note 49, at 381–83; see also Winkler, *supra* note 50, at 687.

111. *Bruen*, 142 S. Ct. at 2131–32 (citing *Heller*, 554 U.S. at 631).

112. *Id.* at 2132.

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

114. Importantly, the Court noted that, to successfully defend a regulation, the government must only find a proper "historical *analogue*, not a historical *twin*." *Id.* at 2133 (emphasis in original); cf. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993) ("Everything is similar in infinite ways to everything else . . . . At the very least one needs a set of criteria to engage in analogical reasoning. Otherwise one has no idea what is analogous to what.").

115. See *id.*; David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational*

licensing scheme, by contrast, could not be justified as analogous to these historical “sensitive places” laws because it generally banned citizens from carrying arms in any place “where people typically congregate,”<sup>116</sup> meaning that entire cities would essentially be exempted from Second Amendment protection.<sup>117</sup>

Turning to New York’s proper-cause requirement, the Court stated that the plain text of the amendment protects ordinary citizens’ general right to carry handguns publicly for self-defense, emphasizing that confining the right to bear arms to the home would nullify half of the Second Amendment’s explicit protections—to not only “keep” but also “bear” arms.<sup>118</sup> The central right of the Second Amendment has been held to be the right to bear arms for self-defense in case of confrontation, which often will take place outside the home.<sup>119</sup> In assessing New York’s requirement that applicants for a license to carry a firearm in public show “proper cause”—as defined by the New York courts—the Court assessed a variety of sources that the respondents appealed to, dating from the 1200s to the early 1900s.<sup>120</sup> The Court explained that, “when it comes to interpreting the Constitution, not all history is created equal.”<sup>121</sup> Therefore, even in light of the pre-existing right doctrine, historical evidence long-predating the enactment of the Second and Fourteenth Amendments will carry less weight than historical precedents closer in time to these enactments if legal conventions have changed in the intervening years.<sup>122</sup> Thus, English practices traceable from the Middle Ages to the ratification of the Constitution will carry more weight than ancient practices that became obsolete before ratification.<sup>123</sup> Likewise, post-enactment history can be elucidating when “a regular course of practice” can settle the meaning of disputed terms and phrases.<sup>124</sup> However,

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*Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 203, 227–36, 242–45 (2018); see also *Heller*, 554 U.S. at 626.

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

117. *Id.* at 2133–34. The Court also refused to allow the Second Amendment to be construed to apply only in the home. *Id.* at 2134 (“[T]he Second Amendment guarantees an ‘individual right to possess and carry weapons in case of confrontation,’ and confrontation can surely take place outside the home.”) (quoting *Heller*, 554 U.S. at 592).

118. *Id.* at 2134.

119. *Id.* at 2134–35; *Heller*, 554 U.S. at 592, 599.

120. *Bruen*, 142 S. Ct. at 2135–36.

121. *Id.* at 2136.

122. *Id.*

123. *Id.* (citing *Dimick v. Schiedt*, 293 U.S. 474, 477 (1935)).

124. *Id.* (quoting *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020)); see also *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring) (“[W]here a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.”); *THE FEDERALIST* NO. 37, at 179 (James Madison) (Buccaneer Books 1992) (“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,

when post-enactment precedents take effect long after ratification, they will be accorded less weight.<sup>125</sup> With the parameters of its historical inquiry set, the Court proceeded to determine that the historical record the respondents compiled failed to demonstrate a historical analogue for New York's firearm licensing scheme.<sup>126</sup> That is, there was no historical tradition of limiting the public carry of firearms to citizens who could demonstrate a special need for self-defense, nor was there a historical tradition of broadly prohibiting the carry of commonly used firearms for self-defense.<sup>127</sup>

A few key takeaways from the Court's evaluation of this compendium of historical precedents will inform how a model gun control statute can be structured. First, the *manner* of public carry was historically subject to reasonable regulation—individuals could be restricted from carrying deadly weapons in a way that would be likely to terrorize others.<sup>128</sup> Second, states with surety laws<sup>129</sup> provided financial incentives for responsible arms carrying, rather than directly restricting public carry.<sup>130</sup> Third, states have historically been able to restrict or eliminate one kind of public carry—usually concealed carry—so long as they allowed the other type of carry—usually open carry.<sup>131</sup> Fourth, the more widely enacted a type of statute is, the more likely the court is to uphold it. Thus, the relatively few historical examples prohibiting the carry of pistols—and in some cases all firearms—in towns, cities, and villages could not “overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry.”<sup>132</sup> Finally, as Kavanaugh's concurrence underscores, the Court's

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until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”).

125. *Bruen*, 142 S. Ct. at 2137; *cf.* *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 312 (2008) (Roberts, C. J., dissenting) (“The belated innovations of the mid- to late-19th-century courts come too late to provide insight into the meaning of [the Constitution in 1787].”).

126. *Bruen*, 142 S. Ct. at 2138.

127. *Id.*

128. *Id.* at 2150.

129. Surety statutes generally required certain individuals to post bond before carrying weapons in public. These were not the general bans absent a specific showing of a particular need as the New York statute was. Rather, these statutes targeted those threatening to do harm. *Id.* at 2148; *see also* *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017) (“[S]urety laws did not deny a responsible person carrying rights unless he showed a special need for self-defense. They only burdened someone reasonably accused of posing a threat. And even he could go on carrying without criminal penalty. He simply had to post money that would be forfeited if he breached the peace or injured others—a requirement from which he was exempt if *he* needed self-defense.”).

130. *Bruen*, 142 S. Ct. at 2150.

131. *Id.*

132. *Id.* at 2154. Many of the statutes that prohibited or severely restricted the public carry of arms were enacted in the Western Territories prior to statehood. *Id.* The Court recognized two main defects in analogizing these statutes to modern legislation. First, the territorial populations that lived under these statutes was miniscule—less than one percent of the population at the time, showing that they were not widely adopted. *Id.* Second, the American territorial system was transitional and temporary, allowing for more improvisational territorial legislation that was short-lived and rarely subject to judicial scrutiny. *Id.*

opinion does not jeopardize the existing “shall-issue” licensing regimes employed in forty-three states, only the “may-issue” regimes employed by six states and the District of Columbia.<sup>133</sup> The difference between these two is that when an applicant meets the statutory criteria in a shall-issue regime, they must be issued a license. Under a “may-issue” regime, however, even if an applicant meets the statutory criteria, a licensing officer has the discretion to refuse to issue a license, based on the difficult to meet “special need” requirement.<sup>134</sup> Although the Court did not explicitly say that “shall-issue” regimes and “proper cause” requirements for licenses to carry firearms for self-defense are per se unconstitutional, it is difficult to see how either of these could be upheld.<sup>135</sup>

#### B. SUMMARY OF SECOND AMENDMENT PRECEDENT

Before moving on to the model statute, a brief summary of the major limitations imposed by the foregoing trilogy of modern Second Amendment jurisprudence will prove helpful. First, the core right protected by the Second Amendment is an individual right to keep and bear arms for self-defense. Second, this right is effective against both the state and federal governments. Third, if the Second Amendment’s plain text—as interpreted by the Supreme Court—covers an individual’s conduct, it is presumptively protected, and the government must demonstrate that the law in question is analogous—though not necessarily identical—to a historical practice of firearms regulation. Fourth, when seeking a historical analogue to justify a modern regulation, not all history is created equal. Examples of post-ratification regulation that settle disputed terms and are relatively close in time to the adoption of the Bill of Rights can be particularly informative, as can evidence of English and Colonial practices that stayed in effect at least until ratification. Fifth, the more widespread a particular firearm regulation is, the more likely it is constitutional. Sixth, a legislature might well be able to ban or severely restrict either concealed carry or open, so long as they allow one of the two methods to remain legal. Finally, some types of firearm regulations are presumptively lawful—prohibitions on possession by felons and the mentally ill, laws against brandishing a firearm—while some are presumptively unlawful—shall-issue regimes, proper cause requirements.

at 2155.

