



NOTE

Gunmaking at the Founding

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Abstract. Homemade guns are being used in a growing number of crimes across the United States, creating what gun control organizations describe as the fastest-growing threat to public safety in America. States and the federal government are cracking down. New laws criminalize gunmaking without a license, prohibit the sale or transfer of homemade guns, and even ban some forms of gunmaking altogether.

But the constitutionality of these regulations is uncertain. After the Supreme Court's landmark ruling in *New York State Rifle & Pistol Association, Inc. v. Bruen*, courts have begun to invalidate rules that are not "consistent with this Nation's historical tradition of firearm regulation." Constitutional challenges to new gunmaking regulations have already created court splits on a pair of key questions commanded by *Bruen*. First, does the plain text of the Second Amendment cover a right to manufacture firearms? Second, are modern restrictions on gunmaking consistent with this country's historical tradition of firearm regulation?

This Note begins to answer these questions by recounting the history of gunmaking practices and regulations at the Founding. It uncovers evidence that the Second Amendment as originally understood did not cover gunmaking, and that in any event, early Americans regulated gunmaking extensively. In light of this history, *Bruen* should permit reasonable modern regulations. This case study makes two methodological arguments relevant to Second Amendment jurisprudence. First, nonstatutory sources of law should play a role in illuminating original constitutional meaning. Second, after *United States v. Rahimi*, modern regulations may be upheld by legal principles that emerge from disparate bodies of law.

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Introduction

In May 2022, a man in small-town Connecticut visited his local police station looking for information about the legal status of gunmaking.¹ The man told police that he wanted to build a semiautomatic rifle with his eighteen-year-old grandson and hoped to do everything legally.² Police grew suspicious and followed the man home.³ There, they found a trove of crude and unlabeled homemade guns in various stages of assembly, as well as ammunition, gunmaking tools, and a book about gunmaking.⁴ The grandson confessed to officers that he had purchased the contraband online.⁵ Although he knew the firearms were illegal, he wanted to build weapons “to protect his family.”⁶ According to police, the grandson thought “guns [were] cool” and found “firearm laws to be tyrannical.”⁷ Police arrested both the grandfather and his grandson.⁸

The legal status of gunmaking is unclear.⁹ Over the past decade, many states and the federal government have rewritten laws to address the growing problem of homemade guns.¹⁰ One particularly high-profile form of the

1. Peter Yankowski & Liz Hardaway, *Police: East Hampton Teen, Grandfather Charged with Building “Ghost Guns,”* MIDDLETOWN PRESS (updated May 19, 2022, 8:33 AM), <https://perma.cc/GCT3-LU8H>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Rachel Sharp, *Teen and Grandfather Arrested for Running Ghost Gun Workshop from Garden Shed*, INDEPENDENT (May 20, 2022, 10:42 AM EDT), <https://perma.cc/62LP-QWAL>. Officials initially charged both with multiple firearms offenses. *Id.* The grandson pleaded guilty to unlicensed manufacture of a firearm rate-of-fire enhancement, a class D felony. Criminal/Motor Vehicle Conviction Case Detail: Clayton Hobby, STATE OF CONN. JUD. BRANCH, <https://perma.cc/P898-K3JA> (archived Oct. 26, 2024). He was sentenced to five years in jail, with a suspended sentence after one year, and five years of probation. *Id.* The grandfather eventually pleaded guilty to resisting arrest, a class A misdemeanor in Connecticut. Criminal/Motor Vehicle Conviction Case Detail: Kerry Schunk, STATE OF CONN. JUD. BRANCH, <https://perma.cc/9CJN-4WY7> (archived Oct. 26, 2024).

9. See *infra* Part III.B. Historian Brian DeLay has argued that individuals using ghost gun kits or 3D printers are not “making” firearms at all, but rather are merely *assembling* weapons—just as an assembler of IKEA furniture is not “making” furniture. See Brian DeLay, *The Myth of Continuity in American Gun Culture*, 113 CALIF. L. REV. (forthcoming 2025) (manuscript at 199-202), <https://perma.cc/47GA-Y3RA>. Without deciding this question, this Note assumes, as courts have, that the regulations and conduct discussed involve some form of “gunmaking.”

10. See *infra* note 15.

problem involves “ghost guns,” or homemade firearms unlabeled with a serial number.¹¹ The number of unlabeled guns found at crime scenes nationwide rose elevenfold from 2016 to 2021.¹² In California, somewhere between one-quarter and one-half of firearms recovered at crime scenes are ghost guns, and most suspects caught with them cannot legally possess firearms at all.¹³ Prominent gun control organizations have called ghost guns “the fastest growing gun safety problem in the country” and an “existential threat to public safety.”¹⁴

Authorities have begun to crack down. Fourteen states and the District of Columbia have recently enacted laws regulating the manufacture of guns or gun parts without a license or without following standards such as weapons labeling.¹⁵ Federal law permits individuals to make guns—so long as the gun is “detectable,” as defined by federal law—but has long required anyone “engaged in the business” of making firearms for livelihood or profit to be licensed by

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11. For accessible backgrounders, see Annie Karni & Chris Cameron, “Ghost Guns”: *What They Are and Why There’s a Fight over Them*, N.Y. TIMES (Aug. 8, 2023), <https://perma.cc/6KFJ-F6S4>; 2 U.S. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, *Part III: Crime Guns Recovered and Traced Within the United States and Its Territories*, in NATIONAL FIREARMS COMMERCE AND TRAFFICKING ASSESSMENT (NFCTA): CRIME GUN INTELLIGENCE AND ANALYSIS 1, 5 (2024) (discussing the issue of ghost guns and noting “[i]t is probable that current trace data significantly underrepresents the number of [privately made firearms] recovered in crimes”); and Nada Tawfik, *Why Ghost Guns Are America’s Fastest-Growing Gun Problem*, BBC NEWS (Aug. 8, 2023), <https://perma.cc/7JCH-ADM5>. See also *United States v. Bishoff*, 58 F.4th 18, 20 n.2 (1st Cir. 2023) (“Ghost guns are firearms sold as sets of parts that can be assembled at home, and that typically lack markings such as serial numbers.”), *cert. denied*, 143 S. Ct. 2481 (2023); *United States v. Alcantara*, No. 22-CR-152, 2023 WL 3883961, at *1 n.2 (S.D.N.Y. June 8, 2023). Federal law enforcement uses the broader term “privately made firearm,” or PMF. 27 C.F.R. § 478.11 (2023).
 12. Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. 24652, 24656 (Apr. 26, 2022) (codified at 27 C.F.R. pts. 447, 478, 479 (2023)); see also Keegan Hamilton & Patricio Matos, *Untraceable “Ghost Guns” Are Surging Across the US, Exclusive Data Shows*, VICE NEWS (June 1, 2022, 9:34 AM), <https://perma.cc/A6NK-MJFU>.
 13. Glenn Thrush, “Ghost Guns”: *Firearm Kits Bought Online Fuel Epidemic of Violence*, N.Y. TIMES (updated June 22, 2023), <https://perma.cc/AN6S-H762>.
 14. *Ghost Guns Recoveries and Shootings*, EVERYTOWN FOR GUN SAFETY (July 31, 2023), <https://perma.cc/Q9ML-GN2U>; *Ghost Guns: An Existential Threat to Public Safety*, GIFFORDS, <https://perma.cc/5GCC-4TYF> (archived Oct. 16, 2024).
 15. *Ghost Guns*, GIFFORDS, <https://perma.cc/9YSX-8WEG> (archived Oct. 28, 2024) (collecting laws); e.g., DEL. CODE ANN. tit. 11, §§ 1462-1463 (2021) (banning all “untraceable” self-made firearms); CAL. PENAL CODE §§ 16520, 16531 (West 2024); see also Off. of the Att’y Gen., Cal. Dep’t of Justice, *Legal Requirements for Self-Made Firearms 2* (n.d.), <https://perma.cc/8LVS-FAUV> (“With limited exceptions, the sale or transfer of ownership of self-manufactured or self-assembled firearms is prohibited under California law.”).

the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).¹⁶ Licensed manufacturers are required to identify the firearm “by means of a serial number engraved or cast on the receiver or frame of the weapon.”¹⁷ Serial numbers allow police to trace guns used in specific crimes through their chain of custody, to track lost or stolen weapons, and to ensure that licensees are compliant with rules regulating the inventory and sale of weapons.¹⁸ Most recently, the Biden administration has tried to curb the ghost gun proliferation by broadening the federal definition of a “firearm” to require a license from manufacturers who sell finished firearm parts.¹⁹

These regulations are now under threat. After a quartet of landmark Supreme Court cases—*Heller*, *McDonald*, *Bruen*, and *Rahimi*—the constitutionality of all gun regulations hinges on a new “history and tradition” test.²⁰ After *Bruen*, if the plain text of the Second Amendment covers the regulated conduct, then the regulation will be invalidated unless the government can “justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”²¹ Specifically, the inquiry considers “whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.”²² As the *Rahimi* Court clarified, a principle can emerge from multiple bodies of historical regulations “[t]aken together.”²³

Litigants have already begun to use *Bruen* to invalidate gunmaking regulations by arguing that the Second Amendment’s plain text covers gunmaking—or is at least ambiguous on gunmaking—and that early Americans did not regulate gunmaking at all.²⁴ These claims have been raised in a lawsuit that was recently heard on appeal by the Supreme Court in the

16. 18 U.S.C. § 923(a) (“No person shall engage in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing ammunition, until he has filed an application with and received a license to do so from the Attorney General.”); *Privately Made Firearms*, U.S. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://perma.cc/7WV5-45L4> (archived Oct. 16, 2023).

17. 18 U.S.C. § 923(i).

18. Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. 24652, 24659 (Apr. 26, 2022) (codified at 27 C.F.R. pts. 447, 478, 479).

19. *Id.* at 24653, 24661-62.

20. *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2128 (2022); *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024).

21. *Bruen*, 142 S. Ct. at 2129-30.

22. *Rahimi*, 144 S. Ct. at 1898; *see also id.* at 1925 (Barrett, J., concurring) (“Historical regulations reveal a principle, not a mold.”).

23. *See id.* at 1901; *see also infra* Part III.D (describing the fledgling doctrine of Second Amendment emergence).

24. *See infra* Part III.B.

2024-2025 term challenging the ATF’s authority to regulate ghost guns.²⁵ This suit and others raise several questions: What is the “history and tradition” of making firearms and regulating homemade firearms in the United States? Does the right to “keep and bear arms” encompass a federal constitutional right to manufacture unlabeled arms without a license? Already lower courts have split on these questions.²⁶

This Note begins to answer these questions by surveying the history of gunmaking at the Founding.²⁷ It uncovers two historical traditions necessary to evaluate the constitutionality of modern gunmaking rules. The first is a tradition even older than American gunmaking itself: the tradition of gun importing. The guns *used* by early Americans were seldom *made* by early Americans. Rather, the vast majority of this Nation’s guns used before the nineteenth century were manufactured in Europe. Most early Americans who worked on guns were not makers of whole weapons, but gun repairers.²⁸ Given this tradition of gun importing, an American of 1791 would likely not have considered the right to “keep and bear arms” synonymous with a federal constitutional right to make arms, since most arms of the time were not made domestically but shipped in from abroad. And given that the plain text of the Second Amendment does not address the production of arms, a hypothetical federal constitutional right to gunmaking would require that right to be “found hiding in the Constitution’s penumbras.”²⁹

25. See *infra* notes 315-20 and accompanying text (discussing *VanDerStok v. Garland*, 86 F.4th 179 (5th Cir. 2023), *cert. granted*, *Garland v. VanDerStok*, 144 S. Ct. 1390 (2024)).

26. See *infra* Part III.B.

27. As acknowledged in *Bruen*, “there is an 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.” N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2138 (2022); e.g., Mark Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, Not 1868*, HARV. J.L. & PUB. POL’Y PER CURIAM, Fall 2022, at 3; see also *Rahimi*, 144 S. Ct. at 1898 n.1 (declining again to address the “ongoing scholarly debate” (quoting *Bruen*, 142 S. Ct. at 2138)). In *Rahimi*, Justice Kavanaugh defended the use of post-ratification history, or “tradition.” See 144 S. Ct. at 1916 (Kavanaugh, J., concurring) (“When the text is vague and the pre-ratification history is elusive or inconclusive, post-ratification history becomes especially important.”). By contrast, Justice Barrett expressed skepticism about the use of post-1791 history. See *id.* at 1924-25 (Barrett, J., concurring) (“[E]vidence of ‘tradition’ unmoored from original meaning is not binding law.”). This Note focuses on the Founding, and not on Reconstruction, because the Court has “generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791.” *Bruen*, 142 S. Ct. at 2137. Further scholarship should explore how public understandings of the Second Amendment vis-à-vis gunmaking might have changed over the nineteenth century.

