The Business, Entrepreneurship & Tax Law Review

Volume 7 | Issue 1 Article 7

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ABSTRACT

During the gangland-era crime sprees of the 1920s and 1930s, Congress enacted the National Firearms Act in an attempt to make it more difficult to acquire the types of weapons favored by gangsters by imposing an extreme tax on these weapons. The draconian rules governing the purchase of these firearms are still in place today, but, with the Supreme Court's recent ruling in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, the National Firearms Act may soon fall to challenges presented by Second Amendment activists. In *Bruen*, the Court ruled that, when the plain text of the Second Amendment protects a citizen's conduct, if the government wants to burden that conduct, it must first show historical precedent for the gun control measure in both purpose and method. This article argues that the NFA will likely not survive a challenge if it is put to the test under the *Bruen* standard of review. However, minor changes to its enforcement may be enough to rehabilitate the National Firearms Act should it be found to be unconstitutional.

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I. INTRODUCTION

The Second Amendment reads, "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."[1] To the chagrin of many gun rights activists, the Supreme Court has, in the past, been reticent to issue many decisions regarding the limits of this seemingly straightforward amendment.[2] Prior to the *Bruen* decision in 2022, the last major decision issued by the Court was handed down in 2008 with a clarifying decision in 2010.[3] However, the *Bruen* decision, which altered the prevailing standard for analyzing Second Amendment claims, has motivated supporters of less restrictive gun control measures to present new challenges to gun control laws, even when the pertinent legal questions in these challenges have already been answered.[4] New lawsuits have already arisen challenging the ability of the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") to regulate firearm parts manufacturers[5] as well as various other attacks on gun control measures including magazine capacity bans and assault weapon bans[6].

One case in particular presents an intriguing legal question. In January of 2022, the ATF raided the home of Matt Hoover, the star of the CRS Firearms YouTube Channel, after he posted a video to his channel discussing a metal "auto keycard" that he owned.[7] The key card in question was etched with outlines of a necessary component of an automatic weapon, a weapon that is regulated by the National Firearms Act of 1934 ("NFA").[8] The ATF arrested Hoover and charged him with illegal possession of a "machine gun."[9] Hoover's defense attorneys are arguing in part that the NFA, the act which gives the ATF the authority to promulgate many gun regulations and enforce them, is unconstitutional under *Bruen*.[10] While Hoover's attorneys have repeatedly stated that their only goal is the defense of their client, they seek a dismissal of the case which would cause the NFA to be ruled unconstitutional.[11]

The central question of this article is the constitutionality of the NFA under the *Bruen* decision. Part II of this article will discuss the history and function of the NFA, the restrictions it imposes on gun ownership and various other acts which

1. U.S. CONST. amend. II.
2. Ariane de Vogue & Devan Cole, *Supreme Court Agrees to Take Up Major Second Amendment* Case, CNN (Apr. 26, 2021, 11:21 AM), https://www.cnn.com/2021/04/26/politics/supreme-court-second-amendment-case/index.html.
3. *Id.*
4. Amelia Thomson-Deveaux, *What the Supreme Court's Gun Ruling Means for Gun* Control, FIVE THIRTY EIGHT (June 23, 2022, 1:20 PM), https://fivethirtyeight.com/features/what-the-supreme-courts-gun-ruling-means-for-gun-control.
5. Eric Schmitt, *Missouri Attorney General Schmitt Sues Biden Administration Over Unconstitutional Attempt to Regulate Firearm Parts,* ATTY. GEN. OFFICE, (July 27, 2022, 4:44 PM), *https*://ago.mo.gov/home/news/2022/07/27/missouri-attorney-general-schmitt-sues-biden-administration-over-unconstitutional-attempt-to-regulate-firearm-parts.
6. *See*: *Current Litigation,* NRA (May 13, 2021), https://www.nraila.org/legal-legislation/current-litigation. *See also*, *Representative Litigation*, 2ND AMEND. L. CTR. (last visited Nov. 17, 2022), https://www.2alc.org/representative-litigation.
7. William Lawson, *Is the NFA Unconstitutional?*, THE MAGLIFE BLOG (July 14, 2022), https://gunmagwarehouse.com/blog/is-the-nfa-unconstitutional.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

have modified it. Part III of this article will discuss the standard of review of gun control laws imposed under *Bruen*. Part IV of this article will discuss whether or not the NFA is likely to pass said review and will discuss possible ways to rehabilitate the NFA should it be found unconstitutional in the future.

II. BACKGROUND

In 1934, Congress, purportedly exercising its authority to levy taxes, enacted the NFA to curtail the gangland crimes of the era.[12] The NFA imposed a 200 dollar tax on the making and transfer of certain weapons and firearm "mufflers",[13] a price that was well over 10% of the average annual household income at the time.[14] By imposing such a severe tax, Congress hoped to "discourage or eliminate" transactions in these firearms.[15]

Multiple weapons are restricted by the NFA. Under the NFA, "rifle" is defined as a rifled bored weapon designed to be fired from the shoulder, capable of firing a single projectile with each pull of the trigger[16], and "shotgun" is defined as a smoothbore weapon meant to be fired from the shoulder capable of firing either a single or multiple projectiles (ball shot) with each pull of the trigger.[17] "Any other weapon" refers to "Any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive."[18] "Destructive device" refers to explosives, incendiaries, or poison gases and the means for employing them.[19] "Machinegun" is defined as a weapon that can shoot more than one shot by a single function of the trigger.[20] Finally, a silencer is defined as any device or part of a device that silences, muffles, or diminishes the report of a firearm.[21]

The NFA defines "firearm" in the following manner:

> The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined

12. *National Firearms Act*, ATF, *https://www.atf.gov/rules-and-regulations/national-firearms-act* (last visited Nov. 17, 2022).
13. *Id.*
14. Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization and the Second Amendment*, 46 CUMB. L. REV. 33, 50 (2015) ("average annual family income in this period was $1,524.").
15. ATF, *supra* note 12.
16. 26 U.S.C. § 5845.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. 18 U.S.C. § 921.

