New York State Rifle & Pistol Association v. Bruen announced a novel constitutional test for gun regulation. This test requires gun regulation to be “consistent with this Nation’s historical tradition of firearm regulation.” This Comment provides the first scholarly sketch of historical pretrial firearms regulations. Based on this history, I argue that forbidding non-dangerous individuals awaiting trial from possessing a firearm violates the Second Amendment under Bruen. I also reject attempts to justify gun regulation by classifying defendants as categorically unvirtuous or dangerous, by appealing to the “seriousness” of a crime or by analogizing pretrial release conditions to historical surety laws. Moreover, I draw a big-picture conclusion about the Court’s historical tradition analysis. Under Bruen, courts need to fabricate a suitably described historical tradition by which to compare historical and modern firearm regulations. In that respect, despite Bruen’s promise to reign in judicial discretion, its historical-tradition analysis ultimately increases judicial discretion by allowing courts to set the relevant description by which to compare historical and modern gun regulations.

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INTRODUCTION

The Supreme Court’s decision in *District of Columbia v. Heller* heralded a new era of individual gun rights.¹ Litigation challenging federal gun regulations followed immediately.² Since *McDonald v. Chicago* incorporated this individual right against the states,³ gun rights activists and individual defendants have challenged a wide range of firearms regulations.⁴ But challenges to the regulation of firearms possession have rarely succeeded, and

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¹ 554 U.S. 570, 595 (2008).
² See infra Section I.B.
³ 561 U.S. 742, 750 (2010).
⁴ See Stephen Kiehl, Comment, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1141-44 (2011) (collecting cases on challenges to firearm regulations under *Heller* and *McDonald*).
courts repeatedly rejected challenges to the federal ban on possession of firearms by convicted felons.\(^5\)

Enter New York State Rifle & Pistol Ass’n v. Bruen, which announced a novel constitutional test for gun regulation.\(^6\) This test requires gun regulation to be “consistent with this Nation’s historical tradition of firearm regulation,” a test that the Court takes to be “[i]n keeping with Heller.”\(^7\) The Courts of Appeals had not seen things this way prior to Bruen, given that all of them adopted a “means-end” scrutiny approach to gun regulation—usually applying intermediate or strict scrutiny to balance Second Amendment rights with the government’s interest in the gun regulation.\(^8\) The Court expressly reset the discussion on firearm regulation by doing away with this means-end scrutiny test.\(^9\)

A nationwide wave of litigation revisiting federal felon-in-possession firearms bans ensued after Bruen.\(^10\) Though some members of the Bruen majority have reassuringly stated that a “variety” of firearms regulation remains constitutional,\(^11\) the Fifth Circuit promptly invalidated a major federal firearms prohibition—a move that the Supreme Court is currently reviewing.\(^12\) And regulations that commentators argued were already unconstitutional under Heller are likely to receive renewed challenges.\(^13\)

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5 See id. at 1145 (observing that “lower courts have upheld virtually all gun regulations they have considered post-Heller”); Dru Stevenson, In Defense of Felon-in-Possession Laws, 43 CARDozo L. REV. 1573, 1579-80 n.19 (2022) (collecting cases to conclude that “all the circuits have now agreed to uphold § 922(g)(1) [the federal felon-in-possession ban] against facial challenges based on the Second Amendment”).

6 142 S. Ct. 2111 (2022).

7 Id. at 2126.

8 Id. at 2125; see also Stevenson, supra note 5, at 1579-80 (noting varying methodologies among the circuit courts for evaluating gun regulations); Jacob D. Charles, Defeasible Second Amendment Rights: Conceptualizing Gun Laws That Dispossess Prohibited Persons, 83 LAW & CONTEMP. PROBS. 53, 56-58 (2020) (describing the post-Heller means-end scrutiny approach); infra note 48 (collecting cases).

9 See Bruen, 142 S. Ct. at 2125-26, 2133 n.7.

10 See, e.g., Range v. Att’y Gen. U.S., 53 F.4th 262, 268 n.6 (3d Cir. 2022), vacated, reh’g granted en banc, 56 F.4th 992 (3d Cir. 2023) (collecting district court cases that have addressed the constitutionality of 18 U.S.C. § 992(g)(1) post-Bruen).

11 See Bruen, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (stating that Bruen does not cast doubt on prohibitions on firearm possessions by felons, bans on carrying weapons in sensitive places, and regulations on the commercial sale of arms).

12 United States v. Rahimi, 61 F.4th 442, 448 (5th Cir. 2023) (holding that 18 U.S.C. § 922(g)(8), a firearm ban on persons subject to domestic violence court orders, is facially unconstitutional under the Second Amendment), cert. granted, 143 S. Ct. 2688 (2023).

This Comment considers a largely overlooked part of the story on firearm regulation: the regulation of firearms by pre-trial and pre-conviction individuals charged with crimes. As this Comment catalogues, those charged with a crime are routinely stripped of their right to bear arms, either by mandatory pretrial firearm possession conditions or by mandatory statutory provisions.

Some of these people have been found to present a threat based on individualized evidence, but others have not. And the firearms rights of pretrial individuals released on bond present a different set of questions than the rights of convicted individuals. Pretrial defendants have not been found guilty of anything. They remain members of the community, subject to certain conditions, as they await trial.

Is it constitutional after Bruen to forbid non-dangerous individuals awaiting trial to possess firearms? This Comment argues it is not. Those charged with a crime, even a felony, are not excluded from “the people” given the right to bear arms under the Second Amendment. Because courts cannot merely narrow the scope of the Second Amendment to justify pretrial gun regulation, they must instead perform Bruen’s historical tradition analysis. However, even the Bruen majority seems divided on how to apply this analysis to gun regulations related to crime.


15 See infra Part I.


17 See infra Sections II.A and IV.A.

18 See infra Sections II.A and IV.B-E.

19 See infra Section II.B.
This Comment provides the first scholarly sketch of historical pretrial firearms regulations. This history reveals a traditional respect for the liberty and rights of those accused of all but the most serious crimes. Modern outright bans on firearms possession by those awaiting trial find hardly any historical precursors. Nevertheless, disarmament of individuals found to pose a risk of physical danger—whom I will label “dangerous persons” for brevity—as well as a judge’s discretionary power to impose conditions on bonds that protect community safety, are clear historical checks on the right to bear arms.

In light of this evidence, this Comment argues that courts should adopt a “dangerous persons” standard for pretrial disarmament. It also responds to recent attempts to justify gun regulation by classifying defendants as categorically unvirtuous or dangerous, by appealing to the “seriousness” of a crime (e.g., as a felony), or by analogizing pretrial release conditions to historical surety laws.

By exploring the pretrial conditions context, this Comment reveals that Bruen’s reliance on history is fraught. Most justifications for pretrial firearms conditions run afoul of the historical record or of Bruen’s historical analysis. But others—like mandatory pretrial conditions for “dangerous” classes of persons—pose questions left unresolved by Bruen. Despite Bruen’s promise, the ghost of means-end scrutiny reappears in the analysis of pretrial conditions. And despite Bruen’s promise to reign in judicial discretion, its historical-tradition analysis ultimately increases judicial discretion by allowing courts to set the relevant description by which to compare historical and modern gun regulations. These issues are separate from broader criticisms of Bruen’s historical-tradition analysis as a methodology that relies on regulations made “nearly exclusively by white men in an era when women and minorities did not have a voice.”

The tragic reality of gun violence in America may be a cause for despair at yet fewer avenues for gun regulation. It may be that the aggregate deregulatory effect of Bruen “will be devastating to black communities” in

20 See infra Part III.
21 See infra Part IV.
22 See infra Section IV.B.
23 See infra Sections IV.B-D.
24 United States v. Jackson, 661 F. Supp. 3d 392, 408 (D. Md. 2023); see also State v. Philpotts, 194 N.E.3d 371, 373 (Ohio 2022) (Brunner, J., dissenting) (observing that the historical-tradition analysis cannot "account for what the United States' historical tradition of firearm regulation would have been if women and nonwhite people had been able to vote for the representatives who determined these regulations").
This Comment points to a silver lining. A danger-centric standard for disarming individuals awaiting trial aligns with revised approaches to disarming felons and those with domestic violence restraining orders. Though sensible gun regulation remains crucial, tacking on gun-related penalties for nondangerous defendants places a substantial burden on exactly those communities that gun regulation is meant to protect, and with little benefit to public safety.

Part I of this Comment considers federal and state pre-trial firearms release conditions. Part II turns to Bruen’s analytical framework. Section II.A explicates the historical-tradition analysis and points to the key choice points in the analysis—some of which remain unrecognized. Section II.B distinguishes conflicting approaches among two members of the Bruen majority: Justice Barrett and Justice Kavanaugh. Part III sketches the history of pretrial firearms conditions. Part IV argues that neither the plain text of the Second Amendment nor the Bruen historical-tradition analysis permits a categorical ban on weapons possession by pretrial defendants. Section IV.A rebuts the claim that pretrial defendants are outside the scope of the Second Amendment. Considering the history of firearm regulation, Sections IV.B through E argue for a danger-centric approach to disarmament of individuals awaiting trial, while pointing out shortcomings in Bruen’s historical-tradition analysis. The Conclusion suggests that this approach coheres with other forms of crime-related gun regulation.

I. MODERN FIREARMS REGULATION FOR THOSE AWAITING TRIAL

Though some defendants are held without bail, many defendants post bail in the United States and return to the community as they await trial. Defendants who post bail are usually released on several conditions. As this Part surveys, mandatory restrictions on pretrial firearm possession are a routine entry in this litany of conditions, and these mandatory restrictions have robustly resisted constitutional invalidation under the Second Amendment.

25 See Khiara M. Bridges, Race in the Roberts Court, 136 HARV. L. REV. 23, 33 (2022) (arguing that Bruen ignores the fact that a gun regulation that expressed white supremacy at a previous point in history may now have the opposite effect of protecting Black communities).

26 See infra Conclusion.

27 See PRETRIAL JUST. INST., supra note 16, at 4-5 (noting how pretrial release condition metrics are structurally biased, particularly based on race).

A. Statutory Bases for Pretrial Firearms Conditions

Under the Bail Reform Act of 1984, judges must release a person from jail on “personal recognizance”—with no cash bond or security—unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.\(^\text{29}\) In turn, the judge may impose “the least restrictive further condition” or “combination of conditions” that will “reasonably assure” appearance of the person and public safety.\(^\text{30}\) These conditions include posting a cash bond, observing a curfew, maintaining employment requirements, refraining from alcohol use, undergoing a medical evaluation, or “refrain[ing] from possessing a firearm, destructive device, or other dangerous weapon.”\(^\text{31}\)

Unlike these discretionary conditions, several federal statutes place mandatory firearms restrictions on defendants awaiting trial. Under 18 U.S.C. § 922(d)(1), it is illegal for anyone to sell or transfer a firearm to a person indicted in any court for any crime punishable by one or more years of imprisonment.\(^\text{32}\) And under 18 U.S.C. § 922(n), a person indicted in any court for any crime punishable by one or more years of imprisonment is prohibited from shipping or transporting any firearm or ammunition in interstate or foreign commerce.\(^\text{33}\) In some states, even individuals charged with non-felonies such as misdemeanors would be subject to these conditions, so long as the possible jail time exceeds a year.\(^\text{34}\) These laws do not prohibit firearms possession outright, but clearly burden one’s ability to acquire firearms—which is protected by the Second Amendment.\(^\text{35}\)

Moreover, under 18 U.S.C. § 3142(c)(1)(B), any person indicted on a set of crimes involving a “minor victim” may only be released from jail on the condition that the person “refrain from possessing a firearm, destructive device, or other dangerous weapon.”\(^\text{36}\) These possession conditions must be
imposed, even if the court concludes that the defendant is neither a danger to the community nor a flight risk.

