

TEXT-AND-HISTORY OR MEANS-END SCRUTINY IN  
SECOND AMENDMENT CASES?  
A RESPONSE TO PROFESSOR NELSON LUND'S CRITIQUE  
OF *BRUEN*\*

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Professor Nelson Lund's "*Bruen*'s Preliminary Preservation of the Second Amendment," recently published in the *Federalist Society Review*, critiques the Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen*.<sup>1</sup> *Bruen* held that New York's restrictive handgun licensing scheme violated the Second Amendment.<sup>2</sup> As Lund notes, "*Bruen* was an easy case, which the Court resolved correctly."<sup>3</sup> After all, the text of the Amendment prohibits infringement of "the right of the people" to "bear arms."<sup>4</sup> Moreover, "the Court was justified in repudiating the interpretive

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<sup>1</sup> Nelson Lund, *Bruen's Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279 (2022), available at <https://fedsoc.org/commentary/publications/bruen-s-preliminary-preservation-of-the-second-amendment> (hereinafter "Lund").

<sup>2</sup> *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

<sup>3</sup> Lund 280.

<sup>4</sup> "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. CONST., amend. II.

approach adopted by a consensus of the circuit courts after *Heller*.<sup>5</sup> That consensus was a two-part interest-balancing test, under which the circuit courts had largely balanced the fundamental right away.

Nevertheless, Professor Lund devotes a major discussion to what he argues are “some serious difficulties that will arise in applying the new approach that *Bruen* adopts.”<sup>6</sup> While any ground-breaking decision may entail perceived difficulties, I wish to take issue with some of his arguments.

Lund begins by taking aim at *Bruen*’s foundation: *Heller*’s holding that the Second Amendment’s text and history protect an individual right to keep and bear firearms. Professor Lund’s criticisms of *Heller*’s historical reasoning are unpersuasive. Justice Antonin Scalia’s conclusions in *Heller* that the Second Amendment protects a preexisting right to keep and bear arms, and that this right extends to modern handguns, are based on sound historical evidence and legal reasoning.

Lund’s criticisms of *Bruen* fare no better than his criticisms of *Heller*. He takes issue with *Bruen*’s articulation and adoption of a text-and-history standard—or, perhaps more accurately, a “text-first-then-history-second” test—for Second Amendment cases, which is to replace the means-ends scrutiny that had prevailed in the lower courts in the interim between *Heller* and *Bruen*, arguing that a standard based purely on text and history is unsound and that *Bruen* is inconsistent in applying it. Neither charge is correct. *Bruen*’s adoption of this text-and-history standard is based on sound constitutional analysis and comports with the doctrine that applies in the context of many other constitutional rights—including, contra Lund but consistent with *Bruen*, many First Amendment cases. And while Lund argues that portions of *Bruen* gesture towards a continuing form of means-ends scrutiny, his contentions are either misplaced or based on stray remarks from *Bruen* raising issues that the decision does not purport to definitively resolve.

Finally, Lund argues that a pure text-history test is either unworkable or manipulable and that a limited form of means-ends scrutiny should still be applied to Second Amendment challenges. In my view, *Bruen* provides a viable jurisprudence for resolution of Second Amendment cases—one that is far superior to any interest-balancing test or means-ends scrutiny. We know from the post-*Heller* experience what to expect from a Second Amendment jurisprudence based on means-end scrutiny: naked value

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<sup>5</sup> Lund 280. See *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

<sup>6</sup> See Lund 280, 289.

judgments imposed by federal judges who are hostile to the right to keep and bear arms. By contrast, *Bruen's* text-and-history approach makes it far more difficult for judges to base their decisions in Second Amendment cases on their own policy preferences and moral judgments.

The issues raised below are primarily methodological. Professor Lund and I might not disagree on what the end result should be in resolving Second Amendment cases. In *Bruen*, the Supreme Court adopted the text-history approach and rejected means-ends scrutiny. Lund argues that approach will be unworkable without application of limited means-ends scrutiny. My argument is that *Bruen's* test is in fact workable and is less susceptible to manipulation by inferior courts than is means-ends scrutiny.

#### I. PROFESSOR LUND'S CRITICISMS OF *HELLER* ARE UNPERSUASIVE

##### A. *Heller's* Holding that "Arms" Includes Handguns

For Lund, the Supreme Court's errors in its modern Second Amendment jurisprudence started with *District of Columbia v. Heller*, which held the Amendment to protect individual rights and invalidated the District's ban on mere possession of handguns.<sup>7</sup> He states: "Justice Scalia's majority opinion is an exquisite tapestry of sound textual and historical arguments interspersed with fallacious lapses, ambiguous and inconsistent obiter dicta, self-confident ipse dixits, and mischaracterizations of precedent."<sup>8</sup> Without going into all of the details he articulated in a prior article, Lund faults *Heller* by saying:

But when explaining why D.C.'s law was unconstitutional, the Court did not rely on the absence of historical precedents. Instead, it held that there is a specific constitutional right to possess handguns, even if the challenged law allows one to keep other guns for self-defense. *Heller* justified that specific holding by pointing to the popularity of handguns in the 21st century.<sup>9</sup>

But *Heller* found handguns to be protected for several reasons. Most obviously, the plain text protects "arms": "Before addressing the verbs 'keep' and 'bear,' we interpret their object: 'Arms.' The 18th-century meaning is

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<sup>7</sup> *Heller*, 554 U.S. 570.

<sup>8</sup> Lund 283 (citing Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009); Heller and Second Amendment Precedent, 13 LEWIS & CLARK L. REV. 335 (2009)).

<sup>9</sup> Lund 284.

no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined 'arms' as 'weapons of offence, or armour of defence.'<sup>10</sup> *Heller* continues, "The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose."<sup>11</sup> Again, the argument is based squarely on the plain text of the Second Amendment.

