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THERE IS NO *BRUEN* STEP ZERO: THE LAW-ABIDING CITIZEN AND THE SECOND AMENDMENT

Jeff Campbell*

Introduction

In *District of Columbia v. Heller*,[1] the Supreme Court transformed Second Amendment law by adopting an originalist approach in gun-rights cases. Breaking from its previous cases, the Court recognized an individual right to bear arms, at least within the home.[2] The Court's method, while not fully specified, focused on history to determine the meaning of the Second Amendment.[3] But despite the abrupt change in the law, the anticipated revolution never really came. Lower courts turned away nearly every challenge to existing gun laws, sometimes by declining to extend *Heller* outside the home,[4] sometimes by finding that the laws passed means-end scrutiny.[5] Originalist Justices were frustrated by what some perceived to be a rebellion of lower-court judges.[6]

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[1] 554 U.S. 570 (2008).

[2] *Id.* at 635.

[3] *Id.* at 605-19.

[4] *See, e.g.*, Williams v. State, 10 A.3d 1167, 1177 (Md. 2011); Commonwealth v. Perez, 952 N.E. 2d 441, 451 (Mass. App. Ct. 2011); People v. Dawson, 934 N.E.2d 598, 607 (Ill. App. Ct. 2010); People v. Yarbrough, 86 Cal. Rptr. 3d 674, 687 (Cal. Ct. App. 2008); Piszczatoski v. Filko, 840 F. Supp. 2d 813, 829 (D.N.J. 2012), *aff'd sub nom.* Drake v. Filko, 724 F.3d 426 (3d Cir. 2013).

[5] *See, e.g.*, Worman v. Healey, 922 F.3d 26 (1st Cir. 2019); Libertarian Party of Erie Cnty. v. Cuomo, 970 F.3d 106 (2d Cir. 2020); Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J., 910 F.3d 106 (3d Cir. 2018); Harley v. Wilkinson, 988 F.3d 766 (4th Cir. 2021); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185 (5th Cir. 2012); Stimmel v. Sessions, 879 F.3d 198 (6th Cir. 2018); Kanter v. Barr, 919 F.3d 437 (7th Cir. 2019); United States v. Torres, 911 F.3d 1253, 1264 (9th Cir. 2019); United States v. Reese, 627 F.3d 792, 801 (10th Cir. 2010); Schrader v. Holder, 704 F.3d 980 (D.C. Cir. 2013).

[6] *See, e.g.*, Silvester v. Becerra, 138 S. Ct. 945, (2018) (Thomas, J., dissenting from denial of certiorari) ("[T]he lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights."); Peruta v. California, 582 U.S. __, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (criticizing the "distressing trend" of "the treatment of the Second Amendment as a disfavored right"); Friedman v. City of Highland Park, 577 U.S. 1039 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (complaining of "noncompliance with our Second Amendment precedents" by "several Courts of Appeals").

In *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court stepped in again.[7] First, the Court held that the Second Amendment applies outside the home.[8] Then, the Court swept away 14 years of post-*Heller* lower-court precedents, announcing that there is no place for means-end scrutiny or interest-balancing in Second Amendment cases.[9] Instead, the Court adopted an exclusive "text and history" approach: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[10] (This is step one: text.[11]) "The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[12] (This is step two: history.) After that, the analysis ends. If a regulation cannot be justified by a long historical pedigree, then it cannot survive. The opinion's tone on this point is almost parental: If you lower courts cannot use your judicial tools responsibly, then we will take them away.[13]

Immediately on the heels of *Bruen*, however, some lower courts have adopted a new method of resistance.[14] Unable to bend the Second Amendment's text to exclude conduct that seems unsavory and without any history on hand to support laws that seem wise, they have invented a "*Bruen* Step Zero."[15] Before getting to the text-and-history test, they ask a threshold

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[7] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111 (2022).

[8] *Id.* at 2122.

[9] *Id.* at 2129 ("*Heller* relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny."). But nearly every circuit court had read *Heller* to apply some form of heightened scrutiny test. *See, e.g.*, Worman v. Healey, 922 F.3d 26, 38 (1st Cir. 2019); Libertarian Party of Erie Cnty. v. Cuomo, 970 F.3d 106, 128 (2d Cir. 2020); Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. New Jersey, 910 F.3d 106, 118-19 (3d Cir. 2018); Harley v. Wilkinson, 988 F.3d 766, 769 (4th Cir. 2021); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 207 (5th Cir. 2012); Stimmel v. Sessions, 879 F.3d 198, 206 (6th Cir. 2018); Kanter v. Barr, 919 F.3d 437, 442 (7th Cir. 2019); United States v. Torres, 911 F.3d 1253, 1264 (9th Cir. 2019); United States v. Reese, 627 F.3d 792, 801 (10th Cir. 2010); Schrader v. Holder, 704 F.3d 980, 989 (D.C. Cir. 2013).

[10] *Bruen*, 142 S. Ct. at 2129-30.

[11] To be sure, the Court called the "two-step approach" adopted by lower courts "one step too many." *Id.* at 2127. But that was because lower courts had treated text and history as one step, used to determine "the original scope of the right based on its historical meaning." *Id.* at 2126. The Court's opinion nevertheless discerns in *Heller* a two-step test of its own: text first, history second. The *Bruen* opinion is structured this way, with the Court first examining in Part III.A whether the text encompasses petitioners' conduct, *id.* at 2134-35, and then in Part III.B examining the historical support offered for the regulation, *id.* at 2135-56. Lower courts have correctly discerned that this is a two-step test. *See, e.g.*, United States v. Quiroz, 2022 WL 4352482, at *3-4 (W.D. Tex. Sept. 19, 2022) ("*Bruen*'s First Step: 'receiving' a firearm under the Second Amendment's plain text . . . . *Bruen*'s second step: the historical analysis.").

[12] *Bruen*, 142 S. Ct. at 2130. In keeping with tradition for courts plainly making new law, the Court denied that it was doing so, maintaining that it was applying the test announced in *Heller*. That position is hard to take seriously. *See, e.g.*, Randy Barnett, *A Minor Impact on Gun Laws but a Potentially Momentous Shift in Constitutional Method*, SCOTUSBLOG (June 27, 2022, 5:00 PM), https://www.scotusblog.com/2022/06/a-minor-impact-on-gun-laws-but-a-potentially-momentous-shift-in-constitutional-method/. After all, *Heller* appeared to announce that some form of means-end scrutiny to be named later applied. *See* District of Columbia v. Heller, 554 U.S. 570, 628-29 (2008) ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, [the law] would fail constitutional muster."). It's not surprising then that lower courts had not discerned from *Heller* the test that the *Bruen* Court did.

[13] *Bruen*, 142 S. Ct. at 2127 ("Despite the popularity of this two-step approach, it is one step too many."); *see also id.* at 2131 ("If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of 'intermediate scrutiny' often defer to the determinations of legislatures.").

[14] *See infra* Section I.

[15] Tip of the hat to Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

question: Is the individual involved a "law-abiding citizen"? If they decide he isn't, they say, the text-and-history test isn't triggered, and the challenge fails before it gets to step one. Lower courts therefore find themselves able to do exactly what they did before *Bruen*—summarily reject Second Amendment challenges to gun laws without the need to consider constitutional text or relevant history.

That is not the law. This article argues that *Bruen* Step Zero is inconsistent with the text-and-history test and unsupported by *Heller* and *Bruen*. Section I introduces the Step Zero approach by analyzing a sample of post-*Bruen* lower-court opinions that use it or discuss it as a possibility. Using these cases as a jumping-off point, the article then evaluates arguments in support of Step Zero. Section II analyzes the text of the Second Amendment and argues that a Step Zero method is inconsistent with it and would have undesirable consequences up and down the Bill of Rights. Section III covers the majority opinions in *Heller* and *Bruen*, finding no support for the Step Zero method in either. Section IV considers the concurring opinions of Justices Alito and Kavanaugh in *Bruen*, which demonstrate the relatively narrow gap between the results that might be expected from the proper method and the Step Zero approach. The Step Zero method is likely not necessary to uphold many of the laws for which it is most rhetorically appealing. Its greatest impact will be practical: By avoiding the text-and-history test, it will make it cheaper and easier for prosecutors and judges to turn away challenges from criminal defendants, maximizing the cases they can process. Section V considers the likely results of this state of affairs: *Bruen* Step Zero may never bother the Supreme Court in the way the post-*Heller* resistance sometimes appeared to, since it offers a path to reach results popular with the Court's conservative political constituency—striking down laws that impact more rural, whiter gun-rights groups and efficiently tossing out challenges from many criminal defendants, who are disproportionately poor people of color.

