



Public Safety and Individual Rights in the Age of Firearms

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Loaded Questions: Firearms Regulation After *New York State Rifle & Pistol Association, Inc. v. Bruen*

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Introduction

The United States Supreme Court fired its own shot into Second Amendment case law with its recent decision in *New York State Rifle & Pistol Association, Inc. v. Bruen* (*Bruen*).¹ The high court did so in two parts. First, the court overhauled the analysis that courts must use to decide whether laws governing firearms infringe the Second Amendment. The new test is discussed below. Second, using its new test, the high court invalidated a New York state law requiring an applicant to show “proper cause” to carry a gun for self-defense in public.

Bruen affects the issuance of concealed carry licenses in California.² State law generally prohibits the carrying of firearms concealed on the person. (Penal Code § 25400.) But anyone who obtains a license to carry a firearm concealed on their person is exempt from the general prohibition. (Penal Code § 25655.) A police chief or other head of a city police department may issue a concealed carry license. (Penal Code § 26155.) Alternatively, a police chief or other department head may contract with the sheriff of the county in which the city is located for the sheriff to issue concealed carry licenses. (Penal Code § 26150, subd. (c)(1); § 26155, subd. (c).) Either way, *Bruen* significantly impacts the criteria that may be considered in issuing concealed carry licenses, as discussed below.

Bruen also forces an examination of other California firearms laws upon which cities frequently rely in discharging their duty to protect the public health, safety, and welfare. Those laws as well are discussed in this paper.

The *Bruen* Decision

¹ *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022) 142 S.Ct. 2111.

² See *id.* at pp. 2134-2124.

Bruen held unconstitutional the State of New York’s law requiring applicants to show “proper cause” to obtain a license to carry a gun for self-defense in public.³ Two residents challenged the law after New York denied each a license to carry a handgun in public because neither demonstrated a “special need” beyond general self-defense.⁴

The Court examined New York’s law under the framework set out in *District of Columbia v. Heller*⁵ and *McDonald v. Chicago*.⁶

At the outset, the court rejected the approach that almost all lower courts had used in evaluating Second Amendment claims under *Heller* and *McDonald*.⁷ That approach involved two steps. The first required the government to show that a challenged law regulates activity outside the original scope of the Second Amendment.⁸ If the government succeeded, the activity was categorically unprotected, and the law survived.⁹ Otherwise, the analysis proceeded to step two -- how close the law came to the core of the Second Amendment right, and how severely the law burdened that right.¹⁰ If the law burdened the core right, a court applied “strict scrutiny,” almost certainly dooming the law.¹¹ Otherwise, a court applied “intermediate scrutiny,” under which the vast majority of firearms laws survived.¹²

Bruen rejected this two-step framework.¹³ Step two now no longer exists. The Court found that the traditional tiers of scrutiny -- used for decades to test the constitutionality of laws -- has no place in the Second Amendment calculus.¹⁴

The Court reformulated the remaining step into a new test based on constitutional text and history. When the Second Amendment’s plain text encompasses a person’s conduct, the Constitution presumptively protects that conduct.¹⁵ The government must then justify its law by showing that the law

³ *Id.* at p. 2156.

⁴ *Id.* at p. 2123.

⁵ *District of Columbia v. Heller* (2008) 554 U.S. 570.

⁶ *McDonald v. City of Chicago, Ill.* (2010) 561 U.S. 742.

⁷ *New York State Rifle & Pistol Association, Inc. v. Bruen, supra*, 142 S.Ct. at p. 2127.

⁸ *Id.* at p. 2126.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Id.* at pp. 2127, 2129.

¹⁴ *Id.* at pp. 2127-2129.

¹⁵ *Id.* at pp. 2129-2130.

is consistent with the historical tradition of firearms regulation in the United States.¹⁶ Only then does the regulated conduct fall outside of the Second Amendment's protections.¹⁷

The Court offered a few general guidelines to assist in unpacking its new framework. If the societal problem giving rise to a gun regulation existed around the time the Second Amendment was ratified in 1791, the lack of a similar regulation suggests the modern gun law is unconstitutional. If the societal problem was tackled through different means, it may also suggest the modern gun law violates the Second Amendment. If an analogue of the modern law was proposed during that period, and rejected out of constitutional concerns, this too provides evidence that the modern law cannot stand.¹⁸

In searching for a historical analogue to justify a current firearms law, the analogue must be well-established and “analogous enough,” but need not be a twin to the proposed law. Only if a court concludes that the modern gun law and its historical analogue are “relevantly similar” will the court uphold the modern law.¹⁹ Otherwise that law is unconstitutional.

