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Selections from The Civil Right to Keep and Bear Arms: Federal and Missouri Perspectives (2023 Edition)

Royce de R. Barondes

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The Civil Right to Keep and Bear Arms: Federal and Missouri Perspectives

“[T]o keep in awe those who are in power”

Aymette v. State, 21 Tenn. 154, 158 (Tenn. 1840)

by

Royce de R. Barondes

(2023 Edition)

Dedication and Acknowledgement (2023 Edition)

This book is dedicated to Joan Barondes, with the hope that she would have found it to be the product of worthy effort; to Charles M. Dale, with whom the author wishes he could have discussed the subject of this book; and to Thomas E. O. Marvin, about whom the following words were written after his passing: “In the history and traditions of New Hampshire he had always been deeply interested, and he had a large collection of the weapons and mementoes of the old wars and of colonial times. Colonel Marvin had been for many years the secretary of the New Hampshire Society of the Sons of the Revolution.” *New Hampshire Necrology: Colonel Thomas E. O. Marvin*, LI THE GRANITE MONTHLY 239, 241 (May 1919) (No. 5).

The author would also like to acknowledge the assistance of Jennifer Bukowsky in developing the author’s perspective on firearms law as applied in litigation, which has substantially influenced his understanding and, hence, this work.

Lastly, preparation of this work required ferreting-out old and otherwise obscure source material. In that endeavor, the author gratefully acknowledges the exquisite assistance of Cindy Shearrer, with the library of the University of Missouri, School of Law.

Some of the work on this volume was completed during a summer where the author’s research was funded by the Law School Foundation.

This work does not purport to represent the views of any person other than the author.

Author’s Note

This work is in the nature of a primer—an introduction to the relevant legal principles—which may provide a useful intermediate point of study before looking at the more comprehensive works referenced above. It is primarily designed to be of assistance to law students who are beginning their introduction to the civil right to bear arms. In preparing a book to fulfill these purposes, it is necessary to focus on larger issues. This results in a publication that does not address detail that may well be relevant in connection with the provision of legal or other professional advice to a client.

The author’s understanding of this subject was primarily formed by reference to two works: Stephen P. Halbrook, *Firearms Law Deskbook* (multiple editions), and Nicholas J. Johnson et al., *Firearms Law & the Second Amendment* (Aspen casebook, multiple editions). Those works are wonderful.

A slim work, such as this one, whose origins are as an instructional text, cannot practicably include the wealth of information in those volumes. Those wishing a

reference to comprehensive discussion and citations to works addressing the subject of firearms law should check the Halbrook and Johnson et al. works.

This book discusses circumstances that have been reported-upon in the press or that have been the subject of litigation. In addressing these matters, other than those with which the author has been personally involved, the discussion of the factual predicates is based exclusively on those third-party reports. Your author's investigation of factual circumstances is only to the extent expressly referenced in this book. So, for example, allegations that a person engaged in some conduct do not necessarily mean he or she did so. And references to alleged actions that persons took in connection with events not involving this author are allegations of circumstances based on those reports.

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Preface to 2023 Edition

The author did not grow up hunting. Nor did he grow up engaging in a material way in firearms sports. The author came to study firearms law late in his career. His employer elected to expand its curricular offerings in a way that seemed to necessitate that the author pick-up a new class. The subject of firearms law seemed to be one that would attract the requisite student interest and enrollment. Indeed it did.

The first edition of this book, the 2022 edition, was prepared for use as a text in a seminar on firearms law. This edition collects material addressing matters that the author was unable to include in the 2022 edition. It is as well designed to be used as an instructional text in a seminar on the subject.

In writing this book, this author has endeavored to focus on what is the apparent implications of the currently-settled view that the Second Amendment is understood in light of the original public understanding of its terms, perhaps as adjusted as of the time the Fourteenth Amendment was adopted.

In the Founding Era, there was not the extensive web of firearms restrictions that is present today. So, there are not Founding-Era analogues for many of the contemporary restrictions. Consequently, much of the contemporary firearms regulatory state is suspect under *Bruen*. And a text that analyzes contemporary legislation, in light of *Bruen*, will find numerous illustrations of constitutional infirmity.

Because we have a Second Amendment, made applicable to the States by the Fourteenth Amendment (if it were not intended to be so applicable before that enactment), our courts and legislatures conform to its dictates. This book is about what that calls for. It is not about the author's personal preferences.

More generally, we currently have a Federal regulatory state that seems unlikely to be within the scope of a Federal government of limited powers envisioned by the Founders and as reflected in the original understanding of the terms memorialized by the organic documents they authored. Over centuries our judiciary has enabled expansion of Federal powers. And that expansion occurred at a time when originalism was not emphasized in jurisprudence. *Stare decisis* in past, erroneous decisions does not materially burden contemporary development of Second Amendment jurisprudence consistent with modern theories of originalism, for the simple reason that the Supreme Court took few cases concerning the Second Amendment when other styles of interpretation were emphasized. We end up with a document for which the emphasis on originalism in interpretation diverges depending on which provision is at issue.

Were the author vested with authority to decide whether criminal offenses untethered to physical dangerousness ought to give rise to firearms prohibitions, he might well prefer more restrictions on felons than, it appears, the Second

Amendment would contemplate. However, the body text below discusses the author's best understanding of what it actually means to subject contemporary prohibitions to the Second Amendment, under the original meaning of the Second Amendment.

The author finds anathema the governmental approach of deliberately pursuing a course of action that is dubious in light of authority governing protected civil rights. Conscious pursuit of such a problematic course, subsequently proved unconstitutional, is not cleansed by subsequent judicially-compelled compliance.

The author's other firearms scholarship has included work addressing the Law Enforcement Officers Safety Act.^a At times, some States have apparently taken a contumacious position in respect of that enactment. This author has expressed his belief that States should comply with the apparent meaning of the enactment, even though the author strongly disagrees with the suitability of legislation that gives special status to former government employees in exercise of an enumerated constitutional right. But, insofar as the enactment is valid, your author believes States should comply, even though the legislation finds substantial disfavor in his mind.

In sum, the legal analysis reflects the author's understanding of the implication of the core principles, which produces results that are at times at variance with what he might prefer as matters of policy.

Chapter Six collects this author's analysis of certain issues that are presented by *Bruen*. In preparing that chapter, this author has endeavored to apply his understanding of Founding-Era concept of the right to keep and bear arms. The author expects that in the near future, some courts will not faithfully implement the principle that the Second Amendment is to be understood in light of the original public understanding. A contemporary culture of dependency on the government does not rest easily, in some quarters, with the basic thrust of the Second Amendment. This author suspects that will result in even judges generally inclined to give effect to the original meaning of a Constitutional provision to go wobbly, on occasion.

In future editions, to be prepared after courts have settled on the treatment of some issues, it seems likely the author's voice will express more disagreement with then-settled principles. That discussion also is expected not to focus on the author's personal preferences but, rather, conforming to what propriety requires—actually implementing the original understanding of the Second Amendment and the lack of mandatory dependency on the government that it implements.

^a Royce de R. Barondes, *Contumacious Responses to Firearms Legislation (LEOSA) Balancing Federalism Concerns*, 56 HOUS. L. REV. 1 (2018).

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CHAPTER 6. APPLICATION OF *BRUEN'S* PRINCIPLES TO ILLUSTRATIVE REGULATIONS AND RESTRICTIONS

SECTION 1. COLLECTION OF THE COMPONENTS OF THE STANDARD; AUTHORITY ADDRESSING ABORTION

(A) *BRUEN'S FOUNDATIONAL PRINCIPLES*

Much of the authority that preceded *Bruen* misapplied the Second Amendment—misapplied *Heller*. In what appears to be an atypical approach to applying the Constitution—an approach uniquely applied to the Second Amendment—in 2011 the Fourth Circuit directly expressed a bias against a fulsome implementation of the constitutional right recognized in *Heller* and *McDonald*. It selected the following words in *United States v. Masciandaro*:

There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions. It is not clear in what places public authorities may ban firearms altogether without shouldering the burdens of litigation. The notion that “self-defense has to take place wherever [a] person happens to be” appears to us to portend all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities. And even that may not address the place of any right in a private facility where a public officer effects an arrest. The whole matter strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree.¹

One should think that a lower court’s role is to implement its best understanding of the principles announced by a higher court, and the fact that the best understanding of the principles “portend[s] all sorts of litigation” should not excuse failing to follow the best understanding of the higher court’s opinions.

Another judicial tack, post *Heller*, produced similar results. Allegations of violation of the Second Amendment often are presented in claims brought under 42 U.S.C. § 1983. “Qualified immunity under section 1983 shields a state or local official from personal liability unless his action violated a ‘clearly established statutory or constitutional right[] of which a reasonable person would have known.’”² In 2001, the Supreme Court held “that whether ‘the facts alleged show the officer’s conduct violated a constitutional right . . . must be the initial inquiry’

in every qualified immunity case.”^a However, this mandated order was abrogated in 2009’s *Pearson v. Callahan*, after which courts have the discretion to proceed immediately to whether the right is clearly established.³ This provided a mechanism that allowed courts to postpone grappling with the implications of *Heller* and *McDonald*.

Let us illustrate. *Shaefer v. Whitted* (2015) involves, among other things, a claim for alleged violation of the Second Amendment arising from a police officer’s disarmament of a person at his own dwelling. The relevant alleged facts may be summarized as follows:

The homeowner had called police, after killing a dangerous dog that had wandered onto his property. It was alleged the responding officer’s unannounced, sudden disarmament of the homeowner precipitated a sequence of events resulting in the homeowner being shot and killed by the officer.⁴

The court concludes:^b “Assuming, *arguendo*, the First Amended Complaint did state a claim for relief under the Second Amendment, it would still be barred under the doctrine of qualified immunity because it cannot be shown Officer Whitted’s conduct was a violation of clearly established law under the Second Amendment.”⁵

An additional illustration is provided by *Chesney v. City of Jackson*.⁶ There the court dismisses a claim, founded on the Second Amendment, arising from the physical seizure, disarmament and arrest of someone openly carrying a firearm on government property.⁷ The civil litigation followed the government’s dismissal of criminal charges.⁸ The court relies on the fact that any alleged Second Amendment right outside the home at that time was not clearly established.⁹

These two approaches to rejecting claims under the Second Amendment (avoiding a fulsome application of *Heller’s* principles on the ground that the right is a vast *terra incognita* and relying on a right not being clearly established, without other analysis) have unnecessarily operated to exacerbate politicization of the aftermath of *Heller* and *McDonald*. Indeed, recognition of the Second Amendment as protecting an individual right gives rise to numerous questions concerning the scope of the right. These two approaches create a mosaic of judicial

^a *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *abrogated by Pearson*, 555 U.S. at 236)). In the 2001 case of *Saucier v. Katz*, the Supreme Court—mandated a two-step sequence for resolving government officials’ qualified immunity claims. First, a court must decide whether the facts that a plaintiff has alleged make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was “clearly established” at the time of defendant’s alleged misconduct. Qualified immunity is applicable unless the official’s conduct violated a clearly established constitutional right.

Pearson, 555 U.S. 223, 232 (2009) (citations omitted) (citing *Saucier*, 533 U.S. 194 (2001)).

^b The court did, however, allow an excessive force claim under the Fourth Amendment to proceed. *Schaefer v. Whitted*, 121 F. Supp. 3d 701, 716–17 (W.D. Tex. 2015).

decisions that can be directed to mislead the broader public, which is not informed as to the details of legal analyses. A picture can be crafted, by those who wish to limit the right to keep and bear arms, that misleadingly appears to show that the Supreme Court, when it merely applies *Heller* and holds a right within the Second Amendment, is inventing new components of the rights.

Before *Bruen*, in construing the Second Amendment, lower courts typically followed a two-step approach, described in *Bruen* as follows:

Since *Heller* and *McDonald*, the two-step test that Courts of Appeals have developed to assess Second Amendment claims proceeds as follows. At the first step, the government may justify its regulation by “establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood.” The Courts of Appeals then ascertain the original scope of the right based on its historical meaning. If the government can prove that the regulated conduct falls beyond the Amendment’s original scope, “then the analysis can stop there; the regulated activity is categorically unprotected.” But if the historical evidence at this step is “inconclusive or suggests that the regulated activity is not categorically unprotected,” the courts generally proceed to step two.

At the second step, courts often analyze “how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on that right.” The Courts of Appeals generally maintain “that the core Second Amendment right is limited to self-defense *in the home*.” If a “core” Second Amendment right is burdened, courts apply “strict scrutiny” and ask whether the Government can prove that the law is “narrowly tailored to achieve a compelling governmental interest.” Otherwise, they apply intermediate scrutiny and consider whether the Government can show that the regulation is “substantially related to the achievement of an important governmental interest.”¹⁰

A state of flux exists concerning application of the import of *Heller* and *McDonald*, as informed by *Bruen*, to various circumstances previously addressed by lower courts and some addressed thereafter. This chapter endeavors to illustrate the meaning of *Bruen* by considering the proper contemporary treatment of assorted issues that have been previously, or are being, litigated. Many other issues will, of course, be litigated. And this author’s understanding of the implications of *Bruen* may not find favor with the courts. One supposes that is particularly the case as to lower courts, many of which may fairly be characterized as having a course of practice of hesitating to give fulsome effect to the Supreme Court’s decisions on firearms rights, sometimes expressly.^c

^c See *supra* p.163, text accompanying note 1 (re. *Masciandaro*).

To minimize duplication in recitation of the standards expressed in *Bruen* that will be applied in this chapter, it is helpful to collect, at the beginning, key extracts. We shall begin this chapter with that. The basic points are expressed in body text. The relevant passages from *Bruen* are in the margin.

First Extract, addressing overarching principles:^d

- **[I.a]** Consistency with historical treatment / tradition is required.
- **[I.b]** The burden of proof is on the government.

Second Extract, addressing additional general principles:^e

- **[II.a]** Deference to legislative interest-balancing is rejected.
- **[II.B]** The “right of law-abiding, responsible citizens to use arms for self-defense” is “elevate[d] above all other interests.”

Third Extract, addressing the nature of a relevant analogue—In assessing whether a historical regulation is an adequate analogue for a “societal problem that has persisted since the 18th Century”:^f

^d The first extract is:

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.”

New York State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2129–30 (2022) (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961)).

^e The second extract is:

If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of “intermediate scrutiny” often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here. 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. It is this balance—struck by the traditions of the American people—that demands our unqualified deference.

Bruen, 142 S. Ct. at 2131 (2022) (citation omitted).

^f The third extract:

The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment’s text and historical understanding. In some cases, that inquiry will be fairly straightforward. For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And

- *[III.a]* Absence of a “distinctly similar historical regulation” is “relevant evidence” of unconstitutionality.
- *[III.b]* Society’s having then addressed that problem through “materially different means” “could be” evidence of unconstitutionality.
- *[III.c]* Prior attempts to enact “analogous regulations during this timeframe” having been rejected on constitutional grounds is “some probative evidence” of unconstitutionality.
 - The referenced “timeframe” is expressed ambiguously. Apparently, the reference is to the Founding Era or, potentially, the time the Fourteenth Amendment was adopted.¹¹
 - The opinion evinces subtle thoughtfulness in its discussion of this circumstance. It does not reference “judicial” rejection. Rejections of restrictions by the Congress and the Executive Branch are not expressly excluded from rejections that inform the scope of the Second Amendment.

Fourth Extract, providing guidance by illustration concerning how the principles governing analogues are to be applied:[§]

if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.

Bruen, 142 S. Ct. at 2131 (2022).

[§] The fourth extract:

Heller itself exemplifies this kind of straightforward historical inquiry. One of the District’s regulations challenged in *Heller* “totally ban[ne]d handgun possession in the home.” The District in *Heller* addressed a perceived societal problem—firearm violence in densely populated communities—and it employed a regulation—a flat ban on the possession of handguns in the home—that the Founders themselves could have adopted to confront that problem. Accordingly, after considering “founding-era historical precedent,” including “various restrictive laws in the colonial period,” and finding that none was analogous to the District’s ban, *Heller* concluded that the handgun ban was unconstitutional.

New York’s proper-cause requirement concerns the same alleged societal problem addressed in *Heller*: “handgun violence,” primarily in “urban area[s].” Following the course charted by *Heller*, we will consider whether “historical precedent” from before, during, and even after the founding evinces a comparable tradition of regulation. And, as we explain below, we find no such tradition in the historical materials that respondents and their amici have brought to bear on that question.

While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution—and a Second Amendment—“intended to

- **[IV.a]** The proper level of generality / specificity / abstraction by which to gauge whether a contemporary problem was also an historical problem is illustrated by *Bruen*'s classification of the analogue referenced in *Heller* as “firearm violence in densely populated communities.”
 - What it means for an area to have been “densely populated” in 2008 is, of course, qualitatively different from dense population in the Founding Era.
 - *Heller* and *Bruen* could have provided, but their outcomes in fact *reject*, the following analysis:
 - The perceived problem addressed in *Heller* was firearms violence in “densely populated” areas.
 - Although there are not analogues in the Founding Era for the type of restriction in the District of Columbia, at issue in *Heller*, the absence of a Founding-Era analogue does not mandate invalidation of D.C.'s restriction. That is because what constitutes a “densely populated” area modernly is a completely different thing—is qualitatively different from—a densely populated area in the Founding Era.
 - In sum, *Bruen* does not provide a rigorously defined standard by which one can assess whether a contemporary problem existed, in a comparable way, in the Founding Era. Rather, we simply have an illustration. However, that illustration indicates the following, where the government seeks to justify a contemporary restriction not having a Founding-Era analogue:
 - A substantial change in societal circumstances—in the illustration, a change in population density over centuries—is not inherently sufficient to obviate the need for an 18th century analogue.
- **[IV.b]** Only in limited circumstances can a court properly validate a restriction unsupported by a Founding-Era analogue. The identified

endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.

Bruen, 142 S. Ct. at 2131–32 (2022) (citations omitted) (first quoting *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008), then quoting *id.* at 634, then quoting *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819)).

circumstances involve “unprecedented societal concerns or dramatic technological changes.” The qualifiers, “unprecedented” and “dramatic,” require an extreme magnitude. And, even if there is such a large variation between the contemporary context and the former time-period, such a substantial disparity only “may”—not “shall”—require a “more nuanced approach.” A “more nuanced approach” apparently references obviating the need for an analogue.

Fifth Extract, which may seem tedious on first reading but evidences remarkable prescience, preemptively rejecting one way in which a subsequent court might improperly expand the permissible restrictions—the requirement for an analogue involves finding restrictions that are “relevantly similar”:^h

- *[V.a]* The opinion limits the ability to use certain pseudo-analogues to justify a contemporary restriction. The historical restriction must be analogous in a relevant way.

Our collection of basic principles should also address an extract from *Heller* that is easily abused and that the above principles reject. In *Heller*, the Court stated: “Of course the right was not unlimited, just as the First Amendment’s right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”¹² One occasionally encounters analyses, even post-*Bruen*, that in essence take the style of:

Heller concludes that the right is not unlimited. So, the prohibition under consideration is not unconstitutional.

This style of discussion, of course, lacks cogence. It is the kind of discussion that is said to “prove too much.” For example, were that enough, all prohibitions on firearms possession outside the home could be validated. A court could simply state: “The right is not unlimited. This subject remains entitled to possess a firearm in his home.” But, of course, *Bruen* itself directly rejects that conclusion.

^h The fifth extract provides:

When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are “relevantly similar.” And because “[e]verything is similar in infinite ways to everything else,” one needs “some metric enabling the analogizer to assess which similarities are important and which are not,” For instance, a green truck and a green hat are relevantly similar if one’s metric is “things that are green.” They are not relevantly similar if the applicable metric is “things you can wear.”

Bruen, 142 S. Ct. at 2132.

In sum, *Heller's* reference to the right not being unlimited cannot properly be deployed as a talismanic cudgel to destroy claims on its own. The reference, in fact, adds nothing to a proper analysis.

To illustrate a modified version of this style of discussion, we may turn to discussion from a 2012 First Circuit opinion:

In *Heller*, the Court explained that “the right secured by the Second Amendment is not unlimited” and noted that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under Second Amendment or state analogues.” We have interpreted this portion of *Heller* as stating that “laws prohibiting the carrying of concealed weapons” are an “example[] of ‘longstanding’ restrictions that [are] ‘presumptively lawful’ under the Second Amendment.”¹³

This discussion is a modified style, because it follows the uninformative reference to a right not being unlimited with a misleading reference to a half-truth. Although some courts in the nineteenth century did validate prohibitions on carrying concealed arms, a number of the courts that did so simultaneously indicated prohibitions on carrying firearms openly were not permissible.ⁱ

As the last extract from *Bruen* illuminates, a proper analysis must focus on the comparability of Founding-Era analogues in terms of the objective sought to be achieved and the manner used. The restriction must be consistent with historical treatment / tradition. Observation I.a. And the analogue must be comparable—analogue—in the relevant way. Observation V.a.

