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Excising the Second Amendment: Why Taxes Targeting Common Firearms Are Unconstitutional

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In recent years, a growing number of states have enacted or considered special excise taxes specifically targeting the purchase of firearms and ammunition. California enacted such a tax in 2023, openly labeling it a "sin tax." The strategy is straightforward, and mirrors shameful laws that suppressed the rights of freed Blacks during the Jim Crow era: if a legislature cannot ban the exercise of a constitutional right outright, it can make that exercise progressively more expensive until it becomes practically inaccessible to ordinary citizens. Using the historical test mandated by the U.S. Supreme Court in New York State Rifle & Pistol Association v. Bruen*, this paper argues that special taxes on common arms—those that single out firearms, ammunition, and related items (rather than applying generally to all goods)—have no support in the Nation's historical tradition of firearm*

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regulation and are therefore unconstitutional. The historical record is clear: prior to 1900, the few laws that taxed weapons were limited to items like bowie knives and pocket pistols, which were weapons many contemporaries regarded as falling outside Second Amendment protection. Even then, those taxes were outliers mostly found in southern states, and sometimes applied only when such arms were carried rather than merely purchased. They conspicuously and almost uniformly excluded the prevailing combat arms of the day.

Taxes on the arms seen as most useful for lawful purposes were essentially nonexistent, and under Bruen, that makes modern taxes imposed on the sale of arms unconstitutional. That includes excise taxes like those passed by California and Colorado, the federal Pittman-Robertson excise tax that has been in place since 1937, and any taxes imposed by the National Firearms Act to the extent they apply to commonly owned arms. All are repugnant to the Second Amendment and should be stricken by courts.

Introduction and Background

The constitutional right to keep and bear arms has never been understood as a purely abstract guarantee, costless to exercise. Firearms are property; they are bought and sold in the marketplace like everything else. But the Second Amendment's protection would be hollow if legislatures could freely place special financial burdens on the exercise of that right that do not apply to any other consumer goods or activities.

Historically, it was only after 1930 that broader taxes on common arms were first assessed on a permanent basis[1] with the Pittman-Robertson Act, which imposed an 11% tax on firearms (10% for handguns), ammunition, and archery equipment, and distributed the proceeds to state governments for wildlife projects.[2] Around the same time, the National Firearms Act imposed exorbitant taxes, though it applied only to particular types of weapons considered by Congress and the Supreme Court at the time to be unprotected by the Second Amendment, such as machine guns, suppressors, and short-barreled rifles and shotguns.[3] Federal taxes on arms are thus of even more recent vintage than New York's carry regime

[1] Prior excise taxes on firearms were imposed as temporary measures to pay for the cost of World War I, but those were repealed some years later, then restored in 1932 during the Great Depression. *See* Jane G. Gravelle, Cong. Research Serv., IF12173, Firearms and Ammunition Excise Tax (FAET) (Feb. 6, 2026), https://www.congress.gov/crs-product/IF12173. Additionally, in both the founding era and the nineteenth century, a wide array of imported goods were subject to tariffs, and firearms were no exception. That is discussed in Part V of this article.

[2] Sam Schipani, *Did You Know that Gun Sales Fund State Wildlife Programs?,* SIERRA (Apr. 12, 2018), https://www.sierraclub.org/sierra/pittman-robertson-wildlife-conservation-fund.

[3] National Firearms Act of 1934, Pub. L. No. 73-474, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–5872).

that was struck down in *New York State Rifle & Pistol Ass'n v. Bruen,* which dated back to 1911.[4] At the state and local level after 1900, taxes on common guns remained as rare as they were throughout the nineteenth century, and so the government-imposed tax burden was mostly limited to the federal Pittman-Robertson excise tax.

That is now changing as part of a broader effort by a handful of restrictive states to raise the price of exercising the Second Amendment, and it is not limited to taxation. For example, getting a concealed handgun license in Santa Clara County, California, costs approximately $2,000 in total expense.[5] Litigation has been filed to challenge that exorbitant expense, but even relatively affordable counties in the state will cost an applicant at least $500 to obtain a carry permit, thanks to burdens imposed by state law such as a 16-hour training course (up from 8 hours pre-*Bruen*),[6] livescan fingerprinting,[7] and sometimes even a psychological examination.[8] Other traditionally restrictive states such as New York are similarly expensive, with New York City charging hundreds of dollars simply for a permit to *acquire* a firearm.[9]

Excise taxes on firearms are the latest way the anti-gun states are attempting to price their residents out of the right to keep and bear arms. California led the way in 2023, when Governor Gavin Newsom signed into law what he proudly described as a "sin tax"[10]—an 11% excise tax imposed specifically on firearms, firearm precursor parts, and ammunition sold at retail.[11] This tax applies in addition to generally applicable sales taxes. It sits atop a costly gun transfer legal regime that includes a background check fee of $37.19 per firearm

[4] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 11 (2022).
[5] Brandon Pho, *State Gun Group May Sue Santa Clara County Over License Fees,* SAN JOSÉ SPOTLIGHT (Feb. 27, 2025), https://sanjosespotlight.com/state-california-gun-group-may-sue-santa-clara-county-over-concealed-carry-weapons-permit-license-fees.
[6] Cal. Penal Code § 26165(a)(1).
[7] Cal. Penal Code § 26185(a)(1); Cal. Code Regs., tit. 11, § 4420.
[8] Cal. Penal Code § 26190(e)(1).
[9] N.Y.C. Police Dep't License Div., *New Application Instructions*, https://licensing.nypdonline.org/new-app-instruction (last visited May 21, 2026).
[10] Alexei Koseff, *Bills of 2023 | Newsom Signs 'Sin Tax' on Guns and Ammo*, SIGNAL SCV (Dec. 29, 2023), https://signalscv.com/2023/12/bills-of-2023-newsom-signs-sin-tax-on-guns-and-ammo.
[11] Cal. Rev. & Tax. Code § 36011 (enacted 2023, eff. July 1, 2024) (establishing an 11% excise tax "upon licensed firearms dealers, firearms manufacturers, and ammunition vendors" on gross receipts from retail sales of firearms, firearm precursor parts, and ammunition).

purchase,[12] a $25 firearm safety certificate fee for first-time buyers,[13] and an ammunition background check fee of five dollars assessed each time a Californian seeks to buy ammunition.[14] All of this is in addition to the federal excise tax of 11% (or 10% for handguns).

To illustrate what this adds up to, a hypothetical gun sales example is in order. Imagine a handgun that would sell for $500 in a Los Angeles gun store, if no taxes or other fees were assessed by the government. Suppose the gun store bought it for $400 from the supplier, and expects to make $100 in profit when it is sold to the end consumer.[15] Combined federal and state excise taxes add $84 to the price of the gun, bringing its listed retail price to $584. Adding in the background check fees ($37.19) and the 9.75% general sales tax assessed in Los Angeles ($56.94), that gun that should have been priced at $500 (including sales tax, $548.75) will actually cost the buyer $678.13 out the door. And if it is their first gun and they need a firearms safety certificate, that price rises to $703.13, a roughly 28% increase from the price the gun would have cost if only basic sales tax were applied to the gun store's price.

The new state excise tax is thus not some rare intrusion by a government that has otherwise left the Second Amendment alone; it is the latest in a pattern of various "poll taxes" for gun buyers. This tactic is not limited to California. Colorado followed suit and became the second state with such a tax, though it set its rate at 6.5%.[16] Other states are watching, and similar measures are under active consideration elsewhere.[17]

The imposition of special financial burdens on constitutional rights is not a new idea. Legislatures that are hostile to particular constitutional protections have long attempted to use taxation as a tool of suppression, and the Supreme Court has repeatedly recognized this danger, albeit principally in the First Amendment context. The question this paper addresses is whether the same principle that blocks taxes that suppress First Amendment rights applies with equal force to the Second Amendment.

The answer, under the historical methodology the Supreme Court has mandated for Second Amendment cases, is clearly yes. In *Bruen*, the Court confirmed that the Second

[12] *See* Cal. Dep't of Just., Off. of the Att'y Gen., *Frequently Asked Questions #13 (How much is the state fee when purchasing a firearm?)*, https://oag.ca.gov/firearms/pubfaqs (last visited Sept. 16, 2026).
[13] *See* Cal. Dep't of Just., Off. of the Att'y Gen., *Firearm Safety Certificate Frequently Asked Questions #6 (How much does the Firearm Safety Certificate cost?)*, https://oag.ca.gov/firearms/fscfaqs (last visited Sept. 16, 2026).
[14] Assem. Bill No. 28, 2023–2024 Reg. Sess. (Cal. 2023) (signed into law Sept. 26, 2023).
[15] Which is when the excise taxes are assessed, and then the gun store passes that cost to the buyer.
[16] Colo. Rev. Stat. § 39-37-101, et seq.
[17] Chip Brownlee, *Seven States Move to Tax Guns and Ammo*, THE TRACE (Mar. 4, 2024), https://www.thetrace.org/2024/03/maryland-tax-bill-guns-ammo.

Amendment's scope is determined by reference to this Nation's historical tradition of firearm regulation. When that tradition is examined with care, it reveals a consistent and conspicuous absence of laws imposing special per-unit taxes on the arms most commonly used by law-abiding citizens for lawful purposes. The historical laws that did tax weapons were narrow in scope: they targeted weapons already considered "dangerous and unusual"—such as bowie knives and pocket pistols—and, critically, no taxes targeted the prevailing arms most useful to the militia of the day or those chosen by the people for self-defense. They were also concentrated almost exclusively in Southern states and territories, and some of them were openly racist efforts to disarm newly freed Black Americans.[18] This is not the kind of "well-established and representative historical analogue" that *Bruen* demands.[19]

The focus here will be on the Second Amendment analysis and examining the historical tradition of taxing arms specifically. There are certainly other constitutional grounds to argue against particular types of taxes on firearms, such as cases challenging the National Firearms Act on Taxing Power grounds (in addition to Second Amendment arguments),[20] but they are beyond the scope of this paper.

This paper proceeds as follows. Part I summarizes the *Bruen* standard. Part II explains why special taxes on arms implicate the Second Amendment's plain text. Part III argues that the "nuanced approach" *Bruen* reserves for unprecedented concerns has no application here, and explains the correct level of generality that should apply. Part IV examines how courts have treated taxes on other constitutional rights and concludes with a look at a recently published ruling on the constitutionality of excise taxes on firearms. Part V undertakes the historical analysis. Part VI concludes.

I. The *Bruen* Test: A Simple First Step, Followed by The Government's Historical Burden

Before examining the specific historical record pertaining to taxes on arms, it is important to understand the analytical framework the Supreme Court has established for Second Amendment challenges. That framework, set out in *District of Columbia v. Heller* and

[18] *See* Part V, *infra.*
[19] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022).
[20] *See, e.g.,* Silencer Shop Found. v. BATFE, No. 6:25-CV-056-H, 2026 U.S. Dist. LEXIS 174125, at *6 (N.D. Tex. Aug. 5, 2026) ("By zeroing out the transfer and making taxes for most NFA firearms, Congress eliminated the constitutional basis for the regulations that formerly supported the taxes for those firearms. No longer can the challenged NFA provisions be justified—as they have been for nearly 90 years—under Congress's taxing power.").

definitively reaffirmed and clarified in *Bruen*, is a historical inquiry that admits no judicial interest-balancing.

In *Heller*, the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms for lawful purposes, including self-defense in the home. It rejected the application of any interest-balancing test, explaining that "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."[21]

In 2022, the Court reaffirmed *Heller*'s "original public meaning test" for analyzing Second Amendment challenges. Applying it, the Court found that the Second Amendment protects the right to armed self-defense in public.[22] *Bruen* reiterated that courts may not engage in any form of "intermediate scrutiny" or "strict scrutiny" in Second Amendment cases.[23] The Court confirmed the test in Second Amendment cases is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[24]

To determine whether historical laws the government puts forward are relevant analogues, courts are to look to "how" and "why" the historical laws regulating arms-bearing conduct. Or as the Court put it in *Hemani*, "[t]he more closely a contemporary law mirrors a well-established historical analogue in purpose and operation, the more likely it is to be upheld. Conversely, the more a modern law diverges from traditional laws in purpose and operation, the less likely it is to survive review."[25] At the same time, the Court has cautioned against seeking out only "historical twins," because the law is not "trapped in amber" and "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."[26] Ultimately, "the 'how' and 'why' of the historical analogue and modern regulation must be close enough to enable a court to say: 'Because this historical law was understood to be compatible with the

[21] District of Columbia v. Heller, 554 U.S. 570, 634 (2008).
[22] *Bruen*, 597 U.S. at 19, 31–33.
[23] *Id.* at 23.
[24] *Id.* at 24.
[25] United States v. Hemani, 608 U.S. 772, 780–81 (2026).
[26] United States v. Rahimi, 602 U.S. 680, 692 (2024).

right codified by the Second Amendment, we can infer that the restriction imposed by the modern law is likewise consistent with that right.'"[27]

Whatever the relevance of proposed analogues, the Court could not have been clearer that the *Bruen* test is, in terms of its substantive historical analysis, a one-step test: "Despite the popularity of this two-step approach, it is one step too many."[28] It reaffirmed the same in *Rahimi*, stating that "[i]n *Bruen*, we explained that when a firearm regulation is challenged under the Second Amendment, the United States must show that the restriction 'is consistent with the Nation's historical tradition of firearm regulation.'"[29]

To be sure, a challenger must show at *Bruen*'s first step that the Second Amendment right to keep and bear arms is at least *implicated*.[30] As Justice Thomas later explained, "[a] challenger need only show that 'the plain text' of the Second Amendment covers his conduct. This burden is met if the law at issue 'regulates' Americans' 'arms-bearing conduct.'"[31] But that initial showing is not an intensive analytical step. Like the First Amendment, which applies whenever speech is regulated, the Second Amendment applies whenever the law regulates acquisition, ownership, possession, carrying, use, or commerce in arms. Or as the Court has explained, if a law applies to "the people," or concerns any form of "arms," or places any restrictions on either keeping or bearing of arms, then the plain text is implicated.[32] Whether a challenged law that implicates the plain text "nevertheless comports with our historical tradition of firearm regulation . . . is a question for *Bruen*'s second step, not its first."[33]

Put more simply, "implicating" the right to keep and bear arms is far more expansive than covering only laws that directly restrict the literal "keeping" and "bearing" of arms. A law may "implicate" the Second Amendment either directly or indirectly because constitutional rights protect not only core conduct but they also "implicitly protect those closely related acts necessary to their exercise."[34] Indeed, lower courts have long recognized

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[27] Wolford v. Lopez, 146 S. Ct. 2032, 2044 (2026).
[28] *Bruen.* 597 U.S. at 19.
[29] *Rahimi,* 602 U.S. at 689 (citing *Bruen*, 597 U.S. at 24); *see also id*. at 692 ("[T]he appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.").
[30] *Bruen*, 597 U.S. at 17.
[31] Snope v. Brown, 145 S. Ct. 1534, 1536 (2025) (Thomas, J., dissenting from denial of certiorari) (parenthetical omitted).
[32] *Wolford*, 146 S. Ct. at 2043.
[33] *Id.* at 2054 (Barrett, J., concurring).
[34] Luis v. United States, 578 U.S. 5, 26 (2016) (Thomas, J., concurring).

the Second Amendment protects such "attendant rights."[35] As the Tenth Circuit put it, "[t]he Second Amendment's text is not limited to direct prohibitions on possessing or using firearms. It states that the 'right of the people to keep and bear Arms, shall not be infringed.'"[36] And once that right is implicated, the government "must show that the restriction 'is consistent with the Nation's historical tradition of firearm regulation'"—full stop.[37]

The Tenth Circuit's logic is cogent because if judges got to decide whether an "ancillary right" is important enough to warrant protection, that heralds the reimposition of interest balancing in disguise. Unfortunately, ever since *Bruen* was decided, some courts are seeking to accomplish exactly that. They have exaggerated *Bruen*'s "first step" into a gatekeeping device that avoids the historical inquiry altogether, shifting the burden away from the government. Under these "extremely narrow reading[s]," the Second Amendment is "wrongly. . .reduced to 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'"[38] These courts seek to effectively reimpose their pre-*Bruen* balancing tests in most Second Amendment cases.