> in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device.[22]

The firearm described in (1) and (2) above is known as a short-barreled shotgun ("SBS").[23] The firearm described in (3) and (4) above is known as a short-barreled rifle ("SBR"). [24]

While there are specific processes one must follow when making firearms, purchasing firearms, or importing firearms subject to the NFA; for brevity's sake, the scope of this paper will focus only on the *purchase* of SBRs, SBSs, Machine Guns, and Silencers. Today, if an individual wishes to purchase one of these restricted firearms, he must first fill out a Form 4-Application for Tax Paid Transfer and Registration of Firearm (ATF Form 5320.4) commonly referred to as a "Form 4".[25] Typically, the buyer will purchase the firearm but will not take possession of the item until the Form 4 is approved, which can typically take up to a year.[26] When applying for a tax-paid transfer, the applicant must pay 200 dollars (but only five dollars when applying for the transfer of "any other weapon").[27] Along with the submission of the Form 4, the prospective buyer must also submit a two-inch by two-inch photograph of their head clearly showing their facial features as well as two completed copies of an FBI form FD-258 (Fingerprint Card).[28] A completed copy of the Form 4 must be forwarded to the "chief law enforcement officer" in the locality.[29]

If the application is approved, the Director of the ATF will affix and cancel the NFA stamp and return the original Form 4 with the stamp attached to the transferor (usually a local gun shop).[30] At that point, the original applicant, the transferee, may take possession of the firearm.[31] The transferee must keep the approved Form 4 with the firearm and present the form to any ATF officer on request.[32] Should the application be denied, the application will be returned to the applicant along with the remittance of the paid tax.[33]

After the NFA, Congress enacted the Federal Firearms Act ("FFA"), "the first federal law to regulate the interstate commerce in ordinary firearms (rifles, shotguns, and handguns)."[34] The FFA served to lay the foundation for government control over firearms commerce and would later be superseded by the much more expansive Gun Control Act of 1968.[35]

The Gun Control Act of 1968 was passed in response to multiple assassinations including the assassinations of Attorney General Robert Kennedy; Martin Luther

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22. 26 U.S.C. § 5845.
23. 18 U.S.C. § 921.
24. *Id.*
25. Brandon Maddox, *ATF Form 4: Understanding NFA Transfers,* SILENCER CENT. (Aug. 10, 2022), *https*://www.silencercentral.com/blog/atf-form-4-understanding-nfa-transfers.
26. *Id.*
27. *Id.*
28. 27 CFR § 479.85 (2022).
29. § 479.84.
30. § 479.86.
31. *Id.*
32. *Id.*
33. *Id.*
34. NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 356 (Vicki Been et al. eds., 2012).
35. *Id.*

King, Jr.; and President John F. Kennedy.[36] It imposed more stringent record-keeping requirements on gun dealers, banned all firearm possession by felons, and expanded the NFA by adding the AOW category to the definition of "firearm" regulated by the NFA[37] as well as the "destructive device" category.[38]

III. THE *HELLER* DECISION AND THE *BRUEN* STANDARD OF REVIEW.

A. Early Challenges to the NFA

There were two early challenges to the NFA, only one of which involved the Second Amendment. *Sonzinsky v. United States* challenged the ability of Congress to use its tax power as a means to make an activity criminal, and in *United States v. Miller* the federal government appealed a lower court's decision that the NFA infringed the Second Amendment.

In *Sonzinsky v. United States,* the petitioner, a firearms dealer, was charged and convicted of dealing in firearms regulated by the NFA without paying the annual 200-dollar tax levied on dealers in such arms by the NFA.[39] The petitioner argued that the tax imposed by the NFA, "Is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states because it is not granted to the national government."[40] The Court reasoned that, since every tax is in some measure regulatory in that every tax represents an "economic impediment to the activity taxed," it is no less a tax simply because it has a regulatory effect.[41] Thus, the Court held that, even if the purpose of the NFA was to restrict the sale of "firearms" regulated by the NFA, the tax imposed by the NFA was, on its face, a tax, and it was not the purview of the court to try to parse out the motives "which may move Congress to exercise a power constitutionally conferred upon it."[42]

In *United States v. Miller*, Jack Miller and Frank Layton were charged with the transportation in interstate commerce of an SBS without having paid the tax required by the NFA.[43] The two demurred, claiming the NFA "is not a revenue measure but an attempt to usurp police power reserved to the States, and is therefore unconstitutional."[44] The demur also claimed that the NFA infringed upon the Second Amendment.[45] The District Court held the NFA did violate the Second Amendment, sustained the demur, and quashed the indictment.[46] The US government appealed.[47] Citing *Sonzinsky*, the Court ruled that the first argument of the demur, that the NFA "[u]urps police power reserved to the states" was plainly incorrect.[48] As to

36. *Gun Control Act of 1968*, ATF, https://www.atf.gov/rules-and-regulations/gun-control-act (last visited Nov. 17, 2022).
37. JOHNSON ET AL., *supra* note 34, at 428–29.
38. Gun Controal Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968).
39. Sonzinsky v. United States, 300 U.S. 506, 511 (1937).
40. *Id.* at 512.
41. *Id.* at 513.
42. *Id.* at 513–14.
43. United States v. Miller, 307 U.S. 174, 175 (1939).
44. *Id.* at 176.
45. *Id.*
46. *Id.* at 177.
47. *Id.*
48. *Id.* at 177–78.

the second argument, the Court held that the Second Amendment only applies to the possession and use of those firearms necessary for the "preservation or efficiency of a well-regulated militia."[49] The Court's analysis in *Miller*, that the Second Amendment did not guarantee an individual right to bear arms but a right to bear arms as part of a militia, would stand for nearly 70 years.