28. See *infra* Part I.

29. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring) (per curiam).

Even if the Second Amendment does protect gunmaking, a second historical tradition informs the *Bruen* analysis: the tradition of gunmaking regulation. This Note shows that public and private authorities regulated gunmaking before, during, and after the Founding. First, public authorities and industry actors regulated who could make guns for whom. These commercial regulations kept guns and gunmaking out of the hands of persons perceived as threats to safety, such as enemy Native tribes and English loyalists who took up arms for the Crown.³⁰ One of the most important institutions for regulating gunsmiths was the apprenticeship, a public-private system that comprehensively regulated the professional, educational, social, and moral rearing of gunsmiths.³¹ Second, authorities and industry actors regulated how guns and gun parts could be made by requiring gun inspection and gun labeling for quality assurance and property designation.³² These regulations sometimes also took the form of private rules backed by norms and customs.³³ Third, public authorities instituted regulations to standardize gunmaking.³⁴ Fourth and finally, when authorities needed gunsmiths for collective defense, gunsmiths could be impressed to produce or repair weapons.³⁵

This history of gunmaking regulation reveals a principle: Public authorities wielded powers to train and sanction gunmakers and to halt or permit their work as the exigencies of public safety required. Those who have purported to tell the story of gunmaking in early America have largely overlooked these historical regulations and the tradition of regulating gunmaking.³⁶

30. See *infra* Parts II.B-C.

31. See *infra* notes 57-71 and accompanying text. See generally William J. Novak, *Public-Private Governance: A Historical Introduction*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 23, 39 (Jody Freeman & Martha Minow eds., 2009) (defining “public-private governance” as a system, familiar in early America, that distributed power between public and private parties in order to mediate between the “twin evils of both public corruption and private coercion” (emphasis omitted)).

32. See *infra* notes 188-90, 248-53 and accompanying text.

33. See *infra* notes 177-81 and accompanying text.

34. See *infra* notes 169-75 and accompanying text.

35. See *infra* notes 182-87 and accompanying text.

36. See, e.g., AM. GUNSMITHS GUILD, BLUE BOOK 5 (1948) (claiming “[f]or the past two hundred years American gunsmiths have operated their shops without restraint or regulations”); JAMES WHISKER, THE GUNSMITH’S TRADE 67 (1992) (observing “[t]he manufacture of arms in early America” was “essentially an unregulated industry”); see also Peter Jensen-Haxel, Comment, *3D Printers, Obsolete Firearm Supply Controls, and the Right to Build Self-Defense Weapons Under Heller*, 42 GOLDEN GATE U. L. REV. 447, 476 (2012); Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479, 496 (2014); Chelsea Karen, Note, *The Right to Bear 3D-Printed Firearms: Problems Created by Modern Gunsmithing*, 36 J. C.R. & ECON. DEV. 41, 44 (2022); Michael L. Smith, Note, *The Second Amendment Implications of Regulating 3D Printed*
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This Note argues that whether or not a federal constitutional right to gunmaking exists, reasonable modern gunmaking regulations are consistent with the Nation’s historical tradition of firearm regulation and, therefore, permissible under *Bruen*. Part I surveys the history of gunmaking in early America, beginning with the first colonial gunsmiths of the seventeenth century. Part II surveys the history of gunmaking regulations. Finally, Part III analyzes modern regulations of arms manufacturing in light of *Bruen* and *Rahimi*.

Ultimately, this Note is about more than gunmaking. It makes two methodological arguments relevant to Second Amendment jurisprudence. First, by uncovering important nonstatutory sources of law, this Note expands our understanding of “our Founders’ law” and gets us closer to original understandings of the Second Amendment.³⁷ Second, after *Rahimi*, modern laws may be upheld by legal principles that emerge from multiple—even unrelated—bodies of law.³⁸ This doctrine of Second Amendment emergence allows a larger number of modern regulations to survive constitutional scrutiny.

I. A History of Gunmaking

This Part explores the history of gunmaking in early America, from colonial times through the Founding. It begins with the English colonies, where a small but persistent gunmaking tradition took root—and where survival depended on reliable arms imports from Europe. It then discusses gunmaking at the Founding of the United States.

Any history of gunmaking can be only provisional.³⁹ Records from most gunsmiths have not survived, if such records were ever kept.⁴⁰ For centuries,

Firearms, 31 SYRACUSE J. SCI. & TECH. L. 60, 82-83 (2014-2015). *But see* ROBERT J. SPITZER, GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS 40-41, 53-55, 198-99 (2015); *Repository of Historical Gun Laws*, DUKE CTR. FOR FIREARMS L., <https://perma.cc/4X2J-B8UC> (archived Oct. 19, 2024); Mark Frassetto, *Firearms and Weapons Legislation up to the Early Twentieth Century* (Jan. 15, 2013) (unpublished manuscript), <https://perma.cc/6FGV-6LYA>.

37. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2136 (2022); *see* *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008); *cf.* Joshua Hochman, Note, *The Second Amendment on Board: Public and Private Historical Traditions of Firearm Regulation*, 133 YALE L.J. 1676, 1684 (2024) (arguing for the use of nonstatutory sources in the context of public transportation).

38. *See infra* notes 370-73 and accompanying text (discussing emergence).

39. Historians of early America ought to acknowledge Herman Melville’s admonition, “[t]ruth uncompromisingly told will always have its ragged edges.” 13 HERMAN MELVILLE, *Billy Budd, Foretopman*, in *WORKS OF HERMAN MELVILLE* 1, 109 (Raymond W. Weaver ed., 1924).

gunmaking was a trade protected by secrecy.⁴¹ Multiple professions were involving in gunmaking, and contemporaries and later historians used various terms to describe their work.⁴² Most crucially, there is an unavoidable definitional problem about what it meant to “make” a gun. The standard term of the era, “gunsmith,” referred both to a maker of whole weapons (akin to an auto manufacturer today) and, much more commonly, to a weapons repairer (akin to an auto mechanic).⁴³ The historical record seldom clearly distinguishes between the two; some “gunsmiths” made entire weapons, while many more “gunsmiths” made parts or merely repaired broken guns.⁴⁴

With these qualifications in mind, some themes emerge from the haze of history.

A. Gunsmithing in the Colonies: 1606-1763

This Subpart discusses gunsmithing in the American colonies, from the arrival of permanent European settlers through the Seven Years’ War. It discusses how the earliest permanent European settlers relied on gun imports, how these settlers reared gunsmiths by relying on professional apprenticeships, and how gunsmithing developed as a skilled handicraft.

Before making guns, English settlers in the New World imported guns. The First Charter of Virginia, promulgated by King James I in April 1606, granted the settlers the right to import “the Goods, Chattels, Armour, Munition, and Furniture, needful to be used by them, for their said Apparel, Food, [and] Defence.”⁴⁵ Settlers arrived at Jamestown in 1607 well stocked with

40. See HAROLD B. GILL, JR., *THE GUNSMITH IN COLONIAL VIRGINIA* 6 (1974) (noting “very little is known” of the work of seventeenth-century gunsmiths in Virginia); Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 ST. MARY’S L.J. 35, 48 (2023).

41. See Edgar Zilsel, *The Genesis of the Concept of Scientific Progress*, 6 J. HIST. IDEAS 325, 336 (1945) (discussing a culture of secrecy among gunmakers in the late Middle Ages).

42. J.P. STELLE & WM. B. HARRISON, *THE GUNSMITH’S MANUAL; A COMPLETE HANDBOOK FOR THE AMERICAN GUNSMITH* 22 (New York, J. Haney & Co. 1883) (noting ambiguities in the term “gunsmith”). Even more terms were used to describe guns. Generically, guns could be called “arms,” “ammunition,” or a “piece,” among others; specifically, guns were often referred to by type, such as a musket or rifle. See *infra* notes 172, 187, 242 (listing laws with a variety of such references). To heap on complications, terms differed not only by time but also by place. See DE WITT BAILEY & DOUGLAS A. NIE, *ENGLISH GUNMAKERS: THE BIRMINGHAM AND PROVINCIAL GUN TRADE IN THE 18TH AND 19TH CENTURY* 13 (1978) (describing how these terms differed between America and England).

43. DeLay, *supra* note 9, at 211-20.

44. See *id.*

45. The First Charter of Virginia—1606, 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* 3783, 3787 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE].

matchlock muskets, snaphances, and wheel locks.⁴⁶ The Jamestown colonists did not manufacture their own weapons; they instead relied on weapons imported from England.⁴⁷ The 1620 Charter of New England as well as the 1629 Charter of Massachusetts Bay likewise granted settlers the right to import “Weapons, Ordinances, Munition, Powder, Shott” as well as “all other Things necessarie” for colonial defense.⁴⁸

Guns of the time broke frequently.⁴⁹ And so the first guns came with gunsmiths—to be precise, gun part assemblers, gun troubleshooters, and gun fixers.⁵⁰ Colonial arms preparation consisted mainly of fixing guns by salvaging and assembling parts.⁵¹ Around the time of the American Revolution, there were perhaps as few as several hundred and as many as several thousand active gunsmiths in the colonies—a highly inexact estimate that depends on definitions of “gunsmith.”⁵² Colonial gunsmiths were geographically dispersed and diverse in ethnicity, politics, and religion.⁵³ Some gunsmiths earned a comfortable living.⁵⁴ But most tradesmen likely could not sustain a livelihood on gunmaking alone and so picked up other trades and occupations.⁵⁵ Notably, colonial gunsmiths abandoned formal trade guilds common in the Old World.⁵⁶

46. HAROLD L. PETERSON, *ARMS AND ARMOR IN COLONIAL AMERICA 1526-1783*, at 43 (1956); GILL, *supra* note 40, at 3.

47. See 1 GEORGE D. MOLLER, *AMERICAN MILITARY SHOULDER ARMS* 5 (2011); Tom Grinslade, *Eighteenth Century American Fowlers—The First Guns Made in America*, 89 AM. SOC’Y ARMS COLLECTORS BULL. 1, 1 (2004).

48. The Charter of New England—1620, in 3 THORPE, *supra* note 45, at 1827, 1834-35; The Charter of Massachusetts Bay—1629, in 3 THORPE, *supra* note 45, at 1846, 1855.

49. SPITZER, *supra* note 36, at 35.

50. See *supra* notes 42-44 and accompanying text.

51. Grinslade, *supra* note 47, at 1; see Ed Crews, *The Gunsmith’s Shop*, COLONIAL WILLIAMSBURG J., Autumn 2000, at 50.

52. See HENRY J. KAUFFMAN, *EARLY AMERICAN GUNSMITHS 1650-1850*, 1-94 (1952) (listing several hundred gunsmiths who may have been working at the time of the Revolution); M.L. BROWN, *FIREARMS IN COLONIAL AMERICA: THE IMPACT ON HISTORY AND TECHNOLOGY 1492-1792*, at 347 (1980) (suggesting fewer than 2,000 active gunsmiths around the time of the American Revolution); CHARLES WINTHROP SAWYER, *FIREARMS IN AMERICAN HISTORY: 1600 TO 1800*, at 118 (1910) (estimating “at least 200 [gunsmiths] in the Colonies, mostly south of New England”); WHISKER, *supra* note 36, at 73 (estimating thousands of gunsmiths and armorers in the colonies and states across various periods). For a discussion of problems with defining “gunsmith,” see *supra* notes 42-44 and accompanying text.

53. See BROWN, *supra* note 52, at 149-50; see also FELICIA JOHNSON DEYRUP, *ARMS MAKERS OF THE CONNECTICUT VALLEY: A REGIONAL STUDY OF THE ECONOMIC DEVELOPMENT OF THE SMALL ARMS INDUSTRY, 1798-1870*, at 13 (1948).