A final observation, derived from *Heller*, *McDonald* and *Bruen* merits mention. When the Fourteenth Amendment was adopted, segments of the population were being subjected to violence, including armed violence, and, as noted above, addressing this circumstance was an objective of the Fourteenth Amendment.^j At that time, the Constitution could have been amended to eliminate the right to bear arms, and been accompanied by Federal statutes criminalizing private firearms ownership. But that was not the path chosen to increase individuals’ safety and freedom. The path chosen was *not* to prohibit private ownership of firearms as used in the military. Rather, the choice was to prevent criminalization of the access to arms, and to allow private citizens to have arms suitable for defense against persons armed with military firearms.

ⁱ See *supra* p.71 et ff.

^j See *supra* p.69 et ff.

(B) AUTHORITY CONCERNING ABORTION

Before turning our application of these standards to some issues raised in litigation, we should collect some observations concerning the constitutional jurisprudence addressing abortion.^k The plurality opinion in 1992's *Planned Parenthood of Southeastern Pennsylvania v. Casey* states:

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.

Respondents attempt to avoid the conclusion that § 3209 is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. . . . [R]espondents argue, the effects of § 3209 are felt by only one percent of the women who obtain abortions. Respondents argue that since some of these women will be able to notify their husbands without adverse consequences or will qualify for one of the exceptions, the statute affects fewer than one percent of women seeking abortions. For this reason, it is asserted, the statute cannot be invalid on its face. We disagree with respondents' basic method of analysis.

The analysis does not end with the one percent of women upon whom the statute operates; it begins there. *Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.* For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid

^k Nicholas Johnson discusses the relevance of abortion jurisprudence to Second Amendment doctrine in Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97 (1997). In a subsequent work he notes:

Stenberg protects the right-bearer's access to marginally better methods of abortion where her life or health is at stake. This right to "better" variations of the broadly protected right to abortion prevails in the face of empirical dispute over whether the methodology really is better, over empirical objections that it is actually worse (riskier), over objections that it cannot really be distinguished from other available methodologies, and over objections that the state's interest in regulating the procedure is extraordinarily powerful, because it borders on infanticide. These positions and the principles that support them transfer readily to the assault weapons question.

Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285, 1314–15 (2009) (footnotes omitted). In that article, he extends the analysis to restrictions on modern civilian, e.g., AR-pattern, rifles.

on its face because most newspapers would adopt the policy even absent the law. *The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.*¹⁴

We know the highlighted principles are not idiosyncratic to abortion jurisprudence, because the opinion directly indicates that they are not. It indicates the same holds true for First Amendment jurisprudence, citing First Amendment authority. The principle is one of more general applicability to civil rights whose exercise the Constitution protects. Thus, the 2022 holding in *Dobbs*, that “[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion,”¹⁵ should not operate to abrogate the more general principle applicable to assessing actions expressly protected by the Constitution.

The majority opinion in 2000’s *Stenberg v. Carhart* confirms the understanding that a valid restriction on a constitutional right may not prohibit the manner in which some, albeit a minority, may most efficaciously exercise that right:

The D & X procedure’s relative rarity (argument (1)) is not highly relevant. The D & X is an infrequently used abortion procedure; but the health exception question is whether protecting women’s health requires an exception for those infrequent occasions. A rarely used treatment might be necessary to treat a rarely occurring disease that could strike anyone—the State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it.¹⁶

(C) IMPORT OF MONOTONICALLY INCREASING REGULATION IN ASSESSING FOUNDING-ERA RESTRICTIONS

As to firearms restrictions, we have a generally one-way trend in Congressional respect for the right to bear arms. One might say that Federal restrictions have at least through the 1970s been monotonically¹ increasing.

The entire area was generally left unmolested by Congress for over one hundred years, other than subjecting States to restrictions comparable to those applicable to the Federal government. Since the first part of the twentieth century, Congress engaged in incrementally restricting firearms rights. The initial steps included limiting interstate transport. That included restrictions on mailing concealable firearms, adopted in 1927, and acquisitions of arms by certain criminals in interstate transactions, adopted in 1938. That second prohibition,

¹ A “monotonic” relationship is one “having the property either of never increasing or of never decreasing as the values of the independent variable or the subscripts of the terms increase.” Monotonic, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/monotonically>.

identified elsewhere^m as containing a significantly limiting interstate commerce nexus element, only applied to a person under indictment for or convicted of a “crime of violence,” or a person who was “a fugitive [sic] from justice.”¹⁷

With some intervening incrementally more fulsome revisions, Congress in 1968 adopted the much more encompassing Gun Control Act of 1968. Although the scope of a disqualifying conviction was expanded in 1961 from a “crime of violence” to a “crime punishable by imprisonment for a term exceeding one year,”¹⁸ by 1968, the prohibition (then re-codified in title 18) provided two relevant exclusions.

First, the Secretary of the Treasury could remove the restriction on application. Hence, there remained individualized determinations, albeit ones that had an increased bias against termination of the prohibition, as compared to the Founding-Era analogue.¹⁹

Second, the disqualifying crimes were amended in the late 1960s to exclude:

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.²⁰

It appears the Secretary of the Treasury did not zealously exercise this delegated authority,²¹ and the authority to identify “similar” offenses was reallocated to the courts in 1986.²²

In sum, highlightsⁿ of the primary steps in the sequence of Federal regulation up to 1986, applicable to individuals, in order, are:

- No statutory Federal restrictions; followed by Federal—
- 1927: restrictions arising from the designation of concealable firearms as non-mailable for private persons through the U.S. Postal Service, with assorted exceptions for, *e.g.*, conveyance for repair or to manufacturers or dealers²³—a prohibition of limited effect, because it did not apply to private carriers;²⁴
- 1934: provisions heavily taxing and requiring the registration of fully automatic firearms and short-barreled rifles and shotguns;²⁵

^m See *supra* p.124, text accompanying n.31.

ⁿ Only highlights are included, which is not to say omitted components, *e.g.*, mental-health prohibitions, were not present (they have been) or that they are not significant.

- 1938: new prohibitions applicable to those convicted of crimes of violence, limited to interstate transactions or activity (i.e., inapplicable to single-State possession of arms already at rest in the relevant State);
- 1961: expansion of the 1938 prohibition to persons convicted of a crime punishable by more than one year; and
- 1968: further expansion of the prohibition arising from a criminal conviction, to prohibit disqualified persons' possession of firearms that had traveled in interstate commerce,²⁶ tempered by revisions (i) excluding, from the disqualifying crimes, certain business practices crimes and State misdemeanors punishable by not more than two years²⁷ and (ii) allowing individualized Executive Branch removal of a prohibition arising from a non-firearm criminal conviction.²⁸

And it was twenty-four more years until the door shut on the individualized removals of those prohibitions.^o

More restrictions temporarily arose in 1994 from what is commonly misleadingly referenced^p as a Federal Assault Weapons Ban,²⁹ which terminated on its own (not from subsequent, affirmative Congressional action) in 2004.³⁰

We can essentially depict Congressional view of the suitable restrictions, at least through the 1970s, on a time-line:

^o See *supra* p.122, n.f.

^p The enactment was not a “ban.” It did not prohibit “the possession or transfer of any semiautomatic assault weapon otherwise lawfully possessed under Federal law on the date of the enactment.” Pub. L. No. 103-322, § 110101(a), 108 Stat. 1996, 1997 (1994).

Moreover, use of the term “assault weapon” involved a manufactured neologism, and no principle other than a preference to inflame is apparent for the selection of the term. Even a 1989 report by a working group of the ATF states the following concerning the origins of the misleading terminology, expressly identifying the term as “somewhat of a misnomer”:

The working group determined that the semiautomatic rifles in question are generally semiautomatic versions of true selective fire military assault rifles. As a class or type of firearm they are often referred to as “assault rifles,” “assault-type rifles,” “military style rifles,” or “paramilitary rifles.” Since we are only concerned with semiautomatic rifles, it is somewhat of a misnomer to refer to these weapons as “assault rifles.” True assault rifles are selective fire weapons that will fire in a fully automatic mode. For the purposes of this paper, it was necessary to settle on one term that best describes the weapons under consideration, and we will refer to these weapons as “semiautomatic assault rifles.”

ATF Working Group, Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Rifles, at 5–6 (July 6, 1989) (footnotes omitted). See also NRA-ILA, The Truth About So-Called “Assault Weapons,” <https://www.nra-ila.org/the-truth-about-so-called-assault-weapons/> (visited Aug. 3, 2023) (“The origin of ‘assault weapon’ stems from the term ‘assault rifle,’ which the U.S. Army defines explicitly as a selective-fire rifle chambered for a cartridge of intermediate power. The term ‘assault rifle’ only applies to automatic firearms rather than the semi-automatic firearms that gun control advocates are focused on banning today.”).

Restrictions:

Fewest Restrictions Governed by 2A

Most Restrictions

Time:

Founding Era

14th Amendment Adopted

Contemporary

Perhaps the most prominent outlier in this one-way trip in restricting rights is FOPA's preemption of State laws as applied to interstate transport.^q But even that cannot be said clearly to evidence Congress moving to a position supporting a more encompassing civil right to bear arms. As noted above,^r the initially-adopted protection was almost immediately watered-down. And it was not free-standing; it was part of legislation that adopted a substantial restriction—closing the registry of machineguns that can be personally owned, i.e., not allowing subsequently-made machineguns to be privately owned.^s

Another primary, potential exception would be 2005's PLCAA.^t As to the above-referenced timeline, the PLCAA, at most, would perhaps indicate that the monotonically-narrowing Congressional regulation of the civil right to bear arms paused in 2005.

Two salient implications of this essentially monotonically-increasing scope of Federal restrictions at least through the 1970s merit identification. First, that the Federal restrictions through the 1970s were essentially monotonically increasing allows identification of additional implications of *Bruen's* approach.

In general terms, *Bruen* channels the analysis of the scope of the Second Amendment to focus on the Founding-Era understanding of the right. As noted above, the *Bruen* opinion states, "And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality."³¹

The first illustration of this principle that would come to mind would likely involve judicial invalidation of statutory provisions. But long-standing Congressional determinations that Executive Branch actions improperly interfere with constitutionally protected rights similarly evidence the relevant public understanding. They also memorialize one branch's determination that another is endeavoring improperly to trench on the recognized scope of a constitutional right.

^q See *supra* p.140.

^r See *supra* p.140, n.z.

^s See *supra* p. 140, n.z.

^t See *supra* p.142.

Thus, Congressional determinations from the 1970s or 1980s countering Executive Branch restrictions on firearms rights also support the view that the implicated Executive Branch actions were, in fact, inconsistent with the Founding-Era understanding of the right. During the period that Congress was monotonically increasing restrictions on firearms rights, one might say the following. Because the Congress's path had been consistently in derogation of firearms rights, any restriction that was too much for Congress—any Congressional rejection of a restriction proposed by the Executive Branch—was necessarily something beyond the Founding-Era conceptualization of a permissible restriction on firearms rights. That is because at that time, that Congressionally-approved restrictions had been monotonically increasing indicates that Congress was already willing to adopt restrictions inconsistent with the Founding-Era conceptualization. The styling of the NFA as an exorbitant tax, because the Congressionally-desired prohibition was considered unconstitutional,^u is an illustration.

In another style of incrementalism, firearms restrictions are initially styled with grandfather clauses (allowing some to continue exercising rights). The misnamed Federal Assault Weapons ban^v is an illustration.

Second, the progression of the Federal restrictions arising from criminal convictions through the 1970s illustrates the path of incrementalism in efforts to eliminate protected civil rights. The initial Federal criminalization of firearms possession arising from prior criminal misconduct was in the Federal Firearms Act of 1938.³² Congress did not, a century and one-half after the adoption of the Second Amendment, think suitable to jump to our current state of affairs, in which any Federal felony conviction, other than for certain business practices crimes, results in a effectively permanent firearms ban. It took multiple incremental steps ultimately to reach that stage.

These styles of incrementalism operate to take advantage of a status-quo bias to achieve, through multiple steps, changes that could not be approved in a single step. The adoption of the first incremental step over time builds more support for what was initially the marginally most expansive restriction that could be achieved. Over time, what was the marginal restriction becomes solidified as mainstream, with further restrictions becoming the marginally accepted ones.

This is not to say that incrementalism is not a suitable way to change popular consensus. However, popular consensus is not the test for whether legislation comports with the Bill of Rights, where the original understanding of the right is the touchstone. The need to follow incrementalism in restricting a civil right protected by the Bill of Rights suggests that steps following the first are inconsistent with the Founding-Era conceptualization of the scope of the protected

^u See *supra* p.150, text accompanying n. 131, et ff.

^v See *supra* p.174.

right. And the adoption of restrictions with grandfather clauses evidences the unconstitutionality of the new provisions.

(D) STATUTORY RESTRICTIONS OMITTING ELEMENTS NECESSARY FOR A RELEVANT ANALOGUE

Statutory criminal restrictions on firearms rights often will not include restrictions that allow the restriction to be comparable to a Founding-Era analogue. An issue arises whether such a firearms restriction can be validly applied to anyone. This question may arise in connection with discussing the difference between a “facial” challenge and an “as applied” one.

A facial challenge often is styled as one asserting that the statute in question cannot constitutionally be applied to anyone.^w In your author’s view, that focus seems to miss the mark as to the types of circumstances under consideration.

In our system, it is legislators who make criminal laws. The role of the judiciary is to apply them and, in the process, interpret or construe them. It is not the role of our judiciary to invent the crimes.

Restrictions that are invalid under *Bruen*, because they do not have a Founding-Era analogue, may be capable of being applied to restrict firearms rights of someone in the following sense: It is possible the person’s firearms rights could have been constitutionally restricted, had the criminal statute been crafted with a more limited prohibition that in fact matches the analogue. That does not, however, mean the statute should be constitutionally applied to anyone. Doing so puts the courts in the position of making criminal statutes. It allows the legislature to abnegate its obligation to express those items that are criminalized.

This is not simply a pedantic objection. If legislatures avoid adequately specifying what is criminalized, in a constitutionally-cabined way, it avoids the democratic check associated with only having properly elected persons, selected for purposes of making the law, being the ones who make the criminal law. This is, in fact, one of the principles that give rise to the well-known principle of lenity in interpretation of criminal statutes.³³

This concern appears to be of enhanced significance currently. The Court has increasingly been characterized as assuming a politicized character.³⁴ It seems crucial, as part of assuring the perceptions of the fairness of judicial proceedings, and that courts do not appear to be captured inappropriately by political winds,

^w As one court has stated: “If a facial challenge is upheld, then the state cannot enforce the statute against anyone. On the other hand, an “as-applied” challenge consists of a challenge to the statute’s application only to the party before the court. *Amelkin v. McClure*, 205 F.3d 293, 296 (6th Cir. 2000) (parallel citation omitted) (citation omitted) (citing *Board of Trustees v. Fox*, 492 U.S. 469, 483 (1989)).

that the Supreme Court not follow decision-making that in fact results, or even appears to result, in the judiciary assuming that legislative function.

Let us identify two examples. After *Bruen*, some States adopted kitchen-sink statutes imposing numerous restrictions on firearms rights. Some would appear manifestly unconstitutional. Perhaps not so for others. If a court decides to invalidate such kitchen-sink prohibitions only in part, picking and choosing what is criminalized, the jurisdiction is effectively allowed to adopt a criminal statute akin to: All firearms possession that can be criminalized is hereby criminalized. That is not the product of a satisfactory process.

A second example involves *United States v. Rahimi*, 61 F.4th 443 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023), which is currently before the Supreme Court as this book is being finished. The subject of that case is not within one of the specific applications referenced in the latter parts of this chapter. However, the case does allow us to illustrate the above principle.

The relevant statutory provision gives rise to criminal firearms prohibitions applicable to persons subject to certain domestic violence restraining orders.^x If certain judicial determinations are made, a person's firearms rights are suspended under Federal law. And that is the case even if the State order creating the finding does not by its terms prohibit firearms possession. So, somewhat oddly, in terms of our notions of Federalism, by this enactment, a State is denied the ability to impose certain restrictions on persons without also prohibiting those persons having their firearms rights removed.

Be that as it may, the restriction in the statute does not appear to have a Founding-Era analogue. The closest analogue would be surety statutes. And those did not prohibit firearms possession, unless, in addition to judicial determination of dangerous had been made by a court, no one would be willing to supply a required bond for the subject's conduct. The analog required inability to get a bond. That is

^x The relevant prohibition applies to a person:

who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

18 U.S.C. § 922(g)(8) (Westlaw through Pub. L. No. 118-13).

crucial for understanding the analogue's application. And the relevant Federal statute does not have something that corresponds. The Federal statute, thus, does not have an analogue. It imposes a much lower threshold for disarming someone than existed in the Founding Era.

A court looking at convictions based on this provision might take the following position:

Let us take it that there are some sets of actions involving physical misconduct on a spouse that sufficiently egregious, or sufficiently likely to be predictive of future violence, that, in the Founding Era, no one would have given a bond on the future conduct of the subject. There are some persons who could have been disarmed whose misconduct threatened their spouses, etc. So, the current prohibition could properly be applied to someone. So, the statute is constitutional, unless the individual proves that he or she is someone who could not have been properly disarmed under a Federal statute containing elements, not in the current one, that would be collectively analogous to a Founding-Era analogue.

This would in the nature of concluding, in the current style, that there needs to be an as-applied challenge. Following that style of approach again puts the courts in a legislative function, depriving public of their role in indirectly controlling the criminal statutes.

A Supreme Court in *Rahimi* opinion may well focus on the dangerousness of the defendant in *Rahimi* and on that basis conclude that this is a person who could have been disarmed in the Founding-Era, under restrictions that had components not included in 18 U.S.C. § 922(g)(8). If the Court follows that path to reversing the decision in *Rahimi*, it will have only itself to blame for the unforced error of consciously taking a path that increasingly politicizes the Supreme Court as an institution.

SECTION 2. GOVERNMENTAL SEIZURE OR RETENTION OF SPECIFIC ARMS

One occasionally encounters contemporary cases where the government resists returning a specific arm that has previously been seized. In that context, some courts have stated that the Second Amendment does not extend to possession of a specific arm:

- “The right protected by the Second Amendment is not a property-like right to a specific firearm, but rather a right to keep and bear arms for self-defense.”³⁵
- “Lawful seizure and retention of firearms, however, does not violate the Second Amendment. Indeed, this court has held that even the unlawful retention of specific firearms does not violate the Second Amendment,

because the seizure of one firearm does not prohibit the owner from retaining or acquiring other firearms.”³⁶

Although those cases were decided before *Bruen*, one nevertheless encounters similar authority postdating *Bruen*. For example, in 2023 a Federal district court wrote the following in connection with a person who brought claims arising from a firearms seizure premised on an erroneous belief by law enforcement personnel the subject had a prior felony conviction:

Moreover, courts have generally held that the Second Amendment is not implicated by the seizure of specific firearms. Given that the Complaint is devoid of any allegation that Defendants prevented Plaintiff from acquiring new firearms, Plaintiff has failed to plead a cognizable violation of his Second Amendment right to bear arms.³⁷

This view is not universal. The Third Circuit stated in 2022:

The government cites other authority suggesting that seizures do not burden Second Amendment rights as long as citizens can “retain[] or acquir[e] other firearms.”

The government notes that the Takings and Due Process Clauses more clearly protect private property. So, it suggests, the Second Amendment provides “not a property-like right to a specific firearm,” but just a general right to buy guns.

We disagree. We would never say the police may seize and keep printing presses so long as newspapers may replace them, or that they may seize and keep synagogues so long as worshippers may pray elsewhere. Just as those seizures and retentions can violate the First Amendment, seizing and holding on to guns can violate the Second. The Second Amendment may let the government outlaw specific types of weapons—perhaps “dangerous and unusual weapons.” But as we have explained, it does forbid unjustifiable burdens on the right to “keep” one’s own arms.³⁸

In this author’s view, the Third Circuit had it right.

As noted above,^y there are at least sporadic Founding-Era restrictions that involved dispossession of individual arms used by persons in engaging in misconduct. The vantage-point from which one assesses Founding-Era analogues requires referencing the nature of the restriction imposed in the Founding Era. *Bruen* states (see Observation III.b): “[I]f earlier generations addressed the societal

^y See *supra* p.25.

problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.”³⁹

Such a Founding-Era restriction involving dispossession of an arm used during misconduct does not, under these principles, support the taking of an arm from one who has not engaged in wrongdoing.^z In the court’s language, the earlier, Founding-Era regulation, which involves dispossession of an arm for the subject’s misconduct, involves “materially different means” from the government’s retaining an arm, owned by one who has not engaged in misconduct.

Let us turn to another aspect of the import of these Founding-Era restrictions that involves dispossession or forfeiture of an arm for having engaged in misconduct. Such a Founding-Era restriction, involving seizure of a particular arm used to engage in misconduct, cannot justify ongoing bans including bans on acquiring other arms. These Founding-Era regulations are, in *Bruen’s* words, not “distinctly similar.”

SECTION 3. INDEFINITE RECORDS RETENTION BY DEALERS

Until 2022, dealers had long been permitted to destroy a Form 4473, the document that records the initial purchaser and his or her details, after 20 years.⁴⁰ A dealer going out of business had been, and currently is, obligated to deliver to the government those it retains.⁴¹

As we have seen, Congress has long resisted Executive Branch efforts to create a registry of firearms (other than those that are covered by the NFA), which date at least to the 1930s.^{aa} We have above detailed the reason why creation of a registry has been resisted.^{bb} In sum, that resistance is to make it impracticable for the government to engage in widespread disarmament (whether for specific types of firearms or for all types by broad classes of persons). That it is inefficient for the government to reconfigure the information dealers collect so as to identify who has what arms is not a bug; it is a feature.