Applying this framework to New York's law, the Court concluded that the Second Amendment's text does not draw a distinction between the home and public spaces with respect to keeping and bearing arms.²⁰ The text therefore encompasses a right to carry a firearm in public such that the Second Amendment presumptively protects that right.

The Court then canvassed firearms regulations dating from the late 1200s in England to the early 20th century in the United States.²¹ After an exhaustive inventory, the Court found a lack of a broad tradition restricting the public carry of firearms.²² New York's “proper cause” requirement for obtaining a license for public carry failed the Court's historical test, and was invalidated as unconstitutional.

Although *Bruen* finally articulated a framework for evaluating Second Amendment challenges, it remains uncertain what the precise contours of

¹⁶ *Id.* at pp. 2129-2130.

¹⁷ *Id.* at pp. 2129-2130.

¹⁸ *Id.* at p. 2131.

¹⁹ *Id.* at p. 2133.

²⁰ *Id.* at pp. 2134-2135.

²¹ *Id.* at pp. 2134-2156.

²² *Id.* at p. 2156.

that framework are, and how they will apply to an ever-expanding body of firearms laws.

Implication of *Bruen* for California municipalities

The *Bruen* decision has far-reaching consequences for the issuance of concealed carry licenses. This paper assumes a police chief will be the official issuing licenses under Penal Code section 26150, but the same analysis applies if a sheriff issues licenses under section 26155.

A police chief may issue a concealed carry license under section 26150 if the applicant satisfies four criteria:

1. The applicant is of good moral character;
2. The applicant shows good cause for issuing the license;
3. The applicant is a resident of the city, or has a principal place of employment or business in the city and spends substantial time in that place of employment or business; and
4. The applicant has completed training as described in Penal Code section 26165.

Criteria 3 and 4 are objective and *Bruen* has no impact on them.

Criteria 1 and 2, on the other hand, invite subjective evaluation. *Bruen* looms large over the “good moral character” requirement, and invalidates the “good cause” requirement altogether. We turn first to the “good cause” requirement.

California’s “Good Cause” Requirement Violates the Second Amendment

Bruen outright rejects “may issue” laws that require an applicant for a license to show a special need for protection.²³ *Bruen* cites California’s “good cause,” D.C.’s “proper reason,” Hawaii’s “exceptional case,” Maryland’s “good and substantial reason,” Massachusetts’ “good reason,” and New Jersey’s “justifiable need” requirements as inconsistent with the Second Amendment.²⁴ These laws impermissibly confer upon licensing officials “open-ended discretion” in deciding whether to issue concealed carry

²³ See *id.* at pp. 2122, 2138.

²⁴ See *id.* at pp. 2122-2124, fn. 2, 2161 (conc. opn. of Kavanaugh, B.).

licenses.²⁵ California may no longer impose a good cause requirement for issuance of a concealed carry license, and a police chief therefore may no longer require an applicant to show good cause to obtain that license.

California’s “Good Moral Character” Requirement Is on its Face Constitutional; the Potential Peril Lies in its Application

Bruen instructs governmental agencies to ensure that their concealed carry licensing requirements are based on “narrow, objective, and definite standards.”²⁶ How that directive actually impacts the “good moral character” requirement is not definitive.

Bruen reinforces that government agencies may ensure that only “law-abiding, responsible citizens” obtain concealed carry licenses. Constitutionally permissible requirements are “designed to ensure only that those bearing arms in the jurisdiction are, in fact, ‘law-abiding, responsible citizens.’”²⁷

Good moral character is surely one valid barometer of responsibility, and perhaps of tendency toward lawful behavior. The difficult task for a police chief lies in measuring good moral character within *Bruen*’s “narrow, objective, and definite standards” command. *Bruen* provides examples of permissible criteria for assessing whether an applicant is law-abiding and responsible, and by analogy, of good moral character: “fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force.”²⁸ Thus, a police chief may exclude from consideration for a concealed carry license mentally ill persons adjudicated as a danger to others, convicted felons, and other dangerous individuals. Obviously, this list is not exhaustive.

The California Attorney General recently advised local governments as to the permissible contours of the “good moral character” inquiry.²⁹ The Attorney General suggests evaluating personal characteristics such as “honesty,

²⁵ See *id.* at pp. 2161-2162 (conc. opn. of Kavanaugh, B.).

²⁶ See *id.* at p. 2138, fn. 9 (discussing the permissible requirements in “shall-issue” states).

²⁷ *Ibid.*

²⁸ *Id.* at p. 2162 (conc. opn. of Kavanaugh, B.)

