HIGH STAKES: A CONSTITUTIONAL ANALYSIS OF THE GUN CONTROL ACT'S PROHIBITION AGAINST MEDICINAL MARIJUANA USERS, POST-BRUEN

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The constitutional framework for Second Amendment challenges changed dramatically when the United States Supreme Court released its decision on N.Y. Pistol & Rifle Association v. Bruen *in the Summer of 2022. In his majority opinion, Justice Clarence Thomas rejected the lower courts' use of strict or intermediate scrutiny, and instead replaced it with a test centered on historical evidence to justify challenged gun laws to better align the outer limits of the American peoples' Second Amendment right with what the founding fathers intended. The use of historical justifications for present-day gun laws, however, presents several issues for lower courts dealing with the likely new influx of Second Amendment challenges post-*Bruen*. One major issue for present-day Second Amendment challenges is when history provides little to no insight on how the founding fathers understood the right in a particular context. For medicinal marijuana users currently prohibited from legally purchasing a firearm due to their status as a Schedule I substance user, the lack of historical justifications defending such a prohibition presents a potential avenue for a successful Second Amendment challenge under* Bruen*. Furthermore, this Note will discuss the implications of Justice Thomas's new test on several categories of seemingly uncontroversial gun restrictions that would have no sensible place in our nation's early history.*

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I. INTRODUCTION

The business of marijuana has come a long way. Since marijuana first became legal for medicinal use in California through the state's Compassionate Use Act of 1996,[1] the legal market for marijuana has grown exponentially. The now-global market boasts an estimated value of $16.7 billion USD with a predicted growth rate of 25.4% per year for the next seven years.[2] In total, thirty-seven states have now approved the legalization of the medicinal use of marijuana, while only twenty-one states have legalized marijuana for its recreational use.[3]

Medicinal marijuana, in particular, saw dramatic growth in its demand with the onset of the COVID-19 pandemic.[4] The pandemic's effect on many Americans' mental health caused a significant rise in recorded depressive and anxiety disorders.[5] These detrimental effects and the continued availability of medicinal marijuana throughout the pandemic led to a significant increase in the number of

1. *See* Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (1996).

2. *Legal Marijuana Market Size, Share & Trends Analysis Report by Product Type (Flower, Oil and Tinctures), by Application (Medical, Adult Use), by Region (North America, Europe, APAC, LATAM, Africa), and Segment Forecasts, 2023-2030*, GRAND VIEW RSCH., https://www.grandviewresearch.com/industry-analysis/legal-marijuana-market (last visited Dec. 28, 2023) [https://perma.cc/ZH2Q-9BNA].

3. Matthew Johnston, *Biggest Challenges for the Cannabis Industry in 2023*, INVESTOPEDIA (Nov. 10, 2022), https://www.investopedia.com/biggest-challenges-for-the-cannabis-industry-in-2019-4583874 [https://perma.cc/2K3S-S3Q2].

4. Emily Earlenbaugh, *Medical Cannabis Use for Mental Health Increased During Covid-19 Pandemic, Study Finds*, FORBES (Sept. 25, 2020, 3:07 PM), https://www.forbes.com/sites/emilyearlenbaugh/2020/09/25/medical-cannabis-use-for-mental-health-increased-during-covid-19-pandemic-study-finds/?sh=58b02b596d3f [https://perma.cc/EFY6-3SNP].

5. *See* Johnston, *supra* note 3.

Americans looking to obtain a medicinal marijuana card.[6] Many of these individuals, however, were caught off guard when they realized they effectively surrendered their Second Amendment right in exchange for that card.[7]

With the Supreme Court's ruling in *D.C. v. Heller*, the Court put much of the debate surrounding the Second Amendment to rest.[8] In *Heller*, the Court ruled the Second Amendment granted individuals a constitutional right to possess and carry firearms for the purpose of self-defense.[9] Following this landmark case, the United States circuit courts "coalesced" around a two-step approach to Second Amendment challenges to federal gun laws.[10] Under this approach, many modern-day gun regulations were ruled constitutional under either intermediate or strict scrutiny, depending on how close these laws burdened the "core" of the Second Amendment.[11] Specifically, many gun restrictions were upheld because the government's interest of public safety was ruled to outweigh the burden on these individuals' Second Amendment rights.[12]

For medicinal marijuana patients, merely possessing a medicinal marijuana card rendered them ineligible to legally purchase a firearm, stripping them of their constitutional right.[13] Firearm dealers were directed to assume, solely based on possession of the card, that these individuals were users of a controlled substance and could not legally purchase a firearm, and this practice largely seemed to be settled as comporting with the Second Amendment under the post-*Heller* test.[14] This all changed with the announcement of Justice Thomas's opinion in *N.Y. Pistol & Rifle Ass'n v. Bruen*.[15]

In *Bruen*, Justice Thomas summarily rejected the circuit courts' two-step test for Second Amendment challenges as "one step too many."[16] Instead, Justice

6. *See, e.g.*, Zeninjor Enwemeka, *More People Are Seeking Medical Marijuana Cards amid Coronavirus Outbreak*, WBUR (Apr. 3, 2020), https://www.wbur.org/news/2020/04/03/medical-marijuana-applications-increase-coronavirus-outbreak [https://perma.cc/Z37G-52GZ]; Adam Walser, *Medical Marijuana Industry Booming in Florida During Covid-19 Pandemic*, ABC ACTION NEWS (Apr. 24, 2020, 8:08 AM), https://www.abcactionnews.com/news/local-news/i-team-investigates/medical-marijuana-industry-booming-in-florida-during-covid-19-pandemic [https://perma.cc/2DDN-FX8U].

7. *See, e.g.*, Carla K. Johnson, *Illinois Medical Pot Users Erroneously Told to Give up Guns*, SEATTLE TIMES (Apr. 25, 2016, 3:11 PM), https://www.seattletimes.com/nation-world/oddities/erroneous-letters-tell-illinois-pot-users-to-give-up-guns/ [https://perma.cc/TU5F-FTWM].

8. *See, e.g.*, Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 487–88 (2004) (highlighting the "divisive" debate between scholars arguing the Second Amendment grants a collective right against those who argue the Amendment grants an individual right to self-defense); *see also* District of Columbia v. Heller, 554 U.S. 570, 628–30 (2008).

9. *Heller*, 554 U.S. at 628–30.

10. *See, e.g.*, Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019) ("After *Heller*, we developed a two-step test for Second Amendment challenges.").

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

12. *See, e.g.*, *Kanter*, 919 F.3d at 448–49 (ruling the government met the burden of intermediate scrutiny by its purported important governmental objective of preventing gun violence).

13. *See* Letter from Arthur Herbert, Assistant Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, to All Federal Firearms Licensees, U.S. Dep't of Just.: Bureau of Alcohol, Tobacco, Firearms and Explosives (Sept. 21, 2011).

14. *See id.*

15. *See Bruen*, 142 S. Ct. at 2126 (declining to adopt the court of appeals test).

16. *Id.* at 2127.

Thomas endorsed the Court's use of history in *Heller* and ruled courts must look to the historical understanding of the scope of the Second Amendment to help shape our modern gun laws.[17] In essence, Justice Thomas's ruling requires the government to point to a "historical tradition of firearm regulation" that justifies the gun law that is being challenged.[18] If there was no such historical tradition, Justice Thomas directed attorneys to use analogical reasoning to find a historical tradition of "relevantly similar" historical analogs in either *how* the compared laws burden the Second Amendment right or *why* they do so.[19]

With this drastic change in how courts should rule on Second Amendment challenges, many modern gun restrictions are now in jeopardy of being ruled unconstitutional. Recently, for example, the Fifth Circuit ruled a firearm restriction against domestic violence abusers subject to a restraining order unconstitutional after previously ruling that same provision constitutional under the now-rejected test.[20] It is uncertain to what extent the landscape of gun regulations in this country will change under Justice Thomas's new test, but it is safe to assume that many current firearm restrictions will be subject to new Second Amendment challenges.[21]

Two such challenges the courts will likely face are challenges brought by medicinal marijuana users to §§ 922(g)(3) and (d)(3) of the Gun Control Act ("GCA").[22] Considering these challenges have previously been dismissed under the circuit courts' now-rejected balancing test, the government will likely be required to provide a historical justification for the GCA's current prohibition on these users of the drug.[23]

This Note will argue that the current prohibition against medicinal marijuana patients violates the Second Amendment under *Bruen*. The current law possesses no "historical twin" found in the time surrounding the Second Amendment's ratification, and there exists no "relevantly" similar historical analog that indicates the Second Amendment should not afford these medicinal marijuana patients the right to bear arms.[24]

Part II of this Note will first detail the current legal status of marijuana, its classification under the Controlled Substance Act, and its relationship to the GCA. Furthermore, Part II will explain the Supreme Court's recent decisions in both *Heller* and *Bruen* as well as the subsequent effect these decisions had on Second Amendment jurisprudence found throughout the United States courts of

17. *See id.* at 2131.

18. *Id.* at 2126.

19. *Id.* at 2132–33.

20. *See* United States v. Rahimi, 61 F.4th 433, 448 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023).

21. *See* Tierney Sneed, *How the Supreme Court Put Gun Control Laws in Jeopardy Nationwide*, CNN: POLS. (Oct. 10, 2022, 2:46 PM), https://www.cnn.com/2022/10/09/politics/gun-control-second-amendment-supreme-court-bruen-fallout/index.html [https://perma.cc/XR4H-LBFY].

22. *See* Sam Reisman, *DOJ Says Medical Pot Patients Have No Right to Bear Arms*, LAW360 (Aug. 8, 2022, 8:57 PM), https://www.law360.com/articles/1519290/doj-says-medical-pot-patients-have-no-right-to-bear-arms [https://perma.cc/GG78-KZGE].

23. *See Bruen*, 142 S. Ct. at 2126.

24. *See id.* at 2132–33.

appeals. Specifically, Part II will explain what Justice Thomas's new *Bruen* test requires of the government to justify a newly challenged gun law.

Part III of this Note will investigate whether there exists a sufficient "historical tradition of firearm regulation"[25] found in this country's history that supports the GCA's effective prohibition against medicinal marijuana patients. Part III will look to potential justifications found in English common law, colonial-era American disarming efforts, and colonial-era police powers used to regulate firearms. Because of the lack of marijuana-related legislation found during the time surrounding the Second Amendment's ratification, Part III will closely investigate potential historical analogs to the GCA as possible historical justifications for the government.