I. The Lower-Court Cases

We'll begin by looking at some of the lower-court cases to have embraced or hinted at the Step Zero approach and the arguments they make in its favor. The intent here is not to compile a comprehensive list of cases, but rather to provide a sample of how the method operates in practice. The cases discussed below are meant to give the reader a sense of how the Step Zero approach operates and how its proponents justify it.[16]

A. Fooks v. State

In *Fooks*,[17] Maryland's intermediate appellate court (now called the Appellate Court of Maryland) considered the appellant's challenge to his criminal convictions under two Maryland statutes that criminalize possession of certain firearms by anyone convicted of a common-law

[16] These cases were identified by reviewing every reported opinion (through September 30, 2022) in the Westlaw database that cited *Bruen* and used the term "law-abiding."

[17] 278 A.3d 208 (Md. Ct. Spec. App. 2022), *cert. granted*, 285 A.3d 848 (Md. 2022). The Maryland Supreme Court's grant of certiorari does not impact the appellate opinion's utility as an example of the Step Zero approach, and indeed only heightens the urgency of the issues discussed here, since Maryland's high court will likely have to decide whether to follow the lower court's approach. Indeed, these questions garnered significant attention at oral argument. *See* Oral Argument at 5:05, 10:30, 8:40, 13:50, 44:45, Fooks v. State, No. 24, Supreme Court of Maryland, Supreme Court Webcast Archive (Mar. 2, 2023) https://www.courts.state.md.us/sites/default/files/import/coappeals/media/2022/scm20230302caseno24.mp4.

crime and sentenced to more than two years' incarceration.[18] Mr. Fooks had been convicted of the common-law crime of constructive criminal contempt and was sentenced to four and a half years in prison.[19] Briefing in the case finished in December 2021, and the case was ordered submitted on the briefs (without oral argument) in February 2022, four months before *Bruen* came down.[20] But just six days after the opinion in *Bruen* was announced the Appellate Court released its decision, much of which, one can safely assume, was written before the Supreme Court significantly changed the applicable test.

The Appellate Court read *Bruen* narrowly. The court wrote that "*Bruen* addressed the constitutionality of state limitations on carry licenses for *law-abiding* citizens and held that those citizens' right to own and carry firearms extended beyond the home into public spaces. … *Bruen* didn't deal at all with limitations grounded in prior criminal behavior."[21] And, the court noted, *Heller* said that it did not cast doubt on "longstanding prohibitions on the possession of firearms by felons and the mentally ill,"[22] which the *Fooks* court interpreted to mean that *Heller* "expressly did not cast doubt on laws limiting disqualified persons' access to guns."[23] *Bruen*'s "analytical shift," the *Fooks* court announced, "doesn't affect the analysis or outcome here, though—for reasons we'll explain, Mr. Fook's [sic] arguments here will fail at the first analytical step."[24]

The Appellate Court first rejected a facial challenge to the laws.[25] Turning to Mr. Fooks's as-applied challenge, the court discussed at length—and adopted—the Fourth Circuit's "two-prong test for assessing a Second Amendment challenge."[26] That test asked first "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee."[27] That question involved history, but under Fourth Circuit precedent "[i]f a challenged law is presumptively valid and the challenger does not rebut the presumption, the court will effectively supplant the historical inquiry with the more direct question of whether the challenger's conduct is within the protected Second Amendment right of law-abiding, responsible citizens to use arms in defense of hearth and home."[28]

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[18] Mr. Fooks was convicted of violating Maryland Public Safety Articles 5-133(b)(2) and 5-205(b)(2). *Fooks v. State*, 278 A.3d at 212.

[19] *Id.* at 212 n.3.

[20] Case information, Robert L. Fooks v. State of Maryland, CSA-REG-0269-2021 (on file with author).

[21] *Fooks*, 278 A.3d at 217 (citation omitted).

[22] *Id.* (quoting *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (quoting District of Columbia v. Heller, 554 U.S. 570, 626-27) (2008)).

[23] *Id.* The category of "disqualified persons" can of course be much larger than the categories of "felons and the mentally ill." *See* Section IV, *infra*.

[24] *Fooks*, 278 A.3d at 217.

[25] *Id.* at 220. Some of the analysis in this section resembles the Step Zero approach, but on the whole, it turns on court-specific rules for facial challenges. I have therefore focused on the analysis in the "as-applied" section. The line between "as-applied" and "facial" challenges in this context is unclear, because the appellant's argument is that the law may not be applied against him, for the universal reason that it is inconsistent with our nation's tradition of firearm regulation. *Cf.* Richard H. Fallon Jr., *Fact and Fiction About Facial Challenges*, 99 CAL. L. REV. 915, 923-25 (2011) (explaining that any constitutional challenge may be characterized simultaneously as "facial" and "as-applied"). But that difficulty is beyond the scope of this article: Whatever the label, *Fooks* makes the Step Zero analytical move to defeat the Second Amendment challenge, and that is the move with which this article is concerned.

[26] *Fooks*, 278 A.3d at 221 (quoting Hamilton v. Pallozzi, 848 F.3d 614, 623 (4th Cir. 2017)).

[27] *Id.* (quoting United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010)).

[28] *Id.* at 222 (quoting *Hamilton*, 848 F.3d at 624 (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008))) (internal quotation marks omitted).

The second prong was means-end scrutiny.[29] The *Fooks* court conceded that *Bruen* rejected the second prong of that framework in favor of the exclusive text-and-history approach.[30] But the court apparently concluded that *Bruen* had no impact on the Fourth Circuit's first-prong jurisprudence.[31]

The court therefore started by determining whether the challenged laws were "presumptively lawful."[32] It concluded that they were, analogizing to the dicta in *Heller* so describing "prohibitions on the possession of firearms by felons and the mentally ill."[33] But the court held that "a court could find a statute presumptively valid based solely on the legislature's determination [to pass it]."[34]

Following the Fourth Circuit's pre-*Bruen* precedent, the court then asked "whether the challenger's conduct is within the protected Second Amendment right of 'law-abiding, responsible citizens to use arms in defense of hearth and home.'"[35] "Mr. Fooks asks us . . . to treat him as a law-abiding, responsible citizen for Second Amendment purposes . . . ."[36] But "Mr. Fooks is not, for these purposes, a law-abiding citizen . . . . His conduct fell outside the scope protected by the Second Amendment, and [the challenged laws] are not unconstitutional as applied to him."[37]

To briefly review: The *Fooks* court reasoned that it could still apply the "scope" prong of the Fourth Circuit's old test. But rather than make that inquiry "text and history," the court asked first whether the law was presumptively valid (which turned out to mean that a legislature passed it),[38] and then whether Mr. Fooks was a law-abiding citizen. Because he had been convicted of a disqualifying common-law offense, he was not law-abiding, and so the analysis ended there: There was no need to apply *Bruen*'s "text-and-history" test.

B. People v. Rodriguez

Rodriguez is a published opinion from a New York trial court.[39] The defendant was charged with criminal possession of a weapon; he moved to dismiss the charges under *Bruen*.[40]

The court acknowledged that *Bruen* held that New York's licensing scheme was unconstitutional, but rejected the defendant's arguments because he apparently had not applied for a license and therefore, in the court's view, lacked standing to challenge the licensing regime.[41] He could challenge only New York's ban on unlicensed possession, and the licensing law was not

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[29] *Id.*

[30] *Id.* at 223.

[31] *See id.*

[32] *Id.*

[33] *Id.* at 224.

[34] *Id.* at 222; *but see* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2131 (2022) ("If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of 'intermediate scrutiny' often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here.").