*Heller* rejected the argument "that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed," because "the American people have considered the handgun to be the quintessential self-defense weapon."<sup>12</sup> The Amendment protects "arms 'in common use at the time' for lawful purposes like self-defense."<sup>13</sup> To be in common use "at the time" refers to the types of arms in common use in 1791 as well as those in common use today. Isn't it inherent in the term "the *right* of the *people*" that the people get to choose what "arms" they keep and bear, in the same manner that they can choose what speech to utter under the First Amendment? As just noted, it is what "the American people have considered" to be the self-defense weapons of choice.<sup>14</sup>

Finally, contra Lund, *Heller did* "rely on the absence of historical precedents." It rejected D.C.'s analogy to Boston's 1783 ban on loaded firearms in buildings because that was a fire protection measure, not an arms control law.<sup>15</sup> It relied on colonial and founding-era practices for the proposition that "the sorts of weapons protected were those 'in common use at the time,'"<sup>16</sup> which incorporated "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"<sup>17</sup> And it cited antebellum cases holding that prohibitions on concealed carry are constitutional only if open carry is allowed for the proposition that "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."<sup>18</sup>

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<sup>10</sup> *Heller*, 554 U.S. at 581 (quoting 1 *DICTIONARY OF THE ENGLISH LANGUAGE* 106 (4th ed.)).

<sup>11</sup> *Id.* at 628.

<sup>12</sup> *Id.* at 629.

<sup>13</sup> *Id.* at 624.

<sup>14</sup> *Id.* at 629.

<sup>15</sup> *Id.* at 631.

<sup>16</sup> *Id.* at 625, 627 (citing *United States v. Miller*, 307 U.S. 174, 179 (1939)).

<sup>17</sup> *Id.* at 627.

<sup>18</sup> *Id.* at 629.

In short, *Heller*'s holding that the Second Amendment protects handguns was based on text and history, and not simply, as Lund suggests, on "the popularity of handguns in the 21st century." Moreover, modern popularity is relevant because of text and history. *Heller*'s text and history analysis led it to conclude that the Second Amendment protects arms that are in common use by law-abiding citizens. And common use by law-abiding citizens is known by looking at current usage, inasmuch as "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."<sup>19</sup>

*B. Heller Was Based on Sound Historical Evidence*

Lund argues that *Heller* found a right to have a handgun without conducting any historical analysis, which in turn raises a problem for *Bruen*, which requires such analysis in Second Amendment cases.<sup>20</sup> But *Heller* did conduct a historical analysis. First, as noted above, it rejected as an outlier Boston's restriction on loaded firearms in buildings, and it rejected gunpowder storage rules as not analogous to a handgun ban.<sup>21</sup> Second, it pointed to antebellum state cases that affirmed the right to carry a handgun openly.<sup>22</sup>

The scarcity of restrictions on weapons at the founding, Lund suggests, might be attributable to the lack of any need for restrictions in the perception of legislatures, and does not necessarily imply lack of the power to impose them.<sup>23</sup> How is it to be determined whether restrictions that were not adopted would have been considered unconstitutional?<sup>24</sup> *Bruen* states that lack of a historical tradition of restrictions "is merely 'relevant evidence' of their unconstitutionality," but, Lund continues, it "does not say what additional evidence might be required" to decide either way.<sup>25</sup>

Without a specific modern restriction at issue, the evidence required cannot be particularized. But *Bruen* sets forth three types of evidence suggesting when a modern restriction may be unconstitutional: (i) the restriction addresses a problem that existed in the 18th century, but there were no similar historical restrictions regarding the same problem; (ii) earli-

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<sup>19</sup> *Id.* at 582.

<sup>20</sup> Lund 293.

<sup>21</sup> *Heller*, 554 U.S. at 631-32.

<sup>22</sup> *Id.* at 629.

<sup>23</sup> Lund 293-94.

<sup>24</sup> *Id.* at 294.

<sup>25</sup> *Id.*

er generations addressed the same problem by materially different means; and (iii) analogous restrictions were rejected on constitutional grounds.<sup>26</sup> *Bruen* goes on to devote several more paragraphs to a discussion of how to reason by analogy on the subject, noting that “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are ‘*central*’ considerations when engaging in an analogical inquiry.”<sup>27</sup>

Finally, what evidence is required to determine constitutionality is a question that could be asked about the application of any general rule. Rules are applied based on the quantity and quality of the relevant evidence. Text and history clarify the meaning of constitutional provisions, while means-ends scrutiny invariably introduces policy preferences into the analysis. While any test can be abused, the presumption that the text justifies conduct and the exception for historical restrictions are simply less susceptible to manipulation than is means-ends scrutiny with its inherent subjective basis.

### *C. The Right to Bear Arms as a Pre-Existing Right*

Since, as *Bruen* acknowledges, the language of the Second Amendment is “unqualified,” Lund states, “Absent evidence to the contrary, one might think the right that was codified in the Second Amendment was the right to be completely free of federal restrictions.”<sup>28</sup> In a note, he adds: “*Heller* called this a ‘pre-existing right’ but offered no evidence except an ipse dixit from a late 19th century judicial opinion.”<sup>29</sup>

But *Heller* offered far more than that citation. The context of that term was the Court’s statement that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’”<sup>30</sup> The English Declaration of Rights of 1689 was part of this history: “That the subjects which are Protestants may have arms for their

<sup>26</sup> *Bruen*, 142 S. Ct. at 2131.

<sup>27</sup> *Id.* at 2133 (citation omitted and multiple quotation marks deleted).

<sup>28</sup> Lund 293.

<sup>29</sup> *Id.* at 293 n.66 (quoting *Heller*, 554 U.S. at 592 (citing *United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (“This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . .”))).

<sup>30</sup> *Heller*, 554 U.S. at 592.

defense suitable to their conditions and as allowed by law.”<sup>31</sup> As Blackstone wrote, this reflected “the natural right of resistance and self-preservation,” and “the right of having and using arms for self-preservation and defence.”<sup>32</sup> As *Heller* further stated, “By the time of the founding, the right to have arms had become fundamental for English subjects.”<sup>33</sup>

Lund makes some of the same points, quoting extensively from Blackstone and other sources to show the nature and existence of the pre-existing right. As Lund further reflects, “The Second Amendment was completely uncontroversial when it was adopted, partly because of a broad consensus about the validity of the political principles articulated in the Declaration of Independence.”<sup>34</sup> While *Heller* did not mention the Declaration, it certainly recounted the basic historical sources for characterizing the right to bear arms as a pre-existing right.

## II. *BRUEN*’S REASONS FOR REJECTING MEANS-ENDS SCRUTINY ARE SOUND

Part III of Professor Lund’s article, entitled “*Bruen*’s Future,” begins by noting that *Bruen* substituted a text-history mode of interpretation for the lower courts’ reliance on a two-part interest-balancing test that reified judicial policy preferences.<sup>35</sup> *Bruen* explained:

[W]e 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.”<sup>36</sup>

This is commonly known as the “text-and-history” test. Because it focuses initially, and primarily, on the text of the Second Amendment—and

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<sup>31</sup> *Id.* at 593 (quoting 1 W. & M., c. 2, § 7).

