CONSTITUTIONAL LAW — SECOND AMENDMENT — EN BANC FOURTH CIRCUIT UPHOLDS MARYLAND ASSAULT WEAPONS BAN UNDER *BRUEN*'S "TEXT AND HISTORY" TEST. — *Bianchi v. Brown*, 111 F.4th 438 (4th Cir. 2024) (en banc).

"The AR-15 is the best-selling rifle in the United States," with as many as 16 million Americans owning an AR-15-style firearm.[1] "Assault weapons" like the AR-15 are also disproportionately the weapon of choice "in mass public shootings and killings of law enforcement officers."[2] Ten states and the District of Columbia have banned assault weapons, including AR-15s and other comparable semiautomatic firearms.[3] However, the Supreme Court's 2022 decision in *New York State Rifle & Pistol Ass'n v. Bruen*[4] cast doubt on the constitutionality of such measures by establishing a new test for firearm regulations based on the Second Amendment's text and history.[5] Recently, in *Bianchi v. Brown*,[6] the Fourth Circuit upheld Maryland's assault weapons ban under *Bruen*, holding that the regulated arms were not protected by the Second Amendment's text and that the statute was consistent with a historical tradition of "regulating excessively dangerous weapons."[7] While *Bianchi* exemplifies the confusion among lower courts attempting to apply *Bruen*'s "text and history" test, the Fourth Circuit's interpretation of *Bruen* presents a potential path forward for other courts.

In 2020, three Maryland residents, three gun rights organizations, and a licensed Maryland firearms dealer sued the then–state Attorney General and other law enforcement officials under 42 U.S.C. § 1983, alleging that "enforcement of Maryland's assault weapons regulations was unconstitutional under the Second Amendment[]."[8] Maryland law makes it illegal to "possess, sell, . . . transfer, purchase, or receive an assault weapon,"[9] subject to limited exceptions.[10] The district court

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1 Emily Guskin et al., *Why Do Americans Own AR-15s?*, WASH. POST (Mar. 27, 2023, 6:12 AM), https://www.washingtonpost.com/nation/interactive/2023/american-ar-15-gun-owners [https://perma.cc/L88Q-2D7Q].

2 *The Effects of Bans on the Sale of Assault Weapons and High-Capacity Magazines*, RAND (July 16, 2024), https://www.rand.org/research/gun-policy/analysis/ban-assault-weapons.html [https://perma.cc/6KCX-NMKK].

3 *Id.*

4 142 S. Ct. 2111 (2022).

5 *Id.* at 2129–30.

6 111 F.4th 438 (4th Cir. 2024) (en banc).

7 *Id.* at 441.

8 *Id.* at 443.

9 MD. CODE ANN., CRIM. LAW § 4-303(a)(2) (West 2024). "Assault weapon" is defined as "an assault long gun," "an assault pistol," or "a copycat weapon." *Id.* § 4-301(d). "Assault long gun" encompasses forty-five enumerated semiautomatic rifles and shotguns. *Id.* § 4-301(b); PUB. SAFETY § 5-101(r)(2). "Assault pistol" includes fifteen semiautomatic pistols. CRIM. LAW § 4-301(c). "Copycat weapon" is defined as any other firearm with certain characteristics such as large-capacity magazines or folding stocks. *Id.* § 4-301(h)(1).

10 CRIM. LAW § 4-303(b).

dismissed the complaint, as the Fourth Circuit had previously upheld the constitutionality of the statute in 2017 under an intermediate scrutiny standard.[11] A panel of the Fourth Circuit affirmed,[12] and the plaintiffs subsequently appealed to the Supreme Court.[13] Before deciding the petition for certiorari, the Court issued its opinion in *Bruen*, clarifying the standard for assessing Second Amendment challenges.[14] The Court had previously established that the Second Amendment protected "an individual right to keep and bear arms" in *District of Columbia v. Heller*,[15] but declined to specify a level of scrutiny for evaluating gun regulations.[16] *Bruen* disavowed the means-end scrutiny approach that had developed in the lower courts post-*Heller*.[17] Instead, *Bruen* established a new test, requiring a court to first assess whether the plain text of the Second Amendment protects the conduct that the government seeks to regulate.[18] If so, the burden shifts to the government to show that the regulation "is consistent with the Nation's historical tradition of firearm regulation"[19] by identifying analogous historical regulations.[20] This analysis turns on "how and why the regulations burden . . . [the] right to armed self-defense."[21] The Court then granted certiorari on *Bianchi*, vacated the judgment, and remanded the case to the Fourth Circuit for reconsideration in light of *Bruen*.[22]