²⁹ *Office of the Attorney General’s Legal Alert on U.S. Supreme Court Decision in New York State Rifle & Pistol Association v. Bruen, No. 20-843* (June 24, 2022), at < <https://oag.ca.gov/system/files/media/legal-alert-oag-2022-02.pdf>>.

trustworthiness, diligence, reliability, respect for the law, integrity, candor, discretion, observance of fiduciary duty, respect for the rights of others, absence of hatred and racism, fiscal stability, profession-specific criteria such as pledging to honor the constitution and uphold the law, and the absence of [any] criminal conviction.”³⁰ Consideration of these factors does not run afoul of *Bruen*. But *how* a police chief evaluates these factors will be closely watched by gun rights advocates to ensure a chief does not cross the still blurry line between allowable objective criteria and the “open-ended discretion” *Bruen* rejected.

Many cities and counties have adopted their own criteria to guide their police chief or sheriff in evaluating applications for concealed carry licenses. The criteria are simply too vast and varied to evaluate here. Nevertheless, a couple of general principles may be gleaned from an overview of those criteria in the wake of *Bruen*. Conviction of any crime is most likely a permissible disqualifying factor, with the understanding that the less serious the crime, the more likely an unsuccessful applicant will challenge the decision on the basis that the crime does not implicate whether the applicant can safely and responsibly handle a firearm. Armed robbery and failing to signal a lane change in traffic yield starkly different implications in this context. Perhaps anticipating this issue, some cities and counties -- in establishing disqualifying factors -- focus on crimes of violence, or crimes that involve significantly endangering the lives of others.

At the other end of the spectrum is the disqualifying factor that the applicant has been arrested, even if no charges are filed. Depending on the circumstances, using an arrest as a basis to deny a concealed carry license may reveal very little about an applicant’s law abiding tendency, and thereby impermissibly infringe the Second Amendment. *Bruen* itself, in approving of Connecticut’s “suitable person” licensing factor, observes that officials may deny a concealed carry license only to those whose “conduct has shown them to be lacking the essential character of temperament necessary to be entrusted with a weapon.”³¹ This suggests that not all interactions with law enforcement -- whether it be detainment, arrest, indictment, or even conviction in some cases -- will be sufficient to deny a concealed carry license.

³⁰ *Id.* at p. 3.

³¹ *New York State Rifle & Pistol Association, Inc. v. Bruen, supra*, 142 S.Ct. at p. 2123, fn. 1.

Local officials involved in concealed carry licensing decisions should consult with their legal counsel to review any local criteria used in those decisions.

Assuming an applicant meets the objective criteria of residency and completion of a firearms training class, a police chief must issue a concealed carry license upon finding the applicant to be of good moral character. Penal Code section 26150 provides that a police chief “may issue” the license, but *Bruen* in practice requires a chief to issue the license.

***Bruen’s* Impact on Other Public Safety Laws upon which Cities Regularly Rely**

Cities rely on a host of California laws regulating firearms possession. This section identifies historic analogues to some of those laws to aid cities that might be confronted with a *Bruen* challenge to their actions. Those laws are divided into two groups below: (1) laws regulating possession of firearms by mentally ill persons and convicted felons; and (2) “red flag” firearms laws related to domestic violence, workplace harassment, gun-related violence, and general harassment.

Before turning to those laws, it is helpful to note again that the initial inquiry under *Bruen* is whether the Second Amendment’s plain text encompasses a person’s conduct. If it does, the government must justify its law by showing it is consistent with the nation’s historical tradition of firearms regulation. To do so, the government must identify a restriction -- existing around the time the Second Amendment was ratified in 1791, or the Fourteenth Amendment was ratified in 1868 -- that imposed a burden on the Second Amendment right analogous to that imposed by the challenged modern law. The court will uphold a modern-day regulation only if it is “relevantly similar” to a historical precursor.³² A proper analogue need not be a “historical *twin*.”³³

1. Laws Prohibiting or Regulating Firearms Possession by Convicted Felons and Mentally Ill Individuals

The Supreme Court has found a “longstanding [tradition of] prohibition on the possession of firearms by felons[,] the mentally ill,[]” and arguably, other

³² *New York State Rifle & Pistol Association, Inc. v. Bruen*, *supra*, 142 S.Ct. at p. 2132.

³³ *Id.* at p. 2133.

dangerous individuals.³⁴ The Court identifies this tradition without providing much historical support rooted in the 18th or 19th centuries. The Court has instead relied on 20th century legislation to uphold exclusions of felons and mentally ill persons from possessing firearms.