<sup>32</sup> *Id.* at 594 (quoting 1 BLACKSTONE, COMMENTARIES \*\*139-40 (1765)).

<sup>33</sup> *Id.* at 593 (citing JOYCE MALCOLM, TO KEEP AND BEAR ARMS 122-34 (1994)).

<sup>34</sup> Lund 301-02.

<sup>35</sup> *Id.* at 289-90.

<sup>36</sup> *Bruen*, 142 S. Ct. at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

looks to history only secondarily—it would perhaps be more accurate to call it the “text-first-and-history-second” test. Lund lobs a variety of objections at the reasons *Bruen* gave for adopting this test over some form of means-ends scrutiny. But these criticisms miss their mark.

*A. The Second Amendment’s “Unqualified Command”*

Lund begins by criticizing *Bruen*’s citation to the First Amendment case *Konigsberg v. State Bar of California* in describing the Second Amendment as an “unqualified command.” *Konigsberg* observes that “the commands of the First Amendment are stated in unqualified terms,” but as “their origin and the line of their growth” clarify, libel, slander, conspiracy, and the like are excluded from its coverage.<sup>37</sup> However, contrary to the language in *Konigsberg*, Lund states, “[*Bruen*’s] test is quite novel,” and “*Konigsberg* endorses the very same two-part test used by the post-*Heller* circuit courts . . . .”<sup>38</sup> But *Bruen* cites *Konigsberg* simply for its observation that the Second Amendment states an “unqualified command,” without more. Lund calls this a “strange invocation of authority for the self-evident proposition that the texts of both the First and Second Amendments contain unqualified commands,” but the citation is not so strange given that it is limited to that very self-evident proposition.<sup>39</sup>

To be sure, later First Amendment case law ultimately adopted a tiers-of-scrutiny framework to govern Free Speech Clause cases. But that hardly means that such a framework should apply to the Second Amendment; indeed, it is not even clear that that approach should, or will, continue to apply to the First Amendment. It is worth recalling Chief Justice John Roberts’ comment in the *Heller* oral argument that “these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don’t know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case.”<sup>40</sup> Tiers of scrutiny have been criticized in First Amendment cases,<sup>41</sup> and they may be questioned more (or even revisited) in the future. At oral argument in *Bruen*, Justices showed interest in reconsid-

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<sup>37</sup> *Konigsberg*, 366 at 50 n.10.

<sup>38</sup> Lund 290 (citing *Konigsberg*, 366 U.S. at 50).

<sup>39</sup> *Id.*

<sup>40</sup> Transcript of Argument, *Heller*, No. 07-290, at 44 (March 18, 2008).

<sup>41</sup> See *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 124-28 (1991) (Kennedy, J., concurring) (advocating the elimination of tiers of scrutiny for content-based restrictions of speech).



ering the use of tiered scrutiny in the First Amendment context. Justice Brett Kavanaugh said he found Professor Joel Alicea’s amicus brief challenging the concept and its pervasive use “very helpful.”<sup>42</sup>

*B. The Court’s Reliance on History in Interpreting the First Amendment*

Lund next argues that *Bruen* “exaggerates the extent to which the Court’s First Amendment jurisprudence has relied on historical evidence rather than interest-balancing under the tiers of scrutiny.”<sup>43</sup> He goes on to say “it’s doubtful that the test announced in *Bruen* will prove workable, and the Court’s First Amendment jurisprudence does not suggest otherwise.”<sup>44</sup> Again, even if Lund’s characterization of First Amendment jurisprudence were accurate, that would hardly undermine *Bruen*’s interpretation of the Second Amendment, which came to the Court unencumbered by the “baggage” of cases applying the tiers of scrutiny.

In any event, it is Lund who exaggerates the extent to which history *does not* play a role in First Amendment cases. As *Bruen* explains, to survive a First Amendment challenge “the government must generally point to *historical* evidence about the reach of the First Amendment’s protections.”<sup>45</sup> For that proposition, *Bruen* cites *United States v. Stevens*, which placed the burden on the government to prove that “a type of speech belongs to a ‘historic and traditional categor[y]’ of constitutionally unprotected speech . . . .”<sup>46</sup> To be sure, many First Amendment cases engage in means-ends scrutiny. But some of the Court’s classic First Amendment decisions rely exclusively on a historical analysis with no balancing of governmental interests.<sup>47</sup> So

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<sup>42</sup> *Bruen*, No. 20-843, Tr. of Oral Argument at 53 (referencing Brief for J. Joel Alicea as Amicus Curiae). See Joel Alicea and John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 54 NAT’L AFFAIRS (Fall 2019), available at <https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny>.

<sup>43</sup> Lund 290.

<sup>44</sup> *Id.*

<sup>45</sup> *Bruen*, 142 S. Ct. at 2130.

<sup>46</sup> *Id.* (quoting *United States v. Stevens*, 559 U.S. 460, 468–471 (2010)). Rejecting “the Government’s highly manipulable balancing test,” *Stevens* added, “Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that ‘depictions of animal cruelty’ is among them.” *Stevens*, 559 U.S. at 472.

<sup>47</sup> E.g., *Near v. State of Minnesota*, 283 U.S. 697, 713 (1931) (“The question is whether a statute authorizing such proceedings in restraint of publication [abatement as a public nuisance] is consistent with the conception of the liberty of the press as historically conceived and guaranteed.”); *Grosjean v. American Press Co.*, 297 U.S. 233, 245 (1936) (Whether an onerous tax on owners of newspapers violates the freedom of the press “requires an examination of the history and

while the Court has engaged in interest-balancing in some First Amendment cases, it has relied on historical evidence in others, and *Bruen* was right to point to the latter as providing support for adopting a text-and-history approach.

In sum, while the Court has often relied on means-ends scrutiny in First Amendment cases, *Bruen* correctly notes that it has also exhibited a longstanding reliance on a historical test. That historical test has proven workable, and there is no reason why a similar test would not be workable in Second Amendment cases.

