SMU | Dedman School of Law

SMU Law Review

Volume 76 | Issue 4 Article 2

2023

(Gun) Tag, Congress Is It!

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ABSTRACT

The current majority of the Supreme Court has significantly increased access to firearms. In last year's New York State Rifle & Pistol Association v. Bruen *decision, the majority curtailed legislative options for protecting U.S. citizens from the danger presented by unfettered access to life-threatening weapons. The majority refused to acknowledge the danger inherent in firearms and the substantive difference in function between an antique flintlock and an AK-47. The Court's refusal to consider the change that technology has brought to firearm capabilities has resulted in a dramatically reduced ability for any legislation to address the danger of firearms in a constructive manner. However, this reduction is not necessarily an elimination. Even with the historically inaccurate and logically flawed decision of the current majority, there are still measures that can be taken. Modern technology can be used to limit the harm posed by rampant gun possession even under the Court's recent interpretation of the Second Amendment.*

The majority in Bruen *embraced analyzing the purpose of the Second Amendment to hold that people should be allowed to carry a gun outside their home and on the streets of every city in America. The adoption of purpose analysis, however, can not only enlarge gun rights but also constrain gun harms, such as via technological means. This same purpose analysis can be used to establish meaningful safeguards to help reduce unnecessary deaths that even this majority will be hard-pressed to deem unconstitutional. Legislators should use purpose analysis to establish regulations that will help protect Americans from gun violence.*

This Article proposes the introduction of methods like gun tagging to promote greater safety in our country. The contributions of this work are thus two-fold: an analysis of the Bruen *decision both from a historical and legal perspective, and the introduction of gun tagging as a mechanism to enhance public safety in the United States. This analysis shows the flaws in the majority opinion in* Bruen *but simultaneously highlights the fact that the proposal in this Article works under that regime until the members of the Court are changed and that law can be overturned. This solution balances the concerns of gun skeptics with the judicial embrace of gun rights, for better or for worse, in our nation's history.*

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https://doi.org/10.25172/smulr.76.4.2

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I. INTRODUCTION

IS there still a way to pass a regulation that increases gun safety and makes it past the conservative majority of the Supreme Court? This Article (building on a body of past work)[1] shows that law and technology provide a way to do so, even under the Court's current so-called purpose analysis of the Second Amendment. Increasing gun safety would be highly beneficial given the United States' struggles with mass and other shootings, a problem even more critical in light of the liberalized carrying of weapons in public spaces as per the recent decision in *New York State Rifle & Pistol Association v. Bruen*.[2]

The Article begins with a discussion of the history of the Second Amendment. Following that, it analyzes the established purpose of the Second Amendment and how that purpose legitimizes the use of gun-tagging technology specifically. Part of this discussion highlights the flawed approach that the current majority of the Court has adopted in *Bruen* in what could be argued was an extreme move. The Article points out how the *Bruen* decision is factually flawed and legally spurious: for example, the Court's majority states that judges do not have the expertise to make cost-benefit judgments when it comes to firearms[3] and that judges should not be empowered to make these choices,[4] while at the same time, the decision eliminates all evaluation by legislators and grants significant power to the six justices in the majority. The conclusion of this Article is that while the reasoning of the *Bruen* decision may be flawed, there is little doubt that, under that decision (and certainly also under a more thoughtful and balanced approach to the Second Amendment at some future point), tagging technology can be used in a constitutionally supported manner as it relates to firearms.

A primary goal of this Article is to demonstrate that using purpose analysis for the Second Amendment can actually establish a safer gun environment than we currently have by validating commonsense potential

1. *See* Robert E. Wagner, *Corporate Criminal Prosecutions and the Exclusionary Rule*, 68 Fla. L. Rev. 1119 (2016); Robert E. Wagner, *Miranda, Inc.: Corporations and the Right to Remain Silent*, 11 Va. L. & Bus. Rev. 499 (2017); Robert E. Wagner, *Cruel and Unusual Corporate Punishment*, 44 J. Corp. L. 559 (2019); Robert E. Wagner, *Corporate Criminal Prosecutions and Double Jeopardy*, 16 Berkeley Bus. L.J. 205 (2019).

2. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022).

3. *Id.* at 2130–31.

4. *Id.* at 2129.

regulations such as gun tagging via RFID mechanisms. This Article's proposal regarding tagging could be implemented in three phases. Tagging essentially improves the ability to identify firearms and their location to increasing degrees in different phases. The first phase entails introducing a QR code on guns that would give important information to police officers. The second phase would add a type of radio identifier that would signal if the firearm were near a detector. The third and final phase is a type of GPS tracking system that could signify a gun's proximity to law enforcement, locations like schools, and criminal activity.

Tagging is a legislative option that could increase safety without infringing Second Amendment rights. The Supreme Court majority indicated that experimentation with reasonable regulations would continue under the Second Amendment, and individual justices encouraged such experimentation.[5] For phase three of the tagging proposal, the technology is under development, and it is already fully developed for phases one and two. In a different context, the question has been asked whether technology can not only increase the lethality of arms but could also directly increase safety.[6] This Article suggests that this is indeed the case. This Article applies purpose analysis to a technology-based proposal for gun safety that fits within that purpose and within the evolving jurisprudence of the Second Amendment. Gun regulation should look to modern technology to increase safety for us all.

II. THE SECOND AMENDMENT'S MUDDLED PAST

Even before our country had adopted the Constitution, we had laws dealing with regulating firearms.[7] Our history is filled with good and bad attempts by various governmental bodies to deal with firearms; in fact, a governmental attempt to seize firearms arguably started the American Revolutionary War.[8] This history culminated in the adoption of the Second Amendment, which states: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[9]

What does "keeping and bearing" mean? In this context, "'keeping' a gun means having it in one's constructive possession," (for example, in one's home) and "'bearing' a gun means [actually] carrying it on one's person."[10] Given the reference to "a well-regulated Militia," there has been disagreement about whether the Second Amendment was limited—due to this

5. *See* McDonald v. City of Chicago, 561 U.S. 742, 902–03 (2010) (Stevens, J., dissenting).

6. *See* Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 Harv. J. Legis. 279, 280–81 (2016).

7. *See, e.g.*, Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 84 (2d Cir. 2012) ("New York's efforts in regulating the possession and use of firearms predate the Constitution.").

8. Adam Winkler, Gunfight: The Battle Over the Right to Bear Arms in America 105 (2011) [hereinafter Gunfight].

9. U.S. Const. amend. II.

10. Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 Stan. L. Rev. 1, 2 (2012) (footnote omitted).

"militia" reference—to a group right, or whether, regardless of the militia reference, it was still a right for individuals.[11] The question of a group right tied to the existence of the militia versus an individual's right to gun ownership regardless of any militia connection is the subject of a vast amount of debate and academic scholarship.[12] Many esteemed scholars and jurists have come to profoundly different conclusions on this question. One fairly extreme position endorsed by the former Chief Justice of the Supreme Court, Warren Burger, was that the individual rights argument for the Second Amendment was so flawed that it amounted to "fraud."[13] In contrast, the majority on the Supreme Court came to the opposite conclusion and held that it is in fact an individual right in *District of Columbia v. Heller*.[14]

For the time being, the *Heller* decision settled where the Supreme Court stands in the debate about whether there is an individual right to bear arms.[15] Since the decision, much of the debate has shifted from questioning the individual nature of the right to investigating its scope.[16] In *Bruen*, the most recent related case, the current majority of the Supreme Court dramatically increased the scope of the Second Amendment and explicitly held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home."[17] This never-before-granted extension of the individual right to carry a gun outside the home was a dramatic expansion of the right, but it was not an unfettered guarantee to carry any gun anywhere for any purpose. Even this majority of the Court specifically refrained from commenting on the scope outside the right for a handgun to be carried outside the home.[18]

The scope questions that the majority left open remain very contentious. There is a significant and "fundamental divergence of opinion" about said scope.[19] Even though most Americans believe we should have the right to possess guns, there are many significant disagreements about the specifics.[20]

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11. *See, e.g.*, GUNFIGHT, *supra* note 8, at 33.