B. The Supreme Court Affirms a Personal Right to Keep Arms

In 2008, the Supreme Court affirmed an individual right to bear arms and clarified its nearly seven decades old decision in *Miller*, in *District of Columbia v. Heller*. The respondent, a District of Columbia special police officer applied for a registration certificate to keep a handgun in his home; the District of Columbia refused to issue him one.[50] The District of Columbia at the time prohibited handguns entirely and required any registered long guns to be stored with a trigger lock or disassembled.[51] After being denied permission to keep a handgun in his house, the respondent filed a lawsuit seeking to enjoin the city from enforcing the ban on handguns and the storage requirement, arguing that the ban was an infringement on his Second Amendment rights.[52] The District Court for the District of Columbia dismissed his complaint, and the respondent appealed.[53] After the Court of Appeals reversed, the City appealed to the Supreme Court and the Court granted Certiorari.[54]

Justice Scalia, writing for the Court, explained that in the text of the Second Amendment, the right to "keep and bear arms" was given to "the people".[55] As "the militia" was comprised of only a subset of "the people", the Second Amendment could not refer only to the right to bear arms as part of a militia when these rights were given to all of "the people".[56] Having established that the Second Amendment right is exercised individually by all Americans, the Court's analysis turned to the phrase, "to keep and bear arms."[57] "The most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons'."[58] Putting together these two phrases, the Court held that the Second Amendment guarantees an individual liberty to have firearms.[59] The Court additionally held that this right was not limited to weapons that were in use during the 18th century, but that it extends "prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[60]

Furthermore, the Court held "the inherent right of self-defense has been central to the Second Amendment right."[61] In dicta, the Court described why a complete and total ban on handguns would violate the Second Amendment, reasoning:

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49. *Id.* at 178.
50. District of Columbia v. Heller, 554 U.S. 570, 575 (2008).
51. *Id.* at 574–75.
52. *Id.* at 575–76.
53. *Id.* at 576.
54. *Id.*
55. *Id.* at 581.
56. *Id.* at 580–81.
57. *Id.* at 581.
58. *Id.* at 582.
59. *Id.* at 592.
60. *Id.* at 582.
61. *Id.* at 628.

> "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."[62]

The Court declined to expand on what makes a handgun easier to store, harder to wrestle away or what makes a handgun easier to use in self-defense situations; however, given that the Court compared handguns to "long guns" (rifles and shotguns), it is reasonable to assume the Court was referring to the lighter and shorter nature of handguns as compared to "long guns". Whatever the case, the Court stated that a ban on handguns "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose," and as such does not pass Constitutional scrutiny.[63]

The Court also held that the Second Amendment is not unlimited in that it did not confer an individual right to "the people" to have whatever sort of weapon they wanted for whatever purpose they wanted.[64] While the Court cautioned that it did not intend its opinion in *Heller* to represent an exhaustive analysis of the Second Amendment, it expressly stated that the opinion *did not* invalidate "laws imposing conditions and qualifications on the commercial sale of arms."[65] The Court also expressly addressed *Miller's* interpretation of the Second Amendment, affirming that only the sorts of weapons "in common use at the time" are protected by the Second Amendment and that there is a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[66] The Court further explained the meaning of the *Miller* decision stating that under *Miller*, the Second Amendment does not protect those weapons "[n]t typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[67] The Court failed to discuss why it chose to single out SBSs as weapons not typically possessed by law-abiding citizens for lawful purposes as opposed to SBRs or AOWs.

The opinion in *Heller* ends by stating that, because the case was the "Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."[68] The Court further stated that the exceptions that it discussed to the personal right to keep and bear arms were not set in stone and were open to debate should these exceptions become the subject of a future dispute.[69]

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62. *Id.* at 629.
63. *Id.* at 628–29.
64. *Id.* at 626.
65. *Id.* at 626–27.
66. *Id.* at 627.
67. *Id.* at 625.
68. *Id.* at 635.
69. *Id.*

Within 48 hours of the Supreme Court's decision in *Heller*, Alan Gura, the plaintiff's attorney in the *Heller* case brought suit on behalf of Otis McDonald and other parties challenging the City of Chicago's complete ban on handguns. [70] While the *Heller* case dealt with whether the Second Amendment prohibited federal infringement on the right to bear arms, it did not apply its reasoning to whether or not the Second Amendment protections also applied to the states.[71]

In *McDonald v. City of Chicago*, Otis McDonald, a community activist in his late seventies who had recently been threatened by local drug dealers for his community activism, sought to purchase and keep a handgun in his home for self-defense.[72] The City of Chicago municipal code maintained that "[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm," and then prohibited the registration of most handguns creating a statutory scheme that the court held to be, in effect, a ban on handgun possession, "by almost all private citizens who reside in the city."[73] Petitioners argued that the Chicago handgun ban violated their Second Amendment rights for two reasons: first, the right to keep and bear arms is covered under the Fourteenth Amendment's Privileges or Immunities Clause; and second, that the Fourteenth Amendment's Due Process Clause "incorporates" the right to keep and bear arms.[74]

