THE BRUEN PROBLEM: WRITING GUN LAWS THAT CAN WITHSTAND CONSTITUTIONAL CHALLENGE

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ABSTRACT

One of the most pressing public policy issues in the United States is gun regulation. An incredibly polarizing topic, it pits those who prioritize the preservation of their constitutional rights against those who prioritize safeguarding the American youth. Advocates for the latter push for more fervent gun legislation, but as the Supreme Court's decision in New York State Rifle & Pistol Association v. Bruen (2022) *clearly holds, many contemporary gun control laws are not legally robust. It is now more critical than ever to write gun control laws that are both effective and capable of withstanding constitutional scrutiny. But how is this achievable in the post-*Bruen *landscape? Recent legal challenges have exposed ambiguities and pitfalls in the "text, history, and tradition" test, making its application difficult. This paper examines early interpretations of the Second Amendment, the influence of the landmark* Bruen *decision and its lower court predecessors (including* U.S. v. Rahimi*), and proposes solutions to drafting gun control legislation that both protects and considers constitutional precedents.*

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I. Introduction

In the 21st century, gun control legislation has emerged as one of the most critical and contentious policy issues in the United States. Gun ownership is protected by the Second Amendment, and has become just as cultural as it is constitutional. Thus, gun regulation has been scarce in the United States, with the Supreme Court widely leaving its interpretation untouched. But a series of devastating shootings at schools, religious institutions, and entertainment venues has profoundly impacted American communities, leading to widespread calls for more stringent gun regulation. Despite these calls, the path to enacting meaningful legislation has been unduly and frustratingly prolonged, and most efforts to curb the increasing rate of mass shootings have fallen short.[1] Advocates for gun regulation argue that reasonable restrictions to the right to keep and bear arms are consistent with constitutional precedents and are necessary to keep the public safe. Other interest groups such as the National Rifle Association (NRA) steadfastly oppose measures to limit gun access, supporting a broad and absolute interpretation of the Second Amendment.[2] The question of the Second Amendment's scope has been called into

[1] Luke J. Rapa et al., *School shootings in the United States: 1997–2022*, 153 Pediatrics e2023064311 (Apr. 1, 2024).
[2] *About The NRA Foundation*, NRAFoundation (last accessed Jan. 31, 2025) https://www.nrafoundation.org/about-us/.

question largely within the past two decades, as few debates over its explicit meaning existed before the 21st century. Many early interpretations of the amendment were quite narrow or unclear about the implications of an individual right versus a collective gun ownership right. Contemporary gun control legislation has become even more challenging with the *Bruen* precedent, as its legal tests explicitly require historical calls, when little judicial precedent for this issue even exists.

II. Text and History of the Second Amendment

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[3]

The Second Amendment is generally thought of in two clauses: the prefatory clause, which implies the necessity of Militia service or a collective gun ownership right, and the operative clause, which plainly states that the right of the people to possess firearms shall not be infringed by the federal government.[4] Early interpretations of the plain text of the Second Amendment seemed to prioritize the amendment's prefatory clause

[3] U.S. Const. amend. II.
[4] *Second Amendment of the U.S. Constitution*, Justia Law (Accessed Jan. 31, 2025) https://law.justia.com/constitution/us/amendment-02/#:~:text=The%20Second%20Amendment%20is%20naturally,shall%20not%20be%20 infringed".

and avoided the question of the legal weight of the operative clause on its own, only referring to it in passing. By the end of the Reconstruction Era, the Court affirmed the narrow scope of the Bill of Rights in *United States v. Cruikshank* (1876), holding that the right to keep and bear arms existed pre-constitution, and that the amendment only existed to keep Congress from infringing on the right of state assemblies.[5] A decade later, the Court furthered this notion in *Presser v. Illinois* (1886), rendering a state-wide gun control regulation in Illinois constitutional while ruling that Second Amendment protections only fell within the federal scope.[6]