12. *See, e.g.*, *id.*; William Reach, *The Collective Endures: Pre-*Heller *Precedent and Our Understanding of the Modern Second Amendment*, 31 WM. & MARY BILL RTS. J. 607, 607 (2022); *see generally* Michael Busch, Comment, *Is the Second Amendment an Individual or a Collective Right:* United States v. Emerson's *Revolutionary Interpretation of the Right to Bear Arms*, 77 ST. JOHN'S L. REV. 345 (2003).

13. Darrell A.H. Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69, 76 (2016) (quoting GUNFIGHT, *supra* note 8, at 25).

14. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

15. *Id.*; Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1293 (2009). The status of *stare decisis* is, of course, more uncertain at this time than before the recent overturning of *Roe v. Wade*. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242, 2262–64 (2022).

16. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 377 (2009).

17. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

18. *See id.* at 2157 (Alito, J., concurring).

19. *See* Young v. Hawaii, 992 F.3d 765, 807 (9th Cir. 2021) (en banc) (quoting Isaiah v. State, 58 So. 53, 56 (Ala. 1911)).

20. *See* Miller, *supra* note 15, at 1355.

One indication of the popularity of the belief that we have the right to possess guns is the sheer popularity of gun ownership. The rate of gun possession is growing at a staggering pace. Over a decade ago, there were already over 280 million guns in the United States, which equated to almost one for every American.[21] Then, by 2017, there were approximately 393.3 million guns, which amounted to 1.2 guns for every person.[22] There are literally more guns in the United States than people. Related to that, we have "one of the highest murder rates and more guns per capita than any Western industrialized nation."[23] In fact, Yemen, the next most highly armed country, has less than half the number of guns per capita that we do.[24] In an attempt to deal with the amount of gun crime in the United States, many regulations have been passed, and such regulations are not automatically constitutionally invalid.[25]

That said, finding support for gun regulation is complicated by the fact that empirical data about guns and the safety surrounding them is notoriously contested.[26] This is one of the reasons that, even before *Heller*, a complete elimination of gun rights has never been politically feasible in the United States.[27] Whether one likes it or not, "guns are here to stay."[28] In America, guns are just "too common for a British-style gun ban to be feasible."[29] Fortunately, there is significant room for regulation without needing to resort to outright bans.

There are divergent opinions on how to best deal with criminal gun activity. One position in this context is that more law-abiding individuals should have guns as a deterrent against criminals, and an opposing view is that criminal gun activity or gun possession by criminals would be reduced if there were fewer guns in circulation overall.[30] In making these types of decisions and establishing regulations, commentators and courts have said that legislatures are "'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks."[31] Addressing the complexity of the question, the dissenting justices in *Bruen* agreed that the proper way to address this problem is through legislators rather than the Court.[32]

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21. Gunfight, *supra* note 8, at 10.
22. *Bruen*, 142 S. Ct. at 2164 (Breyer, J., dissenting).
23. Gunfight, *supra* note 8, at 77.
24. *Bruen*, 142 S. Ct. at 2164 (Breyer, J., dissenting).
25. *See, e.g.*, Justice v. Town of Cicero, 827 F. Supp. 2d 835, 842 (N.D. Ill. 2011).
26. Blocher, *supra* note 10, at 3.
27. Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 733 (2007).
28. Gunfight, *supra* note 8, at 10.
29. *Id.* at 20.
30. *See* Kolbe v. Hogan, 849 F.3d 114, 149–50 (4th Cir. 2017) (Wilkinson, J., concurring).
31. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 97 (2d Cir. 2012) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994)).
32. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2167 (2022) (Breyer, J., dissenting).

Heated and long-running arguments about guns have been waged in very acrimonious and at times highly personal ways by people of all walks of life including politicians, historians, and even economists.[33] Both sides of the gun debate have a broad spectrum of proponents, ranging from the seemingly perfectly rational to the most extreme. Problematic reasoning has been prominently demonstrated by both supposed "gun nuts" and "gun grabbers."[34] Scholars have suggested that getting effective gun safety laws passed has been made very difficult by radical pro-gun lobbyists (such as those who even resist machine gun limitations).[35] Similarly, these same scholars have pointed out that even if there is no indication that a potential firearm regulation will reduce violence at all, it will still be supported by the supposed "gun grabbers."[36] For example, critics described both the pre-*Heller* D.C. handgun ban and the federal assault rifle ban as "triumphs of symbolism over substance."[37] So-called gun grabbers have been quoted admitting how legislation that had been passed would "not take one gun out of the hands of one criminal."[38] Some early laws, such as the National Firearms Act, had fingerprint requirements with which legislatures knew criminals would not comply, but that would allow the criminals to be put in prison for years just for noncompliance.[39] Conversely, even though almost everyone is aware and concedes that eliminating guns in the United States is essentially impossible, at least one commentator has stated that "the 'real purpose' of licensing is to collect data to enable the government to confiscate all the guns."[40] This false proposition that federal registration would lead to the eventual confiscation of all civilian firearms has defeated many initiatives.[41] There is no possibility for total elimination of guns in the United States even though instances of gun violence often do influence legislatures' ability to pass gun control laws,[42] and recently, on average, there has been a mass shooting in excess of every single day.[43] Even the prospect of six-year-old child shooters will not come close to enabling a total elimination of guns in the United States.[44] This is clear since even the level of

33. Miller, *supra* note 13, at 71.
34. *See* Gunfight, *supra* note 8, at 33.
35. *Id.* at 9.
36. *See id.* at 10, 33.
37. *Id.* at 39.
38. *See id.* at 18.
39. *National Firearms Act: Hearings on H.R. 9066 Before the Committee on Ways and Means*, 73d Cong. 22 (1934) (statement of Homer S. Cummings, U.S. Attorney General) ("I do not expect criminals to comply with this law . . . I want to be in a position, when I find such a person, to convict him because he has not complied.").
40. Gunfight, *supra* note 8, at 230.
41. *See id.* at 252.
42. *See id.* at 251.
43. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2165 (2022) (Breyer, J., dissenting).
44. *See* Talal Ansari, *Elementary School Teacher Shot by 6-Year Old in Virginia, Police Say*, Wall St. J. (Jan. 6, 2023, 8:46 PM), https://www.wsj.com/articles/elementary-school-teacher-shot-by-6-year-old-in-virginia-police-say-11673047864 [https://perma.cc/75PV-3DE7].

tragedy of children shooting children has been happening over and over for decades.[45]

A large problem with gun regulations is the simple fact that they will often impact law-abiding individuals and criminals will ignore them.[46] A very important and recognized goal is avoiding "arming the bad man and disarming the good one to the injury of the community."[47] For the first time in the history of the United States, a majority of the Supreme Court held in *McDonald v. City of Chicago* that the Fourteenth Amendment applied the Second Amendment to state restrictions on gun control, and hence, the Court dramatically broadened an individual's right to possess a gun.[48] However, in that case, even the dissenting justices (who did not think the individual right to bear arms was required by the Second and Fourteenth Amendments) recognized that a potential problem with regulations is the possibility that they "simply take guns from those who use them for lawful purposes without affecting their possession by criminals[.]"[49] People on both sides of the debate often recognize that not all regulations have this unwanted consequence, and measures like background checks and gun-free zones have many supporters among gun owners.[50] In keeping with this, there are already systems for dealers to run background checks on purchasers that take less than a minute.[51] Furthermore, many different types of registration requirements have been authorized and used for well over a century.[52]

In addition to these types of regulations, there are also many types of firearm rules that are not restrictive of gun owners. For example, some simple or basic registration requirements have been forbidden by several state laws.[53] There are even states that have passed laws limiting a company's ability to prohibit guns on its own property.[54] Arguably, these types of laws interfere with a company's choices and hinder its ability to protect its employees and customers.[55]

The appropriateness of all these regulations both restricting and liberalizing gun possession revolve around the question of purpose: why do we have the Second Amendment? Autonomy, personal safety, and prevention of tyranny are just some of the possible purposes of the Second

45. *See* John Woodrow Cox, Steve Hendrix & Steven Rich, *A 6-Year-Old Is Accused of Shooting Someone at School. He Isn't the First.*, Wash. Post (Jan. 11, 2023, 7:00 AM), https://www.washingtonpost.com/dc-md-va/2023/01/11/elementary-students-guns-fired-school [https://perma.cc/J2PT-PMCL].