While the Court held the Second Amendment right was *not* covered under the Privileges or Immunities Clause,[75] the Court held the 14th Amendment incorporated the right to keep and bear arms and that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[76] The Court ultimately held that the Second Amendment protected the personal right to keep and bear arms from both federal and state infringement.[77]

In addition to extending the Second Amendment protection of the right to keep and bear arms to the state level, the decision in *McDonald* also seemed to reject the argument that Second Amendment rights differ from other amendments in the Bill of Rights in that the rights codified in the Second Amendment have intense implications regarding public safety.[78] The Court reasoned that every constitutional right which "imposes restrictions on law enforcement and on the prosecution of crimes" could have a potential impact on public safety by potentially setting free or making it harder to capture a potentially violent criminal.[79] While the Court did not explicitly state that public policy arguments could not be used to prohibit a provision in the Bill of Rights from binding the States, the Court rejected the argument on the grounds the respondents failed to cite any previous case which held that public policy considerations would justify a State's infringement on a Constitutional right.[80]

Heller and *McDonald* established the Second Amendment right to keep and bear arms is a right personally held by each American and protected by both state

70. JOHNSON ET AL., *supra* note 34, at 639.
71. *Id.*
72. McDonald v. City of Chi., 561 U.S. 742, 751 (2010).
73. *Id.* at 750.
74. *Id.* at 753.
75. *Id.* at 758.
76. *Id.* at 778.
77. *Id.* at 749–50.
78. *Id.* at 782.
79. *Id.* at 783.
80. *Id.*

and federal government. However, both cases held that the Second Amendment was not absolute and that state and federal governments could restrict firearm ownership, but declined to say how.

C. The Bruen Standard of Review

As part of its blockbuster 2021-2022 term, the Supreme Court dealt a blow to gun control regulations across the nation. In *N.Y. State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court reaffirmed its *Heller* and *McDonald* holdings that the Second Amendment protected a personal right to keep and bear arms from both state and federal infringement. In both of those cases, the Court held that the Second Amendment was not absolute and that Second Amendment rights may still be regulated in keeping with the Constitution. In the *Bruen* case, the Supreme Court established a standard of review by which lower courts may analyze whether or not individual gun control efforts infringe upon the rights protected by the Second Amendment.

New York State had been regulating the public carrying of handguns since at least 1905[81], and prior to *Bruen*, New York was one of the six states in the country with "May Issue" concealed carry permit laws.[82] A "May Issue" jurisdiction or state is one in which the licensing authority that issues concealed-carry permits may, "deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license."[83] New York State's licensing procedure required the following:

> "A license applicant who wants to possess a firearm at home (or in his place of business) must convince a "licensing officer"—usually a judge or law enforcement officer—that, among other things, he is of good moral character, has no history of crime or mental illness, and that "no good cause exists for the denial of the license."…If he wants to carry a firearm outside his home or place of business for self-defense, the applicant must obtain an unrestricted license to "have and carry" a concealed "pistol or revolver."…To secure that license, the applicant must prove that "proper cause exists" to issue it...If an applicant cannot make that showing, he can receive only a "restricted" license for public carry, which allows him to carry a firearm for a limited purpose, such as hunting, target shooting, or employment."[84]

The Court noted that there was no statute to define "proper cause", but case law had established a demanding standard by which applications for permits would be measured: Not only would working or living in a high crime area not be enough to show a "proper cause", but applicants would need to show that their need to carry a weapon in self-defense was "distinguishable" from the rest of the community.[85]

The petitioners, Brandon Koch and Robert Nash, were members of the New York State Rifle & Pistol Association, a public interest group dedicated to

81. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).
82. *Id.* at 2123–24.
83. *Id.* at 2124.
84. *Id.* at 2122–23.
85. *Id.* at 2123.

defending the Second Amendment rights of New York State citizens.[86] Both Koch and Nash applied for and were denied unrestricted licenses and subsequently sued the licensing authorities who denied their applications alleging that their Second Amendment Rights had been infringed.[87] After the lower courts had dismissed the petitioners' complaint, the Supreme Court granted certiorari.[88]

In the years since the *Heller* and *McDonald* decisions, Courts of Appeals adopted a two-step test by which the state or federal government could demonstrate that its regulations did not infringe upon an individual's Second Amendment Rights.[89] In the first step, the government would be required to "[j]stify its regulation by 'establish[ing] that the challenged law regulates activity falling outside the scope of the right [to keep and bear arms] as originally understood.'"[90] In the second step, a court would be required to analyze whether or not and to what degree the law in question burdens a "core" right protected by the Second Amendment.[91] If a "core" right was burdened, a court would apply "strict scrutiny" to determine whether or not the Government could prove that the law in question was, "narrowly tailored to achieve a compelling governmental interest."[92] If a "core" Second Amendment right was not burdened, the government would be required to show that the law in question was "substantially related to the achievement of an important governmental interest,"[93] (*i.e.* an intermediate scrutiny standard of review).