[35] Fooks v. State, 278 A.3d., 208, 222 (2022) (quoting *Hamilton*, 848 F.3d at 624).

[36] *Id.* at 225.

[37] *Id.* at 226.

[38] *See supra* note 34.

[39] People v. Rodriguez, 171 N.Y.S.3d 802 (Sup. Ct. 2022)

[40] *Id.* at 803.

[41] *Id* at 805. ("He does not claim to have sought a license.")

unconstitutional: "[L]ike most rights, the right secured by the Second Amendment is not unlimited."[42] The opinion's last paragraph, though, suggests different reasoning:

> Defendant misreads *Bruen* as eviscerating the police powers of the State to address criminality, or as applying to anyone other than law-abiding citizens. Failing to seek a license before roaming the streets with a loaded firearm is not abiding by the law, and nothing in the Second Amendment requires that it be tolerated. The Constitution is not a suicide pact. The motion to dismiss is denied.[43]

It's not clear how seriously to read this paragraph. Closing paragraphs in judicial opinions are sometimes dramatic and rhetorical, more for emphasis than analysis. But it's worth noting that the analysis here does not summarize the reasoning that came before. Earlier in the opinion, the court had held that the defendant lacked standing to challenge the licensing regime because he hadn't applied for a permit. But in the final paragraph, the Court was making a *merits* determination: Because the defendant had not followed the law that required him to "seek a license," he was not "law-abiding," and therefore entirely outside the scope of the Second Amendment. That conclusion is *Bruen* Step Zero: A person is deemed "not law-abiding" (here not because of a criminal conviction but for allegedly not submitting to an unconstitutional permitting regime), and on that basis the text-and-history test is not applied.

C. United States v. Daniels

Daniels, from a federal trial court in Mississippi, does not take the Step Zero approach but does raise it as a possibility. There, the defendant moved under the Second Amendment to dismiss his indictment for "possessing a firearm while an unlawful user of a controlled substance" in violation of 18 U.S.C. § 922(g)(3).[44] The court applied *Bruen*'s text-and-history test.

At step one, the court analyzed the text, and concluded that the regulated conduct (possessing a firearm or ammunition) fell within the text of the Second Amendment.[45] But the court noted that "*Bruen* describes 'ordinary, law-abiding, adult citizens' as indisputably 'part of "the people" whom the Second Amendment protects.'"[46] The court continued that, since the law at issue covers only "unlawful" users of drugs, "there is some doubt that [the law] is textually covered by the Second Amendment, insofar as it has been interpreted to guarantee the right to keep and bear arms to ordinary, law-abiding, responsible citizens concerned with self-defense."[47]

The court did not take that offramp but went on to step two, conducting a historical analysis by analogy to laws disarming "high-risk" classes such as felons, the mentally ill, "tramps," and intoxicated people.[48] The pedigree of those laws supported the drug-user law at issue, which therefore survived Second Amendment scrutiny.[49]

There is however, one more notable feature of the court's opinion. In addition to referencing the possibility of excluding drug users as non-law-abiding at the beginning of the

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[42] *Id.* at 806 (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).
[43] *Id.*
[44] United States v. Daniels, 610 F. Supp. 3d 892, 892 (S.D. Miss. 2022).
[45] *Id.* at 894.
[46] *Id.* (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2134 (2022)).
[47] *Id.*
[48] *Id.* at 895-96.
[49] *Daniels,* 610 F. Supp. 3d at 895-96.

analysis, the court raised a similar possibility at the end. The court quoted the Seventh Circuit's statement that "most scholars of the Second Amendment agree that the right to bear arms was tied to a concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'"[50] In an appended footnote, the court cited a similar claim from the Fifth Circuit, then stated: "This observation comports with the Supreme Court's statements that the Second Amendment, *as a threshold matter*, covers only ordinary and responsible law-abiding citizens."[51] (The court didn't cite the statements it meant; this article will consider and reject possibilities in the next section.)

So, while the court applied the correct test under *Bruen*, it made two suggestions of a different approach. The non-law-abiding could be excluded not as an application of the text-and-history test (the method the court used in this case to exclude drug users) but rather "as a threshold matter." That would be *Bruen* Step Zero.

D. United States v. Rahimi

Rahimi is the first post-*Bruen* decision from a federal Court of Appeals to vacate a federal criminal conviction on Second Amendment grounds.[52] Applying the text-and-history test, the Fifth Circuit held that the federal ban on possession of a firearm by a subject of a domestic violence restraining order[53] was unsupported by historical tradition and therefore unconstitutional.[54] While it does not exactly adopt a Step Zero approach, the opinion demonstrates the panel's discomfort with the question of the Second Amendment's scope.

The first panel opinion was released on February 2, 2023.[55] That opinion described the Step Zero argument: "According to the Government, *Heller* and *Bruen* add a gloss on the Second Amendment that restricts its applicability to only 'law-abiding, responsible citizens,' and 'ordinary, law-abiding citizens.' Because Rahimi is neither responsible nor law-abiding, as evidenced by his conduct and by the domestic violence restraining order issued against him, he falls outside the ambit of the Second Amendment."[56] The court then rejected it emphatically: "the Government's argument fails because (1) it is inconsistent with *Heller, Bruen*, and the text of the Second Amendment, (2) it inexplicably treats Second Amendment rights differently than other individually held rights, and (3) it has no limiting principles."[57] After expanding on each argument, the court concluded that "Rahimi, while hardly a model citizen, is nonetheless part of the political community entitled to the Second Amendment's guarantees . . . ."[58]

But one month later, the panel opinion was withdrawn and replaced with a new one. The opinion was largely the same and reached the same result. But the Step Zero analysis was notably different. The court framed the government's argument the same way but eliminated the three-

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[50] *Id.* (quoting United States v. Yancey, 621 F.3d 681, 684-85 (7th Cir. 2010)).

[51] *Id.* at 897 n.5 (emphasis added).

[52] United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023).

[53] 18 U.S.C. § 922(g)(8).

[54] *Rahimi*, 61 F.4th at 448.

[55] United States v. Rahimi, 59 F.4th 163, *withdrawn and superseded by* United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023).

[56] *Rahimi*, 59 F.4th at 170 (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008), and N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2122 (2022)).

[57] *Id.* at 171.

[58] *Id.* at 172.

pronged list of reasons it failed.[59] While the court still discussed some of the same reasons, it no longer appeared to emphatically reject the Step Zero approach. Instead, it read "*Heller*'s reference to 'law-abiding, responsible' citizens . . . to exclude from the Court's discussion groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders 'presumptively' tolerated or would have tolerated."[60] Rahimi's protected status therefore became a closer question, subject to more open-ended reasoning. But "on the record before" the court, he did not fall into a prohibited group because the restraining-order proceeding was civil and, "while he was *suspected* of other criminal conduct at the time, Rahimi was not a convicted felon or otherwise subject to another 'longstanding prohibition on the possession of firearms' that would have excluded him."[61] The court stated that it was "hew[ing] carefully to the Supreme Court's delineation of who falls within, and without, the overarching class of 'law-abiding, responsible citizens' covered by the Second Amendment."[62]

The new *Rahimi* opinion is in some ways contradictory, but it suggests more openness to a Step Zero approach. Indeed, the court no longer appears to be rejecting the government's "gloss," just finding it inapplicable to Mr. Rahimi in particular. For some other set of people, perhaps those with an actual criminal conviction, or at least a charge, the court would apparently hold that they were excluded from the Second Amendment at the threshold.

II. Textual Arguments

As we have seen, some courts employ *Bruen* Step Zero before the text-and-history test. They first ask whether a person is "law-abiding" as a threshold question; if the court decides the answer is no, the analysis stops there. This section considers the arguments that could be made in support of this approach. As the Supreme Court has instructed, this section starts with the constitutional text.

Perhaps the easiest defense of *Bruen* Step Zero would be to deny that it exists at all. Maybe these courts are just doing "step one," and the Second Amendment's text excludes the non-law-abiding?