46. Miller, *supra* note 13, at 84.

47. Gunfight, *supra* note 8, at 211.

48. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

49. *Id.* at 923 (Breyer, J., dissenting).

50. *See* Gunfight, *supra* note 8, at 88.

51. *See id.* at 71.

52. *See, e.g.*, Justice v. Town of Cicero, 827 F. Supp. 2d 835, 844 (N.D. Ill. 2011) (citing Heller v. District of Columbia, 670 F.3d 1244, 1253–54 (D.C. Cir. 2011)).

53. *See, e.g.*, Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 196 (2006).

54. *See* Blocher, *supra* note 10, at 41.

55. *See id.* at 41–42.

Amendment.[56] Some of these possible purposes make more sense than others; for example, protection from a tyrannical government is hard to justify as the purpose of the individual rights understanding of the Second Amendment because the right has always been recognized not to extend to the kind of weapons (like machine guns, artillery or possibly nuclear weapons) that would be needed to oppose the government.[57] In addition to giving owners the ability to protect themselves, guns are seen by some as a way of forcing attention and possibly action in political contexts.[58] Individuals with those views and some states themselves have shaped and influenced the understanding of the purpose of the Second Amendment. The right to bear arms is enshrined in the vast majority of the constitutions of individual states.[59] Elaborating on the purpose of the Second Amendment, some state constitutions have specifically spelled out that not only is defending people a part of the purpose, but the right is also connected with the defense of property.[60] In *Bruen*, the justices in the majority reaffirmed their position that the core purpose of the Second Amendment is self-defense.[61]

Even though self-defense is the Supreme Court majority's named primary purpose behind the Second Amendment, many courts have indicated that in the wrong hands, guns are extremely dangerous, and these courts frequently illustrate this fact by referring to the many mass shootings in recent history.[62] The minority in the *Bruen* case pointed out that in 2020, over 45,000 Americans were killed by guns and that gun violence is now the leading cause of death for children.[63] In stark contrast, the current Court's majority does not readily acknowledge the death toll attributable to guns and rather refers to handgun violence as an "*alleged*" societal problem.[64] The majority's support of significant limitations on gun regulations is clearly bolstered and perhaps made more palatable to them by this willful ignorance.

The current majority's level of vehemence against many safety-focused regulations is new for the Supreme Court. Dating all the way back to the period of famed and highly regarded jurist William Blackstone,[65] the right was recognized as limited and it had remained so for a very long time.[66] This limited aspect of the right has been recognized and endorsed by courts

56. Blocher & Miller, *supra* note 6, at 283.
57. Miller, *supra* note 15, at 1294.
58. *See* Marc Fisher, Miranda Green, Kelly Glass & Andrea Eger, *"Fear on Top of Fear": Why Anti-Gun Americans Joined the Wave of New Gun Owners*, Wash. Post (July 10, 2021), https://www.washingtonpost.com/nation/interactive/2021/anti-gun-gun-owners [https://perma.cc/R4PG-Y6KJ].
59. *See* Volokh, *supra* note 53, at 192.
60. *See id.* at 198–204.
61. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).
62. *See, e.g.*, Kwong v. Bloomberg, 723 F.3d 160, 174 (2d Cir. 2013) (Walker, J., concurring).
63. *Bruen*, 142 S. Ct. at 2163 (Breyer, J., dissenting).
64. *Id.* at 2131 (emphasis added).
65. *See generally* Wilfrid Prest, William Blackstone: Law and Letters in the Eighteenth Century (2008).
66. *See* Young v. Hawaii, 992 F.3d 765, 793–94 (9th Cir. 2021) (en banc).

and scholars who have stated that the right to bear arms without reasonable regulation would "encourage anarchy, not liberty."[67] Even outside the legal or political spheres, the need for this limitation has been recognized; philosophers, for example, have argued that recognizing the right to bear arms without regulation is impossible.[68]

Practically speaking, the reason that some individuals insist on their continued (and, as far as they are concerned, ideally unhampered) ability to own guns relates to their perceived inability to rely on the police alone for protection.[69] The conversations about the theoretical pros and cons of gun ownership have hardly influenced many peoples' interest in buying more guns. Indeed, there are more people buying guns than ever before.[70] Furthermore, gun sales go up when a Democrat is elected President, possibly due to the concern that tighter regulations will follow.[71] On top of that, times of uncertainty result in a dramatic increase of gun purchases.[72] The politically turbulent events since President Biden's election at the end of 2019, including the insurrection on January 6, 2020, and the ongoing COVID-19 pandemic, may have influenced the gun market for years to come.

The public perception of appropriate firearm regulation has historically experienced ups and downs.[73] Various types of weapons regulations have always been a part of American legal history.[74] Regulations ranging from what kinds of guns are allowed in the first place to how guns should be stored have been a part of American law since before the American Revolution and have persisted well after the adoption of the Second Amendment.[75] When the Second Amendment was adopted, there was a significant amount of regulation primarily at the individual state level.[76] It took over a hundred and fifty years before the federal government got involved in regulating guns in the 1930s.[77] This may be explained by the fact that the states themselves were regulating guns or by the changing nature of guns themselves; for example, until the Civil War, guns only accounted for a very small percentage of homicides.[78] In this early period, the laws that the states passed were strict.[79] The Revolutionary Era had laws both requiring and prohibiting carrying firearms publicly, depending on the context.[80] Requiring

67. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 517 (2004).
68. *See id.* at 504.
69. *See* Gunfight, *supra* note 8, at 106.
70. *See* Fisher et al., *supra* note 58.
71. *See id.*
72. *See id.*
73. *See* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 91 (2d Cir. 2012).
74. Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 Calif. L. Rev. 63, 90 (2020).
75. Cornell & DeDino, *supra* note 67, at 516.
76. *Id.* at 502–03.
77. *See* Winkler, *supra* note 27, at 713.
78. Cornell & DeDino, *supra* note 67, at 500.
79. Gunfight, *supra* note 8, at 113.
80. *See* Young v. Hawaii, 992 F.3d 765, 795 (9th Cir. 2021) (en banc).

men to carry guns while attending church was a part of many states' laws.[81] There is vast evidence that extensive regulation in both directions existed during the Founding Era and the early Republic.[82]

Requiring people to perform activities with their guns and keeping track of exactly who had guns was a part of founding-era laws.[83] The early law of our country could force people to have guns, mandate they have ammunition for those guns, and even force them to use their guns without reimbursing individuals for the cost of using the guns.[84] The "militia laws" forced all men between eighteen and forty-five to keep an operable gun and required the government to keep track of these individuals.[85] "[T]he founders understood that gun rights had to be balanced with public safety needs."[86] The need to balance public safety resulted in many seeming contradictions like early Bostonians banning essentially all loaded weapons from any building in the city[87] alongside the early Connecticut government forcing people to take guns into churches and other public meetings.[88] Some legal measures could be seen as even more extreme, such as ones involving officials conducting door-to-door inspections and inquiries about gun ownership in some early states.[89] Clearly, the laws from our nation's past dealing with guns were quite diverse and were often implemented in ways that were in tension with each other. At no point, however, was there a question during the Founding Era or thereafter of the possibility of banning all gun ownership in the country.

