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## BRUEN'S RICOCHET: WHY SCORED LIVE-FIRE REQUIREMENTS VIOLATE THE SECOND AMENDMENT

### INTRODUCTION

City of Boston residents who wish to carry a handgun for self-defense must apply for a License to Carry Firearms (LTC) with the Boston Police Department.<sup>1</sup> The application process includes numerous steps, such as completing a license application, consenting to an interview with a Firearms Licensing Official, successfully completing a criminal background check, and furnishing a “Firearm Safety Certificate or Hunting Safety Course Certificate issued by the Commonwealth of Massachusetts.”<sup>2</sup> But the City’s LTC guidelines also state that applicants must pass a shooting qualification test (Qualification Test) “at the Boston Police Department Firearms Range at Moon Island within two weeks of the date of the application.”<sup>3</sup> To pass the Qualification Test, applicants must (1) “show the safe handling of, and familiarity with, a .38 caliber, 4-inch barrel revolver” and (2) complete a scored live-fire test.<sup>4</sup>

Conditioning a handgun carry license on a scored live-fire exercise violates the Second Amendment right to keep and bear arms.<sup>5</sup> In the

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<sup>1</sup> *Owning a Firearm in Boston*, CITY OF BOS. (July 19, 2021), <https://www.boston.gov/owning-firearm-boston> [<https://perma.cc/KQG2-543E>]. The Boston Police Commissioner serves as the local licensing authority for the City of Boston. *Id.*

<sup>2</sup> *Id.*; *License to Carry Firearms (LTC) Application Guidelines*, BOS. POLICE DEP’T [hereinafter *LTC Application Guidelines*], [https://www.boston.gov/sites/default/files/file/document\\_files/2017/07/license-to-carry-firearms-guidelines.pdf](https://www.boston.gov/sites/default/files/file/document_files/2017/07/license-to-carry-firearms-guidelines.pdf) [<https://perma.cc/2CM3-JFMX>].

<sup>3</sup> *LTC Application Guidelines*, *supra* note 2.

<sup>4</sup> *Owning a Firearm in Boston*, *supra* note 1; *see also Staying Legal*, BOS. POLICE DEP’T, <https://bpdnews.com/staying-legal> [<https://perma.cc/5JCV-328M>]; Matthew Medsger, Joe Dwinell & Flint McColgan, *Police Chiefs in Massachusetts Hold “Power” When It Comes to Gun Licenses*, BOS. HERALD (June 4, 2022, 4:44 PM), <https://www.bostonherald.com/2022/06/04/police-chiefs-in-massachusetts-hold-power-when-it-comes-to-gun-licenses> [<https://perma.cc/73CG-V4QA>] (mentioning Boston’s scored live-fire test); *Boston/Brookline Moon Island Practice Test*, MASS FIREARMS SCH., <http://www.massfirearmsschool.com/class/boston-brookline-moon-island-practice-test> [<https://perma.cc/2G7U-DUCA>]. The City of Boston has not published an online version of the Qualification Test’s instructions and procedures for prospective applicants. But many local firearms schools, when advertising their respective training course offerings, have provided more details about the Qualification Test. *See id.*; *Boston Moon Island Practice Qualification (BMIPQ)*, SALOMON FIREARMS TRAINING, <https://salomonfirearms.com/product/boston-moon-island-practice-qualification> [<https://perma.cc/K6FA-HKBD>] (stating that the City of Boston Qualification Test “is outdoors, and consists of firing a total of 30 rounds with a 4-inch .38 special revolver, at a distance of 7 & 15 yards. . . . You need a minimum score of 210 points [out of 300] to pass (70%)”); *see also* Brief for Appellee at 11, *MacNutt v. Police Comm’r of Bos.*, 572 N.E.2d 577 (Mass. App. Ct. 1991) (No. 89-P-276) (describing the Qualification Test).

<sup>5</sup> This Note uses the City of Boston’s LTC licensing regime illustratively. The Note’s arguments apply to any licensing regime that requires — or contemplates requiring — scored live fire as a condition for a handgun carry permit. For example, the Massachusetts City of Brookline also imposes a scored live-fire requirement for LTC applicants. *See Boston Moon Island Practice*

wake of *New York State Rifle & Pistol Ass'n v. Bruen*,<sup>6</sup> municipalities that wish to preserve sensible firearm regulation should understand the constitutional limits of licensure requirements — promoting public safety and upholding Second Amendment rights need not be mutually exclusive.

Part I analyzes the statutory scheme for carrying firearms in the Commonwealth of Massachusetts and describes the Qualification Test. Part II outlines the constitutional framework for Second Amendment cases, chronicling the evolution from a “reasonable regulation” standard<sup>7</sup> to the post-*Bruen* state of play. Part III applies that framework to the Qualification Test, concluding that mandatory scored live-fire exercises violate the Second Amendment, and briefly discusses legal remedies.

## I. CARRYING HANDGUNS IN MASSACHUSETTS

This Part explores the statutory scheme for carrying handguns in the Commonwealth of Massachusetts and discusses how the City of Boston has chosen to augment state requirements for an LTC by implementing the Qualification Test.

### A. *Statutory Requirements and Delegation to Local Licensing Authorities*

In Massachusetts,<sup>8</sup> any person seeking to possess a non-large capacity<sup>9</sup> rifle or shotgun must apply for a “firearm identification card”<sup>10</sup> (FID) with a local licensing authority.<sup>11</sup> The licensing authority “shall issue [the FID],” unless “it appears that the applicant is a prohibited person.”<sup>12</sup>

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*Qualification (BMIPQ)*, *supra* note 4 (describing shooting tests). In Illinois, all applicants for a Concealed Carry License “must pass a live fire exercise with a concealable firearm.” *Frequently Asked Questions*, ILL. STATE POLICE, <https://www.ispfsb.com/Public/Faq.aspx> [<https://perma.cc/2LB6-ZEG2>].

<sup>6</sup> 142 S. Ct. 2111 (2022).

<sup>7</sup> See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 716–19 (2007).

<sup>8</sup> See generally MASS. GEN. LAWS ch. 140, §§ 121–131Y (2022).

<sup>9</sup> A large capacity weapon includes “any firearm, rifle or shotgun . . . capable of accepting more than ten rounds of ammunition in a rifle or firearm and more than five shotgun shells in the case of a shotgun.” *Id.* § 121.

<sup>10</sup> *Id.* § 129B(1).

<sup>11</sup> *Id.* The statute defines “licensing authorities” as “the boards in Boston and other cities which by special statutes or city charters have the power to issue licenses.” *Id.* § 1. In the context of firearms licensure, local police commissioners generally serve as the licensing authorities. See Medsger et al., *supra* note 4.

<sup>12</sup> MASS. GEN. LAWS ch. 140, § 129B(1). For example, the statute classifies anyone convicted of a felony, “misdemeanor punishable by imprisonment for more than 2 years,” violent crime, firearms-related offense, certain drug offenses, or misdemeanor domestic violence as a “prohibited person.” *Id.* § 129B(1)(i).

Conversely, a License to Carry Firearms (LTC) entitles its holder “to purchase, rent, lease, borrow, possess and carry” *handguns*, rifles, and shotguns.<sup>13</sup> Either the colonel of state police or a licensing authority can issue an LTC.<sup>14</sup> As with an FID, the statute bans “prohibited person[s]” from obtaining an LTC.<sup>15</sup> Yet, unlike how it treats FIDs, which a local licensing authority “shall issue” but for the “prohibited person” exception, the statute, until most recently, afforded local licensing authorities broad discretion in approving LTC applications.<sup>16</sup> In this sense, Massachusetts was long a “may-issue” state for handgun licensure because it required showing “good reason” for an LTC.<sup>17</sup> After the *Bruen* decision, Governor Baker signed into law Massachusetts House Bill 5163,<sup>18</sup> which amended chapter 140, section 131(d) of the Massachusetts General Laws and made Massachusetts, at least facially, a shall-issue jurisdiction.<sup>19</sup>

### B. City of Boston LTC Requirements

The Boston Police Commissioner serves as the licensing authority charged with issuing LTCs to Boston residents.<sup>20</sup> The Commissioner historically possessed broad discretion, prior to the recent amendment to chapter 140, section 131(d) of the Massachusetts General Laws, when reviewing LTC applications.<sup>21</sup> Apart from submitting to an interview with a Firearms Licensing Official and successfully completing a criminal background check, an LTC applicant must “[p]ass a shooting test at

<sup>13</sup> *Id.* § 131(a).

<sup>14</sup> *Id.* § 131(d). In practice, an applicant generally must apply for an LTC at a local police department. See Medsger et al., *supra* note 4 (observing that Massachusetts gun laws “begin and end with the local [police] chief”).