The Fourth Circuit affirmed.[23] Writing for the en banc court, Judge Wilkinson held that assault weapons were not covered by the Second Amendment's text and that Maryland's regulations were consistent with a "tradition of regulating excessively dangerous weapons."[24] Applying the first step of *Bruen*, he determined that assault weapons did not fall within the textual "right to keep and bear arms."[25] Though acknowledging that assault weapons might literally appear to be "arms," he argued that the "text [could not] be read in a vacuum."[26] To the contrary,

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[11] Bianchi v. Frosh, No. JKB-20-3495, 2021 WL 12192789, at *1 (D. Md. Mar. 4, 2021); *see* Kolbe v. Hogan, 849 F.3d 114, 121 (4th Cir. 2017) (en banc).

[12] Bianchi v. Frosh, 858 F. App'x 645, 646 (4th Cir. 2021) (mem.) (per curiam).

[13] Petition for Writ of Certiorari at 5, Bianchi v. Frosh, 142 S. Ct. 2898 (2022) (No. 21-902).

[14] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

[15] 554 U.S. 570, 595 (2008).

[16] *See id.* at 634–35.

[17] *Bruen*, 142 S. Ct. at 2127. Most circuits had adopted a two-step approach where courts first evaluated whether the conduct fell within the scope of the Second Amendment and then applied either strict or intermediate scrutiny, depending on the nature of the conduct and the burden of the regulation. *See, e.g.*, Kolbe v. Hogan, 849 F.3d 114, 132–33 (4th Cir. 2017) (en banc).

[18] *Bruen*, 142 S. Ct. at 2129–30.

[19] *Id.* at 2130.

[20] *Id.* at 2131.

[21] *Id.* at 2133.

[22] Bianchi v. Frosh, 142 S. Ct. 2898, 2898–99 (2022) (mem.) (citing *Bruen*, 142 S. Ct. 2111).

[23] *Bianchi*, 111 F.4th at 441.

[24] *Id.* at 446. Judge Wilkinson was joined by Chief Judge Diaz and Judges King, Wynn, Thacker, Harris, Heytens, Benjamin, and Berner. *Id.* at 441.

[25] *Id.* at 452.

[26] *Id.* at 447 (citing Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring)).

because "the Second Amendment . . . codified a *pre-existing* right"[27] and "the *central component*" of this right was individual "self-defense,"[28] Judge Wilkinson wrote that the Amendment incorporates common law limitations on the right to self-defense.[29] Hence, the amendment does not guarantee a right to possess or use any weapon for any purpose; instead, it protects only arms typically used for self-defense.[30] However, "dangerous and unusual weapons" that are most suitable for criminal and military use, as opposed to those "in common use . . . for self-defense," can be lawfully banned.[31] He then found that AR-15s and similar firearms were unsuitable for self-defense given their "dangerous and unusual" military characteristics and therefore could be banned.[32]

Judge Wilkinson further held that even if assault weapons were covered by the Second Amendment's text, Maryland's regulations were consistent with a historical tradition of state legislatures responding to technological developments in weaponry by banning "dangerous and unusual" new weapons.[33] He traced the development of weapons technology, finding historical examples of nineteenth- and twentieth-century state laws regulating firearms and dangerous weapons such as Bowie knives.[34] This trend continued into the later twentieth century with new regulations of Tommy guns, machineguns, and semiautomatic firearms.[35] Judge Wilkinson concluded that these regulations, enacted by state legislatures in response to dangerous new weapons, were sufficiently analogous to the Maryland statute regulating assault weapons and therefore the Maryland statute satisfied the second step of *Bruen*.[36]

Chief Judge Diaz concurred and wrote separately to criticize *Bruen*, characterizing the methodological approach as "a labyrinth for lower courts."[37] He noted that both the *Bianchi* majority and dissent had examined the same history, only to come to "diametrically opposed conclusions."[38] Judge Gregory concurred in the judgment, disagreeing with both the majority's and dissent's interpretations of *Bruen* and arguing "that the Second Amendment presumptively protects all bearable arms, but history supports regulation of arms that are dangerous and unusual,

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[27] *Id.* (alteration in original) (quoting *Bruen*, 142 S. Ct. at 2127).