In 2022, this provision was amended.^{cc} Dealers are not allowed to destroy those forms. As a result, records are available for government review of all firearms purchases from licensees since 2002, and they will remain available—either at the respective dealer or, if it has gone out of business (and the business has not been

^z Temporary dispossession and *Terry* stops are discussed elsewhere. *See supra* p.197.

^{aa} *See supra* p.130 and n.50.

^{bb} *See supra* p.130.

^{cc} Definition of “Frame or Receiver” and Identification of Firearms, 81 Fed. Reg. 24,652 (Apr. 26, 2022) (amending 27 C.F.R. 478.129(e) to require the records “shall be retained until business or licensed activity is discontinued”).

continued by a successor), with the government. The rationale expressed in the adopting release is the following (emphasis added):

Given advancements in electronic scanning and storage technology, ATF's acceptance of electronic recordkeeping, the reduced costs of storing firearm transaction records, *the increased durability and longevity of firearms*, and the public safety benefits of ensuring that records of active licensees are available for tracing purposes, the Department proposed to amend 27 CFR 478.129 to require FFLs to retain all records until business or licensed activity is discontinued, either on paper or in an electronic format approved by the Director, at the business or collection premises readily accessible for inspection. Also, a proposed amendment to 27 CFR 478.50(a) would allow all FFLs, including manufacturers and importers, to store paper records and forms older than 20 years at a separate warehouse, which would be considered part of the business premises for this purpose and subject to inspection. These amendments would reverse a 1985 rulemaking allowing non-manufacturer/importer FFLs to destroy their records after 20 years.⁴²

The rationale is, on its face, disingenuous. The reference to an increased longevity of firearms confirms that what the government has provided is in fact a rationalization of a decision made for reasons not accurately expressed in the release. Firearms design and manufacturing technology had progressed, as of the 1980s, to allow for the manufacture of arms with a lifespan long exceeding the 20-year records retention term in effect in the 1980s. The limit, in its form in the 1980s until 2022, was not the product of an accurate conclusion that firearms became unusable after twenty years. So, a transition to requiring records to be kept indefinitely cannot be justified as a consequence of the increased longevity of firearms.

By way of example, ignoring minor hold-outs, the U.S. Army generally transitioned from the 1911 pistol (1911 referencing the year it was adopted by the Army⁴³) as a sidearm to a Beretta in the 1980s.⁴⁴ Nevertheless, those 1911 pistols were not worthless as firearms within 20 years of manufacture. Indeed, in 2018—almost half a century after—the government sold surplus 1911s to the public.⁴⁵

That the former 20-year limit on retention of records had nothing to do with twenty years being the age beyond which firearms are no longer dangerous instrumentalities has been memorialized in Federal law since at least the Gun Control Act of 1968. That act had an exclusion from the prohibition for old firearms. But the excluded arms were those made before 1898.⁴⁶ Even firearms 60 years old were not so old as to avoid regulation.

This governmental rationalization of the regulatory change does not engage the issue of whether the change is an impermissible incremental step to creation of

an unconstitutional registry. However, one can glean some insight concerning the Executive Branch's justification of this practice from its discussion of another change made in the same release.

The same release also imposed assorted requirements concerning including serial numbers on what might be properly referenced as mere "precursors" to firearms. And those changes also imposed certain mandates under which dealers repairing homemade firearms were required to include the items in dealer records, if the firearms were kept overnight.⁴⁷ As to those requirements, the adopting release stated:

The commenters are not correct in their belief that the rule requires persons to disclose firearms they have made on Form 4473. Under the proposed and final rule, there are no recordkeeping or marking requirements for personal, non-NFA firearms that are privately made. As to the recordkeeping and marking requirements for the licensees engaged in the business of manufacturing or dealing in firearms, those records are not in the custody of the government, but are retained by the licensee until they discontinue business. *See* 18 U.S.C. 923(g)(4). Additionally, while the proposed rule in no way establishes a registry of firearms, it is worthwhile noting that even actual registration of NFA firearms has never been found to violate a Fourth Amendment right to privacy.

The Department also does not agree that the proposed rule violates a constitutional right to privacy in regard to commenters' property if the government knows how many weapons an individual possesses. "The United States Constitution does not expressly guarantee a right to privacy, but the Supreme Court has held that a right to privacy does exist within the liberty component of the Fourteenth Amendment." *See Padgett v. Donald*, 401 F.3d 1273, 1280 (11th Cir. 2005). Courts have recognized a privacy interest in avoiding disclosure of certain personal matters. *See id.*

"[N]ot all disclosures of private information will trigger constitutional protection." *Doe No. 1 v. Putnam County*, 344 F. Supp. 3d 518, 540 (S.D.N.Y. 2018) (finding courts have found a right to privacy in a "limited set of factual circumstances" involving one's personal financial or medical information, *i.e.*, information of a "highly personal nature"). "[T]he question is not whether individuals regard [particular] information about themselves as private, for they surely do, but whether the Constitution protects such information." *DM v. Louisa County Dep't of Human Services*, 194 F. Supp. 3d 504, 508–09 (W.D. Va. 2016) (finding no right to privacy of medical information) (internal quotation marks omitted). Information regarding firearms ownership or possession is of neither the medical nor financial variety, and no court has found this information to be constitutionally protected. *See Doe 1*, 344 F. Supp. 3d at 541 ("Disclosure

of one's name, address, and status as a firearms license [holder] is not one of the 'very limited circumstances' in which a right to privacy exists."").

This discussion appears carefully crafted to be consistent with the following positions:

- There is not a constitutional prohibition on the creation of a registry; and
- Even if there were one, the regulation does not create a registry.

The term "be consistent with" has been carefully chosen. It appears the Executive Branch was, in promulgating this regulation, consciously preserving the ability to argue that there is not a constitutional prohibition on the creation of the registry, without confirming that is its current view. In view of:

- the Executive Branch's prior contumacious responses to limits on creating the components of a registry;^{dd}
- its abject failure in maintaining a machinegun registry;^{ee} and
- the resulting, adverse Congressional response—

it is clear why the Executive Branch would be inclined to avoid directly expressing a held opinion that that creation of a registry is constitutional.

In this section, we shall detail whether creation of a registry is unconstitutional and whether, if so, the change in the dealer document retention requirement is an impermissible step.

Two simplistic assessments may be quickly rejected. The first:

Firearms rights are not unlimited. The restriction is modest and a reasonable balancing of safety implications, useful to assist in the reasonable law enforcement activity of firearms tracing.

This approach delegates to Congress the balancing that the Second Amendment has already, under *Heller*, taken from Congressional control.

The second:

There were no Federal Founding-Era requirements for commercial seller records retention (to this author's knowledge). So, this restriction is necessarily unconstitutional.

^{dd} See *supra* p.133.

^{ee} See *supra* p.130.

This statement reflects an incomplete assessment. One must first address whether the burden arising from mandatory records retention is within the outer bounds of the right. Let us turn to that.

The discussion in *Bruen* initially focuses a reader on the number of “steps” involved in the analysis:

In keeping with *Heller*, we hold that when the Second Amendment’s *plain text covers an individual’s conduct*, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”⁴⁸

A few paragraphs later, the opinion continues:

Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment’s text, *as informed by history*. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second 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.⁴⁹

Although *Bruen* rejected the conclusion that *Heller* contemplates a *two-step* analysis, *Bruen* nevertheless indicated the single step of the analysis has at least two *components*, which may be implicated, in varying degrees, in individual contexts. Those components include:

- ascertaining whether a restriction is within “the outer bounds of the right;” and
- if so, whether the restriction is inconsistent with the Second Amendment.

The import of there being a single step is that similar principles govern the various components of the single step. Determining whether the “plain text covers an individual’s conduct” is assessed in light of the “historical tradition.” That is dictated by the following language in *Bruen*:

Whether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the

constitutionality of a particular regulation, *Heller* relied on text and history.⁵⁰

The easily-overlooked consequence is that the first component of the single “step” listed above—concerning whether a restriction is within the outer bounds of the right—is necessarily assessed in light of the historical tradition. That is a more expansive test than a pedantically literalist approach to ascertaining the individual meaning of “bear” or “keep” as words detached from their context.

Because there is a single step, and that step involves consideration of the historical tradition, *Bruen* rejects the following:

A restriction creating a registry, and a restriction arising from incremental steps to such a registry such as the recently enhanced records retention requirement, are outside the plain text of the Second Amendment, because creation of a registry allows one to “keep” and “bear” arms.

To “keep” and “bear” arms, as within the plain text as informed by tradition, includes not being subject to consequences (burdens) for keeping and bearing arms that are outside the historical tradition.

In following the process mandated by *Bruen*, one should identify potentially relevant purposes protected by adoption of the Second Amendment, as the *McDonald* Court did in noting: “[I]ndividual self-defense is ‘the central component’ of the Second Amendment right.” Of course, to state that self-defense is “the central component” does not exclude other purposes as core components of the Second Amendment.

The sources that can reveal those components can include the following non-exhaustive list, which the *Bruen* court references:

- the work of “[F]ounding-[E]ra legal scholars;”
- nineteenth century judicial opinions;
- “‘discussion of the Second Amendment in Congress and in public discourse’ after the Civil War, ‘as people debated whether and how to secure constitutional rights for newly freed slaves;’”⁵¹ and
- observations of “post-Civil War commentators.”⁵²

One can quickly identify two implications of a registry that indicate burdens arising from creation of a registry of firearms ownership, and intermediate steps in the creation of a registry, are within the outer bounds of the right that the Second Amendment protects.

First, a purpose of the right is to preserve a public having the status of being armed, which operates as a check on the government. Restrictions that materially

facilitate the curtailment of the public being armed are thus within the outer bounds of the right.

Second, collection and retention of information concerning who has exercised the right, for reasons discussed below, materially burden exercise of the right for the affected persons. And that the listings are incomplete does not validate them. As noted elsewhere,^{ff} one focuses a constitutional analysis on the affected persons.

We may now turn to the details of examining these concerns.

Inhibiting Wrongful Seizures. We have above detailed that a purpose of the Second Amendment was to maintain an armed public whose status would impede Federal governmental overreach.^{gg} That circumstance clarifies that Federal government actions that facilitate wholesale Federal confiscation of private arms are inimical to the constitutional provision. That is, because the plain text is understood in light of historical tradition, including the principles recognized in the Founding Era, governmental restrictions that facilitate wholesale disarmament are within the “plain text” of the amendment.

This view is consistent with the repeated history of Congress restraining Executive Branch steps in the twentieth century along the path of creating a registry.^{hh} The initial Congressional rejection of Executive Branch efforts on the path of creating a registry that comes to this author’s attention was in the late 1930s.ⁱⁱ Additional manifest Congressional rejection arose in the 1970s.^{jj} These Congressional actions were within the era of Congress’s monotonically-increasing restrictions on firearms rights. For reasons discussed above,^{kk} this timing supports the view that Congressional rejection of the Executive Branch’s attempted steps—some incremental steps—to creation of a registry involved Congressional rejection of Executive Branch objectives as inconsistent with the Founding-Era conceptualization of the right to keep and bear arms.

Firearms serialization is a component of the current recordkeeping regime. Let us turn to one Founding-Era circumstance that has recently been touted as justifying mandatory firearm serialization—Federal marking of governmentally-owned arms. The analysis appears to be sufficiently broad so that it, could, by extension, be used to defend the constitutionality of a registry:

George Washington, in order to reduce the number of army-issued guns his soldiers would take home and attempt to keep, had all Continental Army firearms stamped with an insignia, starting in 1776, to mark them

^{ff} See *supra* p.171.

^{gg} See *supra* p.54 et ff.

^{hh} This history is discussed *supra* pp.133 et ff.

ⁱⁱ See *supra* p.130 & n.50.

^{jj} See *supra* p.131 et ff.

^{kk} See *supra* p.175 et ff.

as public property, though apparently this did not solve the theft problem completely. The marking was alphanumeric: “U.S.XIII,” and though it did not assign a unique serial number to each firearm, the marking served the same purpose as serial numbers today—it allowed the government to identify guns and their source to help enforce antitheft and other laws (such as the prohibition on selling guns to the enemy).⁵³

The author of that discussion, one Dru Stevenson, continues:

According to [military historian Erna] Risch, after 1775, George Washington began a policy of keeping muskets that men brought with them even after the men returned home. “He ordered that no soldier upon the expiration of his term of enlistment was to take with him any serviceable gun. If the musket was his private property, it should be appraised, and he would be given full value for it.”⁵⁴

The discussion further states:

The Continental Army’s rule for marking all its guns with an alphanumeric identifier was a primitive version of modern serial numbering, which involves a unique number for each firearm (of course, the guns themselves were more primitive as well). But *Bruen* mandates “a well-established and representative historical *analogue*, not a historical twin.” The numbering served a very similar purpose—enforcing laws and regulations against theft, trafficking, and so on. In any case, if we are concerned about the original public meaning of the Second Amendment, the public at the time of ratification would have been familiar with alphanumeric marking requirements for firearms at least in the context of preventing theft or inadvertent loss from the military’s inventory (even if historians suggest the system did not work perfectly).⁵⁵

It is the penultimate sentence that might allow extension of this argument to registries. Registries also may be styled as designed to inhibit “theft, trafficking, and so on.”

For something to be an analogue, it must be analogous—meaning it must be analogous *in the relevant regard*. The relevant regard requires an analogy in respect of the purpose and the consequences of the restriction of the right. And the Federal government marking its own property is not analogous in the relevant regard. That is because the marking of government arms does not facilitate the improper seizure of private weapons. So, this pseudo-analogue does not support contemporary restrictions that facilitate bulk government seizure of firearms.

Separately, of course, actions taken during the Revolutionary War to oppose a hostile foreign enemy during military conflict, for reasons referenced above,^{ll} do not illuminate the actions the Federal government may take in opposition to the civil rights of its own people in a time of peace (notwithstanding the 1992 JAMA article referencing the advocacy, by a prominent person, of “‘a military attack’ on areas with high degrees of crime and gang violence”).^{mmm}

It would be expected for those who wish to restrict the Second Amendment to pose that the restriction arising from permanent dealer retention of records is *de minimis* and can be ignored. The point would be that the impediment only comes from seizures themselves, and that could be challenged in court.

The restriction is *de minimis*, however, only if judicial decision-making is correct and costless. And that is not the case. We know that, for example, because *Bruen* itself determined that some jurisdictions had for decades grossly infringed on the rights protected by the Second Amendment.

Burdening Exercise of Protected Rights. Where the government has lists of persons who have arms, it may use the information to target for unfavorable treatment individuals exercising a constitutional right to keep and bear arms. That is illustrated by *Estep v. Dallas County, Texas*, a case from the Fifth Circuit. Although the briefing was oblique as to the issue, the court took the core of the governmental actor’s argument as allowing adverse treatment on account of membership in a civil rights group dedicated to preserving the Second Amendment:

Thus, for purposes of determining whether the Fourth Amendment was violated, the question is: was it reasonable for Officer Peace to think Estep was dangerous and might gain immediate control of a weapon based upon (1) Estep’s vehicle containing an NRA sticker; (2) Estep’s vehicle containing camouflage gear; (3) Estep showing Peace that he had a key chain which contained mace; (4) Estep getting out of the car to hand Peace his identification; and (5) Estep’s manner in answering Peace’s questions?

The answer to that question is no for several reasons. The presence of the NRA sticker in the vehicle should not have raised the inference that Estep was dangerous and that he might gain immediate control of a weapon. Regardless of whether there is some correlation between the display of an NRA sticker and gun possession, placing an NRA sticker in one’s vehicle is certainly legal and constitutes expression which is protected by the First Amendment. A police officer’s inference that danger is afoot because a citizen displays an NRA sticker in his vehicle presents disturbing First and Fourth Amendment implications.⁵⁶

^{ll} See *supra* p.21.

^{mmm} See *supra* p.38.

The most disturbing aspect of this circumstance is not that an individual government functionary might seek to treat adversely a person on account of his exercise of an enumerated right. It is that this is a court’s discussion of a position taken by a governmental actor—the office of a city attorney—in a Federal appellate court, in a deliberate way, after reflection. The government thought this was satisfactory.

Additionally, where the government has this information, it may release it, either intentionally or inadvertently. For example, California announced in 2022 that it had made publicly available the names, addresses and other information of persons who had applied for carry permits from 2011 to 2021.⁵⁷ In 2012, a newspaper obtained from the government and published the addresses of permit holders in two New York counties.⁵⁸ Release of this information may result in one being targeted for exercising a constitutional right, e.g., by persons seeking to steal firearms. Or, it may result in a more mundane form of private discrimination, e.g., employment discrimination.

We have above notedⁿⁿ that the Fourth Circuit relied on the small fraction of licensees whose information was collected in concluding that the governmental actions did not involve statutorily-banned registries. Turning first to the constitutional implications of such an argument: We have already noted, “Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.”^{oo} So, the Supreme Court has, as a matter of general constitutional jurisprudence, flatly rejected the approach that the Fourth Circuit took.

In sum, governmental collection of firearms ownership information burdens firearms rights, in a way that may materially influence the extent to which the civil right is exercised. For this reason, a Founding-Era analogue is required to justify the burden, and there is not one. Hence, the burden on the right is unconstitutional.

SECTION 4. DISABILITIES ARISING FROM NON-VIOLENT CRIMINAL CONVICTIONS

In this section, we will analyze application of *Bruen* to the contemporary Federal prohibition on firearms possession by persons who have committed felonies (or State misdemeanors punishable by more than two years).^{pp} The prohibition arising from prior convictions is wide-ranging. It is not tethered to the subject having used arms criminally or having engaged in actions that involve, or threaten, physical misconduct. But the prohibition does exclude convictions “pertaining to

ⁿⁿ See *supra* p.135 et ff.

^{oo} See *supra* p.171 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992)).

^{pp} The prohibited persons are detailed *supra* p.118 et ff.

antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices.”⁵⁹

The only Founding-Era restrictions^{qq} that were not tethered to individual misuse of arms or physical misconduct were restrictions:

- applicable to persons who were not perceived as fully vested of civil rights on account of their race; and
- restrictions adopted during military conflict, namely:
 - the Revolutionary War (for the disloyal, notoriously disaffected, etc.) or
 - the French and Indian War (on the basis of religious belief,

which are inapposite to contemporary restrictions on those who have committed non-violent felonies, because:

- as noted above, even the egregious *Korematsu v. United States* opinion was not so bold as to indicate that odious restrictions on civil rights based on invidious classifications imposed during military hostilities could be used to justify restrictions when military hostilities were not present;^{rr} and
- as to religious restrictions, the then-extant right under English law did not extend to Catholics, so prohibitions on Catholics were not informative of the right generally,^{ss} and, to boot, they were not widespread^{tt}—in only two colonies (in one of them of only of limited duration)—and thus not analogues that adequately support the contemporary, permanent prohibition.

The other restrictions, linked to having manifested physical dangerousness or misuse of arms, referenced above,^{uu} were:

^{qq} The Founding-Era restrictions are discussed *supra* p.16 et ff.

^{rr} See *supra* p.22

^{ss} See *supra* p.23.

^{tt} The *Bruen* court notes atypical Founding-Era restrictions will not validate contemporary restrictions, in the following language:

In the end, while we recognize the support that postbellum Texas provides for respondents’ view, we will not give disproportionate weight to a single state statute and a pair of state-court decisions. As in *Heller*, we will not “stake our interpretation of the Second Amendment upon a single law, in effect in a single [State], that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense” in public.

New York State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2153 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 632 (2008)).

^{uu} See *supra* p.19.

- based on individualized determinations: a 1637 Massachusetts enactment naming certain persons to turn in their arms; or
- to boot, not actual prohibitions on firearms possession but either involved forfeiture (or temporary dispossession) of individual arms or merely made arms possession more burdensome—surety requirements.

For a Founding-Era restriction to be an analogue meeting the requirements of *Bruen*, it must be analogous in the relevant regard. To justify a contemporary, permanent firearms ban for those who have previously committed non-violent crimes not involving the use of arms, the analogue would need to be analogous as to those circumstances. The Founding-Era (or potentially Fourteenth-Amendment-Era) analogue would need to have met the following requirements:

- involved non-individualized determinations (the contemporary prohibition being a wholesale ban for those who have committed the covered non-violent felonies and misdemeanors);
- been permanent; and
- not been spawned by authoritarian tendencies arising during military conflict.

Relying on untailed prohibitions involves, precisely, the type of reliance on legislative safety determinations in gross that the Court, as noted above,^{vv} has rejected as a basis for validating contemporary firearms prohibitions.

What is left, as the Founding-Era analogues putatively supporting the contemporary restrictions on the non-violent criminals, are the restrictions on the basis of race. To rely modernly on Founding-Era disarmament of blacks as a basis for contemporary firearms prohibitions is to say, in essence, we are all slaves now. It is shocking that the government would make such an assertion, or that judges would rely upon it.