<sup>15</sup> MASS. GEN. LAWS ch. 140, § 131(d). The definitional scope of “prohibited person” varies between the FID and LTC contexts. See *id.* For example, in addition to the FID “prohibited person” classifications described in section 129B, applicants younger than twenty-one years of age are “prohibited persons” for LTC licensure. See *id.*

<sup>16</sup> See *id.* (stating that licensing authorities or the colonel of state police “may issue” an LTC if the applicant “has good reason to fear injury to the applicant or the applicant’s property or for any other reason,” subject to restrictions (emphasis added)).

<sup>17</sup> See *id.*; Ryan Curry, Note, *An Evolving Right: The Shifting Core of the Second Amendment and Its Effect on Public-Carry*, 55 TULSA L. REV. 131, 132–33 (2019) (asserting that shall-issue states grant “public-carry permits [for handguns] . . . so long as certain baseline requirements are satisfied,” *id.* at 132, but may-issue states “often restrict[] public-carry to those applicants who demonstrate some specific, enhanced need for self-defense,” *id.* at 133).

<sup>18</sup> H.B. 5163, 192d Gen. Court, 2021–2022 Sess. (Mass. 2022).

<sup>19</sup> See Shira Schoenberg, *Here’s What Baker Signed, Amended, and Vetoed*, COMMONWEALTH (Aug. 10, 2022), <https://commonwealthmagazine.org/state-government/heres-what-baker-signed-amended-and-vetoed/> [https://perma.cc/N96N-LW7S]; H.B. 5163, 192d Gen. Court, 2021–2022 Sess. (Mass. 2022) (amending § 131(d) by removing the earlier “good reason” language and stating that the licensing authority or colonel of state police “shall issue” an LTC to any applicant who is not a “prohibited person” or “unsuitable to be issued a license” under the statute).

<sup>20</sup> *Owning a Firearm in Boston*, *supra* note 1.

<sup>21</sup> See § 131(d) (stating that licensing authorities “may issue” a license to carry firearms).

the Boston Police Department Range<sup>22</sup> within two weeks of applying for licensure.<sup>23</sup>

The Boston Police Department Range is located at Moon Island,<sup>24</sup> a Boston Harbor island “located on a peninsula off Quincy’s Squantum section”<sup>25</sup> about nine miles from Boston Police Headquarters. The location has operated as a training facility for firefighters since 1959 and for police since 1960.<sup>26</sup> Boston LTC applicants must appear at Moon Island and demonstrate “safe handling of, and familiarity with, a .38 caliber, 4-inch barrel revolver.”<sup>27</sup> Though nowhere described on the City of Boston website or the Boston Police LTC application materials, the Moon Island test involves much more than displaying safe firearm handling. In reality, applicants must shoot thirty rounds, at distances of seven and fifteen yards, and receive a minimum of 210 points out of 300 on a scored target.<sup>28</sup>

## II. CONSTITUTIONAL FRAMEWORK

This Part examines the current constitutional framework for Second Amendment cases, chronicling the evolution from a highly deferential standard to the current focus on the Second Amendment’s plain text and “historical tradition.”<sup>29</sup> Tracing these doctrinal developments will underscore how drastically *Bruen* altered the constitutional paradigm for assessing firearm regulations like the Qualification Test.

<sup>22</sup> *Boston Police Department Firearms License Application Process*, BOS. POLICE DEP’T, [https://www.boston.gov/sites/default/files/embed/b/bpd\\_firearms\\_license\\_application\\_process.pdf](https://www.boston.gov/sites/default/files/embed/b/bpd_firearms_license_application_process.pdf) [https://perma.cc/J4A9-5HDK].

<sup>23</sup> *LTC Application Guidelines*, *supra* note 2.

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

<sup>25</sup> *Boston Police Officer Grazed by Bullet at Moon Island Firing Range, Sent to Hospital*, WCVB (May 26, 2022, 1:05 PM), <https://www.wcvb.com/article/boston-police-officer-grazed-by-bullet-moon-island-firing-range/40117234#> [https://perma.cc/WH24-LLJN].

<sup>26</sup> *Moon Island*, NAT’L PARK SERV., <https://www.nps.gov/boha/learn/historyculture/facts-moon.htm> [https://perma.cc/3PZ8-R3FZ].

<sup>27</sup> *Owning a Firearm in Boston*, *supra* note 1.

<sup>28</sup> *Boston Moon Island Practice Qualification (BMIPQ)*, *supra* note 4. This test started in 1981. *See* MacNutt v. Police Comm’r of Bos., 572 N.E.2d 577, 578–79 (Mass. App. Ct. 1991). Twelve rounds must be fired from a distance of seven yards and the remaining eighteen rounds from a distance of fifteen yards. *See id.* at 578 n.2. Some rounds need to be fired “double action, with a one hand hold.” *Id.* at 579 n.2. Most modern revolvers can be fired either in single-action or double-action modes. In single-action mode, the shooter must “manually pull the hammer back” and then pull the trigger to fire the round. *Double-Action (DA)/Single-Action (SA)*, U.S. CONCEALED CARRY ASS’N, <https://www.usconcealedcarry.com/resources/terminology/types-of-firearms/double-action-single-action> [https://perma.cc/33DT-M6XF]. Alternatively, double-action firing means consecutive “shots may be fired by repeatedly pulling the trigger until all rounds have been fired.” *Id.*

<sup>29</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

A. *The “Reasonable Regulation Standard”*

Prior to *District of Columbia v. Heller*<sup>30</sup> and *McDonald v. City of Chicago*,<sup>31</sup> many judges presumed that the right to keep and bear arms existed “subject to reasonable restriction by the government.”<sup>32</sup> Courts therefore employed what some have called the “reasonable regulation standard,”<sup>33</sup> which resembled rational basis review, but with a smidgeon more bite.<sup>34</sup> Most firearm restrictions would survive this reasonableness review.

B. *An Individual Right that Applies to the States*

After *Heller* and *McDonald* settled that the Second Amendment conferred an individual right to bear arms applicable to the states,<sup>35</sup> circuit courts soon adopted a two-step framework for challenged gun control laws. In *United States v. Marzzarella*,<sup>36</sup> for example, the Third Circuit endorsed a “two-pronged approach to Second Amendment challenges.”<sup>37</sup> In the first step, the court would ask whether the challenged law burdens “conduct falling within the scope of the Second Amendment’s guarantee.”<sup>38</sup> If not, the inquiry ceased, and the challenged law was upheld.<sup>39</sup> But if so, the court would then deploy “some form of means-end scrutiny” to determine whether the law was constitutional.<sup>40</sup> The second step involved two steps of its own — the level of scrutiny depended on “(1) how close the law [came] to the core of the Second Amendment right, and (2) the severity of the law’s burden on the right.”<sup>41</sup> Thus, the “two-step approach” could actually involve four separate questions. This approach often led to applying intermediate

<sup>30</sup> 554 U.S. 570 (2008).

<sup>31</sup> 561 U.S. 742 (2010).

<sup>32</sup> *Nordyke v. King*, 319 F.3d 1185, 1192–93 (9th Cir. 2003) (Gould, J., concurring).

<sup>33</sup> Winkler, *supra* note 7, at 716.

<sup>34</sup> *Id.* at 717–18 (describing how courts “[went] through the formal motions of identifying the underlying governmental objectives” and individual burdens, but the “individual almost never [won]” under the reasonable regulation standard).

<sup>35</sup> *See Heller*, 554 U.S. 570 (holding that the Second Amendment confers an individual armed self-defense right); *McDonald*, 561 U.S. 742 (holding that the Second Amendment applies to the states through the Fourteenth Amendment’s Due Process Clause). These cases utilized a “text and history” approach to Second Amendment challenges. *See Heller*, 554 U.S. at 595.

<sup>36</sup> 614 F.3d 85 (3d Cir. 2010).

<sup>37</sup> *Id.* at 89.

<sup>38</sup> *Id.*

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

<sup>40</sup> *Id.*

<sup>41</sup> *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)).

scrutiny,<sup>42</sup> but it seemed highly susceptible to judicial caprice and untethered interest balancing.<sup>43</sup>

### C. Bruen and the End of Means-End Scrutiny

The Supreme Court recently revisited its Second Amendment jurisprudence in *New York State Rifle & Pistol Ass'n v. Bruen*.<sup>44</sup> In *Bruen*, two applicants for an unrestricted handgun carry license sued the superintendent of the New York State Police and a New York Supreme Court justice for violating their Second Amendment rights.<sup>45</sup> The licensing officers denied their applications for failure to show “proper cause” for an unrestricted handgun carry license, as required by state law.<sup>46</sup> Before reaching the merits, the Court declined to follow the two-step approach, holding that it was “one step too many.”<sup>47</sup> The second step of the inquiry, which required interest balancing and means-end scrutiny, was “inconsistent with *Heller*’s historical approach.”<sup>48</sup> The Court underscored that “the Constitution presumptively protects” individual conduct covered in “the Second Amendment’s plain text.”<sup>49</sup> For a gun control regulation to pass constitutional muster, the government must demonstrate that it “is consistent with the Nation’s historical tradition of firearm regulation.”<sup>50</sup> The Court then held that New York’s “proper-cause requirement” violated the right of “law-abiding citizens with ordinary self-defense needs” to keep and bear arms.<sup>51</sup>

*Bruen* changed the state of play for Second Amendment cases by (1) discontinuing the old two-step approach and (2) tasking the government with establishing that a gun control law comports with the historical understanding of firearm regulation. What specifically troubled the majority was the impermissible discretion that state licensing officers exercised when determining whether a *suitable* applicant for a general handgun license adequately showed a “special need” for unrestricted

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<sup>42</sup> *But see* *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020) (concluding that a California ban on large capacity magazines (LCMs) “severely burden[ed] the core of the” Second Amendment right, *id.* at 1143, so strict scrutiny applied, *id.* at 1159). Applying strict scrutiny, the panel held that California’s LCM ban could not survive. *Id.* at 1143. The Ninth Circuit en banc upheld the LCM ban. *See* *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (en banc).