### *C. Bruen's Dictum About Sensitive Places*

Lund also attempts to use *Bruen*'s discussion of restrictions on carrying firearms in "sensitive places" to undermine its holding adopting a text and history approach. *Bruen* recalls *Heller*'s dictum about "longstanding" laws forbidding the carrying of firearms in sensitive places like schools and government buildings, adding, "Although the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited—*e.g.*, legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions."<sup>48</sup> The Court cited a law review article by David Kopel and Joseph Greenlee and the amicus brief of the Independent Institute for this statement. *Bruen* thus "assume[d] it settled" that arms carrying could be prohibited in these locations and that courts may use analogies to them to decide if modern regulations are constitutional.<sup>49</sup>

Lund points out that the Kopel and Greenlee article cited by the Court mentions only two pre-Second Amendment prohibitions on carry in such sensitive places. They include Maryland's ban on carrying arms into the legislature from the mid-17th century, and Delaware's 1776 ban on bearing arms at polling places.<sup>50</sup> After the amendment's ratification, no other such bans (at least as mentioned by Kopel and Greenlee) were on the books until after ratification of the Fourteenth Amendment.<sup>51</sup> Lund states, "If that's all

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circumstances which antedated and attended the adoption of the abridgement clause of the First Amendment.").

<sup>48</sup> *Bruen*, 142 S. Ct. at 2133 (citing David B. Kopel & Joseph Greenlee, *The "Sensitive Places" Doctrine*, 13 CHARLESTON L. REV. 205, 229–36, 244–47 (2018); Brief for Independent Institute as Amicus Curiae at 11–17, *Bruen*, 142 S. Ct. 2111).

<sup>49</sup> *Bruen*, 142 S. Ct. at 2133.

<sup>50</sup> Lund 295.

<sup>51</sup> *Id.*

it takes to identify a regulatory tradition that authorizes a gun regulation, it won't be very hard for courts to limit *Bruen* to its facts."<sup>52</sup>

Had the sensitive places issue actually been before the Court, Lund is certainly correct that the cited laws should not suffice to support constitutionality. Far more exhaustive historical research would be warranted in a case where a specific place is at issue. Moreover, one would not expect to find any historically significant restrictions at most public places, such as roads, stores, places of public assembly, and outdoor venues.

But the sources cited by the Court do include further founding-era laws involving sensitive places. For example, the Independent Institute amicus brief quoted Virginia's 1786 enactment that no man shall "come before the Justices of any court, or other of their ministers of justice doing their office, with force and arms," exempting "the Ministers of Justice in executing the precepts of the Courts of Justice, or in executing of their office, and such as be in their company assisting them . . . ."<sup>53</sup> Courthouses fit easily within sensitive places under the historical test.

Regarding schools, in 1828, University of Virginia's Board of Visitors, which included Thomas Jefferson and James Madison, prohibited students from keeping arms on campus.<sup>54</sup> As Lund points out, that did not apply to faculty and staff.<sup>55</sup> For that very reason, depending on other historical evidence, a faculty member today who wishes to carry a firearm on campus might be able to raise a viable Second Amendment claim.

Government buildings, legislative assemblies, and polling places concern government functions overseen by the government. Should an actual case or controversy arise, further historical research would be warranted. As a practical matter, serious issues regarding whether such places should be classified as sensitive may be unlikely to arise. Given the onerous restrictions and sweeping bans in some states—such as New York's ban on carrying firearms in most public places, in response to *Bruen*<sup>56</sup>—there are far bigger fish to fry for Second Amendment litigation.

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<sup>52</sup> *Id.* at 296.

<sup>53</sup> 1786 Va. Acts 33, ch.21 (quoted in Brief for Independent Institute, *supra* note 48, at 12).

<sup>54</sup> Meeting Minutes of University of Virginia Board of Visitors, 4–5 Oct. 1824, *Rotunda* (1824) (cited in Brief for Independent Institute, *supra* note 48, at 14).

<sup>55</sup> Lund 295.

<sup>56</sup> See, e.g., *Antonyuk v. Hochul*, 2022 WL 16744700 (N.D.N.Y. 2022), *stay granted*, 2022 WL 18228317 (2d Cir. 2022), *motion to vacate stay denied*, *Antonyuk v. Nigrelli*, 2023 WL 150425 (U.S. 2023); *Hardaway v. Nigrelli*, 2022 WL 16646220 (W.D.N.Y. 2022), *appeal filed* (2d Cir., Nov. 15, 2022); *Christian v. Nigrelli*, 2022 WL 17100631 (W.D.N.Y. 2022) (preliminary in-

Had the Court's dictum about sensitive places actually been a holding, Lund would be correct in saying that the evidence would be flimsy. Dictum remains open to question. *Heller* referred to presumptively lawful restrictions on possession of firearms by felons.<sup>57</sup> But cases applying the text-history method have raised questions as to the application of that dictum to non-violent felons.<sup>58</sup>

"*Bruen's* endorsements in dicta of shall-issue permitting schemes and gun-free zones in 'sensitive places' suggest that this Court may find a way to uphold (or allow the lower courts to uphold) all but the most outlandish and onerous regulations," Lund argues.<sup>59</sup> But *Bruen* warned against defining sensitive places "too broadly," commenting that "there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department."<sup>60</sup>

In fact, New York responded to *Bruen* by enacting the broadest restrictions ever on permit holders. So far, the ensuing litigation is not going well for New York, largely because of the text-history approach.<sup>61</sup> While limited means-ends scrutiny arguably could reach the same result, in application the alleged public-safety justification almost always prevails over the constitutional right.

#### *D. Bruen Eschews Means-End Scrutiny*

Finally, Lund argues that means-end scrutiny is in some sense inevitable.<sup>62</sup> He first contends that this is illustrated by *Bruen's* discussion of licensing laws, which purportedly engages in such scrutiny by approving restrictions "designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'"<sup>63</sup> But *Bruen's* brief discussion of licensing laws does not suggest that they are constitutional because they are properly tailored to advance an important government

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junction against gun ban on private property without invitation), *appeal filed* (2d Cir., Nov. 15, 2022).

<sup>57</sup> *Heller*, 554 U.S. 626-27 & n.26.

<sup>58</sup> *E.g.*, *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting); *Range v. Garland*, 53 F.4th 262 (3d Cir. 2022), *reh. en banc granted & vacated*, 56 F.4th 992 (3d Cir. 2023).

<sup>59</sup> Lund 296.

<sup>60</sup> *Bruen*, 142 S. Ct. at 2134.

<sup>61</sup> *Antonyuk*, 2022 WL 16744700; *Hardaway*, 2022 WL 16646220.

<sup>62</sup> Lund 297.