For example, before *Bruen*, the Ninth Circuit would look to the "severity of the burden" before deciding which level of scrutiny to apply. Post-*Bruen*, that court simply slapped a fake moustache on that inquiry in *B&L Productions v. Newsom*, asking whether a law "meaningfully constrains" the right before turning to history.[39] But the "meaningfully constrains" language is indistinguishable from determining the "severity of the burden." It's the same concept, stated with different words. Both invite courts to decide whether the Second Amendment is "really worth insisting upon."[40]

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[35] *See, e.g.*, Boland v. Bonta, 662 F. Supp. 3d 1077, 1085 (C.D. Cal. 2023) (citing Jackson v. City & Cnty. of San Francisco, 746 F.3d 953, 967 (9th Cir. 2014); Ezell v. City of Chicago, 651 F.3d 684, 704 (7th Cir. 2011); Rigby v. Jennings, 630 F. Supp. 3d 602, 615 (D. Del. Sept. 23, 2022)).
[36] Ortega v. Grisham, 148 F.4th 1134, 1143 n.3 (10th Cir. 2025).
[37] United States v. Rahimi, 602 U.S. 680, 689 (2024) (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022)).
[38] Yukutake v. Lopez, 130 F.4th 1077, 1092 (9th Cir. 2025) (citing *Bruen*, 597 U.S. at 70). *Yukutake* was vacated and will be reheard en banc, as is always the case for any Second Amendment victory in the Ninth Circuit, with only one exception. *See* Brief of Amici Curiae Second Amendment Foundation, et al. at 3–12, Yukutake v. Lopez, No. 21-16756 (9th Cir. Aug. 25, 2025). Nevertheless, the three-judge panel's point quoted above is still persuasive.
[39] B & L Prods., Inc. v. Newsom, 104 F.4th 108, 118 (9th Cir. 2024). The *B&L Productions* panel lifts its "meaningfully constrains" language directly from pre-*Bruen* precedent. *Id.* at 118 (citing Teixeira v. Cty. of Alameda, 873 F.3d 670, 680 (9th Cir. 2017)).
[40] District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

Some lower courts have rationalized this defiance by being draconian in their application of the Second Amendment's plain text. To those courts, no conduct is protected by the plain text of the Second Amendment unless it literally consists of keeping or bearing arms. For example, the First Circuit ruled that "laws regulating the purchase or acquisition of firearms do not target conduct covered by the Second Amendment's 'plain text.'"[41] According to that court, such laws are "constitutional unless plaintiffs demonstrate that the Act is abusive toward Second Amendment rights."[42] So much, then, for *Bruen*'s rejection of judge-empowering interest-balancing inquiries.[43] If judges are now going to decide whether a law is "abusive" enough before any historical analysis can even occur, then interest-balancing has made its triumphant return.

This funhouse mirror version of strict textualism evaporates when courts prefer to *narrow* what the Second Amendment protects even further than an overly strict reading of the plain text allows for. When a law directly impedes the literal keeping or bearing of arms, some courts *add* words to the text of the Second Amendment so they can assert, *e.g.*, that a particular arm is not covered by the plain text of the Second Amendment. In those cases, it is no longer enough to just be an "arm" as the Supreme Court has defined that term using founding-era dictionaries. Instead, several circuits now say "arms" are *only* those weapons commonly used for self-defense. If a plaintiff does not have sufficient statistical data to prove that common use in self-defense specifically (other lawful purposes, like hunting or sports shooting, are not even considered), they lose, and no meaningful historical analysis occurs.

An example of that is the Second Circuit's summary order in *Calce v. Tisch.* In that case, plaintiffs challenged New York state and city laws that prohibit the possession of stun guns and tasers.[44] The district court had ruled that "Plaintiffs 'failed to provide any evidence that stun guns and tasers are in common use' and therefore, on the summary judgment record before it, 'no reasonable jury could return a verdict that stun guns and tasers are presumptively protected by the Second Amendment.'"[45] The Second Circuit agreed and affirmed the ruling, becoming only the latest of the circuits hostile to the Second Amendment to try and limit the weapons protected by the Second Amendment as much as possible.[46] The

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[41] Beckwith v. Frey, No. 25-1160, 2026 U.S. App. LEXIS 9723, at *15–16 (1st Cir. Apr. 3, 2026).
[42] *Id.* at *16.
[43] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 22 (2022).
[44] Calce v. Tisch, No. 25-861-cv, 2026 U.S. App. LEXIS 10458 (2d Cir. Apr. 13, 2026).
[45] *Id.* at *2 (quoting the district court ruling).
[46] "[L]ower courts have been quick to make distinctions along various lines, carving items out from the textual scope of 'Arms' one by one." Jamie G. McWilliam, *Arms*, Paper No. 2026-3, at 6 (Univ. of Wyo. Firearms Rsch. Ctr. Mar. 31, 2026) (forthcoming 2026–2027 in 101 TUL. L. REV.). "The result has been doctrinal fragmentation. Courts exclude weapons, components, and accessories from constitutional

Supreme Court has seemingly rejected this approach, explaining that "arms" refers to any "implements used for offense or defense" or "any weapon customarily used for offensive or defensive purposes."[47] Whether the Second Circuit and others will heed that message is another matter, given that court's long-running hostility to Second Amendment claims.[48] Perhaps demonstrating little confidence that they will, the Supreme Court has recently granted cert to a pair of cases that will decide the scope of what a protected arm is.[49]

But for the time being, the current state of Second Amendment law in many circuits is a restrictive "Goldilocks" test that keeps historical analysis at bay and upholds almost every challenged law. If a plaintiff sues over an "ancillary" right that is not the literal keeping or bearing of arms, their conduct is "too cold," too far away from the plain text to merit historical analysis. If instead a plaintiff challenges a law that undeniably blocks the keeping or bearing of an arm, then it is often deemed "too hot," and no historical analysis will occur as the court hearing the case finds some rationale[50] for why the plain text somehow doesn't cover the conduct at issue.

The Supreme Court has only just begun to correct this disturbing pattern. In its *Wolford* ruling, it reaffirmed that the plain text does indeed have an expansive scope, leading the

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protection based on common use, military lineage, perceived functional necessity, or categorical labels such as 'accoutrements,' often without a clear theory of why those distinctions follow from the Amendment's text as originally understood." *Id.* at 50–51. But the plain text makes no such distinctions, and there is no "commonly used for self-defense" qualifier to be found. The Second Amendment presumptively protects *all* "arms," which includes common arms, uncommon arms, non-lethal arms, and even "dangerous and unusual" arms. All arms come under the plain text, so any restrictions on them must comport with historical tradition. Undoubtedly, the government will have no trouble upholding certain restrictions under the historical analysis. But it must still meet its historical burden even if it will do so easily in some cases; it cannot dodge it by insisting the weapons it regulates are not "arms."

47 Wolford v. Lopez*,* 146 S. Ct. 2032, 2041, 2043 (2026).

48 *See, e.g.*, Harrel v. Raoul, 144 S. Ct. 2491, 2492 (2024) (Thomas, J., statement respecting denial of certiorari) ("According to the Seventh Circuit, the rifle selected by millions of Americans for self-defense and other lawful purposes does not even fall within the scope of the Arms referred to by the Second Amendment . . . This Court is rightly wary of taking cases in an interlocutory posture. But, I hope we will consider the important issues presented by these petitions after the cases reach final judgment.")

49 Viramontes v. Cook Cty., No. 25-238, 2026 U.S. LEXIS 2893 (June 30, 2026); Grant v. Higgins, No. 25-566, 2026 U.S. LEXIS 2887 (June 30, 2026).

50 "Come hell or high water, *Heller* or *Bruen*, our court will find a way to uphold any weapons restriction that a liberal State can dream up. And the Supreme Court's occasional grant of certiorari and reversal has done *nothing*—and I mean that literally—to change our court's behavior." Knife Rts., Inc. v. Bonta, No. 24-5536, 2026 U.S. App. LEXIS 20960, at *82 (9th Cir. July 16, 2026) (VanDyke, J., dissenting from the denial of rehearing en banc.).

main dissent to argue that "the majority essentially directs courts to start by simply asking whether a gun owner cannot do what she wants with her firearm."[51] But for the purposes of this paper, we will assume that the erroneous form of the *Bruen* test some lower courts have adopted, with a formidable "plain text analysis," will apply to any challenge to the taxation of arms.

II. Special Taxes on Arms Implicate the Plain Text of the Second Amendment

Given all of this, it is unsurprising that in defending its new state excise tax on guns and ammunition, California argues the plain text of the Second Amendment is not implicated even as it taxes a constitutional right at 11% (that case is discussed in more depth in part IV of this paper). That is incorrect based on the Supreme Court's existing Second Amendment precedent.

In the context of the right to carry, the Court explained that permitting regimes were subject to constitutional challenge when "lengthy wait times in processing license applications *or exorbitant fees* deny ordinary citizens their right to public carry."[52] There, the Court was talking about application fees and other expenses inherent to the permitting process, and was presenting an exception to the idea that "imposing fees on the exercise of constitutional rights is permissible when the fees are designed to defray (and do not exceed) the administrative costs of regulating the protected activity."[53] In other words, even if the government asserts that permitting fees are tied to the costs of regulating the protected activity, they are *still* unconstitutional if they have the effect of denying citizens their constitutional right to bear arms.

When the issue is a tax and not a fee, the government's position is even more impugned, because there is no link between the specific protected activity and administrative costs related to it. In fact, as to California's excise tax specifically, there *already is* an administrative fee when buying guns. The state charges a total of $37.19 for each background check, ostensibly to cover the cost of that check and the state's transfer registry.[54] That fee is itself exorbitant relative to most of the rest of the country, where there is no charge for

[51] *Wolford*, 146 S. Ct. at 2064 (Jackson, J., and Sotomayor, J., dissenting).
[52] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 38 n.9 (2022) (emphasis added).
[53] Kwong v. Bloomberg, 723 F.3d 160, 165 (2d Cir. 2013).
[54] "The DROS fee is $31.19 which covers the costs of the background checks and transfer registry. There is also a $1.00 Firearms Safety Act Fee, and a $5.00 Safety and Enforcement Fee." Cal. Dep't of Just., Off. of the Att'y Gen., *Frequently Asked Questions #13 (How much is the state fee when purchasing a firearm?)*, https://oag.ca.gov/firearms/pubfaqs (last visited Sept. 16, 2026).

standard federal background checks.[55] The excise tax on guns and ammunition is just an extra burden imposed by the government unconnected to any administrative costs to be neutralized. To be sure, in enacting its excise tax, the California legislature declared that "gun violence ... causes economic harm in impacted communities and imposes enormous fiscal burdens on state and local governments and taxpayers."[56] But that is not the sort of "administrative cost" that it is permissible to try and defray with fees. In the same way that a parade or demonstration permit fee for a Black Lives Matter march may not try and stick the organizers with the costs of policing unrelated illegal riots and must be tied to the costs of that demonstration,[57] so too may the government not saddle law-abiding gun buyers with the general cost of policing criminal violence committed with firearms.[58]

Even the Ninth Circuit, which has long disfavored Second Amendment claims,[59] accepted comparisons to the First Amendment in a case concerning whether California could limit gun buyers to one gun per month. "We are not aware of any circumstance where government may temporally meter the exercise of constitutional rights in this manner. And we doubt anyone would think government could limit citizens' free-speech right to one protest a month, their free-exercise right to one worship service per month, or their right to be free from unreasonable searches and seizures to apply only to one search or arrest per month."[60] If it is true that the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees,"[61] then these comparisons matter.

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[55] "The FBI does not charge a fee for conducting NICS checks. However, states that act as points of contact for NICS checks may charge a fee consistent with state law." Bureau of Alcohol, Tobacco, Firearms & Explosives, *Is There a Charge for NICS Checks?*, https://www.atf.gov/firearms/questions-and-answers?page=8 (last visited Sept. 16, 2026).
[56] Assem. Bill No. 28, 2023–2024 Reg. Sess., ch. 231, § 2(f) (Cal. 2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB28.
[57] Cox v. New Hampshire, 312 U.S. 569, 577 (1941).
[58] Nor does it matter whether some would consider an 11% tax or fee to not be prohibitive. In the First Amendment context, which is discussed later in this article, "[a] tax based on the content of speech does not become more constitutional because it is a small tax." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 136 (1992).
[59] *See, e.g.,* Duncan v. Bonta, 83 F.4th 803, 808 (9th Cir. 2023) (Bumatay, J., Ikuta, J., R. Nelson, J., and VanDyke, J., dissenting) ("If the protection of the people's fundamental rights wasn't such a serious matter, our court's attitude toward the Second Amendment would be laughably absurd.").
[60] Nguyen v. Bonta, 140 F.4th 1237, 1243 (9th Cir. 2025). *Nguyen* remains the only Second Amendment final judgment victory in a civil case in the Ninth Circuit that was not overturned on appeal, or reversed en banc after prevailing on appeal.
[61] McDonald v. City of Chicago, 561 U.S. 742, 780 (2010).