Turning to state courts, nearly all states permit discretionary firearms possession conditions. In theory, these conditions are supposed to be “tailored to address the twin concerns” of “risk of flight and danger to the community.” But in practice, state judges impose conditions of release “in a near rote fashion—some utilizing a checklist—often with little or no evidence that the condition is necessary to avoid the risk or risks that fuel them.”

Defendants swept into an efficiency-centered pretrial process often face a four-way Sophie’s choice: either forgo bail and remain detained (which is undesirable), pay bail (which is unaffordable for many), engage with a bond system (which has “its own notoriously predatory nature”), or accept whatever pretrial conditions on release that the court imposes (which have their own “monetary costs, social costs, and criminogenic effects”). Beyond this, several states impose mandatory pretrial firearms conditions for those charged with non-violent crimes. As a result, state and federal judges alike seem to routinely impose firearms conditions without extensive consideration of public safety or flight risk.

B. Pre-Bruen Caselaw on Pretrial Firearms Conditions

Courts routinely upheld mandatory firearms possession bans for felons under *Heller.* This Section considers the extent to which the same is true for those charged with a crime.

In the landmark case *District of Columbia v. Heller,* the Court announced an individual right to possess handguns “held and used for self-defense in the home.” The Court gestured at “historical justifications” for gun control regulations as “exceptions” to the individual right, but left development of

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37 See, e.g., MINN. STAT. § 629.715 (2023) (permitting pretrial firearms conditions for “crime[s] against persons”); NEV. REV. STAT. § 178.4851 (2022) (permitting pretrial firearms conditions for community safety or to assure appearance).


39 Id. at 148.

40 See id. at 184.

41 See, e.g., 725 ILL. COMP. STAT. 5/110-10 (2024) (forbidding weapons possession as a pretrial release condition upon indictment for any crime and allowing judges to forgo the condition if unwarranted or “impractical”); WASH. REV. CODE § 9.41.040(2)(a)(iv) (2022) (prohibiting firearms possession by someone released on bond after a judge has found probable cause to believe that person has committed a “serious offense,” including drug and non-violent offenses).

42 See, e.g., United States v. Bacon, 884 F.3d 605, 607 (6th Cir. 2018) (upholding felon weapons possession bans under 18 U.S.C. §§ 922(d)(1) and 922(k)).

those justifications for “when those exceptions come before us.”44 Heller also considered certain firearm regulations “presumptively lawful,” including “longstanding prohibitions on the possession of firearms by felons.”45 Despite this dictum from Heller, the federal statute prohibiting felons from possessing firearms—18 U.S.C. § 922(g)(1)—was the most frequently challenged gun regulation prior to Bruen.46 These challenges universally failed.47

Nearly all courts of appeals after Heller applied either intermediate scrutiny, strict scrutiny, or an “undue burden” standard to gun regulations.48 These means-end scrutiny tests involved (1) determining whether the Second Amendment protected the relevant conduct and then (2) determining whether the gun regulation was a justified means of achieving a substantial or compelling governmental interest.49

Though very few individuals challenged pretrial firearms release conditions post-Heller, there are notable exceptions involving non-violent crimes. In United States v. Arzberger, what was likely the first challenge to a firearms release condition post-Heller, a man was charged with possession of child pornography under 18 U.S.C. § 2252A(a)(2)(B).50 The Adam Walsh Amendments to 18 U.S.C. § 3142(c)(1)(B) impose certain mandatory conditions on the pretrial release of persons charged with possession of child pornography. These conditions include a curfew, a no-contact order with possible witnesses, electronic monitoring, and prohibition on possessing a

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44 See id. at 635; see also United States v. Beno, 664 F.3d 1180, 1183 (8th Cir. 2011) (“[T]he Supreme Court contemplated . . . a historical justification for the presumptively lawful regulations.”); Binderup v. Att’y Gen. U.S. of Am., 836 F.3d 336, 343 (3d Cir. 2016) (en banc) (plurality opinion) (“Heller catalogued a non-exhaustive list of presumptively lawful regulatory measures that have historically constrained the scope of the right.”).
47 See Stevenson, supra note 5, at 1578-79 (“[A]ll eleven of the numbered federal circuit courts, as well as the D.C. Circuit, have considered and rejected Second Amendment challenges to the felon-in-possession laws.”).
48 See, e.g., United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) (applying a two-pronged approach which “ask[s] whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee”); U.S. v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012) (stating that the same two-pronged approach is “the appropriate level of scrutiny”); Kolbe v. Hogan, 849 F. 3d 114, 121 (4th Cir. 2017) (ruling that the proper standard of review for “weapons of war” was intermediate scrutiny); Kanter v. Barr, 919 F. 3d 437, 442 (7th Cir. 2019) (“We have consistently described step two as akin to intermediate scrutiny.”) (internal quotes omitted); United States v. Reese, 627 F.3d 792, 800 (10th Cir. 2010) (citing Heller to apply a two-pronged undue burden approach to Second Amendment challenges).
49 See, e.g., Marzzarella, 614 F.3d at 89 (explaining this two-prong analysis).
firearm or other dangerous weapon. In striking down these mandatory conditions as unconstitutional, the court held that the Adam Walsh Act’s mandatory firearm condition facially violated the Second Amendment as construed in *Heller*. It reasoned that “although the Supreme Court has indicated that [firearms possession] may be withdrawn from some groups of persons such as convicted felons, there is no basis for categorically depriving persons who are merely accused of certain crimes of the right to legal possession of a firearm.” The court concluded that the defendant must be given an opportunity to contest whether the firearms condition was necessary for community safety in an individualized judicial determination.

A few other district courts followed *Arzberger* in striking down the Adam Walsh Act’s mandatory requirements. These courts imposed firearms conditions only once they made individualized findings regarding the defendant’s threat to public safety. But several courts of appeals declined to adopt this reasoning for nonfirearms conditions. And a Ninth Circuit panel rejected an as-applied challenge to the Act’s firearms condition, noting that the Act’s mandatory weapons condition is “absolute by [its] own terms,” even though other release conditions in the Act allow for discretion.

For other criminal charges, most federal courts routinely impose mandatory firearm conditions post-*Heller* without much thought. As one federal court noted, “to ‘eschew possession of weapons’ is a boilerplate condition” for those indicted on a felony in the First Circuit.

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52 *Arzberger*, 592 F. Supp. 2d at 603, 607.
53 Id. at 602.
54 Id. at 603.
56 For instance, one court that invalidated the mandatory pretrial release conditions still imposed a firearms condition, noting that “in most cases” the firearms condition was necessary to “safeguard pretrial services officers” who would visit the defendant. *Smedley*, 611 F. Supp. at 974.
57 See, e.g., United States v. Peeples, 620 F.3d 1136, 1137-39 (9th Cir. 2010) (rejecting a facial challenge to a non-firearms condition because the defendant could not “establish that a curfew or electronic monitoring would be inappropriate for all defendants charged with knowingly receiving child pornography,” and rejecting an as-applied challenge because the district court had “discretion . . . in applying the mandatory release conditions”); United States v. Stephens, 594 F.3d 1033, 1038 (8th Cir. 2010) (rejecting a facial challenge for similar reasons).
58 See United States v. Kennedy, 327 F. App’x 706, 707 (9th Cir. 2009) (distinguishing certain mandatory conditions from the Walsh Act).
the purchase and transport ban under section 922(n) between *Heller* and *Bruen*. But the district courts that did rejected both facial and as-applied challenges to the mandatory firearms condition of section 922(n). In a typical case, *United States v. Love*, a federal district court held that section 922(n) was facially valid under intermediate scrutiny because the government had a substantial interest in imposing the pretrial firearms condition. It reasoned that “Congress has found that individuals under indictment pose a greater likelihood to misuse firearms,” thereby justifying a blanket firearms restraint on those indicted for a crime. The court also found the condition constitutional as-applied even though the defendant had “not been adjudicated to be a danger.” Other courts have upheld mandatory firearms conditions under section 922(n) as applied to defendants lacking any history of allegations of violence, and without an individualized hearing. Additionally, courts have held that section 922(n) does not violate the requirement that only a “least restrictive condition or combination of conditions” be imposed pretrial under 18 U.S.C. § 3142(c)(1)(B).

This survey suggests that federal courts repeatedly rejected challenges to pretrial weapons restrictions under section 922(n) prior to *Bruen*. Some state courts upheld analogous state laws imposing mandatory pretrial firearms conditions. The courts that considered the weapons conditions for those charged with crimes involving a minor under the Adam Walsh Amendments to section 3142(c)(1)(B) were divided in whether the mandatory weapons conditions there violate the Second Amendment.

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62 2021 U.S. Dist. LEXIS 232481, at *6-11 (“There is a reasonable fit between § 922(n) and ensuring public safety.”).

63 Id. at *10 (“Congress undoubtedly found that persons under indictment have a somewhat greater likelihood than other citizens to misuse firearms.” (citing *United States v. Graves*, 554 F.2d 65, 71-72 (3d Cir. 1977))).

64 Id. at *8.

65 See, e.g., *Call*, 874 F. Supp. 2d at 971, 978-79 (imposing firearms condition on defendant lacking history of violent activity who was indicted on fraud, embezzlement, and sale of stolen military firearms).

66 See id. at 975, 979.

67 See, e.g., *State v. Jorgenson*, 312 P.3d 960, 961 (Wash. 2013) (upholding a Washington law prohibiting firearms possession by someone released on bond upon finding of probable cause that they committed a “serious offense”).
II. **BRUEN AND CRIME-RELATED FIREARMS REGULATION**

The previous Part indicates the breadth of pretrial gun regulation in the United States. Challenges to these regulations were largely defeated post-*Heller*. The question is whether *Bruen* will make such challenges more successful. This Part reconstructs *Bruen*’s test for evaluating gun regulations. Section A analyzes this test and highlights key choice points in the test that the Court left to judicial discretion. Section B points to a divide between members of the *Bruen* majority regarding both the nature of the historical-tradition test and how to apply it to crime-related gun regulation. This Part argues that *Bruen*’s historical tradition analysis for gun regulation requires judges to make several key normative judgments based on their own sensibilities—arguably more so than under the pre-*Bruen* means-end scrutiny approach—despite the Court’s claims to the contrary.