The categorical limits on firearms possession by convicted felons and mentally ill persons -- in the California Penal Code and Welfare and Institutions Code -- likely fall within this purported longstanding tradition. *Heller* found, the *McDonald* plurality reiterated, and Justice Kavanaugh in his *Bruen* concurrence agreed, that these limits are “presumptively lawful.”³⁵

This presumptive validity is enjoyed by California Penal Code section 29800, which categorically disqualifies convicted felons from purchasing, receiving, or possessing firearms. Also presumptively valid is Welfare and Institutions Code section 8103, which disqualifies persons adjudicated to be a “danger to others as a result of a mental disorder or mental illness, or who has been addicted to be a mentally disordered sex offender” from purchasing, receiving, or possessing firearms. The federal Gun Control Act³⁶ also excludes from access to firearms convicted felons and domestic violence misdemeanants, mentally ill persons, and those subject to restraining orders for exhibiting harmful behavior.

The origin of these types of safety regulations was disputed during the *Bruen* oral argument. Justice Kagan queried whether the historical understanding of the Second and Fourteenth Amendments should stop at the “original” meaning, considering that widely-accepted exclusion of felons and the mentally ill took form for the first time in the 20th century.³⁷ This argument, supported by much of the legal scholarship on this topic, was also presented in amicus briefs submitted in support of New York’s law.³⁸ In response, the

³⁴ *Id.* at p. 2162 (conc. opn. of Kavanaugh, B); *McDonald v. City of Chicago, Ill.* (2010) 561 U.S. 742, 786; *District of Columbia v. Heller* (2008) 554 U.S. 570.

³⁵ *New York State Rifle & Pistol Association, Inc. v. Bruen, supra*, 142 S.Ct. at p. 2162 (conc. opn. of Kavanaugh, B).

³⁶ 18 U.S.C.A. § 922, subdivision (g) prohibiting any person “who is an unlawful user of or addicted to any controlled substance” from possessing a firearm alone was held unconstitutionally vague by a Utah federal district court in *United States v. Morales-Lopez*.

³⁷ NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., et al., Petitioners, v. Kevin P. BRUEN, In His Official Capacity as Superintendent of New York State Police, et al., Respondents., 2021 WL 6051152 (U.S.), 9 (U.S.Oral.Arg.,2021).

³⁸ *Compare* Coleman Gay, “Red Flag” Laws: How Law Enforcement’s Controversial New Tool to Reduce Mass Shootings Fits Within Current Second Amendment Jurisprudence (2020) 61 B.C. L. Rev. 1491, 1528–1529 (“[P]rohibitions on possession of firearms by individuals included in *Heller*’s presumptively lawful list--for example, the mentally ill--were practically nonexistent at the time of the Second Amendment’s ratification and therefore are not “longstanding” relative to the Constitutional Convention. To the extent courts are true to the inquiry to be

New York Rifle & Pistol Association argued that these 20th century prohibitions were based on a “tradition from the beginning for keeping certain people outside of the group of people that were eligible for possession of firearms.”³⁹

Numerous historical documents, laws, and state constitutions support the argument that the right to bear arms was never intended to apply to *all* people. The author of *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?* posits: “Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from possessing firearms].”⁴⁰ Further, the author cites several state constitutions which, between 1838 and 1845, limited the right to bear arms to “free” men, suggesting that the right excluded felons.⁴¹

In *National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, the Fifth Circuit opined that the restrictions for suspect groups “may have been animated by a classical republican notion that only those with adequate civic ‘virtue’ could claim the right to arms,” and that the historical conception of the right did not preclude “laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally imbalanced, are deemed incapable of virtue.”⁴²

conducted at Step One, the absence of any such laws in 1791 prohibiting persons deemed mentally unstable by society from possessing firearms is a strong indication that such persons were thought to have Second Amendment rights. Moreover, the *Heller* majority repeatedly implied that the Second Amendment applies to *all* citizens, not just the subset of citizens deemed responsible or law-abiding.”) with *U.S. v. Bena* (8th Cir. 2011) 664 F.3d 1180, 1183 (emphasis added) (quoting a Founding Father’s view that the state may not “prohibit the people of the United States, who are *peaceable* citizens, from keeping their own arms”).

³⁹ NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., et al., Petitioners, v. Kevin P. BRUEN, In His Official Capacity as Superintendent of New York State Police, et al., Respondents., 2021 WL 6051152 (U.S.), 9 (U.S.Oral.Arg.,2021).

⁴⁰ Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 Okla. L. Rev. 65, 96 (1983).