<sup>63</sup> *Id.* (quoting *Bruen*, 142 U.S. at 2138 n.9).

interest; rather, it suggests they are constitutional because they are sufficiently analogous to historically accepted government measures designed to prevent actually violent or dangerous people from bearing arms. Had a shall-issue permitting system been the issue before the Court, the race would have been on to find historical analogues to justify it.

Yes, *Bruen* also suggests that abuses—such as “lengthy wait times” or “exorbitant fees”<sup>64</sup>—could be subject to challenge if, in practice, they “deny ordinary citizens their right to public carry.”<sup>65</sup> That is not means-end scrutiny either—it is simply an application of *Bruen*’s core holding that the text and history of the Second Amendment protect the right of ordinary citizens to carry firearms in common use. And Lund is wrong to insist that every time a court compares the burden on the Second Amendment right with its justification, it is engaged in means-end scrutiny.<sup>66</sup> As *Bruen* clearly explained, while an inquiry into the burden and justification of a modern law is part of the process of reasoning by analogy to historical restrictions, it is *not* “means-end scrutiny under the guise of an analogical inquiry,” since this analogical reasoning *always* requires a court “to apply faithfully the balance struck by the founding generation to modern circumstances.”<sup>67</sup>

Lund also invokes Justice Samuel Alito’s suggestion at oral argument in *Bruen* that a sensitive place would be like a courthouse or government building where everyone goes through a magnetometer and security officials are present.<sup>68</sup> But isn’t such screening and protection at such official places just a modern adaptation of historical understandings? In older times, for instance, bailiffs in courthouses would have had the power to conduct searches when necessary to protect those present.

How are bans on nuclear weapons and artillery to be justified under the historical test? Lund states that cannons were available to civilians at least until the mid-19th century.<sup>69</sup> Actually, “destructive devices” such as cannons were not federally regulated until added to the National Firearms Act

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<sup>64</sup> *Bruen*, 142 U.S. at 2138 n.9.

<sup>65</sup> *Id.*

<sup>66</sup> Lund 298.

<sup>67</sup> *Bruen*, 142 U.S. at 2133 n.7.

<sup>68</sup> Lund 298-99.

<sup>69</sup> *Id.* at 300 & n.98. The source for this states only that “at least as late as the mid-nineteenth century, an abolitionist newspaperman apparently defended his printing office with a cannon.” Nelson Lund, *The Proper Use of History and Tradition in Second Amendment Jurisprudence*, 30 FLA. J.L. & PUB. POL’Y 171, 177-78 (2020) (citing CASSIUS M. CLAY, *THE LIFE OF CASSIUS MARCELLUS CLAY: MEMOIRS, WRITINGS, AND SPEECHES* 482 (1886)).

in 1968, under which they are required to be taxed and registered.<sup>70</sup> But text comes before history, and the Second Amendment refers to arms that a person can “bear” or carry,<sup>71</sup> which eliminates heavy weapons. Add to that the historical tradition of banning weapons that are dangerous and unusual, which *Heller* formulates as the common-use test,<sup>72</sup> and the parade of horrors vanishes.

That leaves the current bans on modern rifles (pejoratively labeled “assault weapons”) and standard (“high”) capacity magazines. Lund suggests that “judges could faithfully apply means-end scrutiny by requiring the government to justify every regulation in light of the purpose of the Second Amendment, which is principally to secure the natural or inherent right to self-defense.”<sup>73</sup> That’s what some judges have pretended to do in upholding such bans on the basis that citizens “need” only inferior firearms with ten-round magazines for self-defense.<sup>74</sup> The historical common-use test, not misused means-ends scrutiny, provides the proper level of protection. And since the Supreme Court has already done the work to find that arms in common use pass the text-first-then-history-second test, further historical enquiry is unnecessary to decide whether arms in common use are protected.

### III. THE TEXT-HISTORY TEST PROVIDES A MORE WORKABLE AND EFFECTIVE MEANS OF PROTECTING SECOND AMENDMENT RIGHTS THAN MEANS-END SCRUTINY

*Bruen* teaches that:

reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more

<sup>70</sup> Pub. L. 90-618, 82 Stat. 1213, 1231, 1234 (1968). See 26 U.S.C. § 5845(a)(8), (f) (“destructive device” defined as a weapon that expels a projectile with barrel over .5 inch in diameter), § 5861 (prohibition on unregistered NFA firearms).

<sup>71</sup> “[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Bruen*, 142 S. Ct. at 2132 (quoting *Heller*, 554 U.S. at 582).

<sup>72</sup> *Heller*, 554 U.S. at 627. Of course, when the plain text covers conduct, the burden is on the government to show that certain weapons are dangerous and unusual. See *Bruen*, 142 S. Ct. at 2129-30; *Caetano v. Massachusetts*, 577 U.S. 411, 412 (2016).

<sup>73</sup> Lund 300.

<sup>74</sup> E.g., *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 411 (7th Cir. 2015) (a non-banned firearm “gives householders adequate means of defense”), *cert. denied*, 136 S. Ct. 447 (2015).

legitimate, and more administrable, than asking judges to “make difficult empirical judgments” about “the costs and benefits of firearms restrictions,” especially given their “lack [of] expertise” in the field.<sup>75</sup>

A historical document, such as a law enacted around 1791, says what it says, and distortion of its language may be easily detected. By contrast, means-ends scrutiny allows judges to make ostensibly empirical findings that are in fact founded on their value judgments, not the rule of law. And it’s easy for judges simply to defer to legislatures without conducting the hard work assigned to the judiciary under our system of separation of powers. Requiring lower courts to rest their judgments on text and history may not preclude them from smuggling in policy preferences, but it makes such legislating from the bench more obvious. Means-end scrutiny enables the same abuses to a greater degree by making it easier to hide them.

#### A. *The Objectivity of Historical Texts*

Lund points out that “Perhaps the most extreme example of hostility to the Second Amendment was the Ninth Circuit’s decision in *Young v. Hawaii*.”<sup>76</sup> Previously, based primarily on antebellum state cases, the court held that no right to carry *concealed* exists, but refused to opine on whether a right to carry openly exists.<sup>77</sup> Then in *Young*, it struck the coup de grâce by opining that, based on history, no right to carry *openly* exists either. As Lund notes, “It simply eradicated the textually guaranteed right of the people to bear arms on the ground that an unlimited power of the government to deny that right has existed for centuries.”<sup>78</sup> *Bruen* makes clear that the Supreme Court will reject such “fake originalism.”<sup>79</sup>

But *Young* demonstrates how the original documents of history may readily expose a court as distorting and manipulating those sources. For instance, *Young* claimed that the English Statute of Northampton of 1328 “applied to anyone carrying arms, without specifying whether the arms were carried openly or secretly. In 1350, Parliament specifically banned the carry-

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<sup>75</sup> *Bruen*, 142 S. Ct. at 2130 (citation omitted).

