# TREATING YOUNG ADULTS AS CITIZENS

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> *"'[T]yranny of the majority' is now generally included among the evils against which society requires to be on its guard.*
>
> *Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities."*
>
> *-John Stuart Mill*[1]



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1. JOHN STUART MILL, ON LIBERTY 13 (London, John W. Parker & Son 1859).

## INTRODUCTION

John Stuart Mill distilled what the Founders knew all along: majorities harnessing the power of the state are often willing to trammel minorities' rights. The Founders drafted the Constitution to curb, in James Madison's words, "the superior force of an interested and overbearing majority."[2] But how are mere "parchment barriers" to withstand overbearing majorities?[3] "[I]t would require," in Alexander Hamilton's words, "an uncommon portion of fortitude in . . . judges."[4]

In issuing *Firearms Policy Coalition v. McCraw*,[5] the first post-*Bruen*[6] merits win for Second Amendment claimants, Judge Mark T. Pittman displayed just such fortitude in guarding the Second Amendment rights of eighteen-to-twenty-year-olds from a Texas statute that forbade them, with narrow exceptions, from applying for licenses to carry firearms in public.[7]

Part I of this Essay provides a relevant overview of the U.S. Supreme Court's 2008 *District of Columbia v. Heller*[8] decision, what came after, and how the Court responded to what came after in *Bruen*. Part II uses that jurisprudence as the starting point for examining Judge Pittman's ruling.

## I. *HELLER*, DEFIANCE, AND *BRUEN*

### *A.* Heller

When *District of Columbia v. Heller* conducted a plain-text analysis to hold that the Second Amendment protected individual rights to keep and bear arms for self-defense in the home,[9] it made clear that those rights belonged to "all Americans" who were members of the nation's political community by virtue of their being "law-

2. THE FEDERALIST NO. 10, at 42 (James Madison) (George W. Carey & James McClellan eds., 2001).

3. THE FEDERALIST NO. 48, *supra* note 2, at 256 (James Madison).

4. THE FEDERALIST NO. 78, *supra* note 2, at 406 (Alexander Hamilton).

5. No. 21-cv-1245, 2022 WL 3656996 (N.D. Tex. Aug. 25, 2022), *appeal dismissed sub nom.* Andrews v. McCraw, No. 22-10898, 2022 WL 19730492 (5th Cir. Dec. 21, 2022).

6. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122, 2156 (2022) (holding that the Second Amendment protects "an individual's right to carry a handgun for self-defense outside the home" without having to "demonstrat[e] to government officers some special need").

7. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *1, *11 (exempting some current and former military personnel and those protected by a protective order).

8. 554 U.S. 570 (2008).

9. *Id.* at 576–600, 635.

abiding, responsible citizens."[10] Law-abiding eighteen-to-twenty-year-olds, who can vote[11] and be conscripted into the military,[12] easily fall into this category.

*Heller*'s broader analysis is difficult to insulate from applicability to the public square. In particular, *Heller*:

- disaggregates the right to keep arms from the right to bear—carry—arms, where keeping naturally refers to the home while carrying more naturally applies to the public square;[13]
- holds that the Second Amendment protects an "individual right to possess *and carry* weapons in case of confrontation,"[14] most of which are not limited to the home, in a world where, as the recent COVID pandemic showed, it is practically impossible always to stay home;
- relies upon nineteenth-century case law holding that the right to bear arms guarantees an individual's ability to carry a firearm either concealed or openly;[15]
- notes that "the need for defense of self . . . is *most* acute" in the home,[16] recognizing (as is self-evident) that it exists in public;[17]
- lists a few "longstanding," "presumptively lawful" arms-bearing regulations, including "laws forbidding the carrying of firearms in sensitive places," without sanctioning a ban on public carriage, suggesting that (1) carriage in ordinary (i.e., not sensitive) public places had to be permitted, and (2) the presumption of legality could be overcome in the appropriate circumstances.[18]

10. *Id.* at 580–81, 635.
11. U.S. CONST. amend. XXVI.
12. 50 U.S.C. § 3803 (requiring Selective Service registration for those between ages eighteen and six months and twenty-six).
13. *Heller*, 554 U.S. at 582–84.
14. *Id.* at 592 (emphasis added).
15. *Id.* at 626–29.
16. *Id.* at 628 (emphasis added).
17. *See id.* at 584 (recognizing that the term "bear arms" implies a right to "carry[] [a] weapon . . . for the purpose of 'offensive or defensive action'" and "in no way connotes participation in a structured military organization"). As Judge Richard Posner recognized, it "is as important outside the home as inside." Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012).
18. *Heller*, 554 U.S. at 626–27, 627 n.26 (emphasis added).

*Caetano v. Massachusetts*,[19] which vacated and remanded the Massachusetts Supreme Judicial Court's judgment that stun guns were not protected by the Second Amendment,[20] supports this conclusion because Ms. Caetano carried her stun gun in public.[21]

### *B. Defiance*

Almost as soon as *McDonald v. City of Chicago*[22] incorporated the Second Amendment against the states,[23] lower federal courts and state courts began defying *Heller*'s mandate. Recognition of defiance came from multiple quarters, including policy

19. 577 U.S. 411 (2016) (per curiam).
20. *Id.* at 412.
21. *See id.* at 413 (Alito, J., concurring in the judgment) (describing the circumstances in which Ms. Caetano carried her stun gun).
22. 561 U.S. 742 (2010).
23. *Id.* at 750.

commentators,[24] academics,[25] members of Congress,[26] and even Supreme Court Justices.[27] Judicial hostility to Second Amendment

24. *See, e.g.*, Clark Neily, *The Right to Keep and Bear Arms: 10 Years after* Heller, CATO POL'Y REP., Sept./Oct. 2018, at 16, 16 (recognizing that lower courts have adopted an "unduly narrow interpretation" of *Heller*); Opinion, *Waiting for Justice Gorsuch*, WALL ST. J. (Feb. 24, 2017, 7:17 PM), https://www.wsj.com/articles/waiting-for-justice-gorsuch-1487893991 [https://perma.cc/ULC4-HYUN] (describing the Fourth Circuit as creating a new "legal test" and not letting "mere precedent" stand in their way to uphold a state firearms regulation).

25. This author has made this assertion several times. *See, e.g.*, George A. Mocsary, *A Close Reading of an Excellent Distant Reading of* Heller *in the Courts*, 68 DUKE L.J. ONLINE 41, 41 (2018) [hereinafter Mocsary, *Close Reading*] (asserting that "lower courts have deliberately and systematically undercut both the right to bear and the right to keep arms as articulated by the U.S. Supreme Court in [*Heller*]"); Robert J. Cottrol & George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 GEO. J.L. & PUB. POL'Y 17, 30 (2016) (suggesting that lower courts have "outright defied decades of fundamental-right jurisprudence"); George A. Mocsary, *Defying the Supreme Court in* Kolbe v. Hogan, LAW & LIBERTY (Dec. 20, 2017), https://lawliberty.org/defying-the-supreme-court-in-kolbe-v-hogan [https://perma.cc/853Q-A3DU] [hereinafter Mocsary, *Defying the Supreme Court*] (describing how the Fourth Circuit defied *Heller* by applying "intermediate scrutiny in a form that resemble[d] rational basis review"); George A. Mocsary, Assoc. Professor of L., S. Ill. Univ. Sch. of L., *Heller* and Public Carry Restrictions (Feb. 2, 2018), *in* 40 CAMPBELL L. REV. 431, 441–46 (2018) (describing the lower courts' "outright defiance of decades of fundamental-right jurisprudence"). So have other law professors. *See, e.g.*, Marc A. Greendorfer, *After* Obergefell*: Dignity for the Second Amendment*, 35 MISS. COLL. L. REV. 128, 142 (2017) ("[L]ower courts' interpretation of *Heller* was utterly at odds with what the Supreme Court said in *Heller*."); Nicholas J. Johnson, *The Power Side of the Second Amendment Question: Limited, Enumerated Powers and the Continuing Battle over the Legitimacy of the Individual Right to Arms*, 70 HASTINGS L.J. 717, 719 (2019) (noting that the lower courts' "prevailing standard for deciding Second Amendment claims bears no resemblance to *Heller*'s pronouncement that guns in common use are constitutionally protected"); Joyce Lee Malcolm, *Defying the Supreme Court: Federal Courts and the Nullification of the Second Amendment*, 13 CHARLESTON L. REV. 295, 304 (2018) (describing "the individual right laid out by the Supreme Court" as "illusionary" because of lower courts' treatment of the right); Christopher M. Johnson, Note, *Second-Class:* Heller*, Age, and the Prodigal Amendment*, 117 COLUM. L. REV. 1585, 1612 (2017) (adding that "current restrictions on handgun purchases by law-abiding 18-to-20-year-old adults raise serious concerns regarding [the Second Amendment's] infringement").