[28] *Id.* at 448 (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008)) (citing *Bruen*, 142 S. Ct. at 2135; McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

[29] *Id.* at 448–49.

[30] *Id.* at 450 (quoting *Heller*, 554 U.S. at 626).

[31] *Id.* at 452–53 (quoting *Bruen*, 142 S. Ct. at 2128, 2134).

[32] *Id.* at 458–59.

[33] *See id.* at 462.

[34] *Id.* at 465–67 (citing Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS., no. 2, 2017, at 55, 62–68).

[35] *Id.* at 469–71.

[36] *Id.* at 471–72.

[37] *Id.* at 473 (Diaz, C.J., concurring). Chief Judge Diaz was joined by Judges King, Wynn, Thacker, Benjamin, and Berner. *Id.*

[38] *Id.* at 474.

including but not limited to, those arms not presently in common use."[39] While criticizing the majority for employing the means-end scrutiny forbidden by *Bruen*,[40] he concluded that Maryland's laws fell within a historical tradition of regulating excessively dangerous weapons.[41]

Judge Richardson wrote for the dissenters, concluding that the statute was unconstitutional.[42] He first argued that assault weapons are literally "bearable arms"[43] and therefore presumptively protected by the Second Amendment's plain text.[44] He rejected the notion that *Heller* limited the amendment's text to exclude "dangerous and unusual" weapons, instead locating that analysis in *Bruen*'s second step.[45] He then reviewed English common law and Founding-era history,[46] determining that the government could ban only weapons that are either "particularly useful for criminal activity" or not in common use for lawful purposes.[47] However, he argued that arms in common usage for lawful purposes could not be banned, even if dangerous.[48] He then asserted that because assault weapons like the AR-15 are commonly used for lawful purposes, such as recreation or self-defense, they are constitutionally protected.[49] He disputed the majority's characterization of AR-15s as inappropriate for self-defense, pointing to their ease of use, accuracy, and stopping power.[50] He also rejected the majority's historical analogues, finding that they banned only arms "that were both dangerous *and unusual*," but not those in common use.[51]

Bianchi exemplifies the judicial confusion generated by *Bruen*. Both critics and supporters of *Bruen* have noted the difficulties faced by courts attempting to apply its "text and history" approach.[52] Courts are divided over how to determine the scope of the Second Amendment's plain text, how to understand *Heller*'s presumptive protection of arms "in common use," and how to analyze analogous regulations in finding

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[39] *Id.* at 477 (Gregory, J., concurring in the judgment) (citing District of Columbia v. Heller, 554 U.S. 570, 582 (2008)).

[40] *Id.* at 479 (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127, 2133 n.7 (2022)).

[41] *Id.* at 482.

[42] *Id.* at 483 (Richardson, J., dissenting). Judge Richardson was joined by Judges Niemeyer, Agee, Quattlebaum, and Rushing. *Id.*

[43] *Id.* at 500 (quoting *Heller*, 554 U.S. at 582).

[44] *Id.* at 501.

[45] *Id.* at 502 (quoting *Heller*, 554 U.S. at 627).

[46] *Id.* at 515.

[47] *Id.* at 514 (citing William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1499–500 (2024)).

[48] *Id.* at 516.

[49] *Id.* at 518–19.

[50] *Id.* at 525–26.

[51] *Id.* at 532.

[52] *Compare* Baude & Leider, *supra* note 47, at 1469 (criticizing "confusion and misapplication [of *Bruen*] in the lower courts"), *with* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 78 (2023) (characterizing post-*Bruen* rulings as "scattered, unpredictable, and often internally inconsistent").

a historical tradition. The way that *Bianchi* overcomes these doctrinal puzzles offers a path forward for other courts grappling with *Bruen*.