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[63] As interpreted by the Supreme Court in *Heller*, the first ("prefatory") clause does not limit the second ("operative") clause,[64] so the latter is the whole ballgame: "the right of the people to keep and bear Arms, shall not be infringed." This text, *Heller* says, "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[65]

To state the obvious, the plain text does not limit its scope to "the right of law-abiding citizens." As with any text, a litigant could argue for (and a court could adopt) any "gloss" that

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[59] *Rahimi*, 61 F.4th at 452.

[60] *Id.* at 452 (quoting *Heller*, 554 U.S. at 627 n.26).

[61] *Id.* at 452 (quoting *Heller*, 554 U.S. at 626-27).

[62] *Id.* n.6.

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

[64] *Heller*, 554 U.S. at 577.

[65] *Id.* at 592; *see also* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2127 (2022) (*Heller*'s textual "analysis suggested that the Amendment's operative clause—'the right of the people to keep and bear Arms shall not be infringed'—guarantees the individual right to possess and carry weapons in case of confrontation.").

they invent.[66] But the Supreme Court in *Bruen* commands us to look at "the Second Amendment's *plain* text."[67] The "plain text" does not include anything about law-abiding citizens.

The only plausible textual hook on which to hang the "law-abiding" proviso, then, is the Amendment's use of the term "the people." Does that phrase really mean "law-abiding citizens"?

The first objection to this view restates the argument above: It is simply an exercise in defining a term to mean something other than what it says. The "plain text" does not say "law-abiding citizens," and ordinary speakers of English don't use the term "the people" to mean only "law-abiding citizens."

The second objection is that it risks wreaking havoc on the rest of the Bill of Rights. In *Heller*, the Supreme Court devoted considerable attention to the meaning of the phrase "the people." The Court found it significant in discerning its meaning that the phrase "right of the people" occurs elsewhere in the Constitution twice: in the First Amendment's Assembly and Petition Clause and the Fourth Amendment's Search and Seizure Clause.[68] The Court noted that a similar phrase appears in the Ninth Amendment, and the term "the people" also appears (among other places) in the Tenth Amendment.[69]

The Court stated that "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset."[70] But that's exactly what the "law-abiding citizen" limitation turns out to be: an "unspecified subset" not mentioned in the text. And based on the text, the Court "start[ed] with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans."[71] "All Americans" includes those who are not law-abiding. So anyone looking for this limitation in the text must overcome the Supreme Court's "strong presumption."

Moreover, the Court went on to quote from *United States v. Verdugo-Urquidez*, which took an intratextualist approach to defining the term "the people."[72] The *Heller* Court quoted the following passage with approval:

> 'The people' seems to have been a term of art employed in select parts of the Constitution . . . . Its uses suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers 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.[73]

If that is correct—and *Heller* suggests that it is—then there is a glaring problem with reading "the people" in the Second Amendment to mean "law-abiding citizens." If "the people" is

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[66] *Cf.* United States v. Locke, 471 U.S. 84, 93 (1985) ("It is clear to us that the plain language of the statute simply cannot sustain the gloss appellees would put on it."); McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 502 (1991) (Rehnquist, C.J., dissenting) ("The Court's ponderously reasoned gloss on the statute's plain language sanctions an unwarranted intrusion into a carefully drafted congressional program . . . .").

[67] *Bruen*, 142 S. Ct. at 2129 (emphasis added).

[68] *Heller*, 554 U.S. at 580.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 581.

[72] *See generally* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748 (1999) (encouraging a holistic reading of the Constitution, in which "the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or very similar) word or phrase").

[73] *Heller*, 554 U.S. at 580 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).

a term of art in the Bill of Rights, then it must take the same meaning each time it appears there. But it cannot be that the Fourth Amendment protects only the law-abiding. The Court has repeatedly said the opposite,[74] and some Justices and scholars have frequently criticized the exclusionary-rule remedial regime that sometimes makes it appear to protect criminals only.[75] If a court reads in "law-abiding," then many exclusionary rule cases will be over as soon as they start: The defendant seeks to suppress evidence that he possessed contraband, if there is such evidence then he is not law-abiding, and so the Fourth Amendment does not protect him. Or even to set that problem aside, the Fourth Amendment does not categorically exclude probationers, who by definition have been convicted of breaking a criminal law.[76]

The problem would reoccur with the First Amendment. It cannot be that "the people" who may peaceably assemble and petition the government includes only the law-abiding. Could Mr. Fooks, for example, having been found in contempt for not paying his child support, really be forbidden from exercising the rights of assembly and petition?

This article has assumed so far that "law-abiding" means "not guilty of a criminal offense" and that usage alone is enough to demonstrate that the proposed reading of "the people" as "law-abiding citizens" is impossible and foreclosed by precedent. But it bears noting that there is no reason it would have to be so limited. Laws with civil penalties are laws just the same. A person who commits a traffic violation such as speeding does not abide by that law. And some laws issue commands without penalties, like the admonition to have health insurance or pay a fine of zero dollars[77]; a young healthy person without insurance is not abiding by that law.

And one doesn't need an adjudication of guilt (or liability, or anything else) to have broken the law. Section I detailed two examples of this sort of flexibility: In *Daniels*, the court suggested the defendant was not law-abiding not by reason of a previous conviction, but because the government had accused him *in the instant case* of being an illegal drug user. And in *Rodriguez*, the court maintained that the defendant was not law-abiding because he had not subjected himself to an unconstitutional permitting regime—the very violation for which he was being prosecuted. One author estimated that the average American professional commits three federal felonies a day.[78] They may well violate at least as many state and local ordinances and regulations. If courts proceed down the Step Zero path—excluding from "the people" whoever they think is insufficiently "law-abiding"—large swaths of the Bill of Rights could be withdrawn not only from people with previous criminal convictions, but from very nearly everyone.

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[74] *See, e.g.*, McDonald v. United States, 335 U.S. 451, 453 (1948) ("This guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike."); Minnesota v. Carter, 525 U.S. 83, 110 (1998) (Ginsburg, J., dissenting) ("Other decisions have similarly sustained Fourth Amendment pleas despite the criminality of the defendants' activities. Indeed, it must be this way. If the illegality of the activity made constitutional an otherwise unconstitutional search, such Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty.") (internal citations omitted).

[75] *See, e.g.*, County of Riverside v. McLaughlin, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting) ("One hears the complaint … that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all. By failing to protect the innocent arrestee, today's opinion reinforces that view."); 1 Wayne R. LaFave, SEARCH AND SEIZURE § 1.2(a) (6th ed. 2022) (cataloguing such arguments).

[76] *See, e.g.*, United States v. Knights, 534 U.S. 112, 122 (2001) (holding that search of probationer's house supported by reasonable suspicion satisfied the Fourth Amendment).

[77] *Cf.* California v. Texas, 141 S. Ct. 2104, 2114 (2021).

[78] HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2011).

The Second Amendment's plain text forecloses the suggestion that the "law-abiding citizen" inquiry is really a part of *Bruen* step one. Supreme Court precedent and the rest of the Bill of Rights make it a logical impossibility. And even if it could be correct, the results would be intolerable. If Step Zero is to be defended, then, it must be on the terms in which it was defined previously—as a threshold inquiry before the text-and-history test.

III. Supreme Court Precedent

If there is no evidence for the Step Zero approach in the text of the Second Amendment, perhaps it can be found in the Supreme Court's opinions. Section I established that Step Zero courts sometimes look to the Supreme Court's foundational Second Amendment cases, *Heller* and *Bruen*, for support.[79] But neither opinion props up a Step Zero inquiry. To be sure, both opinions sometimes refer to "law-abiding citizens." But closer examination makes clear that these statements say only that the Second Amendment applies to the law-abiding: They never say that it doesn't apply to the "non-law-abiding." None of these statements should be read to contradict the analytical approach (text-and-history only) that *Bruen* goes to great pains to state and re-state.[80]

*A. There is no Heller Step Zero***.**

Start with *Heller*. The facts may be familiar: Dick Heller was a special police officer who wished to keep a handgun in his home.[81] District of Columbia law made that impossible to do legally,[82] so he sued on Second Amendment grounds.[83]

The Court considered the meaning of the Second Amendment because the parties debated whether it described an individual right at all. Based on the text, the Court "start[ed] with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans."[84] The Court found that the text "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[85]

The Court did not use the term law-abiding until deep into the opinion, when it turned to the task of distinguishing its previous Second Amendment precedents.[86] In dealing with *United States v. Miller*,[87] the Court explained that the case was not about who could carry arms (militiamen or not), but rather about what types of arms they could carry.[88] Turning to the question of "what types of weapons *Miller* permits,"[89] the Court "read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for

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[79] There does not appear to be anything in the Supreme Court's other post-*Heller* Second Amendment merits cases (*McDonald v. City of Chicago*, 561 U.S. 742 (2010) and *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (per curiam)) that even arguably supports a Step Zero approach.