While the discussion on the precedent concerning taxes on other constitutional rights will continue in part IV, even *without* any comparisons to how courts have treated taxation of other constitutional rights, it is obvious that taxes on guns implicate the plain text of the Second Amendment because they raise the cost of acquiring a firearm. One cannot keep or bear arms without first acquiring them, and constitutional rights protect not only their core exercise but also those closely related acts necessary to that exercise.[62] And it is no different in the Second Amendment context, as its "text is not limited to direct prohibitions on possessing or using firearms. It states that the 'right of the people to keep and bear Arms, shall not be infringed.'"[63]

As discussed in the introduction, a handgun that a firearms dealer buys wholesale for $400 to sell to customers in California will cost those customers an extra $84 just in federal and state excise taxes. This added expense is a burden on the Second Amendment right, and so the plain text is implicated. Courts may not "smuggle additional limits, drawn from our regulatory tradition, into the plain-text stage of the inquiry."[64]

The government may argue that a 21% combined state and federal excise tax is not draconian enough to implicate the plain text. While it may make guns more expensive, it does not make them prohibitively expensive in the way, for example, a $1,000 flat excise tax on guns would.[65] If you can afford a $500 gun at retail, the argument goes, then you can afford another $84 in added expense for the dealer to cover those excise taxes (or if you can't, you could downgrade to a slightly cheaper gun). But such an argument would simply represent the very interest balancing that *Bruen* explicitly rejected: the government would be arguing that the burden on the citizen is not significant enough relative to California's need to fight "gun violence," or the federal government's need to fund conservation. Perhaps those needs are important, but the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[66] Taxes on guns are no exception.

Additionally, the fact that Pittman-Robertson excise taxes (as well as the state equivalents in California and Colorado) are assessed against firearms *dealers* does not

[62] "Constitutional rights thus implicitly protect those closely related acts necessary to their exercise." *Luis*, 578 U.S. at 26 (Thomas, J., concurring).
[63] Ortega v. Grisham, 148 F.4th 1134, 1143 n.3 (10th Cir. 2025).
[64] Wolford v. Lopez, 146 S. Ct. 2032, 2054 n.1 (2026) (Barrett, J., concurring).
[65] "SAFE's $1,000 excise tax imposes a tremendous burden on the rights of responsible law-abiding citizens in the CNMI to obtain handguns." *Murphy v. Guerrero*, No. 1:14-CV-00026, 2016 U.S. Dist. LEXIS 135684, at *79 (D. N. Mar. I. Sep. 28, 2016).
[66] District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

change the plain text analysis. Those dealers pass the cost on to their customers, who then face increased prices. As the Ninth Circuit has explained, "vendors and those in like positions have been *uniformly permitted* to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function."[67] Thus, a gun store operator may "assert the subsidiary right to acquire arms on behalf of his potential customers."[68]

Moreover, as a practical matter, if the government could avoid constitutional scrutiny on these excise taxes simply by moving up the chain of business away from the end consumer who ultimately pays the costs, then it would be impossible to ever challenge these sorts of taxes, no matter how high of a burden they placed on the Second Amendment right. In its own briefing on these issues, California argued for a "Catch-22", with firearm sellers not being able to challenge the tax because the right belongs to their customers, but the buyers also could not challenge the tax because its incidence is on the sellers.[69] That frivolous argument is not one that can coexist with a fundamental right.

Finally, in examining the plain text of the Second Amendment and its application to any issue, properly describing the proposed course of conduct is key. In *Bruen*, New York had argued that the Second Amendment "permits a State to condition handgun carrying in areas 'frequented by the general public' on a showing of a nonspeculative need for armed self-defense in those areas."[70] When it decided that case, the Supreme Court did not say that "carrying handguns publicly for self-defense without a showing of nonspeculative need" was the proposed course of conduct, because that "showing of nonspeculative need" was the *burden* on the Second Amendment right. The burden is not part of the proposed course of conduct; it is the law or practice that is being challenged.[71] The Court reiterated the same in

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[67] Teixeira v. County of Alameda, 873 F.3d 670, 678 (9th Cir. 2017) (en banc) (quoting Craig v. Boren, 429 U.S. 190, 195 (1976)) (emphasis added) (brackets omitted).
[68] *Id.*; *see also* Carey v. Population Servs., *Int'l*, 431 U.S. 678, 683–84 (1977); Ezell v. City of Chi., 651 F.3d 684, 693, 696 (7th Cir. 2011) (supplier of firing range facilities had standing to challenge Chicago ordinance banning firing ranges on behalf of potential customers).
[69] The State had previously complained that non-taxpayers could not challenge the tax when Plaintiffs had brought suit with both retailers *and* buyers as plaintiffs. *See* Defs.' Mem. in Supp. of Demurrer at 12, Jaymes v. Maduros, No. 37-2024-00031147-CU-MC-CTL (Cal. Super. Ct. Feb. 18, 2025) ("The Individual Plaintiffs are not the taxpayers and lack standing to bring this action . . . . "[O]nly *retailers* as the taxpayers are authorized to file and prosecute a tax refund action against the Department." (emphasis added)).
[70] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 33 (2022).
[71] *See* United States v. Martinez, No. 23-cr-114, slip op. at 3 (E.D. Tex. Apr. 14, 2025) ("The Government next suggests that the 'conduct' covered by the text of the Second Amendment should be defined narrowly to fit the precise conduct regulated by § 922(d)(10)—something like 'selling a firearm to a drug trafficker.' . . . But this impermissibly conflates the two steps of *Bruen*.").

Wolford, where it defined the proposed course of conduct just as it did in *Bruen*, "carrying of firearms for self-defense."[72] Hawaii protested that the plain text was not implicated because it does not cover "the right to armed entry onto private property without the owner's consent."[73] That argument was rejected because at the plain text step, "the question is simply whether a challenged law falls within the Second Amendment's 'plain text.'"[74]

The same applies here. The proposed course of conduct may not be defined with unneeded specificity to short-circuit the historical analysis. For example, in this case it would be improper to define the conduct at issue as "acquiring firearms without increased expense resulting from an 11% excise tax." California's excise tax is the *burdensome law being challenged*, and it therefore has no place in the analysis until the historical test. The proposed course of conduct in cases concerning taxes on arms is simply "acquiring firearms," and we know that the ". . .right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair."[75] That's why the right to acquire a firearm is the "*most fundamental* prerequisite of legal gun ownership"[76] and thus, this portion of the analysis should be simple enough.

III. No "Nuanced Approach" Is Warranted: There Is Nothing New About Taxes or Guns

A. *The "Nuanced Approach" Is a Narrow Exception, Not Bruen's Default Mode of Analysis*

Bruen recognized that "unprecedented societal concerns or dramatic technological changes may require a more nuanced approach" when identifying historical analogues for modern firearms regulations.[77] This exception exists because some modern regulations address genuinely novel problems that simply did not exist at the founding. But this

[72] Wolford v. Lopez, 146 S. Ct. 2032, 2046 (2026).
[73] *Id.* at 2049.
[74] *Id.*; *see also id*. at 2054 (Barrett, J., concurring) ("Whether the law nevertheless comports with our historical tradition of firearm regulation—including the traditional property laws that Hawaii invokes today—is a question for *Bruen*'s second step, not its first.").
[75] Andrews v. State, 50 Tenn. (3 Heisk.) 165, 178 (1871); *accord* United States v. Miller, 307 U.S. 174, 180 (1939); Ezell v. City of Chi., 651 F.3d 684, 704 (7th Cir. 2011); *see also* N.Y. State Rifle & Pistol Ass'n v. City of New York, 590 U.S. 336, 364 (2020) (Alito, J., dissenting).
[76] Illinois Ass'n of Firearms Retailers v. City of Chicago, 961 F. Supp. 2d 928, 938 (N.D. Ill. 2014); *see also, e.g.*, United States v. Marzzarella, 614 F.3d 85, 92 n.8 (3d Cir. 2010) (recognizing the commercial sale of firearms as protected by *Heller*).
[77] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 27 (2022).

"nuanced approach" is emphatically not the default analysis. It is a limited exception for genuinely unprecedented circumstances. As *Bruen* itself stated, when "a challenged regulation addresses a general societal problem that has persisted since the eighteenth century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[78] And when the same or similar problem was addressed in the past through "materially different means, that also could be evidence that a modern regulation is unconstitutional."[79] The nuanced approach may not be invoked whenever it is convenient for the government; doing so would effectively eliminate *Bruen*'s default rule.[80]

As a Ninth Circuit panel explained:

> [I]t should be clear enough that courts may not turn "straightforward" cases into "nuanced approach" cases and then use the "nuanced approach" to ban the very things that were universally protected from the Founding through Reconstruction. If that were allowed, then *Bruen*'s instruction that the absence of "a distinctly similar historical regulation addressing [the] problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment," would have little practical force.[81]

While that ruling was vacated when the Ninth Circuit unsurprisingly granted rehearing en banc, that portion of the vacated opinion is entirely consistent with what the Ninth Circuit had previously ruled in *Nguyen v. Bonta*:

> It cannot reasonably be disputed that firearm manufacturing and availability are different today than they were in our early history. But arms trafficking is not a new problem . . . Because the industrialized production of guns can be traced back to the mid-nineteenth century, it is not a "dramatic technological change[]" requiring a nuanced approach . . . In sum, *the modern problems that California identifies as justification for its one-gun-a-month law are perhaps different in degree from past problems, but they are not different in kind. Therefore, a nuanced approach is not warranted.*[82]

[78] *Id.* at 26.
[79] *Id.* at 26–27.
[80] *Id.*
[81] Baird v. Bonta, 163 F.4th 723, 732–33. (9th Cir. 2026) (citations omitted).
[82] Nguyen v. Bonta, 140 F.4th 1237, 1244–45 (9th Cir. 2025) (emphasis added).

The Supreme Court confirmed this methodological approach as well, explaining that the law at issue in *Bruen* "concerned conduct that could have occurred when the Second and Fourteenth Amendments were adopted—carrying a handgun outside the home for self-defense."[83] But it described *Rahimi* as involving "conduct that was distinctively modern: the possession of a firearm by a person against whom a domestic violence restraining order had been issued . . . Accordingly, application of step two of the *Bruen* framework called for a more difficult exercise of judgment," in other words, *Bruen*'s "nuanced approach".[84]

Nguyen's logic applies just as much, if not moreso, to the taxation of arms. To the extent acquiring arms is a "problem," it is certainly not a new one, as acquiring arms has been how most people have exercised the right to keep and bear arms before the Second Amendment was adopted to recognize that right.[85]

Special taxes on the purchase of arms and ammunition do not come close to qualifying for the nuanced approach because there is nothing remotely novel about either taxation or firearms. Both have existed since before the founding of the Republic. The intersection of the two—a legislature deciding whether, and in what manner, to tax the acquisition of arms—is a question that was directly available for resolution by the founding generation and their immediate successors, and yet they never did so. The few types of taxes related to arms that did exist in the eighteenth and nineteenth centuries, as will be discussed in great depth in part V, were completely dissimilar to measures like California's excise tax on guns, or to its federal inspiration, Pittman-Robertson. The first broad excise tax on firearms did not come until after World War I and is therefore well beyond the Founding Era and after the end of the nineteenth century.[86]

[83] Wolford v. Lopez, 146 S. Ct. 2032, 2045 (2026).
[84] *Id*.
[85] The other way people have gotten ahold of weapons historically is making them themselves. *See generally* Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 ST. MARY'S L.J. 1 (2023); *see also* Def. Distributed v. Blanche, Civil Action No. 4:22-cv-00691-O, 2026 U.S. Dist. LEXIS 184659, at *27 (N.D. Tex. Aug. 17, 2026) ("Americans throughout our history have continued to build their own arms. . .").
[86] In *Bruen*, the Supreme Court did not even consider twentieth century evidence that New York and its supporting amici had presented. "We will not address any of the 20th-century historical evidence brought to bear by respondents or their *amici*. As with their late-19th-century evidence, the 20th-century evidence presented by respondents and their *amici* does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 66 n.28 (2022).

B. *When Close Analogues Exist, Courts Should Not Move to Higher Levels of Generality*

Assuming for the sake of argument that a court disagrees with all of the above and grants the government the extra leeway of the "more nuanced approach," that leeway still must not be effectively endless. As the Third Circuit has ruled, "the 'more nuanced approach' does not permit us to abandon the analogical inquiry prescribed by *Bruen*."[87] No doubt that under the nuanced approach, there will be disagreements in the analysis when it comes to the degree of similarity between a modern law and proposed analogues, because ". . .reasonable minds sometimes disagree about how broad or narrow the controlling principle should be."[88] But a core interpretive rule that can be discerned from *Bruen*, *Rahimi*, *Hemani,* and *Wolford* is that when a close historical analogue exists to the modern technology or societal problem at issue, lower courts may not resort to more stretched analogies to avoid the inconvenient fact that the closer analogue does not support the government's position.

Indeed, *Bruen*'s analogical method "instructs courts to use closely matching analogues where available and to abstract up only when necessary."[89] And *Hemani* made this even clearer, as it dealt with historical laws disarming drunkards that were at least superficially similar to how the modern law at issue prohibited unlawful users of marijuana from possessing firearms. But the Court not only rejected those historical laws as insufficiently similar to the modern law, it practically mocked the government for even raising the analogy:

> Nor does the government's theory stop at Mr. Hemani. It extends equally to a husband who regularly takes his wife's prescription Ambien to sleep and a college student who routinely uses a friend's Adderall to cram for exams. The drug involved makes no difference. Nor, again, does it matter how much an individual uses or the effects it has on him. That someone regularly uses any substance found on any of the CSA's five schedules for anything other than its "prescribed purpose" is enough. Without more, the government asks us to analogize all such persons to habitual drunkards. *To state the analogy is to expose its deficiency.*[90] [emphasis added]

[87] Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. AG N.J., Nos. 24-2415, 24-2450, 24-2506, 2026 U.S. App. LEXIS 21156, at *54 (3d Cir. July 17, 2026).
[88] United States v. Rahimi*,* 602 U.S. 680, 740 (2024) (Barrett, J., concurring).
[89] George A. Mocsary, *The Wrong Level of Generality: Misapplying Bruen to Young-Adult Firearm Rights*, 103 WASH. U. L. REV. ONLINE 100, 101 (2025); *id.* ("*Bruen* directs courts to begin with the text, and then to look for distinctly similar Founding-era firearm regulations before resorting to higher levels of abstraction.").
[90] United States v. Hemani*,* 608 U.S. 772, 786–87 (2026) (citations omitted).