A. **Bruen and the Historical Traditions Justifying Firearm Regulations**

*Bruen* preserves the threshold first step of the inquiry from *Heller*. A gun regulation challenger must show that “the Second Amendment’s plain text covers an individual’s conduct” that is forbidden by the gun regulation.68 The Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”69 So a plaintiff has a Second Amendment claim if and only if this “plain”70 or “bare”71 text covers the regulated conduct. Based on this textual analysis, the Court in *Bruen* held that the individual right to keep and bear arms established in *Heller* extends to public spaces outside the home.72

If the plaintiff’s conduct is within the scope of this text, then the court must consider whether the regulation of that conduct is justified. As we saw, *Heller* hinted at a historical basis for justifying gun regulation.73 But *Bruen* turned a one-time historical treatment of the Second Amendment into a historical tradition test that lower courts must administer for a wide gamut of firearms regulations. Despite the “popularity” amongst the Courts of Appeals of a two-step balancing approach to evaluating state firearms regulations, the Court introduced a “test rooted in the Second Amendment’s text, as informed by history.”74

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69 U.S. CONST. amend. II.
70 *Bruen*, 142 S. Ct. at 2126, 2129-30.
71 Id. at 2141 n.11.
72 Id. at 2122.
73 See supra note 43 and accompanying text.
74 *Bruen*, 142 S. Ct. at 2127. The Court collected cases from every circuit supporting a balancing approach. See id. at 2127 n.4.
This test requires that a governmental regulation on firearms be “consistent with the Nation’s historical tradition of firearm regulation.” According to the Court, *Heller* exemplified a “straightforward historical inquiry” in rejecting the District of Columbia’s ban on gun possession in the home. The Court took *Heller* to conclude that the ban was unconstitutional because it was not “analogous” or “somewhat similar” to any regulation present “in the founding period.” The Court thus expanded *Heller* by referring not merely to historical analogues of the Second Amendment (e.g., “analogous arms-bearing rights in state constitutions”), but also to historical analogues of modern gun regulations. With this expansion of *Heller* in hand, the *Bruen* Court glosses this “straightforward historical inquiry” as requiring that a firearms regulation be one “that the Founders themselves could have adopted to confront that problem.”

The Court acknowledges that some cases are less “straightforward” and thus require a “more nuanced approach.” After all, as one court has since noted, a “list of the laws that happened to exist in the founding era is, as a matter of basic logic,” more limited than “what laws would have been theoretically believed to be permissible by an individual sharing the original public understanding of the Constitution.” The Court thus acknowledges that the government merely needs to find a “historical analogue” to its desired gun regulation, not a “historical twin.”

*Heller* merely gestured to this nuanced historical analogue approach, so what counts as a “historical analogue” under *Bruen*? The Court states that this

75 Id. at 2129-30.
76 Id. at 2131.
78 *Heller* never used “analogue” or its cognates such as “analogous” to describe a historical gun regulation. Instead, *Heller* used “analogue” and its cognates to refer to state analogues of the Second Amendment, which is a rights-bearing provision, not a regulation. See *Heller*, 554 U.S. at 589, 600-02, 611, 618, 626. This makes sense because *Heller* did not fashion a historical tradition test at all, but instead remained fairly ecumenical in its approach to evaluating modern gun regulation. See id. at 626-29 (declining to enter into an “exhaustive historical analysis,” and concluding that “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning [firearms from the home] would fail constitutional muster”). In short, a less expansive reading of *Heller* could have treated historical traditions on regulation as sufficient for justifying modern regulation, but not necessary for doing so. But *Bruen* views historical analogues as necessary for justifying modern gun regulation, as this Section shows.
79 *Bruen*, 142 S. Ct. at 2131.
80 Id. at 2131-32.
82 *Bruen*, 142 S. Ct. at 2133.
83 See *Heller*, 554 U.S. at 600-01 (“Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment.”).
“analogical reasoning” requires determining whether “two regulations are relevantly similar.”84 Relevance is to be understood relative to what the Court confusingly labels a “metric” for comparing the modern and historical regulations85—confusing because, unlike a ruler measurement, the ultimate measurement relies on how one describes the items to be compared. As the Court acknowledges, whether two things are similar depends on how one describes the similarity: a green truck is similar to a green hat with respect to the color metric, but not with respect to the wearability metric.86 Looking at both “how and why the regulations burden a law-abiding citizen’s right to armed self-defense” allows comparison of modern and historical regulations.87 From there, the “central” inquiry is whether modern and historical regulations impose “a comparable burden on the right of armed self-defense” that is “comparably justified.”88

The Court means for this historical analogy test to replace “means-end scrutiny” that balances the burden of a firearm regulation with policy objectives of contemporary legislatures.89 Means-end scrutiny, the Court remarked, revises the “balance struck by the founding generation.”90 But in its attempt to access this historical balance, the Court transferred to itself great power as final arbiter of the meaning of historical data. Bruen’s historical analogue test has three essential steps, each of which requires courts to make normative judgment calls.91

1. Step One: Locate Historical Data

Faced with a regulation challenged under the Second Amendment, the court must first locate historical data, which include firearms regulations and the information that provides context for those regulations. These historical firearms regulations serve as the datapoints from which a “tradition” of regulation can be discerned.

But this initial step involves key normative choices. Not all historical facts are created equal. The date on which the Declaration of Independence was signed is a mind-independent fact; the intent behind the phrase “all Men are

84 Bruen, 142 S. Ct. at 2132.
85 Id.
86 Id.
87 Id. at 2133 (emphasis added).
88 Id. at 2133 (citing McDonald v. Chicago, 561 U.S. 742, 767 (2010) and Heller, 554 U.S. at 599).
89 Bruen, 142 S. Ct. at 2126–27, 2133 n.7.
90 Id. at 2133 n.7.
91 For a similar three-step reconstruction of Bruen’s historical tradition test, see Albert W. Alschuler, Twilight-Zone Originalism: The Supreme Court’s Peculiar Reasoning in New York State Pistol & Rifle Association v. Bruen, 32 WM. & MARY BILL RTS. J. 1, 4–5 (2023).
"created equal" is a mind-dependent fact. Justice Breyer voiced the difficulty courts face in gaining access to these mind-dependent facts: “[A]s technological progress pushes our society ever further beyond the bounds of the Framers’ imaginations, attempts at ‘analogical reasoning’ will become increasingly tortured.” Bruen tells us to look at “how and why” historical regulations burden gun rights, but mind-dependent data on the “why” may be lost in the sands of time—and will at least prove challenging for a District Court to locate.

Beyond the problem of locating individual data points, the court does not indicate which interval of time matters for the similarity analysis. As Justice Barrett’s concurrence notes, the Court did not answer “[h]ow long after ratification” a “subsequent practice” may be if that practice is to illuminate “original public meaning.” Some historical data points have little to do with the meaning of the constitutional text, but Bruen’s historical analogue test apparently allows courts to count them anyway. The Court is also unclear on how close the instances must be. Are two distant instances—in different social contexts—enough to establish a “tradition” of regulation?

Finally, there is the question of which datapoints to include. Should contemporary normative views matter? Some firearms regulation was racist or prejudicial against certain religions. The temptation is to exclude these datapoints because “they’re awful, they’re terrible laws.” But as Justice

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93 Bruen, 142 S. Ct. at 2181 (Breyer, J., dissenting).

94 Id. at 2133.

95 See id. at 2162-2163 (Barrett, J., concurring). Compare Randy E. Barnett & Lawrence B. Solum, Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition, 118 NW. U. L. REV. 433, 472 (2023) (arguing that 1868 is a cutoff), with Brief of Everytown for Gun Safety as Amicus Curiae in Support of Defendants-Appellants at 2-3, Antonyuk v. Nigrelli, No. 22-2908 (2d Cir. Jan. 17, 2023) (“1868 is neither a starting-line nor a cutoff; under Bruen and District of Columbia v. Heller . . . both earlier and later history are also relevant.”).

96 See Alschuler, supra note 91, at 17-29 (discussing difficulties in locating the relevant historical data); Barnett & Solum, supra note 95, at 466 (glossing five different ways to understand Bruen’s historical-tradition analysis).

97 See Barnett & Solum, supra note 95, at 444 (claiming that “a constitutional tradition is strongest or most firmly established when it has existed continuously for a very long time (more than a century) throughout the United States”); Motion of Everytown for Gun Safety for Leave to File Amicus Brief in Support of Defendant’s Opposition to Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction at 2, Maryland Shall Issue, Inc. v. Montgomery Cnty., Md., No. 8:21-cv-01736-TDC (D. Md. Jan. 6, 2023) (“[A] small number of laws can be sufficient to establish this nation’s tradition of firearm regulation, at least so long as there is not overwhelming affirmative evidence of an enduring tradition to the contrary.”).

98 See infra Part III.

Jackson has observed, the historical tradition test requires us to resist these temptations. Otherwise, courts (really, the Supreme Court) will need to engage in “some sort of culling of the history so that only certain people’s history counts.”\textsuperscript{100} Allowing such a culling of the record may be normatively desirable but would vitiate the historical traditions test; forbidding such a culling of the record straps constitutional law with historical data that everybody agrees lack any normative force today.

2. Step Two: Describe the Historical Data as a Tradition of Regulation

With this historical data in hand, the court must then ascertain a general description of the “tradition” of regulation. As Solicitor General Prelogar put it, the historical data are used to “discern” certain “enduring constitutional principles” pertaining to firearm regulation.\textsuperscript{101} Normative questions abound at this step.

The degree of generality of the description is one question. Even if judges were historians capable of discerning the intentions behind every historical regulation, no one narrative of “tradition” is clearly the “correct” account of how all those historical regulations hang together.\textsuperscript{102} One could describe all gun regulation very generally as protecting public welfare—in which case almost all gun regulation is permissible.\textsuperscript{103} But one might sort the historical data into more granular traditions, such as disarming treasonous persons, disarming poachers, and so on. These different descriptions for comparison lead to different outcomes.

Moreover, the Court does not specify what relationship the text of the Second Amendment must have to this description of history. \textit{Bruen} motivates the historical analogy test by pointing to the \textit{Heller} Court’s discussion of the scope of “bear” and “arms” in the text of the Second Amendment.\textsuperscript{104} Based on a historical analysis of what counts as “bearable arms,” \textit{Heller} found that founding-era weapons are similar to modern handguns because they are both “bearable arms.”\textsuperscript{105} “Bearable arms” has an obvious textual source in the Second Amendment.

\textsuperscript{100} See id. (response by Justice Jackson).
\textsuperscript{101} Id. at 17-18.
\textsuperscript{102} See United States v. Jackson, No. ELH-22-141, 2023 U.S. Dist. LEXIS 33579, at *28 (D. Md. Feb. 27, 2023) (“Plainly put, . . . there is no one conclusive interpretation of the Nation’s historical tradition with regard to firearm regulation.”).
\textsuperscript{103} See Brief of Amici Curiae Ninth Circuit Federal Public and Community Defenders in Support of Defendant-Appellant at 3, United States v. Garcia, No. 22-50314 (9th Cir. Jan. 10, 2023) (arguing that a “general” description of history leads to overly “broad-brush analogizing that cannot be reconciled with \textit{Bruen}”).
\textsuperscript{104} N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2132 (2022).
\textsuperscript{105} See id.
In contrast, *Bruen* provides a different example of historical tradition of regulation: “sensitive places.”106 Unlike the concept of bearable arms, “sensitive place” is recently minted.107 In dicta, *Heller* indicated that regulations of firearm possession are permissible in “sensitive places” such as “schools and government buildings.”108 Unlike “bearable arms,” talk of “sensitive places” is absent from the “plain text” of the Second Amendment. Therefore, the constitutional text channels judicial discretion in analyzing “bearable arms,” but not “sensitive places.”