<sup>43</sup> For discussion of whether lower courts may have underenforced the *Heller* and *McDonald* decisions, see George A. Mocsary, *A Close Reading of an Excellent Distant Reading of Heller in the Courts*, 68 *DUKE L.J. ONLINE* 41 (2018).

<sup>44</sup> 142 S. Ct. 2111 (2022).

<sup>45</sup> *Id.* at 2125.

<sup>46</sup> *Id.* at 2122–25. The applicants wished to carry their handguns in public for “general self-defense,” but the state placed restrictions on their handgun carry licenses, such as limiting public carry for “hunting and target shooting only” or during travel “to and from work.” *Id.* at 2125.

<sup>47</sup> *Id.* at 2126–27.

<sup>48</sup> *Id.* at 2129.

<sup>49</sup> *Id.* at 2126.

<sup>50</sup> *Id.* at 2129–30.

<sup>51</sup> *Id.* at 2156.

carry.<sup>52</sup> Thus, regulators could plausibly argue that *Bruen* addressed solely the unconstitutionality of restricting handgun carry licenses in a may-issue regime *after* an applicant has met other licensure requirements, like general suitability. Though discretion in assessing an enhanced need for an unrestricted handgun license is now unconstitutional, the government may posit that discretion in granting the license itself may not be.

This argument falls short. Admittedly, the New York gun law in question addressed a particularized set of facts — two licensees seeking to remove carry restrictions on their licenses.<sup>53</sup> But the Court emphasized that its decision applied not just to handgun carry restrictions like the ones at issue in this case.<sup>54</sup> “[T]he government must affirmatively prove that its *firearms regulation*” comports with historical tradition,<sup>55</sup> and the Court underscored that any individual conduct covered by the “Second Amendment’s plain text” — not solely restrictions on already-issued handgun carry licenses — deserves constitutional protection.<sup>56</sup> Thus, despite *Bruen*’s narrow facts, its holdings cast a wide net.

The majority’s discussion of analogical reasoning in applying the historical approach also merits attention. By changing the constitutional paradigm for Second Amendment cases from the two-step method<sup>57</sup> to an exclusively historical approach for conduct covered by the Second Amendment’s plain text, one could argue that the Court replaced the old two-step method’s circularity with a similarly unmoored and unquantifiable historical test. Namely, judges need a rubric to decide whether a firearm law was “unimaginable at the founding,”<sup>58</sup> and the Court did not supply it.

Justice Thomas, who delivered the Court’s opinion, acknowledged that any such historical inquiry “will often involve reasoning by analogy.”<sup>59</sup> But analogical reasoning can be tricky in a Second Amendment context because “[e]verything is similar in infinite ways to everything else.”<sup>60</sup> Disclaiming that it would not “provide an exhaustive survey”<sup>61</sup> of how to assess the relevant similarity between two regulations under the Second Amendment, the Court emphasized two helpful guideposts: “*how* and *why* the regulations burden a law-abiding citizen’s right to

<sup>52</sup> *Id.* (quoting *In re Klenosky*, 428 N.Y.S.2d 256, 257 (App. Div. 1980)).

<sup>53</sup> *See supra* note 46; *Bruen*, 142 S. Ct. at 2125. In this sense, New York deemed the applicants suitable to carry handguns generally but determined that they did not demonstrate “proper cause” for *unrestricted* carry. *See id.*

<sup>54</sup> *See id.* at 2127.

<sup>55</sup> *Id.* (emphasis added).

<sup>56</sup> *Id.* at 2126.

<sup>57</sup> *See supra* notes 37–43 and accompanying text.

<sup>58</sup> *Bruen*, 142 S. Ct. at 2132.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (quoting Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 774 (1993)).

<sup>61</sup> *Id.*

armed self-defense.<sup>62</sup> Thus, when reviewing a challenged gun control law, courts must decide whether (1) the modern (that is, the challenged) and historical regulations impose “a comparable burden” on individual self-defense and (2) the “burden is comparably justified.”<sup>63</sup> Yet Second Amendment analogical reasoning “is neither a regulatory straightjacket nor a regulatory blank check.”<sup>64</sup> Courts should not uphold every modern firearm regulation that “remotely resembles a historical analogue.”<sup>65</sup> At the same time, the government does not need to establish the existence of a “historical *twin*” — only a “well-established and representative historical *analogue*.”<sup>66</sup>

The majority highlighted that its analysis should not be “interpreted to suggest the unconstitutionality of . . . ‘shall-issue’ licensing regimes”<sup>67</sup> that “often require applicants to undergo a background check or pass a firearms safety course.”<sup>68</sup> Such objective tests that do not involve exercising discretion or “formation of an opinion” presumptively pass constitutional muster.<sup>69</sup> Nevertheless, Justice Thomas made no reference to scored live-fire tests.<sup>70</sup> Indeed, a conventional firearms safety course is not the same as a scored marksmanship test. A firearms safety course typically “provides . . . proper education on how to handle, use, store, and transport guns.”<sup>71</sup> Firearms safety courses almost never involve scored live fire — many do not even include a live-fire component.<sup>72</sup>

<sup>62</sup> *Id.* at 2133 (emphasis added).

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

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

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

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 2138 n.9. For more on shall-issue licensing regimes, see Curry, *supra* note 17.

<sup>68</sup> *Bruen*, 142 S. Ct. at 2138 n.9. Justice Thomas suggested that these restrictions are consistent with the historical tradition of limiting public carry to “law-abiding, responsible citizens.” *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)); see also Mark Frassetto, *Firearms and Weapons Legislation Up to the Early Twentieth Century* 41 (Jan. 15, 2013) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2200991](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200991) [<https://perma.cc/E887-ULTE>] (listing Pennsylvania statutes from 1776 and 1779 that permitted disarming “non-associators” and “persons disaffected to the liberty and independence of [the] state”). But some have argued that certain mandatory firearms safety courses may be unconstitutional. See *Md. Shall Issue v. Hogan*, 566 F. Supp. 3d 404 (D. Md. 2021) (challenging state requirement for mandatory firearms safety training that includes live fire), *appeal filed*, No. 21-2017 (4th Cir. Sept. 10, 2021); see also Randy Barnett, *A Minor Impact on Gun Laws but a Potentially Momentous Shift in Constitutional Method*, SCOTUSBLOG (June 27, 2022, 5:00 PM), <https://www.scotusblog.com/2022/06/a-minor-impact-on-gun-laws-but-a-potentially-momentous-shift-in-constitutional-method> [<https://perma.cc/LPH8-GVCU>].

<sup>69</sup> *Bruen*, 142 S. Ct. at 2138 n.9.

<sup>70</sup> Nor does the opinion directly discuss the constitutionality of safe-handling and weapons-familiarity conditions assessed in person by a licensing official. The Qualification Test contains these requirements as well. See sources cited *supra* note 4.

<sup>71</sup> *Gun Owner Safety Training*, EVERYTOWN FOR GUN SAFETY, <https://www.everytown.org/solutions/safety-training/#introduction> [<https://perma.cc/4DD4-SBSC>].