[80] *See, e.g.*, 142 S. Ct. at 2126, 2127, 2128-29, 2129-30.

[81] District of Columbia v. Heller, 554 U.S. 570, 575 (2008).

[82] *Id.* at 574-75 ("The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited.").

[83] *Id.* at 574.

[84] *Id.*

[85] *Id.* at 592.

[86] *Id.* at 619-26.

[87] United States v. Miller, 307 U.S. 174 (1939).

[88] *See* District of Columbia v. Heller, 554 U.S. 570, 622-23 (2008).

[89] *Id.* at 624.

lawful purposes, such as short-barreled shotguns."[90] This statement is about protected arms, not protected people, and so provides no support for the Step Zero approach. It means that the Second Amendment's use of the term "arms" means weapons in common use by law-abiding people for law-abiding purposes: Handguns are in, short-barreled shotguns (and probably machine pistols, grenades, and the like) are out. That's a limitation on the *what* of the Second Amendment, not on the *who*.

Part III of *Heller* offers much-discussed dicta about the limits of the Second Amendment right. The Court noted that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[91] And, the Court said, "[a]lthough we do not undertake an exhaustive historical analysis of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial scale of arms."[92] The Court called these laws "presumptively lawful regulatory measures," and cautioned that they are examples, not an exhaustive list.[93] This is important, and the next section will return to it. But for now, it is sufficient to say that it suggests limitations on the Second Amendment right due to status as a felon, but not wholesale exclusion for those who are not "law-abiding."

The final mention of "law-abiding, responsible citizens" in the opinion provides no more support for the Step Zero thesis. In criticizing Justice Breyer's dissenting opinion, the Court rejected what it called "a freestanding interest-balancing approach."[94] The Court replied that the Second Amendment "is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[95]

The Court was not drawing the outer limit of the Second Amendment right, instead leaving that question "to future evaluation."[96] For the present, it was describing what the *Heller* majority considered a particularly easy case—the one the Court was actually deciding. The Court set out this case—possession of arms by "law-abiding, responsible citizens" in the home for the purpose of self-defense—as what Justice Breyer's dissent skeptically called "the core of the Second Amendment right."[97] But no one can maintain (at least anymore) that *Heller* specified the outer limits of the Second Amendment's protection. *Bruen* held that the right applies to more than defense of "hearth and home": It also protects "an individual's right to carry a handgun for self-defense outside the home."[98] Just as *Heller*'s language does not mean that the Second Amendment applies only within the home, neither does that language mean that the Second Amendment is limited at the threshold to the "law-abiding."

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[90] *Id.* at 625.
[91] *Id.* at 626.
[92] *Id.* at 626-27.
[93] *Id.* at 627 n.26.
[94] *Heller*, 554 U.S. at 634 (internal quotation omitted).
[95] *Id.* at 635.
[96] *Id.*
[97] *Id.* at 720 (Breyer, J., dissenting).
[98] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2122 (2022).

B. The Bruen Majority: There is no Bruen Step Zero.

Bruen picked up where *Heller* left off, describing that case as recognizing that the Second Amendment "protect[s] the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense."[99] "In this case," the Court explained, "petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for their self-defense."[100] As before, this does no more than describe the question at issue in the case: The petitioners pleaded in their complaint below that they were "law-abiding, adult citizens."[101] So the Court was only stating the issue in the case before it. There was no occasion to opine on the rights of anyone other than "law-abiding, adult citizens" because none were at issue in the case.

The *Bruen* Court went on to mirror the *Heller* majority's rejoinder to the "interest-balancing" approach, repeating the same statement that the Second Amendment "'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense."[102] Tailoring the quotation to the instant case, in which public carry was at issue, the Court snipped out *Heller*'s "hearth and home" limitation. But that move only demonstrates the point: What the Second Amendment "elevates above all other interests" is not the same as its outer boundary.

Perhaps the strongest support in *Bruen* for a Step Zero approach comes when the opinion turns to applying the text-and-history test to New York's law. The Court said: "It is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects."[103]

This language could arguably support a Step Zero approach, or more likely, the analogous move of reading "law-abiding" into "the people" discussed in Section II. But caution is warranted. For one thing, a stray piece of dicta on a point that is "undisputed" would be an odd way to interpret the meaning of "the people" (or at least the Scope of the Second Amendment) and invite all the problems raised in Section II. For another, the petitioners pleaded below that they were "law-abiding," so describing them that way makes sense: There was no need to decide more than the case required. And finally, this argument would prove far too much. The Court also notes that Koch and Nash are "ordinary," but to suggest that the Second Amendment protects only people who judges think are "ordinary" would open a whole new can of worms.

The opinion's remaining references to law-abiding citizens reflect the step-two historical approach. The Court framed the relevant question as whether there was a "historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense."[104] So framed, it makes sense that the right-bearers are so described. But if the question were different, it follows, the analysis would be too. The Court might equally ask, in another case, whether there is a historical tradition of disarming misdemeanants or people currently under indictment.[105] The fact that the *Bruen* Court (like the *Heller* Court before it) stuck to answering the question it was asked does not mean it announced a threshold exclusion of the non-law-abiding.

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[99] *Id.*
[100] *Id.*
[101] *Id.* at 2124-25.
[102] *Id.* at 2131 (quoting *Heller*, 554 U.S. at 635).
[103] *Id.* at 2134.
[104] *Id.* at 2138.
[105] *See* United States v. Quiroz, 2022 WL 4352482 (W.D. Texas Sept. 19, 2022), *appeal filed*, (holding federal statute criminalizing receiving a firearm while under indictment unconstitutional under *Bruen*).

IV. The *Bruen* Concurrences and Why Step Zero Matters

Some lower courts have also grasped at the concurrences of Justices Alito and Kavanaugh in *Bruen* to support the Step Zero approach.[106] This section examines these concurrences and the arguments drawn from them to support Step Zero. While it concludes that these Step Zero arguments are not persuasive, discussing them helps answer an important question: What's really at stake here?

If the Step Zero method is just another way to get to the same results as courts would reach when applying the orthodox text-and-history approach, one might think this article is doing nothing but grading judicial opinions on style. On the other hand, if Step Zero makes a big difference in a lot of cases—if it is necessary to uphold a lot of sensible gun laws—then maybe its shaky precedential footing should be overlooked. This section argues that neither of the above statements is true: The Step Zero approach is very probably unnecessary to uphold the kind of gun laws that most everyone agrees we need, yet it will still make a great deal of difference in how Second Amendment litigation turns out. Though the application of Step Zero will lead to different answers for some questions, its impacts will be felt mostly on a pragmatic level, since it saves a lot of time for lawyers defending gun laws—most notably prosecutors.

Let's begin with the *Bruen* concurrences.[107] Justice Alito's concurrence mostly fires back at various points made by the dissent. But it also describes the Court's holding: "Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kind of weapons that people may possess."[108] And later: "Our decision, as noted, does not expand the categories of people who may lawfully possess a gun . . . ."[109]

Justice Kavanaugh's concurrence, joined by Chief Justice Roberts, has a similar point. It notes that "the Second Amendment allows a 'variety' of gun regulations," and quotes *Heller*'s non-exhaustive list of "presumptively lawful regulatory measures" set out in the previous section ("longstanding prohibitions" on possession by felons and the mentally ill, "sensitive place" laws, and the like).[110]

Justice Alito's statements are uncontroversial. The case indeed decided nothing about who may possess a gun. It did not decide, for example, that the "non-law-abiding" are categorically outside the Second Amendment's protection. And of course, it did not "expand" the categories of who may possess a gun: *Bruen* was not a case about those "who" categories, but rather about the constitutionality of may-issue permitting schemes. The "who" questions will be decided in cases

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[106] *E.g.*, Fooks v. State, 278 A.3d 208, 216-17 (2022).