133. *Id.* at 2161 (Kavanaugh, J., concurring). The states with “shall-issue” regimes are New York, California, Hawaii, Maryland, Massachusetts, and New Jersey. *Id.* at 2124. *See also* Thomson Reuters, *50 State Statutory Surveys: Right to Carry a Concealed Weapon*, 0030 SURVEYS 32 (2022). The District of Columbia’s analogue to the “proper cause” standard at issue in *Bruen* has been enjoined since 2017. *Wrem*, 864 F.3d at 668.

134. *Bruen*, 142 S. Ct. at 2123–21.

135. *See id.* at 2138 n.9.

As onerous as these requirements might appear to be, there is still a way for legislatures to assert meaningful control over the exercise of the Second Amendment, albeit with less free reign than they had previously been allowed. A systemic approach to gun ownership composed of rules that have historical analogues in the American legal tradition can be modeled on South Africa's firearm licensing system. South Africa's Firearms Control Act could provide a method to limit possession of high-capacity magazines while still allowing them to be owned for self-defense.

## II. SOUTH AFRICA'S GUN CONTROL SYSTEM

South Africa is fairly unique in its approach to firearms ownership in that a central focus of its firearm licensing system is to allow people the means to defend themselves.<sup>136</sup> Its licensing system is nevertheless comprehensive in spelling out the requirements for owning different categories of firearms and is fairly stringent in its requirements for firearm ownership in the first place—at least when compared with current law in the United States. Because the South African Model allows for a right to own a firearm for self-defense,<sup>137</sup> yet provides a comprehensive licensing scheme, it provides an ideal starting point for drafting a model statute for the United States.

The main feature of South Africa's Firearms Control Act of 2000<sup>138</sup>—which states could benefit from replicating—is a licensing system requiring citizens who wish to own a firearm to first obtain a competency certificate<sup>139</sup> and then obtain a license specific to each firearm that they wish to own.<sup>140</sup> The type of firearm a citizen can own will depend on the type of license that they receive, which, in turn, depends on their purpose for owning the firearm. For instance, a citizen cannot obtain a semi-automatic rifle for occasional hunting or sports shooting because such a weapon is not necessary for that purpose.<sup>141</sup> This an important feature that could lawfully be replicated in the United States<sup>142</sup> to strike a balance between the states' interest in public

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136. Firearms Control Act 60 of 2000 pmbl. JSRSA (S. Afr.) (updated through 2014).

137. *See id.* at ch. 6 § 13.

138. The Act is designed around creating a comprehensive licensing system that requires a competency as well as a license for each firearm that a person owns. *See id.* at ch. 4 § 6(2) (“[N]o licence may be issued to a person who is not in possession of the relevant competency certificate.”).

139. *Id.*

140. *Id.* at ch. 6 § 11 (“The Registrar must issue a separate licence in respect of each firearm licensed in terms of this Chapter.”).

141. *See id.* at ch. 15. Of course, a semi-automatic rifle could be used for occasional hunting or sports shooting, but the South African legislature presumably found that the potential danger of allowing more citizens to own semi-automatic rifles outweighed its utility for occasional hunting and sports shooting.

142. *See infra* Section IV.B.2.

safety and the private interest in self-defense. Take high-capacity magazines, for instance. Some states have tried to outright ban them,<sup>143</sup> but it is not clear that this is constitutional under *Heller*, *McDonald*, and *Bruen*.<sup>144</sup> South Africa's Firearms Control Act could provide a method to limit possession of high-capacity magazines while still allowing them to be owned for self-defense uses.

Although South Africa's system provides a good starting point for a model act, some areas will need modification to comport with U.S. constitutional standards. The main modifications are in the types of firearms that can be owned and the permit issuance requirements. *Heller* instructs that firearms in common use receive Second Amendment protection<sup>145</sup> and *Bruen* indicates that "may issue" regimes are very likely per se unconstitutional.<sup>146</sup> The primary modifications this Note proposes for its Model Act appear in Sections 2(b), 3, 5, and 6 in Part III below.

### III. THE MODEL FIREARMS CONTROL ACT

The following is the full text of the Model Firearms Control Act that this Note proposes the states adopt. This act is intended to supplement existing state firearms regulations by creating an individual licensing requirement.

#### A. CHAPTER 1: DEFINITIONS, LICENSE REQUIREMENT, ELIGIBILITY CERTIFICATE

##### § 1 Definitions

- (a) **Designated Firearms Officer.** A "Designated Firearms Officer" means a law enforcement official designated as such by state law.
- (b) **Accredited Hunting Association.** An "Accredited Hunting Association" means an association meeting the criteria designated

143. See, e.g., Safety for All Act, 2016 Cal. Legis. Serv. Prop. 63, § 6.1 (West), adding CAL. PENAL CODE § 32310(c)–(d) (Supp. 2020).

144. Compare *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1143 (S.D. Cal. 2019) ("California's § 32310 directly infringes Second Amendment rights . . . by broadly prohibiting common firearms and their common magazines holding more than 10 rounds, because they are not unusual and are commonly used by responsible, law-abiding citizens for lawful purposes such as self-defense."), *rev'd sub nom.* *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *vacated*, 142 S. Ct. 2895 (2022) (mem.), with *Wiese v. Becerra*, 306 F. Supp. 3d 1190, 1195 n.3 (E.D. Cal. 2018) (finding that California's high-capacity magazine ban does not violate the Second Amendment), and *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. of N.J.*, 910 F.3d 106, 118 (3d Cir. 2018) (finding that a New Jersey law banning high-capacity magazines "does not severely burden, and in fact respects, the core of the Second Amendment right"), *abrogated by N.Y. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

145. See *supra* Section I.A.3.

146. See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2138 (2022).

by state law.

- (c) **Accredited Sports Shooting Association.** An “Accredited Sports Shooting Association” means an association meeting the criteria designated by state law.

## § 2 License Requirement

- (a) No person may possess a firearm without holding a license issued by the state for that firearm. A separate license is required for each firearm.
- (b) No person may receive a license to possess a firearm without first having been issued an eligibility certificate.
- (c) A Designated Firearms Officer may not issue an applicant a license to possess a firearm that is not legal to possess in the state within which the applicant resides.
- (d) **Familial transfer.** Ownership of a firearm cannot be transferred from one person to another unless the transferee has a license to possess that firearm, even if the transferor and transferee are family members.
- (e) **Issuance.** Upon meeting the criteria for any firearms license, the Designated Firearms Officer to whom the application has been delivered must issue the applicant the appropriate firearms license. Neither the Designated Firearms Officer, nor any other state or federal government employee or agent may prevent an applicant from delivering a valid application to the Designated Firearms Officer.