The problems begin at the first step of *Bruen*: Which "Arms" are covered by the plain text of the Second Amendment?[53] *Heller* defined "Arms" as "[w]eapons of offence,"[54] including "all instruments that constitute bearable arms."[55] However, *Heller* also stated that the amendment protects only weapons "in common use at the time"[56] as opposed to "weapons not typically possessed by law-abiding citizens for lawful purposes,"[57] such as "dangerous and unusual weapons" and those "most useful in military service."[58] *Bruen* did not clarify whether courts should interpret "Arms" literally, as Judge Richardson did,[59] or instead incorporate *Heller*'s limitations on arms "in common use"[60] versus "dangerous and unusual" arms, as Judge Wilkinson did.[61] Other courts are undecided about whether this distinction is part of the plain text analysis in *Bruen*'s first step or the historical tradition analysis in the second step.[62] But a literal reading of "Arms" would apparently offer prima facie protection to even military weapons like the M16 rifle or small nuclear warheads,[63] a seemingly absurd outcome that Judge Wilkinson avoids.[64] Such an approach would also diverge from how courts have incorporated common law historical context from the Founding era in interpreting other rights, like the First Amendment.[65] By incorporating preexisting historical limitations, the *Bianchi* majority appropriately read the Second Amendment in its historical context, consistent with *Heller*'s and *Bruen*'s ostensibly originalist methodologies.[66]

Regardless of whether "common use" is relevant to the plain text interpretation, the term itself is undefined. Neither *Heller* nor *Bruen*

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[53] U.S. CONST. amend. II.

[54] District of Columbia v. Heller, 554 U.S. 570, 581 (2008) (quoting *Arms*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 4th ed. 1773) (alteration added)).

[55] *Id.* at 582.

[56] *Id.* at 627 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

[57] *Id.* at 625.

[58] *Id.* at 627.

[59] *Bianchi*, 111 F.4th at 500 (Richardson, J., dissenting).

[60] *Id.* at 453 (majority opinion) (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2134 (2022)).

[61] *Id.* (quoting *Bruen*, 142 S. Ct. at 2128).

[62] Bevis v. City of Naperville, 85 F.4th 1175, 1198 (7th Cir. 2023) ("There is no consensus on whether the common-use issue belongs at *Bruen* step one or *Bruen* step two."). This lack of clarity is problematic as the party challenging the regulation would bear the burden of showing "common use" if it were a step one issue, whereas the government would bear the burden if it belonged to step two. *See* Jamie G. McWilliam, *The Relevance of "In Common Use" After* Bruen, HARV. J.L. & PUB. POL'Y: PER CURIAM, Fall 2023, at 1, 8.

[63] *See* Charles, *supra* note 52, at 95–96.

[64] *See Bianchi*, 111 F.4th at 460.

[65] *Id.* at 447–48 (analogizing to First Amendment jurisprudence, where activity that is literally "speech" such as defamation or perjury nevertheless falls outside the Amendment's protection).

[66] *See id.* at 448.

specifies a test for whether an arm is "in common use."[67] Judge Richardson argued that so long as a weapon is "widely owned"[68] for any lawful purpose, then it is "in common use"[69] and constitutionally protected.[70] Hence, a legislature could constitutionally regulate a new weapon only before it became too popular.[71] But such an approach would be self-undermining and depend on arbitrary numerical thresholds.[72] And, contrary to the way that legislatures have traditionally responded to new weapons,[73] they would instead have to choose between immediately banning new weapons as soon as they were invented (without the benefit of "observation and experience"), or forgoing regulation entirely once the weapon reached some indeterminate threshold of ownership.[74] This confusion is unsurprising, given that *Heller* provided little guidance on how to operationalize "common use" and *Bruen* provided no further clarity.[75] By contrast, the *Bianchi* majority disclaimed numerical thresholds, instead focusing on whether the arms are in "common use today for self-defense."[76] Analyzing the characteristics of the weapon itself, and its suitability for self-defense, sidesteps any self-undermining and arbitrary numerical thresholds. It also respects the realities of how legislatures respond to public safety threats.[77] Furthermore, such an approach is consistent with *Heller*'s own language placing military-style weapons beyond the protection of the Second Amendment.[78]

As for *Bruen*'s second step, the analysis of "history and tradition" has proven especially confusing.[79] *Bruen* itself dismissed administrability concerns, arguing that the test was no different from the

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[67] *See id.* at 460.