III. PURPOSE ANALYSIS AND GUN REGULATIONS

A. *Heller*, *McDonald*, and *Bruen*

The possibility of a British-like ban on lawful gun possession in the United States remains a political nonstarter.[90] However, much like the First Amendment and its protection of speech, the Second Amendment does not grant the kind of absolute protection that many gun rights advocates likely prefer.[91] In Justice Kavanaugh's concurrence in *Bruen*, he explicitly endorsed the ideas found in *Heller* and *McDonald* that "the Second Amendment 'is neither a regulatory straightjacket nor a regulatory blank check.' Properly interpreted, the Second Amendment allows a 'variety' of gun regulations."[92] The *Heller* decision and subsequent cases have made it clear that Second

81. *See id.*
82. *See* Cornell & DeDino, *supra* note 67, at 505–06.
83. *See id.* at 505.
84. *Id.* at 496.
85. *See generally* Winkler, *supra* note 27, at 709.
86. Gunfight, *supra* note 8, at 114.
87. *See id.* at 117.
88. *See id.* at 115.
89. *See id.* at 113.
90. *See* Winkler, *supra* note 27, at 733.
91. *See* Blocher, *supra* note 16, at 402.
92. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162 (2022) (Kavanaugh, J., concurring) (quoting *Bruen*, 142 S. Ct. at 2133; District of Columbia v. Heller, 554 U.S. 570, 636 (2008)).

Amendment rights are not absolute and many regulations are "presumptively lawful."[93] The Court said: "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[94] Even judges that support gun rights recognize that the "Second Amendment leaves the State with 'a variety of tools for combatting [the problem of gun violence], including some measures regulating handguns.'"[95] Similarly, Justices that are more supportive of gun rights still recognize appropriate limitations like banning guns from sensitive locations and prohibiting possession by felons and other dangerous people.[96] Courts have upheld statutes that affected the core of the Second Amendment when they were deemed a "marginal burden."[97] A license with a fee has been deemed constitutional in some courts due to its less-than-severe burden on the right to bear arms.[98] "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to [exercise the right] cannot be enough to invalidate it."[99]

In *Heller*, the Court pointed out that "the Second Amendment right is not boundless" but gave little direction as to what the limits were.[100] Scholars argued that even if there was an individual right to bear arms, any regulation should be reviewed under a reasonableness standard that most laws would easily pass.[101] Rational basis review just asks if the law is a rational way of furthering any legitimate governmental end.[102] However, this type of rational review standard is clearly not what has developed. Scholars have pointed out that the Court in *Heller* did not establish a way of examining the extent of the right to bear arms, and the Court will likely follow familiar paths laid out in reference to the First Amendment.[103] Borrowing from case law of one amendment to use in another is very common.[104] The *Heller* Court repeatedly referred to the First Amendment as an interpretive analogue for the Second Amendment.[105] In looking at other

93. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 89 (2d Cir. 2012) (quoting *Heller*, 554 U.S. at 627 n.26).
94. *Heller*, 554 U.S. at 626.
95. Young v. Hawaii, 992 F.3d 765, 861 (9th Cir. 2021) (en banc) (O'Scannlain, J., dissenting) (alteration in original) (quoting *Heller*, 554 U.S. at 636).
96. *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1540–41 (2020) (Alito, J., dissenting).
97. *See* Bauer v. Becerra, 858 F.3d 1216, 1220 (9th Cir. 2017).
98. Kwong v. Bloomberg, 723 F.3d 160, 164 (2d Cir. 2013).
99. *Id.* at 168 (alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992)).
100. Miller, *supra* note 15, at 1279–80 (citing *Heller*, 554 U.S. at 635).
101. *See* Winkler, *supra* note 27, at 683.
102. *Id.* at 716.
103. *See* Blocher, *supra* note 16, at 377.
104. *See* Ruben, *supra* note 74, at 81.
105. *See* District of Columbia v. Heller, 554 U.S. 570 *passim* (2008); *see generally* Darrell A.H. Miller, *Guns, Inc.:* Citizens United*,* McDonald*, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. Rev. 887, 890 (2011).

provisions of the Second Amendment, lower courts have agreed that the First Amendment provides an appropriate foundation.[106] Following that lead, multiple courts have used and supported adopting First Amendment principles for Second Amendment analysis.[107] In fact, the First and Second Amendments are often considered to be first cousins.[108] However, courts also recognize that there are limitations to applying First Amendment principles and that firearms pose a different kind of risk to the public.[109]

"The Court also says that the history of the right to keep and bear arms shows that the right is fundamental and not subject to interest balancing . . . . Speech, bodily integrity, and voting are all fundamental rights. These fundamental rights are evaluated by reference to levels of scrutiny."[110] Most of the Bill of Rights is not reviewed under a strict scrutiny analysis.[111] But, a law that targets the core of a right will get strict scrutiny, and a law that is so restrictive that it destroys the right to self-defense of the home is unconstitutional under any level of scrutiny.[112] However, the Court in *Bruen* rejects the two-stage approach, arguing that "the Second Amendment 'is the very *product* of an interest balancing by the people.'"[113] This is a flawed conclusion. No Founding Father weighed the benefits of self-protection against the cost of dozens of children being slaughtered in seconds by a gunman with a weapon. Rather than employing a time-honored balancing test, the Court states that regardless of how important an interest is (i.e., saving the lives of Americans, or even American children specifically) the government must "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[114]

In setting up this framework, the current majority on the Court rejects using the type of analysis deployed for many fundamental rights in the Constitution, most notably those covered by the First Amendment.[115] Ironically, while the Court dictated that the laws used to establish constitutionality must be from the Founding Era or possibly from the time of the adoption of the Fourteenth Amendment, the weapons do not need to be from that era, and in fact, the protection applies to weapons that were not only not in existence during the Founding, they were not even dreamed of.[116] The dissent points out that the majority wrongly decrees that history be used nearly exclusively in the analysis of acceptable regulation.[117]

106. *See, e.g.*, Kwong v. Bloomberg, 723 F.3d 160, 165 (2d Cir. 2013).
107. *See, e.g.*, Young v. Hawaii, 992 F.3d 765, 827 (9th Cir. 2021) (en banc).
108. Blocher, *supra* note 16, at 379.
109. *See, e.g.*, *Young*, 992 F.3d at 827.
110. Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 864 (2013).
111. Winkler, *supra* note 27, at 693–94.
112. *See* Bauer v. Becerra, 858 F.3d 1216, 1222 (9th Cir. 2017) (citing Silvester v. Harris, 843 F.3d 816, 821 (9th Cir. 2016); United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013)).
113. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022) (emphasis in original) (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008)).
114. *Id.* at 2126.
115. *See id.* at 2176 (Breyer, J., dissenting).
116. *See id.* at 2132.
117. *See id.* at 2164 (Breyer, J., dissenting).