One vogue has been to justify these restrictions on the basis that Congress, by criminalizing non-violent conduct, has put the violators in the class of the non-virtuous. And, in this vogue, the constitutional right is limited to the virtuous.⁶⁰ One would not need to check to be reasonably confident as to the following: Precedent excluding the non-virtuous from other civil rights would have included targeting, inimical to contemporary *cancel culture*, of persons engaging in certain now-protected sexual practices. But this author did check. And indeed that is the case.⁶¹ Why a contemporary court would wish to associate itself with that currently-discredited practice is unclear to this author.

^{vv} See *supra* p.166.

Our conclusion that there is not a Founding-Era analogue for the contemporary restrictions arising from convictions for crimes not tethered to violence dovetails with our discussion, above,^{ww} concerning incrementalism. It is through that style of incremental statutory changes that Federal law has transitioned to restrictions widely divergent from the Founding-Era conceptualization.

Lastly, exclusion of antitrust crimes and the like from those that give rise to a firearms prohibition evidences that the restrictions are the product of legislative hostility to exercise of the enumerated civil right.⁶² To provide favorable treatment for antitrust offenders is an exclusion that reeks of class-based favoritism. It belies the notion that the restrictions are properly tailored to disarm on the alleged, proper basis of heightened dangerousness.

SECTION 5. RESTRICTIONS ON LICENSURE OF NON-RESIDENTS

Some States restrict the ability of non-residents to possess concealed firearms. A few cases decided before *Bruen* addressed challenges to that circumstance. *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013), *Bach v. Pataki*, 408 F.3d 75, 94 (2d Cir. 2005) and *Culp v. Raoul*, 921 F.3d 646 (7th Cir. 2019) are prominent cases, although there are others.⁶³ The primary (but not sole) theory for challenging the restrictions was founded on the Privileges and Immunities Clause of Article IV. Those claims consistently failed.

Nowak and Rotunda provide the following summary of the test the Supreme Court follows in applying the Privileges and Immunities Clause of Article IV:

First, the Court determines whether the benefit or activity constitutes one of the “privileges and immunities” protected by the clause. Second, the Court will determine if there is a substantial state interest in the differing treatment of nonresidents. Reciting this test is easier than applying it.⁶⁴

After *Bruen*, applying the first step to restrictions on issuing concealed carry permits to non-residents would appear to be perfunctory. Nowak and Rotunda note: “This clause also protects all rights deemed to be ‘fundamental’ because they are expressly protected by the United States Constitution or any of its Amendments.”⁶⁵

Before turning to application of the second step, let us first review the theories under which the above-referenced opinions rejected claims under the Privileges and Immunities Clause of Article IV. The rationales expressed in these prior, prominent cases consisted of the following:

^{ww} See *supra* p.175 et ff.

Peterson in essence concludes there is not a right to carry a concealed weapon outside the home, and thus the Privileges and Immunities claim falls under the first step.^{xx}

Bach v. Pataki assumed the right was a privilege under Article IV.⁶⁶ As to the second step, in referencing difficulty in monitoring out-of-state applicants, the court concluded the restriction was permissible: “Defendants have demonstrated that ‘non-citizens constitute a peculiar source of the evil at which the statute is aimed.’”⁶⁷ The court’s analysis is conclusory. The court’s theory was residence was necessary for the State to exercise its “considerable discretion” in implementing its “extraordinary power” under the “proper cause” requirement.⁶⁸ This approach is, of course, contrary to *Bruen*, which rejected the constitutionality of vesting in the State such considerable discretion.

The statute addressed in *Culp* provided that out-of-State persons could only receive Illinois licenses if their respective home States had licensing requirements that were “substantially similar” to the Illinois provisions. The opinion notes:

The law of another state is deemed “substantially similar” if the state, like Illinois, (1) regulates who may carry firearms in public; (2) prohibits those with involuntary mental health admissions, and those with voluntary admissions within the past five years, from carrying firearms in public; (3) reports denied persons to the FBI’s National Instant Criminal Background System; and (4) participates in reporting persons authorized to carry firearms in public through the National Law Enforcement Telecommunications System.⁶⁹

As to the Privileges and Immunities Clause of Article IV, the court’s discussion, which cites *Bach*, is relatively brief:

[T]he Privileges and Immunities Clause does not compel Illinois to afford nonresidents firearm privileges on terms more favorable than afforded to its own citizens. Yet that is the precise import of the plaintiffs’ challenge to Illinois’s Concealed Carry Act. They demand the right to carry a concealed firearm despite the (uncontested) information barrier Illinois

^{xx} Relying on the two-step approach to applying the Second Amendment rejected by *Bruen*, the *Peterson* court held “that Peterson’s Second Amendment claim fails at step one of our two-step analysis: the Second Amendment does not confer a right to carry concealed weapons.” The relatively brief discussion makes use of the inadequate approach, referenced above, *see supra* p.169, reciting *Heller’s* observation that the right is not unlimited, as if that were informative in actually analyzing the legality of a restriction.

Turning to the Privileges and Immunities Clause of Article IV, the court concluded that carrying a concealed firearm is not within the privileges and immunities clause. It did so “[f]or largely the same reasons that we reject . . . [the] Second Amendment claim.” And it did so notwithstanding an acknowledgement that, in *Dred Scott*, the Court stated the right to bear arms is one of those privileges and immunities.

faces when monitoring their continued fitness and eligibility. The State does not face this monitoring barrier with its own citizens, however.

Illinois's adoption of a substantial-similarity requirement to bridge the information deficit places nonresidents on equal regulatory footing with Illinois residents and does not offend the Privileges and Immunities Clause. To the extent the impact of this regulation works to disadvantage nonresidents, such an effect is not the type of unjustifiable discrimination prohibited by the Clause. Put another way, the Privileges and Immunities Clause, no more than the Second Amendment, does not force Illinois into a regulatory race to the bottom.⁷⁰

The primary theories for challenge to this style of restriction on non-residents, after *Bruen*, continue to be one directly under the Second Amendment and one under the Privileges and Immunities Clause of Article IV.

Turning to the Second Amendment, *Bruen* advises that one is to look to Founding-Era analogues. This author is not aware of any. There were some colonial provisions that exempted non-residents from mandatory firearms possession. Such an exemption is not analogous to a prohibition. In fact, as discussed above,^{yy} when States ramped-up restricting the carrying of concealed firearms in the early nineteenth century, many expressly excluded travelers from these restrictions. That is, there was a Founding-Era practice *enhancing* non-residents' ability to carry firearms, relative to the rights of residents. And numerous colonial statutes required persons to possess arms while traveling. In light of these directly contrary colonial practices and the absence of analogues supporting the restrictions, the restrictions are not valid.

Restrictive States would have had a better argument had *Bruen* validated may-issue regimes. But it did not.

It is supposed that lower courts will take out of context the following footnote in *Bruen*:

To be clear, 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]." Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent "law-abiding, responsible citizens" from exercising their Second Amendment right to public carry. Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, "law-abiding, responsible

^{yy} See *supra* p.76 et ff.

citizens.” And they likewise appear to contain only “narrow, objective, and definite standards” guiding licensing officials, rather than requiring the “appraisal of facts, the exercise of judgment, and the formation of an opinion,”—features that typify proper-cause standards like New York’s. That said, 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.⁷¹

There is nothing in this vague paragraph that engages the issue of whether a State can prevent most U.S. citizens from carrying firearms in that State. And the actual rationale the *Bruen* Court expresses is inconsistent with the position that a State can. The opinion favorably comments on statutory provisions that “do not necessarily prevent ‘law-abiding, responsible citizens’ from exercising their Second Amendment right to public carry.” Non-licensure of all nonresidents, or nonresidents from some other States, does so fetter the law-abiding.

Were a court instead to focus on these restrictions under the Privileges and Immunities Clause of Article IV, observations by Nelson Lund, predating *Bruen*, seem apt. He has written that the administrative convenience rationale expressed in *Bach* is inconsistent with Supreme Court authority. In particular, prior Supreme Court authority rejected what was effectively a prohibition (in the form of a grossly disproportionate fee) on commercial fishing by out-of-State persons. The Court there indicated, as Lund noted:

The State is not without power, for example, to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats, or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay. We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them.⁷²

On these principles, a State could impose an increased cost for non-residents arising from the increased costs associated with continually checking their backgrounds. And the Court seems willing to give the back of the hand to assertions that mere increased cost in vetting out-of-State persons is an adequate basis to find a restriction consistent with the Privileges and Immunities Clause.^{zz} And, for the

^{zz} See *Barnard v. Thorstenn*, 489 U.S. 546, 556–57 (1989), where the Court made short shrift of a governmental reliance on the burden of vetting non-resident lawyers in a challenge to a residency requirement for lawyers.

State to succeed, it would need to prove that this checking was unsatisfactory, compared to what the State did as to its own residents. That seems unlikely.

Moreover, rejection of a Privileges and Immunities challenge would require a factual predicate that is well beyond what has been established. Nowak and Rotunda note: “Nonresidents may be treated differently from local residents when they in fact are shown to cause a particular harm to state or local interest—‘to constitute a peculiar source of the evil at which the state statute is aimed.’”^{aaa} The required factual predicate would need to address the relevant “evil.” Actually addressing the relevant evil would likely require a level of specificity that a jurisdiction such as Illinois would be unable to meet. The evil is not avoiding a “race to the bottom,” as *Culp* would style it. The evil would involve alleged higher crime arising from allowing non-residents to be licensed, under the checking procedure that Illinois could implement for non-residents, with reasonable, increased fees. It is dubious that a jurisdiction such as Illinois could meet this requirement for many reasons.

First, substantial evidence supports the view that persons who are issued concealed weapons permits are highly law-abiding.⁷³ It would be the government’s obligation to prove, with evidence, the converse as part of demonstrating that it is constitutional not to license citizens of other States.

Second, the government’s evidence would need to address the fact that crime such as robbery generally is committed close to the perpetrator’s residence.⁷⁴ So, a factual predicate would need to show that not licensing non-residents would, in some substantial way, reduce travel to commit crime with a firearm, although much firearm crime is close to the offenders’ respective residences.

Third, the government would need to detail how the prohibition would be lawfully operationalized in a fashion that realized the benefits. This author has elsewhere⁷⁵ concluded that reasonable suspicion a person is armed is, by itself, not a constitutionally sufficient basis to initiate a *Terry* stop. So, the evidence the government would need to assemble would need to show the restriction effective,

^{aaa} JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, at 408 (8th ed. 2010) (quoting *United Bldg. & Const. Trades Council of Camden Cnty. & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208, 222 (1984)). They continue:

How does one determine if the nonresidents are “a peculiar source of the evil”? The Court remanded for further proceedings, so the standard of review is not clear. The Court did say that the state must demonstrate through the making of a factual record at the trial courts that there is a “substantial reason” for the difference in treatment between the local residents or citizen and nonresident. In reviewing the state’s attempt to justify the discrimination, the Court must continue to bear in mind the purpose of the Article IV privileges and immunities clause to insure harmony between the residents of various states and the vitality of the nation as a single Union.

Id. at 408 (footnote omitted).

even though the government could not lawfully stop persons merely suspected of carrying firearms merely to check whether they have permits.

Lastly, it bears mention that the Supreme Court has previously noted the following in upholding a statute challenged under the Privileges and Immunities Clause: “It is plain that the act assailed was not enacted for the purpose of creating an arbitrary or vexatious discrimination against nonresidents”⁷⁶ As is often the case with older Supreme Court opinions, the language is not styled in a way that directly states a standard, or a component of a standard. Nevertheless, the case supports the proposition that enactments infected with arbitrary provisions or “vexatious discrimination” are suspect. It seems fair to say that even some quarters of the judiciary have pursued odious tacks inimical to the civil right to bear arms,^{bbb} and that selected States have been even more extreme.

By way of illustration, a New York statute, invalidated as unconstitutional, prohibits loading more than seven rounds in a magazine that can accept more ammunition.⁷⁷ The Second Circuit, in invalidating the provision, noted:

[T]he seven-round load limit was a second-best solution. New York determined that only magazines containing seven rounds or fewer can be safely possessed, but it also recognized that seven-round magazines are difficult to obtain commercially. Its compromise was to permit gun owners to use ten-round magazines if they were loaded with seven or fewer rounds.⁷⁸

The provision is absurd. Surely it was not going to influence the activities of those bent on evil. It is implausible that it meaningfully addressed criminal activity that did not fall afoul of other criminal prohibitions. But the provision would operate as a trap for the unwary who attempted to comply with the law.

In adopting such an absurd provision, a State’s legislature manifests contempt for the civil right to bear arms. The suitable judicial response is to take cognizance of the jurisdiction’s hostility to the right in assessing the constitutionality of the restrictions on the right that the jurisdiction adopts.

SECTION 6. PROHIBITIONS ON STANDARD-CAPACITY MAGAZINES

Modernly designed semi-automatic pistols often are designed to accommodate, and sold with, magazines having capacities in excess of ten or fifteen rounds. The popular Glock G17 has a standard capacity magazine that accommodates 17 rounds,⁷⁹ as do various models in Sig Sauer’s popular P320 line of pistols.⁸⁰

The Glock G17 has for many years been a popular choice for law enforcement.⁸¹ At various times in recent years, law enforcement personnel have opted to carry

^{bbb} See *supra* p.163.

pistols chambered in .40 S&W, a somewhat larger caliber than the 9 mm caliber of the G17, which results in fewer rounds being accommodated in within a similarly-sized grip.⁸²

AR-pattern rifles are typically sold by the manufacturer with magazines that can hold more than 15 rounds.⁸³ However, some firearms are sold with standard magazines with lesser capacities, such as micro-compact firearms designed to be very easily concealed, *e.g.*, pocket pistols.

Notwithstanding (i) the commonality of standard capacity magazines for pistols at 15 or 17 rounds, (ii) the common use by police of such magazines and (iii) standard capacities for AR-pattern rifle magazines being much higher—a number of jurisdictions have criminalized private person possession of standard-capacity magazines, the limit sometimes being 10 rounds and sometimes 15.⁸⁴ Let us examine the constitutionality of these restrictions.

(A) UNCONSTITUTIONAL AS PREVENTING MOST EFFICACIOUS EXERCISE OF THE RIGHT

We have above noted that, as a matter of constitutional jurisprudence not limited to firearms rights, a valid restriction on a constitutional right may not prohibit the manner in which some, albeit a minority, may most efficaciously exercise that right.^{ccc} As detailed below, these magazine restrictions eliminate what often will be the best way to exercise the right. They are therefore unconstitutional.

As we have noted above,^{ddd} most defensive uses of firearms do not involve discharge of the arm at all. But where an arm does have to be used defensively, one may well need to use more than ten or fifteen rounds. The need to use multiple rounds to stop an attacker can arise because multiple rounds need to be fired to get one round on target, and because multiple rounds on-target may be needed to stop the dangerous conduct.

As to the former, one report notes: “Even police officers, who are presumably certified and regularly re-certified as proficient marksman . . . , hit their targets with only 22% to 39% of their shots.”⁸⁵ Although some members of the public using firearms in self-defense will be more skilled than typical police officers, others will not be. But for a private person, using a firearm with the average accuracy for trained police officers against three attackers, eleven rounds (ten in the magazine

^{ccc} See *supra* p.172.

^{ddd} See *supra* p.90, text accompanying n.14.

and one in the chamber, initially) frequently would not be enough to put just a single round on each of the targets.^{eee}

As to the need to use multiple rounds to stop a single violent attacker, Massad Ayooob noted the following in a declaration in litigation then styled *Duncan v. Becerra*:

There is also the account of Travis Dean Neel. While sitting in a traffic jam behind an officer with a car pulled over, an occupant emerged from the detained vehicle and opened fire on the officer. Neel responded by retrieving his pistol with three magazines from his backseat and opened fire on the assailant, which resulted in him being fired upon and an ensuing gunfight, during the course of which he prevented the assailants from “finishing off” the officer and (with assistance from an off-duty police officer who joined him in the gunfight with his own handgun) from car-jacking a woman to get away, which may have saved that woman’s life. Despite Neel using all three of his fifteen-round magazines, and the several shots fired by the off-duty officer, the assailants were still able to flee, but could just as easily have decided to continue their attack and overcome Neel.⁸⁶

Another illustration provided in Ayooob’s declaration is the following:

Ronald Honeycutt was delivering pizzas when approached by a man with a gun from behind. He turned and fired when he saw a gun in the man’s hand, discharging all of his magazine’s fifteen rounds, which still did not immediately stop the threat, as the attacker remained upright with the gun pointed at him. But the attacker eventually succumbed to his wounds before being able to rack a round into the firing chamber of his pistol, which he had forgotten to do, and is probably why he was pointing the gun at Honeycutt but never discharged a single round.⁸⁷

An example of the need, perceived by trained professionals, to use more than one round on target to cause a subject to stop conduct perceived as dangerous is illustrated by the treatment of Dustin Theoharkis. Trained police officers thought it necessary to shoot Dustin Theoharkis sixteen times when, on being awakened in bed, he was (according to him) merely reaching for his wallet.⁸⁸

That one may carry multiple magazines does not adequately mitigate the burden. It is the private person, who does not get to select the time when defensive firearms use may be necessary, who is particularly disadvantaged by magazine capacity restrictions. As Ayooob further notes:

^{eee} In a simulation (using Excel, run twenty times, with a probability of a round on-target of 0.22), more than 11 rounds were required 50% of the time, and more than 16 rounds were required 35% of the time.

The homeowner who keeps a defensive firearm and is awakened in the night by an intruder is most unlikely to have time to gather spare ammunition. The sudden and unpredictable nature of such attacks, and their occurring in relatively confined spaces, generally do not permit gathering multiple firearms or magazines.

Ideally, one hand would be occupied with the handgun itself, and the other, with a telephone to call the police. And, assuming they even had time for a magazine change, most people do not sleep wearing clothing that would allow them to stow spare magazines, etc. on their person. They would have only what was in the gun.⁸⁹

We have above noted that a restriction that prohibits the most efficacious manner to exercise a constitutionally-protected right is inherently dubious.^{fff} That is the case even where the individual is not typical. So, these circumstances go well beyond the threshold for demonstrating a restriction on standard-capacity magazines is invalid. They are not simply part of the most efficacious manner in which the right can be exercised by a select few. Rather, they are part of the most efficacious manner for a typical exercise of the right.

(B) COMMON VACUOUS JUSTIFICATION TREATING POLICE WEAPONS AS OFF-LIMITS

As noted elsewhere, firearms issued to police officers will typically exceed the ten-round limit^{ggg} and often exceed the fifteen-round limits. One trend in posturing the defense of these restrictions is to lump law enforcement with the military and then assert that, as military weaponry, possession of these standard-capacity magazines is outside the scope of the Second Amendment. For example, “*Heller* specifically contemplated that ‘weapons that are most useful in military service’ fall outside of Second Amendment protection.”⁹⁰ This style of discussion typically is tied to the statement in *District of Columbia v. Heller* that: “It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—

^{fff} See *supra* p.172, text accompanying n.16.

^{ggg} See *supra* p. 198, *infra* p. 203. See also, e.g., *Kolbe v. Hogan*, 849 F.3d 114, 147 (4th Cir. 2017) (“The record shows that, at least within four major police agencies—the Maryland State Police, the Baltimore County Police Department, the Baltimore Police Department, and the Prince George’s County Police Department—the standard service weapons issued to law enforcement personnel come with large-capacity magazines.”), *abrogated by* *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). The relevant statutory provision, addressing what the opinion styles as “large-capacity magazines,” appertained to a magazine with a capacity exceeding ten rounds. MD. CODE ANN., CRIM. LAW § 4-305 (Westlaw through July 1, 2023) (“A person may not manufacture, sell, offer for sale, purchase, receive, or transfer a detachable magazine that has a capacity of more than 10 rounds of ammunition for a firearm.”).

may be banned, then the Second Amendment right is completely detached from the prefatory clause.”⁹¹

There are multiple problems with this style of discussion. First, it misconstrues—takes out of context—dicta in *Heller*. Second, it is inconsistent with the Founding-Era precedent, under which private persons were allowed to possess the arms most suited to what contemporary police officers use their pistols for—stopping crime in progress and detaining criminals.

Taking Dicta from Heller out of Context. This style of analysis takes dicta from *Heller* out of context. *Heller* did not hold that any weapon that is core to a soldier’s kit is outside the scope of the Second Amendment. A semi-automatic pistol with a magazine capacity of less than 10 rounds is, without doubt, within the scope of the Second Amendment. Perhaps the most famous illustration, still in wide use by the public today, is the 1911 pistol—a long-serving military sidearm. And surely its Beretta and Sig Sauer successors are as well within the Second Amendment. Military arms can be within the Second Amendment.^{hhh}

Heller in this dicta simply reserved the issue that some arm that has primary military application may be outside the Second Amendment. To say that one example of a class of a type of arm may be (or even is) outside the Second Amendment is not the same as saying all members of that class are outside the Second Amendment.

By way of analogy: To say that a car that has bald tires, a machine within the class of vehicles called cars, cannot lawfully be driven on a roadway is not to say that all cars—all machines within that class of vehicles—cannot be driven on roadways.