## § 3 Eligibility Certificate

- (a) **Requirements.** To receive an eligibility certificate, the applicant must:
  - (1) Complete an application delivered to a Designated Firearms Officer responsible for the area in which applicant resides;
  - (2) Provide a full set of the applicant’s fingerprints;
  - (3) Be eighteen years old or older;
  - (4) Be lawfully present in the United States;
  - (5) Not suffer from a mental illness that renders the applicant a danger to himself or others;
  - (6) Never have been convicted of a crime punishable by a year

or more of imprisonment;

- (7) Never have been convicted of a crime involving:
    - (A) Fraud in relation to—or supplying false information for the purpose of—obtaining an eligibility certificate, license, permit, or authorization to possess a firearm in terms of this Act or a previous law; or
    - (B) Domestic violence.
  - (8) Not be addicted to any substance that has an intoxicating effect; and
  - (9) Pass a firearms safety course as prescribed by state law.
- (b) **Issuance.** Upon the applicant's completion of the above requirements, the Designated Firearms Officer to whom an application has been delivered must issue a qualified applicant an eligibility certificate within thirty days of delivery.
- (c) **Denial pending investigation.** If the Designated Firearms Officer has a well-founded doubt that an applicant has not met one or more of the eligibility requirements, the Designated Firearms Officer can deny an applicant an eligibility certificate for up to thirty days, during which time he or she may conduct a further investigation to determine whether the applicant has met the requirements to receive an eligibility certificate. After thirty days, the Designated Firearms Officer must either:
- (1) Issue the eligibility certificate if the applicant meets the necessary criteria; or
  - (2) Provide the applicant with the reason for denying the certificate.

If the Designated Firearms Officer has a well-founded doubt as to the mental stability of an applicant, the Designated Firearms Officer has the discretion to require an applicant to undergo a screening by a licensed psychologist or licensed psychiatrist before issuing an eligibility certificate contingent on the psychologist or psychiatrist's determination that the applicant is of stable mental condition.



## B. CHAPTER 2: TYPES OF LICENSES AND USE OF FIREARMS

**§ 4 License to Possess a Firearm for Self-Defense**

- (a) **Firearms that may be possessed for self-defense.** A person can receive a license to possess the following firearms for self-defense:
  - (1) A handgun that is not fully automatic; or
  - (2) A rifle or shotgun that is not semi-automatic or fully automatic.
- (b) **Issuance.** A license to possess such a firearm for self-defense must be issued to any natural person who
  - (1) Holds a valid eligibility certificate; and
  - (2) Applies for a license to possess a firearm for self-defense.
- (c) **Limits.** No person may possess more than two licenses under this section.

**§ 5 License to Possess a Restricted Firearm for Self-Defense**

- (a) **Restricted firearms defined.** The following are considered “restricted firearms” for the purpose of this section:
  - (1) A rifle or shotgun that accepts detachable magazines and is semi-automatic but not fully automatic.
- (b) **Requirements to issue a license to possess a restricted firearm for self-defense.** A license to possess a firearm for self-defense must be issued to any natural person who
  - (1) Holds a valid eligibility certificate;
  - (2) Applies for a license to possess a restricted firearm for self-defense; and
  - (3) Shows cause why the particular restricted firearm for which a license is sought serves a self-defense need that a non-restricted firearm cannot serve.
- (c) **Basis for denial.** The Designated Firearms Officer reviewing the application to possess a restricted firearm for self-defense must provide an objectively reasonable basis, based on clear and convincing evidence, to deny an application for lack of cause under section 5(b)(3).

**§ 6 License to Carry a Concealed Firearm for Self-Defense**

- (a) **Concealed carry defined.** “Concealed carry” means carrying a firearm on the person of the license holder in a way that is not

visible to others.

- (b) **Requirements to issue a license to carry a concealed firearm for self-defense.** A license to possess a firearm for self-defense must be issued to any natural person who
  - (1) Is twenty-one years old or older;
  - (2) Holds a valid eligibility certificate; and
  - (3) Completes an application delivered to a Designated Firearms Officer responsible for the area in which the applicant resides.
- (c) **Arms that may be possessed for concealed carry.** A person who holds a license to carry a concealed firearm can carry any handgun that is concealable on the person, is not fully automatic, and that the person has a license to possess.

#### § 7 License to Openly Carry a Firearm for Self-Defense<sup>147</sup>

- (a) **Openly carry defined.** “Openly carry” means carrying a firearm on the person of the license holder that is not concealed.
- (b) **Requirements to issue a license to openly carry a firearm for self-defense.** A license to openly carry a firearm for self-defense must be issued to any natural person who
  - (1) Is twenty-one years old or older;
  - (2) Holds a valid eligibility certificate; and
  - (3) Completes an application delivered to a Designated Firearms Officer responsible for the area in which applicant resides.
- (c) **Arms that may be possessed for open carry.** A person who holds a license to openly carry a firearm can openly carry any handgun that is not fully automatic and that the person has a license to possess.

#### § 8 License to Possess a Firearm for Occasional Hunting or Occasional Sports Shooting

- (a) **Purpose.** The purpose of this section is to provide responsible, law-abiding citizens access to ordinary firearms for such lawful activities as hunting, target practice, and sports shooting.<sup>148</sup>

147. Either this section or section 5 can be deleted at the determination of the state legislature, but one type of public carry—either open or concealed—must be permitted. *See Bruen*, 142 S. Ct. at 2150.

148. The terms “occasional hunting” and “occasional sports shooting” remain undefined because

- (b) **Persons eligible under this section.** Any person who holds a valid eligibility certificate can receive a license to possess a firearm for occasional hunting or sports shooting.
- (c) **Arms that may be possessed for occasional hunting or sports shooting.** A person may receive a license to possess the following firearms for occasional hunting or occasional sports shooting:
  - (1) A rifle or shotgun that is not semi-automatic or fully automatic; and
  - (2) A handgun that is not fully automatic.

**§ 9 License to Possess a Firearm for Dedicated Hunting or Dedicated Sports Shooting**

- (a) **Dedicated hunter defined.** A “dedicated hunter” means a person who regularly participates in hunting activities and who is a member of an Accredited Hunting Association.
- (b) **Dedicated sports shooter defined.** A “dedicated sports shooter” means any person who regularly participates in sports shooting and who is a member of an Accredited Sports Shooting Association.
- (c) A person who is a dedicated hunter or a dedicated sports shooter can receive a license to possess the following firearms for dedicated hunting or dedicated sports shooting:
  - (1) A rifle or shotgun that is not fully automatic; and
  - (2) A handgun that is not fully automatic.

C. CHAPTER 3: USE AND TRANSPORTATION OF FIREARMS

**§ 10 Use of Firearms.** A person may use a firearm for which the person holds a valid license where it is safe and lawful to do so.

**§ 11 Transportation of Firearms.** A person lawfully possessing a firearm can transport that firearm in any manner that is consistent with state law.

IV. CONSTITUTIONALITY

The Model Act that this Note proposes is designed to survive judicial review by United States courts, rather than to be considered constitutional in an abstract sense. The object of the application of Second Amendment jurisprudence here is “the prediction of the incidence of the public force

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definition is not necessary. Section 8 is rather permissive in providing access to ordinary firearms (as opposed to dangerous and unusual firearms) to any person who can obtain an eligibility certificate.

through the instrumentality of the courts.”<sup>149</sup> As such, this Section argues that the confluence of Second Amendment doctrine and practical considerations will allow the Model Act to remain “lawful” in the realist sense.<sup>150</sup>

#### A. “LONGSTANDING PROHIBITIONS”

The *Heller* Court enumerated in dictum certain restrictions on the right to bear arms that its common use doctrine did not place in jeopardy.

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>151</sup>

Although somewhat reassuring at the time the *Heller* decision was handed down, *Bruen* and *McDonald* have not given this assertion clear majority support. First, in *McDonald*, only Chief Justice Roberts and Justices Scalia and Kennedy joined Justice Alito’s endorsement of this list of presumptively lawful restrictions.<sup>152</sup> Next, in *Bruen*, this passage was omitted entirely from the majority opinion, appearing only in Justice Kavanaugh’s concurrence.<sup>153</sup> Perhaps, then, this *ipse dixit* of “longstanding prohibitions” will not carry any special favor with the Court in the future and sections 3(a)(1–7) of the Model Act will have to be justified under *Bruen*’s historical test.