3. Step 3: Compare the Modern Regulation to the Historical Tradition as Described

Finally, the court must determine whether the modern regulation is “consistent with the Nation’s historical tradition of firearm regulation” as described. The outcome of this comparison will depend on the choices the court makes in the first two steps. Section IV.B shows that the required degree of fit or overlap between the tradition and the regulation is yet another choice a court must make at this step.

B. Two Approaches to Crime-Related Gun Regulation: Barrett Versus Kavanaugh

Disagreements among members of the *Bruen* majority regarding crime-related gun regulation reflect the challenges behind each of the three steps. Finding historical data, describing a tradition or “principle,” and comparing the data within that tradition to a modern regulation each introduce consequential questions about what counts. Part IV will then show that on any plausible resolution of these normative questions about what counts, category-wide disarmament of pretrial defendants violates the Second Amendment.

Justice Breyer’s dissent suggests that *Bruen*’s historical analogy test undermines *Heller*’s dictum blessing felon-in-possession laws.109 Though Justice Breyer takes the Court’s opinion “to cast no doubt on that aspect of *Heller*’s holding,” he finds a “disconnect between *Heller*’s treatment of laws prohibiting, for example, firearms possession by felons or the mentally ill, and the Court’s treatment of New York’s licensing regime” found unconstitutional.

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106 *Id.* at 2133.
109 *Bruen*, 142 S. Ct. at 2189 (Breyer, J., dissenting).
in *Bruen*.*Id.* Justice Breyer juxtaposes Justice Kavanaugh’s pro-felon-in-possession concurrence with then-Judge Barrett’s anti-felon-in-possession opinions (particularly her dissent as Circuit Judge in *Kanter v. Barr*).*Id.* Justice Kavanaugh’s concurrence reiterates *Heller*’s dictum that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill” or “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.”*Id.* Justice Alito’s concurrence (joined by Chief Justice Roberts) similarly asserts that *Bruen* does not “disturb[] anything that we said in *Heller* or *McDonald* . . . about restrictions that may be imposed on the possession or carrying of guns.”*Id.* But Justice Barrett’s concurrence is conspicuously silent on felon-in-possession regulations. Moreover, Justice Thomas’s majority opinion does not mention this issue. Justice Thomas’s toy example for explaining the historical analogy inquiry is a sensitive-place possession ban,*See supra Section II.A (discussing sensitive-place regulations).* not a felon possession ban, even though *Heller* mentioned both regulations in the same breath as examples of “presumptively valid” regulations.*Id.* So despite their convergence on the historical analogue test, the *Bruen* majority may well be divided on what that test says about crime-related possession restrictions.

The upshot is that the *Bruen* majority disagrees, at minimum, on how to describe the historical data (step two of the inquiry above). Justice Kavanaugh takes “felon” to be an acceptable category of persons subject to firearms regulation and deprivation. But he does not describe any tradition that would render a modern ban on felon firearm possession relevantly like historical bans on firearms. In contrast, then-Judge Barrett, dissenting from a Seventh Circuit decision, identifies the relevant tradition from the historical data: regulation of those “who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety.”*Kanter,* 919 F.3d at 454 (Barrett, J., dissenting).

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110 Id.; see also *Heller*, 554 U.S. at 721 (Breyer, J., dissenting) (finding the majority’s apparent blessing of felon-in-possession laws puzzling).

111 *Bruen*, 142 S. Ct. at 2189 (Breyer, J., dissenting) (concluding that the federal felon-in-possession ban violates the Second Amendment, noting that “Founding-era legislators did not strip felons of the right to bear arms simply because of their status as felons” (citing *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting))).

112 *Id.* at 2162 (Kavanaugh, J., concurring) (citing *Heller*, 554 U.S. at 626).

113 *Id.* at 2157 (Alito, J., concurring).

114 See supra Section II.A (discussing sensitive-place regulations).

115 Compare *Bruen*, 142 S. Ct. at 2133 (noting that courts can analogize to historical regulations concerning “sensitive places” to conclude that contemporary restrictions on carrying firearms in new and comparable sensitive locations are constitutionally permissible), with *Heller*, 554 U.S. at 626 (”[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . .”).

116 *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting).
reasons that felons are not categorical threats to public safety, and that there is no tradition of disarming felons. The tradition she does recognize involving public safety “is a category simultaneously broader and narrower than ‘felons’—it includes dangerous people who have not been convicted of felonies but not felons lacking indicia of dangerousness.” After surveying the relevant history, Part IV shows that Justice Barrett’s argument applies with even greater force to those charged with a crime.

III. THE HISTORY OF PRETRIAL FIREARM POSSESSION CONDITIONS

Bruen’s historical-tradition test requires courts to collect historical firearms regulations regarding pretrial firearm conditions. But so far there has been little academic work on the history of bail before, during, and just after the founding. There is even less work considering historical bond conditions, much less those placed on firearms. This Part surveys the relevant history. It shows that substantial burdens were placed on the rights of dangerous people to possess firearms before, at, and directly after the founding. Nearly all other rationales for firearms restrictions at these times can be reduced to the threat that a person or group posed to public safety.

A. The English Tradition

As far back as 602 A.D., English laws imposed firearms possession restrictions on people considered dangerous or who might promote “strife.” From the Welsh Revolt in 1400 to the 1746 Disarmament Act, England enacted several statutes that specifically prohibited those suspected of rebellion and insurrection from possessing arms. In response to the Welsh Revolt, a statute dated 1400 proclaimed that no Welshman could “bear any manner Armour.” The following century, Catholics were “excluded from the right to arms because they were considered potentially disloyal and

117 Id.
118 Id.
119 See supra Part II.
121 See Carroll, supra note 38, at 148 (“Little work has been done . . . to address the reality of nonmonetary pretrial release conditions.”).
122 The Laws of King Æthelbriht, in ANCIENT LAWS AND INSTITUTES OF ENGLAND 3 (Benjamin Thorpe ed., 1840) (making it unlawful to “furnish weapons to another where there is strife”).
123 See generally Greenlee, supra note 46, at 257-61.
124 2 Hen. 4 c. 12, 124 (1400).
seditious.” Stripped of their civil rights, Catholics could not possess arms unless they possessed them for self-defense, and only by permission of a justice of the peace.

During the reign of Charles II from 1660 to 1685, local officials frequently disarmed “dangerous” or “disaffected persons”—persons thought to be disloyal to the Crown. Officers of the Crown could “seize all Armes in the custody or possession of any person” whom they “judge[d] dangerous to the Peace of the Kingdome.” The English Bill of Rights itself declared: “Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.” So Parliament did not accord the right to bear arms to groups it found dangerous or disloyal.

Several statutes passed in the 1700s prohibited “dangerous” individuals from possessing weapons. Constables were instructed to seize weapons from persons who were dangerous or “Offensively Arm’d . . . upon Sight thereof,” while local lieutenants were instructed to search for “arms in the possession of any persons whom they judge dangerous.” And the disarming of Catholic “papists” continued due to “frequent rebellions and insurrections” and the resulting perception that papists “endeavor[ed] to disturb the publick peace and tranquility.” In response to a revolt by loyalists of King James II in 1715, several acts of Parliament forbade those involved in such “unnatural rebellion” from possessing weapons outside of the home. As the 1746 Disarmament Act explained, this firearm regulation

126 Id.
127 1 W. & M. c. 15, 72 (1688) (allowing Catholics to possess arms “for the defence of his House or person” only with permission from a justice of the peace).
128 See, e.g., CALENDAR OF STATE PAPERS, DOMESTIC SERIES OF THE REIGN OF CHARLES II, 1660–1661, at 100, 150 (1860) (cataloguing local officials seizing weapons from “disaffected” persons with support of the king).
129 Militia Act of 1662, 14 Car. 2 c. 3, § 13, 130 (Eng. 1662).
130 1 W. & M. Sess. 2 c. 2, § 7, 143 (Eng. 1688) (emphasis added). The Bruen Court described this provision as the “predecessor to our Second Amendment.” N.Y. Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2141 (2022) (quoting District of Columbia v. Heller, 554 U.S. 570, 593 (2008)).
134 2 Geo. 1 c. 9, 333 (1715); see also 13 Geo. 2 c. 6, 495 (1739) (confiscating all “arms, armour, and ammunition” in the possession of any papist).
135 21 Geo. 2 c. 34, 262-63 (Eng. 1748) (listing the relevant statutes).
was meant to “prevent[] Rebellion and traiterous Attempts in Time to come, and the other Mischiefs arising from the Profession or Use of Arms, by lawless, wicked, and disa\textit{ff}ected Persons.”\textsuperscript{136} William Blackstone noted that anti-hunting laws were sometimes similarly used to prevent “popular insurrections and resistance to the government.”\textsuperscript{137}

In short, England had a “well-practiced tradition of disarming dangerous persons—violent persons and disa\textit{ff}ected persons perceived as threatening to the crown.”\textsuperscript{138} And though “public safety was a concern, most disarmament efforts were meant to prevent armed rebellions.”\textsuperscript{139} \textit{Bruen} itself recognized this English tradition in noting \textit{Sir John Knight’s Case},\textsuperscript{140} which stated that the act of “go\textsuperscript{ing} armed to terrify the King’s subjects” was “a great offence at the common law.”\textsuperscript{141} Any statute regulating behavior involving firearms that “terrif\textsuperscript{ied} the King’s subjects” was merely an extension of the principle that the monarch—not a rogue private individual—is fundamentally “able . . . to protect his subjects.”\textsuperscript{142}

Turning to pretrial detention and bond conditions, English common law traditionally recognizes that prior to a guilty verdict, the liberty of the accused must be preserved as much as possible.\textsuperscript{143} Blackstone remarks that under the “antient common law” stemming from the Norman conquest, “all felonies were bailable.”\textsuperscript{144}

Later statutes \textit{prohibited} bail for certain non-“bailable” offenses like murder, treason, and “in divers instances of felony.”\textsuperscript{145} These non-bailable offenses eventually encompassed serious offenses like prison-breaking and arson.\textsuperscript{146} Additionally, if the defendant confessed to or was caught in the act of certain lesser crimes such as theft—if the probability of guilt was high—then the defendant could also be held without bail.\textsuperscript{147} In contrast, bail was \textit{mandatory} for many crimes, like petty theft and trespasses punishable only by fine.\textsuperscript{148} Where bail was neither mandatory nor prohibited, bail was left to the discretion of the magistrate.\textsuperscript{149}

\begin{footnotesize}
\begin{enumerate}
\item William Blackstone,\textsuperscript{141} supra note 46, at 261.
\item Id.
\item See \textit{id.}
\item See \textit{generally} \textsuperscript{148} Funk & Mayson, supra note 120 (providing a comprehensive overview of bail before and at the founding).
\end{enumerate}
\end{footnotesize}
For an accused person to be admitted to bail, a “surety” was required—a legally binding assurance that a third party would forfeit a certain amount of property if an individual failed to perform some condition, such as appear for trial or keep the peace. The number of sureties required generally increased with the severity of the alleged crime (usually two for felonies). The use of sureties was not limited to those suspected of a crime. Any member of the community who had a “just cause to fear” another person could “demand surety of the peace” (later known as a “peace bond”). For instance, a wife could “demand surety of the peace against her husband, if he threaten[ed] to beat her outrageously or to kill her.” Those who, in the presence of a justice of the peace or constable, went “about with unusual weapons . . . to the terror of the people” could also be subject to a surety of the peace. It does not appear that disarmament was a condition of such sureties.