<sup>76</sup> Lund 287 (citing *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021) (en banc)). See also Stephen P. Halbrook, *Faux Histoire of the Right to Bear Arms: Young v. Hawaii (9th Cir. 2021)*, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3885910](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885910).

<sup>77</sup> *Peruta, v. County of San Diego*, 824 F.3d 919, 933-36, 939 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1995 (2017).

<sup>78</sup> Lund 288.

<sup>79</sup> *Id.* at 290.

ing of concealed arms.”<sup>80</sup> In support, the court purported to quote the statute as follows: “[I]f percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other . . . it shall be judged . . . Felony or Trespass, according to the Laws of the Land.”<sup>81</sup>

But in this quotation, the words omitted at the ellipses constituted the essence of the crime. Those omitted words are included here in italics:

[I]f percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other, *to slay him, or rob him, or take him, or retain him till he hath made Fine or Ransom for to have his Deliverance . . .* it shall be judged . . . Felony or Trespass, according to the Laws of the Land of old Times used . . .<sup>82</sup>

The offense thus consisted of gangs riding with concealed arms to murder, rob, or kidnap. It did not prohibit a peaceable person from carrying concealed arms. *Young* overzealously manipulated the statute in an effort to prove what it could not prove. Anyone could look up the reference and see the distortion.

*Young* also relied on another easily detectable misrepresentation of a historical law. An 1836 Massachusetts law provided:

If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, *on complaint of any person having reasonable cause to fear an injury, or breach of the peace*, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.<sup>83</sup>

Ignoring the requirement that there must first be a “complaint of any person having reasonable cause to fear an injury, or breach of the peace,” *Young* averred that public carry was limited to “persons who could demonstrate their need to carry for the protection of themselves, their families, or their property. In effect, the Massachusetts law provided that such weapons could not be carried in public unless the person so armed could show ‘reasonable cause.’”<sup>84</sup> *Young* further ignored that, even if found to be a danger, the per-

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<sup>80</sup> *Young*, 992 F.3d at 788.

<sup>81</sup> *Id.* at 788-89 (alterations in original) (partially quoting 25 Edw. 3, 320, st. 5, c. 2, § 13 (1350)).

<sup>82</sup> 25 Edw. 3, 320, st. 5, c. 2, § 13 (1350).

<sup>83</sup> 1836 Mass. Acts 750, ch. 134, § 16 (emphasis added).

<sup>84</sup> *Young*, 992 F.3d at 799.



son subject to a complaint could still carry arms provided that he posted a bond.

In a 2003 Ninth Circuit case, *Silveira v. Lockyer*, Judge Steven Reinhardt wrote that “some of the framers explicitly disparaged the idea of creating an individual right to personal arms.”<sup>85</sup> In fact, he went on, “John Adams ridiculed the concept of such a right, asserting that the general availability of arms would ‘demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man—it is a dissolution of the government.’”<sup>86</sup> As the original source shows, Adams said no such thing. Instead, the full quotation and context show he upheld the right of self-defense: “To suppose arms in the hands of citizens, to be used at individual discretion, except *in private self-defense*, . . . is to demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man—it is a dissolution of the government.”<sup>87</sup> Adams had in mind the misuse of arms in the recent Shays’ Rebellion, and in no manner disparaged the individual right to personal arms. In fact, he contrasted the misuse of arms with their proper use when he singled out “private self-defense.”

In short, as *Bruen* states, “reliance on history to inform the meaning of constitutional text” is “more legitimate, and more administrable” than having judges who lack expertise weigh the costs and benefits of restrictions.<sup>88</sup> These examples demonstrate how courts’ misuse of history may be detected simply by looking up the original sources. But when they apply means-ends scrutiny and find that the government interest outweighs a constitutional right, who’s to say that they got it wrong?

#### *B. Means-Ends Scrutiny Imports the Subjective Value Judgments of Judges*

To reiterate, *Bruen* held that the Second Amendment presumptively protects conduct within its plain text, and that the government must demonstrate that a challenged restriction is consistent with this Nation’s historical tradition. The Court rejected means-ends scrutiny—under which a court balances the severity of a restriction with the governmental interest—as a way of justifying such restrictions.<sup>89</sup>

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<sup>85</sup> *Silveira v. Lockyer*, 312 F.3d 1052, 1085, *reh. denied*, 328 F.3d 567 (9th Cir. 2003), *cert. denied*, 540 U.S. 1046 (2003).

<sup>86</sup> *Id.* (citing 3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES 475 (1787)).

<sup>87</sup> 3 JOHN ADAMS, A DEFENCE, *supra* note 86, at 475 (emphasis added).

<sup>88</sup> *Bruen*, 142 S. Ct. at 2130 (citation omitted).

<sup>89</sup> *Id.* at 2126.

In contrast to *Bruen*'s text-first-and-history-second test, a means-end analysis requires judges to engage in balancing and consider their own subjective value judgments. It requires them to engage in subjective moral judgments in determining which governmental purposes are sufficiently "important" or "compelling" to justify overriding Second Amendment rights. And it requires them to engage in a subjective balancing process to determine which restrictions are sufficiently tailored to advance the approved purposes, such that the cost they impose on the right to keep and bear arms is not out of proportion to the supposed benefit they achieve in furthering the government's aims.

In *New York State Rifle & Pistol Association v. City of New York*, the Second Circuit upheld the city's ban on taking a handgun out of one's licensed premises other than to a shooting range in the city.<sup>90</sup> A person with a second home could just obtain a second handgun to keep there, and a person who wanted to go to shooting ranges or enter competitions outside the city could rent a gun there, the court imagined without a scintilla of evidence.<sup>91</sup> Since the court found no significant burdens on the right to bear arms, it applied intermediate scrutiny. The declaration of a former police official said that taking a handgun out of one's licensed premises "constitutes a potential threat to public safety," as licensees would be susceptible to stress, road rage, and other disputes that make it dangerous to have a firearm.<sup>92</sup> Concluding that its review required "difficult balancing" of the constitutional right with the governmental interests, the court upheld the ban based on the speculation of a single police officer.<sup>93</sup>

When the Supreme Court granted certiorari in the case, the city—with the support of the state of New York—amended its ordinance in a manner that the Court found to moot the case.<sup>94</sup> Although he concurred in the dismissal, Justice Kavanaugh shared his "concern that some federal and state courts may not be properly applying *Heller* and *McDonald*."<sup>95</sup> Dissenting from the order, Justice Alito said he would have decided the case on the

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<sup>90</sup> *New York State Rifle & Pistol Association, Inc. v. City of New York*, 883 F.3d 45 (2d Cir. 2018).