<sup>72</sup> See, e.g., *Courses for Students*, NAT’L RIFLE ASS’N, <https://firearmtraining.nra.org/student-courses> [<https://perma.cc/L2PN-57KN>] (describing four-hour gun safety course “that is conducted

Tellingly, the City of Boston considers its marksmanship test and firearms safety course distinct requirements, noting on its LTC application guidelines that applicants must complete *both* a firearms safety course *and* a marksmanship test at the Boston Police firing range.<sup>73</sup> Thus, it does not follow from the majority opinion that marksmanship tests, though they arguably rely on “narrow, objective, and definite standards,”<sup>74</sup> are constitutional. And by observing that even shall-issue “permitting scheme[s] can be put toward abusive ends” when they “deny ordinary citizens their public right to carry,” the opinion suggests the opposite.<sup>75</sup>

Justice Alito’s concurring opinion observed that the Court “decide[d] nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun.”<sup>76</sup> Regulators may point to this language as support for maintaining certain licensing requirements, such as a scored live-fire shooting test. But this argument fails to persuade. First, these opinions have no precedential value in light of the majority opinion, which the concurring Justices joined.<sup>77</sup> Second, even if they did, Justice Alito’s primary objective was to note that Justice Breyer’s dissent,<sup>78</sup> which focused on “the dangers of gun violence,”<sup>79</sup> was inapposite in a case about an unconstitutional handgun licensing regime.<sup>80</sup> Thus, when mentioning “requirements” and “who may lawfully possess a

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*in the classroom only*” (emphasis added). This National Rifle Association (NRA) safety course is emblematic of the typical firearms safety course required by shall-issue jurisdictions. See, e.g., *Approved Basic Firearms Safety Course List Updated*, COMMONWEALTH MASS., <https://www.mass.gov/doc/approved-basic-firearms-safety-course-list-o/download> [https://perma.cc/53V6-DLYK] (listing this course as an approved firearms safety course); *Acceptable Firearms Training Documentation*, FLA. DEP’T AGRIC. & CONSUMER SERVS., <https://www.fdacs.gov/Consumer-Resources/Consumer-Rights-and-Responsibilities/Concealed-Weapon-License/Applying-for-a-Concealed-Weapon-License/Acceptable-Firearms-Training-Documents> [https://perma.cc/2L9D-NL9Z] (explaining that applicants can show “proof of competency with a firearm” for a Florida concealed weapon license by completing “[a]ny National Rifle Association firearms safety or training course”); *Illinois Concealed Carry Approved Curriculum*, ILL. STATE POLICE, <https://www.ispfsb.com/Public/Documents/CCWCurriculumList.pdf> [https://perma.cc/PU4F-BWW9] (listing NRA Home Firearm Safety Course as an approved firearms safety course for a concealed carry license).

<sup>73</sup> *Owning a Firearm in Boston*, *supra* note 1.

<sup>74</sup> *Bruen*, 142 S. Ct. at 2138 n.9.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 2157 (Alito, J., concurring).

<sup>77</sup> See Thomas B. Bennett et al., *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 839 (2018) (“[L]ower courts should follow the majority opinion . . . [They] must follow binding precedent and ignore concurring opinions . . .”). Justices Alito, Kavanaugh (joined by Chief Justice Roberts), and Barrett filed concurring opinions. Because they all joined the majority opinion, however, these “vanilla concurrences” have “no impact” and “count[] for nothing” legally. *Id.* at 847.

<sup>78</sup> *Bruen*, 142 S. Ct. at 2156 (Alito, J., concurring).

<sup>79</sup> *Id.* at 2163 (Breyer, J., dissenting) (discussing gun policy and conceding that the Court’s holdings severely impede states from “passing laws that limit, in various ways, who may purchase, carry, or use firearms of different kinds”).

<sup>80</sup> *Id.* at 2157 (Alito, J., concurring) (questioning the utility of gun violence statistics in this context).

gun,”<sup>81</sup> Justice Alito was most likely signaling that prohibited-person provisions, which proscribe gun licensure for certain classes (such as felons),<sup>82</sup> remain unaffected by the Court’s decision. Still, states cannot enforce any law “that effectively prevents its law-abiding residents from carrying a gun” for armed self-defense.<sup>83</sup>

Justice Kavanaugh’s concurrence, joined by Chief Justice Roberts, emphasized that shall-issue regimes “may [still] require a license applicant” to submit to fingerprinting, a criminal and mental health background check, and “training in firearms handling and in laws on the use of force, among other possible requirements.”<sup>84</sup> Lawmakers could argue that a live-fire marksmanship test falls within this ambit. But “training in firearms handling” primarily involves classroom instruction, weapons handling, and occasionally, live fire.<sup>85</sup> It is different from a *scored* live fire, or marksmanship, test.<sup>86</sup> Even if all firearms safety courses pass constitutional muster, conditioning a handgun carry license on demonstrating sufficient *accuracy* with the weapon, or even “safe handling of” and “familiarity with” it, via an in-person examination with a licensing official exceeds the conventional understanding of “training in firearms handling.”<sup>87</sup>

The concurrence also asserted that shall-issue regimes imposing certain threshold requirements — like background checks and fingerprinting — are constitutionally permissible, but they must “operate in that manner in practice.”<sup>88</sup> Thus, a shall-issue state cannot institute overreaching suitability requirements — including objective ones<sup>89</sup> — if they infringe the self-defense right or amount to “open-ended discretion.”<sup>90</sup>

### III. APPLYING THE CONSTITUTIONAL FRAMEWORK TO THE QUALIFICATION TEST

Firearm regulations face exacting scrutiny post-*Bruen*. This Part asks whether conditioning LTC receipt on satisfactory performance of a scored live-fire test violates an applicant’s Second Amendment rights.

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<sup>81</sup> *Id.*

<sup>82</sup> *See, e.g., supra* notes 12, 15 (Massachusetts prohibited-person provisions).

<sup>83</sup> *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring).

<sup>84</sup> *Id.* at 2162 (Kavanaugh, J., concurring). *But see supra* note 68.

<sup>85</sup> *See NRA Basic Pistol Shooting for Massachusetts LTC*, U.S. CONCEALED CARRY ASS’N, <https://training.usconcealedcarry.com/class/nra-basic-pistol-shooting-for-massachusetts-ltc/66b842de-941a-11ec-991d-02420a000193> [<https://perma.cc/Y7H2-C2HZ>] (describing pistol training course that satisfies Massachusetts LTC requirement and includes eight hours of classroom instruction and one hour of range time).

<sup>86</sup> The City of Boston’s LTC application guidelines list *both* a state-compliant firearms safety course *and* a marksmanship test as requirements. *See LTC Application Guidelines, supra* note 2.

<sup>87</sup> *Id.*

<sup>88</sup> *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring).

<sup>89</sup> *See* Barnett, *supra* note 68 (questioning whether conditioning a handgun carry license on sixteen hours of firearms safety instruction would fail the *Bruen* test).

<sup>90</sup> *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring).

Arguing that it does, the Part concludes with a brief discussion of legal remedies.

*A. Historical Firearm Regulations Do Not Include  
Scored Shooting Tests*

Putting aside any constitutional questions that the Massachusetts gun laws raise,<sup>91</sup> the City of Boston's Qualification Test comports with the plain text of the amended state statute.<sup>92</sup> Massachusetts law does not forbid a licensing authority, like the Boston Police Commissioner, from engaging in the practice.<sup>93</sup> But the Qualification Test must survive *Bruen* analysis on its own accord.

Before engaging in that analysis, this Note observes that Massachusetts employs, at least facially, a shall-issue regime for handgun carry licenses.<sup>94</sup> The *Bruen* Court held that shall-issue regimes that “contain only ‘narrow, objective, and definite standards’” are usually constitutional.<sup>95</sup> These objective standards include “undergo[ing] a background check or pass[ing] a firearms safety course.”<sup>96</sup> The City of Boston could presumptively argue that its Qualification Test, which requires an LTC application to obtain a quantifiable point tally on a scored target, is the type of objective test that Justice Thomas deemed constitutional.

But that contention misconstrues *Bruen*. First, the *Bruen* majority did not hold that *all* objective licensing requirements are constitutional, for even an objective test must not “deny ordinary citizens their right to public carry.”<sup>97</sup> And a shall-issue permitting scheme “can be put toward abusive ends.”<sup>98</sup> Because the Qualification Test requires applicants to fire a heavy, unpopular handgun accurately,<sup>99</sup> which not everyone can do, it impedes law-abiding citizens from exercising their armed self-

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<sup>91</sup> The amended Massachusetts statute permits the licensing authority to deny licensure to anyone “unsuitable to be issued a license.” Act of Aug. 10, 2022, 2022 Mass. Acts ch. 175, § 7. The Court in *Bruen* recognized that narrowly tailored “suitability” provisions are constitutional as long as they “appear to operate” like an ordinary shall-issue statute. *Bruen*, 142 S. Ct. at 2123 n.1. Though the City of Boston could argue that the Qualification Test is lawful because it comports with the state statute (in essence, an inaccurate shooter is “unsuitable” for licensure), the City would still need to establish that the Qualification Test is consistent with the historical tradition of firearm regulation under *Bruen*.

<sup>92</sup> Act of Aug. 10, 2022, 2022 Mass. Acts ch. 175.

<sup>93</sup> See MASS. GEN. LAWS ch. 140, § 131(a) (2022) (A licensing authority may impose “such restrictions relative to the possession, use or carrying of firearms as the licensing authority considers proper.”).

<sup>94</sup> See sources cited *supra* note 19.