26. *See* Brief of United States Senator Ted Cruz and 24 Other U.S. Senators as Amici Curiae Supporting Petitioners at 11, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843) (taking the position that "courts may not upset or chip away at the constitutional balance between the risks and benefits of a right to keep and bear arms").

27. *See* Rogers v. Grewal, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from the denial of certiorari) (noting that "many courts have resisted our decisions in *Heller* and *McDonald*" (collecting cases)); Peruta v. California, 137 S. Ct. 1995, 1997 (2017) (Thomas, J., dissenting from the denial of certiorari) (describing the Ninth Circuit's approach to Second Amendment rights as "indefensible"); Silvester v. Becerra, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from the denial of certiorari) (describing the "Ninth Circuit's deviation from ordinary principles of law" as "unfortunate, though not surprising"); Jackson v. City of San Francisco, 576 U.S. 1013, 1014 (2015) (Thomas, J., dissenting from the denial of certiorari) (arguing that "[d]espite the clarity with which [the Supreme Court] described the Second Amendment's core protection for the right of self-defense, lower courts . . . have failed to protect it"); Friedman v. City of Highland Park, 577 U.S. 1039, 1039 (2015) (Thomas, J., dissenting from the denial of certiorari) (arguing that "noncompliance with [the Supreme Court's] Second Amendment precedents warrants [the] Court's attention").

claims was at times zealous[28] enough that judges would rather undermine basic legal principles, including decades of fundamental rights jurisprudence, than rule in favor of rights claimants.

Parts of one case are worth briefly describing.[29] In *Drake v. Filko*,[30] the U.S. Court of Appeals for the Third Circuit heard a challenge to New Jersey's may-issue licensing system under which applicants had to show an "urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun."[31]

The court applied the two-part test, which had become common in the lower courts.[32] Under that test, courts first determined whether the conduct in question was protected by the Second Amendment's text, as informed by history.[33] If the conduct was not covered, the plaintiff lost. If it was covered, courts applied means–end scrutiny in the second step.[34]

Under step one, the *Drake* majority held that New Jersey's licensing regime's 1924 enactment made it longstanding and therefore presumptively lawful.[35] Whether or not 1924 made the statute old enough to be longstanding,[36] despite circuit precedent

28. *See* Mocsary, *Close Reading*, *supra* note 25, at 42 n.10 (citing examples of zealous language from judicial opinions that one might find inappropriate to an "impartial guardian of the rule of law," Bush v. Gore, 531 U.S. 98, 129 (2000) (Stevens, J., dissenting)).

29. See Cottrol & Mocsary, *supra* note 25, at 31–33, for a fuller analysis.

30. 724 F.3d 426 (3d Cir. 2013), *abrogated by Bruen*, 142 S. Ct. 2111 (2022).

31. *Id.* at 428 (quoting N.J. Admin. Code § 13:54-2.4(d)(1) (2002)). As one casebook explains:

> Most states have a *shall-issue* system for permitting. Except in special circumstances, an applicant who meets all the statutory criteria shall be issued a permit.
>
> . . . .
>
> In . . . New Jersey, . . . carry permits are issued only on a *may-issue* basis, under which local issuing authorities exercise far more discretion in deciding who will, and will not, be allowed to obtain a permit.

NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, E. GREGORY WALLACE & DONALD KILMER, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 786 (3d ed. 2022).

32. *Drake*, 724 F.3d at 429 (quoting United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010), *abrogated by Bruen*, 142 S. Ct. 2111); *accord Bruen*, 142 S. Ct. at 2126–27 (describing the two-step test used by the courts of appeals).

33. *Drake*, 724 F.3d at 429 (quoting *Marzzarella*, 614 F.3d at 89).

34. *Id.* (quoting *Marzzarella*, 614 F.3d at 89).

35. *Id.* at 432–34.

36. It is not under *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. at 2154 n.28 ("As with their late-19th-century evidence, the 20th-century evidence presented by respondents

holding (in accord with the ordinary legal meaning of *presumption*) that "[s]aying that there is a presumption necessarily assumes that it can be overcome in some cases,"[37] the court ignored the plaintiff's arguments rebutting the presumption of lawfulness.

The majority then analyzed New Jersey's law under what it called "intermediate scrutiny,"[38] but which was more deferential than rational basis review. Under the Third Circuit's (fairly standard) version of intermediate scrutiny, the state must show that the challenged law "does not burden more [conduct] than necessary" to achieve a "substantial" or "important" state interest.[39] Relying on "*no evidence at all*," the majority ruled in New Jersey's favor.[40] The majority lifted the state's evidentiary burden on the ground that the law's enacting legislature "could not have foreseen that restrictions on carrying a firearm outside the home could run afoul of [the] Second Amendment" because "the teachings of *Heller* were not available until that landmark case was decided in 2008."[41]

But a prior legislature's alleged lack of foreknowledge does not absolve the state of its evidentiary burden in constitutional litigation.[42] Indeed, the government defendant in an earlier Third Circuit Second Amendment case, which the *Drake* majority cited twenty-three times,[43] successfully defended its law with post-enactment evidence from outside the legislative record.[44]

and their *amici* does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence.").

37. *In re* Cendant Corp. Litig., 264 F.3d 201, 282 (3d Cir. 2001); *see also Presumption*, BLACK'S LAW DICTIONARY (11th ed. 2019) (noting that the adversely affected party may "overcome[] [the presumption] with other evidence").

38. *Drake*, 724 F.3d at 435.

39. *See Marzzarella*, 614 F.3d at 97–100 (analogizing to First Amendment intermediate scrutiny and applying the test).

40. *Drake*, 724 F.3d at 454 (Hardiman, J., dissenting).

41. *Id.* at 438 (majority opinion).

42. *See Marzzarella*, 614 F.3d at 100 (relying on a post-enactment study to determine whether a statute was a reasonable fit with the legislature's interest in preventing gun violence); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 393–94 (2000) (considering third-party evidence where "Missouri does not preserve legislative history"); Randall v. Sorrell, 548 U.S. 230, 253–56 (2006) (considering post-enactment research and expert testimony developed specifically for litigation); United States v. Carter, 750 F.3d 462, 467–68 (4th Cir. 2014) (relying on post-enactment evidence to assess the merits of a Second Amendment claim); Moore v. Madigan, 702 F.3d 933, 937–41 (7th Cir. 2012) (same); United States v. Reese, 627 F.3d 792, 802–03 (10th Cir. 2010) (same), *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022); United States v. Yancey, 621 F.3d 681, 686 (7th Cir. 2010) (same).

43. *Drake*, 724 F.3d at 429–36.

44. *Marzzarella*, 614 F.3d at 99–100 & nn.17–19, 21.

The import of *Drake*'s holding cannot be understated: It is the equivalent of a lower court holding that *Brown v. Board of Education of Topeka*[45] does not require desegregation of schools that were segregated before that decision was handed down or that *Obergefell v. Hodges*[46] does not require states to recognize same-sex marriages if they banned them before that decision, because those respective states could not have known that school segregation and same-sex-marriage bans would eventually be declared unconstitutional.