To sum up, in the English tradition, firearms bans were frequently imposed on those thought to pose a danger to the public—usually, those who were perceived to be rebellious or seditious. Bail was made available to many of those accused of felonies as a matter of right, and denied to those accused of serious felonies and to those who were likely guilty. Disarmament was not a condition of bail. And issuance of peace bonds (“sureties of the peace”) generally required “just cause to fear” the person subject to the bond, and these bonds likewise did not require disarmament.

B. The Colonies

The American Colonies continued the tradition of disarming rebellious, disaffected, or dangerous individuals. Modelling their laws on the 1328 Statute of Northampton (and Sir John Knight’s Case interpreting that Statute), several states forbade carrying arms in an aggressive manner and

150 See 3 Edw. c. 15 (Eng. 1275); TIMOTHY CUNNINGHAM, 1 A NEW AND COMPLETE LAW-DICTIONARY, “Bail in Criminal Causes,” “Surety of the Peace” (London, 1765).

151 See TIMOTHY CUNNINGHAM, 1 A NEW AND COMPLETE LAW-DICTIONARY, “Bail in Criminal Causes” (London, 1765).

152 See 4 WILLIAM BLACKSTONE, COMMENTARIES *252; 20 VINER’S ABRIDGEMENT, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 106-107 (London, 2d ed. 1793); Bond, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “peace bond”—a term dating from 1846—as “[a] bond required by a court from a person who has breached or threatened to breach the peace”).

153 TIMOTHY CUNNINGHAM, 2 A NEW AND COMPLETE LAW-DICTIONARY “Surety of the Peace” (London, 1765).

154 Id.

155 2 Edw. 3 c. 3 (Eng. 1328) (prohibiting individuals to come “with force and arms” before the “King’s Justices” or to “ride armed by night or by day, in Fairs [or] Markets”).
imprisoned or required peace bonds of those who did.\textsuperscript{156} One legal manual instructed constables to “take away Arms from such who ride, or go, offensively armed, in Terror of the People.”\textsuperscript{157} Bruen itself cites this manual.\textsuperscript{158} In 1637, the Massachusetts Bay leadership disarmed the followers of the dissident Anne Hutchinson, who was convicted of sedition (which was treated much like treason).\textsuperscript{159} Disaffected colonists who remained loyal to England were to be “disarmed, the dangerous kept in safe custody, or bound with sureties for good behavior.”\textsuperscript{160} Therefore, dangerous and disaffected persons continued to be subject to firearms regulation.

Discriminatory gun possession bans were also common for disarming Native Americans, Black people, and indentured servants, but even these laws—to the extent they had any purpose not rooted in racial animus—were justified in terms of prevention of danger, sedition, or rebellion.\textsuperscript{161}

The backdrop to these prohibitions was a colonial firearms culture more protective of firearms rights than the English motherland.\textsuperscript{162} The English Bill of Rights provided Parliament the power to say which groups of people could “have Arms . . . by Law.”\textsuperscript{163} But American jurists sensed that the colonial arms right was broader than the English arms right, excepting groups thought to

\textsuperscript{156} 1 Acts and Resolves of the Province of the Massachusetts Bay 18 (Boston, 18692); Acts and Laws of His Majesty’s Province of New Hampshire in New England 1-2 (Portsmouth, Daniel Fowle 1761); 2 Laws of the Commonwealth of Massachusetts, from November 28, 1780 to February 28, 1807, at 623 (Boston, Thomas & Andrews & Manning & Loring 1807).

\textsuperscript{157} George Webb, The Office of Authority of a Justice of Peace 92-93 (Williamsburg, William Parks 1736).

\textsuperscript{158} N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2145 (2022).


\textsuperscript{160} G.A. Gilbert, The Connecticut Loyalists, 4 Am. Hist. Rev. 273, 283 (1889). For colonial statutes disarming British loyalists, see Mass. Province Laws ch. 21, 479 (1776); 8 The Statutes at Large of Pennsylvania from 1682 to 1801, at 559-60 (1902).

\textsuperscript{161} See, e.g., 2 The Colonial Laws of New York from the Year 1664 to the Revolution 679-80, 687 (1894) (New York law of 1664 forbidding slaves to have or use weapons without their master’s permission due to the “many Mischiefs” and “ill and Dangerous practices” caused by slaves); Laws and Ordinances of New Netherland, 1658-1674, at 234-35 (1868) (New York law of 1656 “forbid[ing] the admission of any Indians with a gun . . . into any Houses” to “prevent such dangers of isolated murders and assassinations”); see generally Michael A. Bellesiles, Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794, 16 Law & Hist. Rev. 567, 576 (1998) (observing that, in response to rebellious events, the earliest firearm legislation in colonial America prohibited Native Americans, Black people, and indentured servants from owning firearms).

\textsuperscript{162} See Greenlee, supra note 46, at 261 (arguing colonists “soon grew contemptuous of the constricted nature of the English arms right”).

\textsuperscript{163} 1 W. & M., Sess. 2, c. 2 (Eng. 1668).
be rebellious, seditious, or dangerous. When he introduced the Second Amendment to Congress, Madison ultimately criticized arms rights in the English Declaration of Rights as too limited, particularly because it protected “arms to” Protestants only.

C. The Founding

As Bruen reiterates, historical evidence from the era of constitutional ratification is central to the “historical tradition” analysis of the scope of the Second Amendment. Samuel Adams’ proposed amendments were a particularly important blueprint for the Second Amendment. He proposed that the Constitution “be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms.” The key word here is “peaceable”: it was a synonym for “non-violent” or “non-dangerous,” not “law-abiding.”

State constitutional conventions proposed disarming rebellious individuals. New Hampshire’s proposed such an amendment: “Congress shall never disarm any citizen, unless such as are or have been in actual Rebellion.” And those who had their firearms confiscated could have them restored if they were no longer dangerous or rebellious.

In a much-discussed proposal, Pennsylvania suggested a right to bear arms that was more restrictive: “[N]o law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public
injury from individuals." And the first proposal in American history that arguably allowed disarming a person for any "crimes committed" was rejected.

As in England, many who committed firearms offenses were not disarmed, but instead had to post a "surety" to ensure good behavior. For defendants awaiting trial, a surety was generally required where an individual entered into a "recognizance to keep the peace" before a court, with the condition to appear at the next term of the court. Echoing the common law rule, William Rawle explained that members of the public could seek peace bonds if they had "just reason to fear" that an individual would use the arms unlawfully. Rawle explained that such peace bonds did not violate the Second Amendment because the right to keep and bear arms "ought not . . . be abused to the disturbance of the public peace." Notably absent in these cases are any express firearms conditions—or any non-monetary conditions—after the surety was posted. That said, the fact that peace bonds did not require outright disarmament is unsurprising because peace bonds generally did not impose non-monetary burdens; peace bonds, as a form of recognizance, were merely "conditional debts" imposed on the bonded person.

Finally, the major legal manuals in America inherited the English distinction between offenses where bail was mandatory, prohibited, and discretionary. The key innovation by the time of the founding was the rising popularity in the colonies of the “dissenter” model, which revised the English

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173 See C. Kevin Marshall, Why Can't Martha Stewart Have a Gun?, 32 Harv. J.L. & Pub. Pol'y 695, 712-13 (2009) (“For relevant authority before World War I for disabling felons from keeping firearms, then, one is reduced to three proposals emerging from the ratification of the Constitution.”).

174 See, e.g., Acts and Laws of His Majesty's Province of New-Hampshire in New England 1-2 (1761) (stating in a 1759 that persons "who shall go armed offensively" were not released "until he or she find such sureties for the peace and good behavior," and requiring forfeiture of only those arms "used by the offender" in the offense).

175 See Welling’s Case, 47 Va. 670, 670 (Va. Gen. Ct. 1849) (requiring that a defendant enter a "recognizance" with "sureties" to keep the peace both before and after trial). For further comparison of bail bonds and peace bonds, see Funk & Mayson, supra note 120, at 32-37.


177 Id.

178 See Funk & Mayson, supra note 120, at 35.

179 See, e.g., Webb, supra note 157, at 30-33; see also Funk & Mayson, supra note 120, at 15-18 (collecting sources).
common law model and required bail for all but capital offenses, if the prisoner provided sufficient sureties.\textsuperscript{180}

D. The Nineteenth Century

The 100 years following the founding saw incremental expansions to this danger-based framework of firearms regulation. Discriminatory weapons bans for Native Americans, Black persons held in slavery, and persons freed from slavery were common.\textsuperscript{181} Some states prohibited “tramps”—males begging for charity outside their home county—from carrying weapons.\textsuperscript{182} Yet these discriminatory laws made clear that such weapons regulation was meant to prevent violence or dangerous conduct.\textsuperscript{183} For example, Pennsylvania expressly prohibited tramps from carrying a weapon “with intent unlawfully to do injury or intimidate any other person.”\textsuperscript{184}

By the turn of the twentieth century, some states did ban “vicious persons” from possessing firearms. In upholding one tramp weapons ban, Ohio’s Supreme Court indicated that the Second Amendment “was never intended as a warrant for vicious persons to carry weapons with which to terrorize others.”\textsuperscript{185} But in provisions of this kind, “vicious person” was not a free-wheeling category of lawbreakers, but a label attached to individuals who would use firearms more dangerously than others.

Finally, the nineteenth century continued the practice of granting bail to pretrial defendants if they posted bond. In one typical bail statute, Arizona permitted bail as a matter of right for offenses not subject to the death penalty and required two sureties to ensure appearance of the pretrial defendant.\textsuperscript{186} There is no mention of firearms conditions in this statute or others.

\textsuperscript{180} See Funk & Mayson, supra note 120, at 19-29 (describing the dissenter model).


\textsuperscript{182} See, e.g., 1 A DIGEST OF THE STATE OF PENNSYLVANIA FROM THE YEAR 1700 TO 1894, at 541 (Frank F. Brightly ed., 12th ed. 1894) (defining "tramp" as a person "going about from place to place . . . begging" and with "no fixed place of residence"); 1878 N.H. Laws 612, ch. 270 § 2 (requiring imprisonment of any tramp "found carrying any fire-arm or other dangerous weapon, or shall threaten to do any injury to any person, or to the real or personal estate of another"); see also Greenlee, supra note 46, at 270 n.138 (collecting sources).

\textsuperscript{183} See, e.g., Waters v. State, 1 Gill 302, 309 (Md. 1843) (approving disarmament of free Black people as a “dangerous population”).

\textsuperscript{184} 1 A DIGEST OF THE STATE OF PENNSYLVANIA FROM THE YEAR 1700 TO 1894, at 541 (Frank F. Brightly ed., 12th ed. 1894).

\textsuperscript{185} State v. Hogan, 63 Ohio St. 202, 218-19 (1900).

In sum, the survey of these four periods suggests that there is a tradition of disarming particular persons who pose an elevated risk of physical danger to the public. It also suggests that there is a tradition of disarming categories of persons found to be rebellious, seditious, or physically dangerous. But notably lacking from the record is any evidence that the government disarmed persons solely because they broke the law, much less persons merely suspected of having broken the law. So mere application of Bruen’s straightforward “historical twin” approach discussed in Part II provides no justification for categorically disarming pretrial defendants. Part IV turns to the trickier question of whether Bruen’s more nuanced “historical analogue” approach justifies categorically disarming pretrial defendants.