Moreover, the view preserved by this *Heller* dicta is, of course, in opposition to the core of the holding in *Miller*, which, to the contrary, indicates that use as an arm by ordinary soldiers bolsters the claim that possession of the arm is protected by the Second Amendment.ⁱⁱⁱ

Arms Used to Stop Crime and Detain Criminals Were Privately Possessed in the Founding Era. But, for another reason, one can easily see that linking a style of arm as being useful to those stopping crime in progress and capturing criminals does not advance the agenda of those who would wish to place the style of arm as outside the Second Amendment. That erroneous view is inconsistent with the notions of who would participate in preventing and restraining criminal activity during the Founding Era.

^{hhh} Discussion of, e.g., the Heckler & Koch Mark 23, a pistol rather difficult to carry concealed (the contemporary style in which handguns are typically carried), will be left for another time.

ⁱⁱⁱ See *supra* p.153, text accompanying n.149.

In the Founding Era, ordinary members of the public would participate in enforcing the law. The first city police department in the United States dates to the 1830s.^{jjj} This context rejects the notion that the Founders had contemplated a government that institutionalized dependency on the government, with only government employees having access to the most efficacious tools to use to curtail ongoing criminal conduct. The Founding-Era analogues, then, do not conceptualize those enforcing the law as entitled to arms different from those that may be possessed by ordinary citizens.

Additionally, we have above indicated that in adopting the Second Amendment, the Founders rejected a conceptualization that contemplated excluding from the public arms primarily with a military application. However, even adoption of that neutered version of the Second Amendment would not support prohibition on the public's carrying arms carried by ordinary police officers. Although as touted by *JAMA*, in 1992 the then-president of the Los Angeles County Medical Association called for a “military attack” on certain high-crime communities,^{kkk} the role of the police, in the ordinary case, is not to engage in military action. Their objectives are not killing people. Rather, they are to use arms as necessary to stop a threat—just as members of the public can as part of engaging in lawful self-defense. As well-known firearms trainer and expert Massad Ayoob noted:

Virtuous citizens buy their guns to protect themselves from the same criminals police carry guns to protect the citizens, the public, and themselves from. Therefore, armed citizens have historically modeled their choice of firearms on what police carry. The vast majority of California law enforcement officers carry pistols with double-stack magazines whose capacities exceed those permitted under California Penal Code section 32310.⁹²

Understanding the similarity of the purposes in which the arms are used by private persons and contemporary police, a prohibition on public possession of ordinary sidearms carried by police cannot be justified as being a mere prohibition on arms with only a military use.

(C) PROHIBITIONS ON COMPONENTS NOT CONSIDERED NECESSARY BY THE COURT

One judicial analysis post-dating *Bruen*, from Judge Karin J. Immergut of the Federal District Court in Oregon, provides the following alternative justification for validating these restrictions: “. . . Plaintiffs have not shown that the magazines

^{jjj} See *supra* p.105, text accompanying n.80.

^{kkk} See *supra* p.99.

restricted by Measure 114 are necessary to the use of firearms for lawful purposes such as self-defense. Therefore, Plaintiffs have failed to show that magazines capable of accepting more than ten rounds of ammunition are covered by the plain text of the Second Amendment.”⁹³

This analysis is, of course, entirely untethered to the analysis provided in *Bruen*. Nothing in the *Bruen* standard focuses the analysis, of a restriction on a firearm feature, on whether the arm could still function without the restricted feature. Unsurprisingly, the court cites not to *Bruen* but, rather, Ninth Circuit authority predating *Bruen*:

The Second Amendment covers firearms and items “necessary to use” those firearms. *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (“[W]ithout bullets, the right to bear arms would be meaningless.”); see also *Bruen*, 142 S. Ct. at 2132 (noting that the Second Amendment “covers modern instruments that facilitate self-defense”). Like bullets, magazines are often necessary to render certain firearms operable.⁹⁴

Were this approach correct, it would validate patently invalid restrictions, and there is not valid limiting principle. The same approach would allow the government to prohibit common calibers. A barrel accommodating 9 mm ammunition could be banned as not “necessary.” It could prohibit semi-automatic pistols altogether, relegating the public to ownership of revolvers. The Founding Era did not have an analogue for this style of regulation.

There is another fundamental problem with this discussion. What *Jackson* discusses is whether the protection extends to something beyond a firearm—in that case, bullets. A magazine is a part of the firearm. The extent to which the Second Amendment extends beyond firearms involves a completely separate matter from regulating the features of the arm.^{l11} As to carrying a particular arm, the issue, rather, is whether the arm is “in common use.”^{mmm} And standard capacity magazines exceeding 15-round capacity are firearm components in common use.⁹⁵

^{l11} Cf. *Ass’n of New Jersey Rifle & Pistol Clubs, Inc. v. Att’y Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018) (“Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are ‘arms’ within the meaning of the Second Amendment. *Id.*; see also *United States v. Miller*, 307 U.S. 174, 180 (1939) (citing 17th century commentary on gun use in America that “[t]he possession of arms also implied the possession of ammunition.” (parallel citation omitted)), *abrogated in part on other grounds by* *Ass’n of New Jersey Rifle & Pistol Clubs, Inc. v. Att’y Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018).

^{mmm} *Bruen* notes:

Whatever the likelihood that handguns were considered “dangerous and unusual” during the colonial period, they are indisputably in “common use” for self-defense today. They are, in fact, “the quintessential self-defense weapon.” Thus, even if these colonial laws prohibited the carrying of handguns because they were considered “dangerous and unusual weapons” in the

(D) CONCLUSION

One may take it that the correct analysis of restrictions on standard-capacity magazines is as follows:

These are in common use. That would seem to be dispositive. *Heller* indicates that the test for treating a class of arm as outside the Second Amendment's scope is that it is "dangerous and unusual."^{nmn} The conjunction "and" indicates that one in common use cannot be deemed outside the scope of the Second Amendment.

Although not necessary for their possession being protected by the Second Amendment, one may note that they are particularly beneficial for use by private persons in self-defense. It would not be unexpected, for persons who ultimately need to use firearms for self-defense, not to have been able to gear-up with multiple magazines. Carrying spare magazines may be impracticable. Or it may be that an arm was picked-up during the emergency itself, without opportunity to get more gear.

An argument they are only for the military and thus outside the Second Amendment is gravely flawed, both factually and doctrinally. Police are not the military, but police are commonly issued pistols with 15-round or 17-round magazines. And even if their application were solely limited to military activity (including training), that would not, by itself, be sufficient to exempt them from the scope of the Second Amendment. The *holding* of *Miller* indicates that an arm having a military application does not diminish the applicability of the Second Amendment to its possession but, rather, the opposite.

1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.

New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2143 (2022) (citation omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008)).

^{nmn} The court states:

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."

Heller, 554 U.S. at 627 (citation omitted). *Caetano* concludes that where the arm in question is in common use at the time of the challenge to the restriction, that it was not in common use at the time of the Founding—in that case, it being technology not invented at the Founding (a stun-gun)—is not relevant. *Caetano v. Massachusetts*, 577 U.S. 411, 412 (2016) (per curiam).

Chapter 6 Endnotes

¹ *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J., joined by Duffy, J.) (quoting Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1515 (2009)), *abrogated by* *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

² *Est. of Phillips v. District of Columbia*, 455 F.3d 397, 402 (D.C. Cir. 2006) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

³ *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

⁴ *Schaefer v. Whitted*, 121 F. Supp. 3d 701, 707 (W.D. Tex. 2015) (citation omitted).

⁵ *Whitted*, 121 F. Supp. 3d at 711.

⁶ 171 F. Supp. 3d 605 (E.D. Mich. 2016).

⁷ *Chesney*, 171 F. Supp. 3d at 613–14.

⁸ *Chesney*, 171 F. Supp. 3d at 614.

⁹ *Chesney*, 171 F. Supp. 3d at 622 (“[T]his Court concludes, in accordance with the uniform weight of authority in cases decided within this circuit, that the Second Amendment right posited by Plaintiff here—i.e., the right to openly carry a firearm outside the home—was not clearly established at the time of the incident giving rise to this suit.”).

¹⁰ *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (citations omitted) (footnote omitted) (first quoting *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019) (internal quotation marks omitted), then quoting *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (internal quotation marks omitted), then quoting *Kanter*, 919 F.3d at 441 (internal quotation marks omitted), then quoting *id.* (internal quotation marks omitted), then quoting *Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018) (emphasis added in *Bruen*), then quoting *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017) (internal quotation marks omitted), then quoting *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012)).

¹¹ *See Bruen*, 142 S. Ct. at 2138.

¹² *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (citation omitted).

¹³ *Hightower v. City of Bos.*, 693 F.3d 61, 73 (1st Cir. 2012) (first quoting *Heller*, 554 U.S. at 626, then quoting *id.*, then quoting *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009)).

¹⁴ *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 893–94 (1992) (emphasis added) (citation omitted) (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)).

¹⁵ *Dobbs*, 142 S. Ct. at 2284.

¹⁶ *Stenberg v. Carhart*, 530 U.S. 914, 934 (2000).

¹⁷ *Federal Firearms Act*, Pub. L. No. 75-785, § 2(e), 2(f), 52 Stat. 1250, 1251 (1938).

¹⁸ *To Strengthen the Federal Firearms Act*, Pub. L. No. 87-342, 75 Stat. 757 (1961). The relevant statutory provisions were then codified at 15 U.S.C. § 901 et seq.

¹⁹ 18 U.S.C. § 925(c) (1964 Supp. V).

²⁰ *Id.* § 921(a)(20). This exclusion was not present, for example, in 15 U.S.C. § 901 (1964).

²¹ The historical Code of Federal Regulations for 1984 was searched using the following:

- advanced: 921! & (“BUSINESS PRACTICES” OR ANTITRUST OR “ANTI-TRUST”); and
- advanced: “punishable #by imprisonment #for a term exceeding” & (“BUSINESS PRACTICES” OR ANTITRUST OR “ANTI-TRUST”).

The searches yielded nothing expanding the definition. In particular, the following potentially relevant regulations were identified:

Crime punishable by imprisonment for a term exceeding one year. Any offense for which the maximum penalty, whether or not imposed, is capital punishment or imprisonment in excess of one year. The term does not include (a) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or (b) any State offense (other

than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
27 C.F.R. § 55.11 (Westlaw, through Apr. 1, 1984).

Crime punishable by imprisonment for a term exceeding 1 year. Any offense for which the maximum penalty, whether or not imposed, is capital punishment or imprisonment in excess of 1 year. The term shall not include (a) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulations of business practices excluded from the meaning of the term under provisions contained in this part, or (b) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of 2 years or less.

27 C.F.R. § 178.11 (Westlaw, through Apr. 1, 1984).

²² Firearms Owners' Protection Act, § 101, Pub. L. No. 99-308, 100 Stat. 449 (May 19, 1986). *Compare* 18 U.S.C. § 921(a)(20) (1982) (continuing to vest in the Executive Branch authority to designate similar offenses), [https://tile.loc.gov/storage-services/service/l1/uscode/uscode1982-00701/uscode1982-007018044/pdf](https://tile.loc.gov/storage-services/service/l1/uscode/uscode1982-00701/uscode1982-007018044/uscode1982-007018044.pdf).

²³ An Act Declaring Pistols, Revolvers, and Other Firearms Capable of Being Concealed on the Person Nonmailable and Providing Penalty, Pub. L. No. 69-583, 44 Stat. 1059, 1059–60 (1927).

²⁴ NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT 570 (3d ed. 2022).

²⁵ National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934).

²⁶ Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1220–21 (*inter alia*, adding 18 U.S.C. § 922(h), prohibiting receipt by a prohibited person of a firearm “which has been shipped or transported in interstate or foreign commerce”).

²⁷ Gun Control Act of 1968, 82 Stat. at 1216 (adopting definition in 18 U.S.C. § 921(a)(20)).

²⁸ Gun Control Act of 1968, 82 Stat. at 1225 (adopting 18 U.S.C. § 925(c)).

²⁹ Pub. L. No. 103-322, §§ 110101–110106, 108 Stat. 1996–2010 (1994).

³⁰ *Id.* § 110105 (stating the enactment is “repealed effective as of the date that is 10 years after that date [of enactment]”).

³¹ *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2131 (2022).

³² Federal Firearms Act, Pub. L. No. 75-785, 52 Stat. 1250 (1938).

³³ For example, *United States v. Bass*, 404 U.S. 336, 348 (1971) states:

Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies ‘the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.’ H. Friendly Mr. Justice Frankfurter and the Reading of Statutes, in *Benchmarks* 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

³⁴ By way of illustration, a 2020 Associated Press story begins:

Chief Justice John Roberts defended the authority of the Supreme Court to interpret the Constitution, saying its role should not be called into question just because people disagree with its decisions.

When asked to reflect on the last year at the court in his first public appearance since the U.S. Supreme Court overturned *Roe v. Wade*, Roberts said Friday he was concerned that lately some critics of the court's controversial decisions have questioned the legitimacy of the court, which he said was a mistake.

The Associated Press, Chief Justice John Roberts Defends the Supreme Court—as People’s Confidence Wavers, NPR (Sept. 10, 2022 11:05 AM ET) (<https://www.npr.org/2022/09/10/1122205320/chief-justice-john-roberts-defends-the-supreme-court-as-peoples-confidence-waver>).

³⁵ *Houston v. City of New Orleans*, 675 F.3d 441, 445 (5th Cir.), *opinion withdrawn and superseded on reh'g on other grounds*, 682 F.3d 361 (5th Cir. 2012).

³⁶ *Rodgers v. Knight*, 781 F.3d 932, 941–42 (8th Cir. 2015); *accord* *Scheffler v. Helget*, No. A22-0205, 2022 WL 17574689, at *3 (Minn. Ct. App. Dec. 12, 2022) (quoting *Rodgers*) (temporary seizure), *review denied* (Mar. 28, 2023).

³⁷ *Brodrick v. Washington Cnty. Bd. of Cnty. Comm’rs*, No. 22-CV-271, 2023 WL 113723, at *2 (N.D. Okla. Jan. 5, 2023) (citations omitted).

³⁸ *Frein v. Pennsylvania State Police*, 47 F.4th 247, 256 (3d Cir. 2022) (first quoting *Walters v. Wolf*, 660 F.3d 307, 318 (8th Cir. 2011), then quoting *Houston v. City of New Orleans*, 675 F.3d 441, 445 (5th Cir.), *opinion withdrawn and superseded on reh’g on other grounds*, 682 F.3d 361 (5th Cir. 2012), then quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)).

³⁹ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2131 (2022).

⁴⁰ Definition of “Frame or Receiver” and Identification of Firearms, 81 Fed. Reg. 24,652, 24,667 (Apr. 26, 2022) (referencing 1985 rulemaking).

⁴¹ 27 C.F.R. § 478.127 (through July 6, 2023).

⁴² Definition of “Frame or Receiver” and Identification of Firearms, 81 Fed. Reg. 24,652, 24,667 (Apr. 26, 2022) (footnotes omitted).

⁴³ Dave Campbell, *Colt History: A Look Back at the 1911, American Rifleman* (Mar. 7, 2011), <https://www.americanrifleman.org/content/colt-history-a-look-back-at-the-1911/>

⁴⁴ *E.g.*, *The Beretta M9: 25 Years of Service, American Rifleman* (Nov. 12, 2009), <https://www.americanrifleman.org/content/the-beretta-m9-25-years-of-service/>.

⁴⁵ *See* Todd South, *Want a Genuine US Military Surplus 1911? Here’s (Finally) How You Can Get One*, *Army Times* (May 14, 2018), <https://www.armytimes.com/off-duty/gearscout/2018/05/14/want-a-genuine-us-military-surplus-1911-heres-finally-how-you-can-get-one/> (“The Civilian Marksmanship Program last year announced it would sell 10,000 of the legendary pistols that have been in Army stocks for decades to collectors.”).

⁴⁶ *Gun Control Act of 1968*, Pub. L. No. 90-618, 82 Stat. 1213, 1214, 1216 (1968) (adding 18 U.S.C. § 921(a)(3), (a)(16) (excluding antique firearms from the definition of firearms, and defining antique firearms)).

⁴⁷ 81 Fed. Reg. 24,652, 24,707 (Apr. 26, 2022); 27 C.F.R. §§ 478.92(a)(2), 478.125(i) (through July 6, 2023).

⁴⁸ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n. 10, (1961)).

⁴⁹ *Bruen*, 142 S. Ct. at 2127 (emphasis added).

⁵⁰ *Bruen*, 142 S. Ct. at 2129.

⁵¹ *Bruen*, 142 S. Ct. at 2128 (quoting *Heller*, 554 U.S. 570, 614).

⁵² *Bruen*, 142 S. Ct. at 2128.

⁵³ Dru Stevenson, *A Founding-era Analog for Modern Serial Number Requirements*, *Duke Center for Firearms Law*, <https://firearmslaw.duke.edu/2023/02/a-founding-era-analog-for-modern-serial-number-requirements/> (Febr. 10, 2023), <https://web.archive.org/web/20230628231150/https://firearmslaw.duke.edu/2023/02/a-founding-era-analog-for-modern-serial-number-requirements/>.

⁵⁴ *Stevenson*, *supra* note 53.

⁵⁵ *Stevenson*, *supra* note 53.

⁵⁶ *Estep v. Dallas Cnty., Tex.*, 310 F.3d 353, 358 (5th Cir. 2002).

⁵⁷ KTVL Staff, *10 Years of California Concealed Weapons Permit Holders’ Personal Data Leaked* (June 30th 2022, 7:28 PM CDT), <https://ktvl.com/news/local/california-concealed-carry-weapons-permit-data-firearms-dashboard-portal-breach-leak-department-of-justice-siskiyou-county-jeremiah-larue-rob-bonta>.

⁵⁸ KC Maas and Josh Levs, *Newspaper Sparks Outrage for Publishing Names, Addresses of Gun Permit Holders*, *CNN* (Updated 10:23 AM EST, Dec. 27, 2012), <https://www.cnn.com/2012/12/25/us/new-york-gun-permit-map/index.html>.

⁵⁹ 18 U.S.C. § 921(a)(20)(A) (Westlaw through Pub. L. No. 118-10).

⁶⁰ The seminal framing is: “In classical republican political philosophy, the concept of a right to arms was inextricably and multifariously tied to that of the ‘virtuous citizen.’” Don B. Kates, Jr., *The*

Second Amendment: A Dialogue, 49 LAW & CONTEMP. PROBS., Winter 1986, at 143, 146 (cited in, e.g., *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010)).

⁶¹ See Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the “Virtuous,”* 25 TEX. REV. L. & POL. 245 (2021).

⁶² In discussing strict scrutiny, Peter Rubin notes:

[T]he inquiry into narrow tailoring—into the fit between classification and proffered goal—serves at least three distinct purposes. First, it ensures that the stated purpose was indeed the actual purpose behind the classification. A narrow tailoring inquiry can help to “smoke out” illegitimate purposes by demonstrating that the classification does not, in fact, serve the stated, legitimate purpose.

Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 14 (2000) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

⁶³ *Application of Ware*, 474 A.2d 131, 133 (Del. 1984); *People v. Perez*, 325 N.Y.S.2d 183, 184 (Co. Ct., Onondaga County, 1971).

⁶⁴ JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 9.6(f)(i), at 406 (8th ed. 2010).

⁶⁵ *Id.* at 413. See also *id.* at 407 (“All rights directly protected by the Constitution, such as First Amendment rights, or other constitutional rights that the Court has been found to be fundamental for the purposes of due process and equal protection analysis, constitute privileges and immunities of citizenship.”).

⁶⁶ *Bach v. Pataki*, 408 F.3d 75, 91 (2d Cir. 2005).

⁶⁷ *Bach v. Pataki*, 408 F.3d at 94 (quoting *Hicklin v. Orbeck*, 437 U.S. 518, 526 (1978)).

⁶⁸ *Bach v. Pataki*, 408 F.3d at 79 (“Local licensing officers, often local judges, have considerable discretion in deciding whether to grant a license application.”); *id.* at 80 (“A licensing officer . . . enjoys wide discretion in exercising this ‘extraordinary power,’ which may be exercised at ‘any time,’ and includes the prerogative ‘to monitor carry licenses he has issued to ensure that the basis for issuance of the license remains.’” (first quoting *O’Brien v. Keegan*, 663 N.E.2d 316, 317 (N.Y. 1996), *abrogated by* *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), then quoting N.Y. PENAL LAW § 400.00(11), then quoting 1991 N.Y. Op. Atty. Gen. (Inf.) 72, 1991 N.Y. AG LEXIS 84, *3)).

⁶⁹ *Culp v. Raoul*, 921 F.3d 646, 651 (7th Cir. 2019).

⁷⁰ *Culp*, 921 F.3d at 657–58.

⁷¹ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2138 (2022) (first quoting *Drake v. Filko*, 724 F.3d 426, 442 (3d Cir. 2013) (Hardiman, J., dissenting), then quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969), then quoting *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)).

⁷² *Toomer v. Witsell*, 334 U.S. 385, 398–99, (1948) (quoted in Nelson Lund, *Have Gun, Can’t Travel: The Right to Arms Under the Privileges and Immunities Clause of Article IV*, 73 UMKC L. REV. 951, 963–64 (2005)).

⁷³ *E.g.*, JOHN R. LOTT, JR., *MORE GUNS LESS CRIME* 251 (3d ed. 2010) (“Permit holders committed murder at 1/182nd the rate of the general public.”).