Finally, Part IV of this Note will recommend that §§ 922(d)(3) and 922(g)(3) of the GCA be ruled unconstitutional as applied to medicinal marijuana patients. This Part will also urge the Court for further clarification on how the *Bruen* test can be applied to seemingly sensible gun restrictions that simply did not present problems to the Founding Fathers, but currently do so in modern-day America. Ultimately, this Note concludes that medicinal marijuana patients should not be stripped of their right to bear arms in self-defense for simply possessing a medicinal marijuana card, nor should they be stripped of this right if they decide to use the drug. Doing so represents a gun regulation that "our ancestors would never have accepted,"[26] and therefore, the provision should be ruled unconstitutional under *Bruen*.

II. BACKGROUND

A. Marijuana's Current Legal Status in the United States

The Controlled Substances Act ("CSA") "establishes a unified legal framework to regulate certain drugs that are deemed to pose a risk of abuse and dependence."[27] The CSA does not apply to every drug but instead applies only to those "designated for control" by Congress.[28] These drugs are classified into subgroups called "schedules," and divided into any class between I and V based on their "medical utility and their potential for abuse and dependence."[29] A lower numbered Schedule group is subject to the strictest controls listed in the CSA.[30] The implementation and enforcement of the CSA is left primarily in the hands of the Drug Enforcement Administration ("DEA"), which designates drugs for their specific Schedule classification so long as the drug meets the CSA's requirements.[31] Additionally, Congress is permitted to place a substance into a

25. *Id.* at 2126.

26. *Id.* at 2133 (quoting Drummond v. Robinson, 9 F.4th 217, 226 (3d Cir. 2021)).

27. JOANNA R. LAMPE, CONG. RSCH. SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 118TH CONGRESS 1 (2023).

28. *Id.*

29. *Id.*

30. *See id.*

31. *See id.*

specific Schedule classification or change a substance's classification through legislation.

Currently, marijuana is listed as a Schedule I substance under the CSA, which classifies Schedule I substances as "drug[s] or other substance[s] [that have] a high potential for abuse" that "[have] no currently accepted medical use in treatment in the United States," and lack an "accepted safety for use of the drug or other substance under medical supervision."[32] Many laws, like the GCA, use these Schedule classifications in determining whether a user of these substances can legally purchase a firearm.[33]

Under the GCA, it is also prohibited for a dealer to transfer firearms to someone that the transferor knows or has reason to believe falls within one of the categories of the CSA.[34] The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") enforces federal firearms laws and regulations,[35] and the ATF has directed that dealers, before any sale is made, must fill out Form 4473, which asks whether the transferee is an unlawful user of marijuana or any other controlled substance specified in the CSA.[36] If answered in the affirmative, these individuals would be unable to legally obtain a firearm.[37] Furthermore, in an open letter issued to all federal firearms licensees, the ATF advised firearm dealers that if they were "aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law," then they would have a "reasonable cause to believe" the individual is an unlawful user of a controlled substance," regardless of whether that individual ultimately ever used the drug.[38]

Similar gun restrictions relating to an individual's drug use were virtually nonexistent during the time surrounding the Second Amendment's ratification.[39] In fact, "certain mood-altering substances" like opiates and cocaine were "often regarded as compounds helpful in everyday life."[40] It was not until the early twentieth century that Americans largely began viewing these drugs as dangerous, addictive, and in need of being controlled.[41] David Musto, an expert on U.S. drug policy, described the nineteenth century as "an era of wide availability and unrestrained advertising" for drugs.[42]

32. 21 U.S.C. § 812(b)(1)(A)–(C).

33. *See* 18 U.S.C. §§ 922(d)(3), (g)(3). This Note treats these two provisions of the Gun Control Act as one effective prohibition against medicinal marijuana patients. The provisions act in tandem. Section 922(g)(3) prohibits Schedule I substance users from purchasing firearms and section 922(d)(3) prohibits firearm dealers from knowingly selling these firearms to Schedule I substance users.

34. *Id.* § 922(d)(3).

35. *Organization, Mission and Functions Manual: Bureau of Alcohol, Tobacco, Firearms and Explosives*, U.S. DEP'T OF JUST., https://www.justice.gov/doj/organization-mission-and-functions-manual-bureau-alcohol-tobacco-firearms-and-explosives (last visited Dec. 28, 2023) [https://perma.cc/DG3D-PJZN].

36. *See* Letter from Arthur Herbert, *supra* note 13.

37. *Id.*

38. *Id.*

39. David F. Musto, *Opium, Cocaine and Marijuana in American History*, 265 SCI. AM. 40, 40 (1991).

40. *Id.*

41. *Id.*

42. *Id.*

Marijuana began to fall under the control of the federal government in 1937 with the implementation of a "transfer tax."[43] Through the National Firearms Act, the federal government began to prohibit transfers of firearms to individuals using marijuana through this taxing power.[44] Marijuana was regulated this way until Congress passed the Comprehensive Drug Abuse Act of 1970.[45] Title II of the Comprehensive Drug Abuse Act of 1970 constitutes what we now refer to as the CSA, where marijuana is currently listed as a Schedule I substance.[46]

Recently, the debate surrounding the propriety of marijuana's CSA classification has begun to rise, and Congress has discussed amending either the CSA or marijuana's classification.[47] During the 117th Congress, there were two separate bills proposed that called to remove marijuana from the control of the CSA entirely.[48] Both the Marijuana Opportunity Reinvestment and Expungement Act ("MORE Act") and the Cannabis Administration and Opportunity Act would have removed the Schedule I classification or even removed marijuana from under the control of the CSA entirely, but these proposals failed.[49]

In addition to these efforts by Congress, President Joe Biden recently announced a 2022 grant of clemency for federal and D.C. marijuana possession charges.[50] On October 6, 2022, President Biden granted a "full, complete, and unconditional pardon" to U.S. citizens who were previously convicted of simple possession of marijuana under the CSA.[51] Importantly, President Biden also directed the Attorney General to review marijuana's classification as a Schedule I substance under the CSA.[52]

There is also a growing disparity between the treatment of marijuana between state and federal laws.[53] Today, twenty-one states and the District of Columbia have removed prohibitions on both medicinal and recreational use of marijuana by adults.[54] Thirty-seven states permit the medicinal use of marijuana, while another ten states permit the use of "cannabis derivates" like cannabidiol ("CBD").[55] Despite this growing disparity, marijuana remains as a Schedule I substance under federal law.[56]

43. *Id.* at 46.
44. *Id.*
45. *Id.*
46. *See* 21 U.S.C. § 812(c)(10).
47. *See* LAMPE, *supra* note 27, at 35–36.
48. *See id.*
49. *See id.* at 36.
50. Joseph R. Biden, *A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana*, WHITE HOUSE (Oct. 6, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/06/granting-pardon-for-the-offense-of-simple-possession-of-marijuana/ [https://perma.cc/Y9XH-EME2].
51. *Id.*; *see also* LAMPE, *supra* note 27, at 34.
52. *See* Joan Murray, *President Biden Issues Pardons, Looks at Reclassification for Marijuana*, CBS NEWS MIAMI (Oct. 7, 2022, 6:35 PM), https://www.cbsnews.com/miami/news/president-biden-issues-pardons-looks-at-reclassification-for-marijuana/ [https://perma.cc/F9EU-TE8S].
53. *See* LAMPE, *supra* note 27, at 1.
54. *Id.* at 30.
55. *Id.*
56. *See* 21 U.S.C. § 812(c)(10).

This disparity can lead to head-scratching results. A marijuana business may, for example, operate completely within the bounds of its state's laws but be prohibited from accessing certain banking services due to "the carrying on of specified unlawful activity."[57] Furthermore, that same business would be unable to benefit from federal tax deductions due to its violation of the CSA,[58] or may even be disallowed from filing bankruptcy.[59] Individuals, meanwhile, may face obstacles towards securing financial aid, may face "immigration consequences," and are afforded "little or no legal protection from adverse employment consequences" despite acting within the bounds of relevant state law.[60]

In response to this growing disparity, Congress has acted to mitigate the legal ramifications individuals would face if they use marijuana in a state that has lifted its prohibition on the drug. In every budget cycle since 2015, Congress has passed an appropriations rider that prohibits the Department of Justice ("DOJ") from using taxpayer funds to interfere with states that implement "their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[61] Federal courts have gone further, interpreting the rider to bar the DOJ from using funds to prosecute marijuana-related activities that are in "strict compliance" with state law.[62] The GCA's current prohibition against marijuana users, however, remains in effect today.[63]

B. A History of Second Amendment Jurisprudence

1. Second Amendment Jurisprudence, from Heller *to* Bruen

In *D.C. v. Heller*, the Supreme Court considered whether the Second Amendment "codified a pre-existing right" to possess firearms in the name of self-defense or confrontation, or if it granted a collective right to bear arms in connection with a well-organized militia.[64] In his opinion, Justice Scalia relied on a plethora of evidence, ranging from a textual analysis of the prefatory and operative clauses of the amendment's text,[65] to provisions within eighteenth and nineteenth-century state constitutions,[66] to post-ratification commentary by

57. 18 U.S.C. § 1956(a); LAMPE, *supra* note 27, at 31.

58. *See* I.R.C. § 280E.

59. *See* 11 U.S.C. § 1129(a) (barring a court from confirming a bankruptcy plan that is by any means prohibited by law).

60. LAMPE, *supra* note 27, at 31–32.

61. *Id.* at 32 (quoting Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, § 531, 136 Stat. 4561).

62. *Id. See* United States v. Evans, 929 F.3d 1073, 1076–79 (9th Cir. 2019) (upholding a conviction on two individuals who failed to show full compliance with state law).

63. *See* 18 U.S.C. § 922(g)(3).

64. District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (emphasis omitted).

65. *See id.* at 579–600.

66. *See id.* at 584–85.

William Rawles, Joseph Story, and George Tucker,[67] and finally, to pre-[68] and post-Civil War[69] cases that demonstrated how the amendment was understood at the time. Ultimately, the Court concluded the Second Amendment, as understood by the American people when it was ratified, codified a pre-existing right to possess a firearm for the purposes of self-defense,[70] thus eliminating the possibility that the right to bear arms required some connection to militia service.[71]

Notably, Justice Scalia ensured his opinion in *Heller* should not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."[72] Unfortunately, Justice Scalia declined to "undertake an exhaustive historical analysis" of the scope of the Second Amendment,[73] and instead opted to "expound upon the historical justifications" behind these prohibitions when the opportunity would later arise.[74] When the opportunity later presented itself in *McDonald v. City of Chicago*, the Supreme Court again failed to provide these justifications, and instead simply noted the language used in *Heller* regarding these prohibitions.[75]

With respect to the mentally ill exception, scholars have searched eighteenth century records for laws that could constitute such an exception.[76] Unfortunately, these laws "seem to have originated in the twentieth century" with the Uniform Fire Arms Act of 1930, which prohibited any person of "unsound mind" to purchase a firearm.[77] With respect to the felons exception, scholars again found sources to be "surprisingly thin," with one article finding "no colonial or state law in eighteenth-century America formally restrict[ing] the ability of felons to own firearms."[78] As a result, circuit courts have rejected Second Amendment challenges to the GCA brought by drug users based solely on this dicta from Justice Scalia.[79]

In the years following *Heller*, the circuit courts each "coalesced" around a "two-step test . . . to assess Second Amendment claims."[80] This test first required a court to consider whether the alleged infringement by the gun regulation falls

67. *See id.* at 592–95 (explaining that the works from each scholar suggested the prevailing understanding at the time of the ratification of the Second Amendment pointed to an individual right to possess firearms, not one contingent on the need for a militia).