Similarly, in *Wolford*, which involved whether Hawaii could ban carry on private property by default, the Court rejected historical analogues that targeted poaching on private lands as too different from the challenged law to justify it:

> To test whether these analogues are "relevantly similar" to the challenged Hawaii law, we may ask the question set out earlier: "Because it was accepted that prohibiting unauthorized hunting on private land was consistent with the Second Amendment right, can we infer that it is also consistent with that right to ban a person who is lawfully carrying a concealed handgun for self-defense from entering a gas station, coffee shop, grocery store, or other private property open to the public without express and unambiguous consent?" *The question answers itself. The gap between the State's anti-poaching analogues and its new rule is just too wide*.[91] [emphasis added]

Based on those rulings, it seems that the Supreme Court is demonstrating the clear limits of what counts as a relevant historical analogue. That's a beneficial development, because the improper application of levels of generality has become a widespread issue. For example, in a case involving new bans on carry in restaurants that happen to serve alcohol in Hawaii and California (a restriction which applied even to those who are not drinking), the Ninth Circuit disregarded the lack of historical carry restrictions in the numerous bars and taverns that existed in the founding era. Instead, it pointed to colonial laws that restricted the sale of liquor to militia members, and to a few cities that banned carry in ballrooms a century later and upheld the modern laws on that basis.[92] It also did not consider that earlier generations solved the problem of armed drunks by barring only presently intoxicated people from carrying arms, not sober individuals who happened to be carrying firearms in proximity to alcohol.[93]

In another case about non-resident firearms carry and the onerous permitting processes that included wait times spanning over eight months (even for those with a carry permit in their home state), the Supreme Judicial Court of Massachusetts upheld the non-resident permit requirement, citing "going armed" and surety laws.[94] In doing so, it ignored the far

[91] Wolford v. Lopez, 146 S. Ct. 2032, 2052 (2026).
[92] Wolford v. Lopez, 116 F.4th 959, 986 (9th Cir. 2024). *Wolford*, of course, later went up to the Supreme Court, but there the case was limited to just the issue of the property default "vampire" rule. Other "sensitive place" categories have not come before the Supreme Court yet.
[93] *See* United States v. Connelly, 117 F.4th 269, 282 (5th Cir. 2024).
[94] Commonwealth v. Marquis, 495 Mass. 434, 456 (2025).

closer historical analogue: the extensive historical tradition of "traveler's exception" laws, which exempted visitors from other states from local concealed carry restrictions.[95]

When a close historical analogue is apparent, courts should not rise to higher levels of generality, particularly when earlier generations addressed the same problem in a different way (e.g., exempting travelers from carry restrictions rather than requiring them to get a permit, or disarming those who were drinking or intoxicated only, and not sober people). "[W]hen there is a clear and unbroken historical tradition, it is impermissible to analogize at levels of generality so high that precisely what was recognized as protected may now be banned."[96]

That is also exactly what the Supreme Court has already explained.[97] To do otherwise here, in cases concerning a practice (acquiring arms) that long predates the founding, would "read a principle at such a high level of generality that it waters down the right."[98] Courts should not go too far afield of the taxes on arms that existed historically. Going forward, courts should ask whether the government's proffered analogues are at least more similar to the challenged law as the analogues rejected in *Wolford* and *Hemani* were to the laws at issue in those cases. Absent a compelling justification for a significantly higher level of generality, analogues that fall short of this benchmark should not suffice.

No such justification exists in the context of taxing arms. When the government offers nineteenth century taxes on things such as bowie knives, pocket pistols, or certain dealers as analogues for modern excise taxes that apply to *all* firearms and ammunition, courts should examine whether those historical laws are meaningfully similar in purpose and operation—not merely whether they superficially involved "taxes on weapons."

C. *Why This Paper Treats All pre-1900 Historical Laws Equally*

Finally, in discussing historical analogues, *which* historical laws count is undoubtedly of critical importance. However, this paper will not focus on the debate over *Bruen*'s relevant historical time period. In that case, the Supreme Court acknowledged "that there is an

[95] *See* Brief for Nat'l Rifle Ass'n of Am. & Second Amend. Found. as Amici Curiae at 16–28, Commonwealth v. Donnell, No. SJC-13561 (Mass. filed August 16, 2024) (discussing many traveler's exception laws); *see also* Brief for Second Amendment Foundation et al. as Amici Curiae Supporting Petitioner at 7–13, Gardner v. Maryland, No. 25-5961 (U.S. Dec. 11, 2025) (discussing the same).
[96] Baird v. Bonta, 163 F.4th 723, 738 (9th Cir. 2026).
[97] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 26–27 (2022) ("[I]f earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.").
[98] United States v. Rahimi, 602 U.S. 680, 740 (2024) (Barrett, J., concurring).

ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope. . .", but ultimately decided against ruling on that question.[99] It again declined to do so in *Rahimi, Hemani,* and *Wolford*.[100] There are very strong arguments for why Founding Era history is the most critical to consider in the analysis, with later history playing only a confirmatory role.[101] In other contexts, the Court has explained that even "more than 30 States" adopting laws "in the second half of the 19th century . . . cannot by itself establish an early American tradition" because "such evidence may reinforce an early practice but cannot create one."[102] And even as it has declined to confirm the same in the Second Amendment context, it has strongly implied the Founding Era history is paramount. In *Rahimi*, the Court relied exclusively on two sets of laws (sureties and affray laws) that had at least some substantial anchor in the Founding Era.[103] And the opinion of the Court as well as several concurrences are a treasure trove of quotes suggesting the primacy of the Founding Era in *Bruen*'s historical tradition test.[104]

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[99] *Bruen*, 597 U.S. at 37.

[100] *Rahimi*, 602 U.S. at 692 n.1; United States v. Hemani, 608 U.S. 772, 783 n.3 (2026); Wolford v. Lopez, 146 S. Ct. 2032, 2058 n.7 (2026) (Barrett, J., concurring).

[101] *See* Mark W. Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, Not 1868*, 24 Harvard J.L. & Pub. Pol'y Per Curiam 31 (2022) ("No Supreme Court case has ever looked to 1868 as the principal period for determining the meaning of an individual right in the Bill of Rights. If periods after 1791 are consulted at all, it is only to confirm that subsequent authorities remained consistent with the public understanding in 1791").

[102] Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 482 (2020).

[103] *Rahimi*, 602 U.S. at 696–698 (citing a 1795 Massachusetts surety law, laws from four states and colonies prohibiting "going armed" and affrays, the common law, and Blackstone).

[104] "*Since the founding*, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." *Id.* at 690 (emphasis added); *see also id.* at 692 ("[I]f laws *at the founding* regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations.") (emphasis added); *Id.* at 709 ("[W]e seek to honor the fact that the Second Amendment 'codified a pre-existing right' belonging to the American people, one that carries the same 'scope' today that it was 'understood to have *when the people adopted' it*.") (Gorsuch, J., concurring) (quoting District of Columbia v. Heller, 554 U.S. 570, 592 (2008)) (emphasis added); *Id.* at 715 ("The first and most important rule in constitutional interpretation is to heed the text—that is, the actual words of the Constitution—and to interpret that text *according to its ordinary meaning as originally understood*.") (Kavanaugh, J., concurring) (emphasis added); *Id.* at 737 ("[T]he history that matters most is the *history surrounding the ratification of the text*; that backdrop illuminates the meaning of the enacted law. History (or tradition) that long postdates ratification does not serve that function . . . evidence of 'tradition' *unmoored from original meaning* is not binding law.") (Barrett, J., concurring) (emphasis added).

Nevertheless, a series of lower courts have refused to take these hints from the Supreme Court, and continue to insist on giving more emphasis to historical laws from the nineteenth century.[105] Fighting that battle is not the mission of this paper; instead, we will treat all history through as late as the year 1900 as equally relevant to *Bruen*'s historical analysis (only twentieth century history will be treated as irrelevant, based on what the Supreme Court itself has guided).[106] This is done for two purposes: first, if the historical review of this paper were limited to the Founding Era, it would be a very short discussion (given how few laws taxing arms existed in that era). Second, by taking such a permissive approach to the historical review and thereby "steel manning" the government's arguments, the arguments advanced in this paper remain applicable regardless of which side prevails in the "ongoing scholarly debate" over the relevant time period. But this analytical permissiveness should not be taken as endorsement of the use of later history in the *Bruen* analysis; the proper way to go about a case like this would be to only consider Founding Era evidence and promptly strike down taxation of common arms.

IV. Taxing Constitutional Rights: Lessons from Other Contexts

The proposition that the government may not single out a constitutionally protected activity for special financial burdens is well-established in constitutional law, and most thoroughly developed in the First Amendment context. The core principle that emerges from those cases maps directly onto the Second Amendment. While this section will of course not be a comprehensive look at all of the caselaw on such taxation, highlighting a few of the landmark cases is appropriate.

A. *The First Amendment Precedents and Related Cases on Taxing Rights*

The Supreme Court's most important statement on the relationship between taxation and constitutional rights is *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*. There, the Court struck down a Minnesota use tax that specifically targeted the ink and paper used by newspapers, singling them out for treatment not applied to other industries.[107] The Court explained that "[w]hen the State singles out the press . . . the political

[105] *See, e.g.,* Wolford v. Lopez, 116 F.4th 959 (9th Cir. 2024) (relying repeatedly on nineteenth century laws); Bianchi v. Brown, 111 F.4th 438 (4th Cir. 2024) (same); Bevis v. City of Naperville, 85 F.4th 1175 (7th Cir. 2023) (same).
[106] "We will not address any of the 20th-century historical evidence brought to bear by respondents or their *amici*. As with their late-19th-century evidence, the twentieth-century evidence presented by respondents and their *amici* does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 66 n.28 (2022).
[107] Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute."[108] The Court further explained that "[d]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such goal is presumptively unconstitutional."[109] While the government argued the tax was just part of their general scheme of taxation, the Supreme Court disagreed, explaining that the tax "is facially discriminatory, singling out publications for treatment that is, to our knowledge, unique in Minnesota tax law."[110]

Minneapolis Star drew a sharp distinction between generally applicable taxes (like sales taxes)—which the press, like everyone else, must pay—and targeted taxes that single out a constitutionally protected industry. "It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems."[111] But a law that "create[s] a special tax that applies only to certain publications protected by the First Amendment" is a different matter entirely.[112] The Court also underscored the raw power that differential taxation gives government: "A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected."[113]

Some years later, the Supreme Court gave an example of an acceptable tax in this context. In *Leathers v. Medlock*, Arkansas imposed a tax on receipts from the sale of all tangible personal property and of a broad range of specified services.[114] In 1987, the statute was amended so as to impose the sales tax on cable television services as well. The tax affected approximately 100 cable television operators that offered a wide variety of programming—a mixture of news, information, and entertainment—throughout the state, though newspapers and magazines were exempted. That exemption prompted a lawsuit under both the First Amendment and the equal protection clause of the Fourteenth Amendment. The Supreme Court held (among other things) that it was not a violation of the First Amendment to extend the sales tax to cable and satellite television services, or to cable television services alone,

[108] *Id.* at 585.
[109] *Id.*
[110] *Id.* at 581.
[111] *Id.*
[112] *Id.*
[113] *Id.* at 585.
[114] Leathers v. Medlock, 499 U.S. 439 (1991).

while exempting the print media from the tax: "The tax does not single out the press and does not therefore threaten to hinder the press as a watchdog of government activity."[115]

Further, the tax was not "a purposeful attempt to interfere with . . . First Amendment activities. Nor is the tax one that is structured so as to raise suspicion that it was intended to do so. Unlike the taxes involved in *Grosjean* and *Minneapolis Star*, the Arkansas tax has not selected a narrow group to bear fully the burden of the tax."[116]

Forsyth County v. Nationalist Movement reinforced these principles in the permit fee context. The Court was explicit that even a small content-based fee is unconstitutional: "A tax based on the content of speech does not become more constitutional because it is a small tax."[117] The level of the fee is irrelevant once the tax is shown to be targeted at constitutionally protected activity. This has also been confirmed in the voting context, where even a relatively modest $1.50 poll tax in the 1960s (about $15 today) was struck down by the Supreme Court as unconstitutional. "We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay."[118]

The Illinois Supreme Court's reasoning in *Boynton v. Kusper* is also instructive. In striking down a $10 tax on the issuance of marriage licenses, the court acknowledged that the amount "does not . . . impose a significant interference with the fundamental right to marry." But that was irrelevant, because once "it is conceded that the State has the power to . . . single out [a right] for special tax consideration, there is no limit on the amount of the tax that may be imposed."[119]

The Supreme Court has additionally made clear that a fee on a constitutional right may not be used as a general revenue-raising measure. In *Murdock v. Pennsylvania*, the Court struck down a license fee required of religious solicitors, explaining that the fee was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question" but rather a general revenue tax imposed on the exercise of a constitutional right.[120] Such taxes are categorically impermissible. The fees that may pass constitutional muster are those designed only "to meet the expense incident to the administration of the act

[115] *Id.* at 447.
[116] *Id.* at 448.
[117] Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 136 (1992).
[118] Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966).
[119] Boynton v. Kusper, 494 N.E.2d 135, 141 (Ill. 1986).
[120] Murdock v. Pennsylvania, 319 U.S. 105, 113–14 (1943).

and to the maintenance of public order in the matter licensed"[121]—not a revenue measure openly designed to fund entirely separate government programs.