### *C.* Bruen

*New York State Rifle & Pistol Ass'n v. Bruen* can be seen as both a faithful application of the American common law of public arms bearing, which generally held that some form of public carry must be allowed,[47] and a response to post-*Heller* defiance:

> The constitutional right to bear arms in public for self-defense is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need.[48]

Calling the two-part test's heightened-scrutiny prong "one step too many,"[49] the Court set forth the rule for Second Amendment cases: "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."[50]

45. 347 U.S. 483 (1954).

46. 576 U.S. 644 (2015).

47. *See* The Federalist Society, *Should the Future Be Determined by the Past? Bearing Arms After* Bruen., YOUTUBE, at 13:51 (Aug. 17, 2022), https://www.youtube.com/watch?v=kkihPhd_E64 [https://perma.cc/NT48-GH2T] (remarks of Robert Leider) (observing that the right to carry arms in public for individual self-defense existed in the general law in the nineteenth century); *see also* Nelson Lund, Bruen*'s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279, 280–82 (2022) (arguing that it is absurd to think that Americans living in 1791 or 1868 "needed the government's permission to step outside their homes with a gun in their hands"); *see also generally* JOHNSON ET AL., *supra* note 31, at 173–537 (citing cases, statutes, and common practices in America from the colonial period through the nineteenth century).

48. 142 S. Ct. 2111, 2156 (2022) (citation omitted) (quoting McDonald v. City of Chicago, 561 U.S. 742, 780 (2010) (plurality opinion)).

49. *Id.* at 2127.

50. *Id.* at 2129–30; *accord id.* at 2127 ("[T]he 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."); *see also id.* at 2150 (holding that producing historical

As to which history is most important, *Bruen* made clear that the Founding Era's practices matter most.[51] Later nineteenth-century evidence is confirmatory only, inasmuch as it cannot contradict the constitutional text or Founding Era practices, with the possible exception that evidence surrounding the Fourteenth Amendment's ratification may have disproportionate weight because it incorporated the Second Amendment against the states.[52] Nevertheless, incorporated rights apply to the states in the same measure as they do to the federal government.[53]

The history must be applied by analogy. The opinion gives a detailed lesson on analogizing, of which two components are especially important: "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[54] *How* refers to "whether modern and historical regulations impose a comparable burden on the right of armed self-defense," and *why* considers "whether that burden is comparably justified."[55]

The negative aspect of the "why" inquiry is likely to come into play from two angles. First, it should prevent burdensome laws enacted for one purpose—e.g., fire prevention—from being used as a basis to impose burdens for other purposes (or no purpose at all)—e.g., purely for the sake of promoting disarmament. Second, it should cause laws passed for later unconstitutional reasons—like postbellum laws banning the carriage of all but expensive military revolvers passed for the racist reason that freedmen could not afford them[56]—to face a greater hurdle in their justification.

This test, limited to text and historical tradition, is a natural response to over a decade of abuse. Had lower courts properly applied means–end scrutiny, the construct may have survived in

evidence is "respondents' burden").

51. *See id.* at 2127–28 (recognizing a Founding Era historical analysis).

52. *Id.* at 2138 (noting the "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope"); *id.* at 2163 (Barrett, J., concurring) (same).

53. *Id.* at 2137 (majority opinion); *McDonald*, 561 U.S. at 765–66.

54. *Bruen*, 142 S. Ct. at 2133; *see id.* at 2131–34 (analogizing).

55. *Id.* at 2133.

56. *See* Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to Be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1310–13, 1321–23, 1329–33 (1995) (discussing the possible motivations for enacting restrictive firearms legislation); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 335–38, 342–48 (1991) (arguing that the enactment of restrictive firearms regulations in the nineteenth century was largely to deprive freedmen of the right to bear arms).

the Second Amendment space. *Bruen* attempts to limit judges' abilities to interest balance by cabining Second Amendment analysis to text and history. It leaves no lack of clarity about the usual rule in rights cases that the state bears the evidentiary burden. It goes to some lengths to set forth what should be basic rules of analogizing. The Court, in other words, is asserting its authority.[57]

## II. JUDGE PITTMAN'S UNCOMMON FORTITUDE

Coming with a vengeance that surprised even the most vocal proponents of post-*Heller* judicial abdication, the defiance continued post-*Bruen*. In the first case to be decided by a federal appeals court, for example, the Third Circuit held that historical laws disarming politically untrustworthy groups like Catholics, loyalists, those who refused to make loyalty oaths, "Native Americans, Black people, and indentured servants"[58] justified a lifetime arms ban on a man who "pleaded guilty to making false statements about his income to obtain $2,458 of food stamp assistance."[59] The Third Circuit granted en banc rehearing,[60] and a decision is pending at the time of writing. This court is not alone in engaging in pre-*Bruen* defiance.[61] In one particularly egregious

57. *Cf.* Mocsary, *Defying the Supreme Court*, *supra* note 25 (discussing the "U.S. Supreme Court's delegitimizing refusal to review blatant affronts to its authority").

58. Range v. Att'y Gen. U.S., 53 F.4th 262, 274–79 (3d Cir. 2022), *vacated*, 56 F.4th 992 (3d Cir. 2023) (en banc).

59. *Id.* at 266.

60. *Range*, 56 F.4th at 992.

61. *See, e.g.*, People v. Rodriguez, 171 N.Y.S.3d 802, 806 (Sup. Ct. 2022) (opining that the absence of New York's handgun permitting system "would turn New York into the Wild West, placing its citizens at the mercy of criminals wielding unlicensed firearms, concealed from public view, in heavily populated areas"); People v. Williams, 175 N.Y.S.3d 673, 676 (Sup. Ct. 2022) (finding it unnecessary to consider the historical pedigree of New York's firearm licensing scheme because the U.S. Supreme Court left the entire scheme apart from the "proper cause" requirement untouched); People v. Brown, No. 71673-22, 2022 WL 2821817, at *5 & n.3 (N.Y. Sup. Ct. July 15, 2022) (placing the burden on the defendant "to show that the location in which he is alleged to have possessed his gun was a place that would *not* be considered 'sensitive' under the dicta in *Bruen* or under federal statutory location restrictions" when he was arrested "within two blocks," according to Google Maps, of three churches, a public school, and a day care center, despite neither New York nor federal law prohibiting firearms in churches or day care centers at that time (emphasis added)); *see also* Nat'l Rifle Ass'n v. Bondi, No. 21-12314, 2023 WL 2416683, at *4 (11th Cir. Mar. 9, 2023) (reasoning that Reconstruction-era analogues are more probative of the constitutionality of state firearm regulations and rejecting the notion that the Supreme Court has treated Founding Era analogues as more appropriate as a non-binding assumption), *superseded*, 61 F.4th 1317 (11th Cir. 2023). The following cases, contrary to *Bruen*, provide no historical reasoning in denying plaintiffs' Second Amendment claims: United States v. Tribble, 22-CR-085, 2023 WL 2455978, at *3 (N.D. Ind. Mar. 10. 2023) (explicitly declining "to evaluate whether felon-in-possession statutes have sufficient

case, New York's Appellate Division rejected a challenge to the denial of a firearm license by relying on authority resting on the pre-*Bruen* premise that the Second Amendment had no application outside the home and, remarkably, the pre-*Heller* premise that the Second Amendment did not confer an individual right to keep and bear arms.[62]