[107] As (almost) goes without saying, these are concurrences, and so they are not the law for the same reason the dissent is not—too few Justices agreed to sign them. But they nevertheless reflect the thinking of at least a few Justices and are certainly worth evaluating according to their ability to persuade. *Cf.* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

[108] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2157 (2022) (Alito, J., concurring).

[109] *Id.* at 2157-58.

[110] *Id.* at 2162 (Kavanaugh, J., concurring).

in which they are presented. *Bruen* did not decide future cases, but announced the test that will be used to decide them.[111]

Nor is there any support for Step Zero in the statements of Justice Kavanaugh, drawn from *Heller*. It can be perfectly correct that "[p]roperly interpreted, the Second Amendment allows a 'variety' of gun regulations,"[112] including prohibitions on possession of firearms by felons and the mentally ill (and maybe misdemeanants, or traffic-law violators, and so on). But these cases would be *applications* of the text-and-history approach, not carveouts from it. Both opinions note as much, emphasizing that these presumptively valid laws are "longstanding."[113] That is to say, they would very likely survive *Bruen* step two, because "the government [could] demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[114] Like any other laws that the Justices think will be upheld under *Bruen*—and there are surely many—they will survive not because they are exempted from the text-and-history test, but because they will pass it.

To see why this distinction matters, consider the set of all possible laws that could regulate gun possession (or receipt, transport, or the like)[115] with reference to the bearer's "law-abidingness." Let us line them up from most obviously necessary to least. (There need not be agreement on exactly how to rank them; this is only one plausible scheme.) The ranking could start with bans on possession by convicted murderers, robbers, and rapists. Slightly outside of that core there could be bans on possession by people convicted of other common-law felonies (burglary, arson, theft). Beyond that, those convicted of statutory felonies, then misdemeanors, then non-criminal laws such as traffic infractions or other civil regulatory requirements, and so on. Then would come people accused but not convicted of law-breaking. Depending on how far the definition of "law-abiding" goes, this could go as far out as a hypothetical law regulating gun possession by a person without health insurance, or whatever the reader thinks is the bottom of the slippery slope.

Under a Step Zero procedure, the question for a judge evaluating any of these laws is only what it means to be "law abiding." The judge will make that decision and, if the law-breaking at issue is disqualifying in her view, then the analysis stops there: The Second Amendment challenge fails.

Under the orthodox text-and-history approach, it looks different. The action takes place at step two, the history step. Rather than consulting her own view of the term "law abiding," a judge must instead ask whether the government has demonstrated that the regulation "is consistent with

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[111] One feature of Justice Alito's dissent should be of some concern to Step Zero adherents. In recounting various anecdotes demonstrating the need of ordinary people to carry arms for self-defense, he tells the story of "a law-abiding person [who] was driven to violate the Sullivan Law because of fear of victimization and as a result was arrested, prosecuted, and incarcerated." *Id.* at 2159 (Alito, J., concurring). This points to the difficulty of finding a workable definition of "law-abiding" if there were a Step Zero. Justice Alito, for one, does not think that violating the law at issue would count (and that view has much to recommend it). The trial court in *Rodriguez*, readers may recall, took the opposite view, announcing that "[f]ailing to seek a license before roaming the streets with a loaded firearm is not abiding by the law." *Rodriguez,* 171 N.Y.S. 3d at 806.

[112] *Id.* at 2162 (Kavanaugh, J., concurring).

[113] *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

[114] *Bruen*, 142 S. Ct. at 2126.

[115] One open question remaining after *Bruen* is exactly what conduct the Second Amendment's text ("keep and bear") covers. Possession of a handgun in the home (*Heller*) or in public (*Bruen*) turn out to be easy cases for the Court majority. But there will be further questions about regulations on the transfer, receipt, and commercial sale of arms, among many other possibilities. Those conduct questions are outside the scope of this article.

the Nation's historical tradition of firearm regulation."[116] That means that the government must actually produce the historical evidence—statutes, treatises, 18th-century judicial opinions, and the like—for the court to evaluate.[117]

For the laws on the "most obviously necessary" end of this continuum, the procedure employed should make no difference to the correct result. Surely, as the *Heller* Court has already announced in its oft-repeated dicta, bans on possession of firearms by felons are "longstanding" and thus easily supported in our nation's historical tradition.[118] Although this article does not undertake the historical research to know for sure, it seems likely that at least the more dangerous misdemeanors would be similarly supported.[119]

Cases of serious and dangerous criminality give the Step Zero approach some rhetorical appeal. It feels satisfying to announce that the Second Amendment is for the good and not the bad, for the law-abiding and not the rest. But the more serious the criminality, and therefore the more superficially appealing the Step Zero approach, the less work it actually does. In these cases, it does no work at all.

Although she did not write about it in *Bruen*, it appears likely that Justice Barrett takes a similar view. During her time on the Seventh Circuit, she dissented in a case that upheld felon dispossession statutes against an as-applied challenge from a nonviolent offender.[120] Then-Judge Barrett identified "competing ways of approaching the constitutionality of gun dispossession laws. Some maintain that there are certain groups of people . . . who fall entirely outside the Second Amendment's scope."[121] (That sounds like *Bruen* Step Zero). "Others maintain that all people have the right to keep and bear arms but that history and tradition support Congress's power to strip certain groups of that right."[122] (That sounds like the orthodox *Bruen* step two approach.) But "[t]hese approaches will typically yield the same result."[123] Judge Barrett nevertheless favored the latter, since "[i]t is one thing to say that certain weapons or activities fall outside the scope of the right" but "another thing to say that certain people fall outside the Amendment's scope."[124]

To be sure, the Step Zero inquiry will not duplicate the step two historical inquiry in every possible case. There are, no doubt, people who could be described in some sense as not law-abiding for whom there is not a sufficient historical record to justify a ban on firearm possession or other limiting regulation. To return to the health-insurance hypothetical, it seems safe to predict that if a state did enact such a ban (and a judge found that a person without insurance was not "law-abiding"), the method would make all the difference. Under a Step Zero approach, the person would be excluded from the Second Amendment at the threshold, and so the regulation would be upheld. But under the history test, there would almost certainly be no sufficient historical tradition, and so the regulation would be struck down.

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[116] *Bruen*, 142 S. Ct. at 2129-30.

[117] *See Bruen*, 142 S. Ct. at 2130 n.6 ("[I]n our adversarial system of adjudication, we follow the principle of party presentation. Courts are thus entitled to decide a case based on the historical record compiled by the parties.") (internal quotation omitted).

[118] *See Heller*, 554 U.S. at 626.

[119] *Cf. Bruen*, 142 S. Ct. at 2132-33 (discussing the application of analogical reasoning at the history step); *Daniels*, 610 F. Supp. 3d at 895-97 (employing rather broad analogical reasoning to uphold a ban on gun possession by illegal drug users).

[120] *See* Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019), *abrogated by Bruen*, (Barrett, J., dissenting).

[121] *Id.* at 451.

[122] *Id.* at 452.