54. ALEXANDER ROSE, *AMERICAN RIFLE: A BIOGRAPHY* 16 (2008).

55. GILL, *supra* note 40, at 21, 69; see, e.g., MASS. SPY, June 11, 1772, at 64 (printing an ad from two English “ironmongers and gunsmiths” in Boston selling “[a] variety of Articles in
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But colonists retained the most important practice for gunsmiths: professional apprenticeships. The significance of this institution can hardly be overstated. Apprenticeships were education and employment agreements, codified by law and enforced by public officials, through which virtually all gunsmiths in early America entered the trade.⁵⁷ Early Americans developed a thick web of apprenticeship regulations, including laws that spelled out the legal obligations and penalties for both master and apprentice.⁵⁸ Public officials enforced both public regulations and private apprenticeship agreements and, in adapting English common law rules, developed their own common law to govern apprenticeships.⁵⁹ These rules were elaborate and often occupied their own chapter in legal treatises of the era.⁶⁰ Only a “lawful business,” or an

the Gun Way,” including barrels, locks, pocket pistols, and finished guns, as well as pewter, linens, clothes, pins, paper hangers, razors, scissors, penknives, and other items).

56. WHISKER, *supra* note 36, at 1-4.

57. *Id.* at v, 4; Janet L. Dolgin, *Transforming Childhood: Apprenticeship in American Law*, 31 NEW ENG. L. REV. 1113, 1123-26 (1997); Bernard Elbaum, *Why Apprenticeship Persisted in Britain but Not in the United States*, 49 J. ECON. HIST. 337, 346 (1989) (“[C]olonial historians have traditionally judged that among native-born Americans, ‘more often than not, artisans were trained by the apprentice system.’ In British America, apprenticeship was mandated by the Statute of Artificers, and effective enforcement of sanctions against runaway apprentices was facilitated by the prevalence of indentured servitude and legal restrictions on geographic mobility.” (quoting CARL BRIDENBAUGH, *THE COLONIAL CRAFTSMAN* 130 (1950))); JOHN G.W. DILLIN, *THE KENTUCKY RIFLE* 34 (1924) (stating that “[w]ithout exception” all Kentucky rifles were made “by artisans who were the product of a vanished apprentice system”). For further examples of apprenticeship regulations, see Part II (discussing apprenticeship regulations in England and early America).

58. See W.J. RORABAUGH, *THE CRAFT APPRENTICE: FROM FRANKLIN TO THE MACHINE AGE IN AMERICA* 50-51 (1986); see also *infra* Parts II.B.-C (collecting apprenticeship statutes).

59. RORABAUGH, *supra* note 58, at 49-55 (discussing court complaints brought by masters and apprentices). The prevailing belief among masters was that “the law would back them in all cases where apprentices challenged authority.” See *id.* at 54.

60. *E.g.*, CONDUCTOR GENERALIS, OR: THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE 11-15 (Philadelphia, Andrew Bradford 1722) (summarizing the law of apprentices in a widely read legal treatise printed in the colonies and reprinted nearly a dozen times throughout the eighteenth century); THE PRACTICAL JUSTICE OF THE PEACE AND PARISH-OFFICER, OF HIS MAJESTY’S PROVINCE OF SOUTH-CAROLINA 16-22 (William Simpson ed., Charleston, Robert Wells 1761) (detailing the law and procedures of apprentices in South Carolina). See generally Max Crema & Lawrence B. Solum, *The Original Meaning of “Due Process of Law” in the Fifth Amendment*, 108 VA. L. REV. 447, 496-97 (2022) (discussing the influence and importance of eighteenth-century legal hornbooks, which served “as an alternative to legal education in a growing society which depended upon local government for its stability” (quoting John A. Conley, *Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. LEGAL HIST. 257, 283 (1985))). *Conductor Generalis* is a foremost example. Crema & Solum, *supra*, at 496.

enterprise that followed public regulations, could take an apprentice.⁶¹ Public regulations abounded. The standard apprentice contract required consent by a justice of the peace.⁶² A court needed to certify apprenticeships for orphans, and courts could create apprenticeships for children of parents judged to be “incapable of supporting and bringing up their child or children.”⁶³ Courts also needed to approve changes to the apprenticeship agreement, such as when a master wanted to transfer the apprentice to another master.⁶⁴

The law permitted and in some cases required masters to control most aspects of their apprentice’s life, including the apprentice’s tasks, working hours, education, food and drink, economic transactions, romantic prospects, and moment-to-moment whereabouts; an apprentice could not leave the master’s home for even a short time without the master’s consent.⁶⁵ Crucially, though, a master’s control was not absolute and yielded to public regulations. For example, eighteenth-century legal hornbooks convey that courts and justices of the peace could impress or discharge an apprentice,⁶⁶ that

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61. See 1 AN ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH-CAROLINA 26 (Joseph Brevard ed., Charleston, John Hoff 1814) (printing an apprenticeship law that elaborated the legal rules of apprenticeship).
62. CONDUCTOR GENERALIS, *supra* note 60, at 13-14 (printing a model apprenticeship contract, in which the “Justices of the Peace of the County aforesaid . . . do, as much as in us lies, consent to the putting forth the abovesaid J.K. Apprentice, according to the Intent and Meaning of the abovesaid Indenture”); THE PRACTICAL JUSTICE OF THE PEACE AND PARISH-OFFICER, *supra* note 60, at 16 (requiring that apprenticeships “be certified under hand and seal, by any one justice of the peace for the county in which such indenture is executed”).
63. 6 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 32 (William Waller Hening ed., Richmond, Franklin Press 1819) (printing a law of 1748); see also 1 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 538 (Boston, Wright & Potter 1869) (authorizing, in a 1703 law, public officials to bind children into apprenticeships if two justices of the peace agree that the parents, regardless of financial status, “be thought unable to maintain them”).
64. *E.g.*, ACTS AND LAWS, OF HIS MAJESTIES COLONY OF CONNECTICUT IN NEW-ENGLAND, 75 (Boston, Bartholemew Green & John Allen 1702) (“[N]o Apprentice bound for the learning of a Trade, shall be put off by his Master for above a year to any other person, neither in the Lifetime of the Master, nor after his Death by his Executors or Administrators; unless it be by consent of Authority Assembled in some Court, or two Assistants, otherwise all and every such Assignment to be void in Law.”); see also 1 AN ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH-CAROLINA, *supra* note 61, at 27 (articulating similar rules in an apprenticeship law of 1740).
65. WHISKER, *supra* note 36, at 6-9; see also U.S. DEP’T OF LABOR, APPRENTICESHIP: PAST AND PRESENT 1 (1977) (describing apprentices in early America as “bound body and soul to their masters”); RORABAUGH, *supra* note 58, at 45 (discussing the master’s obligations under law).
66. *E.g.*, CONDUCTOR GENERALIS, *supra* note 60, at 12 (“[I]t hath been held, and so is the Law now, that . . . [justices] may either punish or discharge a bad Apprentice, as they shall think fit.”); see also *Dillan’s Case*, 1 Salk. 67, 91 Eng. Rep. 62 (1699) (“The Court held, 1st, That justices may discharge an apprentice”); THE OFFICE AND AUTHORITY OF A
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apprentices could not be bound or discharged without a deed at law,⁶⁷ and that apprentice obligations were no longer legally obligatory after a certain age.⁶⁸ In exchange for their subjugation, apprentices learned the closely guarded “arts and mysteries” of their trade.⁶⁹ Laws created pathways into apprenticeships through indentured servitude, social welfare groups such as churches and the Overseers of the Poor, poor laws, and the Orphan’s Court.⁷⁰ Given this regulatory thicket, by the early eighteenth century it was accepted that an apprentice’s failure to fulfill his duties was not merely a private breach of contract but a “Departure in Law.”⁷¹

Some full-weapon gunsmiths—who built most or all of a firearm—did develop self-sufficiency in the colonies, including most famously makers of the American long rifle known as the Kentucky or Pennsylvania rifle.⁷² Developed in Pennsylvania by German, Austrian, or Swiss immigrants,⁷³ the

JUSTICE OF PEACE 252 (George Webb ed., Williamsburg, William Parks 1736) (“If the Master misuses his Apprentice, or neglects to teach him his Trade, or to read and write, the Court may remove the Apprentice to another Master.”).

67. THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE 17 (New York, John Patterson 1788) (“One cannot be bound an apprentice without deed.” (quoting *Inter Inhabitantes Paroch. Castor & Aicles*, 1 Salk. 68, 91 Eng. Rep. 63 (1701))); THE PRACTICAL JUSTICE OF THE PEACE AND PARISH-OFFICER, *supra* note 60, at 16.
68. THE PRACTICAL JUSTICE OF THE PEACE AND PARISH-OFFICER, *supra* note 60, at 16 (stating the obligations of apprenticeships for males ended at age twenty-one and age eighteen for females); *see, e.g.*, 1 AN ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH-CAROLINA, *supra* note 61, 26.
69. WHISKER, *supra* note 36, at 5; *see also* PAMELA HAAG, THE GUNNING OF AMERICA: BUSINESS AND THE MAKING OF AMERICAN GUN CULTURE 9 (2016). Many of these apprentices were indentured servants serving four to seven years. GILL, *supra* note 40, at 15-16; Brown, *supra* note 52, at 242.
70. HAAG, *supra* note 69, at 9; WHISKER, *supra* note 36, at iv-v; CONDUCTOR GENERALIS, *supra* note 60, at 11-12 (discussing pathways into apprenticeships); U.S. DEP’T OF LABOR, *supra* note 65, at 5 (discussing the poor laws); *e.g.*, 25 THE COLONIAL AND STATE RECORDS OF NORTH CAROLINA 415-22 (Walter Clark ed., 1906) (reprinting a North Carolina law from 1760).
71. CONDUCTOR GENERALIS, *supra* note 60, at 13 (“*On the Apprentices Side*, Any departing from his Service whatsoever, refusing to do any reasonable Se[r]vice, is a Departure in Law . . .”).
72. *See* Stephen V. Grancsay, *The Craft of the Early American Gunsmith*, 6 METRO. MUSEUM ART BULL. 54, 54, 59 (1947) (discussing aspects of the “custom built” American rifle used on the frontier in the eighteenth century, including its artistry, innovations, and connections to earlier European arms); RICHARD C. RATTENBURY, A LEGACY IN ARMS: AMERICAN FIREARM MANUFACTURE, DESIGN, AND ARTISTRY, 1800-1900, at 3-4 (2014) (discussing the mythic early American gunmaker, who “had to rely for the most part on his own inherent inspiration, ingenuity, and talent,” but also acknowledging the early American gunsmith’s reliance on imports). *See generally* DILLIN, *supra* note 57 (providing an overview of the history of the Kentucky rifle).
73. DILLIN, *supra* note 57, at 25.

rifle had some fifty parts, and some components were sourced domestically (such as the hickory wood) and some from Europe (including the flints).⁷⁴ The American long rifle had important uses, especially for hunting on the frontier, but failed to become a useful military weapon due to its slow reload time, smokiness, and lack of a bayonet.⁷⁵

The vast majority of firearms and firearm parts were not made domestically but imported from Europe.⁷⁶ Colonists often assumed that procuring weapons meant importing weapons.⁷⁷ American and European firearms of the colonial era were often hard to distinguish.⁷⁸ The rare gun made entirely in America was likely sold at or near its place of manufacture or assembly, and the place of manufacture sometimes doubled as a personal residence.⁷⁹ A typical colonial gunsmithery of the seventeenth century may have followed the European model, in which a single structure contained the

74. *Id.* at 27-28.

75. John W. Wright, *The Rifle in the American Revolution*, 29 AM. HIST. REV. 293, 295 (1924); Neil L. York, *Pennsylvania Rifle: Revolutionary Weapon in a Conventional War?*, 103 PA. MAG. HIST. & BIOGRAPHY 302, 304-05 (1979) (describing the advantages and disadvantages of the American long rifle and the various reasons it didn't take hold in early American wars).

76. BROWN, *supra* note 52, at 150, 241; Louis B. Wilson, *Firearms in American History*, J. MINN. ACAD. SCI., Apr. 13, 1935, at 20, 21; SAWYER, *supra* note 52, at 29-30; DeLay, *supra* note 9, at 220; 1 MOLLER, *supra* note 47, at xvii, 12; Crews, *supra* note 51, at 52. Many resources used to make guns were sourced domestically, including iron, wood, oil, and coal, while most other resources were imported. See DEYRUP, *supra* note 53, at 35-36; *see also* Neil L. York, *Clandestine Aid and the American Revolutionary War Effort: A Re-Examination*, 43 MIL. AFFS. 26, 26-27 (1979); 1 MOLLER, *supra* note 47, at 141 (“Most of the American gunmakers did not manufacture all of the metal components of the muskets they produced during the Revolutionary War.”).