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149. Justice O. W. Holmes, Address at the Boston University School of Law: The Path of the Law 457 (Jan. 7, 1897), in 10 HARV. L. REV. 457 (1897).

150. See *id.* at 461 (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

151. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008). Unfortunately, the *Heller* Court provided no historical basis for these restrictions, so the *Heller* opinion itself is of no use in finding a historical precedent for these “longstanding prohibitions.” *Id.* at 626–27; see WALDMAN, *supra* note 7, at 126 (“This eminently sensible list barges into the text, seemingly from nowhere.”). In his *McDonald* dissent, Justice Breyer succinctly summarizes the odd nature of this list of “acceptable” regulations.

[T]he Court has haphazardly created a few simple rules, such as that it will not touch “prohibitions on the possession of firearms by felons and the mentally ill,” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,” or “laws imposing conditions and qualifications on the commercial sale of arms.” But why these rules and not others? Does the Court know that these regulations are justified by some special gun-related risk of death? In fact, the Court does not know. It has simply invented rules that sound sensible without being able to explain why or how Chicago’s handgun ban is different. *McDonald v. City of Chicago*, 561 U.S. 742, 925 (2010) (Breyer, J., dissenting) (citations omitted) (quoting *Heller*, 554 U.S. at 626–27).

152. *McDonald*, 561 U.S. at 786 (plurality opinion).

153. *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring).

### 1. Prohibition on Firearm Possession by Felons

When applying *Bruen*'s historical test to section 3(a)(7) of the Model Act—which denies eligibility certificates to felons—the first question is whether the Second Amendment's plain text covers an individual's conduct.<sup>154</sup> To conclude that the Second Amendment does not cover this conduct requires reliance more on dicta from *Heller*, *McDonald*, and *Bruen*, as well as the majority's focus on the rights of *law-abiding* citizens in these cases,<sup>155</sup> rather than a formally applied *Bruen* analysis. In *United States v. Minter*, for instance, a district court was faced with a challenge to the constitutionality of a federal law that makes possession of firearms and ammunition by convicted felons illegal.<sup>156</sup> The district court reasoned that “the Supreme Court in *Bruen* ha[d] already signaled the answer to this question,” and concluded that “the *Bruen* Court's decision did not undermine *Heller*'s statement,” emphasizing that the Second Amendment protects the “right of *law-abiding*, responsible citizens to use arms for self-defense.”<sup>157</sup> Several other district courts have considered the constitutionality of a felon-in-possession laws post-*Bruen*, many of which have concluded that the Second Amendment's plain text does not cover this conduct.<sup>158</sup> However, this reliance on dicta might not be enough to avoid the historical inquiry that *Bruen* demands.<sup>159</sup>

If the Second Amendment's plain text is interpreted to include convicted felons in its reference to “the people,”<sup>160</sup> *Bruen*'s historical test would require the government to determine whether section 3(a)(7) is “consistent with this Nation's historical tradition of firearm regulation.”<sup>161</sup>

154. *Id.* at 2126.

155. Of course, the law-abiding nature of the litigants in *Heller*, *McDonald*, and *Bruen* was never in question, limiting the persuasiveness of this argument.

156. *United States v. Minter*, 635 F. Supp. 3d 352, 354 (M.D. Pa. 2022).

157. *Id.* at 358 (quoting *Bruen*, 142 S. Ct. at 2131) (emphasis in original).

158. See, e.g., *United States v. Ingram*, 623 F. Supp. 3d 660, 664 (D.S.C. 2022) (“[S]imilar discussion regarding felon-in-possession and comparable statutes appears in three different opinions: *Heller*, *McDonald*, and *Bruen*. By distinguishing non-law-abiding citizens from law-abiding ones, the dicta in *Heller* and *McDonald* clarifies the bounds of the plain text of the Second Amendment.”); *United States v. Jackson*, No. 21-51, 2022 U.S. Dist. LEXIS 164604, at \*3 (D. Minn. Sept. 13, 2022) (“In *Bruen*, the Court again stressed that *Heller* and *McDonald* remain good law. Justice Kavanaugh, joined by Chief Justice Roberts, stated that *Bruen* does not disturb what the Court has said in *Heller* about the restrictions imposed on possessing firearms . . . .”); *United States v. Hill*, 629 F. Supp. 3d 1027, 1029–30 (S.D. Cal. 2022); *United States v. Siddoway*, No. 21-cr-00205, 2022 U.S. Dist. LEXIS 178168, at \*3–5 (D. Idaho Sept. 27, 2022); *United States v. Burrell*, No. 21-20395, 2022 U.S. Dist. LEXIS 161336, at \*6–7 (E.D. Mich. Sept. 7, 2022).

159. See, e.g., *United States v. Coombes*, 629 F. Supp. 3d 1149, 1154–56 (N.D. Okla. 2022) (concluding that the Second Amendment does not categorically exclude convicted felons from “the people”).

160. *Id.*

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

Because the earliest felon-disarmament laws date from the twilight of the nineteenth century and the early part of the twentieth century,<sup>162</sup> an earlier historical analogue must be identified. One possible analogue is some American Colonies' practice of attainder, which was utilized to disarm "disaffected" or "delinquent" individuals.<sup>163</sup> Although a bill of attainder would surely constitute a due process violation today, the colonial practice of attainder is still sufficiently analogical to felon-in-possession laws because it is an example of state legislatures disarming individuals considered dangerous.<sup>164</sup> Additionally, a colonial New York law prohibited convicted felons from owning property or chattels, implicitly prohibiting them from owning firearms.<sup>165</sup> Finally, a few historical examples of proposals made during the ratification process show that the founders did not intend to confer the right to bear arms on convicted felons.<sup>166</sup> Proposals from Anti-Federalists in Pennsylvania,<sup>167</sup> Samuel Adams in Massachusetts,<sup>168</sup> and delegates from New Hampshire<sup>169</sup> all show that the framers thought of the Second Amendment as recognizing the right of *law-abiding* citizens to bear arms. One of these proposals, for instance, provided that "no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals."<sup>170</sup> Although these were only proposals, they are still helpful because they illustrate how Americans at the time understood the government's authority to limit firearm possession. These proposals' rejection does not necessarily show that early Americans objected to such limitations on the right to bear arms and could simply be a result of a lack of Federalist support.

162. Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1376 (2009).

163. See Thomas R. McCoy, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 942–49, 1080–82 (1970); 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK 149–50 (Albany, Thurlow Weed 1842); see also STEPHEN P. HALBROOK, *THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* 117–18 (2008).

164. See *Coombes*, 629 F. Supp. 3d at 1157–58.

165. See Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 725 n.33 (1973); 1 THE COLONIAL LAWS OF NEW YORK: FROM THE YEAR 1664 TO THE REVOLUTION 145 (Albany, James B. Lyon 1894); *Coombes*, 629 F. Supp. 3d at 1158–59.

166. See *Coombes*, 629 F. Supp. 3d at 1158–59.

167. 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 665 (1971).

168. *Heller*, 554 U.S. at 716 (Breyer, J., dissenting).

169. 1 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 326 (Philadelphia, J. B. Lippincott Co. 2d ed. 1836) (The proposed amendment provided that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.").