IV. DO HISTORICAL TRADITIONS SUPPORT PRETRIAL FIREARMS REGULATIONS?

This Part considers whether pretrial firearms conditions violate the Second Amendment under Bruen’s historical analogue analysis. Section A argues that the scope of “the people” protected by the Second Amendment cannot be read to categorically exclude those accused of crime. Sections B to E then consider whether, under Bruen, pretrial firearms regulations are “consistent with this Nation’s historical tradition of firearm regulation.”

Four candidates for historical traditions of regulation are considered: laws prohibiting dangerous (Section B) or unvirtuous (Section C) people from possessing firearms, laws prohibiting those charged with serious crimes from possessing firearms (Section D), and surety-of-the-peace bonds (Section E). This Part concludes that none of these traditions justifies category-wide regulation of pretrial defendants. Though it contains many puzzles, Bruen’s historical-tradition test—on any plausible implementation—prohibits category-wide firearms regulation of pretrial defendants without an individualized determination of dangerousness.

A. Defendants as Outside the Scope of “The People”

This Section argues that pretrial defendants are within the scope of the Second Amendment, contrary to several recent judicial opinions. “The right of the people to keep and bear Arms” applies to pretrial defendants.

The scope of “the people” is the key inquiry for considering crime-related firearms restrictions. Heller twice mentioned that gun regulation has not historically targeted “law-abiding citizens.” Bruen turned this mention into

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188 See District of Columbia v. Heller, 554 U.S. 570, 625 (2008) (“For most of our history . . . the Federal Government did not significantly regulate the possession of firearms by law-abiding
a phrase of choice; the majority opinion used the term “law-abiding” fourteen times as a modifier of “citizen.”189 And the majority opinion stated its own holding in these terms: the New York proper-cause gun regulation violated the Second Amendment (via the Fourteenth Amendment) “in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.”190

This use of the phrase “law-abiding citizen” has led post-Bruen courts to hold that felons fall outside the scope of Second Amendment protection.191 For instance, the Third Circuit panel in Range v. Att’y Gen. U.S. said that “[t]hose whose criminal records evince disrespect for the law are outside the community of law-abiding citizens entitled to keep and bear arms.”192 This holding is independent of the historical-tradition analysis discussed in Sections B to E,193 and thus allows courts to avoid relying on their own analysis of historical firearm regulations. Indeed, courts made similar arguments prior to Bruen.194

In contrast, other courts have read the scope of “the people” more broadly in striking down weapons possession laws.195 For instance, the en banc Third Circuit overruled the Third Circuit panel in Range, rejecting the government’s position that “only ‘law-abiding, responsible citizens’ are counted among ‘the people’ protected by the Second Amendment.”196 Heller likewise began its

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189 142 S. Ct. at 2122, 2125, 2131, 2133-34, 2135 n.8, 2138 & n.9, 2150, 2156.
190 Id. at 2156.
193 See id. at 266 (claiming its holding on the historical tradition of firearm regulation as valid “even if [defendant] falls within ‘the people’”).
194 See, e.g., Folajtar v. Att’y Gen., 980 F.3d 897, 905 (3d Cir. 2020) (remarking that “it is difficult to conclude that the public, in 1791, would have understood someone facing death and estate forfeiture,” such as someone charged with a felony, “to be within the scope of those entitled to possess arms” (quoting Medina v. Whitaker, 913 F.3d 152, 158 (D.C. Cir. 2019))).
195 See, e.g., United States v. Rahimi, 61 F.4th 443, 452 (5th Cir. 2022) (holding that an individual subject to a domestic violence restraining order received Second Amendment protections).
analysis with the “strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.”\footnote{554 U.S. 570, 581 (2008).} Heller took the “the people” to “unambiguously refer[] to all members of the political community, not an unspecified subset.”\footnote{Id. at 580.} Additionally, these interpretations deny that historical evidence unrelated to the text of the Second Amendment should be used to narrow the scope of the Second Amendment. Then-Judge Barrett identified two approaches to the use of history post-\textit{Heller}: “[O]ne [approach] uses history and tradition to identify the scope of the right, and the other uses that same body of evidence to identify the scope of the legislature’s power to take it away.”\footnote{Kanter v. Barr, 919 F. 3d 437, 451-53 (7th Cir. 2019) (Barrett, J., dissenting).} The latter approach envisions the Second Amendment as a right with a broad scope (“the people”), subject to regulatory limitations identified by history. In particular, felons fall within this broad scope.

There are several reasons to prefer the latter broad-scope interpretation of “the people.” First, “the Second Amendment’s plain text” makes no mention of felons or lawbreakers.\footnote{See N.Y. Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2129-30 (2022).} “The people” includes the national political community, not a “subset” of it. Indeed, if “the people” has the same meaning in the Second Amendment as it does in the First and Fourth Amendments, then “the people” clearly includes lawbreakers and felons.\footnote{See U.S. CONST. amend. I (protecting “the right of the people peaceably to assemble”); U.S. CONST. amend. IV (protecting “[t]he right of the people” against “unreasonable searches and seizures”); see also \textit{Heller}, 544 U.S. at 644 (Stevens, J., dissenting) (noting the constitutional incongruity of restricting “the people” to include only “law-abiding, responsible citizens”).} Constitutional meanings of “the people” should not be multiplied beyond necessity.\footnote{See ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167-69 (2012) (describing the Whole-Text Canon, which requires that a “text must be construed as a whole”).} Second, restrictive readings of “the people” face a line-drawing problem: who counts as “law-abiding” or “responsible”?\footnote{See United States v. Rahimi, 61 F.4th 443, 453 (5th Cir. 2023) (noting that relying on an interpretation of “law-abiding” admits of “no true limiting principle”).} Surely minor violations of the law do not count, but it is unclear how minor.

Third, the Court’s use of “law-abiding citizen” is plausibly read as a safe harbor—that is, as providing an example of those who receive protection. The Second Amendment protects more than American citizens: “The people” includes both the “national community” and those “who have otherwise developed sufficient connection with this country to be considered part of
that community.”

If “citizen” is not a requirement for Second Amendment protection, then why should “law-abiding” be? Both “law-abiding” and “citizen” are jointly sufficient conditions for Second Amendment protection, not absolute requirements for protection. For these reasons, felons are within the scope of the Second Amendment.

Even if we assume convicted felons were ultimately outside the scope of “the people,” there remains the question of whether those accused of a felony are also outside the scope. The few district courts that have specifically addressed the constitutionality of section 922(n) in a case involving pretrial conditions post-

Bruen are divided. Some have concluded that the plain text of the Second Amendment covers the conduct of individuals under indictment. Others exclude individuals under indictment from Second Amendment protection.

In an illustrative case excluding pretrial defendants from “the people,” United States v. Perez-Garcia, officers arrested the defendant after they found methamphetamine and fentanyl in the rear bumper of his vehicle. The defendant was released under a “Standard Condition” imposed at the judge’s discretion: “The defendant must not possess or attempt to possess a firearm, destructive device, or other dangerous weapon.” The district court held that

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204 Heller, 554 U.S. at 580 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).

205 Some circuits have held non-citizens to have Second Amendment protections. See Pratheepan Gulasekaram, “The People” of the Second Amendment, 85 N.Y.U. L. REV. 1521, 1526-27 (2010) (arguing that Heller’s insertion of “citizen” in “law-abiding citizen” should be reconsidered and that “the people” should also include non-citizens, given that Heller’s rationale of self-defense (as opposed to national defense) applies equally to citizens and non-citizens).


208 Perez-Garcia, 628 F. Supp. 3d at 1048.

209 Id.
this release condition did not violate the Second Amendment.\footnote{210} The court reasoned that the defendant “would not be considered a ‘law-abiding’ or responsible citizen” because he had been “charged with a crime based on a finding of probable cause.”\footnote{211} Based on what it viewed as a “necessary regulatory measure[ ]” for those with pending criminal charges, the district court concluded that the defendant was “outside the plain text of the Second Amendment.”\footnote{212} In a terse order, a Ninth Circuit panel affirmed, indicating that an opinion will eventually issue.\footnote{213}

This reasoning is unpersuasive. The court offers no “plain text” analysis of the Second Amendment. Instead, the court argues that the “regulatory” interests of the state regarding public safety outweigh the “pretrial release liberty” of the defendant.\footnote{214} But, first, if the court is weighing the “regulatory” interests of pretrial release conditions against the Second Amendment liberty interests of the defendant, then the court assumes that the defendant has such liberty interests. The court thus lapses into maintaining that the defendant is within the scope of the Second Amendment. Second, the court fails to engage in any particularized balancing of regulatory and liberty interests. It makes no finding that this defendant accused of a non-violent crime is a threat to public safety, or that the “least restrictive” means of assuring public safety would be through a weapons condition.

Because the textual scope of “the people” is broad, the Supreme Court should not double down on its “law-abiding citizen” gloss of “the people.” The “law-abiding citizen” moniker is frequently contrasted with “thug” or “gangster,”\footnote{215} which are amorphous categories not representative of all lawbreakers. Many lawbreakers pose no firearm-related danger to the community. Making a “law-abiding citizens” restriction into a “citizens not accused of breaking the law” restriction would contradict the American ideal that the liberty of a person awaiting trial should be preserved as much as possible.\footnote{216}

This analysis shows “the people” protected by the Second Amendment include felons. And even if there were some plausible case for excluding convicted felons from “the people,” there is no plausible case for excluding

\footnotesize{\begin{itemize}
\item \footnote{210} Id. at 1054.
\item \footnote{211} Id. at 1053.
\item \footnote{212} Id. at 1053-54.
\item \footnote{213} United States v. Garcia, No. 22-50314, order at 1 (9th Cir. Jan. 26, 2023). To date, no opinion has been filed.
\item \footnote{214} Perez-Garcia, 628 F. Supp. 3d at 1054.
\item \footnote{216} See Funk & Mayson, supra note 120, at 8-9 (arguing that the founding era espoused “lofty legal commitments to [the] liberty” of pretrial defendants).
\end{itemize}}
accused persons from “the people.” Given that lawbreaking may be mundane (as in traffic violations) or nonviolent (as in tax- or drug-related crimes), neither *Heller* nor *Bruen* hides an elephant in a mousehole: a sweeping Second Amendment scope restriction inside of the phrase “law-abiding citizen,” language that can equally be read as an example of, not a requirement for, Second Amendment protection.

**B. Defendants as Dangerous**

Because “the Second Amendment’s plain text covers” those charged with a crime, “the Constitution presumptively protects” the relevant conduct of those persons. Once a plaintiff makes this showing, “[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” This Section turns to the first putative historical tradition: the disarmament of dangerous individuals.

As Part II outlined, evaluation of any firearms regulation under *Bruen*’s historical-tradition analysis has three steps. First, the court must locate the relevant historical data (such as historical firearms regulations). Second, the court must describe the traditions of regulation based in those historical regulations. Third, the court must determine whether the modern regulation fits into a tradition of firearms regulation.

The historical survey in Part III showed that there is a historical tradition of regulating firearm possession by dangerous persons, addressing the first two steps of this inquiry. Various categories of persons perceived to be dangerous, rebellious, or seditious were disarmed outright. And individuals who instilled reasonable fear in others were subject to sureties that burdened their ability to possess firearms (without outright disarming them). In short, under *Bruen*, the Second Amendment permits regulation of “those whose possession of firearms would pose an unusual danger, beyond the ordinary citizen, with respect to harm to themselves or harm to others.” Because of this tradition, disarming persons after a judicial determination that they are dangerous is justified under *Bruen*.