<sup>95</sup> *Bruen*, 142 S. Ct. at 2138 n.9 (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969)).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> See *The Top Selling Guns of 2021*, GUN GENIUS, <https://www.gungenius.com/top-selling/guns/the-top-selling-guns-of-2021> [<https://perma.cc/X49C-RB9H>] (listing the twenty-one top selling firearms in 2021, none of which was the type of .38 revolver used on the Qualification Test).

defense right — the right to public carry is reserved only for those who shoot well with a heavy handgun. Second, Justice Thomas stated that background checks and firearms safety courses are constitutional, but a shooting qualification test is not a firearms safety course.<sup>100</sup> Thus, *Bruen* does not support the proposition that scored live-fire tests survive judicial scrutiny. The Qualification Test's quantitative characteristics may mitigate its constitutional deficiencies but do not cure them. In addition to accuracy, the Qualification Test demands that applicants show "safe handling of, and familiarity with, a .38 caliber, 4-inch barrel revolver."<sup>101</sup> The City of Boston does not provide any concrete guidelines, like a scoring rubric, for the safe-handling requirement, and licensing officials may have differing opinions on the matter. Such requirements do not resemble the "narrow, objective, and definite standards"<sup>102</sup> that Justice Thomas referenced as per se constitutional.

Under *Bruen*, "when the Second Amendment's plain text covers an individual's conduct," a court may conclude that a gun control law passes constitutional muster *only if* the government establishes that the firearm regulation at issue "is consistent with this Nation's historical tradition of firearm regulation."<sup>103</sup> The Qualification Test requires LTC applicants to demonstrate safe handling of a .38 revolver and to obtain a requisite number of points on a scored target.<sup>104</sup> Thus, we must ask whether that regulation — conditioning LTC receipt on satisfactory safe handling and accuracy — (1) is covered by the Second Amendment's plain text and (2) accords with historical firearm regulation.<sup>105</sup> Moreover, the burden would fall on the City of Boston to prove that the Qualification Test comports with that historical tradition.<sup>106</sup>

*I. Does the Second Amendment Cover the Conduct at Issue?* — Step one of the *Bruen* test involves asking whether "the Second Amendment's plain text covers" the individual conduct at issue.<sup>107</sup> Here, the City of Boston's licensing regime prohibits residents from carrying handguns for armed self-defense unless they obtain a qualifying score on a marksmanship test administered "at the Boston Police Department Firearms Range at Moon Island" and demonstrate safe handling of a .38 revolver.<sup>108</sup> The Second Amendment commands that "the right of the people to keep and bear Arms, shall not be infringed."<sup>109</sup> Presumptively, the City of Boston will deny a handgun carry license to any applicant

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<sup>100</sup> The City of Boston considers the firearms safety course and shooting qualification test to be distinct requirements. See *LTC Application Guidelines*, *supra* note 2.

<sup>101</sup> *Owning a Firearm in Boston*, *supra* note 1.

<sup>102</sup> *Bruen*, 142 S. Ct. at 2138 n.9 (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969)).

<sup>103</sup> *Id.* at 2126.

<sup>104</sup> Brief for Appellee, *supra* note 4, at 12.

<sup>105</sup> See *Bruen*, 142 S. Ct. at 2129–30.

<sup>106</sup> See *id.* at 2135.

<sup>107</sup> *Id.* at 2129–30.

<sup>108</sup> *LTC Application Guidelines*, *supra* note 2; see also sources cited *supra* note 4.

<sup>109</sup> U.S. CONST. amend. II.

who cannot fire *thirty* rounds accurately on a scored target with a .38 revolver and demonstrate safe handling of that weapon.<sup>110</sup> A four-inch .38 revolver weighs roughly thirty-four ounces unloaded<sup>111</sup> and has a trigger pull of twelve to fifteen pounds in double-action mode.<sup>112</sup> A Glock nine-millimeter, a common self-defense weapon, weighs about twenty-two ounces unloaded, and its trigger weight registers around six pounds.<sup>113</sup> Some applicants may lack the stamina and strength, due to age or disability, to pass the Qualification Test with a .38 revolver, but could pass a truncated version of the test (that is, firing fewer rounds) or if allowed to use a different handgun.<sup>114</sup> Even if an individual can safely and accurately shoot one handgun model, a Boston LTC applicant must display accuracy and adroitness with a heavy .38 revolver. Accordingly, the answer to this threshold textual question is undoubtedly yes.<sup>115</sup>

2. *Is the Challenged Law Consistent with the American Tradition of Firearm Regulation?* — Proceeding to step two, the Qualification Test’s constitutionality hinges on whether it comports with the American tradition of firearm regulation. Analogical inquiry guides that analysis.<sup>116</sup> To identify a historical analogue, we must determine *how* and *why* the Qualification Test “burden[s] a law-abiding citizen’s right to armed self-defense.”<sup>117</sup> First, the “how”: the Qualification Test impedes the self-defense right by restricting public carry only to those who can shoot a

<sup>110</sup> See sources cited *supra* note 4.

<sup>111</sup> See, e.g., *Smith & Wesson 10*, GUNS.COM, <https://www.guns.com/firearms/handguns/revolver/smith-&wesson-10-38-spl-p-6-rounds-4-barrel-new?p=54236> [<https://perma.cc/YQX4-E7FB>].

<sup>112</sup> See Brad Miller, *Spring Rates and Trigger Pull Weights*, SHOOTING TIMES (Aug. 27, 2020), <https://www.shootingtimes.com/editorial/spring-rates-and-trigger-pull-weights/383919> [<https://perma.cc/6RTR-9E8W>]. The trigger pull is four to six pounds in single-action mode. *Id.*

<sup>113</sup> See Richard Mann, *25 of the Best Handguns Ever*, FIELD & STREAM (Dec. 1, 2021, 8:54 AM), <https://www.fieldandstream.com/25-best-handguns-ever> [<https://perma.cc/SZ3L-LM9L>] (noting that the Glock 17, a nine-millimeter pistol, “has become one of the most recognized pistols in the world”); *Glock 17—The Original*, GLOCK, <https://us.glock.com/en/pistols/g17> [<https://perma.cc/S8ZT-9HTU>].

<sup>114</sup> Professor Nicholas J. Johnson, law professor and NRA-Certified Pistol Instructor, has concurred with this inference, based on more than ten years of experience as a certified handgun instructor. Email from Nicholas J. Johnson, Professor of L., Fordham Univ. (Oct. 30, 2022) (on file with the Harvard Law School Library); see also *Arming the Disabled: A Self-Defense and Concealed Carry Guide for People with Disabilities*, AMMO.COM, <https://ammo.com/articles/disabled-self-defense-concealed-carry-guide-people-with-disabilities> [<https://perma.cc/V6NB-PEMS>] (suggesting that, though small-caliber and “mini” revolvers are suitable for certain disabled people, heavier revolvers may pose challenges for those who do not “have enough finger strength to fully engage the trigger”).

<sup>115</sup> *Bruen*’s first step usually yields a “yes” answer because a gun regulation almost always restricts firearm carry and possession in some way. See, e.g., *United States v. Quiroz*, No. PE:22-CR-00104-DC, 2022 WL 4352482, at \*4, \*13 (W.D. Tex. Sept. 19, 2022) (concluding that federal law preventing individuals under felony indictment from possessing firearms is (1) covered by the Second Amendment’s plain text and (2) not consistent with the historical tradition of firearm regulation).

<sup>116</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2131–34 (2022).

<sup>117</sup> *Id.* at 2133.

.38 revolver with a four-inch barrel accurately and demonstrate safe handling of and familiarity with the weapon. Second, the “why”: though the City of Boston has not explicitly stated why it has chosen to burden the armed self-defense right with its Qualification Test, it seems reasonable to infer that the Qualification Test seeks, at least partially, to promote public safety by ensuring that only qualified shooters possess and carry handguns.<sup>118</sup>

Next, we must search for analogous historical firearms regulations — ones that burdened the self-defense right in a “relevantly similar” way.<sup>119</sup> This analogical test “is neither a regulatory straightjacket nor a regulatory blank check.”<sup>120</sup> Courts should not uphold a modern gun regulation “that remotely resembles a historical analogue.”<sup>121</sup> At the same time, the government need not prove the existence of a “historical *twin*.”<sup>122</sup> For example, laws have long proscribed carrying “firearms in sensitive places such as schools and government buildings.”<sup>123</sup> But which places society considers “sensitive” change over time — courts must therefore determine whether historical analogues exist to justify the modern prohibition.<sup>124</sup>

With the historical methodology limned, the burden would then pass to the City of Boston to establish the appropriate historical analogue. Unfortunately, *Bruen* does not offer much guidance on *how* to complete this historical analysis, and some have compared this phase to “Plato’s unknown.”<sup>125</sup> On the one hand, the City need not show a historical tradition of municipalities administering marksmanship tests in the *exact* same manner — same weapon, same scoring, same rules. That

<sup>118</sup> See *Gould v. Morgan*, 907 F.3d 659, 662 (1st Cir. 2018) (observing that Massachusetts firearm laws are “part of a large regulatory scheme to promote the public safety” (quoting *Commonwealth v. Davis*, 343 N.E.2d 847, 849 (Mass. 1976))). The five states with the highest rates of unintentional shooting deaths are Alabama, Kentucky, North Carolina, Missouri, and Georgia. *Unintentional Shootings*, EDUC. FUND TO STOP GUN VIOLENCE, <https://efsgv.org/learn/type-of-gun-violence/unintentional-shootings> [<https://perma.cc/4386-ZZG5>]. Conversely, “[s]tates with strong gun laws have been found to be associated with lower unintentional firearm injuries.” *Id.*

<sup>119</sup> *Bruen*, 142 S. Ct. at 2132 (quoting Sunstein, *supra* note 60, at 773).