170. SCHWARTZ, *supra* note 167.

Although the historical precedents identified here are not overly persuasive, they have thus far been sufficient for many federal courts that have heard challenges to the federal felon-in-possession law and entertained the question of whether it is consistent with this Nation's historical tradition of firearm regulation.<sup>171</sup> Taking a realist view, this could simply be because the judiciary is staffed by those “who know too much to sacrifice good sense to a syllogism”<sup>172</sup> and are unwilling to invalidate a law that is so sensible on its face. Even the Supreme Court, staffed as it is today, might not invalidate such laws. Assuming Justice Kavanaugh's concurring opinion in *Bruen* to be an honest representation of how he (and Chief Justice Roberts, who joined his concurrence) will vote in the future, the *Heller* Court's enumeration of presumptively lawful regulations will not be stripped of all persuasive effect.<sup>173</sup> After all, it is hard to imagine that Justices Sotomayor, Kagan, or Jackson would not endorse the “longstanding prohibitions” passage from *Heller*. Thus, we can expect laws that prohibit felons from possessing firearms—and section 3(a)(6) of the Model Act—will not be invalidated by the Supreme Court, even if on practical rather than doctrinal considerations.

## 2. Prohibiting Firearm Possession for Certain Non-Felonies

Possibly more challenging, however, is section 3(a)(7), which denies eligibility certificates to individuals convicted of fraud for the purpose of obtaining a firearm; unlawful use or handling of a firearm; or domestic violence. After deciding *Bruen*, the Supreme Court vacated and remanded for further consideration a circuit court decision rejecting a challenge to a Massachusetts law similar to section 3(a)(7) of the Model Act.<sup>174</sup> The law in question prohibited the plaintiff from receiving a license to carry a firearm in public because he had been convicted of attempting to carry a pistol without a license and of possession of an unregistered firearm in the District of Columbia.<sup>175</sup> Although these convictions were misdemeanors, Massachusetts law denied public carry licenses to “persons who had, ‘in any state or federal jurisdiction, been convicted’ of ‘a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed.’ ”<sup>176</sup> In upholding the Massachusetts law,

171. See, e.g., *Coombes*, 629 F. Supp. 3d at 1158–59; *United States v. Collette*, 630 F. Supp. 3d 841, 846 (W.D. Tex. 2022); *United States v. Charles*, 633 F. Supp. 3d 874, 878–79 (W.D. Tex. 2022); *United States v. Price*, 635 F. Supp. 3d 455, 458 (S.D.W. Va. 2022); *United States v. Cockerham*, No. 21-cr-6, 2022 U.S. Dist. LEXIS 164702, at \*3–4 (S.D. Miss. Sept. 13, 2022).

172. O. W. HOLMES, JR., *THE COMMON LAW* 36 (Boston, Little, Brown, & Co. 1881).

173. *N.Y. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2161 (2022) (Kavanaugh, J., concurring).

174. *Morin v. Lyver*, 143 S. Ct. 69, 69 (2022).

175. *Morin v. Lyver*, 13 F.4th 101, 102–03 (1st Cir. 2021), *vacated*, 143 S. Ct. 69 (2022).

176. *Id.* at 103 (quoting Mass. Gen. Laws ch. 140, § 131(d)(i)(D) (2008)).

the circuit court applied intermediate scrutiny, which the Supreme Court has since rejected as inappropriate for Second Amendment analysis.<sup>177</sup> However, in a similar post-*Bruen* case, the Fifth Circuit upheld a law prohibiting possession of a firearm by persons under indictment,<sup>178</sup> and several district courts have upheld laws prohibiting possession of firearms by felons,<sup>179</sup> domestic violence misdemeanants,<sup>180</sup> and unlawful users of controlled substances.<sup>181</sup> Although some district courts have held similar laws unconstitutional,<sup>182</sup> there is, as of yet, no circuit precedent invalidating these laws.

In addition to the weight of circuit precedent, the plain text of *Heller* supports the conclusion that “prohibitions on the possession of firearms by felons and the mentally ill”<sup>183</sup> and similar measures are “presumptively lawful.”<sup>184</sup> However, if the Court determines that *Bruen* abrogates the “longstanding prohibitions” dictum from *Heller*, a historical analogue will have to be found.<sup>185</sup> *Bruen* provides two metrics to be considered in determining whether a regulation is relevantly similar to a historical analogue: (1) how they burden a “law-abiding citizen’s right to armed self-defense,” and (2) why they burden that right.<sup>186</sup>

Under these metrics, section 3(a)(7) of the Model Act could escape invalidation on the same basis as felon-in-possession laws<sup>187</sup>: because it

177. *Bruen*, 142 S. Ct. 2111 at 2129–30.

178. *United States v. Avila*, No. 22–50088, 2022 U.S. App. LEXIS 35321, at \*1 (5th Cir. Dec. 21, 2022); *see also* *United States v. Rowson*, No. 22 Cr. 310, 2023 U.S. Dist. LEXIS 13832, at \*1 (S.D.N.Y. Jan. 26, 2023).

179. *See, e.g.*, *United States v. Kays*, 624 F. Supp. 3d 1262, 1265 (W.D. Okla. 2022); *United States v. Price*, 635 F. Supp. 3d 455, 466–67 (S.D.W. Va. 2022); *United States v. Minter*, 635 F. Supp. 3d 352, 354 (M.D. Pa. 2022); *District of Columbia v. Heller*, 554 U.S. 570, 716 (2008) (Breyer, J., dissenting).

180. *United States v. Nutter*, 624 F. Supp. 3d 636, 644–45 (S.D.W. Va. 2022). Infamously, however, the Fifth Circuit recently held that the federal law prohibiting possession of firearms by persons under a domestic violence restraining order is unconstitutional because it does not fit “within our Nation’s historical tradition of firearm regulation.” *United States v. Rahimi*, 61 F.4th 443, 460 (5th Cir. 2023), *cert granted*, 143 S. Ct. 2688 (2023).

181. *United States v. Daniels*, 610 F. Supp. 3d 892, 897 (S.D. Miss. 2022), *rev’d*, 77 F.4th 337 (5th Cir. 2023).

182. *United States v. Hicks*, No. W:21-CR-00060, 2023 U.S. Dist. LEXIS 35485, at \*17–18 (W.D. Tex. Jan. 9, 2023) (holding a law prohibiting firearm possession while under a felony indictment unconstitutional); *United States v. Quiroz*, 629 F. Supp. 3d 511, 511–12 (W.D. Tex. 2022); *Price*, 635 F. Supp. 3d at 457 (holding a law prohibiting possession of a firearm with an altered, obliterated, or removed serial number unconstitutional); *United States v. Perez-Gallan*, 640 F. Supp. 3d 697, 716 (W.D. Tex. 2022) (holding a federal statute prohibiting firearm possession by those subject to restraining order related to domestic violence unconstitutional).

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

184. *Id.* at 627 n.26.

185. *N.Y. Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133 (2022).

186. *Id.* at 2132–33. These are not the only metrics that could render a historical analogue “relatively similar,” but they are the only metrics the Court explicitly mentioned.

187. *See supra* Section IV.A.1.



burdens a law-abiding citizen's right of lawful self-defense in a way similar to, and for a reason practically identical to, the colonial practice of disarming "disaffected" or "delinquent individuals" through attainder,<sup>188</sup> and the colonial practice of prohibiting convicted felons from owning chattels, including firearms.<sup>189</sup>

First, the burden is similar because a regulation prohibiting possession of firearms to certain classes of misdemeanants does not actually burden the right any more than a law prohibiting a felon's possession of firearms. The right described in *Bruen* is one belonging to *law-abiding* citizens, not citizens convicted of felonies.<sup>190</sup> Individuals convicted of a felony or misdemeanor domestic violence; unlawful use or handling of a firearm; or fraud for the purpose of unlawfully obtaining a firearm are by definition not law-abiding.<sup>191</sup> To the contrary, those individuals would be showing that they are willing to commit serious violent crimes—domestic violence—or crimes showing that they are not safe users of firearms. Second, the reason for the restrictions in section 3(a)(7) of the Model Act are identical to the reasons for the colonial practice of prohibiting dangerous individuals from owning firearms: to ensure those bearing arms are responsible, safe, and law-abiding. In discussing the regulations in shall-issue licensing regimes, *Bruen* acknowledges that regulations designed "to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens' " are constitutional.<sup>192</sup> Because section 3(a)(7) is closely analogous to the presumptively lawful measures expounded in *Heller*,<sup>193</sup> it is likely to be held constitutional.