[123] *Id.*

[124] *Id.*

The most important difference between the approaches, however, may well be pragmatic. Recall that under the text-and-history approach, the government bears the burden of producing the historical evidence to support the challenged regulation.[125] In criminal cases, that means prosecutors. In state court, that means state prosecutors, who have limited resources and extremely heavy caseloads.[126] They are unlikely to have a robust understanding of originalist methodologies and sources, let alone access to those sources and time to devote to studying them. Even if they committed the prosecutorial resources to making historical showings in support of gun laws, that would mean diverting resources away from other prosecutorial endeavors. At some point, that would require prosecuting fewer cases or prosecuting them less vigorously.[127]

And even if prosecutors did the work required under the history step, it would mean more work for judges. A Step Zero approach of deciding that a person is not "law-abiding" involves only two questions: one of interpretation (what does that term mean?) and another of judgment (does it apply to this person?). Both of those exercises are quick and familiar—the kinds of judicial tasks that trial-court judges do every day. The process of assessing the historical record assembled by the government is much more difficult. It requires a great deal of reading, understanding the historical context, and familiarity with the sources favored by originalists. The *Bruen* Court's analysis, though perhaps more detailed than one would ever expect from a busy trial court, is daunting—21 pages in the Supreme Court reporter[128] that the Court describes candidly as "a long journey through the Anglo-American history of public carry."[129] And although originalism may be ascendant at the Supreme Court, it is exceedingly rare that a trial-court judge outside of the Second Amendment context confronts a question for which the rule of decision is historical inquiry.[130]

In the Circuit Court for Prince George's County, Maryland, prosecutors and judges have almost unanimously declined to engage in the step-two historical inquiry. I have had about a dozen *Bruen* hearings challenging criminal laws regulating firearm possession. Only once has a prosecutor produced any historical evidence to attempt to meet the government's burden at *Bruen* step two.[131] One might think that, like a Fourth Amendment hearing in which the state fails to produce any testimony to prove the reasonableness of a warrantless search,[132] the lack of historical evidence would mean that the court could not uphold the challenged law. But in every case except

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[125] *Bruen*, 142 S. Ct. at 2129-30.

[126] In Prince George's County, Maryland, for example, prosecutors in the gun unit carry well over 100 cases at any given time and appear to have far more work than they can do.

[127] Perhaps it would result in prosecutors abandoning other duties, such as the obligation to provide exculpatory evidence to the defense, *see* Brady v. Maryland, 373 U.S. 83 (1983). But it is surely better to predict compliance with oaths to the Constitution and rules of professional conduct.

[128] *See Bruen*, 142 S. Ct. at 2135-56.

[129] *Id.* at 2156.

[130] The Confrontation Clause is the other obvious example, *see* Crawford v. Washington, 541 U.S. 36 (2004), but the Supreme Court's later pronouncements in that area make Confrontation-Clause issues more a familiar exercise in applying a definition to a set of facts than an actual historical inquiry. *See* Davis v. Washington, 547 U.S. 813 (2006). And the overlap between the Confrontation guarantee and the hearsay rule means that genuine Confrontation Clause cases do not arise frequently in trial courts.

[131] The prosecutor in question is a former public defender who has spent a lot of time discussing *Bruen* with the author.

[132] *See, e.g.*, Price v. State, 37 Md. App. 248, 253 (1977) ("We hold that the State should have produced some testimony at the suppression hearing to indicate the factual basis upon which the radio alert was issued and thus have enabled the court to evaluate the reasonableness of the 'stop and frisk' and the ensuing arrest, search and seizure.").

one (the only one argued and decided before the Appellate Court of Maryland decided *Fooks*), the judge declined to dismiss the charges.

The Step Zero approach has provided prosecutors and courts a way around the problems described above. Even in what may be thought of as "heartland" cases—criminal laws prohibiting the possession of firearms by people with previous convictions for felonies, crimes of violence, or serious misdemeanors—prosecutors do not produce historical evidence and judges do not demand it. Instead, they take the quicker and easier route of deciding the case at the Step Zero threshold, leaving them with time to prosecute, convict, and sentence other defendants.

To sum up: Although there will surely be cases in which the Step Zero inquiry and the properly conducted text-and-history test lead to different results, the heartland cases of serious criminality should come out the same, with the gun laws upheld. But to reach that result under the step-two history test will take at least a moderate amount of prosecutorial and judicial resources. The Step Zero approach offers a shortcut to the same place, allowing judges to uphold gun laws without much work, even when the state does not even attempt to meet its historical burden of proof. If Step Zero is permitted to continue in the lower courts, that may be its greatest impact.

V. Step Zero and the Supreme Court

This article has argued that the Step Zero approach is inconsistent with *Heller* and *Bruen.* As we have seen, it offers a way out from the text-and-history approach that the Supreme Court dictated, allowing lower courts to avoid applying that test. In that respect, Step Zero has the potential to be another means of resistance by the lower courts in Second Amendment cases, similar to the widespread reluctance to apply *Heller* beyond its direct holding.[133]

The last time around, that reluctance appeared to bother at least some Supreme Court Justices.[134] And in *Bruen*, that frustration made its way into the majority opinion.[135] But it is not certain that the Supreme Court will find the Step Zero approach bothersome, even assuming they agree that it is wrong.

After all, the Court is not an entirely apolitical institution. Even those who object to critiques of the Court as political must surely acknowledge that it has certain tools it uses with extra-legal considerations in mind. Notably, it has a discretionary certiorari docket, which allows it to select nearly all the cases it hears. This means that it may decide some issues while avoiding others. And even when it decides an issue, it can pick the right "vehicle" to make the result most

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[133] *E.g.,* Williams v. State, 10 A.3d 1167, 1177 (Md. 2011).

[134] *See, e.g.*, *Silvester*, 138 S. Ct. 945, 950 (Thomas, J., dissenting from denial of certiorari) ("[T]he lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights."). *See supra* note 5.

[135] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. __, 142 S. Ct. 2111, 2131 (2022) ("If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of 'intermediate scrutiny' often defer to the determinations of legislatures."); *id.* at 2156 ("The constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.") (internal citation omitted).

palatable: a "Little Sister of the Poor,"[136] a group of young schoolchildren,[137] or a special police officer working at a federal judiciary building.[138]

It should come as no great surprise that the Second Amendment cases the Supreme Court has granted since *Heller* have overwhelmingly come in the same procedural posture as *Heller*: Rather than violating gun laws and waiting to be prosecuted, "law-abiding" guns-rights enthusiasts supported by powerful Second Amendment groups have brought civil suits seeking declaratory and injunctive relief.[139] The lone exception, *Caetano v. Massachusetts*, was a criminal appeal.[140] But it was a *per curiam* reversal of an approach that the Court viewed as flatly inconsistent with *Heller*,[141] and the homeless, female, abuse-victim defendant was exceptionally sympathetic.[142]

The Supreme Court's preferred Second Amendment petitioners are unlikely to be impacted often by a Step Zero approach. Although one could imagine, as this article has, a particularly aggressive definition of "law-abiding" that leaves out people without health insurance or with speeding tickets, that move is much more likely to be employed against people who either have some kind of criminal record[143] or are charged in the instant case with law-breaking behavior.[144] But people without criminal records who bring carefully planned pre-enforcement challenges to gun laws as members of gun-rights groups or in cooperation with Second Amendment litigators will continue to have their cases heard on the merits. Those cases are more politically attractive to the Supreme Court, and they involve plaintiffs who share the Roberts Court's Republican political constituency: whiter, more rural, and more likely to be members of gun-advocacy groups.[145]

The Step Zero approach, however, will overwhelmingly be deployed against motions to dismiss brought by defendants in criminal cases. These litigants will always at least be *charged* with breaking a law, even if that law turns out to have been only an unconstitutional "may-issue"

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[136] *See* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020) (holding that federal government could exempt religious objectors from program designed to ensure contraceptive healthcare coverage).

[137] *See* Brown v. Board of Education of Topeka, Shawnee Cnty., Kansas, 347 U.S. 483, 487 (1954) ("In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis.").

[138] *See* District of Columbia v. Heller, 554 U.S. 570, 574 (2008) ("Respondent Dick Heller is a D.C. special police officer authorized to carry a handgun while on duty at the Thurgood Marshall Judiciary Building.").

[139] *See id.*; *McDonald*, 561 U.S. 742; *Bruen*, 142 S. Ct. 2111; New York State Rifle & Pistol Association v. City of New York, 140 S. Ct. 1525 (per curiam) (holding revisions to challenged licensing scheme mooted case after certiorari was granted).

[140] Caetano v. Massachusetts, 577 U.S. 411 (2016) (per curiam).

[141] *Id.* at 411 ("[T]he explanation the Massachusetts court offered for upholding the law contradicts this Court's precedent.").