<sup>120</sup> *Id.* at 2133.

<sup>121</sup> *Id.* (quoting *Drummond v. Robinson Township*, 9 F.4th 217, 226 (3d Cir. 2021)).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)); see also Frassetto, *supra* note 68, at 88–93.

<sup>124</sup> See *Bruen*, 142 S. Ct. at 2133. In *Bruen*, the Court held that New York, in arguing that all “places where people typically congregate” are “sensitive places” in which the government could prohibit handgun carry, “define[d] the category . . . far too broadly.” *Id.* at 2134. Thus, a historical analogue for “declar[ing] the island of Manhattan a ‘sensitive place’” did not exist. See *id.*

<sup>125</sup> *United States v. Quiroz*, No. PE:22-CR-00104-DC, 2022 WL 4352482, at \*8 (W.D. Tex. Sept. 19, 2022). Though lower courts have not precisely delimited the scope of this burden, early indications suggest that it is demanding. See, e.g., *id.* (finding that the government failed to show that prohibiting people under felony indictment from possessing firearms comports with the historical tradition); *Firearms Pol’y Coal., Inc. v. McCraw*, No. 21-cv-1245-P, 2022 WL 3656996 (N.D. Tex. Aug. 25, 2022) (finding the same for a Texas firearm law proscribing public handgun carry for people between ages eighteen and twenty).

would be a “historical *twin*” and “regulatory straightjacket.”<sup>126</sup> On the other hand, the City would have to do more than merely establish the existence of *any* restriction on public carry in *any* context — that approach would “risk[] endorsing” a regulatory outlier “that our ancestors would never have accepted.”<sup>127</sup> More likely, a court would require the City to substantiate an American tradition of limiting public carry to those who can shoot a prescribed firearm accurately and handle it safely.<sup>128</sup>

(a) *Early American Firearm Regulation.* — When dredging up historical sources to assist with Second Amendment challenges, “not all history is created equal.”<sup>129</sup> *Bruen* commands that the focus must remain on how the people who codified the constitutional rights understood them.<sup>130</sup> Thus, the relevant time periods become the amendments’ adoption dates — 1791 (Second Amendment) and 1868 (Fourteenth Amendment).<sup>131</sup> Moreover, a “regular course of practice” may help illuminate confounding “terms & phrases.”<sup>132</sup> Importantly, laws adopted after ratification that conflict “with the original meaning of the [Second Amendment’s] text obviously cannot overcome or alter that text,” and if “later history contradicts” the Second Amendment’s text, “the text controls.”<sup>133</sup>

The historical tradition indicates a broad armed self-defense right that all citizens possessed, irrespective of marksmanship. Professors George Mocsary and David Kopel, as well as Joseph Greenlee, authored an amicus brief in *Bruen*, surveying several historical sources to ascertain how the Founding era understood the armed self-defense right and

<sup>126</sup> *Bruen*, 142 S. Ct. at 2133.

<sup>127</sup> *Id.* (quoting *Drummond v. Robinson Township*, 9 F.4th 217, 226 (3d Cir. 2021)).

<sup>128</sup> *See id.* at 2138. The *Bruen* Court’s approach to analogical reasoning appears highly circumscribed. For example, to determine whether New York’s “proper cause” requirement comported with the American tradition of firearm regulation, the Court searched for historical analogues — colonial period laws that “required law-abiding, responsible citizens to ‘demonstrate a special need for self-protection distinguishable from that of the general community’ in order to carry arms in public.” *Id.* at 2156 (quoting *In re Klenosky*, 428 N.Y.S.2d 256, 257 (App. Div. 1980)). The Court did not deem that task a hunt for a historical twin. *See id.*

<sup>129</sup> *Id.* at 2136.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* Accordingly, anachronistic historical evidence, such as ancient practice, may not provide assistance if “linguistic or legal conventions changed in the intervening years.” *Id.* Importantly, “the public understanding of” Second Amendment rights in 1791 and 1868 “was, for all relevant purposes, the same with respect to public carry.” *Id.* at 2138.

<sup>132</sup> *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 WRITINGS OF JAMES MADISON 450 (G. Hunt ed., 1908)).

<sup>133</sup> *Bruen*, 142 S. Ct. at 2137 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)). Justice Thomas acknowledged that “unprecedented societal concerns or dramatic technological changes may require a more nuanced approach” to analogical reasoning, and the Second Amendment’s “historically fixed meaning” can apply to “new circumstances,” like modern firearms that did not exist at ratification. *Id.* at 2132.

firearm regulation.<sup>134</sup> For instance, the 1689 English Bill of Rights cites King James II's disarmament of his subjects as a reason for his overthrow,<sup>135</sup> suggesting that "[p]eaceable carry for self-defense" was a protected right in the English tradition.<sup>136</sup> William Blackstone, when describing the "absolute rights" of individuals, discussed the "right of personal security" and the derivative right to bear arms for self-defense in 1765.<sup>137</sup> "By the time of the founding, the right to have arms" was a fundamental English right.<sup>138</sup> Moreover, the Framers understood the perils of forced disarmament by the government that occurred throughout English history.<sup>139</sup>

Nor did the armed self-defense right "stop at the domestic doorstep."<sup>140</sup> Thomas Jefferson, when describing the fundamental laws of nature and important principles of self-government, described the "right and duty to be armed at all times."<sup>141</sup> After the Boston Massacre in 1770, where British Redcoats shot and killed Crispus Attucks and four other American colonists, John Adams, as defense counsel for the British soldiers, acknowledged that "every private person is authorized to arm

<sup>134</sup> Brief of Amici Curiae Professors of Second Amendment Law et al. in Support of Petitioners, *Bruen* (No. 20-843).

<sup>135</sup> An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M. (Eng.); see also 6 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 241 (1924) (citing reasons for King James II's demise, including his refusal to allow certain subjects "the right to carry arms for self-defence").

<sup>136</sup> Brief of Amici Curiae Professors of Second Amendment Law, *supra* note 134, at 7.

<sup>137</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*125-27, \*136, \*139; see also 4 *id.* at \*30 (noting that the law of nature, "self-defense its primary canon," permits the killing of a violent assailant, but a person "ought rather to die . . . than escape by the murder of an innocent"). Though the *Bruen* Court recognized that certain restrictions on carrying firearms may pass constitutional muster, see *Bruen*, 142 S. Ct. at 2133, it upheld the notion of armed self-defense as a "fundamental right," see *id.* at 2151.

<sup>138</sup> *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008) (citing the English Bill of Rights and Blackstone). Though the English tradition protected the right to bear arms and can serve as a historical reference point, the American right was more expansive. See Brief of Amicus Curiae Professors of Second Amendment Law, *supra* note 134, at 19; WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 70 (Portage 2011) (1829) ("No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people."). Conversely, the English right to bear arms was more "cautious[]" and subject to "conditions . . . as allowed by law." See *id.* (quotation omitted). Founding-era lawyer William Rawle stated, however, that the American right to bear arms "ought not . . . be abused to the disturbance of the public peace," and unlawful firearm use would constitute a criminal offense. *Id.* at 71.

<sup>139</sup> 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 143 n.41 (Philadelphia, William Young Birch & Abraham Small 1803) ("Whoever examines the forest and game laws in the British code will readily perceive that the right of keeping arms is effectually taken away from the people of England.").

<sup>140</sup> Joyce Lee Malcolm, *The Right to Carry Your Gun Outside: A Snapshot History*, 83 LAW & CONTEMP. PROBS. 195, 196 (2020).