Another potentially problematic provision is section 3(a)(8), which does not allow individuals addicted to narcotics to obtain an eligibility certificate that is a prerequisite to possession of any firearm. In 2023, a federal court in Oklahoma ruled that the federal statute prohibiting possession of firearms by users of substances made illegal by the federal Controlled Substances Act<sup>194</sup> was unconstitutional.<sup>195</sup> However, this ruling

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188. See McCoy, *supra* note 163, at 942–49.

189. Itzkowitz et al., *supra* note 165, at 721, 725 n.33.

190. *Bruen*, 142 S. Ct. at 2138 n.9.

191. This does not mean, however, that *any* violation of the law will result in a forfeiture of Second Amendment rights. Section 3(a)(7) contemplates specific violations of law that tend to show that allowing that person to own a firearm would be dangerous to themselves, to the public, or both.

192. *Bruen*, 142 S. Ct. at 2138 n.9.

193. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008); see also *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010); *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring).

194. 18 U.S.C. § 922(g)(3).

195. *United States v. Harrison*, No. CR-22-00328, 2023 U.S. Dist. LEXIS 18397, at \*51 (W.D. Okla. Feb. 3, 2023) (concluding that the statute forbidding possession of firearms by unlawful drug users violates the Second Amendment).

is far from sounding the death knell for laws prohibiting possession of firearms by drug *addicts*. Even if this position was adopted by the circuit courts or the Supreme Court, it would not invalidate section 3(a)(8) because that section only prohibits individuals who are *addicted to*, rather than mere users of, intoxicating substances from obtaining eligibility certificates. This is intended to prevent individuals whose mental stability would be regularly impaired by the abuse of drugs or alcohol from possessing firearms and would not apply to an occasional marijuana user. Section 3(a)(8) is therefore very similar to a law prohibiting possession by those with mental illnesses, as described in *Heller* as presumptively lawful.<sup>196</sup>

One final challenge section 3(a)(8) might face is that it is unconstitutional under *Robinson v. California*.<sup>197</sup> In *Robinson*, the Court held that a law criminalizing being addicted to the use of narcotics was cruel and unusual punishment under the Eighth Amendment.<sup>198</sup> This comparison is, however, inapposite. Section 3(a)(8) does not criminalize drug addiction; it only prevents drug addicts from arming themselves—for their own safety and the safety of the general public. It is fundamentally no different from making it illegal for blind persons to drive. Moreover, the Model Act does not prevent persons who were once addicted to drugs but are no longer addicted from obtaining an eligibility certificate. Thus, section 3(a)(8) falls far short of being a punishment at all, much less a cruel and unusual one.

## B. REGULATION OF DIFFERENT CLASSES OF ARMS

### 1. Purpose-Based Licensing

The defining characteristic of the Model Act, in accordance with South Africa's licensing system, is how it ties the ownership of a firearm to its use by only allowing ownership of firearms that are suited to the purpose for which the license is sought. Although access to certain firearms, such as semi-automatic rifles, is restricted under the Model Act, they are not entirely banned. This is done in an attempt to limit access to especially dangerous firearms while acknowledging the reality that a blanket ban on assault weapons might not be held constitutional by the current Supreme Court because of the inherent difficulty in finding a historical precedent regulating distinctly modern arms.<sup>199</sup> Moreover, given the Supreme Court's current 6-

196. *Heller*, 554 U.S. at 626. These presumptively lawful restrictions were also endorsed by two justices in the majority in *Bruen* and would likely also be endorsed by the three dissenting justices. See *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring).

197. *Robinson v. California*, 370 U.S. 660 (1962).

198. *Id.* at 666; U.S. CONST. amend. VIII.

199. See *Miller v. Bonta*, No. 19-cv-01537, 2023 U.S. Dist. LEXIS 188421, at \*97 (S.D. Cal. Oct. 19, 2023).

3 conservative supermajority, a blanket ban would create a risk of creating a dangerous precedent. If the Supreme Court invalidated an assault weapons ban, future Justices who might not consider such a ban unconstitutional *per se* might nevertheless feel duty-bound to apply Supreme Court precedent faithfully.

The requirements for a license to possess a firearm for self-defense described in section 4(b) of the Model act would likely be found constitutional under *Bruen* because it is very closely analogous to the “shall-issue” carry licensing system in place in the vast majority of states.<sup>200</sup> *Bruen* held only that the discretion afforded to licensing officials in the states with “may-issue” regimes is unconstitutional,<sup>201</sup> and did not jeopardize the licensing requirements that are employed in forty-three states.<sup>202</sup> The Court explained that “nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regimes, under which ‘a general desire for self-defense is sufficient to obtain a [permit].’”<sup>203</sup> Moreover, the Court used the fact that “shall-issue” licensing regimes are in place in the vast majority of states to bolster its argument that New York’s “may-issue” regime was unconstitutional.<sup>204</sup> The Court further explained that states are free to “require applicants to undergo a background check or pass a firearms safety course,” and that these measures “are designed to ensure only that those bearing arms in the jurisdiction are, in fact, ‘law-abiding, responsible citizens.’”<sup>205</sup> Section 4(b) of the Model Act follows the convention of a “shall-issue” licensing regime, but applies to firearm ownership for self-defense in general, not just to public carry. Regulations such as section 4(b) of the Model Act, just like regulations that the court mentioned,<sup>206</sup> serve only to ensure that firearm owners are law-abiding, responsible citizens.<sup>207</sup> Thus, section 4(b) burdens the right of law-abiding citizens to keep and bear arms for self-defense to a similar extent, and for the very same purpose, as the public carry licensing requirements in effect in forty-three states.<sup>208</sup> Although the modern prevalence of the licensing

200. *Bruen*, 142 S. Ct. at 2162.

201. *Id.* at 2156.

202. *Id.* at 2138 n.9; *see also id.* at 2161 (Kavanaugh, J., concurring) (“[T]he Court’s decision does not affect the existing licensing regimes—known as ‘shall-issue’ regimes—that are employed in 43 States.”); *id.* at 2162 (Kavanaugh J. concurring) (“[T]he Second Amendment allows a ‘variety’ of gun regulations.”) (citing *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008)).

203. *Bruen*, 142 S. Ct. at 2138 n.9 (quoting *Drake v. Filko*, 724 F.3d 426, 442 (3d Cir. 2013) (Hardiman, J., dissenting)).

204. *Id.* at 2123–24.

205. *Id.* at 2138 n.9 (quoting *Heller*, 554 U.S. at 635).

206. *Id.*

207. *Id.*

208. *See id.* at 2123–24; Thomson Reuters, 50 *State Statutory Surveys: Right to Carry a Concealed Weapon*, 0030 SURVEYS 32 (2022).

requirement might not be doctrinally relevant, practically speaking, 4(b) would be unlikely to be invalidated unless a court were either willing to invalidate the widespread practice of public carry licensing or unwilling to accept licensing for firearm ownership in general.