⁴¹ *Id.* at p. 96, fn. 147 (emphasis added); C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?* (2009) 32 Harv. J.L. & Pub. Pol'y 695, 709, fn.76.

⁴² *National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* (5th Cir. 2012) 700 F.3d 185, 200-201 (“[A]t the time of the founding, ‘the right to arms was inextricably and multifariously linked to that of civic virtue (i.e., the virtuous citizenry)’ ...”); Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 Hastings L.J. 1339, 1360 (2009) (“[F]rom time immemorial, various jurisdictions recognizing a right to arms have nevertheless taken the step of forbidding suspect groups from having arms. American legislators at the time of the Bill of Rights seem to have been aware of this tradition” (footnote omitted)).

The Uniform Firearms Act is frequently cited as the early 20th century precursor to modern laws prohibiting felons from obtaining firearms. The law was developed starting in 1923, then repeatedly amended in the late 1920s and 1930s. One iteration of the law prohibited “delivery of a pistol to any person of ‘unsound’ mind.”⁴³ Another early law was the 1938 Federal Firearms Act (15 U.S.C. §§ 901–910, repealed, Pub.L. 90–351, June 19, 1968) which originally prohibited a narrower subset of the population from receiving a weapon.⁴⁴ The law prohibited a person convicted of a “crime of violence,” defined as “committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny], burglary, and housebreaking, from owning or possessing a firearm.”⁴⁵

State laws established prior to the ratification of the Second Amendment -- such as 1779 Pa. Laws 193, An Act. . . for Disarming Persons Who Shall not Have Given Attestations of Allegiance and Fidelity to this State (§§ 4-5) -- disarmed political dissidents considered a threat to public safety.⁴⁶

While historic analogues of modern laws preventing felons and mentally ill persons from possessing firearms were proposed in the 20th century, these types of laws were not unprecedented in American history. The Supreme Court considers this historical basis sufficiently “longstanding” to uphold such regulations. Therefore, laws which prohibit firearms possession by mentally ill persons and convicted felons still remain protected from Second Amendment challenge in the wake of *Bruen*.

2. “Red Flag” Laws Related to Domestic Violence, Workplace Harassment, Gun-Related Violence, and General Harassment

⁴³ *Mai v. United States* (9th Cir. 2020) 974 F.3d 1082, 1088–1089 (dissenting opinion); 1926 UFA §§ 1, 4; C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?* (2009) 32 Harv. J.L. & Pub. Pol'y 695, 701.

⁴⁴ C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?* (2009) 32 Harv. J.L. & Pub. Pol'y 695, 701.

⁴⁵ *U.S. v. Skoien* (7th Cir. 2010) 614 F.3d 638, 649, fn. 8 (dissenting opinion) (internal quotation marks omitted); C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?* (2009) 32 Harv. J.L. & Pub. Pol'y 695, 701.

⁴⁶ The law stated, in relevant part: “[A]ny person or persons who shall not have taken any oath or affirmation of allegiance to this or any other state and against whom information on oath shall be given before any justice of the peace that such person is suspected to be disaffected to the independence of this state, and shall take from every such person any cannon, mortar, or other piece of ordinance, or any blunderbuss, wall piece, musket, fusee, carbine or pistols, or other fire arms, or any hand gun; and any sword, cutlass, bayonet, pike or other warlike weapon, out of any building, house or place belonging to such person.”

Red flag laws are designed to prevent dangerous persons -- in addition to mentally ill persons and convicted felons -- from acquiring firearms, and to require them to forfeit their weapons.⁴⁷

As of 2022, the District of Columbia and 28 states, including California, have passed “red flag,” or “extreme risk protection” laws which “permit courts to order the seizure of firearms in an attempt to prevent their use for suicide or harm to others.”⁴⁸ California’s laws are rooted in the specific conduct of an individual which the state deems to be unsuitable for possessing arms.

Examples include the following laws:

Code of Civil Procedure section 527.6 -- governing civil harassment restraining orders -- provides that a person who has “suffered harassment . . . may seek a temporary restraining order and an order after hearing prohibiting harassment,” and the person against whom the protective order is issued cannot own, possess, purchase, receive, or attempt to purchase or receive a firearm.

Code of Civil Procedure section 527.8 -- governing workplace violence restraining orders -- allows employees who have suffered “unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace” to seek temporary orders against individuals who similarly cannot “own, possess, purchase, receive, or attempt to purchase or receive, a firearm or ammunition while the protective order is in effect.”