Legislatures have also joined in. New York's Concealed Carry Improvement Act (CCIA) was passed on the afternoon of July 1, 2022,[63] after its governor that morning sent a "message of necessity" to avoid New York's constitutional requirement that bills must be "printed and upon the desks of [New York's legislators], in its final form, at least three calendar legislative days prior to its final passage."[64] Such a message is allowed only when "facts . . . necessitate an immediate vote."[65] One might consider the claim of such urgency odd considering that the law, by its

grounding in the nation's historical tradition of firearm regulation to pass muster under the second prong of the *Bruen* framework"); United States v. Snead, 22-cr-033, 2022 WL 16534278, at *5–6 (W.D. Va. Oct. 28, 2022); United States v. King, 21-CR-255, 2022 WL 5240928, at *4–5 (S.D.N.Y. Oct. 6, 2022); United States v. Burrell, No. 21-20395, 2022 WL 4096865, at *3 (E.D. Mich. Sept. 7, 2022); United States v. Ingram, No. 18-557, 2022 WL 3691350, at *3 (D.S.C. Aug. 25, 2022); Serrano v. Villanueva, ED CV 21-00931, 2022 WL 16838035, at *9 (C.D. Cal. July 7, 2022), *adopted*, No. ED CV 21-931, 2022 WL 16838013 (C.D. Cal. Nov. 9, 2022), *appeal docketed*, No. 22-56173 (9th Cir. Dec. 14, 2022); Pervez v. Becerra, No. 18-cv-02793, 2022 WL 2306962, at *2 n.2 (E.D. Cal. June 27, 2022); Golu v. Linges, D079328, 2023 WL 2231867, at *5–6 (Cal. Ct. App. Feb. 27, 2023); People v. Brundige, 182 N.Y.S.3d 595, 597–601 (Sup. Ct. 2023); People v. Caldwell, 173 N.Y.S.3d 918, 921–23 (Sup. Ct. 2022). Other courts have followed circuit precedent applying the two-part test invalidated by *Bruen*. *See infra* note 123 and accompanying text.

62. Bradstreet v. Randall, 186 N.Y.S.3d 756 (App. Div. 2023). *Bradstreet* cites *Chomyn v. Boller*, 28 N.Y.S.3d 206 (App. Div.), *appeal dismissed*, 27 N.Y.3d 1119 (2016), for the proposition that the licensing official's revocation of the petitioner's firearm license did not run afoul of the Second Amendment in light of *Bruen*. *Bradstreet*, 186 N.Y.S.3d at 757 (citing *Chomyn*, 28 N.Y.S.3d at 207). It is curious that the court applied *Bruen* through the lens of a case decided more than six years before *Bruen* was decided. More notably, however, *Chomyn* itself relied upon three cases in support of its conclusion that the revocation of the petitioner's pistol license violated the Second Amendment. *Chomyn*, 28 N.Y.S.3d at 207. One was *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022), which upheld New York's may-issue law. *Kachalsky*, 701 F.3d at 101. The second implied that *Heller* and *McDonald* limited the right to keep and bear arms to the home. *See* Kelly v. Klein, 946 N.Y.S.2d 218, 220 (App. Div. 2012) ("[*Heller* and *McDonald*] are distinguishable in that they involved the rights of individuals to possess handguns in their homes, whereas, in this proceeding, the petitioner seeks a license which would allow him to carry a concealed pistol without regard to . . . the place of the possession."). The third relied solely on a 1985 case that cited an array of New York court decisions rejecting the view that the Second Amendment confers an individual right. Cuda v. Dwyer, 967 N.Y.S.2d 302, 303 (App. Div. 2013) (citing Demyan v. Monroe, 485 N.Y.S.2d 152, 153 (App. Div. 1985)).

63. 2022 N.Y. Sess. Laws ch. 371 (McKinney).

64. N.Y. CONST. art. III, § 14.

65. *Id.*

terms, became effective two months later.[66] When the governor was asked where carry license holders could carry, she replied, "Probably some streets."[67] When asked, "Do you have the numbers to show that it's the concealed carry permit holders that are committing crimes?," she answered, "I don't need to have numbers."[68] Other legislatures hostile to gun rights have followed New York.[69]

The CCIA has been described as barring carry in a "list of sensitive places [and other restrictions] that's so vast that [one] can't go to any destination . . . . All [one] can practically do is leave [one's] home, spend time on the streets and go back home."[70] The Act, for example, bars carriage of a firearm onto any private property where the owner has not granted express permission.[71] It is difficult to say that public carry is allowed if the default rule is that it is not allowed in, for example, a public accommodation.

66. Concealed Carry Improvement Act § 26.

67. Luis Ferré-Sadurní & Grace Ashford, *N.Y. Democrats to Pass New Gun Laws in Response to Supreme Court Ruling*, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/nyregion/handgun-concealed-carry-ny.html [https://perma.cc/3GCM-SUDB].

68. Anne McCloy, *Hochul Won't Allow NYS to Become "Wild West", Defends New Proposed Limits on Conceal-Carry*, CBS 6 ALBANY (June 29, 2022, 6:06 PM), https://cbs6albany.com/news/local/hochul-wont-allow-nys-to-become-wild-west-defends-new-proposed-limits-on-conceal-carry [https://perma.cc/AB39-5ZHW].

69. *See, e.g.*, Act of Dec. 22, 2022, 2022 N.J. Sess. Laws Serv. ch. 131 (West) (New Jersey law imposing new gun regulations); 2023 Haw. Laws Act 52 (S.B. 1230) (Hawaii law imposing new gun regulations that has been approved by the governor, Michael Tsai, *Green Signs Two Bills Addressing Gun Violence*, SPECTRUM LOCAL NEWS (June 3, 2023, 8:41 AM), https://spectrumlocalnews.com/hi/hawaii/politics/2023/06/03/green-signs-two-bills-addressing-gun-violence [https://perma.cc/9W4D-MT6L]); Don Thompson, *California Gun Bill Fails on Tactical Error in Legislature*, AP NEWS (Sept. 1, 2022), https://apnews.com/article/gun-violence-us-supreme-court-california-politics-anthony-portantino-8f491b7dc121a437632442e4be80c5b9 [https://perma.cc/JZD5-9FGC] (reporting on gun control legislation defeated in California); Gun Safety Act of 2023, 2023 Md. Laws ch. 680 (Maryland law imposing new gun regulations that has been approved by the governor).

70. Zach Schonfeld, *New York Seeks to Test Supreme Court on Gun Control*, THE HILL (Jan. 26, 2023, 6:00 AM), https://thehill.com/regulation/court-battles/3830517-new-york-seeks-to-test-supreme-court-on-gun-control [https://perma.cc/9JEK-3TS7] (quoting this author); *accord* NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, E. GREGORY WALLACE & DONALD KILMER, 2022 SUPPLEMENT FOR FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 96–97 (3d ed. 2022) (listing places designated as "sensitive locations" and describing potential violations of the law); David B. Kopel, *Restoring the Right to Bear Arms:* New York State Rifle & Pistol Association v. Bruen, 2021-2022 CATO S. CT. REV. 305, 328–29 (2022) (same); Leo Bernabei, Note, *Unqualified Command: The (Un)Constitutionality of New York's Concealed Carry Improvement Act*, 92 FORDHAM L. REV. (forthcoming 2023) (manuscript at 3–4, 34), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4395894 [https://perma.cc/WW3E-YTW8] (same).

71. N.Y. PENAL LAW § 265.01-d(1) (McKinney 2022).

The CCIA's "good moral character"[72] requirement is nonproblematic if it merely gets to dangerousness, but California's Attorney General said that good moral character denials can be based on "[a]ny arrest in the last 5 years, regardless of the disposition" or "fiscal stability."[73] It thus does violence to the presumption of innocence and punishes individuals for being poor. Other provisions likewise overcriminalize[74] public carry, like the one barring carriage at "any gathering of individuals to collectively express their constitutional rights to protest or assemble,"[75] which can apply to two individuals meeting in a private home to talk politics.