77. *See, e.g.*, 5 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 47-48 (Nathaniel B. Shurtleff ed., Boston, William White 1854) (printing, in a law of 1675, that “[w]hereas the great necessity of a speedy supply of fire armes . . . is too apparent in this time of warr with the Indians,—It is ordered by this Court, that a thousand fire armes be accordingly procured with all convenient expedition for the use of the country”). George Washington confessed “equal concern and surprize, to hear Such loud complaints in the Eastern States for want of Arms, when we consider the quantities brought in to them” from Europe. Letter from George Washington to Jonathan Trumbull (July 7, 1777), in 8 THE WRITINGS OF GEORGE WASHINGTON 367, 369 (John C. Fitzpatrick ed., 1933); *cf.* DeLay, *supra* note 9, at 229-33 (discussing the extent of arms importation).

78. *See* SAWYER, *supra* note 52, at 4; PETERSON, *supra* note 46, at 178-79; *cf.* DeLay, *supra* note 9, at 216 (discussing how, even in the “distinctive and developed” industry of American long-rifle production, gunmakers “usually relied on imported English or German locks”).

79. BROWN, *supra* note 52, at 243; HENRY J. KAUFFMAN, THE PENNSYLVANIA-KENTUCKY RIFLE 152 (Masthof Press 2005).

gunsmith's home and shop.⁸⁰ Over the colonial era, gunsmitheries grew in size, supporting more gunsmiths and more complex tools.⁸¹

Guns in early America were as unique as their makers. Wholesale firearm production in the American colonies was a handmade craft, different from today's efficient mass production based on interchangeable parts.⁸² Traditional gunsmithing proceeded slowly and methodically; making a single gun could take days or weeks.⁸³ One historian estimated that rifle makers on the frontier, who usually worked alone, produced at most thirty guns each year.⁸⁴ Bespoke production enhanced the gun's artistry—and hampered its usability.⁸⁵ Unique guns required unique gun parts. When guns broke, a specialist needed to forge an exact-fitting replacement or, more commonly, to either refashion an existing part or buy a new part from Europe.⁸⁶ Guns of the time were imperfect tools—given to breaking, exploding, failing in inclement weather, generating conspicuous light and noise, or simply missing their target.⁸⁷ The ubiquity of bayonets on eighteenth-century firearms revealed how battlefield

80. KAUFFMAN, *supra* note 79, at 152; York, *supra* note 76, at 26-27 (noting gunmaking was “extremely individualized”); *see also* Joe D. Huddleston, *Timothy Murphy—Revolutionary Rifleman, in AMERICA: THE MEN AND THEIR GUNS THAT MADE HER GREAT* 5, 6 (Craig Boddington ed., 1981); MICHAEL L. BERGER, *FIREARMS IN AMERICAN HISTORY* 49 (1979).

81. BERGER, *supra* note 80, at 56.

82. *Id.* at 49-50, 56; *see* Grancsay, *supra* note 72, at 54, 59 (detailing the artistry).

83. BERGER, *supra* note 80, at 49-50, 56; LINDSAY SCHAKENBACH REGELE, *MANUFACTURING ADVANTAGE: WAR, THE STATE, AND THE ORIGINS OF AMERICAN INDUSTRY, 1776-1848*, 51 (2019).

84. ROSE, *supra* note 54, at 21.

85. *See id.* at 79-80.

86. *See* PETERSON, *supra* note 46, at 179; Grinslade, *supra* note 51, at 1.

87. I MOLLER, *supra* note 47, at 7-10, 178 (describing the shortcomings of weapons designed for an era of linear military warfare); Grancsay, *supra* note 72, at 60-61 (“While the ordinary rifleman could sight his gun carefully and rely upon his aim at more than a hundred yards, the military musket could hardly be aimed; a hit at sixty yards was mere accident.”); *see also* Letter from Provincial Commissioners to Robert Hunter Morris (May 15, 1756), in 6 *THE PAPERS OF BENJAMIN FRANKLIN* 444, 445 n.2 (Leonard W. Labaree ed., 1963) (noting that even after “a great deal of pains to rectifie them,” defective guns failed so often that one colonist thought the province would be better off to just “throw [their] Philadelphia Arms into the middle of Susquehannah” (quoting Letter from Joseph Shippen to Edward Shippen, Jr. (June 2, 1756), in *Military Letters of Captain Joseph Shippen of the Provincial Service, 1756-1758*, 36 *PA. MAG. HIST. & BIOGRAPHY* 385, 386 (1912))); DAVID HARSANYI, *FIRST FREEDOM: A RIDE THROUGH AMERICA'S ENDURING HISTORY WITH THE GUN* 29-30 (2018) (noting seventeenth-century muskets “fired at relatively low velocity” with “unpredictable” aim and that later rifles boasted better accuracy but fouled easily, were more expensive, and were difficult to load). *But see* Wright, *supra* note 75, at 294 (describing how American gunsmiths had made “remarkable improvements” to the rifle by 1750).

success often depended not on a gun used at distance, but on a blade used at arm's length.⁸⁸

White colonists did not have a monopoly on gunsmithing. Many enslaved Black people were trained in gunsmithing and blacksmithing.⁸⁹ Natives learned gunsmithing, too.⁹⁰ As early as 1628, William Bradford, governor of Plymouth Colony, complained that Natives were receiving traded weapons, stockpiling salvaged parts, and increasingly building their own parts and ammunition.⁹¹ After the Pequot War concluded in 1638, some White colonists in New England enslaved Natives and forced them to work on guns.⁹² Gunsmithing became a valuable resource in Native-colonial relations, gifted for goodwill or exchanged for animal fur.⁹³

Gunmaking had high stakes. Defective guns resulted in accidents and bloodshed.⁹⁴ Even in the "back country" of the frontier, where conditions were

88. 1 MOLLER, *supra* note 47, at 11, 178; REGELE, *supra* note 83, at 22; York, *supra* note 75, at 306 ("European military thinkers believed bayonets should decide the ultimate fate of battle . . . Many tacticians viewed muskets as merely convenient handles for bayonets. European footsoldiers were accordingly trained to fight . . . ready at any moment for the tide-turning thrust of 'cold steel.'").

89. Michael Olmert, *Of Arms, Armorers, & Armories*, COLONIAL WILLIAMSBURG J., Autumn 2012, at 36, 40; Statement Concerning George Mercer's Estate (Feb. 1, 1789), in 1 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 269, 276 n.3 (W.W. Abbot ed., 1987) (reporting George Washington oversaw the estate sale of a slaveowner who owned "two good blacksmiths" and "two carpenters"). Newspapers also carried descriptions of runaway slaves who were apparently skilled at gunsmithing. *E.g.*, George Creager, Jr., *Take Notice*, NAT'L INTELLIGENCER & WASH. ADVERTISER, June 27, 1808, at 4; *cf.* Letter from Thomas Harris to Thomas Jefferson (Sept. 7, 1805), <https://perma.cc/AN6K-CMXE> (recounting, in a remarkable letter apparently about an attempted escape from slavery, a first-person account of Harris's "life & adventures" in which he described himself as "a gunsmith by trade").

90. HARSANYI, *supra* note 87, at 49; DAVID J. SILVERMAN, THUNDERSTICKS: FIREARMS AND THE VIOLENT TRANSFORMATION OF NATIVE AMERICA 31, 102-03, 116 (2016).

91. William Bradford, *Morton and Merry Mount* (1628), in 1 COLONIAL PROSE AND POETRY 50, 53-55 (William P. Trent & Benjamin W. Wells eds., 1901).

92. SILVERMAN, *supra* note 90, at 102-03.

93. *Id.* at 9-12, 51-53; *see, e.g.*, 5 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 679-81 (Harrisburg, Theo. Fenn & Co. 1851) (discussing a 1753 meeting between the Six Nations and Pennsylvania commissioners involving a gunsmith's "Mending of your Guns"); Letter from Benjamin Franklin to James Parker (Mar. 20, 1750), in 4 THE PAPERS OF BENJAMIN FRANKLIN 117, 117-21 (Leonard W. Labaree ed., 1961); Treaty with the Creeks, Nov. 4, 1805, 7 Stat. 96, 97).

94. *E.g.*, DeLay, *supra* note 9, at 144, 206; RECORDS OF THE COLONY AND PLANTATION OF NEW HAVEN, FROM 1638 TO 1649, at 176-77 (Charles J. Hoadly ed., Hartford, Case, Tiffany & Co. 1857) (printing allegations, from 1645, of an injury caused by the sale of a defective gun that discharged into the buyer's eye "and wounded him deepe and dangerously into the head").

rugged and supplies short, wholesale gunmaking needed to be performed by highly skilled craftsmen.⁹⁵

B. Gunmaking at the Founding: 1763-1820

This Subpart discusses colonial gunsmithing from the close of the Seven Years' War through the end of the Founding era. It discusses the growing colonial need for weapons due to conflict with Britain, the colonists' failures to become self-sufficient in gunmaking, and the eventual emergence of a massive domestic gunmaking apparatus in the mid-nineteenth century.

Arms imports increased substantially during the Seven Years' War, and colonial gunmaking capacity remained limited and low volume after the peace.⁹⁶ Most dedicated full-weapon gunsmiths of the time likely worked out of small cabins, perhaps with another smith or apprentice.⁹⁷ Typically, gunsmiths remained gun repairers, fixing weapons bought in parts or in whole from Europe.⁹⁸ Local laws codified the colonial dependence on England for weapons. For instance, one Virginia law required authorities to buy arms from England if militiamen were "so poor, as not to be able to purchase the arms" themselves.⁹⁹

After the Seven Years' War, rising tensions with England galvanized demand for weapons.¹⁰⁰ Contemporaries perceived a widespread arms shortage.¹⁰¹ The British prohibited the export of firearms to the colonies in

95. CARL P. RUSSELL, GUNS ON THE EARLY FRONTIERS: A HISTORY OF FIREARMS FROM COLONIAL TIMES THROUGH THE YEARS OF THE WESTERN FUR TRADE 44 (1957).

96. VICTOR S. CLARK, HISTORY OF MANUFACTURES IN THE UNITED STATES: 1607-1860, at 133-34 (1916); DEYRUP, *supra* note 53, at 34; *see also* Jerald T. Teesdale, *The Gunmaking Industry in Wisconsin*, 32 WIS. MAG. HIST. 302, 302 (1949).

97. SAWYER, *supra* note 52, at 145-51; Kauffman, *supra* note 79, at 155-60; *see also* Crews, *supra* note 51, at 52 ("[M]ost eighteenth-century guns were not made by a single man producing all the components for a single weapon. Most guns in North America came from Europe where they were assembled from parts built by subcontractors who spent their lifetimes making one or two parts, such as barrels or triggers.").

98. *See supra* notes 42-44 and accompanying text; Crews, *supra* note 51, at 53.

99. An Act for the Better Regulating and Training the Militia, Aug. 1755, in 6 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 63, at 530, 531-32.

100. *See, e.g.*, 10 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 293-94 (Harrisburg, Theo. Fenn & Co. 1852); *see also* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 63 (2008).

101. DON HIGGINBOTHAM, THE WAR OF AMERICAN INDEPENDENCE: MILITARY ATTITUDES, POLICIES, AND PRACTICE, 1763-1789, at 50 (1971); HAAG, *supra* note 69, at 8-14; SAWYER, *supra* note 52, at 71, 77; Robert H. Churchill, *Gun Ownership in Early America: A Survey of Manuscript Militia Returns*, 60 WM. & MARY Q. 615, 639 (2003); Letter from Benjamin Franklin to Silas Deane (Aug. 27, 1775), in 22 THE PAPERS OF BENJAMIN FRANKLIN 183, 184 & n.6 (William B. Willcox ed., 1982) ("I am glad to hear that the Gunsmith's
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1774, sending the colonists scrambling to procure firearms.¹⁰² Officials rallied to set up gunsmithing sites, funded and controlled by the colonies.¹⁰³ The eruption of fighting only intensified the need for weapons. One North Carolina representative implored the Continental Congress that “every body encourage the making of Arms.”¹⁰⁴ George Washington similarly bemoaned

Business goes on so well with you. We make great Progress in it here; but the Price is high. If we would acquire that Manufacture in Perfection, it must be by assuring the Workmen of a large Demand, for a Number of Years, and at a Price certain. Then they will be encourag'd to bring up Apprentices for different Parts of the Work, and also to make Tools and Machines for facilitating and expediting it And then I am confident Arms may be made as good and as cheap in America as in any Part of the World.”). To be clear, complaints of arms shortages were not new. *E.g.*, Petition from Richard Partridge, Agent for the Colony of New Jersey, to King George II (1746), in 6 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 362, 363 (William A. Whitehead ed., Newark, Daily Advertiser 1882) (complaining, in a 1746 petition, “[t]hat now in time of War the said Colony are destitute of a sufficient Supply of Arms Ammunition &c. for their Defence against the Common Enemy”); Letter from Governor Belcher to Lord Hardwicke (Dec. 8, 1755), in 8 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 188, 189 (William A. Whitehead ed., Newark, Daily Advertiser 1885) (noting, in a 1755 letter, that “Small arms & Amunition must come from Great Britain for they are not to be had [in New Jersey]”).