<sup>141</sup> Letter from Thomas Jefferson to John Cartwright (June 5, 1824), in 16 THE WRITINGS OF THOMAS JEFFERSON 42, 45 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

himself.”<sup>142</sup> Several Founding-era statutes even mandated public carry “for public-safety reasons,”<sup>143</sup> and evidence of an early American tradition of restricting public carry is scant.<sup>144</sup>

Some firearm regulation did occur in the early colonial period. A 1692 Massachusetts statute empowered justices of the peace to arrest “all affrayers, rioters, disturbers or breakers of the peace” and anyone who “shall ride, or go armed offensively before” any royal officers or ministers “in fear or affray of their majesties’ liege people.”<sup>145</sup> The *Bruen* Court observed, however, that this statute “merely codified the existing common law offense of bearing arms to terrorize the people.”<sup>146</sup> Likewise, some laws prohibited the concealed carry of “Pocket Pistol[s], Skeines, Stilettoes, Daggers or Dirks, or other unusual or unlawful Weapons.”<sup>147</sup> Thus, there is a historical tradition of prohibiting concealed carry of unusual or unlawful weapons, and the Supreme Court has said as much in *Heller*.<sup>148</sup> But even using the broadest form of analogical reasoning, proscribing armed terrorization of the public and the concealed carry of unusual weapons cannot serve as valid historical analogues for a marksmanship test.

<sup>142</sup> Brief of Amici Curiae Professors of Second Amendment Law, *supra* note 134, at 6 (quoting 3 JOHN ADAMS, LEGAL PAPERS OF JOHN ADAMS 248 (Wroth & Zobel eds., 1965)).

<sup>143</sup> *Heller*, 554 U.S. at 601.

<sup>144</sup> N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2142 (2022) (“[T]here is little evidence of an early American practice of regulating public carry by the general public.”).

<sup>145</sup> An Act for the Punishing of Criminal Offenders, ch. 11, 1692 Mass.-Bay Province Acts & Laws 237, 239; *see also* Brief of Amici Curiae Professors of History and Law in Support of Respondents at 11–12, *Bruen* (No. 20-843) [hereinafter Brief of Amici Curiae Professors of History and Law] (citing very similar 1699 New Hampshire statute and colonial era legal commentator to demonstrate historical “restrictions on carrying dangerous weapons”); Brief of Amicus Curiae Patrick J. Charles in Support of Neither Party app. at 1–67, *Bruen* (No. 20-843) (citing laws from the late nineteenth century that required a license for concealed carry of dangerous weapons).

<sup>146</sup> *Bruen*, 142 S. Ct. at 2143.

<sup>147</sup> An Act Against Wearing Swords, &c, ch.9, 1686 N.J. Laws, 289, 289–90.

<sup>148</sup> *Heller*, 554 U.S. at 626. The Framers understood that the Second Amendment right is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* Some have argued that racial animus motivated much of the firearm regulation during the Founding era. *See* Brief of Amici Curiae Firearms Pol’y Coal. et al. in Support of Appellants at 8–9, *Md. Shall Issue v. Hogan*, 971 F.3d 199 (4th. Cir. 2020) (No. 21-2017) [hereinafter Brief of Amici Curiae Firearms Pol’y Coal. et al.]. A 1792 Virginia statute prohibited Black people from “keep[ing] or carry[ing] any gun, powder, shot, club, or other weapon whatsoever, offensive or defensive.” Act of Dec. 17, 1792, ch. 103, 1792 Va. Acts 195, 196. Kentucky had a similar law that barred Black people and Native Americans from possessing firearms, unless free and working as a “house-keeper.” Brief of Amici Curiae Firearms Pol’y Coal. et al., *supra*, at 9. An 1806 Virginia law required free Black people to obtain a license to own a firearm. Act of Feb. 4, 1806, ch. 94, 1805 Va. Acts 274. But other scholars have pushed back on the “gun control is racist” narrative. *See* Patrick J. Charles, *Racist History and the Second Amendment: A Critical Commentary*, 43 CARDOZO L. REV. 1343, 1376 (2022) (arguing that legitimizing either the “gun control is racist” or “Second Amendment is racist” narratives will result in “long-term societal harm”). *But see* NICHOLAS JOHNSON, *NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS* (2014) (discussing the “black tradition of arms” in the United States and chronicling “a tradition of church folk, merchants, and strivers, the very best people in the community, armed and committed to the principle of individual self-defense,” *id.* at 13).

Marksmanship and safe-handling requirements in the context of firearm possession are entirely absent from the historical tradition. Some have even criticized colonial militiamen for their “indifferent shots” and “the relatively low ratio of British casualties to the shots fired.”<sup>149</sup> These deficiencies persisted through the Civil War, with one study “estimat[ing] that Yankee troops fired 1000 rounds for every bullet that actually struck a Confederate soldier.”<sup>150</sup> In fact, two Civil War veterans, “dismayed by the lack of marksmanship shown by their troops,” founded the National Rifle Association in 1871 to “promote and encourage rifle shooting on a scientific basis.”<sup>151</sup> Accurate shooting was not a prerequisite for firearm possession, or even military service, in the Founding era.<sup>152</sup>

Mark Frassetto created a compendium of early American gun laws, organized by category and historical period.<sup>153</sup> This compendium lists sixteen separate categories of historical firearm regulation, including brandishing, concealed carry, dueling, and militia regulation.<sup>154</sup> Frassetto’s work demonstrates that some states proscribed concealed public carry of unconventional weapons<sup>155</sup> and firearm possession for minors.<sup>156</sup> Yet none of the roughly 1000 laws cited conditioned public carry on marksmanship or scored live fire. In fact, many laws mandated public firearm carry.<sup>157</sup>

<sup>149</sup> MICHAEL STEPHENSON, *PATRIOT BATTLES* 14 (2007). *But see* NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, E. GREGORY WALLACE & DONALD KILMER, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* 305 (3d ed. 2022) (observing that the Americans who fought in the 1775 Battle of Bunker Hill “were all good marksmen” (quoting DAVID RAMSAY, *A HISTORY OF THE AMERICAN REVOLUTION* 190 (Lester H. Cohen ed., Liberty Fund 1990) (1789))).

<sup>150</sup> Ron Elving, *The NRA Wasn't Always Against Gun Restrictions*, NPR (Oct. 10, 2017, 5:00 AM), <https://www.npr.org/2017/10/10/556578593/the-nra-wasnt-always-against-gun-restrictions> [<https://perma.cc/GTP6-8KY7>].

<sup>151</sup> *A Brief History of the NRA*, NAT’L RIFLE ASS’N, <https://home.nra.org/about-the-nra> [<https://perma.cc/R4QR-DJXV>].

<sup>152</sup> Nor was firearm training a prerequisite. *See* Brief of Amici Curiae Firearms Pol’y Coal. et al., *supra* note 148, at 25 (“No law prior to the Fourteenth Amendment’s ratification — including the colonial, founding, and early republic periods — preconditioned firearm ownership on training.”). In fact, when the Second Amendment was ratified, “every state *required* ordinary citizens to own firearms.” *Id.* at 26 (emphasis added) (citing state statutes).

<sup>153</sup> *See* Frassetto, *supra* note 68.

<sup>154</sup> *Id.* at 9, 13, 37, 64.

<sup>155</sup> *See id.* at 7 (citing 1837 Georgia statute that prohibited public carry of certain unconventional weapons, except “such pistols as are known and used,” like horseman’s pistols).

<sup>156</sup> *See id.* at 75 (noting 1856 Alabama law that made it a misdemeanor to “sell, or give, or lend to any male minor a pistol”).

<sup>157</sup> *See id.* at 65 (listing 1782 Delaware law that imposed a fine for failing to be armed “at all times” and 1757 Massachusetts statute that required every military-aged male to “appear with arms and ammunition” for military exercises); *see also* Brief of Amici Curiae Professors of History and Law, *supra* note 145, at 18–25 (discussing gun regulations after the Civil War, including an 1871 Texas statute that proscribed carrying pistols absent “reasonable grounds for fearing an unlawful attack” that is “immediate and pressing,” *id.* at 20). In *Bruen*, Justice Thomas acknowledged that

The Supreme Court has recognized some other “longstanding” firearm prohibitions, based on its text-and-history approach, such as restricting the “possession of firearms by felons and the mentally ill” and “forbidding the carrying of firearms” in schools and government buildings.<sup>158</sup> Though these examples elucidate what the Framers understood as acceptable firearm restrictions and may be useful in assessing other Second Amendment challenges, it remains difficult to detect an analogical thread — even an attenuated one — to conditioning handgun carry on marksmanship and discretionary safe-handling requirements.

Some historians have suggested that the Supreme Court has adopted a faulty historical approach. Professor Saul Cornell has argued that the Second Amendment conferred neither an individual nor a collective right to armed self-defense but a “civic right that guaranteed that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia.”<sup>159</sup> This view, Cornell contends, “emphasizes that there can be no right to bear arms without extensive regulation.”<sup>160</sup> Cornell thus posits that both gun control and gun rights advocates apply flawed frameworks in their Second Amendment analyses.<sup>161</sup> Critics have questioned the viability of Cornell’s thesis and have contended that “it gives only a partial, selective, and often unreliable account of the development of the American right to arms.”<sup>162</sup> Indeed, it seems odd to suggest that the government can essentially regulate away the fundamental constitutional right to keep and bear arms. Moreover, the *Heller* Court cast doubt on Cornell’s argument by refusing to adopt it to settle the individual-collective debate.<sup>163</sup> And Cornell’s points have limited salience when the task at

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this statute and two state cases opining on it “support[ed] New York’s proper-cause requirement.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2153 (2022). But he considered it an “outlier[.],” noting that the Court could not “stake [its] interpretation of the Second Amendment upon a single law . . . that contradicts the overwhelming weight of other evidence.” *Id.* Moreover, historical evidence from the late nineteenth century “cannot provide much insight into the Second Amendment” when it conflicts with earlier evidence. *Id.* at 2154.