68. *See id.* at 585–86.

69. *See id.* at 619–26 (explaining that each of the Supreme Court's decisions in *United States v. Cruikshank*, *Presser v. Illinois*, and *United States v. Miller* all supported the Court's conclusion that the right to bear arms was an individual right for self-defense).

70. *See id.* at 602.

71. *See id.*

72. *Id.* at 626.

73. *Id.*

74. *Id.* at 635.

75. McDonald v. City of Chi., 561 U.S. 742, 786 (2010).

76. Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 HASTINGS L.J. 1371, 1376 (2009).

77. *Id.* at 1376–77.

78. *Id.* at 1374.

79. *See, e.g.*, United States v. Dugan, 657 F.3d 998, 999 (9th Cir. 2011).

80. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022); *see, e.g.*, Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019); United States v. Focia, 869 F.3d 1269, 1285 (11th Cir. 2017).

within the scope of the Second Amendment, as explained in *Heller*.[81] If the court determined that the historical evidence is "inconclusive or suggest[ed] that the regulated activity [was] not categorically protected" by the amendment, then the court could move on to the second step.[82] On the other hand, if the evidence suggested the infringement fell outside of the Second Amendment's protection, the regulation would be ruled constitutional.[83]

If necessary, the second step then required courts to analyze "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right."[84] According to the circuit courts[85] and the Supreme Court,[86] the "core" of the Second Amendment is self-defense in the home.[87] If the court ruled that this "core" right was being burdened, then the court would apply strict scrutiny.[88] Otherwise, the court would apply intermediate scrutiny and determine whether the regulation was "substantially related to the achievement of an important governmental interest."[89]

2. The Bruen *Test*

Justice Thomas, in his majority opinion for *Bruen*, rejected the second prong of this test, ruling it inconsistent with *Heller*.[90] In *Bruen*, Justice Thomas explained that the Court in *Heller* warned against the use of such a balancing test, choosing not to let such an important right be left up to the whims of a judge on a case-by-case basis.[91] In fact, Justice Thomas denounced this form of means-end scrutiny entirely as inappropriate for ruling on Second Amendment challenges.[92]

Still, Justice Thomas embraced the first part of this two-step test as being more "broadly consistent" with the ruling of *Heller*.[93] Justice Thomas stated *Heller* "demands a test rooted in the Second Amendment's text, as informed by history."[94] Furthermore, Justice Thomas ruled that under any Second Amendment challenge, the "government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[95] In other words, the right to possess a firearm for self-defense is "presumptively" protected by the Constitution, and the government bears the

81. *Bruen*, 142 S.Ct. at 2126.
82. *Id.* at 2127 (emphasis omitted).
83. *See id.*
84. *Id.* at 2126 (quoting *Kanter*, 919 F.3d at 441).
85. *See Kanter*, 919 F.3d at 441.
86. District of Columbia v. Heller, 554 U.S. 570, 636 (2008).
87. *Id.* at 630.
88. *Bruen*, 142 S.Ct. at 2126 (quoting Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017)).
89. *Id.* (quoting Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 96 (2nd Cir. 2012)).
90. *Id.* at 2127.
91. *Id.* at 2129.
92. *Id.*
93. *Id.* at 2127.
94. *Id.*
95. *Id.*

burden of justifying its regulation by "demonstrat[ing] that the regulation is consistent with this Nation's historical tradition of firearm regulation," and therefore consistent with how this country's founding fathers understood the scope of the Second Amendment when the amendment was ratified.[96]

The basic premise of this test demands courts to first look at the challenged regulation, and then determine whether similar laws prevalent throughout the time surrounding the Amendment's ratification were consistent with the current law.[97] Justice Thomas did admit this test may cause issues for lawmakers when drafting laws that have no logical place being found in the eighteenth or nineteenth century.[98] To help with this issue, Justice Thomas explained the government need not find a "historical twin" in these circumstances, but could instead present a "well-established and representative historical analog[]."[99]

When using these historical analogs, Justice Thomas encouraged attorneys to compare *how* the challenged law and these analogs burden the Second Amendment right and the justification for *why* they burden that right.[100] Notably, Justice Thomas declined to answer what quantity of historical regulations could be sufficient to constitute a historical tradition of firearm regulations in this nation's history, but he does that doubt three regulations alone could be sufficient for such a purpose.[101]

Justice Thomas expressed great faith in any judge to engage in "reasoning by analogy," a task he refers to as "commonplace . . . for any lawyer or judge."[102] To reason by analogy, Justice Thomas explained that attorneys must find laws that are "relevantly similar"[103] to the current regulation. Justice Thomas also provided the lower courts with some wiggle room when he explained the government need not find an exact "historical twin" for an analog, but he also cautioned against finding any loose or tenuous similarity between the current law and the proposed historical analogs.[104] While the government need not find an exact match in history, the laws do need to be "*relevantly* similar" in how or why they burden the Second Amendment right.[105]

Acknowledging this test may prove to be difficult, Justice Thomas provided the lower courts with some guidance on how to approach this novel test.[106] To start, Justice Thomas warned against looking to rules either adopted well before

96. *Id.* at 2126.

97. *See id.* at 2126.

98. *See id.* at 2132–33.

99. *See id.* at 2133 (emphasis omitted).

100. *See id.* (quoting McDonald v. City of Chi., 561 U.S. 742, 786 (2010)) (internal quotation marks and emphasis omitted) ("[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry.").

101. *Id.* at 2142.

102. *Id.* at 2132.

103. *Id.*

104. *Id.* at 2133.

105. *Id.* at 2132 (quoting Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)) (emphasis added).

106. *See id.* at 2133–34.

the adoption of the Second Amendment as well as rules adopted well after its adoption.[107] Thomas argued against giving these historical laws "more weight than [they] can rightly bear" because they may not accurately reflect how the framers understood the scope of the Second Amendment right to be.[108] Post-ratification commentary, like the commentary relied on in *Heller*, is still a very useful tool, according to Justice Thomas, as it gives the courts a better understanding of how the right was understood at the time the amendment was adopted.[109]

Justice Thomas, in summary, explained that if a "governmental practice has been open, widespread, and unchallenged since the early days of the Republic," then the regulation is likely within our nation's historical tradition of gun regulation.[110] Conversely, if the historical tradition of this country is mute on the specific right the current law is looking to regulate, and there are no "relevantly similar" historical analogs, then the law is probably not constitutional, and a Second Amendment challenge would be more likely to succeed.[111]

*3. Second Amendment Jurisprudence, Post-*Bruen

Lower courts began to implement this test immediately, even revisiting previous Second Amendment challenges resolved under the now-rejected circuit court test.[112] In 2023, for example, the Fifth Circuit overturned its previous decision in *United States v. Rahimi* using the *Bruen* test in a constitutional challenge of § 922(g)(8) of the GCA, which prohibited "the possession of firearms by someone subject to a domestic violence restraining order."[113] Having previously ruled the provision passed intermediate scrutiny and, as a result, was constitutional, the Fifth Circuit overturned this decision and ruled the same provision unconstitutional under *Bruen*.[114]

In defending the regulation, the government argued *Heller* and *Bruen* ruled that the Second Amendment does not apply to individuals like Rahimi, but only to law-abiding citizens.[115] In *Bruen*, Justice Thomas uses the phrase "ordinary, law-abiding . . . citizens" when discussing what citizens the Second Amendment applies to.[116] Similarly, in *Heller*, Justice Scalia uses the phrase "law-abiding, responsible citizens" to do the same.[117] Therefore, the government argued, the

107. *See id.* at 2136–37.
108. *Id.* at 2136.
109. *See id.* at 2137.
110. *Id.* (Scalia, J., concurring) (quoting NLRB v. Noel Canning, 573 U.S. 513, 572 (2014)).
111. *Id.* at 2132–33.
112. *See, e.g.*, United States v. Rahimi, 61 F.4th 443, 448 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023) (revisiting a Second Amendment challenge previously decided before the publication of *Bruen*).
113. *Id.*
114. *Id.*
115. *Id.* at 451.
116. *Bruen*, 142 S. Ct. at 2134.
117. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

regulation was constitutional "as applied to Rahimi" because he was found guilty of breaking the law.[118]

The Fifth Circuit quickly rejected this interpretation, relying on the Court's ruling in *Heller* that the amendment's use of the words "the people"[119] referred "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[120] Therefore, the court said, there exists a "strong presumption that the Second Amendment right . . . belongs to all Americans."[121]

The circuit court clarified that the Supreme Court's use of the phrases "ordinary, law-abiding citizens" and "law-abiding, responsible citizens" are meant to exclude from the scope of the Second Amendment those individuals or groups of people who have been *historically* stripped of their Second Amendment right, not who are currently labeled as felons.[122] Under the government's interpretation, the court explained, there would be no limiting principle as to who can be stripped of their Second Amendment right.[123] If the government were correct in its interpretation, "Congress could remove 'unordinary' or 'irresponsible' or 'non-law-abiding people'—however expediently defined—from the scope of the Second Amendment," thus legislating away people's constitutional right.[124]

Ultimately, the Fifth Circuit ruled that § 922(g)(8) was unconstitutional, despite previously ruling the societal benefits had "outweighed its burden on Rahimi's Second Amendment rights."[125] Under *Bruen*, the court recognized this means-end analysis was no longer relevant, and the challenged regulation was deemed an "outlier[] that our ancestors would never have accepted."[126]

In 2022, medicinal marijuana patients challenged the provisions of the GCA that prohibited them from legally purchasing a firearm.[127] Since marijuana became relevant in America well after the ratification of the Second Amendment, looking to a "historical tradition" of this nation's gun control laws for marijuana will require a finding of relevant historical analogs to justify the Act's provision.[128] Under the *Bruen* test, a challenge made against the GCA's provisions[129] that prohibit medicinal marijuana patients from purchasing a firearm could succeed, but this will depend on the presence of "relevantly similar" firearm regulations or similar prohibitions against drug users enacted during the time surrounding the Second Amendment's ratification.[130]

118. *Rahimi*, 61 F.4th at 451.
119. U.S. CONST. amend. II.
120. *Heller*, 554 U.S. at 580 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).
121. *Id.* at 581.
122. *Rahimi*, 61 F.4th at 451–52.
123. *Id.* at 453.
124. *Id.*
125. *Id.* at 461.
126. *Id.* (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022)).
127. *See* Reisman, *supra* note 22.
128. *See Bruen*, 142 S. Ct. at 2132.
129. 18 U.S.C. § 922(g)(3).
130. *See Bruen*, 142 S. Ct. at 2132.