102. Letter from the Earl of Dartmouth to the Governors of the Colonies (Oct. 19, 1774), in PROVIDENCE GAZETTE, Dec. 10, 1774, at 3 (“And his Majesty judging it necessary to prohibit the Exportation of Gunpowder, or any sort of Arms or Ammunition, out of this Kingdom . . . doth therefore, with the Advice of his Privy Council, hereby order, require, prohibit and command, that no Person . . . at any Time during the Space of Six months from the date of this Order in Council, presume to transport into any Parts out of this Kingdom, or carry coastwise, any Gunpowder, or any Sort of Arms or Ammunition, or ship or lade any Gunpowder, or any Sort of Arms or Ammunition . . . without Leave and Permission in that Behalf first obtained from his Majesty or his Privy Council, upon Pain of incurring and suffering the respective Forfeitures and Penalties inflicted by the aforementioned Act.”). The order was renewed regularly until 1783. 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND: COLONIAL SERIES 401 (James Munro ed., 1912).
103. 1 MOLLER, *supra* note 47, at 109-30; SAWYER, *supra* note 52, at 119; *see, e.g.*, 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 71-73 (William Waller Hening ed., Richmond, J. & G. Cochran 1821) (printing a Virginia law from July 1775 that established a public “manufactory of arms” near Fredericksburg for “better defence of this colony”).
104. Letter from Joseph Hewes, Delegate in the Continental Cong., to Samuel Johnston (Feb. 11-13, 1776), in 10 THE COLONIAL AND STATE RECORDS OF NORTH CAROLINA 445, 447 (William L. Sanders ed., Raleigh, Josephus Daniels 1890); *cf.* 11 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 8 (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard Co. 1880) (“Resolved by this Assembly, That in regard to the threatening aspect of the war . . . the colonels of the several regiments in this Colony be, and they are hereby, directed forthwith to cause a view of all the arms and ammunition of the several companies within their several regiments, and of the dwellers within the limits of such companies, and order that they are completely provided with arms and ammunition according to law”); 1 J. LEANDER BISHOP, A
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the “scarcity of gunsmiths” at the start of the Revolution.¹⁰⁵ Leaders across the colonies justifiably worried that “all the Industry of our ingenious Gunsmiths cannot suddenly supply” all the “half-arm’d Farmers and Tradesmen.”¹⁰⁶ Maryland, for example, had just twelve gunsmith shops capable of producing an estimated total of only 240 muskets per month.¹⁰⁷ Gunsmiths were so short in number that Congress requested newly formed states exempt gunsmiths and their workmen from military service.¹⁰⁸ Virginia did so.¹⁰⁹ Officials

HISTORY OF AMERICAN MANUFACTURES FROM 1608 TO 1860, at 606 (Philadelphia, Edward Young & Co. 1864) (“An ordinance was also passed to encourage the manufacture of saltpetre, gunpowder, lead, the refining of sulfur, and providing fire-arms for the use of the Colony.”).

105. HAAG, *supra* note 69, at 9; *cf.* Letter from Joseph Hewes to Samuel Johnston (Nov. 9, 1775), in 2 LETTERS OF DELEGATES TO CONGRESS: 1774-1789, at 323, 323 (Paul H. Smith ed., 1977) (“I hope you have fallen on some method to furnish your Soldiers with Arms and Amunition, those Articles are very scarce throughout all the Colonies. I find on enquiry that neither can be got here, all the Gunsmiths in this Province are engaged and cannot make Arms near so fast as they are wanted.”); Letter from the Lancaster County Committee to the Pennsylvania Convention (July 23, 1776), in 22 THE PAPERS OF BENJAMIN FRANKLIN, *supra* note 101, at 523, 523 (“[O]ur gunsmiths have been busy in the past days repairing weapons, but our stores are almost exhausted. We have scarcely enough muskets for the necessary guards”); Letter from Robert Treat Paine to Joseph Palmer (Mar. 6, 1776), in 3 LETTERS OF DELEGATES TO CONGRESS: 1774-1789, at 344, 344 (Paul H. Smith ed., 1978) (“American never can support her freedom till we have a sufficient source of arms and ammunition of all species among ourselves.”). *But see* Letter from John Hancock, President of Cong., to George Washington (Mar. 6, 1776), in 5 AMERICAN ARCHIVES: FOURTH SERIES 83, 83 (Peter Force ed., Washington, D.C., M. St. Clair Clarke & Peter Force, 1844) (“[T]here is a great number of gunsmiths in this and the neighbouring Colonies.”); Letter from Robert Morris, Exec. Comm., to John Hancock (Jan. 26, 1777), in 6 LETTERS OF DELEGATES TO CONGRESS: 1774-1789, at 149, 149 (Paul H. Smith ed., 1980) (“[T]here now is undoubtedly more than sufficient of Good Arms in the Country . . .”).
106. Memorandum on the Use of Pikes (Aug. 26, 1775), in 22 THE PAPERS OF BENJAMIN FRANKLIN, *supra* note 101, at 181, 182 (noting “a Deficiency” because there were “more Men than we can furnish with Fire Arms”). Colonial leaders advocated using pikes instead of firearms, since “[e]very Smith can make these.” *Id.*
107. 1 BISHOP, *supra* note 104, at 591.
108. DEYRUP, *supra* note 53, at 36; *see also* Greenlee, *supra* note 40, at 60-61, 61 n.153; Letter from John Jay to Alexander McDougall (Mar. 27, 1776), in 1 THE SELECTED PAPERS OF JOHN JAY, at 218, 219 & n.2 (Elizabeth M. Nuxoll ed., 2010) (noting a New York gunmaker’s “difficulty in obtaining workmen”); Letter from Alexander McDougall to John Jay (Apr. 16, 1776), in 1 THE SELECTED PAPERS OF JOHN JAY, *supra*, at 229, 230 (noting the same).
109. 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 103, at 275 (exempting “those employed in the publick manufactory of fire arms” from conscription). The exemption was renewed after the war. 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 10 (William Waller Hening ed., Richmond, George Cochran 1823) (exempting from militia service, in a 1785 law, “persons solely employed in repairing or manufacturing fire-arms”).

complained “commonly” about arms shortages among militiamen.¹¹⁰ To improve the shortages, the Continental Congress established the role of a Public Armorer to oversee weapons manufacturing and repair.¹¹¹ Many colonies and localities did the same, and also established armories.¹¹² The Continental Congress commissioned gun fixers under the Board of War and Ordnance to receive “all arms to be repaired” and implored them to take “every method” to “hasten the repairs of the arms.”¹¹³ Gunsmiths performed work viewed as necessary for defense.

The Revolution roiled supply chains, creating complications for a fledgling nation dependent on arms imports.¹¹⁴ Europe eventually rescued the colonists from their munitions shortage, supplying the colonists with most of the guns used in the War.¹¹⁵ The most significant exporter was France, which covertly armed the revolutionaries with between 30,000 and 200,000 muskets over the course of the War.¹¹⁶ Some states exempted firearm importers from

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110. Churchill, *supra* note 101, at 640; *see also* Letter from J. Yeates, Chairman, Lancaster Comm., to Gen. Comm. (Mar. 29, 1776), in 13 PENNSYLVANIA ARCHIVES: SECOND SERIES 513, 513-15 (William H. Egle ed., Harrisburg, E.K. Meyers 1887) (noting arms shortages among soldiers); Letter from William Atlee, Chairman, Lancaster Comm., to Benjamin Franklin, President, Pa. Conv. (July 23, 1776), in 13 PENNSYLVANIA ARCHIVES, *supra*, at 527, 527-28 (noting the same).
111. *See* 6 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 966 (Worthington Chauncey Ford ed., 1906).
112. 1 MOLLER, *supra* note 47, at 109-30 (detailing efforts by each colony).
113. 10 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 145 (Worthington Chauncey Ford ed., 1908).
114. *See* Letter from John Hancock to George Washington (Mar. 6, 1776), in 3 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 415, 416 (Philander D. Chase ed., 1988) (“With Regard to Arms, I am afraid, we shall, for a Time, be under some Difficulty. The Importation is now more precarious and dangerous.”); *see also* Letter from Robert Morris to John Hancock (Jan. 26, 1777), in 7 NAVAL DOCUMENTS OF THE AMERICAN REVOLUTION 1040 (William James Morgan ed., 1976) (noting that “very considerable quantities” of small arms “may reasonably be expected this Winter, yet their arrival is very uncertain whilst the Enemies ships line the Coast”); Letter from Nicholas Cooke to George Washington (Feb. 18, 1777), in 8 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 355 (Frank E. Grizzard, Jr. ed., 1998) (“The State hath been greatly exhausted of Arms by our former Exertions, and the Enemy having effectually blocked up our Ports, it hath not been in our Power to import any. How far we shall be able to supply the Continental Battalions raising here I am not able to say . . .”).
115. SAMUEL D. SMITH, FRED M. PROUTY & BENJAMIN C. NANCE, TENN. DEP’T CONSERVATION, A PRELIMINARY SURVEY OF HISTORIC PERIOD GUNMAKING IN TENNESSEE 12 (1991) (“[B]oth Congress and the individual Colonies imported most of their firearms from Europe.”); *see also* York, *supra* note 76, at 27.
116. York, *supra* note 76, at 29; 1 JAMES E. HICKS, NOTES ON UNITED STATES ORDNANCE 9 (1940); 1 MOLLER, *supra* note 47, at 102-03, 195 (estimating France sent as many as over 200,000 muskets to Americans); *see also* C.H. Van Tyne, *French Aid Before the Alliance of 1778*, 31 AM. HIST. REV. 20, 20-21 (1925); 1 BISHOP, *supra* note 104, at 572.

taxes out of a recognition that, as put by a 1781 North Carolina law, “it is absolutely necessary that this State should be constantly and effectually supplied with arms.”¹¹⁷ Colonies and the national Congress also actively sought out European gunmaking expertise, offering to pay for the passage of gunsmiths and locksmiths from Britain and France to produce weapons.¹¹⁸ So great was the colonial esteem—and need—for European weapons that officials “put faith in every adventurer who pretended to have influence” as a weapons supplier.¹¹⁹

Yet for all its military glory, the Revolution “failed to raise arms making above the level of a handicraft.”¹²⁰ Public gunmaking sites shuttered after the War, and gunsmiths and guns remained in relatively short supply, at least from the perspective of ever-worried defense officials.¹²¹ Despite the many problems with wartime supply chains, the Revolution hardly ended the colonial reliance on gun imports; domestic manufacturing still failed to arm

117. 24 THE COLONIAL AND STATE RECORDS OF NORTH CAROLINA 380-81 (Walter Clark ed., 1905).

118. HIGGINBOTHAM, *supra* note 101, at 309; 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW-YORK 67 (Albany, Thurlow Weed 1842) (creating a committee to “write to Great Britain for four complete set of locksmiths, to make gun-locks, and that the same committee agree to pay the passages of smiths from Britain to America”); *id.* at 80-81 (identifying an agent to bring smiths and workmen to the colony and “to pay and discharge the passages of such workmen to the city of New-York, at the rate and price of steerage passengers, in any ship or vessel in which they shall arrive”); *The American Commissioners: Contract with Mercier for the Repair of Arms* (May 30, 1777), in 24 THE PAPERS OF BENJAMIN FRANKLIN 100, 100-01 (William B. Willcox ed., 1984); 13 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 303-04 (Worthington Chauncey Ford ed., 1909).

119. NEAR, *supra* note 118, at 6 (quoting Letter from Benjamin Franklin to Robert Morris (Dec. 14, 1782), <https://perma.cc/7UKZ-CLNB>); *see also* 24 THE PAPERS OF BENJAMIN FRANKLIN, *supra* note 118, at 19 n.4 (describing failed efforts to bring 500 skilled gunmakers to America). Indeed, colonial desperation for arms left them vulnerable to scammers like Peter Penet. A “great liar,” in the estimation of one historian, Penet arrived from France with supposed letters and credentials of character and “proposed to undertake to supply arms and munitions of war to the colonies or to congress, through his alleged business connections in France.” IRVIN W. NEAR, THE HISTORY OF PENET SQUARE: AND HEREIN A BRIEF SKETCH OF THE LIFE, CHARACTER AND OPERATIONS OF PETER PENET 4 (1906). Penet apparently failed to substantially deliver on his promises. *Id.* at 6.