Meanwhile, the majority elaborates that while analyzing history is most crucial when examining the regulation of firearms, only a narrow window of history is controlling.[118] The Court points out that as laws were changing in the late 1800s, this was too late to be useful in terms of establishing what is legitimate regulation.[119] Essentially, what the majority opinion states is that guns can change, but they must remain just as protected as the muskets and flintlock pistols that the Framers had in mind.[120]

A hypothetical scenario is illuminating here. Imagine that the Bill of Rights contained an additional amendment guaranteeing the right to interstate travel. This is a perfectly reasonable possibility and, in fact, this right has been effectively found in other parts of the Constitution and upheld by the Court.[121] When this possible hypothetical amendment would have been adopted, horses and carriages were the only effective means of transportation on land. Obviously, there would be no laws at that time regarding speed limits or limitations on the use of air space. Effectively, with the current majority's logic, it would be unconstitutional to prohibit a driver from going a hundred miles an hour on a public road that straddles two states (even in front of a school), just as it would be illegal to regulate that jet airplanes not fly twenty feet above the ground even through a major metropolitan city. As the dissent in *Bruen* points out, the farther we get from the Framers' imagination, the more "unjustifiable and unworkable" a reliance exclusively on history becomes.[122]

Banning speed limits in this scenario would be absurd, but it is the equivalent of what the current majority has imposed in terms of gun regulation and is that with which the United States likely has to live until the Court's membership changes. The Court tries to rescue its reasoning by engaging in a discussion of how to analogize current regulations to those relics of the past which it views as the proper comparators.[123] Two key metrics the Court suggests is looking at "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[124] As the dissent points out, this is effectively recommending that courts use a means (how) and ends (why) analysis to evaluate a modern regulation in comparison to a historical one to establish acceptability.[125] Given this direction by the majority, it is still useful to look at the almost universally followed means-end evaluation that lower courts had been using after *Heller.*

While explicitly rejected by *Bruen*, the two-prong tests that consider not only history but also other interests are still instructive both in terms of their specific current applicability and due to the fact that they are the most likely replacement to the problematic framework of the current Court once its members have changed. In this pre-*Bruen* two-part test,

118. *See id.* at 2127.
119. *Id.* at 2137.
120. *See id.* at 2132.
121. *See* Crandall v. Nevada, 73 U.S. 35, 49 (1868).
122. *Bruen*, 142 S. Ct. at 2181 (Breyer, J., dissenting).
123. *See id.* at 2133.
124. *Id.*
125. *Id.* at 2179 (Breyer, J., dissenting).

"First, the threshold inquiry in some Second Amendment cases will be a 'scope' question: Is the restricted activity protected by the Second Amendment in the first place?"[126] The level of scrutiny analysis follows an inquiry into whether the conduct is protected by the Second Amendment.[127] This inquiry is answered with historical evidence: "Laws restricting conduct that can be traced to the founding era and are historically understood to fall outside of the Second Amendment's scope may be upheld without further analysis."[128] The *Bruen* Court states that the analysis ends at this stage, but then points out that the how and why of a historic regulation is very useful, thereby bringing the second part of the test back to at least some extent.[129]

Before *Bruen*, many courts adopted a multi-tiered analysis for Second Amendment claims, ruling:

> If a regulation "amounts to a destruction of the Second Amendment right," it is unconstitutional under any level of scrutiny; a law that "implicates the core of the Second Amendment right and severely burdens that right" receives strict scrutiny; and in other cases in which Second Amendment rights are affected in some lesser way, we apply intermediate scrutiny.[130]

This determination is based upon the proximity of the law to the core of the right and on how severely the right is burdened.[131]

According to the Court of Appeals for the D.C. Circuit, if intermediate scrutiny is needed, the regulation must be "substantially related to an important governmental objective."[132] This means that "the District must establish a tight 'fit' between the registration requirements and an important or substantial governmental interest, a fit 'that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'"[133] The D.C. Circuit Court wrote that narrow tailoring is present if there is a substantial government interest that could not be promoted as effectively without the regulation, and as long as the means does not substantially exceed the breadth required to accomplish the interest.[134] The D.C. Circuit Court went on to state, "We ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny."[135] Even though many commentators state that the two-prong test has been almost universally adopted, less than half of the cases actually decided have referenced

126. Ezell v. City of Chicago, 651 F.3d 684, 701 (7th Cir. 2011).
127. Young v. Hawaii, 992 F.3d 765, 784 (9th Cir. 2021) (en banc).
128. *Id.* at 783 (quoting Silvester v. Harris, 843 F.3d 816, 821 (9th Cir. 2016)).
129. *See Bruen*, 142 S. Ct. at 2133.
130. *Young*, 992 F.3d at 784 (quoting *Silvester*, 843 F.3d at 821).
131. *See Ezell*, 651 F.3d at 703.
132. Heller v. District of Columbia, 670 F.3d 1244, 1258 (D.C. Cir. 2011) (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)).
133. *Id.* (quoting Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).
134. *Id.*
135. *Id.* at 1252.

it.[136] However, many courts have established and applied the two-part analysis for Second Amendment rights since *Heller* but before *Bruen*.[137]

A succinct description of the process used by many courts was given by the Court of Appeals for the Third Circuit when it said,

> "[W]e ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." If it does not, the inquiry ends. If it does, we move on to the second step: "[W]e evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid."[138]

The two options for levels of scrutiny in this context are "narrowly tailored to achieve a compelling governmental interest" and "reasonably adapted to a substantial governmental interest."[139] The level of scrutiny "depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right."[140] "Increasingly, judges ha[d] latched onto intermediate scrutiny in Second Amendment cases. They ha[d] done so despite the current Court's jaundiced view of balancing tests in general, and intermediate scrutiny in particular."[141] Narrow tailoring is difficult for almost all gun regulations because overinclusive and underinclusive laws are almost a given with gun regulation.[142] No gun control law will make people perfectly safe.[143] Lower courts have suggested that even the exceptions in *Heller* would not pass any kind of heightened scrutiny due to their clear overbreadth.[144]

B. Application of Purpose Analysis to Tagging

To determine if tagging would pass the appropriate level of scrutiny, it is important to examine what any related legislation would involve. The first phase of tagging involves the application and use of QR codes in the firearms context.[145] A QR code would enable a police officer to immediately

136. *See* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 Duke L.J. 1433, 1490 (2018).

137. *See, e.g.*, Kolbe v. Hogan, 849 F.3d 114, 132–33 (4th Cir. 2017) (citing United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010) (collecting cases from the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuit Courts of Appeals)).

138. United States v. One (1) Palmetto State Armory PA-15 Machinegun, 822 F.3d 136, 141 (3d Cir. 2016) (second alteration in original) (quoting United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010)).

139. *Kolbe*, 849 F.3d at 133 (citations omitted).

140. *Id.* (quoting United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010)).

141. Miller, *supra* note 110, at 867–68.

142. *See* Winkler, *supra* note 27, at 731.

143. *Id.*

144. *See, e.g.*, United States v. Booker, 570 F. Supp. 2d 161, 163–64 (D. Me. 2008).

145. Quick Response (QR) codes are "a type of barcode easily readable with digital devices like smartphones. They store information as a series of pixels in a square grid that can be read in two directions—top to bottom and right to left—unlike standard barcodes that can only be read top to bottom." *See* Ennica Jacob, *What Is a QR Code? A Guide to the Barcode's Basics, Why You're Seeing It Everywhere, and How to Scan One*, Bus. Insider (May 3, 2021, 11:37 AM), https://www.businessinsider.com/what-is-a-qr-code [https://perma.cc/LW2B-V8TU].

know the details of any firearm he or she encounters. The type of information that could be immediately available is who owns the gun, whether it has been stolen, and if it is registered to the individual in possession.