⁷⁴ Wim Bernasco & Richard Block, *Where Offenders Choose to Attack: A Discrete Choice Model of Robberies in Chicago*, 47 CRIMINOLOGY 93, 123 (2009) (“Using census tracts, 28 percent of the offenders committed a robbery in their home census tract. Thus, for 28 percent of [the offenders], where they live completely explains where they offend.”); *id.* at 116 (“An increase of one unit in the log of distance in kilometers reduces the odds of a tract being chosen for robbery by a factor of .21 (a reduction of nearly 80 percent”); *id.*, at 115 (“[T]he odds of the tract of residence being chosen for a robbery is 822 times the odds of a distant tract that is five or more borders away from the tract of residence (the reference category). For an adjacent tract (i.e., one border away from the tract of residence), the odds of being chosen are still 99 times the odds of a distant tract.”).

⁷⁵ Royce de R. Barondes, *Conditioning Exercise of Firearms Rights on Unlimited Terry Stops*, 54 IDAHO L. REV. 297, 362, 377 (2018).

⁷⁶ *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 559 (1920).

⁷⁷ N.Y. PENAL LAW § 265.37 (Westlaw, through L.2023, chs. 1 to 208).

⁷⁸ *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015).

⁷⁹ Glock, Inc., G17, <https://us.glock.com/en/pistols/g17> (visited Aug. 14, 2023).

⁸⁰ *E.g.*, Sig Sauer, P320 RXP Full-Size, <https://www.sigsauer.com/p320-rxp-full-size.html> (visited Aug. 14, 2023) (model 320F-9-B-RXP); Sig Sauer, P320 AXG Classic, <https://www.sigsauer.com/p320-axg-classic.html> (visited Aug. 14, 2023) (model 320AXGCA-9-CW-CL-R2).

⁸¹ Robb Manning, Glock 17: How the Full-Sized Striker-Fired Set the Standard, *Gun Digest* (Feb. 20, 2019), <https://gundigest.com/handguns/personal-defense/glock-17-how-the-full-sized-striker-fired-set-the-standard> (“Why the Glock 17 is among the most popular pistols made: . . . From 1986 capture around 70 percent of the US law enforcement market.”). It would appear that, over time, other offerings have reduced the popularity of this particular arm. *See* Glock, Inc., G22, <https://us.glock.com/en/pistols/g22> (noting the pistol has a standard magazine capacity of 15 and stating, “By far the most popular police service pistol in the United States, the GLOCK 22 fires the potent 40 S&W cartridge and holds more rounds for its size and weight than most other full-sized handgun in its class.”).

⁸² One survey of large police force purchases from 2008 to 2012 found the following: “The most common type weapon purchased was 40-caliber (purchased by 65 percent of agencies), and the most common magazine capacity was 15 rounds (purchased by 63 percent of agencies).” Police Executive Research Forum, Police Department Service Weapon Survey, https://www.policeforum.org/assets/docs/Free_Online_Documents/Gun_Violence_Reduction/police%20department%20service%20weapon%20survey%202013.pdf (visited Aug. 14, 2023).

⁸³ *E.g.*, *Del. State Sportsmen’s Ass’n, Inc. v. Del. Dep’t of Safety & Homeland Sec.*, No. CV 22-951, 2023 WL 2655150, at *8 (D. Del. Mar. 27, 2023) (“typically sold with 30-round magazines”).

⁸⁴ *E.g.*, CAL. PENAL CODE § 32310 (Westlaw, through Ch. 1 of 2023–24 1st Ex. Sess., and urgency legislation through Ch. 101 of 2023 Reg. Sess.); *id.* § 16740 (capacity exceeding ten rounds); MASS. GEN. LAWS ch. 140, §§ 121, 131m (Westlaw, through Ch. 6 of the 2023 1st Ann. Sess.) (prohibition on possession of a magazine not lawfully possessed on September 13, 1994, with a capacity of more than ten rounds of ammunition or more than five shotgun shells).

⁸⁵ Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994–2003: Report to the National Institute of Justice, United States Department of Justice*, at 83 (June 2004), <https://www.ojp.gov/pdffiles1/nij/grants/204431.pdf>.

⁸⁶ Declaration of Massad Ayoob in Support of Plaintiffs’ Motion for Preliminary Injunction, ¶ 14, at 6, *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017) (No. 17 cv-1017), *most recent proceeding at* *Duncan v. Bonta*, 49 F.4th 1228 (9th Cir. 2022) (remanding to the trial court).

⁸⁷ Declaration of Massad Ayoob in Support of Plaintiffs’ Motion for Preliminary Injunction, ¶ 15, at 6–7, *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017) (No. 17 cv-1017).

⁸⁸ Ciara O’Rourke, What It’s Like to Survive Being Shot 16 Times, *THE ATLANTIC*, Feb. 7, 2019, <https://www.theatlantic.com/health/archive/2019/02/police-shooting-shot-16-times/582187/>.

⁸⁹ Declaration of Massad Ayoob in Support of Plaintiffs’ Motion for Preliminary Injunction, ¶ 18, at 8, *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017) (No. 17 cv-1017).

⁹⁰ *Hanson v. D.C.*, No. CV 22-2256, 2023 WL 3019777, at *8 (D.D.C. Apr. 20, 2023).

⁹¹ *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

⁹² Declaration of Massad Ayoob in Support of Plaintiffs’ Motion for Preliminary Injunction, ¶ 27, at 10–11, *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017) (No. 17 cv-1017), *aff’d*, 742 F. App’x 218 (9th Cir. 2018), *most recent proceeding at* *Duncan v. Bonta*, 49 F.4th 1228 (9th Cir. 2022) (remanding to the trial court).

⁹³ *Oregon Firearms Fed’n, Inc. v. Brown*, No. 2:22-CV-01815-IM, 2022 WL 17454829, at *9 (D. Or. Dec. 6, 2022), *appeal dismissed*, No. 22-36011, 2022 WL 18956023 (9th Cir. Dec. 12, 2022).

⁹⁴ *Oregon Firearms Federation*, 2022 WL 17454829, at *9.

⁹⁵ One of the many authorities on this issue states:

[In *Association of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney General New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018), *abrogated on other grounds* by *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022),] the Third Circuit “assume[d] without deciding that LCMs are typically possessed by law-abiding citizens for lawful purposes.” *Id.* at 116. It did, however, observe that “millions of magazines are owned, often come factory standard with semi-automatic weapons,” and “are typically possessed by law-abiding citizens for hunting, pest-control, and occasionally self-defense.” *Id.*

Plaintiffs sufficiently demonstrate that this is so. They argue, “There are currently tens of millions of rifle magazines that are lawfully-possessed in the United States with capacities of more than seventeen rounds,” including magazines for the AR-15 rifle, which I have already found to be “in common use” for self-defense. The AR-15 platform is capable of accepting standard magazines of 20 or 30 rounds and is “typically sold with 30-round magazines.” Indeed, Plaintiffs point to evidence suggesting that “52% of modern sporting rifle magazines in the country have a capacity of 30 rounds.” This is enough to show that LCMs are “in common use” for self-defense.

Del. State Sportsmen’s Ass’n, Inc. v. Del. Dep’t of Safety & Homeland Sec., No. CV 22-951, 2023 WL 2655150, at *8 (D. Del. Mar. 27, 2023) (citation omitted) (first quoting *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Att’y Gen. N.J.*, 910 F.3d 106, 116 (3d Cir. 2018), then quoting *id.*, then quoting Plaintiff’s Brief at 9, *Del. State Sportsmen’s Ass’n*, 2023 WL 2655150 (No. CV 22-951), then quoting *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1145 (S.D. Cal. 2019), then quoting Plaintiff’s Joint Reply Brief in Support of Their Motion for Preliminary Injunction, at 16, *Del. State Sportsmen’s Ass’n*, 2023 WL 2655150 (No. CV 22-951)).

CHAPTER 7. BASICS OF THE CIVIL RIGHT TO BEAR ARMS IN MISSOURI

Examination of the highlights of the Federal law governing the civil right to bear arms is the core of this book. In a primer in this area of law, one cannot practicably cover all significant Federal issues. State regulation is, of course, comprehensive as well. And it is similarly outside the scope of this primer to endeavor to address State issues generally.

However, a few considerations have commended dedicating a few pages to some aspects of the law of one state—Missouri. First, by presenting some of the basics of the regulatory framework in one State, a reader can get a sense of the kind of complexity that those who wish to exercise their civil right to bear arms must face, even in a jurisdiction that is relatively accommodating to exercise of the right. The problems, of course, increase substantially where one considers the possibility of bearing arms in multiple jurisdictions.

Second, one gains a different style of appreciation of the consequences of a regulatory regime through personal experience. As noted below, your author initiated litigation challenging an unlawful firearms restriction imposed by his employer, a State instrumentality. His employer for some years maintained a restriction that was directly prohibited by statute. As noted below,^a an appellate court panel unanimously opined: the university’s rule “prohibits what the statute expressly directs the state not prohibit.” By providing a discussion of Missouri law, the reader may gain a sense of the perspective acquired by this author, through substantial expenditure of his personal funds and the discomfort of being the subject of onerous counterclaims.

Article I, Section 23, of Missouri’s Constitution, as amended in 2014, provides

Right to keep and bear arms, ammunition, and certain accessories — exception — rights to be unalienable. — That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or

^a See *infra* p.223.

those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.

A number of changes were made in 2014. The provision had previously been brief. All the material after the first sentence was added in 2014. In addition, the amendment added to the first sentence the references to ammunition and accessories and to defense of one's family. And the 2014 revision deleted a provision stating, "this shall not justify the wearing of concealed weapons."

In this author's experience, courts idiosyncratically apply principles of construction when faced with interpretation of language securing firearms rights. Manifestly unintended results, restricting the scope of the secured right, are common. This approach imposes an almost insurmountable impediment to legislators who seek to secure firearms rights. We will below identify an example from your author's personal experience.

SECTION 1. CONSTITUTIONAL CARRY AND MISSOURI'S PERMIT REGIME

(A) GENERALLY

Missouri issues permits under a shall-issue regime, meaning that in general, the permit issuance is not wholly discretionary—a permit may be denied on only one of the enumerated grounds.¹ The possibility of a discretionary denial is provided by RSMO. § 571.101.1(7) (<https://revisor.mo.gov>, through Nov. 20, 2022), which requires the applicant "[h]as not engaged in a pattern of behavior, documented in public or closed records, that causes the sheriff to have a reasonable belief that the applicant presents a danger to himself or others." The term "public record" is not defined in the chapter, although another chapter² provides a definition apparently capturing the intent: "any document which a public servant is required by law to keep." The sheriff's determination can be challenged in court,³ under a statutory scheme that provides little guidance concerning the standards on review. There is also a process for revocation of a license. Grounds include: "Defendant is reasonably believed by the sheriff to be a danger to self or others based on previous, documented pattern."⁴

This procedure is to be distinguished from the "may-issue" procedure invalidated in *Bruen*. The term "may-issue" regime is used to reference one, as in effect in New York and invalidated in *Bruen*, where "authorities have discretion to 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."⁵ The New York statute required proof of "proper cause," a term judicially defined in New York, according to the Supreme Court, to involve circumstances where the applicant "can 'demonstrate a special need for self-protection distinguishable from that of the general community.'"⁶

Significant changes were made in 2016 (S.B. 656) to the framework governing concealed firearms possession in Missouri. Before that legislation, Missouri law allowed the issuance of concealed carry permits having a five-year term. The 2016 statute adopted what is called *Constitutional Carry*. This references a statutory scheme that does not generally require a permit to possess a concealed firearm in public, although the possession in certain areas may be prohibited. It did so by revising the definition of the offence of unlawful weapons use to limit a prior prohibition on possessing a concealed firearm. In the amendment, the prior prohibition was scaled-back to doing so “into any area where firearms are restricted under section 571.107.”

That statute also authorized the issuance of “lifetime” or “extended” permits. The traditional permits are issued under RSMO. §§ 571.101 *et seq.* The extended and lifetime permits are issued under RSMO. §§ 571.205 *et seq.*

There are a variety of restrictions in Missouri law on possessing firearms in specific locations. Most of them have exceptions for persons who have permits. However, the drafting by which the lifetime and extended permits were adopted creates some room for hostile judicial interpretation of the benefits secured by those lifetime and extended permits:

- RSMO. § 571.030.1(1) includes in the definition of unlawful weapons use the knowing “[c]arr[ying] concealed upon or about his or her person a knife, a firearm, a blackjack or any other weapon readily capable of lethal use into any area where firearms are restricted under section 571.107.” The referenced locations are seventeen enumerated locations, which may be categorized as (i) certain government locations; (ii) certain places of amusement or recreation; (iii) certain locations serving alcohol; (iv) posted private property; (v) certain places of worship; (vi) certain health-care or child care facilities; and (vii) certain educational institutions.
- RSMO. § 571.030.1(8) criminalizes the knowing “[c]arr[ying of] a firearm or any other weapon readily capable of lethal use into any church or place where people have assembled for worship, or into any election precinct on any election day, or into any building owned or occupied by any agency of the federal government, state government, or political subdivision thereof”

So, there are duplicative prohibitions at some locations.

Both these prohibitions are subject to express exclusions for persons who have traditional Missouri permits or who have permits issued by another State:

4. Subdivisions (1), (8), and (10) of subsection 1 of this section shall not apply to any person who has a valid concealed carry permit issued

pursuant to sections 571.101 to 571.121, a valid concealed carry endorsement issued before August 28, 2013, or a valid permit or endorsement to carry concealed firearms issued by another state or political subdivision of another state.

This exclusion does not, by its literal terms, exculpate firearms possession in one of these locations by holders of extended or lifetime permits. Those permits are not issued pursuant to section 571.101. This seems to be a drafting error.

However, there are duplicative exclusions. After listing seventeen locations where an extended or lifetime permit does not “authorize any person to carry concealed firearms,” RSMO. § 571.215.2 provides:

Carrying of a concealed firearm in a location specified in subdivisions (1) to (17) of subsection 1 of this section by any individual who holds a Missouri lifetime or extended concealed carry permit shall not be a criminal act but may subject the person to denial to the premises or removal from the premises. If such person refuses to leave the premises and a peace officer is summoned, such person may be issued a citation for an amount not to exceed one hundred dollars for the first offense.

The language continues, to address the consequences of repeated offenses of refusal to leave.

There is a similar duplicative exclusion from criminal liability as to holders of traditional permits set forth in RSMO. § 571.107.2.

It seems to your author that the intent of the legislation was to eliminate State criminal liability (other than for a potential trespass) arising from concealed firearms possession in one of these locations by persons who have any form of permit. However, because the exculpations are not parallel for holders of traditional or lifetime permits, there is sufficient incoherence in the way the statutes are written that a judge hostile to firearms rights may not be prevented in finding the exculpations do not fully work for holders of extended and lifetime permits. So, reliance on those permits is not currently recommended.

(B) THE SEVENTEEN LOCATIONS

The above statutory scheme provides special, atypical benefits for owners of private property used as a place of worship. Unlike all other private property, for church, etc., property, in order to rely on the threat of government prosecution to disarm those who are on the premises, the owner of a place of worship need not post the private property.

As your author learned by attending hearings on proposed legislation, those who have recently defended this special treatment afforded owners of places of

worship have generally been supported by persons who misstate the relevant law. Quoting statutory language, we have above illuminated that concealed firearms possession by a lawful holder of a traditional permit in a church is not criminalized as unlawful weapons use. Those holders' possession of concealed firearms in a church is not within the criminal prohibitions on firearms possession. Any criminal prohibition would involve a trespass, and in that case only to the extent the notice requirements for a criminal trespass claim had been satisfied.

These provisions are a trap for the unwary. As noted above, in 2016 (S.B. No. 656), Missouri law was revised to eliminate the requirement to have a permit to carry a concealed firearm in many locations (the locations referenced above being exceptions). Many—perhaps most—people will not be able to keep track of the prohibited locations and apply the list spontaneously when they may encounter such a location. And in some cases, a member of the public may be unable to determine whether a location is one of the prohibited ones. For example, one of the prohibited locations is one that serves alcohol for consumption on the premises. There is an exception for a restaurant “having dining facilities for not less than fifty persons and that receives at least fifty-one percent of its gross annual income from the dining facilities by the sale of food.”⁷ The statute does not provide a member of the public a practicable way to ascertain whether a venue is within the exception.

The treatment of churches provides a useful illustration to examine the extent to which the current framework of Constitutional Carry provides a trap for the unwary. Folks attempting to comply with the law, relying on Constitutional Carry, may inadvertently commit unlawful weapons use, by not realizing they are possessing a concealed firearm in one of the prohibited locations.

When your author testified before the Missouri legislature as to the desirability of removing churches from the list of prohibited locations, he referenced the desirability of avoiding the creation of traps for the unwary. This is, after all, a trap that can be avoided. But there is a cost to do so. One has to pay the fee for a permit, and pay for the required class.

After so testifying before a Missouri House committee, the response in justification of the current regime of one Rep. Merideth included that there are many such circumstances (i.e., traps for the unwary). This view is, to your author, manifestly odious. There is little to commend a criminal scheme that simply imposes a financial burden on the exercise of a civil right, and that creates severe criminal punishments for those who do not pay the fee and may inadvertently violate the law.

(C) CONSTITUTIONAL CARRY DOES NOT WORK: THE GUN-FREE SCHOOL ZONES ACT

Another problem with relying on Constitutional Carry is the interplay between Federal and State law. Subject to various exceptions, Federal law criminalizes individual firearms possession within a place a person knows, or has reasonable cause to believe, is a school zone. That includes a location within 1000 feet “from the grounds of a public, parochial or private school.”⁸ “School” excludes higher education.⁹

One exception is that the individual has been licensed to do so by the State where the school is located. The full language is:

if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license.¹⁰

Constitutional Carry would appear not to satisfy this exception, because it does not involve any individualized verification of the individual’s qualification. (An unexpected turn is that the Federal government takes the position that licensure by reciprocity also does not work for this purpose.¹¹) The constitutionality of this peculiar state of affairs is not self-evident. Space and time constraints do not allow its analysis here. A related matter has been the subject of an extensive article by the author.¹²

(D) THE LOCATIONS WHERE MISSOURI LAW CRIMINALIZES FIREARMS POSSESSION BY PERMIT HOLDERS

There are a few locations where Missouri State law criminalizes firearms possession by ordinary members of the public who have concealed firearms permits. Those include prohibitions on carrying a deadly or dangerous weapon into a terminal or aboard a bus,¹³ and on carrying weapons in or on “any facility or conveyance” (subject to certain exceptions) of certain public mass transportation systems of a bi-state development agency.¹⁴

(E) LOCAL PREEMPTION

State law often preempts additional local regulation of firearms possession. The point is that insofar as there are higher restrictions in localities, it becomes impracticable for a member of the public to be fully aware of, and thus comply with, the law. Missouri has such a preemption.¹⁵ The language employed in such a

statute may not be free of ambiguity. Your author finds the Missouri one to be ambiguous in various ways. The details of that ambiguity will not be pursued in this volume.

SECTION 2. STATE STATUTE AUTHORIZING EMPLOYEE VEHICULAR FIREARMS POSSESSION AND THE UNIVERSITY OF MISSOURI SYSTEM

(A) THE STATUTE

In 2013, Missouri statutes were amended to invalidate State employer prohibitions on employees keeping firearms in their vehicles while at work.¹⁶ The law currently provides (emphasis added):

6. Notwithstanding any provision of this section to the contrary, the state shall not prohibit any state employee from having a firearm in the employee's vehicle on the state's property provided that the vehicle is locked and the firearm is not visible. This subsection shall only *apply to the state as an employer* when the state employee's vehicle is on property owned or leased by the state and the state employee is conducting activities within the scope of his or her employment. For the purposes of this subsection, 'state employee' means an employee of the executive, legislative, or judicial branch of the government of the state of Missouri.¹⁷

The statute expressly regulates the State when acting "as an employer." Of course, the State is not acting as an employer when the State prosecutes individuals for violation of criminal law. The legislative history identifies two persons testifying in favor of the bill—the sponsor, Representative Riddle, and the National Rifle Association. That history states:

PROPOSERS: Supporters say that as the law is currently written, the state does not allow its employees to protect themselves while traveling to and from their places of employment.¹⁸

The University of Missouri had long maintained a rule that prohibited private possession of firearms on its campus, subject to exceptions for persons acting in the line of duty. Following adoption of this statute, Missouri State University elected to comply. Shortly after litigation challenging the University of Missouri rule was filed, "MSU President Clif Smart said the exception involving university employees was noted in the policy but not as clearly as it needed to be. He said the university's general counsel reviewed the policy and compared it with the law. . . . Smart said the goal of tweaking the MSU policy was to eliminate any confusion. 'We already had that exception, but it didn't track the language of the law specifically.'"¹⁹

(B) THE LITIGATION

Your author initiated litigation against the University of Missouri system and its then-president in 2015, challenging the rule on statutory and State and Federal constitutional grounds. The system removed the case to Federal court. The case was subsequently remanded after Federal claims were removed. Your author believes *Pullman* abstention^b required remand in any case. The Federal trial court, for reasons it failed to express, did not address that issue.