Code of Civil Procedure section 527.85 authorizes restraining orders to protect students suffering credible threats off campus.

Welfare & Institutions Code section 15657.03 prohibits gun possession or ownership by those subject to protective orders for elder abuse.⁴⁹

⁴⁷ In 1878, the Tennessee Supreme Court noted that a law criminalizing the act of giving a pistol to a minor was passed to “prevent crime” and suppress the “pernicious and dangerous practice of carrying arms,” not abridge a constitutional right. *State v. Callicutt* (1878) 69 Tenn. 714, 716; *National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* (5th Cir. 2012) 700 F.3d 185, 203.

⁴⁸ Seizure and Retention of Firearm Under State “Red Flag” or Extreme Risk Protection Law, 75 A.L.R.7th Art. 7 (2022).

⁴⁹ Any intentional and knowing violation of the above-mentioned protective orders is punishable under Penal Code section 273.6. In addition, any individual who owns, possesses, purchases, or receives a firearm knowing it is in violation of the orders is punished under Penal Code section 29825.

Penal Code Section 136.2 prohibits firearms ownership or possession by those subject to protective orders based on a “good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur.”

Similar protective orders for stalking (Penal Code section 646.91), domestic violence (Penal Code section 18250), and gun violence prevention (Penal Code sections 18100-18175) prohibit subjects from controlling, owning, purchasing, or receiving any firearms or ammunition while the order is in effect. In the case of gun violence restraining orders, those restrained must surrender their firearms.

Penal Code section 18400 in turn allows law enforcement agencies to delay the return of surrendered firearms if given “reasonable cause to believe that the return of a firearm or other deadly weapon seized under this division would be likely to result in endangering the victim or the person who reported the assault or threat.”

Additionally, the Welfare & Institutions Code allows individuals apprehended for examination of their mental condition to have their weapons confiscated under section 8102, allowing a process for the safe return if the individual meets certain requirements.

Lastly, Welfare & Institutions Code section 8103 restricts access to firearms by those “adjudicated by a court of any state to be a danger to others as a result of a mental disorder or mental illness, or who ha[ve] been adjudicated to be . . . mentally disordered sex offender[s],” and by individuals found not guilty of a serious crime by reason of insanity.

Most of the above-mentioned red flag laws are temporary measures to ensure the safety of petitioners and the public at large, restricting firearms possession only during the time that the protective order is in effect.

The key question under *Bruen* is whether these laws are consistent with the historical tradition of firearms regulation in the U.S. We have already shown that to be the case for laws governing possession by mentally ill persons and convicted felons. The remainder of this paper provides evidence of a historical tradition that may be cited to support the red flag laws as applied to all others.

The U.S. government has long recognized the need to protect vulnerable populations from dangerous persons. In 1788, founding father Samuel Adams

proposed language disallowing Congress from preventing “the people of the United States, who are *peaceable* citizens, from keeping their own arms.”⁵⁰ A year earlier, the “highly influential” Dissent of the Minority of the Convention of Pennsylvania of 1787 proposed that “no law shall be passed for disarming the people ... unless for crimes committed, or real danger of public injury from individuals”⁵¹

The examples below support the conclusion that our nation’s historic traditions prevented violent or dangerous persons from possessing firearms, such that today’s red flag laws are consistent with the Second Amendment.⁵²

A common thread runs through most, if not all, of the laws below: The state is empowered to defend law-abiding citizens from those who have or are reasonably likely to spread “fear” or “terror” through the bearings of arms.⁵³

- **English Common Law**

- 1328 Statute of Northampton - English regulation prohibiting the use of weapons to cause “affray of the peace” which predates the existence of firearms.
 - *Sir John Knight’s Case*, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K. B.1686) - Justice Holt interpreted the “in Terrorem Populi” element to require evil intent instead of merely carrying a firearm in public to violate this law. This was the prevalent interpretation in the late 1600s and early 1700s.
- Militia Act of 1662, 13 & 14 Car. 2, c. 3, section 13 (1662) - The law allowed for the government to disarm anyone adjudicated as “dangerous to the Peace of the Kingdom.”
- Common law cases applying the Northampton law allowed for the forfeiture of “armour” of people who terrified the King’s subjects.
- Discriminatory practices to deprive specific groups of rights:
 - The British government disarmed Catholics as they were deemed “untrustworthy” political threats by Protestants.⁵⁴

⁵⁰ *U.S. v. Bena* (8th Cir. 2011) 664 F.3d 1180, 1183 (emphasis added).

⁵¹ The state’s dissent is identified as a “precursor” to the Second Amendment in *U.S. v. Skoien* (7th Cir. 2010) 614 F.3d 638, 639-640.