The Supreme Court rejected this two-step approach holding that, while the first step was "broadly consistent with *Heller*", the second step, a "means-end scrutiny", was unconstitutional.[94] Instead, the Court held, "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."[95] In a rare moment of resounding clarity, the Court gave us an unambiguous standard for applying the Second Amendment:

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

While the standard is straightforward, the Court acknowledged that a historical inquiry as to whether or not a challenged law is analogous to another regulation

86. *Id.* at 2124–25.
87. *Id.* at 2125.
88. *Id.*
89. *Id.*
90. *Id.* at 2126.
91. *Id.*
92. *Id.* (quoting Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017)).
93. *Id.* at 2126–27 (quoting Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 96 (2d Cir. 2012)).
94. *Id.* at 2127.
95. *Id.*
96. *Id.* at 2129–30. (The "unqualified command" here referenced is cited from Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 n.10, 81 S. Ct. 997, 1006 (1961). The "unqualified command" of the Second Amendment is that, "The right of the people to keep and bear arms shall not be infringed.").

enacted by previous generations could prove challenging.[97] The court opined in dicta that a court should start its analysis by asking whether or not a "challenged regulation addresses a general societal problem that has persisted since the 18th century" and whether or not a previous generation had enacted a law or regulation to deal with the societal problem that addresses the problem by similar means to that of the challenged law.[98]

The Court also acknowledged that changes in society and advances in technology would present issues that were inconceivable to 18th Century Americans.[99] The Court reasoned that in the future, courts could infer similarities between historical firearms regulations and modern regulations through analogous reasoning.[100] The Court expressly stated that it was not attempting to explain every manner in which regulations could be similar, but it did state that the *Heller* and *McDonald* opinions provided two metrics by which historical and modern regulations could be shown to be similar: (1) purpose and method ("how and why the regulations burden a law-abiding citizen's right to armed self-defense,")[101] and (2) history (specifically noting that historical evidence of regulations enacted before and right after the ratification of the Constitution was much more useful in evaluating whether a challenged rule was constitutional).[102]

The respondents presented a number of historical regulations potentially analogous to the proper-cause requirement. These regulations largely fell into the broad categories of pre-ratification laws and regulations, and post-ratification restrictions in the form of common-law offenses, statutory prohibitions, and "surety" statutes.[103] After a lengthy analysis of the respondents' historical evidence, the Court held that the respondent failed to meet their burden of identifying a historical regulation analogous to New York's proper-cause requirement and that the proper-cause requirement was unconstitutional.[104]

Justice Alito, in a concurring opinion, joined the opinion of the Court "in full" but wrote his concurrence in order to provide a "succinct summary of what [the Court] actually held."[105] Justice Alito explained that the decision in *Bruen* settled nothing as to the requirements for purchasing a firearm or the kinds of firearms that may be possessed, nor did the majority decision "disturb anything that [the Court] said in *Heller* or [*McDonald*] about restrictions that may be imposed on the possession or carrying of guns."[106]

IV. THE CONSTITUTIONALITY OF THE NFA

Under *Heller,* the Second Amendment protects a personal right to keep and bear arms that are "in common use at the time" for lawful purposes but not "dangerous and unusual weapons."[107] "Under the *Bruen* Standard, unless the

97. *Id*. at 2131.
98. *Id.*
99. *Id.* at 2132.
100. *Id.*
101. *Id.* at 2136.
102. *Id.* at 2137.
103. *Id.* at 2145.
104. *Id.* at 2138.
105. *Id.* at 2156–57.
106. *Id.* at 2157.
107. District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

government can show evidence of an analogous historical law regulating the personal right of the people to keep and bear arms (in common use at the time for lawful purposes) in a similar manner for a similar reason to a challenged law, the challenged law is unconstitutional and the regulated conduct is considered protected by the Second Amendment.[108] Before analyzing whether or not the NFA runs afoul of the *Bruen* Standard, we must ask what is the difference between a weapon that is "dangerous and unusual" and one that is "in common use at the time" by law-abiding citizens for legal purposes. If the NFA regulates weapons that are "dangerous and unusual" then the NFA does not regulate conduct protected by the Second Amendment and could not be called unconstitutional. If the NFA regulates weapons that are "in common use at the time" for lawful purposes, then, unless there is an analogous historical law similarly regulating Second Amendment rights for a similar reason, it is likely the Court would rule the NFA unconstitutional.

A. Are NFA firearms "dangerous and unusual" or "in common use" for lawful purposes?

The *Heller* decision's reading of *Miller* outlined the boundaries of the Second Amendment right to keep and bear arms by stating that the Second Amendment only protected the right to keep and bear the types of arms in common use at the time *for lawful purposes like self-defense* but not the kinds of weapons "not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[109] The court fails to explain why the SBS was singled out as an example of a weapon not typically used by law-abiding citizens for lawful purposes, but we can infer from other passages what it would take for the Court to view a weapon as being in common use for lawful purposes. The Court views self-defense as "the core lawful purpose" to keep a firearm. [110] If a weapon is commonly used for this or another lawful purpose, the Court would likely view the right to keep and bear that weapon as protected by the Second Amendment. The *Heller* decision does not adequately explain whether the phrase "in common use" refers to how many people bear a particular weapon or if, when the weapon is used, it is most often used for a specific purpose. I will address both possible readings of the passage.

If "in common use" refers to how prolific a weapon is, given the Court's decree that bearing handguns for self-defense is constitutionally protected,[111] it is worth asking how many Americans own a handgun as this may give us an idea of how common a weapon must be before bearing such a weapon is protected by the constitution. The issue with analysis in this area is that there is no definitive count of how many firearms Americans own, nor is there a record of what type of firearm Americans own.[112] This is due to the Firearm Owners Protection Act. In 1986, the legislature passed the Firearm Owners Protection Act ("FOPA") which, among

108. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129–30 (2022).
109. *Heller*, 554 U.S. at 624–25.
110. *Id.* at 630.
111. *Id.* at 629.
112. Alex Yablon, *Just How Many Guns Do Americans Own? (And Why Do Estimates Vary So Widely?)*, THE TRACE, (June 21, 2018), https://www.thetrace.org/newsletter/how-many-guns-do-americans-own.

other things, forbade the establishment of a federal firearm registry.[113] Because of this, any count of weapons in the hands of American civilians is *only an estimate*.