C. The Historical Tradition of Gun Regulation in the United States

1. A History of English Laws Regulating Firearms

To best understand how colonial-era Americans understood their Second Amendment right to bear arms, it is important to look throughout the country's history of gun regulations, traced back to English law. Although Justice Thomas warns that "not all history is created equal"[131] when applying the *Bruen* test, laws passed significantly earlier than the Second Amendment's ratification can still provide a glimpse into the American people's understanding of the amendment's scope, particularly if those laws demonstrate a still-prevailing practice "immediately before and after the framing of the Constitution."[132] Understanding both *how* and *why* English laws regulated firearms can be useful tools in demonstrating how colonial-era Americans considered the scope of their Second Amendment right to entail, assuming these laws "survived to become our Founders' law."[133]

Gun regulations in England can be traced as far back to the 1328 Statute of Northampton, which provided, in part, that "Englishmen could not 'come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace . . . upon pain to forfeit their Armour to the King.'"[134]

Similar laws disarming those intending to disrupt the peace were not rare. In fact, throughout English history, "dangerous persons" were often disarmed by means of "sweeping prohibitions that included entire regions or religions."[135] Joseph Greenlee, the Director of Research at the Firearms Policy Coalition, indicates that these "dangerous persons" were "often those involved in or sympathetic to rebellions and insurrections."[136] Notably, those who swore an "oath of allegiance" to the crown were often not disarmed.[137]

Article Seven of the English Bill of Rights of 1689 stated: "the Subjects, *which are Protestants,* may have Arms for their Defence suitable to their Conditions and as allowed by Law."[138] Early American historian Professor Michael Bellesiles highlighted that this right did not come without limitations, as it obviously restricted the right to Protestants only.[139] In fact, "[w]ithin weeks"[140] of

131. *Id.* at 2136.

132. *Id.* (quoting Sprint Commc'ns Co. v. APPC Servs., Inc., 554 U.S. 269, 311 (2008) (Roberts, C.J., dissenting)).

133. *Id.*

134. *Id.* at 2139.

135. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 258 (2020).

136. *Id.*

137. *Id.*

138. Bill of Rights (Act) of 1688, 1 W & M c. 2 § 7 (Eng.) (emphasis added).

139. Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 LAW & HIST. REV. 567, 571 (1998).

140. *Id.*

the bill's completion, Parliament voted to disarm Catholics.[141] Instead of a uniform right to bear arms, only a "specific, reliable group of subjects [were] allowed access to firearms."[142] Catholics were, however, allowed to request permission from a justice of the peace to possess arms "for the defence of his House or person."[143]

Later Parliamentary acts gave English officials the power to "disarm anyone whenever they considered it necessary for public peace."[144] In 1660, for example, King Charles II ordered "disaffected persons" to be disarmed,[145] and the 1662 Militia Act empowered the crown to disarm those judged "dangerous to the Peace of the Kingdom[]."[146] Charles II again disarmed "dangerous and disaffected persons" in 1684.[147] Before the Glorious Revolution of 1688, Greenlee notes, these so-called "disaffected persons" "typically included Whigs and non-Anglican Protestants."[148] After King James II was overthrown by his daughter Mary II and her husband William III during the revolution,[149] these "disaffected persons" began to typically include Tories, who remained loyal to James II.[150] William III, similarly, disarmed "great numbers of papists and other disaffected persons, who disown his Majesty's government."[151]

The crown disarmed individuals who actually took part in revolts against the government as well. In 1715, King James II loyalists revolted against the crown, and British Parliament responded by forbidding those involved from possessing firearms "in various places *beyond* the home."[152] Greenlee notes the passage of several similar acts in the years 1724, 1746, and 1748 in response to other acts of revolt against the crown.[153]

British Parliament also adopted "class-based prohibitions" regarding who was allowed to possess a firearm.[154] When faced with an opportunity to override these prohibitions, Parliament voted against the measure in a landslide.[155] Sir John Lowther, in expressing his approval of the result, described the proposal as a measure "to arm the mob, which I think *is not very safe for any government*."[156]

141. *Id.*

142. *Id.*

143. Act for the Better Secureing the Government by Disarming Papists and Reputed Papists, (1688) § 3, 6 STATUTES OF THE REALM 71 (Eng.).

144. Bellesiles, *supra* note 139, at 571.

145. Greenlee, *supra* note 135, at 259.

146. *Id.*; An Act for Ordering the Forces in the Several Counties of This Kingdom, (1662) § 13, 5 STATUTES OF THE REALM 358 (Eng.).

147. Greenlee, *supra* note 135, at 259.

148. *Id.*

149. *Id.* at 259–60.

150. *Id.*

151. 5 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF WILLIAM III, 1699-1700, 79–80 (Edward Bateson ed., 1937); *see also* Greenlee, *supra* note 135, at 260.

152. Greenlee, *supra* note 135, at 261 (emphasis added).

153. *See id.*

154. Bellesiles, *supra* note 139, at 571.

155. *Id.*

156. *Id.* (emphasis added).

Finally, Parliament passed laws that regulated the *manner of use* of firearms or prohibited especially dangerous weapons that could only reflect a malicious intent.[157] For example, some English laws restricted the ownership of certain pistols or crossbows that Parliament deemed too "easily concealed" and "likely to be used in the commission of a crime."[158]

It was clear that the English government did not believe every person should enjoy the right to own a firearm. In response to a suggestion that more English citizens should be given the right to own firearms, King James I said, "it is not fit that clowns should have these sports."[159] Clearly, the right to own firearms was not a ubiquitous one in seventeenth and eighteenth century England.[160]

2. The History of Colonial-Era Gun Regulations in the United States

a. Fear of "Disaffected Persons"

Like England, several states in early America disarmed groups of citizens out of fear for what these citizens may do to the stability of their government.[161] During the American Revolution, individuals who refused to swear an oath of allegiance to the United States were disarmed.[162] Several states, such as Pennsylvania, disarmed certain individuals due to fear of a "potential threat coming from armed citizens who remained loyal to Great Britain."[163]

Similar to their British predecessors, colonial-era governments demonstrated a severe distrust of Catholics before the American Revolution.[164] The French and Indian War, for example, was a dispute seen by many in the colonies "as a war between Protestantism and Catholicism."[165] Consequently, in 1756, both Maryland and Virginia disarmed Catholics, with Maryland also disarming those unwilling to take an oath of allegiance to King George III.[166] Virginia, for its part, allowed an exception for disarmed Catholics to keep weapons necessary "for the defence of his house or person."[167]

Disarming individuals loyal to the British became more common as time moved toward the American Revolution when distrust of the British was reaching a boiling point.[168] In 1776, Massachusetts passed a law restricting those who refused to a "'test' of allegiance to the 'United American Colonies,'"[169] and

157. *Id.* at 572.
158. *Id.*
159. *Id.* at 567.
160. *Id.* at 571–73.
161. *Id.* at 574.
162. Cornell & DeDino, *supra* note 8, at 506.
163. *Id.*
164. *See* Greenlee, *supra* note 135, at 263.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 263–64.
169. Cornell & DeDino, *supra* note 8, at 507.

disarmed those considered "notoriously disaffected to the cause of America."[170] In Connecticut, just as the Revolutionary War was beginning, those who "libeled or defamed acts of the Continental Congress" were disarmed or put in custody.[171] Similar laws were also passed in Pennsylvania,[172] New Jersey,[173] North Carolina,[174] and Virginia.[175]

Just over a decade later, the Massachusetts legislature enacted a law requiring those who participated in "Shay's Rebellion" against the state to swear an oath of allegiance and give up their arms for a period of three years.[176] Notably, these laws also prohibited these individuals from engaging in jury service, holding government office, or from voting "for any officer, civil or military."[177] Many of these laws intended to disarm individuals with the perceived capacity to "disrupt society."[178] Anne Hutchinson, for example, was convicted of sedition in 1637 and banished from Massachusetts Bay along with some of her supporters.[179] Many of her supporters who were allowed to remain in the colony were disarmed, and only those who "confessed their sins" were eventually welcomed back, and their rights to bear arms were reinstated.[180]

During this era, laws aimed at disarming individuals were frequently passed to disarm groups "on the basis of race and servitude."[181] Several colonies and states took action to disarm slaves and Native Americans due to their perceived lack of loyalty to the colonies and to the states.[182] The Fifth Circuit explained these laws targeted groups for perceived "public safety reasons," and allowing these groups to keep arms "posed a potential danger" to the public.[183]

The ratifying conventions of the Bill of Rights perhaps provide the best indication of how the Founding Fathers understood the extent of their Second Amendment rights, as they can reflect "the original understanding of the Second Amendment."[184] At the Massachusetts convention, Samuel Adams proposed that "peaceable citizens" should never have their right to bear arms be infringed upon by the government.[185] Under contemporaneous definitions, "peaceable" was best

170. 1 JOURNALS OF THE AMERICAN CONGRESS: FROM 1774 TO 1789 285 (1823).

171. Greenlee, *supra* note 135, at 264.

172. 8 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801 559–60 (James T. Mitchell & Henry Flanders eds., 1902).

173. *See* Act for Constituting a Council of Safety, ch. 40 § 20, 1777 N.J. Laws 90.

174. *See* 24 THE STATE RECORDS OF NORTH CAROLINA 89 (Walter Clark ed. 1905).

175. *See* 9 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 282 (1821).

176. Cornell & DeDino, *supra* note 8, at 507–08.

177. *Id.* at 508 (citation omitted).

178. *Id.*

179. Greenlee, *supra* note 135, at 263.

180. *Id.*

181. Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 156 (2007).

182. *See* Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 200 (5th Cir. 2012).