[68] *Id.* at 518 (Richardson, J., dissenting).

[69] *Id.* at 519.

[70] *See id.* at 518–20. *But see* Mike McIntire & Jodi Kantor, *The Gun Lobby's Hidden Hand in the 2nd Amendment Battle*, N.Y. TIMES (June 18, 2024), https://www.nytimes.com/2024/06/18/us/gun-laws-georgetown-professor.html [https://perma.cc/2X4G-EAHA] (criticizing survey data cited by dissent).

[71] *Bianchi*, 111 F.4th at 460.

[72] *See* Bevis v. City of Naperville, 85 F.4th 1175, 1190 (7th Cir. 2023) ("[I]t would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned." (quoting Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015))).

[73] Robert J. Spitzer, *Understanding Gun Law History After* Bruen*: Moving Forward by Looking Back*, 51 FORDHAM URB. L.J. 57, 104 (2023) ("New gun laws are not enacted when firearm technologies are invented or conceived. They are enacted when those technologies circulate sufficiently in society to spill over into criminal or other harmful use, presenting public safety concerns that governments attempt to address through their police and policy-making powers.").

[74] *Bianchi*, 111 F.4th at 461.

[75] McWilliam, *supra* note 62, at 3–4.

[76] 111 F.4th at 460 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2134 (2022)) (citing *Bevis*, 85 F.4th at 1192; United States v. Price, 111 F.4th 392, 404–06 (4th Cir. 2024)).

[77] *See* Spitzer, *supra* note 73, at 104.

[78] District of Columbia v. Heller, 554 U.S. 570, 627–28 (2008).

[79] *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 107–08 (2023).

"commonplace task" of lawyers' analogical reasoning.[80] However, anachronism poses a fundamental problem to *Bruen*'s demand for historical analogues.[81] Neither semiautomatic firearms nor mass public shootings existed at the time of the Founding; there cannot have been regulations addressing these issues in that era.[82] Hence, the absence of regulations is not probative of their constitutionality, as eighteenth- and nineteenth-century legislatures could not have regulated weapons that had not yet been invented to address a problem that did not then exist.

Nevertheless, this quandary can be partially addressed by moving to "a higher level of generality" — that is, identifying a more abstract principle underlying the regulations.[83] In *Bianchi*, Judge Wilkinson generalized from regulations on weapons like Bowie knives and Tommy guns to find a historical tradition of regulatory responses to weaponry innovation.[84] *Bruen* itself left the level of generality unspecified, even though this choice is often outcome determinative.[85] However, the Supreme Court in *United States v. Rahimi*[86] seemed to endorse a higher level of generality in upholding a federal law prohibiting individuals subject to a domestic violence restraining order from possessing a firearm.[87] Eight Justices found that the *principle* of disarming dangerous individuals was consistent with the nation's regulatory tradition, even if the historical analogues operated differently in implementation.[88] The Court reiterated that *Bruen* did not require an exact "historical twin."[89] Still, *Rahimi* declined to specify the precise level of generality for *Bruen*'s history and tradition analysis.[90] Moving to a higher level of generality may nevertheless be a promising way for courts to overcome anachronism by drawing broader principles from the historical record instead of focusing narrowly on individual analogues.

Furthermore, while detractors have criticized decisions like *Bianchi* for improperly narrowing the Supreme Court's precedents to uphold gun safety measures,[91] "narrowing from below" could be seen as a

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[80] *Bruen*, 142 S. Ct. at 2132.

[81] *See* Blocher & Ruben, *supra* note 79, at 150–51.

[82] *Bianchi*, 111 F.4th at 463–64 ("These are not our forebears' arms, and these are not our forebears' calamities." *Id.* at 464.).

[83] Blocher & Ruben, *supra* note 79, at 164.

[84] 111 F.4th at 466–70.

[85] *See* Charles, *supra* note 52, at 139–40; Blocher & Ruben, *supra* note 79, at 162–64.

[86] 144 S. Ct. 1889 (2024).