<sup>91</sup> *Id.* at 57-58, 61.

<sup>92</sup> *Id.* at 63.

<sup>93</sup> *Id.* at 64.

<sup>94</sup> *New York State Rifle & Pistol Association, Inc. v. City of New York*, 140 S. Ct. 1525 (2020).

<sup>95</sup> *Id.* at 1527 (Kavanaugh, J., concurring).

merits, noting that the assertion about road rage in the police official's declaration "is dubious on its face."<sup>96</sup>

The D.C. Circuit's decision in *Heller II*, which upheld a rifle ban and magazine capacity limit, represents another case of slippery empirical judgments made by judges employing means-ends scrutiny. Under intermediate scrutiny, the court explained, the government must show "a substantial relationship or reasonable 'fit' between, on the one hand, the prohibition on assault weapons and magazines holding more than ten rounds and, on the other, its important interests in protecting police officers and controlling crime."<sup>97</sup> While ideally a court should consider the interest of law-abiding citizens as part of the "reasonable 'fit'" calculus, in practice the governmental interest almost invariably outweighs the citizens' interest.

The majority in *Heller II* upheld the law in part because a lobbyist testified at a hearing that "[p]istol grips on assault rifles . . . allow the shooter to spray-fire from the hip position."<sup>98</sup> That unsworn assertion directly conflicted with the plaintiffs' expert and lay evidence that pistol grips on rifles are designed only for aimed fire from the shoulder.<sup>99</sup> The court upheld the ban on magazines holding over ten rounds because they supposedly "pose a danger to innocent people and particularly to police officers," though the court did not factor the needs of law-abiding persons for private self-defense into the balancing.<sup>100</sup>

As a third example, consider the Ninth Circuit's 2021 en banc decision in *Duncan v. Bonta*, which upheld California's ban on magazines holding more than ten rounds. The court applied intermediate scrutiny to the law and found that the record demonstrated "(a) that the limitation interferes only minimally with the core right of self-defense, as there is no evidence that anyone ever has been unable to defend his or her home and family due to the lack of a large-capacity magazine; and (b) that the limitation saves lives."<sup>101</sup> *Duncan's* defiance of *Heller* was thinly disguised.<sup>102</sup> A six-judge

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<sup>96</sup> *Id.* at 1542 (Alito, J., dissenting).

<sup>97</sup> *Heller II*, 670 F.3d at 1262.

<sup>98</sup> *Id.* at 1262-63.

<sup>99</sup> See Stephen P. Halbrook, *Reality Check: The "Assault Weapon" Fantasy & Second Amendment Jurisprudence*, 14 GEO. J.L. & PUB. POL'Y 47, 60-62 (2016).

<sup>100</sup> *Heller II*, 670 F.3d at 1264.

<sup>101</sup> *Duncan v. Bonta*, 19 F.4th 1087, 1096 (9th Cir. 2021) (en banc), *cert. granted, vacated, & remanded*, 142 S. Ct. 2895 (2022).

<sup>102</sup> Among other things, when *Heller* held that handguns are in common use for self-defense, it did not say anything about how many times shots are fired for that purpose, but emphasized that citizens commonly possess handguns for that purpose. See *Heller*, 554 U.S. at 629.

concurrency asserted that “many ‘historians, scholars, and judges have . . . express[ed] the view that the [*Heller* Court’s] historical account was flawed.”<sup>103</sup> Dissenting, Judge Patrick Bumatay said bluntly, “In reality, this tiers-of-scrutiny approach functions as nothing more than a black box used by judges to uphold favored laws and strike down disfavored ones.”<sup>104</sup> And as Judge Lawrence VanDyke added, also dissenting, “By my count, we have had at least 50 Second Amendment challenges since *Heller*—significantly more than any other circuit—all of which we have ultimately denied.”<sup>105</sup> When the Supreme Court decided *Bruen*, it granted certiorari in *Duncan*, vacated the judgment, and remanded the case for further consideration in light of *Bruen*.<sup>106</sup>

But the above decisions illustrate how slippery intermediate scrutiny—or any other form of means-end scrutiny—can be. Judges decide cases based on their subjective value judgments unless they are reined in by the objective standards of text and history; means-end tests give their preferences free rein.

### *C. The Matter of Shall-Issue Laws*

*Bruen* states in footnote 9 that “nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regimes, under which ‘a general desire for self-defense is sufficient to obtain a [permit].’”<sup>107</sup> However, “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.”<sup>108</sup>

In arguing that a pure text-history test is unworkable, Lund says that footnote 9 is an example of *Bruen* itself failing to apply its own test consistently. Stating that the first shall-issue law was apparently passed in 1961, Lund argues that “the Court does not provide so much as a shred of evi-

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<sup>103</sup> *Duncan*, 19 F.4th at 1119 (Berzon, J., concurring).

<sup>104</sup> *Id.* at 1139 (Bumatay, J., dissenting).

<sup>105</sup> *Id.* at 1165 (VanDyke, J., dissenting).

<sup>106</sup> *Duncan v. Bonta*, 142 S. Ct. 2895 (2022).

<sup>107</sup> *Bruen*, 142 S. Ct. at 2138 n.9.

<sup>108</sup> *Id.*

dence that any kind of licensing requirements had ever been imposed on the general population before the 20th century.”<sup>109</sup>

But that disregards that most shall-issue laws provide for *concealed* carry, while unlicensed *open* carry was the general rule from 1607 to 1900.<sup>110</sup> Moreover, *Heller* approved of antebellum judicial decisions that upheld restrictions on concealed carry because open carry was allowed.<sup>111</sup> Open carry satisfied the textual right to bear arms, while restricting concealed carry reflected early post-founding practice in some states. A handgun could be freely (though openly) carried in the years leading up to the enactment of shall-issue laws in the 20th century.