⁵² See *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022) 142 S.Ct. 2111, 2133.

⁵³ *Id.* at p. 2145 (identifying the through line between the late-18th and early-19th century Virginia, Massachusetts, and Tennessee statutes).

⁵⁴ Joyce Lee Malcolm, *To Keep and Bear Arms* 18-19, 122 (1994); Adam Winkler, *Gunfight* 115 (2011).

- “The English Declaration in 1689 recognized an arms right only for Protestant subjects [T]he exclusion is instructive as the closest thing in the historical record, before World War I, to direct support for disarming felons.”⁵⁵

- **Colonial Period**

- Statute of Northampton was still “good law” in the 1700s. In 1 Pleas of the Crown 136 (treatise 1716), the law was interpreted: “no wearing of Arms is within the meaning of [the Statute of Northampton], unless it be accompanied with such Circumstances as are apt to terrify the People.” “Persons of Quality” were in “no Danger of Offending against this Statute by wearing common Weapons” because it was clear there was no “Intention to commit any Act of Violence or Disturbance of the Peace.”⁵⁶
- 1692 Mass. Acts and Laws no. 6, pp. 11-13 - The law modelled after the Statute of Northampton prohibited “go[ing] armed Offensively ... in Fear or Affray.”
- In Colonial America, discriminatory controls similar to anti-Catholic regulations were passed depriving Native Americans and African-Americans from gun ownership, under the same pretense that the groups were similarly deemed “high-risk.”⁵⁷
- A Virginia law in 1756 authorized the disarmament of all refusing a test of allegiance; the local governments seized guns from Catholics and those who were associated with “distrusted inhabitants” to avoid “social upheavals.”⁵⁸ These groups were considered “threats to public safety and stability.”⁵⁹
- During this time, many states also constitutionalized disarmament of slaves and Natives.⁶⁰

⁵⁵ C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?* (2009) 32 Harv. J.L. & Pub. Pol'y 695, 721.

⁵⁶ *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022) 142 S.Ct. 2111, 2142.

⁵⁷ Alexander Deconde, *Gun Violence In America* 22 (2011).

⁵⁸ *Kanter v. Barr* (7th Cir. 2019) 919 F.3d 437, 457 (dis. opn. of Barrett, A.)

⁵⁹ *Id.* at p. 458.

⁶⁰ Eugene Volok, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L & Pol at 208-209.

- “Founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety.”⁶¹

- **Founding Period**

- 1776 Mass. Acts 31-36: The law disqualified British loyalists from possessing weapons for the same reason that minority groups were discriminatorily disarmed.
- The 1776 Continental Congress recommended that local authorities “cause all persons to be disarmed within their respective colonies, who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies, against the hostile attempts of the British fleets and armies.”⁶²
- 1786 Virginia statute codified the Northampton statute - Collection of All Such Acts of the General Assembly of Virginia ch. 21, p. 33 (1794) - “no man, great nor small, [shall] go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the Country.”
- 1795 Mass. Acts and Laws ch. 2, p. 436, in Laws of the Commonwealth of Massachusetts - A similar statute mandated the arrest of “all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of the Commonwealth.”
- 1801 Tenn. Acts pp. 260–261 - Pursuant to this surety statute, any person who would “publicly ride or go armed to the terror of the people, or privately carry any dirk, large knife, pistol or any other dangerous weapon, to the fear or terror of any person” was required to post surety; otherwise, his continued violation of the law would be “punished as for a breach of the peace, or riot at common law.”

- **Antebellum Period**

⁶¹ *Kanter v. Barr* (7th Cir. 2019) 919 F. 3d 437, 456-458 (dis. opn. of Barrett, A.) (argued that historical practice did not support a categorical disarmament of felons because of their status as felons).

⁶² C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?* (2009) 32 Harv. J.L. & Pub. Pol'y 695, 723–724.