B. *Applying the First Amendment Analogy to the Second Amendment Context*

The degree to which all of this prior tax and fee precedent from the First Amendment context has any relevance to the Second Amendment analysis is debatable. Under *Bruen*, the only thing courts are instructed to look to is the historical tradition of firearm regulation. Sticking closely to that instruction from the Supreme Court, then, means disregarding previous determinations on whether taxes and fees on other constitutional rights are permissible. Because the "Supreme Court in *Bruen* decided to discard the scrutiny regime historically applied in the context of constitutional rights, like those protected by the First Amendment, it follows that First Amendment fee jurisprudence would likewise be inapplicable in the Second Amendment context."[122]

But there are strong counterarguments to that approach, even from the Supreme Court itself. In *McDonald v. City of Chicago*, the Court emphatically stated that the Second Amendment is "not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause."[123] If that is true, then comparison to how other rights are treated is fair game.[124]

Ninth Circuit Judge Daniel P. Collins strongly argued in favor of First Amendment comparisons in a now-vacated opinion that is being reheard en banc, citing *Bruen* and *Heller* for support:

> Applying First Amendment standards to this specific question is also consistent with the Court's repeated instruction, beginning in *Heller*, that a historically based body of legal principles must be recognized in the Second Amendment context, just as has been done in the First Amendment context. *See Bruen*, 597 U.S. at 24 (noting that "*Heller* repeatedly compared the right to keep and bear arms" to "the freedom of speech in the First Amendment" and that *Bruen*'s historically based approach "accords with how [the Court]

[121] Cox v. New Hampshire, 312 U.S. 569, 577 (1941).
[122] United States v. Robinson, No. 5:22-cr-72-GAP-PRL, 2023 U.S. Dist. LEXIS 246507, at *10 (M.D. Fla. Feb. 9, 2023) (citation omitted).
[123] McDonald v. City of Chicago, 561 U.S. 742, 780 (2010).
[124] Indeed, in *Wolford*, Justice Barrett's concurrence analogized Hawaii's property default "vampire" rule to the First Amendment context, using the hypothetical of a state making it a crime to wear a hijab onto private property without consent to demonstrate the absurdity of the state's law. Wolford v. Lopez, 146 S. Ct. 2032, 2055 (2026) (Barrett, J., concurring).

protect[s]" First Amendment free-speech rights); *id.* at 24–25 (noting that the basic framework of First Amendment doctrine rests on an understanding of the "historic and traditional categor[ies]" defining constitutionally protected speech); *see also Heller*, 554 U.S. at 634–35 (similarly noting that the basic framework of First Amendment law establishes certain historically based categories and principles, rather than "a freestanding 'interest-balancing' approach").[125]

The answer to this debate may not matter to the result of the particular issue of taxing common firearms, because our nation's historical tradition of firearm regulation does not support taxing the acquisition of common arms anyway. That historical discussion follows in part V below, and it would be valid if courts decide to rely on that alone to strike down state and federal excise taxes on guns, as well as the taxes imposed on certain arms by the National Firearms Act.

But to the extent a court is persuaded that the First Amendment comparison is relevant, a major lesson that can be gleaned from tax and fee cases is that while generally applicable taxes on firearms are acceptable, singling out firearms for special taxation is unconstitutional. This conclusion finds support in the pre-*Bruen* concurring opinion of Judge Bybee in *Pena v. Lindley*. Distinguishing between generally applicable economic regulations and laws that single out firearms for special treatment, he wrote: "The analogy to the First Amendment begins to break down . . . once we move beyond rules of general applicability. In the First Amendment context, laws that single out certain kinds of speech or religion are subject to strict judicial scrutiny."[126] He identified generally applicable taxes—like sales taxes that apply to all goods—as raising no constitutional problem. But a tax expressly targeted at firearms, like the excise tax California enacted, is not a generally applicable tax. It is a tax designed to impose special financial burdens on a constitutionally protected activity, precisely analogous to the discriminatory ink-and-paper tax struck down in *Minneapolis Star*.[127]

Indeed, California's own Governor confirmed the discriminatory intent of the excise tax by calling it a "sin tax." A sin tax is one explicitly designed to discourage or penalize the taxed activity by treating it as morally suspect—akin to tobacco or alcohol. Whatever one may think of the social policy wisdom of that approach, the Supreme Court has made clear that

[125] Yukutake v. Lopez, 130 F.4th 1077, 1097 n.12 (9th Cir. 2025), *vacated*, 144 F.4th 1119 (9th Cir. 2025) (en banc rehearing pending).
[126] Pena v. Lindley, 898 F.3d 969, 1007–09 (9th Cir. 2018) (Bybee, J., concurring in part and dissenting in part).
[127] Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581 (1983).

constitutional rights may not be made the object of government disfavor through discriminatory taxation.

The related argument that federal and state 10% to 11% excise taxes on firearms are "modest"[128] and similar to other excise taxes misses the point entirely—it is the fact of singling out a constitutional right, not the magnitude of the initial imposition, that creates the constitutional defect.[129] *Forsyth County v. Nationalist Movement* and similar cases make that abundantly clear. True enough, a draconian tax that was much higher would be an even greater offense, and one such tax of $1,000 per handgun sold was previously struck down by the United States District Court for the Northern Mariana Islands pre-*Bruen,* in an unpublished ruling.[130] The court found "no legitimate and important interest to be served by the special tax on handguns," noting that "[p]ublic safety cannot be the legitimate interest, unless the Commonwealth seeks to safeguard the community by disarming the poor."[131] But that level of punitive taxation is not necessary to raise a constitutional claim, at least to the extent we can take guidance from other contexts outside of the Second Amendment.[132]

Even if the state and federal excise taxes were somehow construed as a "fee," and it is not clear how they ever could be, they still would fail the analysis. As discussed previously, fees on constitutionally protected activity are permissible only "to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed."[133] The proceeds of California's excise "sin" tax are deposited in the "Gun Violence Prevention and School Safety Fund" and used to fund gun-related crime prevention programs, victim services, and community programs across the state.[134] As for Pittman-Robertson revenue,

[128] Defendants' Memorandum of Points and Authorities in Support of Demurrer to Complaint at 10, *Poway Weapons & Gear, Inc. v. California Department of Tax and Fee Administration*, No. 25CV018964 (Cal. Super. Ct. Sacramento County Oct. 27, 2025).
[129] *Minneapolis Star*, 460 U.S. at 598 (Rehnquist, J., dissenting); *id.* at 583 (majority op.) (the constitutional infirmity lies in "differential treatment" of the press, not the relative burden at any given time).
[130] *Murphy*, 2016 WL 5508998, at *23–24.
[131] *Id.*
[132] *Murphy* contained some language suggesting that a 13% tax might survive scrutiny, based on a comparison to other Commonwealth excise taxes. But that case predated *Bruen*, which abrogated the interest-balancing framework on which that suggestion relied. Under *Bruen*, the constitutionality of a special arms tax is not determined by asking whether the burden it imposes is proportionate to some governmental interest.
[133] Cox v. New Hampshire, 312 U.S. 569, 577 (1941).
[134] Cal. Rev. & Tax. Code §§ 36005, 36041; Stats. 2023, ch. 231, § 2(m) (directing tax proceeds to the Gun Violence Prevention and School Safety Fund for gun violence prevention, healing, and recovery programs).

while that goes towards programs more gun owners approve of,[135] it is nonetheless not a fee implemented to meet the expenses inherent to administrating the sale of firearms. Finally, National Firearms Act taxes were passed as general revenue measures and are likewise not used strictly to fund the administration of NFA transfers.[136]

These are not expenses incident to administering the tax or policing the sale of firearms; they are general governmental programs funded on the backs of those exercising a constitutional right. That is precisely what *Murdock* forbids.[137]

C. *A Note on Cases Concerning the Tax Imposed by the National Firearms Act*

A series of cases exist concerning the National Firearms Act and its constitutionality, and they merit at least brief mention here. The reason they do not feature heavily into this paper is because their underlying logic to uphold NFA taxation of certain arms was mostly not based on the Second Amendment, and certainly not based on *Bruen*'s analysis, but rather on the taxing power. The first big case on this topic was *Sonzinsky v. United States,* where the Supreme Court considered the "question of whether the NFA's $200 tax on dealers in firearms was a constitutional exercise of Congress's enumerated powers."[138] Sonzinsky argued that a taxing measure, by virtue of its deterrent effect on the activities taxed, is a regulation that is outside of Congress's taxing power. The Supreme Court disagreed, holding

[135] "The act provides funding for the selection, restoration, and improvement of wildlife habitat and for wildlife management research. The act was amended in 1970 to include funding for hunter education programs and for the development and operation of public target ranges." *Pittman–Robertson Act*, HUNTER-ED, https://www.hunter-ed.com/national/studyGuide/Pittman–Robertson-Act/201099_92789 (last visited June 5, 2026).

[136] That the amount raised from NFA taxes has been negligible in recent years does not change that. "A statute does not cease to be a valid tax measure because it deters the activity taxed, because the revenue obtained is negligible, or because the activity is otherwise illegal." Minor v. United States, 396 U.S. 87, 98 n.13 (1969).

[137] In *Koons v. Attorney General of New Jersey* a panel of the Third Circuit held that a $50 fee imposed on handgun-carry-permit applicants, which went beyond defraying the costs of administering the permitting program, was likely unconstitutional. 156 F.4th 210, 246–47 (3d Cir. 2025), *reh'g en banc granted, vacated by* 162 F.4th 100 (3d Cir. 2025) (mem.). Because the fee served a purpose beyond administration of the licensing program itself, it effectively was a tax targeting constitutional conduct. *Id.* The part of the Third Circuit panel's decision holding the "fee" likely unconstitutional was unanimous, *see id.* at 274 (Porter, J., concurring in the judgment in part and dissenting in part), and the rehearing petitions targeted other aspects of the panel's ruling, Pls.-Appellees' Pets. for Reh'g En Banc, Koons v. Att'y Gen. N.J., 162 F.4th 100 (3d Cir. Oct. 8, 2025) (No. 23-2043), ECF Nos. 126, 127. It therefore seems unlikely that the en banc court will disturb it. The Third Circuit's persuasive opinion in *Koons* stands for the proposition that States may not place a financial tax on the exercise of protected Second Amendment conduct.

[138] Bezet v. United States, 276 F. Supp. 3d 576, 617 (E.D. La. 2017).

that "a tax is not any the less a tax because it has a regulatory effect."[139] A series of cases over the years have held the same.[140]

A much more recent case, *United States v. Cox*, did briefly look at the issue from a Second Amendment perspective, but the Tenth Circuit concluded the types of arms affected by NFA taxation are not protected by the Second Amendment.[141] Even conceding for the sake of argument that that conclusion is correct (it is not),[142] it has nothing to say about excise taxes on guns that *are* indisputably protected by the Second Amendment, such as handguns.

In *United States v. Peterson*, the Fifth Circuit relied entirely on a footnote in *Bruen* to uphold the NFA's registration and taxation requirements, writing that "Peterson nowhere contends or produces evidence that a $200 tax as applied to him would 'deny' him his Second Amendment rights."[143] That totally misunderstands the footnote it relied on, where the Supreme Court explained that *fees* that are not exorbitant are acceptable.[144] The Supreme Court never blessed revenue-generating taxes unrelated to the administration of the permitting process. Other courts have made the same mistake,[145] and numerous judges on the Fifth Circuit have called for *Peterson* to be reversed en banc.[146]

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[139] Sonzinsky v. United States, 300 U.S. 506, 513 (1937).
[140] *See, e.g.*, Sipes v. United States, 321 F.2d 174, 177 (8th Cir. 1963); Haynes v. United States, 390 U.S. 85, 87 (1968); United States v. Ross, 458 F.2d 1144, 1145 (5th Cir. 1972).
[141] "In sum, the Second Amendment protects neither (1) short-barreled rifles, nor (2) silencers, nor (3) the business of manufacturing and dealing in silencers, so the NFA's regulation of these activities doesn't burden protected conduct. Our analysis thus ends at its first step, and we needn't test the challenged regulations under any form of means—end scrutiny." United States v. Cox, 906 F.3d 1170, 1187 (10th Cir. 2018).
[142] *See* Brief of Amici Curiae Second Amendment Foundation, Second Amendment Law Center, et al. in Support of Petitioner at 14–19, Jamond M. Rush v. United States, No. 24-1259 (U.S. Aug. 28, 2025), https://saf.org/wp-content/uploads/2025/08/Rush-amicus-8.28.25.pdf (arguing why short-barreled rifles are protected by the Second Amendment).
[143] United States v. Peterson, 161 F.4th 331, 340 n.3 (5th Cir. 2025) (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 38 n.9 (2022)).
[144] *Bruen*, 597 U.S. at 38 n.9
[145] "Even if short-barreled rifles fall within the 'plain text' of the Second Amendment, however, his argument is presumptively foreclosed by *Bruen* itself. 142 S. Ct. at n. 9. The Supreme Court took special care to explicitly state that 'nothing in our analysis should be interpreted to suggest the unconstitutionality of...licensing regimes [which] do not require applicants to show an atypical need for armed self-defense' because 'they do not prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right.'" *Robinson*, 2023 U.S. Dist. LEXIS 246507, at *10.
[146] "*Peterson* problems therefore abound. While this Court is bound by the rule of orderliness . . . *Peterson* requires revisitation. I urge the en banc court to recalibrate our Second Amendment jurisprudence to reflect text, history, and tradition—not interest-balancing." United States v.

New litigation challenging the NFA includes Second Amendment arguments,[147] and the rulings resulting from those challenges may shed further light on how courts see these issues.

D. *Assessing the First Court Ruling on the Constitutionality of Excise Taxes on Firearms*

State-level excise taxes on firearms are of relatively recent vintage, and Pittman-Robertson does not appear to have faced a substantive legal challenge (and certainly none post-*Bruen*). But there has been one initial ruling on this topic that merits some discussion. In litigation challenging the constitutionality of California's excise tax on firearms and ammunition,[148] the State filed a motion to have the entire lawsuit dismissed for failing to state a cognizable claim.

The State advanced three primary arguments in its demurrer.[149] First, it argued that the plaintiffs cannot establish that firearms retailers are among "the People" accorded Second Amendment rights. Relatedly, it also argued that the plain text of the Second Amendment does not protect the rights of retailers to sell firearms and ammunition without a tax.[150]

Second, California argued that even if there is standing for gun dealers to bring Second Amendment claims on behalf of their customers—and some Ninth Circuit and California

Comeaux, No. 24-30307, 2026 U.S. App. LEXIS 17772, at *12–13 (5th Cir. June 18, 2026) (Clement, J., and Duncan, J., concurring).