One such estimate, the 2021 National Firearms Survey, discusses the difficulty in gathering data regarding firearm ownership and usage.[114] Regardless of the difficulty in estimating such data points, the report, purported to be the most authoritative source on gun ownership,[115] provides that over 81.4 million Americans own a firearm, with handguns being the most commonly owned.[116] Of those Americans that own a firearm, 82.7% own a handgun, 68.8% own a rifle with 30.2% owning an AR-15 or similar rifle, and 58.4% own a shotgun.[117] Handguns are the most often used firearm employed in self-defense (used in 65% of self-defense incidents) followed by shotguns (21%) and rifles (13%),[118] and firearms are used approximately 1.67 million times a year for self-defense purposes.[119] The report does not make a distinction between shotguns and SBSs nor between rifles and SBRs.

This report seems to concur with the Court's analysis in *Heller* that Americans overwhelmingly choose a handgun for self-defense purposes. Perhaps this is due to almost 75% of self-defense uses of firearms occurring outside of the home where there is limited access to long arms, but a handgun can be concealed on one's body.[120] There are many variables that the report does not cover which would help determine how Americans choose to exercise their Second Amendment rights to defend themselves with firearms. Of those instances where firearms are used in self-defense, what type of firearm was used most often when the incident took place outside of the home? What type of firearm was used most often when the incident took place inside of the home (where, as the Court in *Heller* stated, "the need for defense of self, family, and property is most acute.")?[121] What was the purpose for the purchase of each firearm each gun owner owns?

According to the numbers in the 2021 National Firearms Survey, each year, there are approximately 1,252,000 self-defense uses of firearms outside of the home and 417,500 inside the home.[122] Handguns were used approximately 1,085,000 times across both types of self-defense incidents, with shotguns being used approximately 350,000 times and rifles being used approximately 217,000 times.[123] If handguns are used far more often outside of the home for self-defense, we would conclude that a large percent of the 1,085,000 handgun self-defense instances occur outside of the home, making the use of rifles and shotguns for self-defense inside the home far more common than originally thought.[124] These numbers seem to suggest that rifles and shotguns are used disproportionately more often in self-defense inside the home whereas handguns are the clear favorite outside of the home, though the survey does not make this conclusion.

113. JOHNSON ET AL., *supra* note 34, at 437–38. *See also* Yablon, *supra* note 112.
114. William English, *2021 National Firearms Survey,* GEO. UNIV. MCDONOUGH SCH. OF BUS. RSCH. PAPER SERIES, July 2021, at 2.
115. *Id.* at 4.
116. *Id.* at 1.
117. *Id.* at 17 (analyzing numbers that do not add up to 100% as these numbers account for Americans who own more than one type of weapon).
118. *Id.* at 9.
119. *Id.* at 1.
120. *Id.* at 9.
121. District of Columbia v. Heller, 554 U.S. 570, 628 (2008).
122. English, *supra* note 114, at 9.
123. *Id.*
124. *Id.*

While the 2021 National Firearms Survey does not shed any specific light on the ownership and use of firearms regulated by the NFA, the ATF publishes yearly data regarding how many NFA items are registered in each state. According to the 2011 Firearms Commerce in the United States report by the ATF, in December of 2010, there were over 456,000 machine guns, 285,000 silencers, 74,000 SBRs, and 116,000 SBSs registered to law-abiding citizens across the United States.[125] In 2008, 26,917 Form 4s were processed for the purchase of NFA firearms. [126] These numbers have risen substantially since the days of *Heller*. In 2020, 245,806 Form 4s were processed, representing an increase of almost 1000%.[127] Across the United States, the number of Machine Guns increased to 741,000, silencers increased to 2,664,774, SBRs increased to 532,725, and SBSs increased to 162,267.[128] Each category of NFA item saw an increase from the time of *Heller* to one year prior to *Bruen* with silencers and SBRs each increasing nearly 1000% in a little over a decade.

The handgun may be the preferred weapon of law-abiding citizens seeking to defend themselves, but it is also the preferred weapon of criminals. According to the FBI, of the 14, 224 murders committed in the United States in 2008, the same year as the *Heller* decision, 9,528 were committed with firearms.[129] Of these murders committed with firearms, 6,800 were committed with handguns compared to 380 with rifles, 442 with shotguns, and 81 with "other guns" (1,825 were committed with firearms, but the type of firearm is unknown.).[130] In 2019, 10, 258 murders were committed in the United States with firearms, of which 6,368 were committed with handguns, 364 with rifles, 200 with shotguns, and 45 with "other guns" (3,281 murders were committed with unknown firearms).[131] Again, in this data set there is no distinction between rifles, shotguns, and their shorter counterparts regulated by the NFA.