One of the most constitutionally interpretative cases regarding the Second Amendment came in the 20th century with *U.S. v. Miller* (1939).[7] The case called into question the constitutionality of a 1934 law, the National Firearms Act, which regulated the transfer and manufacture of firearms through interstate commerce.[8] The Court unanimously decided that the defendants' modified shotguns had no "reasonable relationship to the preservation or efficiency of a well-regulated militia,"[9] implying that the

[5] United States v. Cruikshank, 92 U.S. 542 (1876).
[6] Presser v. Illinois, 116 U.S. 252, 265 (1886).
[7] United States v. Miller, 307 U.S. 174 (1939).
[8] *Id.*
[9] *Id.*

Second Amendment's prefatory clause is critical in the interpretation of its operative clause.

However, the Court's widely held prefatory clause notion, as demonstrated by *Miller,* began to shift in the late 20th century. The shift ultimately culminated in the Supreme Court's 2008 decision in *District of Columbia v. Heller*.[10] In *Heller*, the Court, for the first time, explicitly recognized the right of a private citizen to possess firearms for self-defense, distinct from the prefatory clause's relation of gun ownership to militia service.[11] The Court also notably held that the right to keep and carry arms was not unlimited.[12] Longstanding legislation involving gun carry in sensitive areas, prohibitions on possession of guns by felons, and qualifications to purchase a weapon were still constitutionally sound.[13] The Court also set up a test to challenge the constitutionality of gun laws, involving a combination of history and means-end scrutiny.[14] Means-end scrutiny allows judges to simultaneously consider the objectives of the government and the means in which it can achieve those goals while minimizing restrictions on individual rights. The Supreme Court furthered

[10] District of Columbia v. Heller, 554 U.S. 570 (2008).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*

this decision in *McDonald v. Chicago,*[15] where the Court incorporated this right and the historical and means-end scrutiny tests to the states through the Fourteenth Amendment. The *Heller* and *McDonald* decisions fundamentally upended existing interpretations of the Second Amendment, paving the way for further challenges to gun regulation and setting the stage for the Court's recent ruling in *New York State Rifle & Pistol Association v. Bruen*.

III. An Overview of Bruen

The landmark 2022 Supreme Court decision in *Bruen* called into question the constitutionality of New York's "Sullivan Laws," which required individuals to obtain a special license to carry a concealed firearm publicly.[16] These licenses were only awarded to an individual if they could prove a "special need" beyond self-defense.[17] The licensing was considered a "may-issue," an issue that is highly discretionary and subjective in nature, with requirements that are up to the interpretation of the practitioner, such as presumed "maturity." This subjectivity, in turn, placed undue discretionary power to the awarding officer.[18] The special need standard

[15] McDonald v. City of Chicago, 561 U.S. 742 (2010).
[16] New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. ___ (2022).
[17] *Id.*
[18] *Id.*

was also unreasonably difficult to meet: a petitioner on behalf of the New York State Rifle and Pistol Association, Robert Nash, cited a string of recent robberies in his neighborhood in an attempt to clear restrictions on his license, to which he was denied.[19] The opinion of the Court, written by Justice Clarence Thomas, a staunch constitutional originalist, held that "shall-issue," or the objective criteria held in 43 states, remained constitutionally aligned.[20] For example, "Shall-issue" jurisdictions contrasted "may-issue" jurisdictions in that the criteria required were distinct and objective, including requirements such as age and certifications. Many legal experts agree that the Sullivan Laws were unconstitutional. R.E. Barnett remarked in his essay "Implementing Bruen" that the case was "easy on originalist grounds."[21] It is widely held that increasing objectivity in gun regulation is both sensible and constitutional, and may ultimately increase the quality of gun laws. But Barnett and other legal critics took issue with the "text, history, and tradition" test that *Bruen* applied.[22] In the *Bruen* ruling, the Court updated its methodology to test the constitutionality of future gun control legislation.[23] Justice Thomas rejected

[19] *Id.*
[20] *Id.*
[21] Randy E. Barnett & Nelson Lund, *Implementing Bruen,* Law & Liberty (Feb. 6, 2023), https://lawliberty.org/implementing-bruen/.
[22] *Id.*
[23] *Bruen*, 597 U.S. ___.

the two-part standard established by *Heller*, instead asserting that historical precedent should be the sole consideration, not means-end scrutiny.[24] By doing so, judges were not to consider governmental or public interest objectives, but instead, solely historical statutes. As such, in demanding a well-aligned historical precedent, the decision creates a unique challenge to gun legislation: the *Bruen* problem.