Post-*Bruen* defiance has been accompanied by judicial complaining and "uncivil obedience."[76] Uncivil obedience by lower court judges "take[s] the Supreme Court's opinions at face value and pursue[s] the logic of the opinions to their ends" to arrive at absurd or unreasonable outcomes for the purpose of criticizing the opinion.[77] One judge, for example, complained in an order that neither he nor the members of the Supreme Court were trained historians and that he (like the Justices) was unable to perform the historical analysis required by *Bruen*.[78] He ordered the parties to brief him on whether he should appoint a historian as a consulting expert for the case.[79] Another judge referred to *Bruen*'s text, history, and tradition method as a "game of historical Where's Waldo."[80] Other judges have also complained about *Bruen*'s reliance on history.[81] Yet, pre-*Bruen*, judges seemed able to

72. *Id.* § 400.00(1)(b).

73. OFF. OF THE ATT'Y GEN., CAL. DEP'T OF JUST., LEGAL ALERT NO. OAG-2022-02, U.S. SUPREME COURT'S DECISION IN *NEW YORK STATE RIFLE & PISTOL ASSOCIATION V. BRUEN*, NO. 20-843, at 2–3 (2022) (alteration in original) (quoting standards used by various state officials).

74. *See infra* notes 100–105 and accompanying text.

75. N.Y. PENAL LAW § 265.01-e(2)(s).

76. Brannon P. Denning & Glenn H. Reynolds, Essay, *Retconning* Heller*: Five Takes on* New York Rifle & Pistol Association, Inc. v. Bruen, 65 WM. & MARY L. REV. (forthcoming 2023) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4372216 [https://perma.cc/44ZV-LBMU].

77. *Id.* (manuscript at 30) (quoting Brannon P. Denning, *Can Judges Be Uncivilly Obedient?*, 60 WM. & MARY L. REV. 1, 14 (2018)).

78. United States v. Bullock, No. 18-CR-165, 2022 WL 16649175, at *1–2 (S.D. Miss. Oct. 27, 2022).

79. *Id.* at *3.

80. United States v. Love, No. 21-CR-42, 2022 WL 17829438, at *4 (N.D. Ind. Dec. 20, 2022).

81. *See, e.g.*, United States v. Price, No. 22-cr-00097, 2022 WL 6968457, at *4 n.3 (S.D. W. Va. Oct. 12, 2022) (arguing that *Bruen*'s instruction for courts to consider how and why firearm regulations burden the right to armed self-defense is "curious" since it appears to endorse means–end scrutiny even though *Bruen* forbids that method of analysis in

apply the first half of the two-part test without difficulty.[82]

*Enter Judge Mark T. Pittman.* Rather than engage in judicial abdication and complaining, he set out to straightforwardly apply the law. The first clue, perhaps, that this would be an intellectually honest opinion, by a jurist saying what the law demanded rather than what it should demand, was the opinion's succinctness. Judge Pittman did not need to deploy a "mountain of verbiage . . . to explain away [the Second Amendment's] fourteen short words of constitutional text."[83] But, of course, there is more.

### *A. Standing*

Judge Pittman's standing analysis is the first case in point. Responding to a defendant's assertion that the plaintiffs' claim was not ripe for review because "none of the Plaintiffs has ever been arrested or charged" for violating the statute,[84] he cites Supreme Court precedent for the axiomatic rule that "a plaintiff need not violate the statute" to challenge it; they must merely show an intent to engage in conduct that violates it.[85]

Some courts, by contrast, have required that a plaintiff be "arrested and prosecuted—or threatened with arrest or prosecution or with the imposition of a civil penalty" to have standing.[86] One is left to wonder why a new criminal law's

connection with the Second Amendment (first citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132–33 (2022); and then citing *id.* at 2179 (Breyer, J., dissenting)); Oral Argument at 6:45, United States v. Quiroz, No. 22-50834 (5th Cir. Feb. 8, 2023), https://www.ca5.uscourts.gov/OralArgRecordings/22/22-50834_2-8-2023.mp3 [https://perma.cc/5APV-UKL9] (expressing Judge Higginson's frustration over the unmet need for high-quality historical briefing in the district courts and the resulting lack of uniformity in law); Denning & Reynolds, *supra* note 76 (manuscript at 32–33) (quoting a judge's lament that *Bruen*'s interpretation of the Second Amendment binds the nation to the same "relationship" that "the founders had between the federal government and the right to bear arms" (quoting United States v. Holden, No. 22-CR-30, 2022 WL 17103509, at *7 (N.D. Ind. Oct. 31, 2022), *appeal docketed*, No. 22-3160 (7th Cir. Dec. 1, 2022))).

82. *See supra* notes 33, 50 and accompanying text.

83. Silveira v. Lockyer, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

84. Defendant J. Brett Smith's Brief in Support of Motion to Dismiss For Lack of Subject Matter Jurisdiction Pursuant to Fed. R. Civ. P. 12(B)(1) and 12(H)(3) at 2, Firearms Pol'y Coal., Inc. v. McCraw, No. 21-cv-1245, 2022 WL 3656996 (N.D. Tex. Aug. 25, 2022).

85. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *2 (quoting Nat'l Rifle Ass'n of Am. v. McCraw, 719 F.3d 338, 345 (5th Cir. 2013)) (citing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

86. Angelo v. District of Columbia, No. 22-1878, 2022 WL 17974434, at *4 (D.D.C. Dec. 28, 2022). *Compare* Giambalvo v. Suffolk County, No. 22-4778, 2023 WL 2050803, at *5 (E.D.N.Y. Feb. 14, 2023) (finding no standing to challenge various requisites to New York's handgun licensing process when plaintiffs refused to comply with those requisites), *appeal docketed sub nom.* Giambalvo v. New York, No. 23-208 (2d Cir. Feb. 16, 2023), *with*

existence is not threat of prosecution enough.[87] The mean-spiritedness of requiring arrest, prosecution, or the imposition of a civil penalty as a prerequisite for attempting to vindicate an enumerated constitutional right is striking.

### *B. Respecting Citizenship*

"[C]itizen arms-bearing lies . . . within the foundation of the civic edifice."[88] To be a full citizen is to be allowed to bear arms; to be denied the right to bear arms is to be denied inclusion in the polity.[89] Arms bearing includes both militia membership, with its duties and privileges, and individual self-defense.[90] As this subpart shows, Judge Pittman duteously defended not merely the rights but also the full citizenship of this 4.2% of Texas's population,[91] with little legislative representation,[92] against "invasions" of its rights "instigated by the major voice of the community."[93]

Judge Pittman begins, squarely applying *Heller*, by noting that eighteen-to-twenty-year-olds are "members of the political community and a part of the national community."[94] They are therefore protected by the Second Amendment, as they are by

Antonyuk v. Bruen, No. 22-CV-0734, 2022 WL 3999791, at *17 (N.D.N.Y. Aug. 31, 2022) (holding that a plaintiff challenging various provisions of New York's firearm regulations "must indicate his *intent* to violate the law").

87. *Cf.* Anderson & Other Burgesses of Wick v. Magistrates (1749) Mor. 1842, 1845 (Scot.). There, the Scottish Court of Session observed:

> [A] statute can be abrogated . . . by a contrary custom, inconsistent with the statute, consented to by the whole people . . . . When we say, therefore, that a statute is in desuetude, the meaning is, that a contrary universal custom has prevailed over the statute; and so much is implied in the very term desuetude.

*Id.*

88. J. Norman Heath, Citizen Arms-Bearing in Anglo-American Constitutional Philosophy 1760-1860, at 1 (Feb. 2002) (senior honors thesis, University of Massachusetts).

89. *Id. passim.*

90. *See id.* at 87–89 (comparing the constitutional right to bear arms for common defense with the natural right to bear arms for self-defense); *id.* at 64–89 (discussing the exclusion of freedmen from the Massachusetts militia in the mid-1800s).

91. POPULATION DIV., U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SINGLE YEAR OF AGE AND SEX FOR TEXAS: APRIL 1, 2020 TO JULY 1, 2021, https://www2.census.gov/programs-surveys/popest/tables/2020-2021/state/asrh/sc-est2021-syasex-48.xlsx [https://perma.cc/HTG8-YLAH].