[142] *See id.* at 412-13 (Alito, J., concurring in the judgment) (describing the plight of Ms. Caetano, whose abusive boyfriend put her in the hospital, left her homeless, and ignored multiple restraining orders, leading her to carry a stun gun for self-defense, which finally scared him off).

[143] *E.g.,* Fooks v. State, 278 A.3d 208, 224 (2022).

[144] *E.g., Rodriguez*, 171 N.Y.S.3d at 806; *Daniels,* 610 F. Supp. 3d at 892.

[145] *See Trends in Party Affiliation Among Demographic Groups*, PEW RESEARCH CENTER (Mar. 20, 2018), https://www.pewresearch.org/politics/2018/03/20/1-trends-in-party-affiliation-among-demographic-groups/ ("White voters continue to be somewhat more likely to affiliate with or lean toward the Republican Party than the Democratic Party (51% to 43%)."); *Guns and Daily Life: Identity, Experiences, Activities and Involvement*, PEW RESEARCH CENTER (June 22, 2017), https://www.pewresearch.org/social-trends/2017/06/22/guns-and-daily-life-identity-experiences-activities-and-involvement/ ("Republican and Republican-leaning independent gun owners are about twice as likely as gun owners who are Democrats and Democratic-leaning independents to say they belong to the NRA – 24% vs. 11%.").

licensing scheme,[146] and in some cases they will be prohibited from possessing a gun by virtue of previous criminal convictions.[147] They will (of course) be criminal defendants—never a politically popular group. And because they are criminal defendants in this country, they will be disproportionately Black, brown, and poor.[148] To put it mildly, none of those groups are among those that put the Roberts Court's conservative majority in place or lend it popular support.[149]

A Step Zero approach that throws such Second Amendment challenges quickly and efficiently out of court, allowing prosecutors and judges to continue turning the wheels of the massive criminal punishment system, may appeal to trial and appellate courts alike. And doubly so for the Supreme Court, which need never grant a case on the Step Zero question, even if most of its members agree that there is no *Bruen* Step Zero.[150]

This article has argued that Step Zero is wrong, but that its greatest impact will not be upholding a great many gun regulations that would otherwise fall, but instead that it will save judges and prosecutors time and resources in rejecting challenges from criminal defendants. This move won't be applied evenly; it will disproportionately hurt criminal defendants while leaving petitioners like those in *Bruen* and *Heller* unaffected. And that may not bother the Supreme Court; in fact, it may be politically convenient to have a ready-made way for the lower courts to opt out of what may otherwise be considered a methodological mess from the Supreme Court.

If the courts follow this road, there will be another substantial impact on the ground: The public's understanding of Second Amendment rights will diverge substantially from the reality of those rights' vindication in court. To understand why, it will be useful to briefly introduce and apply the concept of "acoustic separation."

Professor Meir Dan-Cohen, borrowing from the philosopher Jeremy Bentham, developed a useful framework to describe this sort of problem.[151] In criminal law, "conduct rules" are aimed

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[146] *E.g., Rodriguez*, 171 N.Y.S.3d at 806.

[147] *E.g., Fooks*, 278 A.3d at 103.

[148] *See, e.g.*, THE SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018), https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/ ("In 2016, black Americans comprised 27% of all individuals arrested in the United States—double their share of the total population."); *id.* (reporting "imprisonment rates for African-American and Hispanic adults that are 5.9 and 3.1 times the rate for white adults, respectively"); Council of State Governments Justice Center, *How Are Hispanic Individuals Represented in the Criminal Justice System?*, https://csgjusticecenter.org/2021/10/12/how-are-hispanic-individuals-represented-in-the-criminal-justice-system/ ("Despite committing crimes at a lower rate, Hispanic adults overall, including immigrants and native-born American citizens, are incarcerated in prison at a rate that is 2.9 times higher than that of White adults."); Prison Policy Initiative, *Beyond the Count: A Deep Dive Into State Prison Populations* (2022), https://www.prisonpolicy.org/reports/beyondthecount.html#demographics ("Almost 1 in 5 people in state prison (19%) report living in public housing as youth, and 2 in 5 (42%) report that their family received public assistance (welfare) at some point before they turned 18."); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1 (Nov. 2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf ("At the end of their case approximately 66% of felony Federal defendants and 82% of felony defendants in large State courts were represented by public defenders or assigned counsel.").

[149] *See, e.g.,* Cheyenne Daniels, THE HILL, *Black Voter Support Plummets for Supreme Court: Poll* (July 27, 2022, 6:28 PM), https://thehill.com/regulation/3577045-black-voter-support-plummets-for-supreme-court-poll/.

[150] In this respect, the Fifth Circuit's decision in *United States v. Rahimi*, discussed *supra* Section I.D will be an interesting test. Recall that the Fifth Circuit invalidated a federal statute, which is usually an automatic ticket to Supreme Court review. But assuming the Supreme Court grants cert in the case, they could still decide it without answering the Step Zero question—for example, by upholding the statute under *Bruen* step two.

[151] *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

at the public: For example, "do not steal."[152] But "decision rules" are aimed at officials such as judges: For example, "[l]et the judge cause whoever is convicted of stealing to be hanged."[153] Dan-Cohen imagined a world of "acoustic separation," where the two groups (the public and officials) are places in chambers sealed off from one another.[154] The public can hear the "conduct rules" but not the "decision rules"; the officials can hear the "decision rules" but not the "conduct rules."[155] As he notes, the real world is not characterized by this kind of perfect "acoustic separation": Each group can, to different extents in different contexts, hear the rules given to the other.[156] And the extent to which the rules are transmitted in each direction has important moral implications for the law: It might be thought to impact the morality of punishment, the social function of law in shaping community standards, and democratic legitimacy.[157]

This same framework can be applied to constitutional rights. As professor Carol Steiker developed it, [158] an "acoustic separation" framework can usefully describe the gap between what the public understands about their criminal-procedure rights (for example, "the requirement of warnings prior to interrogation"[159]) and the extent to which those rights are actually vindicated in court (considering "[t]he distinction between the use of evidence in the 'case-in-chief' and its use as 'impeachment,' the changing meaning of 'standing' to challenge unconstitutional police conduct, or the varying standards for the review of 'harmless error' on appeal."[160]) On Steiker's account, this gap might lead the public to overestimate the constraints on law enforcement vis-à-vis their own rights, skewing public policy in favor of policing and incarceration.[161]

What about Second Amendment rights? In the world this article has posited, the public will continue to receive oversimplified messages about the broad gun rights the Supreme Court has announced, such as the accurate but misleading statement that *Bruen* announced "a right to carry a gun outside the home."[162] (A person could be forgiven for thinking that they are therefore entitled to carry a gun outside their home.) But prosecutors and lower-court judges will hear a different message: Gun rights apply only to the "law-abiding," and what "law-abiding" means is flexible. They will therefore continue to prosecute and convict people at high volumes for gun offenses. As a result, there will be a split between the rights announced by the Court (which are enjoyed only by a favored class) and the results of most Second Amendment claims (which will be summarily rejected due to application of the Step Zero rule to the disfavored class). And this acoustic separation could even lead people statutorily prohibited from gun possession to carry guns in reliance on the rights they'd heard announced. We'd be left with a criminal punishment system with even less claim to moral authority, less likely to achieve just results, and less capable of

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[152] *Id.* at 626-27.

[153] *Id.* (citation omitted).

[154] *Id.* at 630.

[155] *Id.*

[156] *Id*. at 631.

[157] *Id.* at 673-77.

[158] Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2532-34 (1996) (applying to Fourth-, Fifth-, and Sixth-Amendment cases the "acoustic separation" framework of professor Dan-Cohen).

[159] *Id.* at 2537.

[160] *Id.* at 2538.

[161] *Id.* at 2550.

[162] *See id.* at 2538-39 ("The problems attendant in reporting on complicated constitutional cases in general is exacerbated in reporting on the decisions of the Supreme Court. The Court's general opinion-writing style and its lack of communication with and solicitude for the media add to the difficulty that already inheres in attempting to transmit the substance of the more obscure of the Court's opinions to the public at large.").

shaping social rules. This is all the more reason to reject *Bruen* Step Zero and keep the law in application in harmony with the law on the books.