## 2. High-Capacity Magazines and Semi-Automatic Rifles

Perhaps the most difficult constitutional question in this area is whether states can ban specific types of arms. The Supreme Court has not given clear guidance on these issues in any of its decisions, resulting in discordant lower court rulings on the issues of high-capacity magazine bans<sup>209</sup> and assault weapon bans.<sup>210</sup> *Heller* states that the Second Amendment protects individual ownership of the types of firearms in common use, and that this protection means states cannot outright ban handgun ownership, but it is not clear how expansively “common use” (or for that matter, the “type” of a firearm) will be interpreted. Several states have attempted to prohibit possession of high-capacity magazines and assault weapons such as the AR-15;<sup>211</sup> however, until the issue is squarely addressed by the Court, states will have to operate based on discordant lower federal court decisions.

Adding to this opacity is the term “assault weapon” itself. “Assault weapon” is a legal term that is not uniformly defined by legislatures.<sup>212</sup> Some states define these weapons by its semi-automatic<sup>213</sup> functioning in

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209. *Compare* Ass’n of N.J. Rifle & Pistol Clubs Inc. v. Att’y Gen. of N.J., 910 F.3d 106, 117 (3d Cir. 2018) (“The Act [banning high-capacity magazines] does not severely burden the core Second Amendment right to self-defense in the home . . .”), *abrogated by* N.Y. Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111 (2022), *with* Duncan v. Becerra, 970 F.3d 1133, 1169 (9th Cir. 2020) (“California’s near-categorical ban of LCMs [Large Capacity Magazines] infringes on the fundamental right to self-defense.”), *vacated sub nom.* Duncan v. Bonta, 142 S. Ct. 2895 (2022), *and* Duncan v. Bonta, No. 17-CV-1017, 2023 U.S. Dist. LEXIS 169577, at \*4 (S.D. Cal., Sept. 22, 2023) (“There is no American tradition of limiting ammunition capacity . . .”), *appeal docketed*, No. 23-55805, 2023 U.S. App. LEXIS 25723 (9th Cir. Sept. 28, 2023).

210. *Compare* Bianchi v. Frosh, 858 Fed. App’x 645, 646 (per curiam) (4th Cir. 2021) (affirming district court’s dismissal of challenge to Maryland’s assault weapons ban for failure to state a claim on which relief may be granted), *vacated*, 142 S. Ct. 2898 (2022), *with* Miller v. Bonta, 542 F. Supp. 3d 1009, 1021 (S.D. Cal. 2021) (“The overwhelming majority of citizens who own and keep the popular AR-15 rifle and its many variants do so for lawful purposes, including self-defense at home. Under *Heller*, that is all that is needed.”), *vacated*, No. 21-55608, 2022 U.S. App. LEXIS 21172 (9th Cir. Aug. 1, 2022).

211. *See, e.g.*, MD. CODE ANN., PUB. SAFETY § 5-101 et seq. (West 2022).

212. *Compare* MD. CODE ANN., PUB. SAFETY § 5-101(r)(2) (West 2022) (defining assault weapons by enumerating specific makes and models), *with* CAL. PENAL CODE § 30515 (West 2012 & Supp. 2020) (defining assault weapons as semi-automatic rifles with detachable magazines and certain combinations of features), *and* Public Safety and Recreational Firearms Use Protection Act, H.R. 4296, 103d Cong. (1994) (repealed 2004) (defining an assault weapon as either one of a list of enumerated makes and models or as having a combination of specific features).

213. Semi-automatic means having a mechanism for self-loading, but not continuous firing. That is, semi-automatic firearms allow for one shot per trigger pull without requiring manual operation of the firearm between shots.

combination with features like flash hiders,<sup>214</sup> pistol grips,<sup>215</sup> and adjustable stocks.<sup>216</sup> Regardless of how they are defined, however, the most functionally important aspects of assault weapons are that they are semi-automatic rifles and accept detachable magazines.<sup>217</sup> Assault weapons typically fire an intermediate rifle cartridge—a cartridge that is less powerful than a full-power rifle cartridge but more powerful than a pistol cartridge—making for a light and easy-to-use weapon with low recoil.<sup>218</sup> Perhaps the most common cartridge used in assault weapons in the United States is the 5.56 x 45mm NATO round.<sup>219</sup> Although the projectile weighs only one tenth of an ounce, it is capable of traveling at up to 3,200 feet per second—almost triple the speed of sound—making for a rather destructive weapon.<sup>220</sup> Because the functionally important aspect of an assault weapon is that it is a semi-automatic rifle that accepts detachable magazines, the Model Act addresses these features specifically rather than fussing over the minute details of weapons that make little functional difference.

In acknowledgement of the constitutional invalidation risk that an outright ban on high-capacity magazines or assault weapons poses,<sup>221</sup> the Model Act takes an intermediate approach limiting, but not prohibiting, access to assault weapons and does not attempt to regulate magazine capacity. Under sections 4 and 5 of the Model Act, citizens cannot be granted a license to possess a semi-automatic rifle or shotgun—classified as restricted firearms under section 5(a)—for self-defense unless they show the particular restricted firearm for which they are seeking a license serves an important purpose for which a non-restricted firearm is insufficient. For instance, if a person lives on a property with large open fields, a handgun might not be sufficient for self-defense because it is difficult to shoot accurately over a long distance and a manually operated rifle<sup>222</sup> would be too slow to operate and use for self-defense. In this instance a semi-automatic

214. Used for reducing the amount of muzzle flash produced by a firearm upon discharging.

215. A grip shaped like the butt of a pistol.

216. See, e.g., CAL. PENAL CODE § 30515 (West 2012 & Supp. 2020).

217. Detachable magazines can be removed from a firearm without disassembly, allowing for much faster reloads.

218. PHIL KLAY, UNCERTAIN GROUND: CITIZENSHIP IN AN AGE OF ENDLESS, INVISIBLE WAR 152–53 (2022).

219. *Id.*

220. *Id.* at 152. These light but fast bullets have the distinct advantage of producing low recoil while inflicting more damage than would be expected from its muzzle energy alone. *Id.* at 153. A 5.56 mm bullet from an AR-15 will begin tumbling and fragmenting at approximately eleven centimeters into the body, causing hydrostatic shock that can sever muscle tissue and burst apart organs. *Id.*

221. Part of the danger of this overruling risk is that the Court could have occasion to announce a sweeping decision.

222. A manually operated rifle is one that requires manual manipulation of the rifle's action to chamber a new round and fire another shot. A semi-automatic rifle, by contrast, will automatically eject a fired cartridge and chamber a new cartridge, providing a user with one shot per trigger pull.

rifle could be necessary to defend against an attacker who is armed with a semi-automatic long gun, thus serving an important need under section 5(b). Moreover, unlike the unfettered discretion that the “may-issue” regimes discussed in *Bruen* allowed for,<sup>223</sup> section 5(c) severely limits the discretion of the designated firearms officer by requiring “an objectively reasonable basis based on clear and convincing evidence” to support a denial.<sup>224</sup>

Individuals could also obtain a license to possess a restricted firearm for dedicated hunting or sports shooting under section 9 of the Model Act. This is intended for individuals who regularly engage in hunting or sports shooting activities such as competitive shooting. This provision serves the purpose of limiting access to such particularly dangerous firearms as semi-automatic rifles while still allowing individuals to continue to engage in hunting, target practice, and shooting competitions using other kinds of firearms. The requirements that a person be regularly engaged in hunting or sports shooting and belong to an accredited hunting or sports shooting association is meant to keep semi-automatic rifles from being available to any adult for any purpose.