[147] *See, e.g.,* Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment at 24–41, Brown v. Bureau of Alcohol, Tobacco, Firearms and Explosives, No. 4:25-cv-01162-SRC (E.D. Mo. Nov. 14, 2025).

[148] While California courts are historically hostile to Second Amendment claims, the Plaintiffs had no choice but to bring their case in state court thanks to the Federal Tax Injunction Act. "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C.A. § 1341 (West). And a number of cases have held that having constitutional claims does not matter. "It is well settled that allegations of deprivations of constitutional rights do not render the Act inapplicable." Schneider Transp., Inc. v. Cattanach, 657 F.2d 128, 131 (7th Cir. 1981); *see also* Jerron W., Inc. v. State of Cal., State Bd. of Equalization, 129 F.3d 1334 (9th Cir. 1997).

[149] *See* Defendants' Memorandum of Points and Authorities in Support of Demurrer to Complaint at 12–20, Poway Weapons & Gear, Inc. v. California Department of Tax and Fee Administration, No. 25CV018964 (Cal. Super. Ct. Sacramento Cnty. Oct. 27, 2025).

[150] The State had previously complained that non-taxpayers could not challenge the tax when Plaintiffs had brought suit with both retailers *and* buyers as plaintiffs. *See* Defs.' Mem. in Supp. of Demurrer at 12, Jaymes v. Maduros, No. 37-2024-00031147-CU-MC-CTL (Cal. Super. Ct. Feb. 18, 2025) ("The Individual Plaintiffs are not the taxpayers and lack standing to bring this action . . . . "[O]nly *retailers* as the taxpayers are authorized to file and prosecute a tax refund action against the Department." (emphasis added)).

state court precedent certainly suggests as much[151]—the 11% excise tax is not a "meaningful constraint" on the right to keep and bear arms.[152] The State also advanced the sub-argument that "[r]etailers are permitted—but not required—to obtain reimbursement for their tax liability from the consumer at the time of sale."[153] Firearm retailers have relatively thin profit margins, and cannot afford to simply swallow an 11% tax and remain in business.[154] That did not stop California from arguing that gun purchasers "have the option of purchasing firearms from a retailer that chooses not to pass along the cost of the tax," or to buy a used gun from a private party, or via an intrafamilial transfer.[155] The State's ultimate position was that because Plaintiffs failed to meet their burden at the supposed "step one" of *Bruen* (see parts II and III of this paper), no historical analysis needed to be conducted.

Finally, the State argued that Supreme Court First Amendment precedent on the taxation of rights is inapplicable, because *Bruen* rejected means-end scrutiny, an argument that was discussed earlier in this paper.

The Court issued its ruling on June 9, 2026, and unsurprisingly sided with California for the most part, though it rejected the State's most maximal arguments.[156] Taking the restrictive view of the "plain text analysis" that this paper rejected in part I above, the Court held that the plain text of the Second Amendment does not cover the plaintiffs' proposed course of conduct (selling firearms and ammunition without paying the 11% excise tax).[157] Because the text does not cover that conduct, the Court did not proceed to *Bruen*'s historical-tradition analysis, dodging any discussion of historical laws entirely.

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[151] "A vendor challenging a firearms regulation must be able to demonstrate that the would-be purchasers' core right of possession is being meaningfully constrained." United States v. Vlha, 142 F.4th 1194, 1198 (9th Cir. 2025); *see also* Andal v. City of Stockton, 137 Cal. App. 4th 86, 94 (2006).

[152] For more on why the Ninth Circuit's "meaningful constraint" test is antithetical to *Bruen*, see Part I of this paper, *supra*.

[153] *See* Defendants' Memorandum of Points and Authorities in Support of Demurrer to Complaint at 17, Poway Weapons & Gear, Inc. v. California Department of Tax and Fee Administration, No. 25CV018964 (Cal. Super. Ct. Sacramento Cnty. Oct. 27, 2025).

[154] "Before the pandemic hit, most brick-and-mortar stores were in the neighborhood of 12% to 20% margin for new firearms, depending on specific model and category." Doug VanderWoude, *Margin Boosters*, SHOOTING INDUSTRY (Dec. 2021), https://shootingindustry.com/discover/margin-boosters.

[155] *See* Defendants' Memorandum of Points and Authorities in Support of Demurrer to Complaint at 17–18, Poway Weapons & Gear, Inc. v. California Department of Tax and Fee Administration, No. 25CV018964 (Cal. Super. Ct. Sacramento Cnty. Oct. 27, 2025).

[156] Poway Weapons & Gear, Inc. v. California Department of Tax and Fee Administration, No. 25CV018964 (Cal. Super. Ct. Sacramento Cnty. June 9, 2026) (minute order sustaining demurrer in part and overruling in part).

[157] *Id.* at 5.

However, that was not the end of the matter as California hoped, because the Court did at least acknowledge that "because a right to purchase and sell firearms and ammunition is ancillary to the core protections of the Second Amendment, Plaintiffs' claims do not immediately fail."[158] The Court sustained the demurrer because it could not "find an allegation that any individual has been burdened, discouraged, or effectively prohibited from purchasing a firearm because of the AB 28 excise tax."[159] Plaintiffs were granted leave to amend their complaint to add such allegations.

Lastly, the Court agreed with the State that the tax and fee jurisprudence from the First Amendment context is not relevant to the *Bruen* analysis, which rejected means-end scrutiny. For this Court then, the only way Plaintiffs succeed is not under either *Bruen,* nor via comparisons to the First Amendment context; rather, because the right to acquire arms is an "ancillary" right, they must show that the excise tax is a "meaningful constraint" on the ability to acquire firearms.[160]

The Court's analysis finds no support in the Supreme Court's Second Amendment jurisprudence and instead borrows liberally from the Ninth Circuit's misinterpretation of it. It is, as discussed previously in part I, interest balancing by another name, and ignores that "[t]he Second Amendment's text is not limited to direct prohibitions on possessing or using firearms. It states that the 'right of the people to keep and bear Arms, shall not be infringed.'"[161] Nor is this analysis even workable because the 11% tax is obviously not a "meaningful constraint" for the wealthy, but may be a considerable burden of additional expense to the poor. That would mean the tax is only unconstitutional for poor people, which would be a novel conclusion in any context on the constitutionality of taxes. Would gun stores get to apply for refunds for their "poor" customers, and then send the money back to them? We can only speculate, but it is perhaps unsurprising that nonsensical analyses would lead to nonsensical results.

Plaintiffs will have their work cut out for them succeeding in the California state courts, which are historically very hostile to Second Amendment claims.[162] If the litigation is indeed unsuccessful in the state courts, then after a California State Supreme Court ruling or denial

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[158] *Id.*
[159] *Id.* at 6.
[160] *Id.* at 7.
[161] Ortega v. Grisham, 148 F.4th 1134, 1143 n.3 (10th Cir. 2025).
[162] "The claim that legislation regulating weapons violates the Second Amendment has been rejected by every court which has ruled on the question . . . It is long since settled in this state that regulation of firearms is a proper police function." Galvan v. Superior Court of S.F., 70 Cal. 2d 851, 866 (1969).

of review, they will be allowed to petition to the United States Supreme Court for relief. The case is certainly one to follow closely as it moves forward.

V. The Historical Record: Special Taxes on Arms Lack Support

Having established the applicable legal framework, at long last we can finally turn to an examination of the relevant history of taxes on arms. The question under *Bruen* is whether there exists, in the period from the founding through (for the purposes of this paper) the year 1900, a "widespread, well-known, and widely accepted"[163] tradition of imposing special taxes on the purchase of arms commonly owned for lawful purposes. A careful survey of the available record reveals that no such tradition exists.

In examining the relevant history, we keep in mind the Supreme Court's direction that "the more a modern law diverges from traditional laws in purpose and operation, the less likely it is to survive review."[164] If historical taxes targeted "different kinds of people . . . for different reasons, and operated in different ways,"[165] then they are not relevantly similar to modern excise taxes.

A. *The Colonial and Founding Eras*

One of the first legal documents in American history explicitly limited the taxation of arms. Specifically, "The Great Patent of New England," issued by King James I of England on November 3, 1620, stated that for the first seven years of the colony's existence, New England colonists could freely import arms, armor, powder, and other military supplies without paying any customs duties or import taxes either when importing them into the colony, or exporting them for sale abroad.[166] Some of the earliest Virginia colonial charters did the same, with the Second Charter of Virginia declaring in 1609 that the colonists could equip themselves with sufficient "Armour, Weapons, Ordinance, Munition, Powder, [and] Shot" without "paying Subsidy, Custom, Imposition, or any other Tax or Duty."[167]

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[163] Wolford v. Lopez*,* 146 S. Ct. 2032, 2053 (2026).
[164] United States v. Hemani*,* 608 U.S. 772, 780–81 (2026).
[165] *Id.* at 783.
[166] *The Great Patent of New England* (Nov. 3, 1620), *reprinted in* WILLIAM BRIGHAM, THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH: TOGETHER WITH THE CHARTER OF THE COUNCIL AT PLYMOUTH, AND AN APPENDIX, CONTAINING THE ARTICLES OF CONFEDERATION OF THE UNITED COLONIES OF NEW ENGLAND, AND OTHER VALUABLE DOCUMENTS 10–11 (1836).
[167] *The Second Charter of Virginia* (May 23, 1609), *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3790, 3799 (Francis Newton Thorpe ed., 1909).

A 1762 New York City ordinance was likewise concerned with keeping down the cost of arms. It imposed a price control on the rate "cart-men" could charge for transporting gunpowder around New York City, setting the maximum at 2 shillings and 6 pence for up to 4 casks of gunpowder.[168]

Other laws "taxed" Americans by requiring that they *possess* arms so that they could be ready if called to serve in the militia, even going as far as to make militia arms exempt from forfeiture for nonpayment of taxes. For example, a 1793 Massachusetts statute imposed affirmative obligations on men eligible for militia service. That included owning and maintaining "a good musket, with an iron or steel rod, a sufficient bayonet and belt, two spare flints, a priming wire and brush, and a knapsack; a cartridge-box, or pouch with a box therein, to contain not less than twenty-four cartridges, suited to the bore of his musket," and these arms and accoutrements were "exempted from all suits, distresses, executions, or sales for debt, or for payment of taxes."[169] A 1782 Delaware statute required most men between the ages of 18 and 50 to personally provide and maintain their own militia equipment at their own expense, including a musket with a bayonet, 23 cartridges, and more.[170] Other states passed similar laws in the founding era and after.[171] And the federal 1792 Militia Act exempted militia arms "from all suits, distresses, executions or sales, for debt or for the payment of taxes."[172]

Some of the earliest historical examples of laws imposing taxes on arms specifically (as opposed to general duties that applied to all items) were not really taxes in any meaningful sense, but more akin to regulatory fees. For example, a 1762 New York colonial law barred storing more than 28 pounds of gunpowder in New York City within two miles of City Hall,

[168] *A Law for Regulating of Carts and Cart-Men, no. 8, § XII, in* LAWS, STATUTES, ORDINANCES AND CONSTITUTIONS, ORDAINED, MADE AND ESTABLISHED, BY THE MAYOR, ALDERMEN, AND COMMONALTY, OF THE CITY OF NEW-YORK, CONVENED IN COMMON-COUNCIL, FOR THE GOOD RULE AND GOVERNMENT OF THE INHABITANTS AND RESIDENTS OF THE SAID CITY 19 (1763).
[169] *An Act for Regulating and Governing the Militia of the Commonwealth of Massachusetts*, ch. 1, §§ 18–19, 1793 Mass. Acts 289, 298–99; § 24, 304; §§ 37–38, 306–07 (Thomas Adams).
[170] *An Act for Establishing a Militia Within This State*, 1781 Del. Laws 1, 3 (James Adams 1782) (law passed February 5, 1782).
[171] *See, e.g., An Act in Addition to and Alteration of an Act, Entitled, "An Act for Forming and Conducting the Military Force of this State, Conformable to the Act of Congress," Passed the 8th Day of May 1792*, 1799 Conn. Acts 511, 512–13 (Hudson & Goodwin) (creating a fine schedule for men who fail to show up to musters or who are missing required arms or ammunition); *see also An Act to provide for the collection of taxes assessed upon the inhabitants of towns*, ch. 62, § 2, 1827 N.H. Laws 231, 232 (Isaac Hill).
[172] Militia Act of 1792, § 1, 1 Stat. 271, 272.

and imposed a fine of Ten Pounds for violations.[173] If someone wished to store more, they were required to pay a fee of three shillings per barrel of powder per year to use a designated "Powder-House." The Supreme Court has already characterized these colonial powder storage laws as "fire-safety" regulations rather than gun control measures.[174] Black powder was an extreme fire hazard in the densely packed wooden cities of the era, and the laws were designed to prevent conflagrations, not to tax the exercise of Second Amendment rights. Indeed, the law's title even referenced that it was meant to secure the City from the "Danger of Gun-Powder." These sorts of fire-prevention laws concerning gunpowder were common in larger cities and continued into the nineteenth century.[175]

The closest thing to an excise tax on arms or ammunition in the colonial era was a 1759 New Hampshire law that required foreign ships that weighed over 30 tons entering port to pay a tax of two shillings per ton of gunpowder in order to support "his Majesty's fort and fortifications within this province."[176] This was not a tax that applied to *all* arms or ammunition, but instead a port duty on imported powder, applied only to foreign ships. It differs fundamentally from a modern excise tax on retail firearm sales. Moreover, it appears to be an outlier; similar laws are sparse or nonexistent elsewhere in the colonial record. As Justice Kavanaugh noted in *Rahimi*, "in using pre-ratification history, courts must exercise care to rely only on the history that the Constitution actually incorporated and not on the history that the Constitution left behind."[177]

As for the founding era, the only notable tax on arms came in the form of tariffs. For example, as part of its first federal tariff act in 1789, Congress placed an import tax on gunpowder at the rate of 10%.[178] Starting on July 1, 1794, imported firearms faced a 15%

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[173] *Law for the better Securing of the City of New-York, from the Danger of Gun-Powder, no. 21, §§ 1–6, in* LAWS, STATUTES, ORDINANCES AND CONSTITUTIONS, ORDAINED, MADE AND ESTABLISHED, BY THE MAYOR, ALDERMEN, AND COMMONALTY, OF THE CITY OF NEW-YORK, CONVENED IN COMMON-COUNCIL, FOR THE GOOD RULE AND GOVERNMENT OF THE INHABITANTS AND RESIDENTS OF THE SAID CITY 39–40 (1763).