183. *Id.*

184. District of Columbia v. Heller, 554 U.S. 570, 625 (2008); *see* Greenlee, *supra* note 135, at 265.

185. 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 681 (1971).

understood to mean "nonviolent."[186] Perhaps even more demonstrative of the framers' intent behind disarming groups of individuals, New Hampshire's proposal for the Second Amendment provided that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[187]

b. Impressment

States would also disarm individuals in times of military necessity.[188] This was called "impressment," and it was a common exercise of the state's military powers in times of emergency, such as the American Revolution.[189] The practice was looked on with "popular resentment" by the early American people.[190] While Americans were generally fine with the government prohibiting certain dangerous uses of firearms,[191] the taking away of the people's weapons was seen as a direct affront to their liberty, with New England soldiers being recorded as calling it "tyrannical and unjust."[192] Because of this popular resentment, legislatures tended to reserve the use of impressment solely for times of emergency and the practice did not last long into the nineteenth century.[193]

c. Police Powers and the Regulation of Firearm Use

Colonial-era lawmakers passed several laws either regulating the *manner* of carrying firearms or prohibiting especially dangerous weapons that could only reflect a malicious intent.[194] Similar to the Statute of Northampton, Massachusetts, New Hampshire, and Virginia each forbade individuals from bearing arms "in an aggressive and terrifying manner."[195] Like the others, the Virginia statute essentially mirrored the English Statue of Northampton and even provided that "no man, great nor small, [shall] go nor ride armed . . . in fairs or markets . . . in terror of the Country."[196]

Similar to the English laws prohibiting certain weapons, colonial-era states commonly banned either weapons that were deemed too easily concealed or the practice of concealed carry altogether, as evidenced by case decisions like *Aymette v. State*.[197]

186. *See* Greenlee, *supra* note 135, at 266 (listing several contemporaneous dictionary definitions).

187. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (Jonathan Elliot ed., 2d ed. 1836).

188. Churchill, *supra* note 181, at 150.

189. *Id.* at 150–52.

190. *Id.* at 151.

191. *See* Saul A. Cornell, *The Police Power and the Authority to Regulate Firearms in Early America*, BRENNAN CTR. JUST. 1, 7–8 (2021).

192. Churchill, *supra* note 181, at 151–52 (conveying what Nathaniel Greene had heard from New England soldiers in December of 1775).

193. *Id.* at 154–55.

194. Greenlee, *supra* note 135, at 262.

195. *Id.*

196. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2144 (2022).

197. Aymette v. State, 21 Tenn. 154, 161–62 (1840).

In *Aymette*, a Tennessee court dealt with a constitutional challenge to a statute prohibiting the carrying of concealed knives.[198] The court ultimately upheld the statute, stating: "the right to bear arms is not of that unqualified character. [T]he citizens may bear them for the common defence; but it does not follow that they may be borne by an individual, merely to terrify the people or for purposes of private assassination."[199]

In *State v. Reid*, the Alabama Supreme Court upheld a statute that prohibited the concealed carrying of weapons.[200] In *Reid*, the court again pointed to police powers, stating the provision leaves "the Legislature the authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals."[201]

This prohibition of carrying concealed weapons became commonplace amongst the states, especially following the War of 1812.[202] These laws, however, were intended to curb dangerous *uses* of weapons. As an example, one 1859 Ohio law explains: "If it shall be proved . . . that the accused was, at the time of carrying any of the weapon or weapons aforesaid, engaged in the pursuit of any lawful business . . . the jury shall acquit the accused."[203] Notably, these laws did not call for the accused to be disarmed, but instead opted for a "fine up to two hundred dollars or imprisonment up to a month."[204]

The rationale behind these prohibitions ultimately stemmed from a balancing inquiry where these practices were deemed dangerous, and that danger far outweighed the prohibited activity's benefits to the people.[205] Concealed carry was seen as only useful to those who "wanted to surprise a victim."[206] Laws that punished the concealed carry of firearms were common as exercises of the states' police powers, which were generally accepted as a practice that allowed legislatures to "enact laws to promote public welfare," even at the expense of a given right.[207]

It was quite common for legislatures to use these police powers to justify gun regulations in the eighteenth and nineteenth centuries. In *Commonwealth v. Alger*, for example, Justice Lemuel Shaw of the Massachusetts Supreme Court justified the prohibition of using warehouses for gunpowder storage, stating the prohibition was "for the good and welfare of the commonwealth" and its people.[208] Justice Shaw further explained that if enacted laws were for the welfare of the people, and they were clearly reasonable to the point where "all well

198. *See id.* at 155–56.
199. *Id.* at 160.
200. State v. Reid, 1 Ala. 612, 622 (1840).
201. *Id.* at 616.
202. *See* David B. Kopel, *The Second Amendment in the Nineteenth Century*, BYU L. REV. 1359, 1416 (1998).
203. MARVIN WARREN, OHIO CRIMINAL LAW AND FORMS 674 (Robert Clarke & Co. eds., 1870).
204. Cornell & DeDino, *supra* note 8, at 513.
205. *See id.* at 514.
206. Kopel, *supra* note 202, at 1413.
207. *See* Cornell, *supra* note 191, at 5.
208. Commonwealth v. Alger, 61 Mass. 53, 85 (1851).

regulated minds" would see their apparent utility, then such powers were not in conflict with the Constitution.[209]

Other dangerous uses of firearms were commonly prohibited.[210] Legislatures enacted laws that either prohibited the use of firearms during certain times for hunting, prohibited the time in which citizens could fire their weapons at times of war, or prohibited places where one could discharge their firearms, like in a well-populated city.[211] In 1821, the Tennessee legislature enacted a law that prohibited shooting at a target that was "within the bounds of any town, or within two hundred yards of any public road of the first or second class within [the] state."[212] Instead of being disarmed, offending individuals were often forced to only pay a "surety," which amounted to a simple fine for the behavior.[213] In the context of public carry laws, these "surety statutes *presumed* that individuals had the right" to publicly carry that could only later be burdened if a third party could make out a "reasonable cause to fear an injury, or breach of the peace" on the part of the armed individual.[214] If this fear was judged reasonable, then the individual was merely required to post a bond they would later forfeit only if they ultimately were found to later breach the peace.[215] Notably, these individuals were not disarmed.[216]

In *Bruen*, Justice Thomas agreed this class of prohibitions was directed towards the "manner" in which the arms were used, and therefore not indicative of a blanket prohibition against possessing such arms.[217]

III. ANALYSIS

A. The Historical Tradition of Gun Control Laws in the United States

The CSA currently lists marijuana as a Schedule I substance,[218] effectively prohibiting medicinal marijuana patients from legally obtaining a firearm under §§ 922(g)(3) and (d)(3) of the GCA.[219] To determine whether this prohibition would survive a Second Amendment challenge, the GCA would need to survive Justice Thomas's *Bruen* test.[220] Thus, the constitutionality of the GCA provisions will hinge on whether there exists a "historical tradition of firearm regulation" against individuals engaged in marijuana consumption throughout America's

209. *See id.* at 84–85.
210. *See* Cornell & DeDino, *supra* note 8, at 506, 515.
211. *Id.*
212. *See id.* at 515–16.
213. Greenlee, *supra* note 135, at 268.
214. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2148 (2022).
215. *Id.*
216. *Id.*
217. *Id.* at 2150 (emphasis added) ("The historical evidence from antebellum America does demonstrate that the *manner* of public carry was subject to reasonable regulation.").
218. *See* 21 U.S.C. § 812(c).
219. 18 U.S.C. §§ 922(d)(3), (g)(3).
220. *See Bruen*, 142 S. Ct. at 2130 ("The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.").

early history.[221] Laws that mirror such a prohibition or laws that constitute a "relevantly similar" historical analog would support the finding that the prohibition is constitutional, while the absence of such findings would indicate otherwise.[222]

There are several firearm regulations found throughout the history of the United States that could be argued as demonstrating a historical tradition of firearm regulations against medicinal marijuana patients.[223] For the purposes of this analysis, these laws can be grouped into several categories based on "*how* the challenged law[s]" burden the individual's Second Amendment right and "*why* the law[s] burden[] that right."[224] As Justice Thomas explains, courts are required to "assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."[225] Through analogical reasoning, the government must show the GCA imposes both a comparable burden on the right to bear arms and the GCA is comparably justified, as were the following groups of historical gun regulations.[226]

1. Gun Regulations Targeting "Disaffected Persons"

Gun regulations targeting "disaffected persons" constitute a large portion of this country's history of gun regulations.[227] Colonial-era governments would disarm groups of individuals based on their race, religion, political allegiance, or other perceived risk to the stability of society.[228] This practice can be traced back to English common law, where "dangerous" or "disaffected" persons were quite often disarmed for their capacity to disturb the peace.[229] Justice Thomas did caution against the use of English common law to demonstrate how the founding fathers' understanding of the Second Amendment,[230] but these regulations represent a "long, unbroken line of common-law precedent"[231] that influenced many of the gun regulations enacted surrounding the Second Amendment's ratification.[232] Therefore, these regulations better reflect the American people's understanding of their right to bear arms than a single, "short-lived" English practice would, thus alleviating Justice Thomas's concerns.[233]

Simply put, this tradition of disarming "disaffected persons" cannot serve as a "relevantly similar" historical analog to the GCA's current prohibition

221. *See id.*
222. *See id.* at 2131–33.
223. *See supra* Section II.C.
224. United States v. Rahimi, 61 F.4th 443, 454 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023) (emphasis added).
225. *Bruen*, 142 S. Ct. at 2131.
226. *See id.* at 2132–33.
227. *See supra* Subsection II.C.2.
228. *See* Churchill, *supra* note 181, at 156.
229. *See* Greenlee, *supra* note 135, at 257–61.
230. *See Bruen*, 142 S. Ct. at 2136.
231. *Id.*
232. *See supra* Section II.C.
233. *Bruen*, 142 S. Ct. at 2136.

against medicinal marijuana patients.[234] From the disarming efforts by King Charles II to the efforts of multiple colonial-era legislatures, these laws differed both in *how* they burdened the individual's right to bear arms and *why* they burdened that right.[235]

To start, the GCA was not motivated at all by disarming medicinal marijuana patients due to their perceived lack of loyalty or their tendency to disrupt society.[236] Instead, the Act was amended to include the prohibition against drug users as a measure to lower gun violence and prevent criminals and other apparently dangerous individuals from purchasing firearms.[237] Congress's intent, as the Court later explained, was to "keep firearms out of the hands of presumptively risky people."[238]