92. *Legislature Age and Occupation Profiles*, TEX. POL. PROJECT, https://texaspolitics.utexas.edu/archive/html/leg/features/0306_01/ageoc.html [https://perma.cc/3AA5-MCWP].

93. THE FEDERALIST NO. 78, *supra* note 2, at 406 (Alexander Hamilton).

94. Firearms Pol'y Coal., Inc. v. McCraw, No. 21-cv-1245, 2022 WL 3656996, at *4 (N.D. Tex. Aug. 25, 2022), *appeal dismissed sub nom.* Andrews v. McCraw, No. 22-10898, 2022 WL 19730492 (5th Cir. Dec. 21, 2022).

other constitutional provisions.[95] Citing the famous case of *Roper v. Simmons*,[96] in which the Supreme Court held that capital punishment cannot lie for crimes committed before reaching the age of eighteen,[97] Judge Pittman notes that "18 is the point where society draws the line for many purposes between childhood and adulthood."[98]

Just so. As David Kopel and Joseph Greenlee point out, it is starkly inconsistent to "prosecute 18-to-20-year-olds as adults for firearms offenses or other crimes, while simultaneously denying them the right to own firearms because they supposedly are incapable of adult responsibility."[99]

There is a tendency among many (but certainly not all) who favor more gun control, in what might be called a kind of "cultural imperialism," to overcriminalize firearm owners for its own sake.[100] Both classical liberals and progressives have argued—in accord with this nation's foundational values—that it is never acceptable to punish the innocent or the blameless. But to deny an entire group a civil right—and by definition, full citizenship—because of a misuse of that right by a small fraction of that group is to presume collective guilt and to mete out collective punishment.

It is worse when one feels a great enough need for self-protection to carry a firearm without a license. As the Black Attorneys of Legal Aid and its fellow amici said in their brief in support of the petitioners in *Bruen*, when their clients, who live in some of the nation's most dangerous neighborhoods,[101] carry illegally because New York refuses to issue them licenses, "[t]he

95. *Id.* at *4–5.

96. 543 U.S. 551 (2005).

97. *Id.* at 578.

98. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *5 (quoting *Roper*, 543 U.S. at 574).

99. David Kopel & Joseph Greenlee, Opinion, *Gun Ban for Young Adults Would Be Wholly Unconstitutional*, THE HILL (Mar. 13, 2018, 11:30 AM), https://thehill.com/opinion/campaign/378116-gun-ban-for-young-adults-would-be-wholly-unconstitutional/ [https://perma.cc/MXP4-BLEB].

100. Cottrol & Mocsary, *supra* note 25, at 37–44; *cf.* JAMES A. MICHENER, THE BRIDGE AT ANDAU 119 (1957) (quoting a Communist official as having said that "[i]t is better to liquidate hundreds of innocent people than to let one guilty person remain in the party"). *But see* Jacob D. Charles, *Firearms Carceralism*, 108 MINN. L. REV. (forthcoming 2023) (on file with author) (arguing that severe mandatory minimum sentences for gun crimes are counterproductive and harmful to the communities that are most impacted by gun violence).

101. Brief of the Black Attorneys of Legal Aid et al. as Amici Curiae in Support of Petitioners at 1, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843).

consequences for our clients"—including prison time, job loss, and harassment—"are brutal."[102] Even those fortunate enough to escape prison face the "worst kind of '"civil death" of discrimination by employers, landlords, and whoever else conducts a background check.'"[103] Texas's law likely put many eighteen-to-twenty-year-olds, who are violently victimized at a higher rate than other adults (or minors),[104] in the same position. Texas's stricken ban, in other words, ensured that those most likely to have their lives and liberty taken from them by a violent attack would be denied the ability effectively[105] to defend that life and liberty.

Moreover, it is not new, as Texas argued, that criminality "peaks in late adolescence or early adulthood."[106] This has been the case in "every society, for all social groups, for all races and both sexes, at all historical times."[107] Despite this obvious truth, as Judge Pittman observes, the Second Amendment contains no age restriction, unlike some other constitutional provisions.[108] This is

102. *Id.* at 5.

103. *Id.* at 22 (quoting Utah v. Strieff, 579 U.S. 232, 253 (2016) (Sotomayor, J., dissenting)).

104. See *National Crime Victimization Survey Dashboard: Custom Graphics: Single-Year Comparison: Crime Type*, BUREAU OF JUST. STATS. (Mar. 7, 2023), https://ncvs.bjs.ojp.gov/single-year-comparison/crimeType [https://perma.cc/6Q6U-KX3P], and select "victim age" for the "comparison characteristic." Eighteen-to-twenty-year-olds have the highest victimization rate for all violent crime categories except "[s]imple assault"—"[r]ape/sexual assault," "[r]obbery," "[a]ggravated assault," and "[p]ersonal theft/larceny." *Id.*

105. *See* INST. OF MED., NAT'L ACADS., PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15–16 (Alan I. Leshner, Bruce M. Altevogt, Arlene F. Lee, Margaret A. McCoy & Patrick W. Kelley eds., 2013) ("Studies that directly assessed the effect of actual defensive uses of guns . . . have found consistently lower injury rates among gun-using crime victims compared with victims who used other self-protective strategies."); *see, e.g.*, NAT'L RSCH. COUNCIL, NAT'L ACADS., FIREARMS AND VIOLENCE: A CRITICAL REVIEW 115–16 (Charles F. Wellford, John V. Pepper & Carol V. Petrie eds., 2005) (stating that defending with a firearm reduces the probability of injury in assaults from 57.4% to 27.9% and in robberies from 30.2% to 12.8% and reduces the probability of property loss in robberies from 69.9% to 15.2% versus not defending and noting that resisting without a firearm is substantially more likely to lead to injury than not resisting at all). The former report was ordered by President Barack Obama and commissioned by the Centers for Disease Control and Prevention (CDC). INST. OF MED., *supra*, at 11–12. The latter report was developed by the National Academies at the request of a consortium of federal agencies and private foundations, including the CDC and the Joyce Foundation, both of which have historically "taken positions strongly favoring increased gun control." JOHNSON ET AL., *supra* note 31, at 3.

106. Satoshi Kanazawa & Mary C. Still, *Why Men Commit Crimes (and Why They Desist)*, 18 SOCIO. THEORY 434, 436 (2000).

107. *Id.* at 434 (citing Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOCIO. 552, 556, 560, 564–65 (1983)). See generally *id.* for Kanazawa and Still's explanation of Hirschi and Gottfredson's conclusion with a new theory.

108. Firearms Pol'y Coal., Inc. v. McCraw, No. 21-cv-1245, 2022 WL 3656996, at *4

unsurprising. The Founders and their contemporaries regularly carried arms in public from an early age.[109] The right of law-abiding citizens of all ages to carry arms in public was never prohibited, and was only partially regulated by a total of four statutes, over the span of roughly two centuries comprising the colonial and Founding eras.[110] As *Bruen* observed (and held), "[W]hen 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."[111]

More still, arms carriage was sometimes *mandated* for routine excursions from the home—like going to church, public assemblies, or on journeys[112]—and, importantly, during militia service. Judge Pittman notes that it would be incongruous for the Second Amendment to exist, in part, to ensure the existence of a citizen militia while not protecting the militia's members from disarmament.[113] Consistent with their status as full citizens,[114] Judge Pittman notes that militia membership was obligatory for eighteen-to-twenty-year-olds in the Founding Era, as it is today.[115]

That is an understatement. Of the more than 250 militia statutes passed by the colonies and fledgling states, only one did not require militia service by eighteen-to-twenty-year-olds.[116] The militiamen, Judge Pittman notes, had to supply their own arms.[117] And eighteen-to-twenty-year-olds had other armed community

(N.D. Tex. Aug. 25, 2022), *appeal dismissed sub nom.* Andrews v. McCraw, No. 22-10898, 2022 WL 19730492 (5th Cir. Dec. 21, 2022).