120. DEYRUP, *supra* note 53, at 33; *see also* J.H. Westbrook, Book Review, 17 TECH. & CULTURE 752, 753 (1976) (reviewing GILL, *supra* note 40) (concluding the factory system of the Revolutionary era was only “partially successful”).

121. *See* 1 MOLLER, *supra* note 47, at 134-35 (noting a prominent gunmaking factory in Fredericksburg, Virginia, closed in 1783); Carlton O. Wittlinger, *The Small Arms Industry of Lancaster County, 1710-1840*, 24 PA. HIST. 121, 133 (1957); Letter from Charles Yancey to Edward Stevens (Oct. 1-5, 1791), in 9 THE PAPERS OF ALEXANDER HAMILTON 302, 303 (Harold C. Syrett ed., 2011).

the Nation after the War.¹²² In his postbellum report to George Washington, Quartermaster General Timothy Pickering recommended against gunmaking “carried on by the public,” since “this war has afforded too many expensive proofs of its inexpediency.”¹²³ American leaders begrudgingly continued to rely on imported firearms.¹²⁴ “[I]t was thought best to purchase Arms from abroad for the present,” Virginia Governor Patrick Henry explained to Jefferson in 1785, since “the high price of Labor, the Scarcity of Money, and other Difficultys” made it not “possible to establish Manufactures of Arms [domestically] in a short Time.”¹²⁵ For most of the 1790s, Congress eliminated taxes on arms imports and banned arms exports, bolstering the stock of firearms but discouraging domestic gunsmiths.¹²⁶ When Virginia debated ratifying the Constitution in the summer of 1788, delegate and future U.S. Chief Justice John Marshall assured fellow delegates, “[i]f Congress neglect our militia, we can arm them ourselves. Cannot Virginia import arms?”¹²⁷ Procuring arms largely meant importing arms.¹²⁸ From the Revolutionary War until the War of 1812, the most popular military weapon in America was the 1763 Charleville musket, made in France.¹²⁹

The U.S. Constitution was ratified by eleven states in 1788, and the Second Amendment was ratified in 1791. There is no evidence that gunmaking was discussed extensively in the drafting or ratification of these documents.¹³⁰ Histories of American gunmaking tend to omit the Constitution and Bill of Rights altogether.¹³¹

122. See DeLay, *supra* note 9, at 223-33.

123. Letter from Timothy Pickering, Quarter Master Gen., to George Washington (Apr. 22, 1783), <https://perma.cc/Q7AQ-P5Y9>.

124. See REGELE, *supra* note 83, at 29; Letter from Jacob Read to Charles Pinckney (June 18, 1807), in 3 THE PAPERS OF THE REVOLUTIONARY ERA PINCKNEY STATESMEN: DIGITAL EDITION (Constance B. Schulz ed., 2016) (noting South Carolina’s ongoing arms importation).

125. Letter from Patrick Henry to Thomas Jefferson (Sept. 10, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON 507, 507 (Julian P. Boyd ed., 1953).

126. See REGELE, *supra* note 83, at 29.

127. The Virginia Convention (June 16, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1299, 1308 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

128. *Supra* note 77.

129. REGELE, *supra* note 83, at 22, 50; see Report of Timothy Pickering, U.S. Sec’y of War, to the U.S. Senate (Dec. 12, 1795), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 110, 110 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, D.C., Gales & Seaton, 1832).

130. Cf. REGELE, *supra* note 83, at 25 (noting that domestic manufacturing and military self-sufficiency were not the primary concerns of the Founders).

131. See, e.g., STELLE & HARRISON, *supra* note 42, at 9-21; SAWYER, *supra* note 52; A. MERWYN CAREY, AMERICAN FIREARMS MAKERS: WHEN, WHERE, AND WHAT THEY MADE FROM
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The domestic arms market grew slowly through the 1790s.¹³² War in Europe and diplomatic stumbles stimulated demand for arms independence. “The deficiency [of arms],” fretted U.S. Secretary of War Henry Knox in 1794, “cannot be supplied from Europe, under the present circumstances. The only solid resource to obtain a supply, is the establishment of manufactories within each state.”¹³³ To increase the stock of domestic guns and gunmakers, Congress established national armories in Springfield, Massachusetts in 1794 and Harpers Ferry in the western part of Virginia in 1798.¹³⁴ The government also signed several large agreements with private gunmakers.¹³⁵ So desperate was the federal government for firearms that at least one of the contractors, Eli Whitney, had never made a gun before.¹³⁶ Even thereafter, the handicraft of gunmaking remained slow, methodical, and only marginally more productive into the second decade of the nineteenth century.¹³⁷

By and large the domestic arms market came to life as a result of public intervention in the form of subsidies, contracts, and tax protection.¹³⁸ Gunmakers sought state protection. In 1800, with domestic gunmaking still lagging, U.S. Treasury Secretary Oliver Wolcott, Jr. urged Congress to consider “protecting and encouraging the manufacture of Arms” so that domestic gunmaking “supercede the necessity of future dependence on importations from foreign Countries.”¹³⁹ Gunsmiths themselves lobbied

THE COLONIAL PERIOD TO THE END OF THE NINETEENTH CENTURY 143 (1953); 2 GEORGE D. MOLLER, *AMERICAN MILITARY SHOULDER ARMS* (2011); MERRITT ROE SMITH, *HARPERS FERRY ARMORY AND THE NEW TECHNOLOGY: THE CHALLENGE OF CHANGE* (1977).

132. See Letter from Timothy Pickering to George Washington (July 19, 1796), in 20 *THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES* 455, 456 (David R. Hoth & William M. Ferraro eds., 2019).

133. Letter from Henry Knox, U.S. Sec’y of War, to the Speaker of the U.S. House of Representatives (Dec. 10, 1794), in 1 *AMERICAN STATE PAPERS*, *supra* note 129, at 69, 70; see also Report from Joseph B. Varnum to H. Dearborn, Speaker of the U.S. House of Representatives (Apr. 2, 1806), in 1 *AMERICAN STATE PAPERS*, *supra* note 129, at 198, 198 (discussing how import stoppages and low domestic manufacturing “rendered it impossible for individuals to procure” firearms).

134. See SMITH, *supra* note 131, at 28, 52 (discussing the opening of the armories); RORABAUGH, *supra* note 58, at 65 (noting the armories at Harpers Ferry and Springfield “had been established in the 1790s by the new federal government as a result of difficulties in procuring arms during the Revolution”).

135. JAMES F. NAGLE, *A HISTORY OF GOVERNMENT CONTRACTING* 75-79 (2d ed. 1999).

136. BROWN, *supra* note 52, at 383.

137. See SAWYER, *supra* note 52, at 201-05; REGELE, *supra* note 83, at 50-51, 61; SMITH ET AL., *supra* note 115, at 26-29 (estimating 636 guns were produced in Tennessee in 1820).

138. See REGELE, *supra* note 83, at 8, 29, 40, 56, 60.

139. Letter from Oliver Wolcott, Jr., U.S. Sec’y of Treasury, to President John Adams (Nov. 11, 1800), <https://perma.cc/F8DL-KHHR>.

Congress to levy tariffs on guns in order to protect gunmakers “in their most infant state.”¹⁴⁰ The gunmakers’ plea for protection underscored their precarity. Although Americans could “purchase arms cheaper in Europe than they [could] from the American manufacturer,” the gunmakers argued that the country’s reliance on arms imports would be unsustainable, lamenting, “Will the day of importation last forever?”¹⁴¹

Industrialization and the advent of machine-made parts ensured it would not.¹⁴² Over the first two decades of the nineteenth century, several innovations in gunmaking led to a categorical improvement in firearms production.¹⁴³ New industrial technologies and practices facilitated economies of scale and the centralization of weapons production.¹⁴⁴ Of course, decentralized production never went away entirely.¹⁴⁵ And, importantly, gunsmithing apprenticeships endured through the early nineteenth century.¹⁴⁶ But, especially after the Civil War, the industry became increasingly centralized, increasingly reliant on interchangeable parts, and increasingly capable of ever-larger production.¹⁴⁷ Gunmaking had gone industrial.

140. Encouragement to Manufactures, Communicated to the U.S. House of Representatives (Jan. 28, 1803), in 2 AMERICAN STATE PAPERS: FINANCE 22, 22 (Walter Lowrie & Matthew St. Claire Clarke eds., Washington, D.C., Gales & Seaton 1832); 12 ANNALS OF CONG. 356 (1803).

141. Encouragement to Manufactures, Communicated to the U.S. House of Representatives, *supra* note 140, at 22.

142. *But cf.* Lindsay Schakenbach Regele, *Industrial Manifest Destiny: American Firearms Manufacturing and Antebellum Expansion*, 92 BUS. HIST. REV. 57, 65 (2018) (arguing that even after the U.S. “developed its own weapons standards and achieved self-sufficiency in arms production” in the mid-nineteenth century, “it continued to look overseas” for quality weapons); DEYRUP, *supra* note 53, at 142-43 (noting that as late as the 1840s, “[f]iles, the most important tool of small arms manufacture, continued to be imported from England in large quantities,” and that “[d]omestic production of files of sufficiently high quality for small arms could not compete with importation”).

143. VICTOR S. CLARK, HISTORY OF MANUFACTURES IN THE UNITED STATES: 1607-1860, at 419-21 (1916).

144. *See infra* note 147. *But cf.* DEYRUP, *supra* note 53, at 4 (arguing that the Connecticut small-arms industry “did not benefit conspicuously from reduced cost as a result of mass production” until the final third of the nineteenth-century).

145. DEYRUP, *supra* note 53, at 4. *But see* HAAG, *supra* note 69, at 24-25 (arguing that by the mid-nineteenth century “established gunsmiths from the early 1800s were going extinct as a class” and that “gunsmithing as a craft” was in “ruins”).

146. SMITH, *supra* note 131, at 59-65, 334 (discussing the endurance, institutionalization, and ubiquity of apprenticeships at Harpers Ferry through the mid-nineteenth century).

147. CLARK, *supra* note 143, at 419-20 (discussing the advent of interchangeable parts in firearms manufacturing); SPITZER, *supra* note 36, at 37; Richard C. Rattenbury, *Samuel Colt: American Inventor and Manufacturer*, ENCYC. BRITANNICA, <https://perma.cc/V2BY-HPH7> (last updated Oct. 1, 2024); *see also* 3 U.S. CENSUS BUREAU, THE STATISTICS OF WEALTH AND INDUSTRY OF THE UNITED STATES 395 tbl.VIII(B) (Washington, D.C., Government Printing Office 1872), <https://perma.cc/94M6-NVCR> (showing 46

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This brief and necessarily incomplete survey of American gunmaking through the mid-nineteenth century features several themes.¹⁴⁸ First, arms made primarily or entirely in Europe were more common than arms made primarily or entirely in North America. Second, although Americans have long made guns and gun parts, domestic manufacturing did not become self-sufficient until the nineteenth century. Third, the institution of apprenticeships was a comprehensive system for training, supervising, attracting, and regulating gunmakers until the mid-nineteenth century. But apprenticeships were not the only way gunsmiths were regulated. The next Part discusses other ways that early Americans regulated the production of firearms.

II. A History of Gunmaking Regulations

Gunmaking regulations long predate the founding of the republic.¹⁴⁹ This Part surveys the arc of gunmaking regulation before, during, and after the Founding. Part II.A discusses the history of gunmaking control in England. Part II.B moves to regulations of the colonies and states. Finally, Part II.C surveys regulations in the Founding era.

This Part finds that colonial and Founding-era gunmaking regulations fall into six categories:

- (1) **Standard setting:** public and private specifications for manufactured firearms, ranging from size to compatibility with ammunition, to protect the safety of users and improve efficacy;
- (2) **Identification:** public and private requirements that firearms come with die stamps, engravings, markings, or other ways for authorities and users to be assured of the weapon's quality, provenance, and owner;
- (3) **Licensing and inspection:** public and private rules limiting who could legally serve as a weapons manufacturer;

industrial firearms manufacturers, employing a total of 3,297 workers and producing almost \$5.6 million in products in 1870, compared to 615 gunsmith establishments, employing 1,082 workers and producing \$959,602 in products).

148. See *supra* notes 39-44 and accompanying text (discussing the limitations of historical scholarship on gunmaking in early America).