The second phase of tagging involves the use of a device similar to a passive RFID-type tag.[146] In this phase, the firearm would be equipped with a passive radio frequency identifier that could be undetectable from the gun user's perspective. This type of device can be powered by external readers that are within limited ranges (from one to two thousand feet) and allow the transmitter to have no internal power supply.[147] That kind of tag would allow identification of any firearm within range. The readers could be supplied to law enforcement to give early warnings of firearms in the vicinity and, possibly more importantly, could be installed in sensitive locations like school entranceways. This capability would allow people at the most risk to have an early warning of possible dangerous situations, thereby protecting law enforcement and other innocent citizens. In addition, if guns were tagged in this manner, people considering violent actions would be discouraged from using firearms due to their awareness that they would be warning people of their dangerous potential earlier than the perpetrators could cause actual harm. Lastly, this would decrease the desirability of stealing firearms because a reader could identify the gun and potentially that it is a stolen weapon. Therefore, guns would be stolen less frequently and used in violent crimes considerably less frequently, and police officers would be much safer with the possibility of being surprised by a gun being eliminated or at least reduced. This is vitally important when one considers the fact that most police officers killed while on duty are killed by firearms.[148]

The third phase of tagging would take place via the use of a GPS tracker. A GPS tracker would be able to send location information without the use of a specialized reading device.[149] This would significantly cut down on the crimes committed by firearms because a potential criminal would know that they would be apprehended very quickly and their criminal endeavor would be significantly less likely to succeed if they used a firearm. One possibility with this type of device would be that it would send location and activity information to law enforcement when fired. The sound of the gun going off could trigger the GPS to send a signal to law enforcement, speeding up any law enforcement response if necessary. This reduced response time would significantly cut down the deaths associated with firearms. One study found that in 2015, there were over thirty-six thousand gun-related fatalities: roughly twenty thousand suicides, thirteen thousand homicides,

146. "Radio Frequency Identification (RFID), is a technology that is similar in theory to barcode identification. It is a wireless non-contact use of radio frequency electromagnetic fields to transfer data, for the purpose of automatically identifying and tracking tags attached to objects." *See Radio Frequency Identification (RFID)*, ABR, https://www.abr.com/rfid [https://perma.cc/FFF7-MMMF].

147. *See id.*

148. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2166 (2022) (Breyer, J., dissenting).

149. *See TriGGR GPS Weapons Tracker*, Glob. AVL, https://www.globalavl.com/gps-trackers/asset-trackers/701-triggr-gps-weapons tracker.html [https://perma.cc/D35D-YUB6].

and five hundred accidents.[150] How many of those people could have been saved if help was on the way immediately after the gun went off? This particular phase of tagging is still out of reach technologically. The main problems deal with power supply and the size of the tagging mechanism, but both of these problems are being addressed, and the feasibility may not be that far off.[151]

Furthermore, the use of tagging would assist law enforcement even if criminal behavior attempted to subvert the technology. It is possible that the tagging device could be removed or disabled or in fact many guns initially would not have it installed. However, a law enforcement officer would be immediately notified and able to respond more appropriately at the first identification of any firearm since the officer would already know if the tag had alerted him/her to the presence of a firearm. This early warning and increased ability to deal with individuals who want to illegally conceal their firearms could save numerous lives.

The use of gun tagging is entirely compatible with the severe limitations on gun regulations imposed by *Bruen* because the Court stated that if "the regulated conduct falls beyond the Amendment's original scope . . . 'the regulated activity is categorically unprotected.'"[152] This "scope" is the right to keep and bear arms for self-defense.[153] Gun tagging will not stop or even delay a single person from keeping or bearing arms for self-defense and therefore is within the scope of the Second Amendment. If in the future this scope is redefined and a historical analysis using how and why (i.e., means and ends) is implemented, or if the membership of the Court changes and *Bruen* is overturned, tagging will also pass intermediate scrutiny, and if necessary, strict scrutiny. As the Court of Appeals for the Seventh Circuit has described, if there is a severe burden to the Second Amendment's core of self-defense, then there would need to be a very strong public-interest justification and a close fit to the government's means to impose it; restrictions farther away from the core or of a modest nature are "more easily justified."[154]

Even under *Bruen*, laws in place around the time of the adoption of the Second Amendment can be used to show that a current law is constitutional.[155] However, legal regulations of firearms do not have to be exact replicas of historical regulations.[156] The current majority of the Court pointed out

150. *Bruen*, 142 S.Ct. at 2164 (Breyer, J., dissenting) (citing Michael Siegel, Ziming Xuan, Craig Ross, Sandro Galea, Bindu Kalesan, Eric Fleegler & Kristin Goss, *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923 (2017)).

151. *See* David Shamah, *World's Smallest GPS Chip Makes Wearables More Wearable*, Times of Isr. (Sept. 5, 2014, 1:39 PM), https://www.timesofisrael.com/worlds-smallest-gps-chip-makes-wearables-more-wearable [https://perma.cc/2VXQ-4B3G].

152. *Bruen*, 142 S. Ct., at 2126 (2022) (quoting United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012)).

153. *Id.*

154. *See* Ezell v. City of Chicago, 651 F.3d 684, 707–08 (7th Cir. 2001).

155. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1540–41 (2020) (Alito, J., dissenting).

156. Blocher & Miller, *supra* note 6, at 286.

that the list of "'presumptively lawful regulatory measures' was illustrative, not exhaustive."[157] For example, courts upheld—due to minimal impact on the core right even though serial numbers did not exist at the time of the founding—that there is no right to possess a gun with an obliterated serial number.[158] Tracing a weapon via serial number serves a law enforcement interest,[159] but serial numbers seem to have emerged only with the advent of the mass production of firearms.[160] The Court of Appeals for the Third Circuit found that the core right of defending one's hearth and home is not impacted by the requirement that a gun have a serial number.[161] "[U]nmarked firearms are functionally no different from marked firearms."[162]

If a law "restricts possession only of weapons which have been made less susceptible to tracing . . . . [then] [b]ecause it does not limit the possession of any otherwise lawful firearm, it does not burden more possession than necessary to protect the interest in serial number tracing."[163] If a gun is equally useful as a firearm with or without a serial number, that would indicate that a law-abiding citizen should have no preference and only people wanting a weapon for illicit purposes would value an unmarked gun.[164] When speaking about serial numbers, a Court of Appeals said that "[i]t would make little sense to categorically protect a class of weapons bearing a certain characteristic when, at the time of ratification, citizens had no concept of that characteristic or how it fit within the right to bear arms."[165] Like tagging, serial numbers did not exist when the Second Amendment was adopted, and also, like with serial numbers, there is effectively no impact on the core use of self-defense in using a tagged gun, just as there is no impact from a gun with a serial number.

Tagging would pass other levels of scrutiny as well. Illustrative of another type of regulation that has received more scrutiny than serial numbers are registration laws.[166] Registration requirements have been challenged in several settings, with various levels of success.[167] Some have argued that not only are assault weapon bans unconstitutional but so are registration requirements.[168] However, at least one court concluded that there is a distinction between a registration requirement and something that is overly burdensome on the right of a person to lawfully acquire and keep a

157. *Ezell*, 651 F.3d at 701 (quoting District of Columbia v. Heller, 554 U.S. 570, 627 n.26 (2008)) (citing McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (repeating *Heller*'s "assurances" about exceptions)).
158. United States v. Marzzarella, 614 F.3d 85, 87 (3d Cir. 2010).
159. *Id.* at 98.
160. *Id.* at 93 n.11 (citing Thomas Henshaw, The History of Winchester Firearms 1866–1992, at ix (6th ed. 1993)).
161. *See id.* at 87–88.
162. *Id.* at 94.
163. *Id.* at 100.
164. *Id.* at 95.
165. *Id.* at 94.
166. *See* Blocher, *supra* note 16, at 400.
167. *See, e.g.*, Justice v. Town of Cicero, 827 F. Supp. 2d 835, 844 (N.D. Ill. 2011).
168. Blocher, *supra* note 16, at 400.