Further, *Bruen*'s suggestion was dictum, albeit strong dictum. Shall-issue laws were not before the Court, and in fact petitioners conceded that shall-issue laws, which exist in 43 states, are constitutional.<sup>112</sup> They understood that the Court decides cases incrementally rather than taking great leaps forward. Had they recklessly petitioned the Court to invalidate permitting systems per se, the petition likely would have been denied. The plaintiffs only sought licenses to carry, and the Court would not have wished to go further than necessary by overturning the laws of almost all states.

“In our adversarial system of adjudication, we follow the principle of party presentation,” the Court has explained elsewhere.<sup>113</sup> “[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present,” inasmuch as the system “is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.”<sup>114</sup> For *Bruen* to expand the issue to include whether there were 1791 analogues to today's shall-issue laws would have violated these basic principles. While Lund would not likely disagree with this, his suggestion that the Court's comments on carry licenses violat-

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<sup>109</sup> Lund 291-92 (citing David B. Kopel, *Restoring the Right to Bear Arms: New York State Rifle & Pistol Association v. Bruen*, 2022 CATO SUPREME CT. REV. 305, 325-26 (2022)).

<sup>110</sup> Kopel, *Restoring the Right*, *supra* note 33, at 326.

<sup>111</sup> *Heller*, 554 U.S. at 626, 629.

<sup>112</sup> In response to New York's argument that “there is no example in all Anglo American history of the carry rights petitioners seek,” petitioners stated, “In fact, at least 43 states allow just that, while, as in *Heller*, only a few jurisdictions follow New York's lead of presumptively denying a right that the Constitution guarantees to all.” Reply Brief for Petitioners, *Bruen*, No. 20-843, at 1 (Oct. 14, 2021).

<sup>113</sup> *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (holding it to be an abuse of discretion for the Ninth Circuit to interject a theory of the case not presented by the parties).

<sup>114</sup> *Id.* (citations omitted & brackets in original).

ed its own text-history approach disregards the early post-Founding judicial decisions upholding restrictions on one mode of carry if an alternative mode was permitted.

#### IV. CONCLUSION: TEXT-AND-HISTORY, NOT MEANS-ENDS SCRUTINY, IS THE BEST TEST TO PROTECT SECOND AMENDMENT RIGHTS

Finally, post-*Bruen* judicial decisions demonstrate the viability of the text-history approach. New York responded to *Bruen* by greatly limiting the places where firearms may be carried. In a 182-page opinion, Judge Glenn T. Suddaby of the Northern District of New York applied a thorough text-history analysis and issued a preliminary injunction against most of New York's new law.<sup>115</sup> The Second Circuit issued a stay of the injunction, and the Supreme Court denied a motion to vacate the stay. However, Justice Alito, joined by Justice Clarence Thomas, issued the following statement: "The District Court found, in a thorough opinion, that the applicants were likely to succeed on a number of their claims, and it issued a preliminary injunction as to twelve provisions of the challenged law."<sup>116</sup> He invited the applicants to seek further relief "if the Second Circuit does not, within a reasonable time, provide an explanation for its stay order or expedite consideration of the appeal."<sup>117</sup> Evidently, at least some Justices on the Court are keeping a close eye in how the inferior courts are treating *Bruen*.

On both First and Second Amendment grounds, Judge John L. Sinatra, Jr., of the Western District of New York, issued a preliminary injunction against a portion of the gun ban at places of worship or religious observation,<sup>118</sup> and he did the same in a separate case against the gun ban on private property without an invitation.<sup>119</sup>

Lund concludes that courts will not protect a robust Second Amendment "unless judges from across the political spectrum arrive at a shared consensus that the right remains valuable today, just as they have with respect to the freedom of speech."<sup>120</sup> However, he goes on, "*Bruen*'s instruc-

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<sup>115</sup> *Antonyuk*, 2022 WL 16744700 (N.D.N.Y. 2022), *stay granted*, 2022 WL 18228317 (2d Cir. 2022), *motion to vacate stay denied*, *Antonyuk*, 2023 WL 150425 (U.S. 2023).

<sup>116</sup> *Antonyuk*, 2023 WL 150425, at \*1 (statement of Alito, J.).

<sup>117</sup> *Id.*

<sup>118</sup> *Hardaway*, 2022 WL 16646220 (W.D.N.Y. 2022), *appeal filed* (2d Cir., Nov. 15, 2022).

<sup>119</sup> *Christian*, 2022 WL 17100631 (W.D.N.Y. 2022) (preliminary injunction against gun ban on private property without invitation), *appeal filed* (2d Cir., Nov. 15, 2022).

<sup>120</sup> Lund 300.

tion to focus on regulatory traditions will not provide the education that judges need because that test is inherently manipulable.”<sup>121</sup> But all rules are subject to manipulation. And as demonstrated by the pre-*Bruen* lower courts, means-ends scrutiny is the mother of manipulation. No matter what the text and historical tradition dictated, courts usually found a way to balance the right away and to uphold virtually all restrictions. The judges in the inferior courts don’t necessarily need to *like* the Second Amendment, they just need to do their duty and follow Supreme Court precedent.

As *Bruen* recognized about the two-step approach of the lower courts, step one is correctly rooted in text and history, while step two involves means-ends scrutiny, allowing courts to balance away the right. That’s why step two “is one step too many.”<sup>122</sup> *Bruen* thus provides the best and most workable formula for protecting the fundamental right to keep and bear arms: when the text covers one’s conduct, the activity is presumptively protected and the burden is on the government to show that its restriction is consistent with our historical tradition.<sup>123</sup>

#### Other Views:

- Randy Barnett & Nelson Lund, *Implementing Bruen*, LAW & LIBERTY (Feb. 6, 2023), <https://lawliberty.org/implementing-bruen/>.
- Ryan Busse, *One Nation Under Guns*, THE ATLANTIC (Dec. 14, 2022), <https://www.theatlantic.com/ideas/archive/2022/12/gun-violence-scotus-bruen-ruling-mass-shootings/672446/>.
- N.Y. State Rifle & Pistol Ass’n v. Beach, 19-156-cv (2d Cir. Aug. 26, 2020), available at <https://casetext.com/case/ny-state-rifle-pistol-assn-v-beach>.

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<sup>121</sup> *Id.* at 306.

<sup>122</sup> *Bruen*, 142 S. Ct. at 2127.

<sup>123</sup> *Id.* at 2129-30.