The university also brought counterclaims against your author, seeking an injunction ordering your author comply with the unlawful rule, and seeking a declaratory as to validity of the unlawful rule (and, of course, its massive legal fees).^c

The University of Missouri recited the following as a putative basis for suing an employee who challenged a rule directly in conflict with State statute:

The university's counsel stated to the court on July 19, 2017: ". . . the Curators' rule forbids guns on campus, period. Writ large."²⁰ He also stated on July 19, 2017 (emphasis added), to the court:

. . . It's a serious matter. It causes expense for a public institution, and we want -- ***we know what we have decided to do, the same rule that we have applied for years***, and we want to know whether it is appropriate to continue doing that, and we want to seek the guidance of the court for resolution of these issues so that we don't come back six months from now after we win this one or lose this one and Mister -- and somebody else comes up with, Well, what if I did it this way?²¹

A denial of authorization of others to possess firearms on campus, outside the line of duty, was also made on July 14, 2017, via response to interrogatories:²²

^b *Pullman* abstention is a legal principle growing out of American Federalism. It contemplates that certain cases that might otherwise be heard in a Federal court should instead be decided in State courts. Federal courts "abstain" from hearing these cases. The relevant circumstances are ones where the litigation involves unsettled issues of State law, the resolution of which might dispose of an issue.

^c Answer to Plaintiff's Second Amended Petition, Affirmative Defenses, and Counterclaims of Defendants Michael A. Middleton and the Curators of the University of Missouri, Barondes v. Middleton, No. 15AC-CC00426, at 34 (Cir. Ct. Boone Cnty, Mo., Sept. 2, 2016) ("WHEREFORE, Defendants respectfully pray for the following relief . . . Attorneys' fees and costs pursuant to RSMo. § 527.100 . . ."), *further proceedings at State ex rel. Schmitt v. Choi*, 627 S.W.3d 1, 8 (Mo. App. W.D. 2021).

The University is not aware of anyone authorized to carry or possess a firearm or other weapon on Curator-controlled property who at the time was not an Approved Governmental Firearms Possessor. Out of an abundance of caution, the University notes the MUPD's practice of letting students bring hunting firearms to the police station to store them there and, strictly speaking, that would entail some transitory possession of firearm on Curator-controlled property.

The term "Approved Governmental Firearms Possessor" was defined to exclude university employees other than campus police officers, so that possession by university employee, other than a campus police officer, was **not** an "Approved Governmental Firearms Possessor" and was required to be disclosed.

3. The term "Approved Governmental Firearms Possessor" shall mean a person acting in the capacity of an employee or agent of the federal government, any state government, or any instrumentality or subdivision of a state government, authorized by the terms of that employment or agency to possess a firearm while acting in that capacity, other than your employee or agent receiving a majority of his or her compensation from you for providing services other than as a campus police officer.

Barondes Second Interrog. at 2, ¶3 (June 14, 2017).

In contrast to the University of Missouri's assertion concerning "the same rule that we have applied for years" and "the Curators' rule forbids guns on campus, period. Writ large," an email generated shortly before, by university agents in response to a discovery request, references an express authorization of some on-campus firearms possession for persons whose names were redacted in discovery, "As you both have requested an exemption to the campus policy of having a firearm on campus by having a firearm secured and stored in your personnel [sic] vehicle while parked on campus this is approved until and if such approval is withdrawn."²³ That email was internally generated 10 days before the hearing, referenced above, in response to a discovery request.

As you both have requested an exemption to the campus policy of having a firearm on campus by having a firearm secured and stored in your personnel vehicle while parked on campus this is approved until and if such approval is withdrawn. All Missouri State Statutes as it relates to possession of a firearm and transporting a firearm in a vehicle still apply. Thank you for forwarding me a copy of your conceal and carry permits.

Your author is unaware of any authority concluding it proper for a government actor to seek a declaratory judgment affirming the validity of one of its rules against a member of the public where the government entity does not follow the relevant rule.

Of course, to initiate a claim seeking an injunction ordering compliance with a rule, the proponent must assert a basis to apprehend the rule will be violated. Here is the University of Missouri System's response when asked to identify such a basis for asserting your author would violate a rule:

26. Please state all facts and identify all documents that support your contention that “Defendants have a reasonable apprehension that Plaintiff may bring firearms onto University of Missouri property” absent a court order or judgment stating that Plaintiff Barondes may bring firearms onto University of Missouri property.

RESPONSE: The University objects to the Interrogatory because it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The Interrogatory cannot be answered fully without revealing the University's entire case, which obviously cannot be stated in response to an Interrogatory, particularly one that seeks “all” facts and documents in the entire universe that support the University's case. In short, the Interrogatory is a contention interrogatory that, as per Mo. R. Civ. P. 57.01, need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

Nonetheless, and without implying that its answer to the Interrogatory identifies “all” pertinent facts, the University notes that Barondes has consistently claimed he fears for his safety at work. He has also gone on national television to proclaim that self-defense *via* a firearm is a “natural right” and that he is “always concerned” about his safety.

This claim against your author was founded on:

- your author, allegedly (in fact, it was your author's counsel) asserting on television bearing arms is a “natural right”; and
- your author's assertion that one is always to be concerned about one's safety.

As to the former, it is a reiteration of a political viewpoint expressed by the Republican Party in its 2016 Platform that bearing arms is a “natural” right.²⁴

As to the latter, four days before the litigation was initiated, the University of Missouri system agents expressly advised your author and others in community safety training as to active shooters and other active threats, inter alia, (i) “It will

not happen here. That's a myth;" and (ii) "It can happen anywhere, at any time and for any reason."

The university's basis for maintaining the claim was stated in the following language in court:

As to Count III, the injunction, a couple of things: We believe -- essentially, what Mr. Greim^d would say is, We say we're not going to do it, so it's not an issue.

We believe that we are entitled to an injunction that says this is the law and do not break it.

He was -- he is the only faculty member that was motivated to file a lawsuit. He has been motivated to speak on numerous national publication

[The court interrupts]²⁵

In sum, the University of Missouri System identified as its bases to found a claim against your author:

- an assertion (by one of his lawyers) on television of a political position in the 2016 Republican Party's platform;
- his reiteration of the substance of training the system itself provided your author mere days prior to his initiation of the lawsuit; and
- his exercising the right to petition the government, by lawsuit, as contemplated by the Petition Clause of the First Amendment.²⁶

Your author is not aware of any authority validating a governmental actor's founding of a claim that the citizen will violate a rule on the citizen having lawfully exercised his right to express a political view included in a major party platform (in fact by his lawyer), nor for his exercise of First Amendment petition rights).

(C) JUDICIAL DETERMINATION THE UNIVERSITY OF MISSOURI HAD VIOLATED ITS EMPLOYEES' STATUTORY CIVIL RIGHTS

The entirety of the trial court's putative analysis of the statute is as follows:

The Court agrees with defendants that the Rule does not conflict with and is not invalidated by Section 571.030.6. Section 571.030.6, by its own language, addresses criminal conduct, and does not determine what defendants can regulate as a civil matter on their own property.

^d *Editor*—Your author's then-counsel.

The plain language of Section 571.030.6 supports defendants' argument that the Rule does not conflict with the statute. Section 571.030.6 begins with the clause, "Notwithstanding any provision of this section to the contrary." "Notwithstanding" means "despite" or "in spite of." *See, e.g.*, Black's Law Dictionary at 1094. The "section" referred to is Section 571.030, which begins, "A person commits the offense of unlawful use of weapons, except as otherwise provided . . . , if he or she knowingly . . ." RSMo Section 571.030.1. Section 571.030 goes on to define the criminal offense of unlawful use of weapons and enumerate exceptions to the offense and punishment for the offense. *See, e.g.*, RSMo Section 571.030.1(3) (a person commits the offense of unlawful use of a weapon if he knowingly "discharges or shoots a firearm into a dwelling house"); RSMo Section 571.030.2 (exempts uses associated with or necessary to fulfilling "official duties"); RSMo Section 571.030.9 (listing criminal sentences for violations). Section 571.030.6, accordingly, addresses what conduct constitutes the unlawful use of weapons, and not what conduct the University can regulate on its property as a civil matter.

In concluding that the Rule does not conflict with the statute, the Court simply cannot ignore the plain language and meaning of the "notwithstanding" clause and read the rest of Section 571.030.6 in isolation. "Notwithstanding," as noted above, quite obviously means "despite," or "in spite of," and the Court must give effect to its plain meaning. In doing so, the Court gives no effect or significance to the title of the statute given by the Revisor. The plain language controls. There is no conflict between the Rule and Section 571.030.6. For these reasons, the Court grants defendants' motions as to plaintiffs' 571.030.6 claims.²⁷

This discussion is, of course, manifestly vacuous; three appellate judges, both Democrat and Republican appointees, unanimously invalidated the rule. They opined, "The Rule directly conflicts with section 571.030.6 in that it prohibits what the statute expressly directs the state not prohibit. The plain language of section 571.030.6 provides a mandatory directive, 'the state shall not prohibit any state employee from having a firearm in the employee's vehicle on the state's property provided that the vehicle is locked and the firearm is not visible.'"^e

^e State ex rel. Schmitt v. Choi, 627 S.W.3d 1, 8 (Mo. App. W.D. 2021).

The appellate court also illuminated Judge Harris' manifest error in his discussion of the meaning of the phrase, "[n]otwithstanding any provision of this section to the contrary":

It[, Judge Harris' discussion,] likewise miscomprehends how notwithstanding clauses operate.

... [A statutory provision preceded by such a notwithstanding clause] does not operate merely as an exception to other laws. Rather, the opposite is true. It operates to the exclusion of contrary laws and not as an exception to the contrary laws.

It is, of course, easier to construe a statute to have one's preferred meaning if one elects to ignore crucial words it contains. One might wonder how one can plausibly assert that a prohibition on State activity (prohibitions on certain firearms possession) addresses criminal prohibitions when the statute expressly states that it "only appl[ies] to the state as an employer." It would appear that Judge Harris found that nothing could be said that would harmonize (x) that statutory language having the meaning he ascribed to it *with* (y) the express statutory reference to employer status. He simply said nothing about this crucial language. The word "employer," used in the statute, and the word "employee," used in the statute and referenced in the legislative history summarizing the objective of the bill, do not appear in Judge Harris' discussion. And the court had before it the above-quoted summary of the purposes of the legislation—it was provided to the court in the author's court filings.²⁸

The author withdrew from the litigation after the trial court's erroneous (subsequently reversed) decision concerning the statute, and before trial. It was thereafter pursued by Missouri's Office of Attorney General.

The litigation process ultimately determined the University of Missouri System's rule to be invalid on August 31, 2021. At a meeting of the governing body of the University of Missouri system on November 18, 2021, the beginning of a discussion of the system's compliance with the controlling legal authority included the following (Owens being Steve Owens, the then-general counsel of the system and Graves being one of the curators²⁹):

OWENS: . . . The Supreme Court denied transfer on September 1, I think.

GRAVES: OK. And I would assume we been in compliance with state law since then, because were not enforcing the rule.

OWENS: Our current rule as, as unamended, does not comply with the court order.

Applying the Missouri Supreme Court's interpretation of a notwithstanding clause to the statute in this matter, it is apparent that the operation of section 571.030.6 is not limited by its prefatory notwithstanding clause. Thus, . . . by its plain meaning the mandatory directive expressed in section 571.030.6 applies to the exclusion of all other provisions of section 571.030 to the contrary. Quite simply, section 571.030 does not limit the application of section 571.030.6 merely because of the notwithstanding clause that prefaces section 571.030.6. This is a necessary conclusion when the language used is given its plain and ordinary meaning. Thus, even if the mandatory directive of 571.030.6 conflicts with other provisions set forth in section 571.030, the mandatory directive prevails. Thus, the University's Rule is in irreconcilable conflict with the mandatory directive of section 571.030.6, rendering the Rule void to the extent of that conflict.

627 S.W.3d at 9–10 (citations and footnotes omitted) (citing *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 632 (Mo. banc 2007)).

After some discussion, Steve Owens, the then-general counsel for the System realized, in a portion of the meeting not transcribed above, that he had spoken in error. The discussion then continued:³⁰

OWENS: I think I misunderstood your question Curator Graves. We are not enforcing the amendment portion. So, in other words, right now, we are not allowing guns in cars. We ought ... we would ... I don't know whether we're enforcing or not enforcing the other portion of the rule ... the existing portion.

GRAVES: So we're not complying with court order at this time.

OWENS: Correct.

GRAVES: Is that normal practice for the University not to comply with court orders?

OWENS: We need the board to amend the rule.

GRAVES: Well, that I presume that the court, the court ruling controls.

Pause

OWENS: The short answer to your question is, No. It's not our normal practice not to comply with a court order. But, in order to be consistent with court order which which was addressed towards the rule itself, we need to amend the rule so it is consistent with the court order.

Pause

UNKNOWN: Which

Other curators, one Holloway and one Brncic, then joined the discussion:³¹

HOLLOWAY: We were sued by an individual that wanted to bring his gun on our campus, because our rule said that he couldn't do that. The state law says that he can if he's a state employee and he's got the firearm locked and out of sight, in his personal car. That's what the state law says. But our regulation does not meet that standard, does not comply with that. And the court has told us that we need to comply with that, as a university and as our regulations of the university. Is that correct? I mean

UNIDENTIFIED: Un hum.

HOLLOWAY: So we already got sued once. That took a lot of time and money to settle it. And we ... we had expenditure that expenditure on this to fight this in court, correct?

OWENS: Yes, significant.

HOLLOWAY: Have an idea how much that was?

OWENS: I do. [LAUGHS]

HOLLOWAY: Does the other curators understand that the cost that was involved? Okay. So, without amending, I'm no attorney. That's obvious.

BRNCIC: Good job. You're doing a great job.

HOLLOWAY: Without amending our regulations and we could get sued with the same thing again, because we have not complied with court order and somebody wants to bring their firearm and hold it in a certain way. And they said they have the rights from the state laws, but our regulations prevent that. Is that Are we open to another lawsuit?

OWENS: I don't want to going to give you a legal opinion in open session, but we are not in compliance with the court order.

After additional discussion, the following back-and-forth occurred:³²

GRAVES: So, not to belabor the point. So you're saying for the last three months we've been out of compliance with a court order, if we're not in compliance today?

OWENS: Since September 1, yeah.

GRAVES: I find that shocking and if that's true, the truth, this should've been brought to us before now.

UNIDENTIFIED: Good point.

Thereafter, the meeting elected to amend the relevant rule to comply with controlling legal authority. The system a few weeks later again took up the issue. It elected not to post a recording of the subsequent meeting on its YouTube channel. So, this author cannot detail the discussion. However, the system thereafter adopted a vague provision governing firearms, which does not explicitly link the right to possess a firearm in one's vehicle to one being an employee.

(D) THE CONSTITUTIONAL CLAIM

The appellate court affirmed the trial court's dismissal of State constitutional claims.^{f, 33} The court's analysis reflects the approach to defining the contours of a

^f During the trial proceedings, after the author had withdrawn from the litigation, Judge Harris noted in part the following—a more comprehensive transcript is in the accompanying endnote 33:

The final installment of my telling you-all about my different connections with people and such, on Monday my wife -- I don't believe any contract has been signed, but on Monday I think she reached sort of a tentative agreement to work as an independent contractor a few hours a week between now and the end of the fiscal year which is June 30th, 2020 for a program at the University.

right to bear arms relying on balancing that the Supreme Court has recently, in *Bruen*, rejected as a suitable basis for government deprivations of firearms rights.

The author has elected not to detail his analysis of the assorted constitutional issues presented by the rule as it was then in effect. It may be included in a subsequent edition. However, it is helpful to note here one aspect of the issues in that part of that litigation that seems generally to be overlooked.

Dicta in *Heller* makes reference to presumptive legality of longstanding restrictions on firearms possession in “schools.”³⁴ The discussion does not expressly include higher education in “schools” and, for a few reasons that this author noted in briefing in 2018,³⁵ it would seem the better understanding of this part of *Heller* is that it does not reference higher education.

First, there is a definition of “school” in a Federal statute regulating firearms possession. It does not include higher education in the definition.³⁶ The property of higher education institutions is not the locus of heightened Federal firearms restrictions.

Second, Justice Thomas, concurring in *United States v. Lopez*,³⁷ references an unconstitutional statute as reflecting an attempt by Congress to prohibit gun possession within 1,000 feet of a school: “The Court today properly concludes that the Commerce Clause does not grant Congress the authority to *prohibit gun possession within 1,000 feet of a school*, as it attempted to do in the Gun-Free School Zones Act of 1990, Pub.L. 101–647, 104 Stat. 4844.” This states Congress attempted to prohibit gun possession near a school. The statute did not attempt to prohibit firearms possession in proximity to higher education institutions.³⁸ So, in referencing prohibitions on firearms possession in schools, Supreme Court precedent uses the phrase in a way that excludes higher education.

Similarly, Justice Kennedy cited a Wisconsin statute that did not prohibit firearms possession in the vicinity of higher education institutions as illustrative of a State that “ha[s] criminal law outlawing the possession of firearms on or near school grounds.”³⁹ And there are cases discussing other aspects of school regulation where the court’s opinions reference “school” in a way that is inconsistent with “school” as referencing higher education.⁴⁰

Transcript of Proceedings (Court Trial – Through Opening Statements Only), Aug. 14, 2019, State of Missouri ex rel. Schmitt v. Choi, Nos. 16 BA-CV03144, 16BA-CV02758, at p.3, 117–13 (Cir. Ct. Boone Cnty. Mo.), *rev’d in part*, State ex rel. Schmitt v. Choi, 627 S.W.3d 1 (Mo. App. W.D. 2021).

The State did not object. No disclosure of any conversations between the judge and his wife as to the litigation, and exercise of the civil right to bear arms on the campus, were made or requested.

SECTION 3. CERTAIN STATE STATUTORY RESTRICTIONS**(A) UNLAWFUL FIREARMS POSSESSION**

Missouri law makes it a felony for one to possess a firearm if:

(1) Such person has been convicted of a felony under the laws of this state, or of a crime under the laws of any state or of the United States which, if committed within this state, would be a felony; or

(2) Such person is a fugitive from justice, is habitually in an intoxicated or drugged condition, or is currently adjudged mentally incompetent.^g

The prohibition does not apply to “possession of an antique firearm.”⁴¹

The prohibition was substantially expanded in 2008. Before 2008, the prohibition was limited to concealable firearms. In addition, before the 2008 amendment, the disqualifying crimes were limited to “dangerous felonies” or attempts to commit “dangerous felonies.” Lastly, the prohibition was not permanent: it extended for five years following confinement (or, if none, the plea or conviction).

In *Alpert v. State*,⁴² the Missouri Supreme Court affirmed rejection of a declaratory judgment action seeking to invalidate under the Missouri Constitution application of the 2008 prohibition to a claimant. The claimant had two controlled substances convictions in the 1970s, and had his Federal firearms rights reinstated by the Attorney General in the 1980s (under the Federal reinstatement procedure that is no longer funded). In fact, the individual had founded a cast bullet manufacturer in 2007.

(B) DEFINING A CONVICTION FOR PURPOSES OF UNLAWFUL POSSESSION OF A FIREARM

The relationship between reinstatement of Federal firearms rights and State convictions is discussed above.^h “[T]he Eighth Circuit has held that Missouri withholds ‘substantial’ civil rights from convicted felons, such as the right to serve on a jury, the right to hold certain public-sector jobs, and the right to state licensure

^g RSMo. § 571.070.1, to .2, <https://revisor.mo.gov> (visited Aug. 28, 2022).

In *State v. Rodgers*, 396 S.W.3d 398 (Mo. App. W.D. 2013), the court concludes the term “fugitive from justice” was subject to “many reasonable meanings” and, under principles of lenity, was construed so as to not apply to one who was simply the subject of an outstanding warrant for fleeing the scene of a traffic accident.

^h See *supra* p.122.

in certain professions.”ⁱ Caselaw indicates that a Missouri suspended imposition of a sentence does not result in a conviction for purposes of depriving a person of his Federal firearms rights,⁴³ although authority indicates a suspended execution of sentence does.⁴⁴

As noted elsewhere, Missouri is in general a “shall-issue” State, meaning that sheriffs are not granted general discretion to decline to issue permits. However, a sheriff can deny a permit who has “engaged in a pattern of behavior, documented in public or closed records, that causes the sheriff to have a reasonable belief that the applicant presents a danger to himself or others.”⁴⁵ A permit is not required in Missouri to possess a concealed firearm, other than in a limited number of specifically identified types of locations.^j But possession of a permit operates to exclude concealed firearms possession from being criminal under State law—with the possible exception of trespass—in most of, but not all, those locations.^k So, a Missouri permit is not inefficacious.