IV. The *Bruen* Problem

The "text, history, and tradition" test has presented a unique challenge to gun control legislation. While objectivity may increase the quality of gun laws, a demanded historical precedent will certainly decrease their quantity. Critics of the test outline three central issues with its implementation: a lack of historical gun regulation, lack of a clear timeline pertaining to established precedent, and dissimilarity of American firearm history to modern public interest and technology.

Barnett contends that this requirement forces judges and attorneys to sift through the largely "empty pages" of historical gun regulation.[25] Given how divisive and polarizing the issue of gun regulation is, the Supreme Court has widely avoided interpreting the Second Amendment. A

[24] *Id.*
[25] Barnett & Lund, *supra* note 21.

clear interpretation was only first introduced in 2008 with *Heller*, rendering all cases both new and scarce. In response to this lack of precedent, Judge Irene Berger, a U.S. District Judge of West Virginia, concurred on the obscurity of these issues in her 2022 *U.S. v. Nutter* decision*:* "[*Bruen*] requires original historical research into somewhat obscure statutory and common law authority from the eighteenth century by attorneys with no background or expertise in such research."[26] The test also does not set forth a clear timeline of which historical precedents may apply. This, paired with a general lack of historical precedent, results in obscure, cherry-picked precedents that hinder meaningful, societally beneficial regulations. In his opinion in *United States v. Charles,* U.S. District Judge David Counts described the test as a "regulatory straitjacket" and warned that courts will attempt to draw "absurd" and untimely analogies, due to the distinct cultural and technological differences in American historic and modern society.[27] One such warning issued by Judge Counts remarked on the broader definition of a contemporary felony: if an individual with a felony conviction of selling pigs without a license in Massachusetts was charged with unlawful possession of a firearm, the government would have

[26] United States v. Nutter, No. 2:21-CR-001142, 2022 WL 3718518, at 3 n.6 (S.D. W. Va. Aug. 29, 2022).
[27] United States v. Charles, No. 22-CR-00154, 2022 WL 4913900, at 9–10 (W.D. Tex. Oct. 3, 2022).

to demonstrate a historical precedent akin to removing firearms for someone who illegally sold pigs.[28] Another criticism of the test is that it is inconsistently applicable. Federal judges have noted the unclear methodology for comparing modern regulation to historic regulation, as well as a lack of direction in determining which laws are even relevant.

Beyond the scarcity of precedents and the difficulty in applying them, it is also critical to acknowledge the lack of similarity between society when these precedents occurred versus modern day. Between the 18th and 19th century and present day, societal structure has changed, technology has advanced, and guns themselves are entirely different. With the onset of digital commerce, issues like the sale of "ghost guns,"[29] unregulated and therefore untraceable weapons, threaten to undermine gun regulation while also drawing no similarity to a historical analogue. It is difficult to apply a law concerning muskets to the constitutionality of automatic assault weapons. It is even more difficult to apply a law that existed in a homesteading era to a modern, highly-populated urban center.