While a strong history of disarming individuals deemed as "dangerous" in America's history did exist, the perceived danger our Founding Fathers feared was significantly different than the danger the GCA is aimed at preventing.[239] This nation's history points to a clear tradition of disarming groups of individuals based on their perceived danger to the current government, not their danger to other individuals.[240] Whether it be disarming Catholics during the French and Indian War, disarming those refusing to take an oath of allegiance to the crown, or disarming individuals convicted of sedition, these laws were consistently set in place to disarm groups of people who threatened the then-existing political stability of the government.[241] This often resulted in a fluctuation of what group was being disarmed, depending on the political dynamic at the time.[242] As the *Rahimi* court explained, the purpose of these "dangerousness" laws was the "preservation of *political and social order*, not the protection of an identified person from the threat . . . posed by another."[243]

In contrast, the current ban on marijuana patients is primarily motivated by a desire to protect an identified group of people from a specific perceived threat by another group of individuals, not to prevent an insurrection or a threat to the stability of the nation.[244] Consequently, for the government to successfully argue that this group of past gun regulations are "relevantly similar"[245] to the GCA's current prohibition, the government would also need to argue medicinal marijuana users pose a serious threat to the stability of society, not just to other

234. *Id.* at 2132.
235. *See id.* at 2132–33.
236. *See supra* Section II.A.
237. *See* Richard M. Aborn, *The Battle over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417, 428 (1995).
238. Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 n.6 (1983).
239. *See id.*
240. *See supra* Section II.B.
241. *See* Greenlee, *supra* note 135, at 257–67.
242. *See id.* at 263–64.
243. United States v. Rahimi, 61 F.4th 443, 457 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023) (emphasis added).
244. *See Dickerson*, 460 U.S. at 112 n.6.
245. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).

individuals.[246] For a group that is described as lazy, timid, drowsy, or even carefree by politicians, media, or even President Nixon's appointed commission's findings, the irony of an argument calling these individuals dangerous to the political stability of the country is obvious.[247]

The government may argue the Second Amendment, as understood by founders such as Samuel Adams, was intended only for "peaceable citizens," and only granted strict, law-abiding citizens the right to bear arms, but this interpretation fails on two different grounds.[248] First, the term "peaceable," as used by the founders at the Massachusetts ratifying convention, was best understood to apply to those individuals who were considered nonviolent.[249] New Hampshire's Bill of Rights proposal supports this interpretation, as they proposed to exclude from the Second Amendment's protection only those individuals who had participated in an "actual rebellion."[250] Neither of these proposals referenced any exclusion against individuals solely because they broke a law.[251]

Not only does the reasoning behind these historical regulations disarming "disaffected" or "dangerous" persons differ significantly from that of the GCA's, but the process behind *how* these laws burden the Second Amendment right differs significantly as well.[252] The GCA, pursuant to the ATF's directions, prohibits medicinal marijuana patients from purchasing a firearm simply due to their statuses as medicinal marijuana cardholders.[253] The history of regulations targeting "disaffected persons" was far less severe.[254]

First, instead of an outright ban on the purchase of firearms, colonial-era governments would disarm groups of individuals in response to a changing political climate that resulted in these groups becoming less trustworthy to the stability of the government.[255] Second, even when a group of individuals was considered dangerous to society and subsequently disarmed, there were exceptions given to these individuals to allow them to retain their firearms "for the defence of his House or person."[256] Furthermore, individuals convicted for their part in

246. *See Rahimi*, 61 F.4th at 457.

247. *See, e.g.*, Jacob Sullum, *Dr. Oz Warns that Legalizing Marijuana in Pennsylvania Would Aggravate Unemployment by Weakening 'Mojo,'* REASON (May 24, 2022, 3:00 PM), https://reason.com/2022/05/24/dr-oz-warns-that-legalizing-marijuana-in-pennsylvania-would-aggravate-unemployment-by-weakening-mojo/ [https://perma.cc/WT7S-E72Q]. *See also* Josiah Hesse, *Reefer Madness: How Did We End Up with the Lazy Stoner Stereotype?*, LIT. HUB (Sept. 23, 2021), https://lithub.com/reefer-madness-how-did-we-end-up-with-the-lazy-stoner-stereotype/ [https://perma.cc/MN3C-XW5S]; NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 66–73 (1972).

248. *See Rahimi*, 61 F.4th at 457.

249. *See* Greenlee, *supra* note 135, at 265–66.

250. *Id.* at 266.

251. *See id.* at 265–66.

252. *See id.* at 257–67 (demonstrating that these groups were disarmed due to their perceived lack of loyalty to the government, but were also given exemptions to keep some arms for the defense of their home). *But see* Letter from Arthur Herbert, *supra* note 13 (directing dealers to assume medicinal marijuana patients were Schedule I substance users ineligible to purchase a firearm).

253. *See* Letter from Arthur Herbert, *supra* note 13.

254. *See* Greenlee, *supra* note 135, at 257–67.

255. *See id.*

256. *See id.* at 258–59.

Shay's Rebellion were only disarmed for a period of three years and the followers of Anne Hutchinson who were disarmed and banished from Massachusetts Bay were given back their arms if they "confessed their sins" and proved their loyalty to the government.[257] In contrast, the GCA's prohibition does not consider whether these individuals are dangerous to the political stability of the country, nor does the Act allow for exceptions to the defense of the home or give these individuals a chance to retain their right to bear arms.[258]

The GCA differs from these regulations against "disaffected persons" significantly in both *how* the Act burdens their right to bear arms and *why* it does so.[259] The Act was not motivated by a desire to protect the political stability of the country but was instead motivated by a desire to protect another individual from the perceived threat of a group of people, a justification that was recently rejected in the Fifth Circuit.[260] Furthermore, the GCA fails to provide an exception to individuals for the defense of their home and does not afford individuals a chance to retain their firearms through some demonstration that they pose no threat to the stability of society.[261] Instead, the GCA acts as a blanket prohibition due to individuals' statuses as medicinal marijuana patients.[262] Therefore, these regulations against "disaffected persons" cannot be considered "relevantly similar" to the GCA's current prohibition against marijuana users.[263]

2. Impressment

Another common act of gun control found throughout colonial-era America was the use of impressment at times of military need.[264] As mentioned previously, impressment involved the "commandeering of private property for public use in moments of military necessity."[265] Particularly in times of complete military efforts, like the American Revolution, impressment of arms became more common.[266]

Despite its use in times of military necessity, impressment cannot be considered a "relevantly similar" analog to the GCA's current prohibition.[267] Acts of impressment were implemented with drastically different motives than the motives behind the GCA.[268] In contrast to disarming individuals only during times of military necessity, the GCA's prohibition was primarily motivated by a

257. *Id.* at 263.
258. *See* 18 U.S.C. §§ 922(d)(3), (g)(3).
259. *See id. But see* Greenlee, *supra* note 135, at 257–65.
260. *See Rahimi*, 61 F.4th at 457.
261. *See* Greenlee, *supra* note 135, at 258–59, 263.
262. *See* Letter from Arthur Herbert, *supra* note 13.
263. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).
264. *See* Churchill, *supra* note 181, at 150–55.
265. *See id.* at 150.
266. *See* Bellesiles, *supra* note 139, at 585.
267. *See Bruen*, 142 S. Ct. at 2132.
268. *See* Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 n.6 (1983).

desire to keep guns away from criminals and to lower gun violence in the country, with no connection to pressing military need.[269]

Impressment also would likely not be considered a "historical tradition of firearm regulation" in this country to begin with.[270] American citizens looked at impressment with great resentment, and soldiers referred to the act as "tyrannical and unjust," which suggests that the American people understood their Second Amendment right to protect against acts just like impressment.[271] Colonial-era governments adopted the practice of impressment from England's Militia Act of 1662,[272] which allowed the government to seize arms and supplies like carts, wagons, and horses, but these colonial legislators enacted specific exemptions for the impressment of arms, further reflecting they understood the Second Amendment to protect against acts like this.[273] Furthermore, because the acts of impressment were so unpopular amongst the American people, the practice just briefly survived into the nineteenth century.[274]

The short duration of the practice of impressment, the animosity among the American people towards impressment, and the motivations behind acts of impressment all suggest that impressment is neither a historical tradition of firearm regulation in this country nor can it be considered "relevantly similar" to the GCA's prohibition against marijuana users.[275]

3. Firearm Regulations and Police Powers

The concept of police powers was first elaborated by eighteenth-century Scottish legal theorists and further elaborated by William Blackstone in his *Commentaries on the Laws of England*.[276] Through their police powers, legislatures were permitted to act via the government to pass laws that promote the health, safety, and welfare of the state.[277] Through these powers, legislatures were able to regulate firearms and ammunition as long as "all well regulated minds will regard it as reasonable,"[278] and several courts ruled such exercises as comporting with their constitutions.[279] Furthermore, the balancing test behind police powers was "hardwired into the founding era's conception of the police right, and equally central to antebellum police power jurisprudence," suggesting that this use of police powers was certainly a historical tradition of firearm regulation.[280]

269. *See id.*
270. *See Bruen*, 142 S. Ct. at 2126.
271. *See* Churchill, *supra* note 181, at 152 (conveying what Nathaniel Greene had heard from New England soldiers in December of 1775).
272. *Id.* at 151–52.
273. *Id.*
274. *Id.* at 154.
275. *See Bruen*, 142 S. Ct. at 2132.
276. *See* Cornell, *supra* note 191, at 5.
277. *Id.*
278. Commonwealth v. Alger, 61 Mass. 53, 84–85 (1851).
279. *See, e.g.*, *id. See generally* Aymette v. State, 21 Tenn. 154 (1840); State v. Reid, 1 Ala. 612 (1840).
280. *See* Cornell, *supra* note 191, at 8.

Despite their prevalence, these laws cannot be considered "relevantly similar" analogs to the GCA's prohibition against marijuana patients because they differ drastically in *how* these regulations burden the Second Amendment right.[281] First, and perhaps most importantly, the use of police powers to regulate firearms was used entirely to regulate the *manner* in which the firearms were used.[282] Several states forbid the use of weapons "in an aggressive and terrifying manner," or "in Terror of the People."[283] Other states banned the possession of certain types of weapons that could only be used in a manner deemed unsafe, like the possession of concealed pistols or knives, which were considered to reflect only a malicious intent.[284] Second, the punishment for violating any of these regulations or surety statutes involved paying a fine instead of being disarmed, and these fines were only implemented *after* the individual was found to have acted to breach the peace or in a manner deemed unsafe.[285]

The GCA's "controlled substance" provisions work entirely different than these early uses of police powers.[286] Instead of implementing a simple ex-post surety fine or prohibiting specific dangerous uses of a weapon, the GCA institutes a ban prohibiting these individuals from purchasing a firearm in the first place solely due to their possession of a medicinal marijuana card, regardless of whether the firearm dealer knows the person uses the drug.[287] In *Bruen*, Justice Thomas even acknowledged these laws targeted how firearms were used, not who was eligible to purchase them.[288] Such a drastic difference in how these laws burdened the Second Amendment right suggests the current ban cannot be considered "relevantly similar" to these uses of police power.[289]

The justifications behind enacting the GCA and the historical justifications behind these uses of police powers surely indicate their burdens to the Second Amendment were similarly justified,[290] a "central consideration" of a *Bruen* analysis.[291] But while these justifications appear similar, the GCA cannot be considered constitutional due to its reliance on a balancing inquiry that Justice Thomas expressly rejected in *Bruen*.[292] If it were as simple as citing the promotion of public health and safety to the general public to justify the law, then most gun laws, like the one discussed in *Bruen*, would be ruled constitutional.[293] They

281. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).