<sup>158</sup> *Bruen*, 142 S. Ct. at 2162 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). In *Heller*, Justice Scalia did not engage in detailed historical analysis to derive this list but considered the measures “presumptively lawful.” *Heller*, 554 U.S. at 626–27 & n.26; see also Brief in Opposition to Writ of Certiorari at 21–26, 32, *Bruen* (No. 20-843) (citing historical firearms restrictions from “fourteenth-century England through the founding era” that “prohibited carrying firearms where people typically congregated, such as at fairs and markets,” *id.* at 32).

<sup>159</sup> SAUL CORNELL, *A WELL-REGULATED MILITIA* 2 (2006).

<sup>160</sup> *Id.* at 213.

<sup>161</sup> *Id.* at 1–2.

<sup>162</sup> David T. Hardy, *A Well-Regulated Militia: The Founding Fathers and the Origin of Gun Control in America*, 15 WM. & MARY BILL RTS. J. 1237, 1242 (2007) (reviewing CORNELL, *supra* note 159).

<sup>163</sup> *Heller*, 554 U.S. at 622.

hand is to hunt for concrete historical analogues to marksmanship and safe-handling requirements.<sup>164</sup>

Admittedly, it is logically impossible to prove nonexistence. Though courts have not fully grappled with *Bruen* step two, initial treks into “Plato’s unknown” suggest that the government faces a demanding task.<sup>165</sup> At the time of the ratification of the Second and Fourteenth Amendments, there was an American tradition of an expansive right to firearm possession and public carry, circumscribed by restrictions on certain classes of people deemed a threat to public security, usually because of race or criminal history. Neither these nor other colonial prohibitions on using firearms to terrorize the citizenry, concealing unusual weapons, and carrying weapons in certain public places, can function as an analogical thread to marksmanship and firearm handling conditions — to suggest otherwise would amount to a “regulatory blank check” that the *Bruen* Court rebuked.<sup>166</sup>

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<sup>164</sup> Cornell does discuss some colonial laws about firearm regulation, including militia statutes that allowed the government to “keep track of who had firearms” and regulate the storage of gunpowder. CORNELL, *supra* note 159, at 27. He also points to an eighteenth-century Massachusetts law that prohibited “residents from storing loaded firearms in any domestic dwelling.” *Id.* at 28. But that statute prohibited “the depositing of loaded Arms in the Houses of” Boston. *See* Act of Mar. 1, 1783, ch. 46, 1782 Mass. Acts 119. The law did not restrict public carry of loaded weapons; nor did it condition the right to carry loaded firearms on marksmanship or facility with the weapon. For further discussion of Second Amendment interpretive questions, see Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 165 (2000), which suggests that Founding-era “fears rooted in the historical memories of the eighteenth century” are anachronistic. Professor Jack Rakove does not suggest that the historical record is replete with comprehensive restrictions on the right to armed self-defense. *See id.* at 103–13. In an amicus brief in *Heller*, various professors argued “that the private keeping of firearms was manifestly not the right that the framers . . . guaranteed in 1789.” Brief of Amici Curiae Jack N. Rakove et al. in Support of Petitioners at 2, *Heller* (No. 07-290). They cite the English Bill of Rights 1689, which conditions the right to possess firearms on subjective suitability provisions, as evidence that Parliament “did not read [the Bill of 1689] as establishing a broad-gauged right” to bear arms. *Id.* at 6–7. Though looking at “English history and custom before the founding makes some sense” because the Framers “codified a right inherited from our English ancestors,” *see* N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2138–39, Americans sought to codify a much more expansive armed self-defense right in the Second Amendment, *see supra* note 138. It would therefore be improper to tether the American conception of armed self-defense entirely to the English Bill of Rights 1689. The remainder of the brief discusses how the historical record supports a collective Second Amendment right, as opposed to an individual one. *See* Brief of Amici Curiae Jack N. Rakove et al., *supra*. The arguments are not germane to this discussion because (1) the Supreme Court held the opposite in *Heller* — the Second Amendment confers an individual right to bear arms, *Heller*, 554 U.S. at 622 — and (2) the amici do not delineate a historical tradition of firearm regulation that meets *Bruen*’s analogical reasoning requirements.

<sup>165</sup> *See, e.g.*, *United States v. Quiroz*, No. PE:22-CR-00104-DC, 2022 WL 4352482, at \*13 (W.D. Tex. Sept. 19, 2022) (unconstitutional to prohibit persons under felony indictment from possessing firearms); *Firearms Pol’y Coal., Inc. v. McCraw*, No. 21-cv-1245-P, 2022 WL 3656996, at \*6 (N.D. Tex. Aug. 25, 2022) (unconstitutional to prohibit eighteen-to-twenty-year-olds from carrying handguns in public for self-defense).

<sup>166</sup> *Bruen*, 142 S. Ct. at 2133.

### B. Legal Remedies

Based on the City of Boston's facially unconstitutional licensing regime, any Boston resident can seek declaratory, injunctive, and monetary relief for the City's infringing the constitutional right to keep and bear arms under the Second Amendment, as applied to the states by the Fourteenth Amendment's Due Process Clause.<sup>167</sup> This Note does not purport to discuss all the mechanics of either standing or § 1983 liability. As a general matter, however, it bears mentioning that an aggrieved applicant could assert a plausible claim for declaratory, injunctive, and monetary relief against City of Boston licensing officials, the colonel of the Massachusetts State Police, and certain state firearms officials, subject to any affirmative defenses raised by the government.<sup>168</sup> A suit against the City of Boston could also proceed under a *Monell* theory.<sup>169</sup> But the Eleventh Amendment would bar suit against the Commonwealth of Massachusetts in federal and state courts.<sup>170</sup>

### CONCLUSION

Jurisdictions that require applicants for handgun carry licenses to complete a shooting qualification test need to furnish affirmative proof that conditioning the armed self-defense right on a scored live-fire

<sup>167</sup> See 42 U.S.C. § 1983 ("Every person who, under color of any statute . . . of any State . . . , subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."). Aggrieved applicants would need to have standing. The "irreducible constitutional minimum for standing" demands three elements: (1) "an 'injury in fact,'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), that is "concrete and particularized . . . [and] 'actual or imminent,'" *id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)), (2) a "causal connection between the injury and the conduct complained of," *id.*, and (3) the potential for redressability, *id.* at 561. Moreover, facially unconstitutional policies can deter the exercise of constitutional rights and precipitate judicial review. See *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1571 (11th Cir. 1993). Here, prospective applicants lacking experience with a .38 revolver may choose not to apply for an LTC after reading the City's LTC application guidelines. The City's policies therefore chill the armed self-defense right.

<sup>168</sup> Admittedly, qualified immunity would shield state and city officials from money damages when performing "discretionary functions." See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). However, qualified immunity would not apply to violations of "clearly established . . . constitutional rights of which a reasonable person would have known." *Id.* And it would not shield them in a claim for declaratory or injunctive relief under § 1983. See *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

<sup>169</sup> See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) ("[M]unicipalities and other local government units [are] . . . among those persons to whom § 1983 applies.").

<sup>170</sup> The Eleventh Amendment also applies to suits against a state by citizens of the same state in federal court, see *Hans v. Louisiana*, 134 U.S. 1 (1890), and in state court, see *Alden v. Maine*, 527 U.S. 706, 712 (1999). Nonetheless, certain defendants can be sued under an *Ex parte Young* theory when § 1983 does not apply (such as state officers in their official capacity) but only in claims for equitable relief. See Note, *Interpreting Congress's Creation of Alternative Remedial Schemes*, 134 HARV. L. REV. 1499, 1506 & n.62 (2021). But see David Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103, 1165 n.300 (2000) (discussing declaratory relief with *Young*).

exercise comports with the historical tradition of firearm regulation<sup>171</sup> — no such tradition exists. This Note is more than a litigation roadmap, however, and does not argue that all firearm restrictions are unlawful. But certain ones, like the Qualification Test, do not pass constitutional muster. Exploring these constitutional contours will help citizens and lawmakers better understand the scope and limits of what the Second Amendment protects. The right to armed self-defense and promoting public safety need not be irreconcilable ends.

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<sup>171</sup> *Bruen*, 142 S. Ct. at 2129–30.