firearm.[169] A committee that was studying a D.C. regulation and that was cited by the Court of Appeals for the D.C. Circuit stated: "Registration is critical because it . . . allows officers to determine in advance whether individuals involved in a call may have firearms . . . [and] assists law enforcement in determining whether registered owners are eligible to possess firearms or have fallen into a prohibited class."[170] The D.C. Circuit Court said, "We uphold the requirement of mere registration because it is longstanding, hence 'presumptively lawful' . . . ."[171] Furthermore, courts have explained that the registrant's address is obtained at registration time so that first responders know whether there is a gun in the house.[172]

The D.C. Circuit Court also stated, "Indeed, basic registration requirements are self-evidently de minimis, for they are similar to other common registration or licensing schemes, such as those for voting or for driving a car, that cannot reasonably be considered onerous."[173] However, other judges (and now a Justice) viewed registration differently; then-Judge Kavanaugh wrote in dissent, "The fundamental problem with D.C.'s gun registration law is that registration of lawfully possessed guns is not 'longstanding.' Registration of all guns lawfully possessed by citizens in the relevant jurisdiction has not been traditionally required in the United States and, indeed, remains highly unusual today."[174] Judge Kavanaugh stated that there has never been a complete federal gun registration system.[175] Furthermore, he explained, "Registration requirements, by contrast, require registration of individual guns and do not meaningfully serve the purpose of ensuring that owners know how to operate guns safely in the way certain licensing requirements can. For that reason, registration requirements are often seen as half-a-loaf measures aimed at deterring gun ownership."[176] However, as the *McDonald* dissent said, "Even accepting the *Heller* Court's view that the Amendment protects an individual right to keep and bear arms disconnected from militia service, it remains undeniable that 'the purpose for which the right was codified' was 'to prevent elimination of the militia.'"[177] Much like registration laws, historically (at the time of the founding) some of the most intrusive arms regulations were militia laws that required detailed records of who had guns.[178] As pointed out above, there were very few federal laws applying to individuals at the time of the adoption of the Second Amendment, and all historical analogies would have

169. *See Justice*, 827 F. Supp. 2d at 844.
170. Heller v. District of Columbia, 670 F.3d 1244, 1258 (D.C. Cir. 2011) (alterations in original).
171. *Id.* at 1253.
172. *See, e.g.*, Second Amend. Arms v. City of Chicago, 135 F. Supp. 3d 743, 768 (N.D. Ill. 2015).
173. *Heller*, 670 F.3d at 1254–55.
174. *Id.* at 1291 (Kavanaugh, J., dissenting).
175. *Id.* at 1292.
176. *Id.* at 1291.
177. McDonald v. City of Chicago, 561 U.S. 742, 896–97 (2010) (Stevens, J., dissenting) (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008)).
178. Winkler, *supra* note 27, at 709.

to be based on state and local regulations.[179] In that context, Justice Kavanaugh is mistaken when he says there were no longstanding registration requirements. Not only were guns required to be registered, there were door-to-door inspections,[180] far surpassing anything proposed today.

In his lower-court dissent in *Heller II*, then-Judge Kavanaugh seemed to support the idea that no new types of gun regulation are acceptable when he stated, "Registration of all lawfully possessed guns—as distinct from licensing of gun owners or mandatory record-keeping by gun sellers—has not traditionally been required in the United States and even today remains highly unusual."[181] He seemed dismissive when accusing that court's majority of engaging in cost-benefit analysis, an option the Supreme Court had rejected in the name of using history and tradition.[182] Then-Judge Kavanaugh disagreed with the possibility of registration regulations even though various registration requirements had been in effect for over a century[183] and some laws dealing with regulating firearms predate the Constitution.[184]

The idea that there needed to be historical precedent for a specific gun regulation to be constitutional is a stretch. If that were taken literally, it would invalidate congressional gun regulations on airplanes since they did not exist until 1961.[185] Strict adherence to this is problematic. A laser has clearly never been traditionally banned, but does that mean if one became available on the market that can shoot through a building and kill people on the other side, it would be unconstitutional to ban its sale and possession? This seems to be an interpretation that will not find many adherents. Under this reading, the only possibility of banning the laser would be if Congress passed a law quickly enough before the laser became popular (because, according to then-Judge Kavanaugh, the *Heller* Court struck down the regulation there under the reasoning that "handguns had not traditionally been banned and were in common use"[186]).

Machine guns themselves were not traditionally banned when the Second Amendment was adopted, and in the 1920s they were becoming increasingly popular—are we to believe that society barely dodged the bullet (pun intended) of being unable to regulate them? Then-Judge Kavanaugh couches some of his statements by acknowledging that for

> new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed, there obviously will not be a history or tradition of banning such weapons or imposing such regulations. That does not mean the Second Amendment does not apply to those weapons or in those circumstances. Nor does it mean that the government is powerless to

179. *See supra* Part II.
180. *See* GUNFIGHT, *supra* note 8, at 113.
181. *Heller*, 670 F.3d at 1270 (Kavanaugh, J., dissenting).
182. *See id.* at 1279–80.
183. *See* Justice v. Town of Cicero, 827 F. Supp. 2d 835, 842–44 (N.D. Ill. 2011) (citation omitted).
184. *See* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 84 (2d Cir. 2012).
185. *See* Miller, *supra* note 13, at 86.
186. *Heller*, 670 F.3d at 1273 (Kavanaugh, J., dissenting).

> address those new weapons or modern circumstances. Rather, in such cases, the proper interpretive approach is to reason by analogy from history and tradition.[187]

Then-Judge Kavanaugh refers to the possibility that one way for a new regulation to be constitutional would be for it to be a lineal descendant of historical restrictions.[188] This approach is very similar to the language Chief Justice Roberts had used about the possibility of lineal descendants of restrictions being potentially constitutional.[189] However, the lineal descendant approach is troubling. There were basically no federal laws dealing with firearms at the time of the founding, so lineal descendants would have to be taken from state and possibly local laws. Yet, as the dissent in *McDonald* highlighted, "From the early days of the Republic, through the Reconstruction era, to the present day, States and municipalities have placed extensive licensing requirements on firearm acquisition, restricted the public carriage of weapons, and banned altogether the possession of especially dangerous weapons, including handguns."[190] Looking back at both the Founding Era and the early Republic, there is vast evidence for extensive regulation.[191] There were a lot of gun regulations when the Second Amendment was adopted, and most of them were at the state level.[192] There was such a broad spectrum of laws ranging from forced carrying of a firearm to church, to no firearms or ammunition inside city buildings, that it seems any law could make a claim to being a descendant.[193] Using state and local laws as acceptable historical precedent would not be in line with Supreme Court decisions that have struck down gun regulations.