[174] District of Columbia v. Heller, 554 U.S. 570, 632 (2008) (characterizing colonial powder storage laws as "fire-safety" measures rather than gun control).

[175] *An Ordinance for the Safe Keeping of Gunpowder Within the City of Baltimore, and the Precincts Thereof, §§ 1–15 An Ordinances of the Corporation of the City of Baltimore, with the Act of Incorporation and Supplement Thereto Prefixed* 277–83 (1801); *Ordinances of the City of Little Rock, §§ 232–245, in* LITTLE ROCK, ARKANSAS, A DIGEST OF THE LAWS AND ORDINANCES OF THE CITY (1871) (law passed May 30, 1870).

[176] *An Act about Powder Money, reprinted in Acts and Laws of His Majesty's Province of New Hampshire in New England: With Sundry Acts of Parliament; by Order of the Governor, Council and Assembly, Pass'd October 16th, 1759*, 63 (1761).

[177] United States v. Rahimi, 602 U.S. 680, 723 (2024) (Kavanaugh, J., concurring).

[178] Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24, 25.

tax.[179] But these tariffs differed greatly from modern excise taxes on firearms in both how they operated and why they existed. Most obviously, they only applied to imports, while domestic gunmakers could sell their products without paying any such duties. And that promotion of domestic production was the entire point; Alexander Hamilton's highly influential 1791 *Report on Manufactures* recommended protective tariffs on firearms to support domestic production, along with other incentives.[180] Whatever the wisdom and effectiveness of this protectionism—and it did have some critics[181]—the idea was not a "sin tax" like California's modern effort to discourage gun sales, but rather an attempt to ensure the young nation was not reliant on imported foreign arms.[182]

Moreover, firearms and gunpowder were far from the only goods that had import duties placed on them in order to promote domestic production. Hamilton also recommended (and Congress adopted) tariffs on raw steel, iron, carpets, linens, glue, brass wares, books, chocolate, and much more.[183] Similarly, the 1789 tariff on gunpowder mentioned earlier was not alone, as Congress simultaneously imposed tariffs on looking-glasses, shoe and knee buckles, paper, cabinet wares, buttons, saddles, leather, clothing, and many other types of goods.[184] Tariffs were thus more akin to a generally applicable sales tax (albeit only applied to imports), and not unique to firearms in the way current excise taxes like Pittman-Robertson or the NFA's transfer taxes are. And that makes sense, given that tariffs were "the primary source of revenue for the federal government during the Founding Era, and they remained as such for most of the first 150 years of American history as the U.S. emerged to become an economic superpower."[185]

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[179] Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms*, 1787–1823, 7 WM. & MARY BILL RTS. J. 347, 370 n.124 (1999) (discussing various founding era tariffs on arms).
[180] Douglas A. Irwin, *The Aftermath of Hamilton's "Report on Manufactures"*, 64 J. ECON. HIST. 800, 812 (2004).
[181] Tench Coxe, for example, "argued that gunpowder already was being manufactured in several places more cheaply than it could be imported." Halbrook & Kopel, *supra* note 179.
[182] In fact, in 1794 Congress even banned the export of "any cannon, muskets, pistols, bayonets, swords, cutlasses, musket balls, lead, bombs, grenados, gunpowder, [and] sulphur or saltpetre" for one year. *An Act Prohibiting for a Limited Time the Exportation of Arms and Ammunition, and Encouraging the Importation of the Same*, ch. 33, 1 Stat. 369 (1794).
[183] Irwin, *supra* note 180.
[184] Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24, 25.
[185] Scott A. Burns & Caleb S. Fuller, *The Fairy Tale of Returning to a Tariff-funded Government*, INDEP. INST. (May 23, 2025), https://www.independent.org/article/2025/05/23/tariff-funded-government.

In sum, the historical record from the colonial and founding eras provides no support for the existence of a "well-established and representative"[186] national tradition of imposing special taxes on the purchase or possession of commonly owned arms. To the contrary, the evidence points in the opposite direction: the founding generation explicitly exempted arms and military supplies from import duties in one of the earliest legal documents governing English settlement in America. When tariffs were later imposed in the founding era, it was to promote the domestic arms industry, not an attempt to make firearms more costly for citizens to acquire. Militia laws of the era affirmatively *required* citizens to keep and maintain arms while simultaneously protecting those arms from seizure or taxation to satisfy debts. And the few laws that touched on gunpowder in any economic sense were either narrow port duties on foreign shipping or regulatory storage fees designed to mitigate the extreme fire hazards posed by black powder in densely built wooden cities—measures the Supreme Court has already characterized as fire-safety regulations rather than restrictions on the right to keep and bear arms.

None of these historical analogues supports the imposition of a special tax on the retail sale or purchase of firearms and ammunition to law-abiding citizens. The near-total absence of such taxation during the most relevant historical period is itself powerful evidence that the founding generation did not understand the right to keep and bear arms as compatible with special taxes targeting the exercise of that right. For courts that decide to stick closely to founding-era history, which is the correct approach, that should end the historical analysis.

Nevertheless, we continue our journey through history to show that modern excise taxes on common arms find no support in the nineteenth century, either.

B. *Nineteenth Century Taxes on Arms: Targeting "Dangerous and Unusual" Weapons Only*

In the nineteenth century, some laws began to appear that more closely resembled per-unit taxes on certain weapons. But these laws share a critical characteristic that distinguishes them categorically from a modern broad-based excise tax on all firearms and ammunition: they were targeted almost exclusively at weapons already considered "dangerous and unusual", like bowie knives and pocket pistols, and conspicuously excluded the prevailing arms of the day that were in common use for lawful purposes. Further, whereas these historical laws dealt with criminal misuse of particular weapons by imposing a tax burden on only those weapons to discourage their carry, the modern excise taxes apply to *all* firearm sales, either to fund conservation (in the case of Pittman-Robertson) or to

[186] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022).

respond "to the general danger associated with the presence of firearms, not to any specific, heightened risk of their misuse"[187] (in the case of the California and Colorado excise taxes). At best, the analogues may provide support for things like the National Firearms Act's tax on machine guns or explosives to the extent such weapons are considered "dangerous and unusual" today, but they would not support excise taxes on common handguns, rifles, and shotguns.

Moreover, weapons that were once deemed "dangerous and unusual"—and therefore taxable—may not fall into that category anymore today. The best example of this is handguns. As *Bruen* explained:

> Whatever the likelihood that handguns were considered "dangerous and unusual" during the colonial period, they are indisputably in "common use" for self-defense today [colonial laws restricting handguns] provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.[188]

In the same way the law is not "trapped in amber,"[189] the arms the Second Amendment protects are not either. The proper analogue to taxing common arms owned for lawful purposes today would be taxing the prevailing arms owned for lawful purposes in the past, and not taxes that only applied to those weapons seen as "dangerous and unusual." In other words, the historical analogue for things like California's modern excise tax on firearms and ammunition would be historical taxes that applied to long guns and large pistols, and not merely bowie knives, pocket pistols, and other disfavored weapons of the time.[190] With that analytical approach in mind, we turn to some historical laws from the antebellum era.

[187] Wolford v. Lopez, 146 S. Ct. 2032, 2058 (2026) (Barrett, J., concurring).
[188] *Bruen*, 597 U.S. at 47.
[189] United States v. Rahimi, 602 U.S. 680, 691 (2024).
[190] Bowie knives and pocket pistols were not the standard arms of lawful self-defense and militia use in antebellum America. They were regarded by many commentators of the era as the weapons of criminals and duelists—carried concealed and used in personal quarrels rather than borne openly for lawful purposes. Nineteenth-century legal scholars explicitly distinguished between these weapons and the arms protected by the Second Amendment. Henry Campbell Black, author of *Black's Law Dictionary*, wrote that Second Amendment "arms" meant: "those of a soldier. They do not include dirks, bowie knives, and such other weapons as are used in brawls, fights, and riots. The citizen has at all times the right to keep arms of modern warfare . . . But a law which should prohibit the wearing of military weapons openly upon the person, would be unconstitutional." Henry Campbell Black, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 403–04 (1895).

A particularly draconian early example was Alabama's 1837 "*Act to Suppress the Use of Bowie Knives*." The law imposed an eye-popping $100 tax (about $3,500 today) on anyone who sold, gave away, or otherwise transferred a bowie knife or similar weapon in the state.[191]

Most other taxes on these sorts of weapons of the time period were not nearly so severe, and they typically did not tax individual sales. An 1838 law from territorial Florida taxed dealers of dirks, pocket pistols, and bowie knives $200 per year to operate their business and also taxed those who publicly *carried* those specific weapons $10 per year.[192] These amounts were considerable, the equivalent of a $7000 annual business license and a $350 carry permit today, but fell far short of the Alabama law's levy of $100 per bowie knife transfer.

An 1844 Mississippi law taxed bowie knives at one dollar and dueling or pocket pistols at two dollars (roughly $39 and $78 in modern dollars respectively).[193] The tax was later repealed just after the Civil War started, and sheriffs or tax collectors were expressly prohibited from collecting it.[194] Alabama, the same state which previously exorbitantly taxed the transfer of bowie knives, in 1852 only taxed their possession (as well as certain handguns) at $2 each annually.[195] North Carolina taxed bowie knives and pistols at $1.25 each annually in 1856 (roughly $50 today), though it exempted pistols used for mustering, and the tax only applied to those weapons that were publicly carried.[196] The City of Charlotte went much further, taxing all "deadly weapon[s] worn upon the person except a pocket knife" at $50 (roughly $1,000 today). The tax was waived if permission was received beforehand.[197] The City of Jackson, Mississippi imposed a lighter $5 tax on bowie knives and pistols, though it was not limited to only carried weapons.[198]

An 1866 Georgia law was an interesting outlier in that it applied to long guns as well. However, the $1 tax (about $20 today) only applied in three counties (Camden, Glynn, and Effingham), and only to plantations that kept more than three such weapons on their

[191] *An Act to Suppress the Use of Bowie Knives*, no. 11, §§ 1–2, 1837 Ala. Laws 7, 7 (Ferguson & Eaton).
[192] Act of Feb. 10, no. 24, §§ 1–3, 1838 Fla. Terr. Laws 36, 36 (S. S. Sibley).
[193] *An Act to Amend and Reduce into One the Several Acts in Relation to the Revenue of This State, and for Other Purposes*, ch. 1, § 1, 1844 Miss. Laws 57, 58 (C. M. Price & S. Rohrer).
[194] *An Act to Prohibit the Assessment and Collection of Taxes on Bowie-Knives, Sword-Canes and Dirk-Knives*, ch. 125, §§ 1–2, 1861 Miss. Laws 134, 134 (Cooper & Kimball 1862).
[195] *An Act Further to Equalize and Improve the Revenue Laws*, no. 1, § 1, 1852 Ala. Laws 5, 5–6 (Brittan & De Wolf).
[196] *An Act Entitled "Revenue,"* ch. 34, § 23, pt. 4, 1856–1857 N.C. Sess. Laws 34.
[197] *An Act to Incorporate the Mayor and Board of Alderman of the City of Charlotte*, ch. 7, § 19, no. 6, 1866 N.C. Sess. Laws 63, 53–72 (W.M. E. Pell 1866).
[198] *An Ordinance Prescribing the Rates of Taxation for the City of Jackson*, § 1, art. 7, in JACKSON, MISSISSIPPI, CHARTER OF THE CITY AND REVISED ORDINANCES (1867).

premises.[199] An 1867 Mississippi law similarly taxed each "rifle, shotgun, or army gun" at $0.50 each (about $10 today), and taxed pistols and bowie knives at $2 each.[200] While also an outlier in taxing long arms, it did tax them significantly less than the "dangerous and unusual" bowie knives and pistols. More importantly, the timing of this law may suggest it was more a desperation measure in light of the Confederacy having lost the Civil War and trying to re-subjugate newly freed former slaves.

Moreover, at the time, Mississippi was not a state, but a defeated Confederate state entering Reconstruction, and the arms laws of former Confederate states not yet readmitted into the union are likely not a particularly persuasive part of our national tradition. In *Wolford*, the Supreme Court condemned the use of race-based analogues, banishing it from the *Bruen* analysis. "When the war ended, the legislatures in defeated Confederate States quickly enacted so-called Black Codes that aimed to perpetuate the subjugation of blacks," and the claim that these "tainted artifact[s] illuminate[] the original understanding of the right to keep and bear arms cannot be taken seriously."[201]

Regardless, by now a noticeable trend should be taking shape: these taxes on things like bowie knives and pocket pistols were not part of any national tradition but instead were concentrated almost exclusively in *Southern* states and territories, and only rarely affected the long guns seen as the prevailing arms of their time. Given the historical context of the era,[202] the desire to make sure slaves were not armed, and later, the push to price newly freed Black Americans out of firearm ownership as part of the systematic oppression of Jim Crow, likely motivated many of these laws.

An 1867 Mississippi law is the most blatant example. It assessed a tax of between five and fifteen dollars on "every gun and pistol" and required sheriffs to seize weapons from those who could not pay.[203] But this law applied in *only* Washington County, Mississippi—a county that was 92% enslaved as of the 1860 census and remains over 70% African American

[199] *An Act to Authorize the Justices of the Inferior Courts of Camden, Glynn and Effingham Counties to Levy a Special Tax for County Purposes, and to Regulate the Same*, §§ 3–4, 1866 Ga. Laws 27–28.
[200] Act of Feb. 21, ch. 317, §§ 1–2, 1867 Miss. Laws 412, 412–13 (J. J. Shannon & Co.).
[201] Wolford v. Lopez, 146 S. Ct. 2032, 2053 (2026); *see also id.* at 2060 (Barrett, J., concurring) (further explaining why Hawaii cannot rely on "vile laws").
[202] C.D. Michel & Konstadinos Moros, *Restrictions "Our Ancestors Would Never Have Accepted": The Historical Case Against Assault Weapon Bans*, 24 WYO. L. REV. 89, 109–11 (2024) (briefly discussing the "history of armed resistance to the state-sanctioned white supremacist terrorism of the 19th century.").
[203] *An Act To Tax Guns And Pistols in The County Of Washington*, ch. 249, § 1, 1867 Miss. Laws 327–28.

today.[204] This was not a general tax on guns; it was a targeted effort to price freedmen out of firearms ownership.