At first blush, this restriction on semi-automatic rifles seems to violate the historical test created in *Bruen*,<sup>225</sup> unless a historical analogue can be found. However, a close reading of *Bruen*’s test shows that, in reviewing section 9 of the Model Act, the burden to find a historical analogue would never shift to the government. The *Bruen* test states that the Second Amendment presumptively protects an individual’s conduct only when its “plain text covers an individual’s conduct.”<sup>226</sup> The Court has held that the plain text of the Amendment covers “ ‘the individual right to possess and carry weapons in case of confrontation’ that does not depend on service in the militia.”<sup>227</sup> Section 9 of the Model Act, however, does not burden the “individual right to possess and carry weapons in case of confrontation”<sup>228</sup> in the slightest. It restricts only the sporting use of certain weapons, not their self-defense use.<sup>229</sup>

The restriction on the sporting use of certain especially dangerous arms notwithstanding, individuals who wish to own a restricted firearm for self-defense have that option, subject only to a showing that the restricted firearm

223. N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2156 (2022).

224. See *supra* Section III.B.

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

226. *Id.*

227. *Id.* at 2127 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008)).

228. *Heller*, 554 U.S. at 592.

229. It is important to note that the *Heller* Court mentioned a right to hunting. *Id.* at 599 (“[M]ost [Americans] undoubtedly thought it even more important for self-defense and hunting.”). The Model Act accounts for this by allowing for permissive licensing for sporting purposes or hunting under section 8.

they wish to possess serves an important purpose that a non-restricted firearm cannot. This provision requiring an applicant to show that a restricted firearm serves an important purpose is also likely to be found constitutional under *Bruen*. Because section 5(a) concerns a restriction on firearms ownership for self-defense—unlike the sporting use contemplated in section 9—the “plain text” of the Second Amendment presumptively covers the conduct in question. Therefore, the burden would shift to the government to prove that section 5 burdens the right to bear arms for self-defense in a similar way and for a similar reason as a historical analogue to that regulation.<sup>230</sup> The clear historical analogue for section 5 is the English prohibition on going armed with dangerous or unusual weapons.

The offense of *riding or going armed* with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by the statute of Northampton, 2 Edward III, c. 3 (Wearing Arms, 1328), upon pain of forfeiture of the arms, and imprisonment during the king’s pleasure . . . .<sup>231</sup>

Laws prohibiting going armed with dangerous or unusual weapons form a “long, unbroken line of common-law precedent”<sup>232</sup> that was recognized in the United States following the adoption of the Second Amendment.<sup>233</sup> Although the Court stated in *Bruen* that the English and colonial laws prohibiting affrays were not sufficiently analogous to New York’s proper cause requirement,<sup>234</sup> it did not foreclose reliance on these laws to justify other firearms regulations.<sup>235</sup> The Court went so far as to state that “colonial legislatures sometimes prohibited the carrying of ‘dangerous and unusual weapons’—a fact we already acknowledged in *Heller*.”<sup>236</sup> Crucially, sections 4 and 5 of the Model Act concern *dangerous and unusual* weapons, not a restrictive carry licensing scheme like the one the respondents sought to justify in *Bruen*.

230. *Bruen*, 142 S. Ct. at 2132–33.

231. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*149 (William Carey Jones ed., Claitor’s Publ’g Div. 1976) (1765).

232. *Bruen*, 142 S. Ct. at 2136.

233. See BLACKSTONE, *supra* note 231; 1 WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 489 (John Curwood ed., 8th ed. 1824) (“[P]ersons of quality are in no danger of offending against this statute [prohibiting affrays] by wearing common weapons . . . .”); *State v. Langford*, 10 N.C. (3 Hawks) 381, 383 (1824) (“[T]here may be an affray when there is no actual violence: as when a man arms himself with dangerous and unusual weapons . . . .”); *State v. Huntly*, 25 N.C. (3 Ired.) 418, 420 (1843) (“[T]he offence of riding or going about armed with unusual and dangerous weapons, to the terror of the people, was *created* by the statute . . . .”); *State v. Lenier*, 71 N.C. 288, 289 (1874); *English v. State*, 35 Tex. 473, 473 (1871) (rejecting Second Amendment challenge to law regulating the carrying of pistols, dirks, bowie knives, and other deadly weapons).

234. *Bruen*, 142 S. Ct. at 2143.

235. *Id.*

236. *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)).

In comparing sections 4 and 5 of the Model Act with the historical analogue, it is first necessary to establish whether the arms described in section 5(a) can fairly be described as “dangerous and unusual.” Clearly, compared with the types of arms the English law prohibited at the time of Blackstone’s Commentaries, the arms described in section 5(a) are extraordinarily dangerous and unusual. Even compared with other modern firearms, however, semi-automatic rifles that can be reloaded quickly are uniquely destructive.<sup>237</sup> They are capable of inflicting an incredible amount of damage in a short period of time, making them especially dangerous and unusual by any standard.<sup>238</sup> Comparing the relative burdens of the historical prohibition and the Model Act, the latter clearly burdens the right to bear arms to a lesser degree than the historical analogue. The historical offense outright prohibits going armed with dangerous or unusual weapons while sections 4 and 5 only limit it to certain uses. Within the terms of the Model Act, these uses include the “law-abiding citizen’s right to armed self-defense.”<sup>239</sup> Moreover, the historical analogue and the Model Act burden the right for a similar purpose—to prevent especially dangerous and frightening arms from being widespread and to prevent individuals from terrorizing others with these arms.<sup>240</sup>

### C. PUBLIC CARRY

The portion of the Model Act regulating public carry of firearms for self-defense—sections 6 and 7—is perhaps as restrictive as courts will allow under *Bruen*. Of course, sections 6(b) and 7(b) make clear that the Model Act establishes a shall-issue public carry licensing regime, as required by *Bruen*.<sup>241</sup> Sections 6 and 7 also require an applicant to have a valid eligibility certificate, which is where most of the requirements that help ensure safe use of a firearm are listed. The eligibility certificate requirements would not be likely to face much resistance from the courts because they do not burden the right *per se*;<sup>242</sup> rather, they are “designed to ensure only that those bearing arms in the jurisdiction are, in fact, ‘law-abiding, responsible citizens.’”<sup>243</sup> The Model Act leaves to the states the decision of whether one type of

237. KLAY, *supra* note 218, at 152–54.

238. *Id.* The federal government acknowledged as much in making the transfer or possession of assault weapons unlawful. Public Safety and Recreational Firearms Use Protection Act, H.R. 4296, 103d Cong. (1994) (repealed 2004). The act was allowed to expire in 2004 in accordance with its sunset provision.

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

240. BLACKSTONE, *supra* note 231.

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

242. *See supra* Section IV.A.

243. *Bruen*, 142 S. Ct. at 2138 n.9 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).



carry—open or concealed—should be banned.<sup>244</sup>

### CONCLUSION

The governing case law concerning the Second Amendment greatly limits how states can restrict firearm ownership. The Supreme Court's historical approach to Second Amendment challenges places many regulations many people find desirable outside the realm of constitutionality. This does not mean, however, that all reasonable regulations are impossible to implement. The Model Firearms Control Act presented in this Note is an initial step toward a comprehensive firearms licensing system that can serve to keep Americans safer while respecting their right to armed self-defense. The relatively limited nature of the regulations advocated in this Note is simply an acknowledgement of the reality that the Supreme Court has adopted a sweeping interpretation of the Second Amendment irrespective of its true meaning, which may best be left to historians. Given its current membership, the Supreme Court will not, for the foreseeable future, overturn its trilogy of Second Amendment precedents, so all states can do is implement the safest gun control solutions that governing case law will allow. On a later day, perhaps, a differently constituted Supreme Court will reconsider *Bruen* and replace its untenable historical inquiry with some form of means-end scrutiny. If and when that happens, the Model Act proposed in this Note can be expanded to be more restrictive while still respecting the individual right to armed self-defense. This Note offers an initial large step in implementing such solutions.

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244. *Id.* at 2150.