What about the use of silencers and machine guns in crime? A study conducted on the criminal use of firearms silencers found that their use in crime is exceedingly low.[132] Between 1995 and 2005, there were approximately 153 total cases where a silencer was used criminally; this includes simply possessing the silencer without having first paid the required tax per the NFA (a felony) and not using it to commit violence.[133] In 20% of the cases, possession of the silencer was the only charge,[134] and in 92% of cases, the silencer was not actively used in any way but was simply found in possession of the defendant.[135] The criminal use of machine guns is so low that there are only four known instances since 1934 where an automatic weapon

125. ATF, FIREARMS COM. IN THE U.S., 24 (2011).
126. *Id.* at 22.
127. ATF, FIREARMS COM. IN THE U.S.: ANN. STAT. UPDATE 2021, 13 (2021).
128. *Id.* at 16.
129. FBI, EXPANDED HOMICIDE DATA TABLE 8: MURDER VICTIMS BY WEAPON, 2008–2012 (2012), https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2008-2012.xls.
130. *Id.*
131. FBI, EXPANDED HOMICIDE DATA TABLE 8: MURDER VICTIMS BY WEAPON, 2015–2019 (2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-8.xls.
132. Paul A. Clark, *Criminal Use of Firearm Silencers,* W. CRIMINOLOGY REV., Oct. 2007 at 44, 54.
133. *Id.* at 51.
134. *Id.*
135. *Id.* at 52.

was used in a crime where someone was killed.[136] This is despite the fact that the sale of machine guns manufactured after 1986 only became illegal with the passage of FOPA,[137] and, as previously noted, there are at least 741,000 legally owned machine guns in the United States.

What does all of this data mean? In 2008, when the Court in *Heller* stated that the handgun was "the most popular weapon chosen by Americans for self-defense in the home,"[138] it was also the most popular firearm chosen by criminals. Clearly, the Court did not view the handgun as "dangerous and unusual" despite being the preferred tool of murders, so what qualifies a weapon as "dangerous and unusual"? It appears from the language in *Heller* that "dangerous and unusual" simply means "not in common use for lawful purposes".[139] This implies that a weapon's potential use by criminals does not factor into the analysis a court must conduct when evaluating whether or not a firearm is in common use for lawful purposes. This would appear to be consistent with the *Bruen* Court's rejection of a "means-end" analysis. The inverse may also be true. If a type of firearm is in "common use for lawful purposes", the Court may find that that type of firearm is not "dangerous and unusual".

Are NFA firearms in common use for lawful purposes? First, we must ask what lawful purposes an NFA firearm may be used for. Chiefly, for self-defense. The Court in *Heller* discusses why a citizen may choose a certain weapon for self-defense; ease of access, weapon retention, ease of use for those with meager upper body strength, and the ability to operate the firearm with only one hand, would all be valid reasons to choose a weapon with those characteristics for self-defense.[140] As discussed above, the information we have related to gun use in defense of one's home suggests that rifles and shotguns are used in home defense situations in numbers that rival handgun use. Would the Court hold that the use of rifles and shotguns for the defense of one's home is not protected by the constitution? If not, why would the court hold that the use of SBRs and SBSs, which have the defining features of being lighter, shorter, and more maneuverable than their full-size counterparts, is unconstitutional? Bear in mind, SBRs and SBSs are simply shotguns and rifles that are shorter in overall length and/or barrel length. [141] This shorter length and consequently lighter weight would lend these firearms to each of the characteristics the Court said would make for a valid choice of a self-defense weapon.

Where does that leave machine guns and silencers which seem to fit none of the above characteristics? There are many legitimate uses for a silencer that have absolutely no criminal application including hunting, competitive target shooting and other sporting purposes, collecting, and wildlife control applications.[142] A silencer is also especially effective for use in self-defense when paired with subsonic ammunition. The combination of subsonic ammunition and a silencer is far safer to employ in self-defense given that a slower-moving bullet is less likely to over-penetrate a target or a missed round is less likely to go through a wall and injure an

136. Justin Vicory, *Fully Automatic Weapons Used to Shoot Madison County Deputies Called 'Extremely Rare'*, CLARION LEDGER (Sept. 11, 2019, 12:36 PM), https://www.clarionledger.com/story/news/2019/09/11/canton-ms-shooting-fully-automatic-rifles-brad-sullivan-edgar-egbert/2262741001.
137. JOHNSON ET AL., *supra* note 34, at 438.
138. District of Columbia v. Heller, 554 U.S. 570, 629 (2008).
139. *Id.*at 623–25.
140. *Id.* at 629.
141. 18 U.S.C. § 5845.
142. Clark, *supra* note 132, at 47.

innocent 3rd party.[143] While a machine gun is most likely a poor choice for self-defense purposes, given the exceedingly low rate of crime surrounding these weapons as well as the cost-prohibitive nature of such weapons,[144] these weapons are most likely overwhelmingly owned by those who collect firearms or are used for sporting purposes.

All of this is to say that, while there is a gap in information regarding the use of NFA firearms for *any* purpose, the information that *is* available shows that it is highly likely that NFA firearms are overwhelmingly used for lawful purposes, especially compared to handguns. There are a total of 4,161,912 registered Machine Guns, Silencers, SBSs, and SBRs in the United States as of May 2021.[145] American civilians own an estimated 393 million firearms and purchased nearly 40 million firearms in 2020.[146] Clearly, NFA firearms represent only a fraction of all total firearms owned by law-abiding American Citizens but are far less likely to be used to commit a crime than they are to be used for lawful purposes, especially compared to handguns. If "in common use for lawful purposes" refers to how the firearms are commonly used, it is likely that the Court, when specifically considering whether or not the Second Amendment protects the right to keep and bear an NFA firearm, will hold that NFA firearms are protected by the Second Amendment. However, if "in common use for lawful purposes" refers merely to numbers, the likely holding of the Court is less clear. The Court is ambiguous on how exactly this phrase is to be applied and tells us that *Heller* was not meant to be "an exhaustive historical analysis…of the Second Amendment," leaving the door open for further debate.[147] One thing seems clear, the offhand comment in *Heller* referring to SBSs as dangerous and unusual was not meant to be binding and is more likely to be pure dicta than a statement of law given the Court's silence regarding the factors that determine whether a firearm is "in common use for lawful purposes".