109. Joseph G.S. Greenlee, *The Right to Train: A Pillar of the Second Amendment*, 31 WM. & MARY BILL RTS. J. 93, 115–17 (2022) (citing examples of skilled and young marksmen); David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495, 530–33 (2019) (illustrating that young colonists carried guns and were good marksmen); Brief of Amici Curiae Professors of Second Amendment Law et al. in Support of Petitioners at 27–32, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843) [hereinafter Professors' Brief] (explaining the common gun usage of the young Founders and founding citizenry).

110. Professors' Brief, *supra* note 109, at 23.

111. *Bruen*, 142 S. Ct. at 2131.

112. JOHNSON ET AL., *supra* note 31, at 189–91.

113. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *5; *see infra* note 127.

114. *See supra* notes 88–90 and accompanying text.

115. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *6 & n.5.

116. Kopel & Greenlee, *supra* note 109, at 533–34; *see id.* at 533–89 (citing sources).

117. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *6; *accord* JOHNSON ET AL., *supra* note 31, at 256; *see* Kopel & Greenlee, *supra* note 109, at 498, 503, 507–10, 533–34, 591–93 (providing examples and citing sources).

duties: the "hue and cry, watch and ward, and *posse comitatus*."[118] The hue and cry required eighteen-to-twenty-year-olds to help pursue fleeing criminals and stop them with deadly force if needed; watch and ward were daytime and nighttime guard duty, respectively, for towns and villages; and the posse comitatus was the power of the sheriff and other officials to summon able-bodied citizens to keep the peace.[119] The posse comitatus continues to the present day.[120]

The morally questionable result of Texas's law was that eighteen-to-twenty-year-olds who could be compelled by Texas officers to aid in law enforcement under the state's posse comitatus laws to pursue a violent criminal or suppress a riot[121] could not defend themselves from the same criminal or against violence in the same riot. And, of course, the federal government can conscript them into the military to defend the nation.[122]

* * *

Judge Pittman resisted majority opinion, as expressed by the legislature, in guarding the rights and citizenship of eighteen-to-twenty-year-olds. But he went further. He resisted the opportunity to pass the buck by relying on invalid Fifth Circuit precedent, as discussed next.

### *C. Fifth Circuit Precedent vs.* Bruen

Where other district courts have relied on pre-*Bruen* circuit precedent upholding a challenged law without directly applying *Bruen*'s test to the facts at hand,[123] Judge Pittman declined the

118. Kopel & Greenlee, *supra* note 109, at 534–35.

119. *Id.* at 534.

120. *See* David B. Kopel, *The* Posse Comitatus *and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 802–28 (2015) (recounting modern posse comitatus examples).

121. TEX. CODE CRIM. PROC. ANN. arts. 8.01, 8.05; *see also id.* art. 2.14 ("Whenever a peace officer meets with resistance in discharging any duty imposed upon him by law, he shall summon a sufficient number of citizens of his county to overcome the resistance; and all persons summoned are bound to obey.").

122. *See supra* note 12 and accompanying text.

123. *See, e.g.*, Reese v. Bureau of Alcohol Tobacco Firearms & Explosives, No. 20-CV-01438, 2022 WL 17859138, at *8–10 (W.D. La. Dec. 21, 2022) (adopting the historical reasoning of a pre-*Bruen* Fifth Circuit case in holding that "the Second Amendment does not protect the ability of 18 to 20-year-olds to purchase handguns from federal firearms licensees"), *appeal docketed*, No. 23-30033 (5th Cir. Jan. 13, 2023); United States v. Posey, No. 22-CR-83, 2023 WL 1869095, at *5–10 (N.D. Ind. Feb. 9, 2023) (relying on pre-*Bruen* circuit precedent in upholding a ban on unlawful users of controlled substances from

state's invitation to abdicate his responsibility in this way. Seeing that neither Fifth Circuit case in question applied an equivalent of what would become *Bruen*'s test, he faithfully applied *Bruen*'s "how" and "why" to the facts at hand.[124] In the process, he treated eighteen-to-twenty-year-olds as people deserving of rights by default, rather than by government-granted privilege.

First on the list of laws used by the Fifth Circuit in justifying a ban on sales to and public carry by eighteen-to-twenty-year-olds was a set of safety regulations, like laws regulating gunpowder storage, firearm use in militia service, and using guns on certain occasions or in certain places.[125] Judge Pittman correctly notes that these "are not sufficient historical analogs" to the carry ban at issue.[126] The laws here did not address the primary conduct of arms bearing but secondary conduct (like fire safety or not shooting in crowds) that the state could legitimately regulate under its police power.[127]

possessing firearms); United States v. Lewis, No. CR-22-368, 2023 WL 187582, at *4 & n.6 (W.D. Okla. Jan. 13, 2023) (same); United States v. Daniels, 22-cr-58, 2022 WL 2654232, at *4 (S.D. Miss. July 8, 2022) (same); *cf.* United States v. Connelly, No. EP-22-CR-229(2), 2022 WL 17829158, at *2–4 (W.D. Tex. Dec. 21, 2022) (struggling to find a historical justification for disarmament of unlawful users of controlled substances but finding pre-*Bruen* Fifth Circuit precedent on the issue controlling), *reconsideration granted*, No. EP-22-CR-229(2), 2023 WL 2806324 (W.D. Tex. Apr. 6, 2023), *appeal docketed*, No. 23-50312 (5th Cir. May 4, 2023).

124. Firearms Pol'y Coal., Inc. v. McCraw, No. 21-cv-1245, 2022 WL 3656996, at *7–8, *9–11 (N.D. Tex. Aug. 25, 2022), *appeal dismissed sub nom.* Andrews v. McCraw, No. 22-10898, 2022 WL 19730492 (5th Cir. Dec. 21, 2022).

125. *Id.* at *10 (quoting Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 200 (5th Cir. 2012), *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022)). In addition to *NRA v. ATF*, Texas relied on *National Rifle Ass'n of America v. McCraw*, 719 F.3d 338 (5th Cir. 2013), *abrogated by Bruen*, 142 S. Ct. 2111. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *7. *NRA v. McCraw* adopted *NRA v. ATF*'s analysis for its holding. *See* NRA v. McCraw, 719 F.3d at 346–47 (identifying the *NRA v. ATF* test as the operative framework for evaluating the legislation at issue). The analysis in Judge Pittman's opinion and here therefore references *NRA v. ATF*.

126. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *10 (citing District of Columbia v. Heller, 554 U.S. 570, 632 (2008)).

127. *NRA v. ATF* cites WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125–26 (William S. Hein & Co. 2003) (2d ed. 1829), for the proposition that eighteen-to-twenty-year-olds could be disarmed. 700 F.3d at 201 n.12. This claim is aptly refuted in David B. Kopel & Joseph G.S. Greenlee, *History and Tradition in Modern Circuit Cases on the Second Amendment Rights of Young People*, 43 S. ILL. U. L.J. 119, 135 (2018). Rawle does, however, lend support to the proposition that states can regulate within what, in modern parlance, is referred to as their police power but not completely ban arms bearing. Rawle's passage, in its entirety, reads:

> In the second article, it is declared, that a *well regulated militia is necessary to the security of a free state*; a proposition from which few will dissent. Although in actual war, the services of regular troops are confessedly more valuable; yet, while peace prevails, and in the commencement of a war before a regular force can be raised, the militia form the palladium of the country. They are ready to repel invasion, to suppress insurrection, and preserve the good order and peace of government.