149. Cf. Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS., no. 2, 2017, at 55, 56 (noting that “though gun possession is as old as America, so too are gun laws,” and “for the first 300 years of America’s existence, gun laws and gun rights went hand-in-hand”). See generally *infra* Part II.B (discussing gunmaking regulations before Independence).

(4) **Labor and impressment:** public and private requirements on who could make weapons and when, including the institution of apprenticeships and rules compelling manufacturers to repair or make the Nation's weapons;

(5) **Restrictions on dangerous persons:** public prohibitions on gunmaking by or for persons perceived to be dangerous or threatening, including sworn English loyalists, free and enslaved Black people, Indians, and some religious minorities, such as Catholics; and

(6) **Gunpowder making:** rules circumscribing the making, storing, and distributing of the important and highly dangerous component that enabled arms to fire.

A. Gunmaking Regulations in England: 1500-1700

Gunsmithing regulations in the New World grew out of gunsmithing regulations from the Old World. Thus, English traditions matter in two ways. First, English traditions directly and indirectly affected American firearm production. Many gunsmiths in America were immigrants trained in England, and they brought with them the norms, expectations, and technical knowledge from the Old World.¹⁵⁰ Second, English traditions matter to the extent that English norms and practices informed the context and meaning of constitutional text.¹⁵¹ Historians and lawyers continue to debate the extent to which the colonists accepted specific English norms and traditions.¹⁵² There is

150. *E.g.*, SMITH, *supra* note 131, at 38 (discussing an English-born gunsmith reared in the famous Birmingham market); *see id.* at 65 (discussing a synthesis of gunmaking practices as a result of combined English and American traditions).

151. *See* District of Columbia v. Heller, 554 U.S. 570, 599 (2008) (stating the Second Amendment “codified a right inherited from our English ancestors” (quoting Robertson v. Baldwin, 165 U.S. 275, 281 (1897)); N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2136 (2022) (discussing the role of English common law in constitutional interpretation).

152. *Compare* Van Ness v. Pacard, 27 U.S. 137, 144 (1829) (“The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birth right; but they brought with them and adopted only that portion which was applicable to their situation.”), Paul Samuel Reinsch, English Common Law in the Early American Colonies 7 (Oct. 1899) (Ph.D. dissertation, University of Wisconsin) (on file with the Robert Crown Law Library, Stanford Law School) (“In many cases the colonists expressed an adhesion to the common law, but, when we investigate the actual administration of justice, we find that usually it was of a rude, popular, summary kind”), and LAURENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW, at xix-xx (4th ed. 2019) (“English law was complex and bewildering. It is not easy to say *which* English law was the ancestor of American law. . . . The colonies borrowed as much English law as they wanted to take or were forced to take. Their appetite was determined by requirements of the moment, by ignorance or knowledge of what of what was happening abroad, and by general obstinacy. Mapping out how far colonial law fit English law is almost hopeless.”), with John A. Conley, *Doing It by the Book: Justice of the Peace Manuals and English Law in* *footnote continued on next page*

reason to think Americans at the Founding rejected at least some parts of the English tradition of regulating gunmaking, such as religious-based disarmament, and that the traditions changed over time.¹⁵³ That is, the colonists did not always embrace the history relayed in this Subpart. Still, this history gives context to American regulations discussed thereafter.

In England, gunmaking was regulated by a web of public and guild authorities.¹⁵⁴ The guild assured product quality for buyers, protected manufacturers from competition by restricting the supply of labor, and propped up revenues by controlling the supply of goods.¹⁵⁵ Rules of apprenticeship, first established by guilds and later by statutes,¹⁵⁶ exerted far-ranging control.¹⁵⁷ Apprentices had to promise a long tenure, generally seven years.¹⁵⁸ Wealth and class shaped the availability of opportunity.¹⁵⁹ Wages were rare, and illegal in many locales.¹⁶⁰ By the seventeenth century, families

Eighteenth Century America, 6 J. LEGAL HIST. 257, 283-84 (1985) (explaining the “pervasive influence English law had on the northern and middle colonies” and the “heavy reliance [the southern] colonies placed on English law as a foundation and as a dynamic element of their legal systems”).

153. See generally Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983) (chronicling English traditions underlying the Second Amendment from the seventeenth century through the American Revolution).
154. REGELE, *supra* note 83, at 18; WHISKER, *supra* note 36, at 68-69. See generally S.R. Epstein, *Craft Guilds, Apprenticeship, and Technological Change in Preindustrial Europe*, 58 J. ECON. HIST. 684, 688 (1998) (discussing the purposes and development of guild regulations and apprenticeships in England and continental Europe).
155. See 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 63-65 (Edwin Cannan ed., Methuen & Co. 1904) (1776); Epstein, *supra* note 154, at 688, 691; Patrick Wallis, *Apprenticeship and Training in Premodern England*, 68 J. ECON. HIST. 832, 852 (2008).
156. Richard Aldrich, *The Apprentice in History*, in APPRENTICESHIP: TOWARDS A NEW PARADIGM OF LEARNING 14, 14-15 (Patrick Ainley & Helen Rainbird eds., Routledge 2013) (1999) (describing statutes specifying requirements for apprenticeships, including age and employment rules).
157. Wallis, *supra* note 155, at 834; Christopher Brooks, *Apprenticeship, Social Mobility and the Middling Sort, 1550-1800*, in THE MIDDLING SORT OF PEOPLE: CULTURE, SOCIETY AND POLITICS IN ENGLAND, 1550-1800, at 52, 53 (Jonathan Barry & Christopher Brooks eds., 1994) (noting that masters could lawfully prohibit the apprentice from gambling, sex, drinking, and more). But see Chris Minns & Patrick Wallis, *Rules and Reality: Quantifying the Practice of Apprenticeship in Early Modern England*, 65 ECON. HIST. REV. 556, 558 (2012) (arguing that the supposedly “rigid rules of apprenticeship” were in fact “flexible”).
158. Epstein, *supra* note 154, at 688, 691.
159. PETER EARLE, THE MAKING OF THE ENGLISH MIDDLE CLASS: BUSINESS, SOCIETY AND FAMILY LIFE IN LONDON, 1660-1730, at 86-88 (1989) (describing the rising class status of apprentices in the seventeenth century); Brooks, *supra* note 157, at 53.
160. Wallis, *supra* note 155, at 835.

of apprentices often paid a fee to the master, provided bonds to guarantee the apprentice's conduct, and in some cases even subsidized the apprentice's clothing and board.¹⁶¹ Family heritage mattered, too. As with most trades, the English gun trade was "very much a family craft" inherited from father to son.¹⁶² And, like other trades, the guild cloaked gunmaking in secrecy.¹⁶³

Early English regulations often concerned who was allowed to make guns. "From the earliest days of the common law," regulations disarmed individuals who threatened others.¹⁶⁴ These disarmament regulations necessarily also functioned to prohibit the targeted individuals from gunmaking. As purchaser-in-chief, English authorities used contracts to dictate the specifications—such as caliber and barrel length—for manufacturers.¹⁶⁵

The reach of royal regulation was evident in the 1672 requirement empowering the Gunmakers' Company to prove all arms in England.¹⁶⁶ The Board of Ordnance's proving and inspection systems, which oversaw various stages of arms manufacturing, exerted "ever-increasing control over the private component manufacturers and arms assemblers."¹⁶⁷ The Crown, like some colonies, also disarmed whole groups, including Irish Catholics, who were also subject to home searches for arms.¹⁶⁸

161. *Id.*

162. BAILEY & NIE, *supra* note 42, at 62; e.g., SMITH, *supra* note 131, at 61 (discussing the famous Resor family of gunsmiths); see also Jacob Selwood, "English-Born Reputed Strangers": Birth and Descent in Seventeenth-Century London, 44 J. BRIT. STUD. 728, 734-41 (2005) (discussing the connection between English heritage and occupation status via apprenticeships).

163. Zinsel, *supra* note 41, at 336; C.E. Greener, *Gun-Making Handicrafts*, 5 TRANSACTIONS NEWCOMEN SOC'Y 57, 57-58, 65 (1924).

164. *United States v. Rahimi*, 144 S. Ct. 1889, 1899 (2024).

165. SAWYER, *supra* note 52, at 20-21 (describing a 1692 contract with gunsmiths in Birmingham in which muskets were labeled "W R" for William Rex and a proof mark was put on the barrel after live testing); 1 MOLLER, *supra* note 47, at xvii-xviii.

166. See Calvin Goddard, *Proof Tests and Proof Marks: I: Small Arms Practice of the British Companies*, 14 ARMY ORDNANCE 140, 140 (1933). This law built on earlier laws, enacted under the stormy and unpopular reign of Charles I, requiring all firearms manufactured for the general public to undergo proving, or the process of test-firing a weapon and marking it to note its quality and safety. It also established stringent proving tests that penalized gunmakers who failed to follow standards and required firearms be taken to muster places to be stamped with the Armorer proof, the county, and the individual stamper. SAWYER, *supra* note 52, at 17-19, 22, 95-96.

167. 1 MOLLER, *supra* note 47, at xviii. *But cf. id.* at 26 (describing a lack of specific regulations for military shoulder arms and the English reliance on private gunmakers until the early 1700s).

168. *An Act for the Better Securing of Government, by Disarming Papists*, 7 Will. 3 c. 5 (1695) ("[A]ll Papists within this Kingdom of Ireland, shall . . . Discover and Deliver up to some Justice or Justices of the Peace . . . their Arms, Armour and Ammunition of what kind
footnote continued on next page

B. Regulating Gunmaking in the Colonies: 1600-1763

Early Americans broke with several of the English traditions, including guilds. Nonetheless, Americans regulated who could make guns, and for whom, as well as what guns to make. What follows is a partial list of gunmaking regulations in the early and middle colonial periods.

Standard Setting.—As early as the 1630s, colonists were required to be armed for personal and community safety, and laws throughout the colonial period specified the arms colonists should carry.¹⁶⁹ These laws regulated gunmaking indirectly as manufacturing guidelines, specifying the dimensions of a weapon down to the inch. For example, a 1645 Massachusetts law required colonists to use “armes as may be most usefull,” defined as firearms of either “full musket boare, or basterd musket at the least, & that none should be under three foote 9 inches, nor any above foure foote 3 inches in length.”¹⁷⁰ The law’s purpose was expressly tied to safety.¹⁷¹ Standard-setting regulations were common

soever the same be, which are in his or their Hands or Possession, or in the hands of any other Person or Persons in Trust for them . . .”).

169. *E.g.*, 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 84, 93, 120, 190 (Nathaniel B. Shurtleff ed., Boston, William White 1853) (printing laws from the 1630s); 1 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 542 (J. Hammond Trumbull ed., Hartford, Brown & Parsons 1850) (printing a 1650 law requiring all males over 16 to have “in continuall readines, a good muskitt or other gunn, fitt for service”); LAWS OF THE GOVERNMENT OF NEW-CASTLE, KENT AND SUSSEX, UPON DELAWARE 144 (Philadelphia, B. Franklin & D. Hall 1752) (printing a 1740 Delaware law requiring “all the Inhabitants and Freemen” of a town to “provide and keep” specified arms when required by a local officer); 18 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 7-11 (Allen D. Chandler ed., 1910) (printing a 1755 militia law requiring each male aged 16-60 to “constantly keep in his House . . . one Gun or Musquet fit for Service”); A COLLECTION OF ALL THE PUBLIC ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA 215-19 (Newbern, James Davis 1751) (printing a 1746 law requiring freeman and servants between 16-60 to enlist in the militia and “be well provided with” well-maintained arms and ammunition); ACTS AND LAWS, OF HIS MAJESTY’S COLONY OF RHODE-ISLAND, AND PROVIDENCE-PLANTATIONS, IN NEW-ENGLAND, IN AMERICA 64-74 (Newport, Franklin 1745) (printing a 1718 law requiring all men 16-60 serve in the militia and “be always provided with one good Musket, or Fuzee” of specified proportions); 6 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 379-80 (Charles J. Hoadly ed., Hartford, Lockwood & Brainard Co. 1874) (printing a 1741 law requiring every “listed souldier and other house-holder” to “have in continual readiness, a well-fixed firelock . . . to the satisfaction of the commission officers of the company to which he doth belong”).
170. 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 134-35 (Nathaniel B. Shurtleff ed., Boston, William White 1853); *cf. id.* at 222 (providing the same standards in a different statute).
171. *Id.* at 134-35 (“It being requisite that all inhabitants within this jurisdiction should endeavor after such armes as may be most usefull for their owne & the countryes defence.”).

throughout the colonial period, dictating which arms, and with what specifications, satisfied compulsory arms-possession of the militia laws.¹⁷²

Connecticut passed similar laws in 1639 and several times again as late as 1757, permitting public officials to inspect “all defects of armes.”¹⁷³ In South Carolina, an anti-slave-insurrection law empowered private church wardens to inspect arms at church to determine if the firearms were “fit for immediate use and service.”¹⁷⁴

Colonial authorities could also license gunmaking that would be otherwise prohibited. This included special licenses to make guns for allegedly “dangerous” persons such as Indians, as well as licenses for slaves to make guns.¹⁷⁵ Authorities could also license gunpowder making.¹⁷⁶

Labor.—Private and public rules regulated who could make guns and how. Apprenticeships were a ubiquitous form of public-private gunmaker

172. *E.g.*, 4 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 57 (John Russell Bartlett ed., Providence, Knowles, Anthony & Co. 1859) (reporting in a 1708 law that the militia consists of “all males, from sixteen to sixty years of age, who are obliged, at their own charge, to be always provided and fitted with a good firelock musket or fusee, a sword or bayonet, cartouch-box with one pound of good powder, and four pounds of bullets”); 5 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 16-17 (William Waller Hening ed., Richmond, Franklin Press 1819) (printing a 1738 law requiring “all free male persons, above the age of one and twenty years” to be “armed and accoutred” according to statutory specifications); *see also* LAWS OF THE GOVERNMENT OF NEW-CASTLE, KENT AND SUSSEX, UPON DELAWARE, *supra* note 169, at 144.