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218 *Id.* at 2130.

219 Transcript of Oral Argument at 6, United States v. Rahimi, 143 S. Ct. 2688 (2023) (No. 22-915). Notably, the Solicitor General’s test in *Rahimi* permits regulation of both dangerous and non-“law-abiding” persons. *Id.* at 5-6. This Part challenges the “law-abiding” prong.
But many courts have invoked this tradition to approve category-wide firearms regulation of pretrial defendants\(^\text{220}\) (and felons).\(^\text{221}\) Is category-wide regulation of firearm possession by pre-trial defendants consistent with the dangerous-persons tradition of regulation? This Section argues that it is not.

The third step presents the key question here: Does modern regulation of gun possession by pretrial defendants fit into the tradition of regulating firearms possession by dangerous persons? To answer this question, we would need to know whether pretrial defendants as a class are dangerous, and if so, how dangerous. Those are empirical questions. But how dangerous do pretrial defendants need to be to belong to the category of “dangerous persons” who were historically regulated? Can any group who is more dangerous than average be regulated? Do persons need to be dangerous in a particular way (e.g., physically dangerous)? Those are normative questions. Similar normative questions arise not just in defining “dangerous persons” but in defining any regulatory category. \textit{Bruen} does not answer any of these empirical or normative questions.

The pre-\textit{Bruen} means-end scrutiny view would approach this issue by asking what degree of overlap is required between the category “pretrial defendants” and the category “dangerous persons.” Means-end scrutiny then invokes the familiar “tiers of scrutiny”: Rationally related? Substantially related? Narrowly tailored? But \textit{Bruen} did away with means-end scrutiny. The resulting doctrinal hole is a symptom of what Justice Breyer recognized in his \textit{Bruen} dissent: the majority opinion still “ironically” requires courts to consider “a regulation’s means (how) and ends (why)—even as it rejects the utility of means-end scrutiny.”\(^\text{222}\) So if a historical regulation is correctly described as targeting “dangerous persons,” \textit{Bruen} does not give us the tools to determine whether pre-trial defendants are “dangerous persons.”

Nevertheless, the regulation of pretrial defendants is not a justified means of regulating dangerous persons, no matter how one mends this “means-end-scrutiny-shaped hole” in \textit{Bruen}. Regulation of pretrial defendants as a whole category does not pass constitutional muster because the categories of “pretrial defendant” and “dangerous person” do not sufficiently overlap.


\(^{221}\) Compare United States v. Nutter, 624 F. Supp. 3d 636, 644 (S.D.W.V. 2022) (holding that the conduct of convicted felons, a “group[] identified as dangerous,” is subject to regulation), with Range v. Att’y Gen. U.S., 53 F.4th 262, 283 (3d Cir. 2022) (holding that even though felons as a class are not necessarily dangerous, felons are part of a historical class of persons who “lack[] respect for the rule of law and thus [fall] outside the community of law-abiding citizens”).

\(^{222}\) See \textit{Bruen}, 142 S. Ct. at 2179 (Breyer, J., dissenting).
Category-wide regulation of pretrial defendants is arguably “rationally related” to protecting public safety (as in rational basis review). But that does not matter: *Heller* requires more than a “rational basis” for firearms regulation.\(^{223}\) The government may dream up many objectionable category-wide gun regulations based on rational relations or weak correlations.\(^{224}\) As then-Judge Barrett observed, “[t]he government could quickly swallow the [Second Amendment] right if it had broad power to designate any group as dangerous and thereby disqualify its members from having a gun.”\(^{225}\)

Category-wide regulation of pretrial defendants would fail if a stronger relationship were required than “rationally related.” Again, *Bruen* does not tell us what degree of overlap is required between “pretrial defendant” and “dangerous person.” But the analyses under intermediate and strict scrutiny illustrate why pretrial defendants are outside the sphere of “dangerous persons.”

Category-wide regulation of pretrial defendants should fail under a “substantial relation” approach (as in intermediate scrutiny). Though those involved in violent crime may tend to have prior criminal records,\(^{226}\) it is doubtful that being a criminal defendant substantially relates to being dangerous.\(^{227}\) Even if the empirical evidence ultimately showed some degree of correlation, other categories—like young men or (better yet) young men without a high school diploma—would likely be much better predictors of dangerousness than the category “pretrial defendant.”\(^{228}\) Yet disarming these groups would doubtlessly violate the Second Amendment.\(^{229}\)


\(^{224}\) It could, for instance, prohibit firearms possession on the day of the week correlated with the most firearms violence.

\(^{225}\) Kaner v. Barr, 919 F. 3d 437, 465 (7th Cir. 2019) (Barrett, J., dissenting).

\(^{226}\) See Don B. Bates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 Hastings L. J. 1739, 1742 (2009) ("Perpetrator studies dating back to the nineteenth century invariably find that the overwhelming majority of murderers have prior crime records.")


\(^{229}\) Cf. Mayson, supra note 227, at 557 (arguing for a “parity principle” on which “[i]f a defendant is no more dangerous than many non-defendants, and that level of risk would not authorize restraint of a non-defendant, it should not authorize restraint of the defendant either”); I am, of course, ignoring the Equal Protection issues such laws would pose.
Finally, category-wide regulation of pretrial defendants would surely fail under a “narrow tailoring” approach (as in strict scrutiny). On an individual basis, courts can make individualized determinations of dangerousness during bond hearings. As I note below regarding peace bonds, the evidentiary showing required to find that someone is “dangerous” for the purposes of the Second Amendment is fairly low and merely requires “cause” to believe that someone poses a physical danger to the public.\textsuperscript{230} For instance, a showing of probable cause that someone committed a violent offense would automatically suffice to show “cause” to believe that such a person is dangerous for the purposes of the Second Amendment. And though it might be more resource-intensive for courts to find that those charged with a non-violent crime pose a physical threat to the community, such is arguably the price for protecting a constitutional right. On a category-wide basis, firearm regulations could more narrowly target those accused of violent crimes as a proxy for dangerous persons.

Therefore, though there is a longstanding tradition of firearms regulation of dangerous individuals, category-wide regulation of pretrial defendants does not fit into that tradition.

C. Defendants as Lacking Civic Virtue

Another candidate is the tradition of regulating firearms possession by those lacking “civic virtue.” Under the civic virtue rationale, those lacking civic virtue are not necessarily dangerous or even lawbreakers.\textsuperscript{231} In one pre-\textit{Bruen} case, the Fifth Circuit collected founding-era laws regulating “law-abiding slaves,” “free blacks,” and “persons who refused to swear an oath of allegiance to the state or to the nation” (such as “Loyalists”)—extracting from this history a tradition of regulating “untrustworthy” or “unvirtuous” persons.\textsuperscript{232} Before \textit{Bruen}, the Third Circuit similarly concluded that “the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm ‘unvirtuous citizens[,]’” including “any person who has committed a serious criminal offense, violent or nonviolent.”\textsuperscript{233} A Third Circuit panel in \textit{Range} reiterated this “civic virtue” rationale post-\textit{Bruen},\textsuperscript{234} though the Third Circuit discarded this holding in its en banc ruling.\textsuperscript{235} After \textit{Bruen}, some district courts have adopted the civic

\begin{footnotes}
\footnotetext{230}{See infra Section IV.E.}
\footnotetext{232}{\textit{NRA v. ATF}, 700 F.3d 185, 200-201 (5th Cir. 2012).}
\footnotetext{233}{\textit{Binderup v. Att’y Gen. U.S.}, 836 F.3d 336, 348 (3d Cir. 2016).}
\footnotetext{234}{See \textit{Range}, 53 F.4th at 283 (emphasizing a lack of respect “for the rule of law”).}
\footnotetext{235}{See \textit{Range v. Att’y Gen. U.S.}, 69 F.4th 96, 103 (3d Cir. 2023) (mentioning, but declining to adopt, an unvirtuous citizen rationale).}
\end{footnotes}
virtue rationale to justify mandatory firearms conditions in non-criminal contexts, and government briefs have adopted the civic virtue argument in the pretrial firearms conditions context.

The civic virtue theory does not support firearms regulation of pretrial defendants. Some commentators argue that the history of regulating firearms possession by “disaffected” persons supports the civic virtue theory. But as the sketch above showed, those who were merely “unvirtuous” were not disarmed: they had to be dangerous, rebellious, or seditious.

Beyond this historical point, Bruen’s historical tradition analysis would collapse on itself if courts recognized a “those lacking civic virtue” tradition of regulation. The idea of “civic virtue” is a broad and vague philosophical concept. If philosophers are divided on what counts as “civic virtue,” courts and legislatures probably are too. Courts should rightly worry that “those lacking civic virtue” is too general and vague to accurately describe a historical tradition of firearm regulation. Though Bruen’s test allows judicial discretion regarding how generally to characterize a tradition of regulation, “those lacking civic virtue” is practically a catch-all category for “those whom the state wishes to regulate.” “Those lacking civic virtue” plausibly includes both criminals and non-criminals. For instance, it seems “commonsensical” that failing to vote is a civic vice. Failing to feed the parking meter amounts to a miniature transgression of “the nascent social compact.” But neither observation has much to do with firearms. Consequently, the civic virtue theory does not meaningfully channel the discretion of the judiciary or the

236 See, e.g., United States v. Nutter, 624 F. Supp. 3d 636, 645 (S.D. W. Va. 2022) (noting approvingly that a weapons condition on an individual subject to a domestic abuse restraining order was similar to banning firearms for “dangerous or unvirtuous citizens”).

237 See, e.g., United States v. Jackson, 661 F. Supp. 3d 392, 409-10 (D. Md. 2023) (noting that the government employed the civic virtue argument in support of pretrial firearm restrictions for those charged with felonies).


239 See supra Part III; see also Greenlee, supra note 46, at 275-85.

240 See ARISTOTLE, Politics, in THE COMPLETE WORKS OF ARISTOTLE 2062-27 (Jonathan Barnes ed., 1984) (arguing that a “good citizen” is one capable of both ruling and being ruled); JOHN LOCKE, Second Treatise, in TWO TREATISES OF GOVERNMENT 342 (Peter Laslett ed., 1960) (arguing that, as part of the social contract, individual members of society must “resign” their individual judgment on how to operate political society “into the hands of the Community”).

241 See, e.g., JASON BRENNAN, THE ETHICS OF VOTING 42-49 (2011) (noting that different theories of civic virtue differ on whether civic virtue requires “political participation”).

242 See supra Section II.A.

243 BRENNAN, supra note 241, at 40.

legislature in determining who enjoys Second Amendment rights—which is the whole point of *Bruen*’s historical-tradition test.

Therefore, lack of civic virtue is not a viable historical tradition of firearm regulation of pretrial defendants.

D. Defendants Charged with (Serious) Crimes

Several courts have upheld mandatory pretrial firearms conditions for defendants charged with “serious crimes” or felonies.246 The question then is whether all persons charged with “serious” crimes—or else non-violent crimes of a certain kind—should receive less Second Amendment protection.