[87] *Id.* at 1896–97.

[88] *See id.* at 1894, 1901–02.

[89] *Id.* at 1898 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022)).

[90] *See id.* at 1929 (Jackson, J., concurring) (describing the "level of generality at which a court evaluates [historical] sources [under *Bruen*]" as "[not] yet adequately clarified"); *id.* at 1926 (Barrett, J., concurring) ("Harder level-of-generality problems can await another day."). *See generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1092 (1990) (arguing that choosing a level of generality requires value judgments).

[91] *See, e.g.*, Duncan v. Bonta, 83 F.4th 803, 818–20 (9th Cir. 2023) (Bumatay, J., dissenting); Baude & Leider, *supra* note 47, at 1468–69 (criticizing the narrowing of *Heller*).

legitimate response to *Bruen*'s ambiguity.[92] Indeed, the absence of guidance from the Court and its unwillingness to say more than what is strictly necessary in each case may be understood as an implicit delegation to the lower courts to interpret *Bruen* with greater discretion.[93] Such an approach errs on the side of deferring to legislative judgments when the Court has provided an imprecise test like *Bruen* and allows evolving regulations in response to new public safety threats.[94] This point was further underscored by *Rahimi*'s rejection of the Fifth Circuit's strict interpretation of *Bruen* and *Rahimi*'s apparent refusal to further clarify *Bruen*'s test.[95] Viewed this way, *Bianchi* legitimately resisted what otherwise would have been a disruptive decision by adopting a reasonable interpretation of *Bruen*'s broad and vague language.[96]

When Judge Wilkinson criticized *Heller* in 2009,[97] he faced backlash for attacking what many considered an originalist triumph.[98] Yet many of his predictions have now been borne out: The Supreme Court's Second Amendment jurisprudence has led it into a political thicket and empowered the judiciary to undermine legislative judgments and experimentation among the states.[99] Courts have now reached divergent results regarding the constitutionality of laws regulating "ghost guns,"[100] firearms with obliterated serial numbers,[101] large-capacity magazines,[102] carrying of guns in "sensitive places,"[103] and other regulations.[104] Whether the Court chooses to approve *Bianchi*'s reasoning or reject it, the future of gun regulations will likely remain unsettled.

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92 *Cf.* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 960–63 (2016) (arguing that lower courts' narrowing of *Heller* from below was legitimate because the decision's ambiguity was effectively a delegation of interpretive power to lower courts).

93 *See id.* at 962.

94 *See* Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. REV. 1795, 1800 (2023).

95 *See Rahimi*, 144 S. Ct. at 1903.

96 *See* Re, *supra* note 92, at 960.

97 J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 256–57, 264–75 (2009).

98 *E.g.*, Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson III*, 25 J.L. & POL. 1, 1–2 (2009).

99 Wilkinson, *supra* note 97, at 288, 302, 315, 318.

100 *Compare* Def. Distributed v. Bonta, No. CV 22-6200, 2022 WL 15524977, at *2, *4–5 (C.D. Cal. Oct. 21, 2022) (constitutional), *adopted by* 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022), *with* Rigby v. Jennings, 630 F. Supp. 3d 602, 608, 615 (D. Del. 2022) (unconstitutional).

101 *Compare* United States v. Reyna, No. 21-CR-41, 2022 WL 17714376, at *5 (N.D. Ind. Dec. 15, 2022) (constitutional), *with* United States v. Price, 635 F. Supp. 3d 455, 457 (S.D. W. Va. 2022) (unconstitutional at the district court level), *rev'd* 111 F.4th 392 (4th Cir. 2024).

102 *Compare* Ocean State Tactical, LLC v. Rhode Island, 95 F.4th 38, 41 (1st Cir. 2024) (constitutional), *with* Rocky Mountain Gun Owners v. Bd. of Cnty. Comm'rs, No. 22-cv-02113, 2022 WL 4098998, at *2 (D. Colo. Aug. 30, 2022) (unconstitutional).

103 Blocher & Ruben, *supra* note 79, at 146. See *id.* at 140–41 for a summary of conflicting rulings on gun restrictions in places of worship, children's summer camps, mass transit, and Times Square.

104 *See id.* at 106 & nn.25–33.