282. *See supra* Subsection II.C.2.

283. Greenlee, *supra* note 135, at 262.

284. Bellesiles, *supra* note 139, at 572.

285. *See Bruen*, 142 S. Ct. at 2144–46.

286. *See* 18 U.S.C. §§ 922(d)(3), (g)(3) (instituting a blanket prohibition against the purchase or sale to Schedule I substance users).

287. *Id. See also* Letter from Arthur Herbert, *supra* note 13.

288. *Bruen*, 142 S. Ct. at 2150.

289. *Id.* at 2132.

290. *See* Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 n.6, 113 (1983); Cornell, *supra* note 191, at 5–6.

291. *Bruen*, 142 S. Ct. at 2133 (internal quotation marks omitted).

292. *See id.* at 2129 (refusing to allow judges to rule on a case-by-case basis using the Court of Appeals' two-step balancing test).

293. *See generally id.* (ruling the New York firearm regulation unconstitutional, despite the government pointing to public safety as an interest).

were not.[294] Instead, a broad promotion of public health and safety was not ruled a sufficient justification for the firearm regulation in *Bruen*.[295]

This begs the question: how can the use of police powers, a common mechanism for firearm regulation in colonial-era America that inherently required a balancing test, conform with the test in *Bruen*?[296] As the result in *Bruen* shows, citing public safety clearly is not enough.[297] While it was not ruled sufficient as a historical justification in *Bruen*, such a widespread use of police powers surrounding the time of the Second Amendment's ratification does suggest it should be considered a part of this nation's historical tradition of firearm regulation.[298]

Further clarification from the Court would likely be needed to understand this apparent discrepancy between *Bruen*'s ruling and this nation's history.[299] For now, following in the footsteps of *Bruen*, the similarities between the justifications behind these police powers and those behind the GCA should not immediately render the current prohibition "relevantly similar" to this nation's history of gun regulation.[300] Under *Bruen*, the use of police powers alone cannot be considered a "relevantly similar" analog to the GCA's current prohibition against marijuana patients.[301] Therefore, an argument from the government citing these police powers as a historical justification cannot be sufficient alone to render the current gun regulation constitutional.

4. Regulations Targeting "Felons and the Mentally Ill"

One last group of firearm regulations the government may point to as a justification for the GCA in a Second Amendment challenge would be the firearm regulations targeting felons and the mentally ill that Justice Scalia specifically carved out in *Heller*.[302] The federal government had not begun to regulate marijuana until the late 1930s with the introduction of the Marihuana Tax Act of 1937.[303] Furthermore, the first known firearm regulation prohibiting the sale of firearms to the mentally ill was introduced with the Uniform Fire Arms Act of 1930, prohibiting those of "unsound mind" to possess a firearm.[304]

With respect to the aforementioned prohibitions against felons, the Court failed to expound upon the historical justification behind these longstanding prohibitions both in *Heller* and *McDonald*, choosing to explain this justification when a later opportunity arose.[305] That opportunity never arose before *Bruen*, so

294. *See id.* at 2156, 2173.
295. *See id.*
296. *See* Cornell, *supra* note 191, at 8 (explaining that the use of police powers for regulating firearms was widely prevalent in this Nation's history).
297. *See Bruen*, 142 S. Ct. at 2156.
298. *See* Cornell, *supra* note 191, at 8.
299. *See id.*
300. *Bruen*, 142 S. Ct. at 2132.
301. *See generally id.*
302. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).
303. Musto, *supra* note 39, at 46.
304. Larson, *supra* note 76, at 1376–77.
305. *Heller*, 554 U.S. at 635; McDonald v. City of Chi., 561 U.S. 742, 786 (2010).

the justification remains unclear.[306] Ultimately, these prohibitions cannot be considered "relevantly similar" to the GCA's current prohibition against marijuana patients. These prohibitions were enacted centuries after the Second Amendment's ratification and therefore not reflective of how the American people understood their Second Amendment rights.[307] Furthermore, many of the possible historical justifications for Justice Scalia's exception cannot be considered relevantly similar to the GCA in *why* they regulated firearms.

Before the turn of the twentieth century, drug use of opium and cocaine was largely unregulated by the federal government, and even considered by the people to be "helpful in everyday life."[308] States chose to leave drug use unregulated, instead "allowing free enterprise for all practitioners," which resulted in "an era of wide availability and unrestrained advertising" for drugs in nineteenth-century America.[309] It was not until 1937 that Congress began barring those found using marijuana from obtaining a firearm through the Marihuana Tax Act of 1937 and the National Firearms Act.[310] In *Bruen,* Justice Thomas stressed the importance of understanding the scope of Second Amendment rights as they were "understood . . . *when the people adopted them*."[311] For firearm regulations enacted after the Second Amendment's ratification, they are constitutional under *Bruen* only if they reflect the "*public understanding*" of their constitutional rights under the Second Amendment.[312] Post-ratification public understanding of such rights can be inferred by a "regular course of practice."[313] In Justice Thomas's words, "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision."[314]

In this case, the opposite holds true. It was a widespread, unchallenged practice in the early days of the Republic to leave drug use unregulated.[315] It was not until over a century later that the federal government began regulating drug use with respect to firearms, which demonstrates a clear inconsistency with the original understanding of the Second Amendment with respect to firearms.[316] Such an inconsistent practice "cannot overcome or alter" the meaning of the Second Amendment.[317] Furthermore, these laws were implemented in the twentieth century, well over a century after the Amendment's ratification.[318] In *Bruen*, Justice Thomas considered laws enacted seventy-five years after the Amendment's

306. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2189 (2022) (Breyer, J., dissenting).
307. *See id.* at 2136–37.
308. Musto, *supra* note 39, at 40.
309. *Id.* at 42.
310. *Id.* at 46.
311. *Bruen*, 142 S. Ct. at 2136 (quoting District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008)).
312. *Id.* (quoting *Heller*, 554 U.S. at 605).
313. *Id.* (quoting Chiafolo v. Washington, 140 S. Ct. 2316, 2326 (2020)).
314. *Id.* at 2137 (quoting NLRB v. Noel Canning, 573 U.S. 513, 572 (2014) (Scalia, J., concurring)).
315. Musto, *supra* note 39, at 42.
316. *See Bruen*, 142 S. Ct. at 2136–37.
317. *Id.* at 2137 (quoting Heller v. District of Columbia, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).
318. *See* Musto, *supra* note 39, at 46.

ratification as "secondary" in his analysis, stating they "do not provide as much insight into its original meaning as earlier sources" due to the fact these laws cannot be presumed to accurately reflect how the Founding Fathers understood the Second Amendment.[319] Logically, this same caution must only be magnified for laws enacted significantly later, like the GCA.[320] These longstanding prohibitions cannot be considered relevantly similar because they were inconsistent with early American practices and enacted significantly later than the Amendment's ratification.

Furthermore, the laws enacted throughout the twentieth century that prohibit marijuana users or felons in general from purchasing a firearm and their possible historical analogs differ significantly in *why* these laws burdened the Second Amendment right.[321] In a paper exploring what Justice Scalia meant by his carve-out exception to longstanding prohibitions against felons, U.C. Davis law professor Carlton Lawson found a possible justification in the "peaceable citizens" language used in Samuel Adams's ratification proposal.[322] A second possible explanation included New Hampshire's proposal barring those found to participate in an "actual rebellion" from possessing a firearm, but this explanation fails on the same ground.[323] This language, however, was intended to prevent those citizens who posed a *violent* threat to the stability of the government, not to felons generally.[324] In *Rahimi*, the Fifth Circuit rejected the argument that any firearm regulation could be justified by the mere fact the individual was considered a felon.[325] If this were not the case, Congress could strip away one's Second Amendment rights simply by changing what act constitutes a felony.[326] This interpretation neither comports with what founding fathers like Samuel Adams meant by "peaceable citizens," nor does it contain any limiting principle.[327]

In summary, the GCA's current prohibition on the sale of firearms to marijuana patients cannot be considered "relevantly similar" to the laws enacted in the twentieth century against marijuana users or to laws targeting felons generally.[328] These laws are inconsistent with how the early Republic chose to regulate firearms with respect to drug use;[329] they were enacted far later than the Second Amendment's ratification, thus showing they are not an accurate reflection into how the Founding Fathers understood the Second Amendment's scope;[330] and

319. *Bruen*, 142 S. Ct. at 2137 (quoting District of Columbia v. Heller, 554 U.S. 570, 614 (2008)).
320. *See* 18 U.S.C. § 922.
321. *See* Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 n.6 (1983). *But see* United States v. Rahimi, 61 F.4th 443, 443 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023).
322. Greenlee, *supra* note 135, at 265–66.
323. *See id.* at 266.
324. *See id.*
325. *Rahimi*, 61 F.4th at 451–52.
326. *See id.* at 453.
327. *See id; see also* Greenlee, *supra* note 135, at 265–66.
328. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).
329. *See* Musto, *supra* note 39, at 42.
330. *See Bruen*, 142 S. Ct. at 2136–37.

finally, they do not possess the same justification for *why* these laws burden the individual's Second Amendment rights.[331]

IV. RECOMMENDATION

On August 8, 2022, the DOJ filed a brief in the United States District Court of Florida for the case *Fried v. Garland*, arguing against the plaintiffs' claim that the federal ban on marijuana patients possessing a firearm was unconstitutional.[332] There, the DOJ argued that a historical tradition exists in this country of disarming similar "dangerous" groups.[333] In that case, the DOJ followed much of the same reasoning used in several other federal cases where the court dismissed a plaintiffs' Second Amendment challenge to the GCA.[334] Under the two-step balancing test adopted by the circuit courts, challenges brought by medicinal marijuana users like the ones in *Fried* consistently had their Second Amendment challenges dismissed under strict or intermediate scrutiny, depending on how close the infringement was to the "core" of the Second Amendment.[335] Enter *Bruen*.