- By then, established common law principle prohibiting the carrying of deadly weapons in a manner likely to terrorize others. Offenses of “affray” or going armed “to the terror of people” imposed some limits on carrying firearms in this period after the founding.
 - For example, the North Carolina Supreme Court in *State v. Huntly*, 25 N. C. 418, 421-422 (1843) recognized the codified common law offense was adopted as part of the state’s law.⁶³ Furthermore, the court only criminalized carrying a gun for a “wicked purpose” with a “mischievous result” p. 423.
 - In another example, an Alabama state court in *O’Neil v. State*, 16 Al. 65, 67 (1849) applied the common law to punish the carrying of a deadly weapon only “for the purpose of an affray, and in such a manner as to strike terror to the people.”⁶⁴
- 1856 Ala. Acts 17 - The state law disqualified children as they would not be responsible weapon owners.
- In the mid-19th century, many jurisdictions began adopting surety statutes that required individuals to post bond before carrying a weapon in public and targeted only those threatening to do harm.
 - Mass. Rev. Stat., ch. 134, section 16 (1836) and nine other jurisdictions between 1838 and 1871 adopted variations. The Commonwealth required “any person who was reasonably likely to ‘breach the peace,’ and who, standing accused, could not prove a special need for self-defense, to post a bond before publicly carrying a firearm.”⁶⁵ These surety statutes “presumed that individuals had a right to public carry that could be burdened only if another could make out a specific showing of a ‘reasonable cause to fear an injury, or breach of the peace.’”⁶⁶ Even with a showing of reasonable fear, the accused arms-bearer “could go on carrying without criminal penalty” if the accused individual

⁶³ *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022) 142 S.Ct. 2111, 2145.

⁶⁴ *Id.* at p. 2146.

⁶⁵ *Id.* at p. 2148.

⁶⁶ *Id.* at p. 2120.

“post[ed] money that would be forfeited if he breached the peace or injured others -- a requirement from which he was exempt if he needed self-defense.”⁶⁷ A showing of special need was required “only *after* an individual was reasonably accused of intending to injure another or breach the peace. And even then, proving a special need simply avoided a fee rather than a ban [O]nly those reasonably accused were required to show a special need to avoid posting a bond.”⁶⁸ The bond was not considered a huge burden or punishment like a prison sentence.

- **Reconstruction Period**

- 1870 S.C. Acts p. 403, no. 288, section 4 -- The codified common law state allowed the arrest of “all who got armed offensively, to the terror of the people.”

- **20th Century**

- Uniform Firearms Act - Established in the late-1920s and mid-1930s.
- 1931 Pa. Laws 498, No. 158 - No person convicted of a crime of violence can own or possess a firearm.
- Federal Firearms Act of 1938 - Arguably the first federal statute barring felons from possessing firearms; only covered a few violent offenses.
- Gun Control Act of 1968 (codified in part at 18 U.S.C. § 922) - Federal limits on firearm “possession ... [by] various classes of people, including convicted felons, fugitives, drug addicts and unlawful users of controlled substances, illegal and nonimmigrant aliens, persons dishonorably discharged from the American armed forces, individuals who have renounced their United States citizenship, persons subject to certain court orders associated with stalking, harassing, and other domestic-related

⁶⁷ *Id.* at p. 2148.

⁶⁸ *Id.* at pp. 2120, 2149.

actions, and those ‘convicted in any court of a misdemeanor crime of domestic violence.’”⁶⁹

Conclusion

Bruen requires consideration of only objective criteria in processing an application for a concealed carry license. With California’s “good cause” requirement now invalidated, licensing officials must be careful not to transform the separately surviving “good moral character” requirement into a freewheeling discretionary inquiry that runs afoul of *Bruen*.

Perhaps the better news is that *Bruen* reaffirms the principle from *Heller* and *McDonald* that presumptively lawful regulations include prohibitions of firearm possession by convicted felons and mentally ill persons. In order to “elevate[] above all other interests the right of *law-abiding, responsible* citizens to use arms in defense of hearth and home[,]”⁷⁰ local officials must be able to prevent those persons, and other dangerous persons from obtaining firearms. The list of presumptively lawful regulations -- purposefully denoted as “non-exhaustive”⁷¹ in *Heller* -- leaves room to argue that California’s red-flag laws are presumptively lawful.

But whether or not that presumption ultimately attaches to California’s “red flag” laws, they nevertheless fall within the established American tradition of disarming groups deemed unfit to possess weapons. *Bruen* reaffirms the rights of law-abiding, responsible citizens to keep and bear arms for self-defense. Those who have committed violent crimes, or who pose a credible threat of violence to others are neither law-abiding nor responsible, and may be disarmed to the extent necessary to protect themselves and others. *Bruen* does not require “red flag” laws to be matched with twin historical analogues.

⁶⁹ Christopher M. Johnson, Second-Class: Heller, Age, and the Prodigal Amendment (2017) 117 Colum. L. Rev. 1585, 1593.

⁷⁰ *U.S. v. Skoien* (7th Cir. 2010) 614 F.3d 638, 639–640.

⁷¹ *District of Columbia v. Heller* (2008) 554 U.S. 570, 627, fn. 26.