Next were laws "that targeted particular groups for public safety reasons."[128] Judge Pittman notes that these prohibitions targeted groups based on a general determination that the group was untrustworthy rather than an individualized determination that someone belonged to a dangerous group because he or she was dangerous.[129] Moreover, the particular groups in question were either politically suspect, like "persons who refused to swear an oath of allegiance to the state or to the nation" and "law-abiding slaves, free blacks, and Loyalists," or demonstrably dangerous based on "crimes committed, or real danger of public injury from *individuals*."[130] But ordinary eighteen-to-twenty-year-olds who can be conscripted to defend their nation or communities cannot sensibly be disarmed on disloyalty grounds.[131] Nor can they be assumed to be criminals or dangerous en masse, subject to exceptions reminiscent of the special need requirement struck down in *Bruen*.[132]

Judge Pittman then addresses the argument that eighteen-to-twenty-year-olds could be denied the right to bear arms because

> That they should be well regulated, is judiciously added. A disorderly militia is disgraceful to itself, and dangerous not to the enemy, but to its own country. The duty of the state government is, to adopt such regulations as will tend to make good soldiers with the least interruptions of the ordinary and useful occupations of civil life. In this all the Union has a strong and visible interest.
>
> The corollary, from the first position, is, that *the right of the people to keep and bear arms shall not be infringed.*
>
> The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

RAWLE, *supra*, at 125–26. In saying that Congress has no power to disarm the people but that states might attempt it, he recognizes that states, unlike the federal government, possess police powers to regulate public safety. But if that police power is used in a "flagitious attempt" in a "blind pursuit of inordinate power," it runs afoul of the Second Amendment that restrains it. *Id.* Rawle wrote this before *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), held that the Bill of Rights did not restrain state action, *id.* at 250, and before incorporation under the Fourteenth Amendment began.

Judge Pittman also relies on part of this passage to hold that militia members may not be disarmed. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *5 & n.4; *see supra* text accompanying note 113.

128. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *10 (quoting NRA v. ATF, 700 F.3d at 200).

129. *Id.* at *10.

130. NRA v. ATF, 700 F.3d at 200–01 (emphasis omitted) (quoting Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221, 233 (1999)).

131. *See supra* notes 12, 121–122 and accompanying text.

132. *See supra* notes 7, 58–59 and accompanying text.

the age of majority at the Founding was twenty-one.[133] He begins by noting that the Second Amendment, in referring to "the people," refers to "the whole people," rather than a subset of them that excludes young adults.[134]

The Fifth Circuit precedent on which Texas relied effectively holds that minors default to having no rights that a court must uphold unless the minors affirmatively prove that they enjoy the protections of a given constitutional provision.[135] This is not how constitutional rights work and not what *Bruen* or *Heller* demand.[136] In any event, as Judge Pittman observes, eighteen-to-twenty-year-olds were subject to militia service, to which they had to bring their private arms.[137] Given that there were more Founding Era laws mandating public carry by eighteen-to-twenty-year-olds than there were regulating carry (and none banning it),[138] it is unsurprising that the best Texas could do was rely on Fifth Circuit precedent declaring, without support, that being a minor at the Founding meant being without Second Amendment rights.[139]

Finally, Judge Pittman looked at Texas's proffered support for its law in the form of postbellum laws that "restrict[ed] the ability of persons under 21 to purchase or use particular firearms."[140] He first pointed out that, despite the "ongoing scholarly debate" about whether public understanding at the First or Second Founding is most important for evaluating individual rights incorporated against the states, both *Bruen* and other Supreme

133. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *10–11.

134. *Id.* at *10; *see supra* notes 10–12 and accompanying text.

135. NRA v. ATF, 700 F.3d at 201–02. After noting that the age of majority at the Founding was twenty-one, the court stated:

> [1] If a representative citizen of the founding era conceived of a "minor" as an individual who was unworthy of the Second Amendment guarantee, and conceived of 18-to-20-year-olds as "minors," [2] then it stands to reason that the citizen would have supported restricting an 18-to-20-year-old's right to keep and bear arms.

*Id.* However, it did so without providing any (true) support for proposition (1). *See* Kopel & Greenlee, *supra* note 109, at 602–03 (refuting the notion that those below the common law age of majority were not entitled to Second Amendment protection); *see also* Kopel & Greenlee, *supra* note 127, at 136 ("[T]he Fifth Circuit resorted to the claim that minors lack constitutional rights."); *see also supra* notes 108–109 and accompanying text.

136. *See supra* note 50 and accompanying text; *see* District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008) (explaining that the rational basis test cannot apply to the regulation of enumerated constitutional rights).

137. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *6; *see supra* notes 116–117 and accompanying text.

138. *See supra* notes 110, 112 and accompanying text.

139. *See supra* note 135.

140. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *9 (quoting NRA v. ATF, 700 F.3d at 202).

Court precedent make clear that incorporated rights "have the same scope as against the Federal Government."[141]

Judge Pittman correctly states that the referenced laws about the "purchase or use of firearms"[142] were inapt analogies to Texas's complete ban on carriage by eighteen-to-twenty-year-olds.[143] Although the Fifth Circuit case merely listed these laws without description, David Kopel and Joseph Greenlee catalogued and reproduced each one.[144] An examination of these twenty statutes shows that, unlike the Texas law considered by Judge Pittman, only two banned open carry by eighteen-to-twenty-year-olds, and only one specifically barred concealed carry by minors.[145] Most also regulated only some transfers to, not carriage by, minors.[146] Of these transfer statutes, four had parental or emergency exceptions, and five applied only to firearms that could be, or actually were, concealed by a minor.[147]

## CONCLUSION

Judges—whatever the reason—respond to popular, or at least elite, opinion.[148] To do so is to yield to the majoritarian impulse

141. *Id.* at *11 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2137–38 (2022)); *accord* McDonald v. City of Chicago, 561 U.S. 742, 765 (2010) (observing that incorporated rights are enforced against the states under the same standards as against the federal government (quoting Malloy v. Hogan, 378 U.S. 1, 10 (1964))).

142. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *11.

143. *Id.* at *7, *11.

144. Kopel & Greenlee, *supra* note 127, at 137–42.

145. *Firearms Pol'y Coal.*, 2022 WL 3656996, at *1; Kopel & Greenlee, *supra* note 127, at 138 (Kansas banned any possession); *id.* at 140 (Nevada disallowed concealed carry); *id.* at 142 (Wisconsin banned any carry). Many states had statutes banning concealed carry generally but leaving open carry unregulated. George A. Mocsary & Debora A. Person, *A Brief History of Public Carry in Wyoming*, 21 WYO. L. REV. 341, 347 & n.34, 357 (2021) (collecting sources).

146. Kopel & Greenlee, *supra* note 127, at 137–43 (showing that statutes in Alabama, Delaware, the District of Columbia, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Texas, and West Virginia placed restrictions on the transfer of firearms to minors and that the exception was Nevada's 1885 statute that criminalized minors carrying concealed arms).

147. *Id.* at 137 (Georgia emergency exception); *id.* at 138 (Illinois parental exception for concealable arm; Indiana restriction on concealable arm); *id.* at 138–39 (Kentucky restriction on arm actually concealed; Louisiana restriction on concealable arm); *id.* at 140 (Missouri parental exception); *id.* at 141–42 (West Virginia emergency exception); *id.* at 142 (Wyoming restriction on concealable arm).

148. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14 (2009) ("Supreme Court decisions tend to converge with the considered judgment of the American people."); Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 263–64 (2010) (observing that "Professor Friedman posits that the Justices will bend to the will of the people because the Court requires public support to remain an efficacious branch of

that the U.S. Constitution seeks to restrain.[149] It takes uncommon fortitude to resist this impulse and hold true, as Judge Mark T. Pittman did, to constitutional first principles.

government" but that "[o]n [another] account, the Justices do not respond to public opinion directly, but rather respond to the same events or forces that affect the opinion of other members of the public"); Richard A. Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1208–09 (2010) ("In Friedman's telling, Justices throughout history have decided cases by tempering their first-order preferences with their knowledge, or at least their best guesses, as to what the public will bear."); Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1516 (2010) ("Supreme Court Justices care more about the views of academics, journalists, and other elites than they do about public opinion.").

149. *See supra* notes 1–4 and accompanying text.