Such was the zeitgeist of the era in the former Confederacy. President Ulysses Grant later complained to Congress that the Ku Klux Klan's objectives included, "by force and terror, to prevent all political action not in accord with the views of the members, to deprive colored citizens of the right to bear arms . . . and to reduce the colored people to a condition closely akin to that of slavery."[205] The Reconstruction and Jim Crow-era weapons taxes were part of this broader project. The Supreme Court has been clear that laws from this shameful tradition cannot form the basis for upholding modern regulations: as Justice Kavanaugh wrote in *Rahimi*, courts must not rely on "the history that the Constitution left behind."[206] This principle applies with special force to post-Reconstruction disarmament laws whose explicitly racist purpose has been documented.[207] But even setting aside the moral condemnation some of these laws deserve, their concentration in just one region of the country can also lead to their rejection as valid analogues because "[m]erely local attitudes can neither shrink nor inflate the meaning of fundamental Bill of Rights guarantees that apply to the States through the Fourteenth Amendment."[208]

C. *Occupational Taxes on Dealers and Shooting Gallery Restrictions Are Not Relevant Analogues*

One category of historical laws—occupational taxes on arms dealers—deserves special mention. Several nineteenth-century states imposed annual taxes on dealers of certain weapons. An 1885 Kentucky law, for example, imposed a fifty-dollar annual tax on dealers of pistols and bowie knives.[209] Such laws were not per-unit taxes on buyers; they were business license fees imposed on sellers. They are not analogous to modern excise taxes on each individual firearm or ammunition purchase. Notably, these dealer taxes often only applied to the same categories of "dangerous and unusual" weapons discussed above—not to the

[204] U.S. Dep't of the Interior, Census Office, Population of the United States in 1860, at 270 (Gov't Printing Office 1864).
[205] H. Journal, 42nd Cong., 2d Sess. 716 (1872).
[206] United States v. Rahimi, 602 U.S. 680, 723 (2024) (Kavanaugh, J., concurring).
[207] *See also McDonald v. City of Chicago*, 561 U.S. 742, 773 (2010) (Thomas, J., concurring in the judgment) (documenting the post-Civil War disarmament of Black Americans as part of the history supporting Second Amendment incorporation); Henry Clay Warmoth, WAR, POLITICS, AND RECONSTRUCTION: STORMY DAYS IN LOUISIANA 278 (2d ed., Univ. of S. Carolina Press 2006) (former Louisiana governor confirming that an 1865 disarmament law "was aimed at the freedman").
[208] Wolford v. Lopez, 146 S. Ct. 2032, 2050 (2026).
[209] Acts of the General Assembly of the Commonwealth of Kentucky 154 (J. Bradford, Frankfort 1857) (1885 law imposing $50 annual tax on dealers of pistols and bowie knives).

standard combat arms of the day. St. Augustine, Florida, passed such an ordinance in 1878, which required any merchants selling "pistols, bowie-knives, or dirk-knives" to pay a $25 annual tax (about $800 today).[210] Likewise, in 1898, Alabama taxed dealers of pistol and bowie knives $100 per year.[211]

To be sure, some of these laws did go further and covered more than just pistol and bowie-knife vendors. A San Francisco ordinance in 1880 taxed gunpowder vendors $2.50 per quarter.[212] And an 1889 Lafayette, Louisiana ordinance taxed each "gun and pistol establishment" at $5 annually.[213] But for the most part, such occupational taxes focused on dealers of the disfavored concealable weapons of the time.

Similarly, many cities passed taxes or fines on those who operated shooting galleries. These essentially function as early zoning efforts, and were not taxes on each gun sold like modern excise taxes. For example, an 1851 law banned shooting galleries in the town of Newport, Rhode Island, with hefty fines of $200 for a first offense and $500 for subsequent offenses (roughly $8,000 and $20,000 today, respectively).[214] An 1857 New Orleans law took a different tack, opting to tax shooting galleries at sixty dollars each rather than ban them outright, essentially implementing a business license fee.[215] An 1894 Neihart, Montana ordinance was similar, taxing shooting galleries at $10 per quarter.[216] Other cities likewise imposed taxes on shooting galleries.[217] While perhaps providing some support for the idea

[210] Ordinance No. 49, § 1, no. 11 & § 3, in ST. AUGUSTINE, FLORIDA, COMPILATION OF THE ORDINANCES OF THE CITY (1884) (law passed April 28, 1878).
[211] *An Act To Amend The Revenue Laws Of The State Of Alabama*, 1898 Ala. Acts 190, pt. 66–67.
[212] Order No. 1589, §§ 1–2 & 10, nos. IV–VI, in San Francisco, THE GENERAL ORDERS OF THE BOARD OF SUPERVISORS PROVIDING REGULATIONS FOR THE GOVERNMENT OF THE CITY AND COUNTY OF SAN FRANCISCO (1881) (approved July 28, 1880).
[213] *An Ordinance to Levy and Enforce Payment of an Annual License Tax*, § 11, The Lafayette Advertiser, Feb. 2, 1889, at 8 (Lafayette, Louisiana) (imposing a $5 annual license tax on gun and pistol establishments).
[214] *An Act in Amendment of an Act Entitled an Act Relating to Theatrical Exhibitions and Places of Amusement*, §§ 1–2, 1851 R.I. Pub. Laws 9, 9 (Joseph Knowles).
[215] Henry Jefferson Leovy, THE LAWS AND GENERAL ORDINANCES OF THE CITY OF NEW ORLEANS, TOGETHER WITH THE ACTS OF THE LEGISLATURE, DECISIONS OF THE SUPREME COURT, AND CONSTITUTIONAL PROVISIONS, RELATING TO THE CITY GOVERNMENT 242 (1857) (citing § No. 680, taxing pistol galleries at $60).
[216] Ordinance No. 32, § 1, pt. 19, The Neihart Herald, Jan. 27, 1894, at 2 (Neihart, Montana) (imposing a $10 quarterly license on shooting galleries).
[217] *See, e.g.,* Ordinance No. 5, §§ 1 & 6, *The Nevada Democrat*, Aug. 20, 1856, at 4 (Nevada, California) (requiring a $10 quarterly license for pistol or rifle shooting galleries); *An Ordinance for the Purpose of Creating a Revenue for the Town of Lake Charles, Levying a License on Trades, Professions, Occupations, etc.,* § 1, para. 3, The Lake Charles Echo, Jan. 17, 1880, at 1 (Lake Charles, Louisiana) (imposing license fees on pistol galleries).

that modern shooting ranges can be regulated and taxed,[218] these laws do not support taxing the sale of individual arms or ammunition.

D. *Property Taxes and Tariffs of General Applicability May Support Modern Sales Taxes, But Not Excise Taxes Targeting Gun Sales*

An additional category of historical law sometimes cited in this debate does not support the government's position: personal property taxes that included firearms amongst long lists of taxable property. For example, an 1876 Alabama law included firearms and bowie knives in its listing of taxable personal property, but did so as part of a broadly applicable property tax covering all manner of personal goods—kitchen furniture, jewelry, silverware, plates, pianos and other musical instruments, paintings, clocks, watches, gold chains, and more—at a rate of 0.75% of the total value.[219] A Virginia law from around the same time included in its taxable personal property "[t]he aggregate value of all rifles, muskets, and other fire-arms, bowie-knives, dirks, and all weapons of a similar kind," with an "exception for arms issued by the state to members of volunteer companies."[220] In 1882, Jackson, Mississippi included guns in its list of taxable personal property, which also included cattle, horses, mules, watches, pianos, organs, and a number of other types of property.[221]

Similarly, just as in the founding era, tariffs continued to be imposed on imported firearms throughout the nineteenth century. But like those founding era examples discussed earlier in this paper, such tariffs were protectionist efforts targeting a broad swath of imported goods and were not limited to firearms. For example, the controversial Tariff of 1842, which was known as the "Black Tariff", placed import duties on firearms, but also on a breathtaking array of other goods, including: iron, screws, cutlery, lead, tin, coal, marbles,

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[218] *But see* Ezell v. City of Chicago, 651 F.3d 684, 704 (7th Cir. 2011) ("The right to possess firearms for protection implies a corresponding right to . . . maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective.").
[219] David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEGIS. 223, 303 (2024).
[220] *Id*. at 308 (citing Act of Mar. 31, 1875, ch. 239, §5(18), 1874–1875 Va. Acts 281, 282–83 (1875); Act of Mar. 27, 1876, ch. 162, § 6(18), 1875–1876 Va. Acts 162, 164 (1876); Act of Apr. 22, 1882, ch. 119, § 6(18), 1881–1882 Va. Acts 497, 499 (1882); Act of Mar. 15, 1884, ch. 450, § 6(18), 1883–1884 Va. Acts 561, 563 (1884); Act of Jan. 16, 1890, ch. 19, 1889–1890 Va. Acts 18, 19 (1890); Act of Mar. 6, 1890, ch. 244, § 6(18), 1889–1890 Va. Acts 197, 198–200 (1890); Act of Mar. 8, 1894, ch. 797, § 1(18), 1893–1894 Va. Acts 930, 931 (1894)).
[221] *Revised Ordinances, ch. 1, art. 1, §§ 3–5,* in JACKSON, MISSISSIPPI, AMENDMENTS TO THE CHARTER AND REVISED ORDINANCES OF THE CITY (1882) (adopted April 27, 1882).

apothecary vials and bottles, porcelain glass, leather, gloves, furs, hats and bonnets, paper, books, sugar, cocoa, olive oil, salt, liquor, and much, *much* more.[222]

Whatever the policy wisdom of personal property taxes and protectionist tariffs, they are precisely the kind of generally applicable taxes that pose no constitutional problem, and indeed, the challengers in the pending California litigation concede that sort of tax, like a general sales tax, is constitutional even if applied to firearms.[223] The issue arises when firearms are singled out for special taxation, not when they are taxed like all other general property or merchandise.

E. *Summarizing Historical Laws Related to Weapons Taxation*

The historical survey above reveals a consistent pattern: prior to 1900, there is no "open, widespread, and unchallenged"[224] tradition of imposing special per-unit taxes on the purchase of commonly owned arms seen at the time as useful for lawful purposes. The laws that did tax weapons were: (1) targeted exclusively at arms that many contemporaries regarded as falling outside Second Amendment protection—bowie knives, pocket pistols, and other concealable weapons used in personal quarrels; (2) concentrated in Southern states and territories rather than representing a national tradition; (3) in some cases, they were transparently racist efforts to disarm Black Americans following the Civil War; and (4) in other cases, they were annual occupational taxes on dealers of certain disfavored weapons, or property taxes and import duties that included guns among a large assortment of other goods, rather than per-transaction taxes on buyers of common arms. The "how" and "why" of these laws differ dramatically from modern state and federal excise taxes that apply to every firearm sale. "To state the analogy is to expose its deficiency."[225]

Even if a reviewing court charitably allows consideration of historical laws as late as 1900 rather than focusing on the Founding Era, and also assumes that a regional tradition of almost exclusively southern states is sufficient under *Bruen*, there is no overcoming the fact

[222] *An Act to Provide Revenue from Imports, and to Change and Modify Existing Laws Imposing Duties on Imports, and for Other Purposes*, ch. 270, § 1, 5 Stat. 548, 555 (1842).
[223] Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Demurrer at 14 n.2, *Poway Weapons & Gear, Inc. v. California Department of Tax and Fee Administration*, No. 25CV018964 (Cal. Super. Ct. Sacramento County filed Apr. 8, 2026) (Plaintiffs "do not challenge California's ordinary sales tax as applied to firearms and ammunition because it applies equally to all goods sold in the state and, unlike the excise tax on firearms and firearm parts, does not single out Second Amendment-protected items for special taxation.").
[224] Wolford v. Lopez, 146 S. Ct. 2032, 2044 (2026) (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 36 (2022)).
[225] United States v. Hemani, 608 U.S. 772, 786–87 (2026).

that the arms seen as commonly owned for lawful purposes were not subject to special taxation. At most, taxes like things on bowie knives and pocket pistols may provide some limited support for taxing weapons deemed "dangerous and unusual" today. They do not provide support for taxing every firearm sold, and even if they did, they would contradict founding-era evidence that *required* possession of such arms. In short, the relevant historical laws targeted different categories of arms for different reasons and operated in materially different ways, so they do not justify upholding the modern regulation. The gap between the historical taxes and the modern excise taxes is "just too wide."[226]

Conclusion

Earlier generations knew what taxes were. They knew what firearms were. They chose—consistently, repeatedly, and across every region of the country—not to impose special per-unit taxes on the purchase of the sorts of arms commonly used for lawful purposes. That choice reflects a constitutional understanding that must be honored today.

The right to keep and bear arms is not merely a right to own guns if one can afford to pay whatever financial burden a disfavoring legislature cares to impose. It is, as the Supreme Court has confirmed, a fundamental constitutional right entitled to the same protection as any other enumerated right. Special taxes on the exercise of that right in the form of levies that single out popular firearms and ammunition have no support in the Nation's historical tradition of firearm regulation.

The historical record is clear. The founding generation did not establish a tradition of taxing the purchase of commonly owned arms. The nineteenth century produced some taxes on the "dangerous and unusual" weapons of that era, but conspicuously excluded the prevailing common arms of the day. No broadly applied, nationally representative tradition of taxing arms purchases existed before 1900.

The First Amendment analogy confirms this conclusion. The Supreme Court has long held that differential taxation of constitutionally protected activity is presumptively unconstitutional. A "sin tax" on firearms and ammunition, openly designed to discourage their purchase by treating them as morally equivalent to cigarettes, is as plainly unconstitutional as a sin tax on newspapers or church attendance would be. The size of the tax is irrelevant; it is the act of singling out firearms and ammunition for taxation that creates the constitutional defect.

[226] *Wolford,* 146 S. Ct. at 2052.

California's 11% excise tax, inspired by the equally unconstitutional federal excise tax known as Pittman-Robertson, is but one example of what will become an increasingly common tactic if courts do not enforce the constitutional limits that *Bruen* demands. States hostile to the Second Amendment will inevitably reach for their taxing power once their prohibitory laws are struck down, seeking to achieve through financial burden what they cannot accomplish through outright prohibition. The constitutional answer must be a firm one: the Second Amendment's command that this right "shall not be infringed" means that the government may not make the exercise of that right more expensive through taxation, any more than it may ban arms outright.