After *Bruen*, some courts have pointed to historical regulations that regulate firearms possession by non-violent criminal offenders. For instance, the Third Circuit cited firearms regulation of those convicted of non-violent hunting crimes as evidence of a historical tradition of regulating non-violent criminals.246 But to extract a historical tradition of “laws disarming non-violent criminals” from this set of historical regulations, one needs to describe the historical tradition of regulation in sweeping generality. Hunting crimes are a small subset of crimes—and they are crimes that are very likely to involve weapons. Without further data, it is not clear why courts should recognize such a broad tradition based on hunting laws.

Some courts cite Pennsylvania’s constitutional proposal that no disarmament of individuals may occur “unless for crimes committed.”247 But, first, this historical proposal was never adopted. Second, modern regulations must be consistent with a historical tradition of regulation, not a single historical fact. *Bruen* itself emphasized that “we will not ‘stake our interpretation of the Second Amendment upon a single law, in effect in a single [State], that contradicts the overwhelming weight of other evidence. . . .’”248

The “serious crime” justification applies even less to those merely accused of a crime. The constitutional default is that merely being charged with a crime is not sufficient to deprive one of constitutional protections. “In our

245 See, e.g., United States v. Rowson, 652 F. Supp. 3d 436, 462-72 (S.D.N.Y. 2023) (rejecting a facial challenge to Section 922(n), reasoning that “felony indictees” are a subset of persons for whom “probable cause has been found” that they “have committed a serious crime); United States v. Jackson, 661 F. Supp. 3d 392, 413 (D. Md. 2023) (holding that the “historical tradition of sometimes detaining defendants charged with serious crimes supports restricting their Second Amendment rights while under indictment”).

246 See Range, 53 F.4th at 281 (citing Delaware, Massachusetts, Maryland, and Virginia laws disarming individuals who poached protected animals or hunted animals while trespassing on certain lands).


society liberty is the norm, and detention prior to trial . . . is the carefully limited exception.”249 Mere accusation of wrongdoing—even with a finding of probable cause—“is not enough” to impose detention or protective bail measures on a defendant.250 Further justification is needed to impose a condition that amounts to a constitutional deprivation.251

Some courts argue that “the greater” possibility of detention includes “the lesser” possibility of disarmament.252 As one court post-Bruen put it: “[T]he historical tradition of sometimes detaining defendants charged with serious crimes supports restricting their Second Amendment rights while under indictment.”253 But this view faces two objections.

The first objection is historical. At or before the founding, even though some defendants charged with serious felonies were detained in some jurisdictions, all jurisdictions recognized a category of “bailable” offenses, some of which were modern-day felonies.254 Indeed, the “dissenter” model jurisdictions considered all but capital crimes bailable.255 These individuals were to be released on bail with no other condition than to appear for their court date and to be in good behavior in the meantime. So historically, merely being charged with a felony—the typical “serious crime”—did not justify detention (or, therefore, disarmament).

The second objection is logical and doctrinal. Under current law, the two permissible grounds for pretrial detention (or a bail requirement that results in detention) are dangerousness and flight risk. If a person is detained for dangerousness, then a pretrial weapons condition is concededly justified. But if the only ground for detention is flight risk, then a pretrial weapons condition is not justified because a weapons condition has little rational connection to preventing flight. The greater power to detain the defendant to prevent flight includes the lesser power to impose lesser restraints (e.g., release conditions) to prevent flight. It does not entail the power to impose

250 Id. at 750.
251 See Carroll, supra note 38, at 164 (noting that the Supreme Court “has maintained that imposition of a condition of release may not be arbitrary”); Mayson, supra 227, at 504-07 (discussing the impact of Salerno on pretrial detention).
252 See United States v. Jackson, 661 F. Supp. 3d 392, 414 (D. Md. 2023) (“If an indictment is constitutionally sufficient to trigger a complete prohibition on a defendant's Second Amendment rights, because of pre-trial detention, then it must also be sufficient to temporarily restrict the right to acquire or transport arms while a felony indictment is pending.”); see also United States v. Slye, No. 1:22-mj-144, 2022 WL 9728732, at *2 (W.D. Pa. Oct. 6, 2022) (“It would be illogical to conclude that the Court has the authority to set conditions temporarily depriving an accused of all of the aforementioned constitutional protections by ordering his detention but lacks the authority to impose far less severe restrictions . . . .”).
253 Jackson, 661 F. Supp. 3d at 413.
254 See supra Section III.A.
255 See id.
unrelated restraints for unrelated reasons. But the “greater includes the lesser” argument permits the state to do just that: deprive anyone who could have been in jail of any rights they could have lost while in jail, including their firearms rights. The state does not have such authority.256

In sum, there is no historical tradition of detaining or disarming defendants charged with “serious” crimes absent an individualized finding of dangerousness or flight risk.

E. Surety-of-the-Peace Laws

As we saw above, the common law and founding-era peace bond system allowed any person with “just cause to fear” another person to demand a “surety of the peace.”257 Some courts have seized on an analogy between peace bonds and pretrial release conditions to support pretrial disarmament conditions.258 Others have rejected the analogy in striking down firearms restrictions.259

This analogy does seem strong if the court makes an individualized determination of dangerousness. Just as peace bonds burden a person who has caused a well-founded fear in another, so too do pretrial conditions burden defendants who pose a danger to public safety. But peace bonds are a poor analogy to mandatory pretrial regulations absent an individualized determination. Peace bonds were routinely particularized.260 To the extent that they did not rely on particularized findings, peace bonds were issued against groups thought to be dangerous to the public.261 But then the surety law justification reduces to the dangerousness justification discussed above.262

256 See United States v. Scott, 450 F.3d 863, 866 n.5 (9th Cir. 2006) (“The right to keep someone in jail does not in any way imply the right to release that person subject to unconstitutional conditions—such as chopping off a finger or giving up one’s first-born.”); see also United States v. Reeves, 591 F.3d 77, 79 (2d Cir. 2010) (invalidating as unconstitutional a supervised release condition requiring defendant convicted of child pornography possession to notify probation officer of entry into a “significant romantic relationship”).

257 See supra Section III.A.

258 See, e.g., Jackson, 661 F. Supp. 3d at 414 (“Both surety statutes and pretrial release restrictions operate to limit the rights of a discrete group of people, and not the public generally. They also both allow such restrictions for the purpose of public safety.”); United States v. Fenc, No. 21-CR-3101, 2022 WL 17586363, at *3 (S.D. Cal. Dec. 7, 2022) (comparing surety statutes to pretrial firearm restrictions); United States v. Kays, 624 F. Supp. 3d 1262, 1265-66 (W.D. Okla. 2022) (comparing surety statutes to pretrial firearm restrictions in upholding felony-related restrictions, but rejecting the analogy for misdemeanor-related restrictions).


260 See supra Part III.

261 See id.

262 See supra Section IV.B.
Finally, unlike pretrial firearms conditions, peace bonds never amounted to outright firearm bans.\textsuperscript{263}

That said, these judicial missteps are understandable. Reliance on the historical practice of peace bond issuance provides an illustration of the hazards of judicially invented descriptions of a “historical tradition of firearm regulation.”\textsuperscript{264} Courts may ignore the crucial differences between historical and modern regulations while focusing on other similarities. Some purposes are analogous, some are not; some regulatory means are analogous, some are not. But because peace sureties are themselves a historical judicial practice, and not a suitably described historical tradition of firearm regulation, courts need to fabricate a suitably described historical tradition by which to compare historical and modern firearm regulations. Absent a Supreme Court stipulation of the “correct” characterization of what peace sureties (and other historical practices) are “supposed to do,” and into what tradition they “fit,” lower courts are likely to continue debating the role of peace bonds on point.

\section*{Conclusion}

\textit{Heller} and \textit{Bruen} indicated that the text of the Second Amendment determines the scope of its protections. This Comment argued that the plain text of the Second Amendment protects the firearm rights of pretrial defendants. Because pretrial defendants have Second Amendment rights, \textit{Bruen} requires modern firearm regulations of pretrial defendants to be “consistent with this Nation’s historical tradition of firearm regulation.”\textsuperscript{265} This Comment characterized \textit{Bruen}’s analysis in three steps. First, \textit{Bruen} instructs courts to locate historical firearm regulations. This Comment surveyed the historical data relevant to firearm regulation of pretrial defendants. Second, based on that historical data, \textit{Bruen} requires courts to describe a tradition of firearm regulation. This Comment argued that there is a historical tradition of firearm regulation for dangerous individuals. Third, \textit{Bruen} requires modern firearm regulations to be “consistent with” that tradition as described.\textsuperscript{266} This Comment argued that category-wide firearms regulations of pretrial defendants without an individualized determination of dangerousness do not fit into any historical tradition of firearm regulation—including the tradition of firearm regulation for dangerous individuals. They thus violate the Second Amendment.

\begin{flushleft}
\textsuperscript{263} See supra Part III. \\
\textsuperscript{264} See N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2126 (2022). \\
\textsuperscript{265} Id. \\
\textsuperscript{266} Id.
\end{flushleft}
Individualized determination of dangerousness is a clear safe harbor for protecting the constitutional rights of the accused.267 These individualized determinations could easily take place when a judicial officer determines the bond of the defendant, as they do for other release conditions.268

This danger-centric approach to firearm regulation also suggests a unified view of how to regulate gun possession among criminals, accused criminals, the mentally ill, those credibly accused of domestic violence, children, and other groups. Individuals in these groups could be subject to firearm regulation if they would be dangerous possessors of weapons. The argument in this Comment is consistent with an aggressive legislative approach to gun regulation, on which (for instance) the government proactively makes individualized determinations of dangerousness for anyone receiving a “shall-issue” gun permit. Given the history of disarming dangerous individuals, Bruen does not prohibit proactive legislation in this area.

However, this Comment argues that Bruen requires gun regulations to rest on the right traditions. For instance, the Solicitor General’s test in Rahimi—pending before the Supreme Court—permits regulation of dangerous persons and non-“law-abiding” persons, even if they are not dangerous.269 This Comment suggests that the weapons restriction in Rahimi is perfectly compatible with Bruen as long as the court issuing the domestic violence restraining order made a particularized finding of dangerousness. But this Comment rejects the Solicitor General’s implication that those who break the law but are not adjudicated dangerous may nevertheless be disarmed.

Decarceration and penal abolition advocates should consider the appeal of a danger-centric approach to pretrial conditions.270 Many of the arguments in

267 See Berry v. District of Columbia, 833 F.2d 1031, 1035 (D.C. Cir. 1987) (stating that drug testing and treatment as pre-trial release conditions would likely be constitutional if “there is an individualized determination that an arrestee will use drugs while released pending trial”); United States v. Scott, 450 F.3d 863, 874 (9th Cir. 2006) (holding a state law requiring that the pretrial defendant consent to random drug testing and the searching of the defendant’s home violated the Fourth Amendment in the absence of any judicial determination that such pretrial condition was necessary).


269 Transcript of Oral Argument at 5-6, United States v. Rahimi, 144 S. Ct. 483 (2023) (No. 22-915).

270 See Carroll, supra note 38, at 183-92 (cataloging the various costs and criminogenic effects of nonmonetary pretrial conditions).
favor of pretrial firearms restrictions would accord substantial discretion to the government in how to treat people accused of a crime. Defendants violating those restrictions would be subject to a higher bail and likely jail time. Requiring a finding of dangerousness ensures that non-dangerous individuals do not bear the costs of restraining people who are dangerous.