Expungements. In a series of enactments starting in 2012,⁴⁶ the Missouri legislature expanded the criminal convictions that could be expunged. Before the changes effective January 2018, records of expunged crimes were to be destroyed.⁴⁷ Concurrent with the 2018 expansion in offenses subject to expungement, there was a change in the recordkeeping for expunged offences; entities possessing records are to treat the records as “closed,” as opposed to destroying the records.⁴⁸ At that time, closed records were available under RSMO. § 610.120.1 to law enforcement in review of persons seeking firearms permits. So, for a few years, the expunged records could be assessed in connection with issuance of concealed weapons permits. In a continuing legal education presentation in 2017, your author identified a concern that the statutory scheme adopted effective 2018 might be considered as insufficient to allow reinstatement of Federal firearms rights.^{l, 49}

The availability of these records under RSMO. § 610.120.1 to law enforcement in connection with review of persons seeking permits to purchase or possess a firearm was eliminated in 2021 legislation.⁵⁰ That legislation also added to Missouri statutes an express provision in RSMO. § 610.140.8 that, “For purposes of

ⁱ United States v. Ray, No. 14–05041–01–CR–SW, 2015 WL 5202109, at *2 (W.D. Mo. Sept. 3, 2015). The recent adoption of amendments to Art. I, § 23, of the Missouri Bill of Rights does not “restore the civil right of all citizens to bear firearms in Missouri.” *Ray*, 2015 WL 5202109, at *2. See also, e.g., United States v. Langford, No. 14–3051–CR–S–BCW, 2016 WL 483119, at *2 (W.D. Mo. Feb. 5, 2016) (“[T]he Eighth Circuit has held that Missouri withholds ‘substantial’ civil rights from convicted felons, such as the right to serve on a jury, the right to hold certain public-sector jobs, and the right to state licensure in certain professions.”).

^j See *supra* p.213 et ff.

^k See *supra* p. 213 et ff.

^l See *supra* p.123 (discussing *Van Der Hule v. Holder*).

18 U.S.C. 921(a)33(B)(ii), an order or expungement granted pursuant to this section shall be considered a complete removal of all effects of the expunged conviction.”⁵¹

Your author has under advisement whether this portfolio of statutory changes is sufficient to remove any legitimate basis to conclude that a conviction expunged under this statutory scheme remains a basis for criminalizing firearms possession under Federal law. However, in 2022, your author heard, in informal communication from another lawyer, that the Federal government was so restrictively construing Missouri’s reinstatement provisions.⁵²

Sparing Interpretations of Longer-Standing Restoration Procedures. Missouri law does not allow issuance of a concealed carry permit to one who has “pled guilty to or entered a plea of nolo contendere or been convicted of” certain crimes.⁵³ *Hill v. Boyer*⁵⁴ involves a very sparing interpretation of a now-repealed statutory provision “restor[ing] all the rights and privileges of citizenship” to persons discharged from probation.⁵⁵ The case has been interpreted to treat differently (worse) those who have been pardoned following a guilty plea, relative to those convicted following a plea of not guilty.

Prior Missouri authority, *Guastello v. Department of Liquor Control*, holds that where a statute conditions receipt of a license on both (i) the absence of a conviction of particular crimes and (ii) good moral character, an applicant who has received a pardon cannot be summarily rejected, but the underlying event can still be considered.⁵⁶ This seems eminently sensible, where absence of good moral character need not be proved by a criminal conviction.

We have two recent cases addressing this type of issue in the firearms law context. Turning to the more recent case, in *Stallsworth v. Sheriff of Jackson County*, the Missouri Court of Appeals, Western District, holds that a pardon does not remove the disability preventing firearms licensure of one who has entered a guilty plea to a crime.⁵⁷ The firearms permit scheme prohibits issuance of a permit to one who has “pled guilty to or entered a plea of nolo contendere or been convicted of” certain crimes.⁵⁸ The court treats the pardon as eliminating the conviction, but not the separate disqualifier arising from one pleading guilty. The court notes the anomalous result: A pardon results in restoration of firearms rights to one who has been convicted after entering a not guilty plea, but not for one who entered a guilty plea.⁵⁹

Stallsworth relies on the 2016 opinion in *Hill v. Boyer*,⁶⁰ where the Missouri Supreme Court examines the consequences for one Hill of a now-repealed statutory provision “restor[ing] all the rights and privileges of citizenship” to persons discharged from probation, providing in greater detail:

When a defendant who has been placed upon probation or parole for the term prescribed by the court, and the court granting the probation or

parole is satisfied that the reformation of the defendant is complete and that he will not again violate the law, the court shall, by order of record, grant his absolute discharge

Any defendant who receives his final discharge . . . shall be restored all the rights and privileges of citizenship.⁶¹

The *Hill* court's discussion of this language is puzzling:

Even if this Court assumes for the sake of argument that Mr. Hill's statutory restoration of rights "obliterated" the fact of his prior conviction, the fact that he pleaded guilty is not negated because "*Guastello* held only that the fact of conviction was obliterated and not the fact of guilt." Therefore, "an offender's conviction (pertaining to guilt as opposed to the mere conviction) [can] be considered and used in future determinations involving an offender."

Mr. Hill admits that he pleaded guilty to an offense that bars the sheriff from issuing a concealed weapon permit to Mr. Hill.⁶²

This discussion is puzzling, because the relevant statutory language does not state the fact of conviction is obliterated. Rather, it directly addresses the alleged *per se* consequences of a guilty plea or conviction following a plea of not guilty, and negates them.

A more coherent approach to the current statutory scheme would be that a pardon (or the former restoration provision) eliminates the *per se* prohibition on licensure, but the sheriff nevertheless retains the right to decline to issue a permit under a different provision that conditions issuance of a permit on the requirement that the applicant:

(7) Has not engaged in a pattern of behavior, documented in public or closed records, that causes the sheriff to have a reasonable belief that the applicant presents a danger to himself or others....⁶³

That would be consistent with the framework, hypothesized by Samuel Williston a century ago in a law review article, approvingly discussed by the *Guastello* court,⁶⁴ in which he states:

[I]f character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.

But under a statute which requires as a condition of naturalization that the alien seeking to be naturalized must prove that he has behaved as a man of good moral character during his residence in the United

States, it has been rightly held that a pardoned convict is not within the statute. Here it is not conviction, but character, which is in question.⁶⁵

Interrelationship with Federal Prohibition. As to State convictions for offences disqualifying under Federal law, there is authority supporting the conclusion that even if civil rights (to vote, hold public office and sit on a jury) are restored, if that conviction continues to prohibit the individual's receipt of a concealed weapons permit, Federal firearms rights are not restored.⁶⁶

(C) EXPUNGEMENT OF AN ARREST UNDER EXISTING LAW.

RSMO. § 610.122 allows for an arrest record to be expunged if “the arrest was based on false information,” and other requirements are met. *Doe v. St. Louis County Police Department*,⁶⁷ involves a permit-holder who was arrested following discovery of a firearm at an airport screening checkpoint. The court holds that the arrest for unlawful use of a weapon under RSMO. § 571.030.1(1) can be expunged—that the arrest was based on false information by virtue of the fact that the possession by a permit-holder is not criminal.

Chapter 7 Endnotes

¹ RSMo. §§ 571.101.2, 571.205.3 (stating a permit “shall be issued” if specified criteria, which do not include the issuing official’s discretion, are met). Treatment of persons having expunged convictions is, however, not entirely clear.

² RSMo. § 575.010(9) (<https://revisor.mo.gov>, through Nov. 20, 2022).

³ RSMo. § 571.114.

⁴ RSMo. § 571.117.1, <https://revisor.mo.gov>, through Nov. 20, 2022).

⁵ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2124 (2022).

⁶ *Bruen*, 142 S. Ct. 2111, 2123 (2022).

⁷ RSMo. § 571.107.1(7).

⁸ 18 U.S.C. § 921(a)(26).

⁹ 18 U.S.C. § 921(a)(27).

¹⁰ 18 U.S.C. § 922(q)(2)(B)(ii).

¹¹ *See* Royce de R. Barondes, *Federalism Implications of Non-Recognition of Licensure Reciprocity under the Gun-Free School Zones Act*, 32 J.L. & POL. 139, 144 (2017).

¹² *See id.*

¹³ RSMo. § 577.712 (a class D felony).

¹⁴ RSMo. § 70.441.

¹⁵ RSMo. § 21.750.

¹⁶ H.B. 533, 2013 Mo. Legis. Serv. H.B. 533 (West’s No. 73).

¹⁷ RSMo. 571.030.6, <https://revisor.mo.gov> (visited Aug. 29, 2022).

¹⁸ <https://house.mo.gov/billtracking/bills131/sumpdf/HB0533C.pdf>; <https://web.archive.org/web/20170127232713/https://house.mo.gov/billtracking/bills131/sumpdf/HB0533C.pdf>. “There was no opposition voiced to the committee.” *Id.*

¹⁹ Claudette Riley, *MSU Revises, Clarifies Campus Firearms Policy*, News-Leader.com (Dec. 3, 2016, 6:03 p.m.), <https://www.news-leader.com/story/news/education/2016/12/03/msu-revises-clarifies-campus-firearms-policy/94759292/>.

²⁰ Transcript of July 19, 2017, Hearing, *Barondes v. Middleton*, No. 16 BA-CV03144, at 47, *II* 7–8 (Cir. Ct. Boone Cnty. Mo.), *rev’d in part*, *State ex rel. Schmitt v. Choi*, 627 S.W.3d 1 (Mo. App. W.D. 2021).

²¹ Transcript of July 19, 2017, Hearing, *supra* note 20 at 42, *II* 15–23.

²² Defs.’ Resp. to Barondes’ Second Interrog. ¶26, at 5, *Barondes v. Middleton*, *supra* note 20 (July 14, 2017).

²³ Email of R. Douglas Schwandt to Scott Richardson, re. Royce de R. Barondes Lawsuit (July 7, 2017; 9:03:46 a.m.).

²⁴ Committee on Arrangements for the 2016 Republican National Convention, Republican Platform 2016, at 12, [https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL\[1\]-ben_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf) (“We uphold the right of individuals to keep and bear arms, a natural inalienable right that predates the Constitution and is secured by the Second Amendment.”).

²⁵ Transcript of July 19, 2017, Hearing, *supra* note 20 at 48, *II* 3–10.

²⁶ *See, e.g., Borough of Dureya v. Guarneri*, 564 U.S. 379 (2011).

²⁷ Order and Judgment, *State ex rel. Hawley v. Choi & Curators of the University of Missouri*, No. 16 BA-CV02758 & *Barondes & State ex rel. Hawley v. Choi & Curators of the University of Missouri*, No. 16BA-CV03144 (Cir. Ct. Boone Cnty., Mo., Sept. 5, 2018), reproduced, omitting the first six words, in *State ex rel. Schmitt v. Choi*, 627 S.W.3d 1, 8 (Mo. App. W.D. 2021).

²⁸ Plaintiff Barondes’ Suggestions in Support of Plaintiff Barondes’ Motion for Summary Judgment on Count I of Plaintiff Barondes’ Second Amended Petition, at 6 (May 3, 2018), *Barondes & State ex rel. Hawley v. Choi & Curators of the University of Missouri*, 16 BA-CV03144 (Cir. Ct. Boone Cnty, Mo.).

²⁹ The extracts reproduced above begin at 2:09:12 in University of Missouri System, University of Missouri Board of Curators Meeting Part 1, <https://www.youtube.com/watch?v=5CUfiaCbUbc>.

Graves is also a partner in the law firm that, before Graves became a curator, represented this author in part of the litigation.

³⁰ *Id.* at 2:10:17.

³¹ *Id.* at 2:11:20.

³² *Id.* at 2:15:37.

³³ An extract from the trial transcript is below:

The final installment of my telling you-all about my different connections with people and such, on Monday my wife -- I don't believe any contract has been signed, but on Monday I think she reached sort of a tentative agreement to work as an independent contractor a few hours a week between now and the end of the fiscal year which is June 30th, 2020 for a program at the University.

I can tell you, you know, it's -- she has two other part-time positions unrelated to the University. This is something that -- again, I don't think a contract has been finalized, but -- and she would not be an employee of the University. This came about on Monday. Literally, I think she was probably meeting with folks at the same time that we were having our conference call.

It would be, as I say, a few hours a week between now and the end of the school -- excuse me -- the fiscal year.

I don't think that affects my ability to preside, but it just came about, so I wanted to apprise you-all.

MR. SAUER: We have no objection, Your Honor.

MR. THOMPSON: None from the University, Your Honor.

THE COURT: All right. Very good.

Thank you.

Transcript of Proceedings (Court Trial – Through Opening Statements Only), Aug. 14, 2019, State of Missouri ex rel. Schmitt v. Choi, Nos. 16 BA-CV03144, 16BA-CV02758, at p.3, 17 to p.4, 15. (Cir. Ct. Boone Cnty. Mo.), *rev'd in part*, State ex rel. Schmitt v. Choi, 627 S.W.3d 1 (Mo. App. W.D. 2021).

³⁴ District of Columbia v. Heller, 554 U.S. 570, 626–27 & n.26 (2008).

³⁵ Plaintiff Barondes' Response in Opposition to Defendants' Motion and Cross-Motion for Judgment on the Pleadings, at 27–30 (May 30, 2018), Barondes v. Middleton, No. 16 BA-CV03144 (Cir. Ct. Boone Cnty. Mo.), *rev'd in part*, State ex rel. Schmitt v. Choi, 627 S.W.3d 1 (Mo. App. W.D. 2021).

³⁶ 18 U.S.C. § 921(a)(27) (Westlaw through Pub. L. No. 118-10).

³⁷ 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (emphasis added).

³⁸ See 104 Stat. 4845 (defining “school” as “a school which provides elementary or secondary education”).

³⁹ *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). The referenced Wisconsin statute did not prohibit firearms near higher education institutions. See WIS. STAT. § 948.605 (1991–1992); WISC. STAT. ANN. §§ 948.61(1)(b), 948.605(1)(b), 948.605(1)(c), 948.605(2) (Westlaw 1993).

Another usage of “school,” in respect of firearms possession in schools, in the opinion appears to equate “school” with secondary education and below. See *Lopez*, 514 U.S. at 582 (Kennedy, J., concurring) (discussing OKLA. STAT. ANN. tit. 21, § 858 (Westlaw 1996) (which references parents of students under eighteen years of age).

⁴⁰ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985). See generally *Kittle-Aikeley v. Strong*, 844 F.3d 727, 739–40 (8th Cir. 2016) (en banc) (discussing *Vernonia* and *T.L.O.*).

⁴¹ RSMO. § 571.070.3, <https://revisor.mo.gov> (visited Aug. 28, 2022).

⁴² 543 S.W.3d 589 (Mo. banc 2018).

⁴³ *United States v. Thornton*, 766 F.3d 875, 877 & n.1 (8th Cir. 2014); *United States v. Hill*, 210 F.3d 881, 883 (8th Cir. 2000); cf. *United States v. Love*, 59 F. App'x 165, 166 (8th Cir. 2003) (“Under

Arkansas law, a determination that a person is guilty of a felony is a conviction even though the court suspended imposition of the sentence.”); *but cf.* *United States v. Craddock*, 593 F.3d 699, 701 (8th Cir. 2010) (holding a Missouri suspended imposition of sentence does constitute a conviction for purposes of 21 U.S.C. § 841(b)(1)(A)).

In a case vacated on transfer, the Missouri Court of Appeals held that Oklahoma’s equivalent of Missouri’s suspended imposition of sentence (SIS) did not constitute a conviction for purposes of RSMo. § 571.070. *State v. Rohra*, No. 105084, 2107 WL 5580221 (Mo. App. E.D. Nov. 21, 2017), *vacated on transfer*, 545 S.W.3d 344 (Mo. banc 2018) (holding defendant’s argument had been waived). Oklahoma had a statute providing that its equivalent of an SIS was treated as a conviction in limited circumstances: the SIS appertained to a violation of the controlled substances act. Nevertheless, the Missouri court held this specific Oklahoma statute was insufficient to cause the SIS-analogue for a controlled substances violation to constitute a conviction for purposes of RSMo. § 571.070.

⁴⁴ *See Berryman v. United States*, No. 11–079§ 3–CV–W–DGK, 2012 WL 1438760, at *1 (W.D. Mo. Apr. 25, 2012).

⁴⁵ RSMo. § 571.101.1(7) (through Nov. 20, 2022).

⁴⁶ H.B. 1647, 2012 Mo. Legis. Serv. H.B. 1647 (West’s No. 65).

⁴⁷ RSMo. § 610.140.6 (Westlaw, Missouri Statutes Annotated–2016) (“A copy of the order shall be provided to each entity named in the petition, and, upon receipt of the order, each entity shall destroy any record in its possession relating to any offense listed in the petition.”).

⁴⁸ S.B. Nos. 588, 603 & 942, 2016 Mo. Legis. Serv. S.B. 588, 603 & 942 (West’s No. 83) (amending RSMo. 610.140.7 (substituting “close any record” for “destroy any record”).

⁴⁹ *See also, e.g.*, *United States v. Sanford*, 707 F.3d 594, 597 (6th Cir. 2012) (prohibition on receipt of a permit for eight years following conviction enough to prevent reinstatement of Federal firearms rights, although one could possess a firearm on one’s own land or place of business; shall-issue state; *see* MICH. COMP. LAWS § 28.425b(7) (Westlaw Michigan statutes Annotated–2010)); *United States v. Harris*, 2018 WL 6498715 (E.D. Tex. Dec. 11, 2018) (continuing prohibition on issuance of a concealed carry permit results in Federal rights not being restored). *See also* *Barr v. Snohomish County Sheriff*, 440 P.3d 131 (Wash. 2019) (holding Federal firearms rights are not reinstated by the sealing of records of juvenile convictions, rejecting *Siperek v. United States*, 270 F. Supp. 3d 1242 (W.D. Wash 2017) (reciting the effect of sealing to be “treated as if it never occurred,” although a subsequent conviction could result in their unsealing)). *See generally* *Bergman v. Caulk*, 938 N.W.2d 248, 252 (Minn. 2020) (“[T]he sealing of judicial records under inherent authority simply does not reach those records that are held in the executive branch.”).

⁵⁰ S.B. Nos. 53 & 60, 2021 Mo. Legis. Serv. S.B. 53 & 60 (West’s No. 37).

⁵¹ It would appear lack of parentheses around “33” is a typographical error, as would be “order or expungement” (vs. “order of expungement”).

⁵² *See generally* Patrick Deaton, *Expunging a Criminal Conviction in Missouri: Lessons Learned*, J. MO. BAR, July-Aug. 2020, at 164 (stating, before the 2021 revisions, “The FBI, which operates the National Instant Criminal Background Check System, currently takes the position that an order of expungement in Missouri is not a true expungement in reliance on *State of Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008).”).

⁵³ RSMo. § 571.101.2(3); *see also id.* §§ 571.101.2(4) (reordering the language); 571.205.3(2)–(3).

⁵⁴ 480 S.W.3d 311 (Mo. banc 2016).

⁵⁵ RSMo. § 549.111.2 (1969), *repealed*, 1977 Mo. Laws 658, 662–63.

⁵⁶ 536 S.W.2d 21, 22, 25 (Mo. banc. 1976) (addressing a statute that denied a liquor license to a person on account of either “(1) lack of good moral character, or (2) a conviction under a liquor law,” and stating, “The trial court correctly ruled that denial of a license to respondent solely because of the prior convictions was unauthorized.”); *id.* at 23–24 (adopting the following view: “View #2 is that the fact of conviction is obliterated but the guilt remains. Under this view, if disqualification is based solely on the fact of conviction the eligibility of the offender is restored. On the other hand, if good

character (requiring an absence of guilt) is a necessary qualification, the offender is not automatically once again qualified—merely as a result of the pardon.” (footnote omitted).

⁵⁷ 491 S.W.3d 657, 660 (Mo. App. W.D. 2016), *reh’g denied* (July 5, 2016).

⁵⁸ RSMo. § 571.101.2(3); *see also id.* §§ 571.101.2(4) (reordering the language), 571.205.3(2)–(3).

⁵⁹ *See Stallsworth v. Sheriff of Jackson Cnty.*, 491 S.W.3d 657, 660 n.4 (Mo. App. W.D. 2016), *reh’g denied* (July 5, 2016) (“[T]he effect of *Hill* is to treat a pardoned felon convicted after trial differently from a pardoned felon convicted after a guilty plea”).

⁶⁰ 480 S.W.3d 311, 313 (Mo. banc 2016).

⁶¹ RSMo. §§ 549.111.1, 549.111.2 (1969), *repealed*, 1977 Mo. Laws 658, 662–63.

⁶² *Hill v. Boyer*, 480 S.W.3d 311, 315 (Mo. banc 2016) (quoting *State v. Bachman*, 675 S.W.2d 41, 51 (Mo. App. W.D.1984)).

⁶³ RSMo. § 571.101.2(7).

⁶⁴ *Guastello v. Dep’t of Liquor Control*, 536 S.W.2d 21, 24 (Mo. banc 1976).

⁶⁵ Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 653–54 (1915) (footnote omitted).

⁶⁶ *Van Der Hule v. Holder*, 759 F.3d 1043 (9th Cir. 2014); *United States v. Sanford*, 707 F.3d 594, 597 (6th Cir. 2012) (shall-issue state; *see* MICH. COMP. LAWS § 28.425b(7) (Westlaw Michigan statutes Annotated–2010)); *United States v. Sam*, No. CR 6:15–00254, 2016 WL 1600229, at *5 (W.D. La. Mar. 23, 2016), *report and recommendation adopted*, No. CR 6:15–00254, 2016 WL 1573002 (W.D. La. Apr. 18, 2016). *See supra* p.123.

⁶⁷ 505 S.W.3d 450 (Mo. App. E.D. 2016).

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