With all of these issues, the *Bruen* test has faced wide judicial criticism from lower courts, leading the Supreme Court to clarify and

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[28] *Id.*
[29] *What Are Ghost Guns?*, Brady United (last visited Apr. 24, 2025), https://www.bradyunited.org/resources/issues/what-are-ghost-guns.

modify a few of the standards of the test in its *United States v. Rahimi* (2024).[30] Respondent Zachary Rahimi was charged with domestic violence, and as such, subject to a civil protective order that prevented him from possessing firearms.[31] The *Rahimi* case presented a unique issue: what is the extent to which gun ownership restriction was permitted by the *Bruen* test? Respondent Rahimi attempted to use *Bruen* to object to his indictment by citing his Second Amendment rights.[32] He challenged the order, arguing that it was unconstitutional under the "text, history, and tradition" test established by *Bruen*.[33]

The Fifth Circuit originally ruled for Rahimi by applying the "text, history, and tradition" test, as that court could not find a clearly analogous historical precedent to justify the order that prevented Rahimi from possessing firearms.[34] This ruling was incredibly controversial and highlighted a central issue in *Bruen*'s application: historically analogous firearm regulation was exceedingly rare, allowing even common-sense gun laws to be ruled unconstitutional.

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[30] United States v. Rahimi, 61 F. 4th 443 (5th Cir. 2023).
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*

Eventually, Rahimi's case made it to the Supreme Court. After the Court heard arguments, the justices ultimately ruled against Rahimi, and by doing so, they made important clarifications to the *Bruen* test. The Court upheld the civil order issued against Rahimi, emphasizing that *Bruen* does not demand a "historical twin" but instead a "broad historical tradition" to support modern regulations.[35] In Rahimi's case specifically, the Court used 18th and 19th century surety statues and "going armed" laws to call back to a broad historical tradition.[36] Surety statutes were a preventative measure, requiring individuals who were suspected of "future misbehavior" or violence to post a bond in order to be able to publicly carry a firearm. The interpretation of "future misbehavior" was broad: it could include spousal violence, like in Rahimi's case, or previous firearm misuse, among others. "Going armed" laws sought to disarm individuals who participated in affrays, or fighting in public and disturbing the peace. Based on the combination of these historical precedents, the Court reaffirmed that firearm restrictions on individuals who "pose a demonstrable danger to society" were constitutional, loosening the rigid historical approach that *Bruen* established.[37] While *Rahimi* did clarify the "text, history, and

[35] United States v. Rahimi, 602 U.S. 680 (2024).
[36] *Id.*
[37] *Id.*

tradition" test, designing constitutionally sound gun control legislation remains a significant challenge in the post-*Bruen* era. Considering that the majority Americans support reasonable restrictions on firearm ownership,[38] how is it possible for government officials to protect public interest while simultaneously conforming to historical precedent and acting within the bounds of *Bruen*?

V. Writing Gun Legislation Post-*Bruen*

An important regulatory piece from the *Bruen* decision is aligning with "shall-issue" jurisdictions and writing concrete and objective laws. A gun salesman or a police officer should never have the same level of discretion or judicial power that the Sullivan Law's special licenses granted them or be faced with the subjective criteria established by six states' "may-issue" jurisdictions pre-*Bruen*. Regulations for gun sales should concern empirical criteria, such as age, completion of firearm training, and the absence of a criminal background. Outdated background check databases and processes should be modernized and improved to assist with the validity of these objective criteria. By focusing on objective and

[38] Katherine Schaeffer, *Key Facts About Americans and Guns*, Pew Research Center (July 24, 2024), https://www.pewresearch.org/short-reads/2024/07/24/key-facts-about-americans-and-guns/.

measurable requirements, lawmakers can ensure that gun control laws are effective, constitutionally sound, and do not place an undue burden on salesmen or regulators. Objective criteria also lessen the burden of the *Bruen* test, as objective criteria simplify the process of drawing a historical analogue.