Justice Kavanaugh may also not be as bound to only allowing historical restrictions as some of his previous positions may indicate since he repeatedly pointed out that as a judge on the "lower court," he had no choice but to apply the Supreme Court's decision in *Heller*, possibly leaving open the door to changing the law now that he is on the Supreme Court.[194] In slightly different ways, he said multiple times that the task of a lower court was "to apply the Constitution and the precedents of the Supreme Court, regardless of whether the result is one we agree with as a matter of first principles or policy."[195] Now that Justice Kavanaugh is on the Court, he is endorsing regulations lacking the strong connection to history he

187. *Id.* at 1275.
188. *See id.*
189. "[W]e are talking about lineal descendants of the arms but presumably there are lineal descendants of the restrictions as well." Kanter v. Barr, 919 F.3d 437, 465 (7th Cir. 2019) (Barrett, J., dissenting) (alteration in original) (quoting Transcript of Oral Argument at 77, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290) (statement by Chief Justice Roberts)).
190. McDonald v. City of Chicago, 561 U.S. 742, 899–900 (2010) (Stevens, J., dissenting) (citing *Heller*, 554 U.S. at 683–87 (Breyer, J., dissenting)).
191. *See* Cornell & DeDino, *supra* note 67, at 505.
192. *Id.* at 502–03.
193. *See supra* Part II.
194. Heller v. District of Columbia, 670 F.3d 1244, 1285 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).
195. *Id.* at 1296 (stating that he was obligated to follow *Heller*).

previously seemed to require; for example, he supports the requirement for fingerprinting that did not exist in the 1700s.[196] In his *Bruen* concurrence, Justice Kavanaugh moderated some of the positions towards which he was leaning as an appellate judge.[197]

Although seemingly in the opposite direction, Justice Barrett also does not appear to agree with the automatic legitimacy of historical restrictions. While a sitting circuit judge, she stated that dicta does not settle legal cases, potentially maintaining the possibility to rule that even long-established regulations are unconstitutional.[198] According to Justice Barrett, even a felon dispossession statute of the type that has been around for centuries targets the whole right since it restricts a felon in his home from having a gun for self-protection and is hence possibly unconstitutional.[199] However, her concurrence in *Bruen* did not make this claim, and the other Justices in the majority reiterated that those types of regulations are presumptively constitutional.[200]

Setting aside the new Justices' positions on historical requirements, it is worth examining the viability of tagging under the different levels of scrutiny (or under a how-and-why analysis endorsed by the majority as part of its historical analysis) that may be applied if the practice cannot be considered outside the scope of the Second Amendment. At least one court has already determined that there is not a Second Amendment right to have an unmarked firearm in the home.[201] There is only a small step between a marked firearm and a tagged firearm. Since a rational-basis test is almost certainly not going to be applied in most Second Amendment scenarios,[202] it is more important to focus on the alternatives. The two most likely options for levels of scrutiny are "narrowly tailored to achieve a compelling governmental interest" and "reasonably adapted to a substantial governmental interest."[203] Many scholars and courts have recognized that almost any regulation will impose some level of burden, but the governmental interest is often manifestly paramount.[204] The first question is whether tagging can serve a "substantial" or even the more difficult "compelling" governmental interest.[205]

As explained above, tagging guns will protect police officers, help to prevent crime, and increase public safety. All of these goals have been described as critical in numerous cases. There is no doubt that protecting police officers and aiding in crime control are significant governmental

196. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162 (2022) (Kavanaugh, J., concurring).
197. *See id.*
198. *See* Kanter v. Barr, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting).
199. *See id.* at 465.
200. *See Bruen*, 142 S. Ct. at 2162–64 (Barrett, J., concurring).
201. United States v. Marzzarella, 614 F.3d 85, 95 (3d Cir. 2010).
202. *See id.* at 95–96.
203. Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017) (citations omitted).
204. *See, e.g.*, Winkler, *supra* note 27, at 718 (citing Mosher v. City of Dayton, 358 N.E.2d 540, 543 (Ohio 1976)).
205. *See id.* at 731.

interests.[206] Additionally, promoting public safety and preventing gun violence have been declared important governmental interests.[207] Courts have repeatedly held that public safety is a key governmental interest and reducing "gun-related injury and death" furthers public safety.[208] Even beyond a merely important interest, courts have held over and over that public safety is not only a substantial but, in fact, a compelling government interest.[209] In addition to public safety, crime prevention has also been defined as not only a substantial governmental interest but, in fact, a compelling one.[210] Not only has this principle been followed by multiple lower courts, but the Supreme Court has explicitly held that preventing crime is a compelling governmental interest.[211] In fact, courts have acknowledged that providing safety for its citizens is the government's most basic task.[212]

Given the clear purpose of the tagging scheme, the remaining question is one of fit. It is clearly "reasonably adapted" given that it achieves the goals described above. It is also "narrowly tailored," as evidenced by the fact that it will further the significant goals desired while at the same time not hamper the defense of self or of property. Justice Brandeis, writing for the Court in 1920, relatedly elaborated on how new innovations or inventions can fit into existing constitutional settings. In *Ex parte Peterson*, he explained that a judge could refer questions to an "auditor" to sharpen the factual issues for the jury, even though no identical practice existed in 1791.[213] He stated that "[n]ew devices may be used to adapt the ancient institution to present needs . . . . Indeed, such changes are essential to the preservation of the right."[214] The same thing could be said today, in relation to tagging and the right to bear arms. A gun tag is a new device that can be adapted to the ancient institution and preserve the right to defend while reducing the danger to society.

In asking about the burden placed on the right, courts have asked questions such as whether there is "anyone in the City who will be unable to purchase a firearm [that could have previously legally done so] because of this restriction?"[215] In a tagging jurisdiction, the answer to this telling question is absolutely not. In fact, jurisdictions could make it easier to buy and keep firearms after implementing this proposal. Depending upon the political climate of the region, legislation could be adopted to subsidize new gun purchases or offer rebates for retrofitting existing guns, which would speed up the percentage of firearms with the tagging in place. This is the opposite of cases we have seen where the regulations seem like veiled

206. *See* Heller v. District of Columbia, 670 F.3d 1244, 1262 (D.C. Cir. 2011).
207. *See* Kwong v. Bloomberg, 723 F.3d 160, 168–69 (2d Cir. 2013).
208. *See, e.g.*, Bauer v. Becerra, 858 F.3d 1216, 1223 (9th Cir. 2017) (citation omitted).
209. *See, e.g.*, Second Amend. Arms v. City of Chicago, 135 F. Supp. 3d 743, 756–57 (N.D. Ill. 2015) (collecting sources).
210. *Kwong*, 723 F.3d at 168.
211. United States v. Salerno, 481 U.S. 739, 748 (1987).
212. *See, e.g.*, Kolbe v. Hogan, 849 F.3d 114, 150 (4th Cir. 2017) (Wilkinson, J., concurring).
213. *See Ex parte* Peterson, 253 U.S. 300, 309–10 (1920).
214. *Id.*
215. *E.g.*, Second Amend. Arms v. City of Chicago, 135 F. Supp. 3d 743, 754 (N.D. Ill. 2015).

attempts to ban guns, like the Chicago ordinance that required range training.[216] In that case, the claim was "that the range ban impermissibly burdens the core Second Amendment right to possess firearms at home for protection because the Ordinance conditions lawful possession on range training but makes it impossible to satisfy this condition anywhere in the city."[217] These types of regulations do little other than fuel the position of some gun enthusiasts that any gun regulation has an ultimate goal of removing all guns and making the United States more like Great Britain.[218] Rather than pursuing impossible goals and achieving nothing, legislatures should pass statutes requiring that firearms be tagged. Tagging is consistent with the purpose and history of the Second Amendment and would pass any level of scrutiny whether one calls it a balancing test or a historical analysis using the key metrics of how and why.

IV. CONCLUSION

The majority decision in the recently decided *Bruen* case is both logically and historically flawed. However, until the makeup of the majority of the Supreme Court is changed and that decision can be overruled, some of the rationale from that decision can still be built upon to implement legislation that will increase safety. The generally recognized purpose of the Second Amendment is self-defense. In all three of the recent gun control Supreme Court decisions, the majority has stressed this idea and how the Court was striking down legislation because the regulations in question (among other historical reasons) defeated this self-defense purpose. In line with this purpose of the Second Amendment, a mechanism of tagging firearms first with simple QR codes, then with RFID technology, and ultimately with GPS technology should be implemented. This proposal would have little effect on the ability of someone to protect themselves, but would dramatically improve the maintenance of a safe community.

216. *See* Ezell v. City of Chicago, 651 F.3d 684, 691 (7th Cir. 2001).
217. *Id.* at 698.
218. *See* Winkler, *supra* note 27, at 701.