B. The Constitutionality of the NFA

If any of the firearms regulated by the NFA are protected under the Second Amendment, then the NFA is in trouble. The purpose of the NFA is to "discourage or eliminate" the sale of certain firearms thereby curtailing organized crime by taxing these firearms.[148] Applying the *Bruen* standard to the NFA, if NFA firearms are held to be "in common use for lawful purposes", they are protected by the Second Amendment. If this is the case, unless the government can show a historical analogous law where certain firearms were subjected to a tax to curtail organized crime by discouraging the sale of said firearm, the portion of the NFA requiring firearm purchasers to pay a $200 tax prior to acquiring these weapons will most likely be held to be unconstitutional. Given that "there is very little historic precedent for

143. *Id.* at 46.
144. Philip Wegmann, *It's Still Legal to Own a Machine Gun (It's Also Extremely Difficult and Especially Expensive,* WASH. EXAM'R (Oct. 2, 2017, 3:53 PM), https://www.washingtonexaminer.com/its-still-legal-to-own-a-machine-gun-its-also-extremely-difficult-and-especially-expensive.
145. ATF, *supra* note 127, at 17.
146. *How Many Guns Are in the US? (Gun Ownership Statistics),* AM. GUN FACTS (Jan. 7, 2022), https://americangunfacts.com/gun-ownership-statistics.
147. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2128 (2022).
148. ATF, *supra* note 12.

using taxation to manage harms associated with gun violence,"[149] it seems unlikely that the federal government would be able to show an analogous historic example of the taxing power of Congress used to combat gun violence.

There are additional complications for the NFA in *Bruen*. In the footnotes of the *Bruen* opinion, the Court states that nothing in the decision "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].'"[150] The Court goes on to state that these regimes pass constitutional muster given that shall-issue regimes and requirements to pass background checks and firearms safety courses under these regimes only seek to ensure those carrying firearms are responsible law-abiding citizens.[151] However, the Court states, "Because any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry."[152]

This footnote seems to directly address the concerns many gun owners have as to the current "licensing scheme" imposed by the ATF. As of January 6, 2023, the average processing time for properly and completely filled out Form 4s is 270 days for eForms and 315 days for paper forms..[153] As discussed above, any purchase of an NFA firearm (other than an AOW which requires a $5 tax) requires a purchaser to pay a $200 tax. It is possible that even if the Court held that the NFA was wholly constitutional as written, the wait time and $200 tax could infringe on a citizen's Second Amendment rights as applied.

C. Rehabilitating the NFA

Should the NFA be found to be unconstitutional, it could be rehabilitated relatively easily if the federal government wishes to save it. First, the $200 tax on the purchase of an NFA firearm could be rescinded. Transfer and Making taxes represented $51,677,000 of taxes in 2020,[154] representing an incredibly small percentage of the United States' overall revenue of $3.4 trillion in 2020.[155] Removing the $200 tax stamp requirement would hardly bankrupt the United States and would easily fix at least one issue with the NFA.

Next, Congress could properly support the ATF in its efforts to process Form 4s. As of October 18, 2022, the ATF was conducting application processing seven days a week, was attempting to move tax-paid applications online, and was trying to reduce the amount of time it took to process applications to purchase NFA firearms.[156] If Congress removes the $200 tax stamp requirement and properly supports the application handling efforts of the ATF, the constitutional issues with the NFA

149. Rosanna Smart, *Firearm and Ammunition Taxes,* RAND (Apr. 15, 2021), https://www.rand.org/research/gun-policy/analysis/essays/firearm-and-ammunition-taxes.html.
150. *Bruen*, 142 S. Ct. at 2138 n.9.
151. *Id.*
152. *Id.*
153. ATF, *Current Processing Times*, https://www.atf.gov/resource-center/current-processing-times (last updated Jan. 6, 2023).
154. ATF, *supra* note 127, at 12.
155. CONG. BUDGET OFF., THE FEDERAL BUDGET IN FISCAL YEAR 2020: AN INFOGRAPHIC, https://www.cbo.gov/publication/57170.
156. ATF, *supra* note 153.

addressed in this article could be solved. If these two changes were made, and the ATF adopted a "shall-approve" stance regarding how it decides to approve applications to purchase an NFA firearm, all that would be left would be constitutional efforts to ensure NFA firearm purchasers were indeed responsible law-abiding citizens.[157] If FOPA is kept in place, these changes, while they will most likely lead to higher numbers of SBSs, SBRs, and Silencers being purchased, will not lead to higher numbers of machine guns being purchased. Remember, FOPA outlawed the manufacture of new machine guns after 1986 and there are fewer than 800,000 registered in the US. If the demand for these firearms increases, the cost will increase as well, making these firearms even more cost prohibitive to own than they are already.

V. CONCLUSION

The Supreme Court intoned in *Bruen*, "The constitutional right to bear arms…is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'"[158] The Court has rejected a means-end analysis that allows a well-meaning government to restrict Constitutional rights based on public policy concerns, holding instead that restrictions on Second Amendment rights must be evaluated according to the history of gun control in this country. Under the Court's holding in *Bruen*, if the NFA's imposition of a tax on certain firearms is challenged, the NFA is likely to fall.

However, the NFA can be rehabilitated by eliminating the onerous tax stamp requirement and excessive wait times for the approval of Form 4s. Additionally, the ATF must institute a shall-issue regime in the approval of applications to transfer NFA firearms. This would restrict the NFA's burden on constitutionally protected behavior to that of constitutionally sound efforts to ensure only those who would otherwise be allowed to purchase these weapons are allowed to purchase them.

157. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2138 n.9 (2022).
158. *Id.* at 2156.