Under the new test introduced by Justice Thomas in *Bruen*, the balancing inquiry consistently used by circuit courts can no longer be applied to Second Amendment challenges.[336] Instead, the government has the burden of providing a historical justification for the challenged firearm regulation to show the challenged regulation is consistent with the scope of the Second Amendment, *as understood at the time it was ratified*.[337] In the case of marijuana patients who have had their Second Amendment right to bear arms stripped away,[338] the GCA's prohibition is unconstitutional.

First, the government cannot justify such a blanket prohibition simply because marijuana patients are considered felons under federal law. In *Fried v. Garland*, the DOJ relies on Justice Scalia's dicta in *D.C. v. Heller*, assuring the decision should not "cast doubt on longstanding prohibitions" against the possession of firearms by felons.[339] As discussed, this interpretation is simply incorrect. As the Fifth Circuit notes, this language was intended to refer to those groups who have been *historically* stripped of their Second Amendment rights, not just those categorized as felons under the law.[340] Otherwise, there would be no limiting principle to who Congress can strip of their Second Amendment

331. *See supra* notes 324–29 and accompanying text.

332. *See* Reisman, *supra* note 22.

333. *See id.*

334. Defendants' Memorandum in Support of Motion to Dismiss First Amended Complaint or Alternatively for Summary Judgment at 16–18, Fried v. Garland, 640 F. Supp. 3d 1252 (2022). *But see* United States v. Rahimi, 61 F.4th 443, 451–54 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023) (rejecting this same argument).

335. *See, e.g.*, United States v. Dugan, 657 F.3d 998, 999 (9th Cir. 2011) (ruling against plaintiffs' Second Amendment challenge to the schedule I Substance user provisions).

336. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

337. *See id.* at 2136.

338. *See* Reisman, *supra* note 22.

339. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

340. *See* United States v. Rahimi, 61 F.4th 443, 452 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023).

right.[341] Therefore, a Second Amendment challenge cannot be dismissed solely based on the language found in *Heller*, so the government must instead show a historical justification for the GCA's prohibition under the new *Bruen* test.[342]

The government cannot provide a historical justification for the GCA's current prohibition against medicinal marijuana users because there is no historical tradition of prohibiting similar drug users from possessing a firearm, nor is there any "relevantly similar" historical analog that similarly burdens the Second Amendment right on the basis of drug use.[343] Drugs were widely available and widely advertised throughout the eighteenth and nineteenth centuries, and states chose to leave such drug use largely unregulated.[344] The current firearm prohibition against marijuana users thus demonstrates a dramatic shift in how firearms were regulated during the time surrounding the Second Amendment's ratification.[345] The lack of colonial-era firearm regulations regarding drug use strongly indicates the current prohibition against marijuana users violates the Second Amendment, as understood at the time of its ratification.[346]

Furthermore, the government cannot point to any other "relevantly similar" historical analogs for the GCA's current prohibition against marijuana users.[347] The majority of this country's colonial-era history of gun regulation involved disarming groups of individuals due to their perceived risk to the political stability at the time, *not* because of a possible risk to another individual.[348] These "dangerous" or "disaffected" persons included those who were perceived as being capable of participating in actual rebellion of the current government, *not* those considered incapable of safely using a firearm.[349] Furthermore, this prohibition cannot possibly be compared to the act of impressment due to impressment's short-lived tenure in American history and the lack of any related emergency requiring the government to take these citizens' firearms.[350]

The government may have had a plausible argument in citing the historical, "widespread"[351] use of police powers to regulate firearms, but these measures differed significantly in *how* they burdened Second Amendment rights. Instead of implementing fines after an individual was found to improperly use a firearm or banning specific uses of firearms as was historically accepted, the GCA institutes a blanket prohibition against a group of individuals before they are even found to improperly use the firearm solely because of their status as a medicinal

341. *See id.* at 453.

342. *Bruen*, 142 S. Ct. at 2126.

343. *See supra* Section II.C.

344. *See* Musto, *supra* note 39, at 42.

345. *See id.* (explaining that modern gun restrictions for drug users did not exist during the time of the Second Amendment's ratification).

346. *See id. See also Bruen*, 142 S. Ct. at 2136–37.

347. *See supra* Part III.

348. *See generally* Greenlee, *supra* note 135. *See also* United States v. Rahimi, 61 F.4th 443, 451–54 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023).

349. *See Rahimi*, 61 F.4th at 451–54.

350. *See supra* Subsection III.A.2.

351. *See* Cornell, *supra* note 191, at 5–6.

marijuana patient.[352] Furthermore, the use of police powers during the colonial era required legislatures to conduct balancing tests to determine whether a regulation was appropriate.[353] In *Bruen*, Justice Thomas expressly rejected the use of such a balancing inquiry when analyzing statutes under a Second Amendment challenge.[354] In fact, Justice Thomas rejected the plaintiffs' proposed use of police powers as a "relevantly similar" analog to the gun regulations challenged in *Bruen*.[355] Accordingly, the use of police powers to promote public safety cannot be considered a "relevantly similar" historical analog to the GCA's prohibition against medicinal marijuana patients.[356]

This new *Bruen* test will certainly lead to controversial and even downright preposterous results. Previous sensible restrictions on the ownership of firearms that either protected vulnerable classes of society or promoted general benefits to society are now on the cusp of being ruled unconstitutional due to a lack of historical laws addressing a now-recognized societal problem.[357] Just recently, the Fifth Circuit ruled a provision of the GCA that prohibited domestic violence abusers subject to a restraining order from owning a firearm unconstitutional, despite the same court previously upholding the statute under the circuit courts' pre-*Bruen* balancing test.[358] This very Note, in fact, could easily be changed to apply to a different Schedule I substance user, and the result should be the same under the exact criteria of the *Bruen* test, despite the obvious safety concerns this could lead to.

Furthermore, federal judges have *already* begun to express frustration with Justice Thomas's test.[359] While the Supreme Court may have "80 amici from Ph.D. historians" at their disposal, the judges complained, lower courts typically receive just "one amicus" when ruling on these cases.[360] Clearly, the resources available to the Court will not be present for the government every time there is a Second Amendment challenge at the lower court level, which will likely prove to present an even greater burden for the government in any Second Amendment challenge to come.[361]

In addition to causing these logistical issues, Thomas's *Bruen* opinion failed once again to expound on the alleged justifications for prohibitions against felons or the mentally ill.[362] Regardless, neither of these prohibitions can be

352. *See* 18 U.S.C. §§ 922(d)(3), (g)(3).

353. *See* Cornell, *supra* note 191, at 8.

354. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

355. *See generally id.* (rejecting the government's purported reason of public safety as a justification behind the New York gun regulation).

356. *Id.* at 2132.

357. *See supra* Subsection III.A.4.

358. *See* United States v. Rahimi, 61 F.4th 443, 448 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023).

359. *See* Avalon Zoppo, *Judge Frustrated over Lack of Historical Analysis in Gun Rights Cases*, LAW.COM: NAT'L L.J. (Feb. 8, 2023, 5:13 PM), https://www.law.com/nationallawjournal/2023/02/08/judge-frustrated-over-lack-of-historical-analysis-in-gun-rights-case/ [https://perma.cc/94FC-25SK].

360. *Id.*

361. *See id.*

362. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2189 (2022) (Breyer, J., dissenting).

considered historical traditions of this nation's gun laws under the *Bruen* test.[363] Further guidance from the Court will be crucial in defending many sensible gun laws that promote generally approved benefits to society,[364] but do not have a place in this country's historical tradition of gun regulations.[365] In the colonial era, police powers were commonly used to regulate gun and ammunition use, but these inherently required a balancing test, as explained in *Aymette*.[366] A balancing inquiry is rooted in this nation's history of gun regulations, but it is also expressly rejected by Justice Thomas for a test that looks to the historical tradition of gun laws.[367] Addressing this apparent disparity must be a priority for the Court, otherwise more seemingly sensible gun restrictions to "all well regulated minds"[368] will be ruled unconstitutional under this test.

The GCA's prohibition against medicinal marijuana users represents a *drastic* shift from the Founding Fathers' understanding of their rights under the Second Amendment, and it is this understanding that must govern modern-day gun regulations under Justice Thomas's test in *Bruen*.[369] Under the *Bruen* test, §§ 922(g)(3) and (d)(3) of the GCA must be ruled unconstitutional as applied to medicinal marijuana patients. Currently, these patients cannot legally purchase firearms, despite the current legal status of marijuana in the majority of states and, more importantly, the lack of *any* historical tradition or "relevantly similar"[370] historical analogs in this country of prohibiting drug users from purchasing firearms.[371]

V. CONCLUSION

Under the *Bruen* test espoused by Justice Thomas, §§ 922(d)(3) and (g)(3) of the Gun Control Act are unconstitutional. Under *Bruen*, modern-day gun regulations *must* comport with both the text of the Second Amendment *and* its historical understanding.[372] These provisions of the GCA have no basis in the historical tradition of gun regulation found during the time surrounding the Second Amendment's ratification, nor do they have a "relevantly similar" historical analog.[373] These medicinal marijuana users are having their constitutional right to bear arms stripped away solely due to their possession of a marijuana card or their use of a drug that was never regulated during the times surrounding the

363. *See supra* Subsection III.A.4.

364. *See, e.g.*, United States v. Rahimi, 61 F.4th 443, 461 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023) ("[W]e previously concluded that the societal benefits of § 922(g)(8) outweighed its burden on Rahimi's Second Amendment rights. But *Bruen* forecloses any such analysis in favor of a historical analogical inquiry . . . .").

365. *See* Greenlee, *supra* note 135, at 265–66.

366. Aymette v. State, 21 Tenn. 154, 161–62 (1840).

367. *See* Cornell, *supra* note 191, at 8; *Bruen*, 142 S. Ct. at 2126.

368. Commonwealth v. Alger, 61 Mass. 53, 84–85 (1851).

369. *Bruen*, 142 S. Ct. at 2132–33.

370. *Id.* at 2132.

371. *See supra* Subsection III.A.4.

372. *Bruen*, 142 S. Ct. at 2131.

373. *See supra* Part III.

Second Amendment's ratification.[374] Therefore, these provisions of the GCA should be considered an "outlier[] that our ancestors would never have accepted",[375] and ultimately ruled unconstitutional.

374. Musto, *supra* note 39, at 42.

375. *Bruen*, 142 S. Ct. at 2133 (quoting Drummond v. Robinson, 9 F.4th 217, 226 (3d. Cir. 2021)).