The American Academy of Pediatrics suggests one such law that is not yet broadly implemented: a "cool-off" law.[39] Essentially, when an individual wants to purchase a firearm, there is a mandated "cool-off" period between the day of purchase and their eventual permanent possession of the weapon. According to the APP, these waiting periods are an "under-utilized, evidence-based-strategy for reducing death and injuries."[40] These "cool-off" laws not only fall within public interest, but also hold constitutional weight. While not a historical twin, the broad historical tradition of "preventative justice" set by the 19th century surety statutes, which required a suspected individual to post a bond before publicly carrying a weapon, certainly applies to "cool-off" laws.[41]

Historical precedents also apply to banning high-capacity and semi-automatic rifles, or other firearms that are "unusually dangerous" or

[39] *Waiting Periods for Firearms Purchases*, American Academy of Pediatrics (Last visited Feb. 2, 2025), https://www.aap.org/en/advocacy/state-advocacy/waiting-periods-for-firearms-purchases/ .
[40] *Id.*
[41] *Rahimi*, 602 U.S. 680.

dangerous at scale. In the founding era of the United States, lawmakers in many states regulated certain classes of weapons that were seen as "unusually dangerous" or that had no ordinary use in a militia. For example, an 1837 Georgia law banned specific, highly dangerous weapons, such as Bowie knives and horseman's pistols.[42] An 1838 Tennessee law banned both Bowie knives and Arkansas toothpicks, weapons that were considered "unusually dangerous."[43] While these weapons may not be viewed as an unusual danger in the modern age, these laws show a historical trend of restriction for weapons that are contemporarily considered unusually dangerous, such as semi-automatic weapons.

Historical precedent can also be found for minimum age laws, drawing towards the early prefatory clause interpretation and the minimum age requirements to join the militia. Safe storage regulations laws can also be upheld with laws such as an 18th century Massachusetts statute which mandated safe firearm storage and punished careless storage.[44] Requirements for permits or licenses also have historical analogues, as many states have historically banned concealed carry.[45] The surety statutes

[42] Act of Dec. 25, 1837, No. 90, § 1, 1837 Ga. Laws 90.
[43] Act of Jan. 27, 1838, ch. 137, § 1, 1837–1838 Tenn. Pub. Acts 200.
[44] Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts 218.
[45] *Bruen*, 597 U.S. ___.

from the 19th century could also represent a broad historical tradition that would require a form of licensing for gun carry.

In writing gun control legislation post-Bruen, legislators should also carefully consider the historical analogues that the Supreme Court accepted under *Bruen* and *Rahimi*. In *Rahimi*, restrictions on firearm possession for individuals who posed a genuine threat to others–including felons, the mentally ill, or those subject to convictions like Zachary Rahimi's–have wide historical support, such as the "going armed" laws or the surety statues, and are likely to withstand constitutional scrutiny.[46] Laws inhibiting possession based on conduct are legally robust and defensible. Furthermore, as outlined in *Bruen*, the Court also protects and upholds gun control legislation in sensitive places, like schools and government buildings, as these have historical analogues and protect the public interest.

Post-*Bruen* gun legislation must strike a delicate balance: it must be constitutionally sound with respect for historical analogues while remaining effective in protecting public interest by reducing gun violence. Lawmakers must be creative by finding historical analogues and focus on

[46] Andrew Willinger, *Rahimi, Categorical Bans, and Irresponsibility*, Duke Center for Firearms Law Blog (July 3, 2024), https://firearmslaw.duke.edu/2024/07/rahimi-categorical-bans-and-irresponsibility.

objective and empirical criteria for firearm possession. Regulations should attempt to adhere to previously established analogues, such as existing gun-free zones, restrictions by conduct, and preventative measures. By carefully considering the text of the Second Amendment, the history and tradition of U.S. gun control legislation, and the aim to safeguard American youth and citizens, policymakers can seize a solution to the *Bruen* problem and draft protective, constitutionally sound gun regulation.

VI. Conclusion

In face of the increase in large-scale firearm related crimes, gun regulation remains one of the most pressing public policy challenges in modern America. Although the *Bruen* precedent challenges and inhibits pre-existing regulation, abiding by its constraints can potentially increase the quality of regulatory laws. As time passes, the Supreme Court will continue to expand and contract on this relatively new precedent, as they have in *Rahimi,* and account for scenarios in which this interpretation is difficult to apply. As the Court continues to define and contour this precedent in the future, quality legislation will hopefully result, which will allow for the simultaneous protection of constitutional rights as well as the protection of American citizens' lives.