173. 1 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 169, at 30, 128, 282; 2 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 20 (J. Hammond Trumbull ed., Hartford, F.A. Brown 1852) (appointing officials to conduct mandatory inspections of “Armes and amunition”); 6 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 169, at 382-83 (reprinting a 1741 law requiring militiamen and citizens to “bring forth their arms and ammunion” to be reviewed annually by commanders upon penalty of fine); 10 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 559 (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard Co. 1877) (reprinting a 1756 law commanding the same weapon inspections twice annually); 11 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 104, at 8 (reprinting a 1757 law requiring “arms and ammunion of the several companies within their several regiments, and of the dwellers within the limits of such companies” to be viewed immediately in light of “the threatning aspect of the war and the extraordinary emergencies that may happen at this season”).

174. THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA 186 (John Faucheraud Grimke ed., Philadelphia, R. Aitken & Son 1790).

175. *See infra* notes 191-207 and accompanying text (discussing prohibited persons); *see, e.g.*, 1 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 169, at 74 (ordering, in a law of 1642, “that no Smith within these libertyes . . . shall trade any Instrument or matter made of iron or steele with [Indians], nor deliver any that are allreddy made, without lypense from two Magistrats”).

176. *See infra* note 208 and accompanying text.

regulation, as detailed in contracts, statutes, and treatises.¹⁷⁷ The master was delegated near-complete control over the apprentice, regulating most aspects of the apprentice's life and work.¹⁷⁸ Public law was the source of this power.¹⁷⁹ Public authorities regulated apprenticeships through a complex web of legislative regulations and court-developed common law rules, governing an apprenticeship's labor conditions, employment terms, and criminal and civil standards.¹⁸⁰ The master was, in a legal sense, a delegate of public authorities. The master wielded public power, as noted by one eighteenth-century treatise from South Carolina, due to the master having "government" of his apprentice.¹⁸¹

Other regulations were also far-reaching. Authorities could impress gunsmiths, require citizens to keep their arms repaired, and force gunsmiths to abandon other work to make or repair firearms. As early as 1624, the Virginia General Assembly enacted a law requiring that "the commander of every plantation take care" that all gun parts were "fixt and their arms compleate."¹⁸² In Maryland, a 1697 law impressed gunsmiths into the militia in order to "see that all the publick Arms are well fitted & fixt up."¹⁸³ If a county were "destitute of a Smith or other person quallifyed for performance of such worke," then the militia officer had the authority to compel gunsmiths in nearby counties to fix arms "imediately."¹⁸⁴ If a gunsmith refused, then the sheriff was commanded to take the gunsmith into custody and bring him to court at Annapolis "to answer such their contempt."¹⁸⁵ Connecticut had

177. See *supra* notes 57-71 and accompanying text (discussing apprenticeships). See generally Novak, *supra* note 31, at 27-32 (discussing public-private regulations in early America).

178. See *supra* notes 57-71 and accompanying text.

179. See, e.g., 1 AN ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH-CAROLINA, *supra* note 61, at 26 (noting, in an apprenticeship law of 1740, that apprentices were "indented in the manner and according to the directions of this act").

180. See *supra* notes 57-71 and accompanying text.

181. THE PRACTICAL JUSTICE OF THE PEACE AND PARISH-OFFICER, *supra* note 60, at 143; see also 2 AN ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH-CAROLINA, *supra* note 61, at 52 (Joseph Brevard ed., Charleston, John Hoff 1814) (printing a law of 1794 addressed to all masters with "power over, government or command of, any white apprentice").

182. 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 127 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823).

183. 23 ARCHIVES OF MARYLAND 249 (William Hand Browne ed., 1903).

184. *Id.*

185. *Id.*

already promulgated a similar rule in 1665.¹⁸⁶ Such public safety laws appeared in many colonies throughout the seventeenth and eighteenth centuries.¹⁸⁷

Identification.—At least two colonies, Connecticut and Maryland, required the labeling or tracking of impressed or confiscated weapons. The Connecticut

186. 2 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 173, at 19.

187. *E.g.*, 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, *supra* note 170, at 25 (printing a 1642 law that required “every smith in this jurisdiction, laying aside all other busines, do with all speed attend the repairing of the ammunition of the severall townes, fitting them for any suddaine occasion, & shall receive country pay for it”); RECORDS OF THE COLONY AND PLANTATION OF NEW HAVEN, *supra* note 94, at 168 (publishing a 1645 law in which the “gunne smithes were desired to lay aside all other buissines & gett those gunnes repayred that are defective”); 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 221-22 (John Russell Bartlett ed., Providence, A. Crawford Greene & Brother 1856) (ordering in 1650 that several named individuals “shall mende and make all lockes, stockes and pieces that by order from the warden of each Towne shall be from any of the inhabitants thearof presented to them, for just and suitable satisfaction in hand payed, without delay, under the penaltie of ten pounds,” and that “all men that have gunns and pieces to mend, and have need to have them mended for their present defence, shall forthwith, according to order, carrie those pieces to mende, upon paine of forfeiting ten shillings a piece”); 2 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 173, at 19 (ordering in 1665 officials to require local gunsmiths “to be presently paid upon the repaire of the deficient Armes, forthwith to doe what is requisit to be done for fitting the Armes sent to them”); 3 ARCHIVES OF MARYLAND 531 (William Hand Browne ed., Baltimore, Isaac Friedenwald 1885) (“[A]ll Smiths which have tooles be forced to fixe armes for the Soldiers & all other the Inhabitants of the province.”); THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 285-86 (William Brigham ed., Boston, Dutton & Wentworth 1836) (empowering, in a law of 1671, a Council of War to impress “Men,” “Arms,” “Ammunition,” and “whatsoever else they may judge needfull,” and clarifying that “no Smith in this Government, who is able to do it, shall refuse or neglect to amend any Arms brought unto him for such purpose”); 5 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, *supra* note 77, at 54 (empowering, in 1675, a public official “to impresse an able gunsmith” to move to Concord “for the fixing up of armes, from time to time, during this warr”); 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 182, at 208 (ordering, in a law of 1632, “That all gunsmiths . . . be compelled to worke at their trades and not suffered to plant tobacco or corne or doe any other worke in the ground”); GILL, *supra* note 40, at 7-9 (discussing Virginia gunmaking impressment laws of 1672, 1692, and 1705); 23 ARCHIVES OF MARYLAND, *supra* note 183, at 249 (law of 1697); 4 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 22 (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard Co. 1868) (“[A]ll smiths in those plantations of the sea side are hereby required to apply themselves to mend such armes as shall be brought to them”); 8 ARCHIVES OF MARYLAND 67 (William Hand Browne ed., Baltimore, Isaac Friedenwald 1890) (ordering, in 1688, that several named public officials throughout Maryland “have power to presse a smith for the fixing the said Armes” and that the gunsmiths “doe noe other business in the way of [their] trade till those be done amended and finished”); 7 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 26-27 (William Waller Hening ed., Richmond, Franklin Press 1820) (permitting, in a 1756 law, impressment of gunmakers for “fixing of arms . . . or doing any other work whatever, where need shall be”).

laws were designed to return the weapon or compensate its owner upon loss.¹⁸⁸ In Maryland, the anti-theft law required “all the Public Arms” to be marked and granted discretion to the governor or commander in chief to denote the marking and manner of marking.¹⁸⁹ The law expressly prohibited buying and selling arms defaced of their marking.¹⁹⁰

Gunmaking by and for Dangerous Persons.—Disarmament laws targeted several categories of persons feared by colonial authorities: Indians,¹⁹¹ Black people enslaved and free,¹⁹² Roman Catholics (in some colonies)¹⁹³ and

188. *E.g.*, 10 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 173, at 479-80 (printing a law of 1756 authorizing officials to impress arms and “keep a regular account from whom such arms and accoutrements are taken, and to what captain the same are delivered, with the same numbered and the names of the owners to which each number belongs”); 11 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 104, at 123 (empowering a militia official to impress arms “and order the same to be marked and apprized by two judicious persons under oath . . . therein expressing the names of the owners with the marks and prizes as aforesaid”); *cf.* 4 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 187, at 485 (authorizing, in a 1704 law, militia officers to impress soldiers and record “a perticular account what armes, ammuniton, or other accoutrements, are imprest or taken upon the Colonies account for each of them”). For similar Lancaster County regulations involving impressed or confiscated weapons, see Letter from the Committee of Lancaster County to the Committee of Safety (Nov. 9, 1775), in 13 PENNSYLVANIA ARCHIVES, *supra* note 110, at 297 (“The then committee of this county, upon hearing of those arms, requested some of their members to examine and send them down, intending an application to the Assembly to have them repaired at the public expense, and put into the hands of such associators as were unable to furnish themselves, and who were to give receipts for them to be returned, if not lost in actual service.”).

189. LAWS OF MARYLAND AT LARGE, WITH PROPER INDEXES 425 (Thomas Bacon ed., Annapolis, Jonas Green 1765) (printing a 1733 law intended “to prevent the Embezzlement of the Public Arms,” which required that “all the Public Arms shall be Marked” and banned the sale or purchase of these weapons).

190. *Id.*

191. To be sure, the English position on trading firearms with Indians varied over time based on local and temporal security conditions and by tribe. See Donald E. Worcester & Thomas F. Schilz, *The Spread of Firearms Among the Indians on the Anglo-French Frontiers*, 8 AM. INDIAN Q. 103, 103-08 (1984). Moreover, some believed the “gun trade was an altruistic one” that—in the racist language of the time—would raise “the savage to civility.” See ROSE, *supra* note 54, at 7.

192. For a discussion of the racism and prejudice of these laws, see Brennan Gardner Rivas, *Strange Bedfellows: Racism and Gun Rights in American History and Current Scholarship*, in NEW HISTORIES OF GUN RIGHTS AND REGULATION: ESSAYS ON THE PLACE OF GUNS IN AMERICAN LAW AND SOCIETY 149 (Joseph Blocher et al. eds., 2023). See also Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30 (2023); Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537 (2022).

193. See *infra* note 205.

members of the Moravian Church,¹⁹⁴ and suspected and sworn English loyalists (during the Revolution).¹⁹⁵ Such laws not only prohibited dangerous persons from possessing guns, but implicitly and sometimes explicitly also prohibited dangerous persons from gunsmithing (and sometimes gunpowder making) and nondangerous persons from gunsmithing for dangerous persons.¹⁹⁶

In 1619, the General Assembly of Virginia, the first legislative body created by European settlers in North America, enacted as one of its first measures a law requiring “[t]hat no man do sell or give any Indians any piece shott, or poulder, or any other armes offensive or defensive, upon paine of being held a Traytour to the Colony, & of being hanged, as soon as the fact is proved, without all redemption.”¹⁹⁷ In 1630, a royal proclamation forbade anyone from teaching an Indian “to make or amend” firearms “or anything belonging to them.”¹⁹⁸ A decade later, English and colonial authorities forbade gunsmiths

194. See Letter from Jonathan Belcher, N.J. Gov., to Thomas Pownall, N.J. Lt. Gov. (Nov. 10, 1755), in 8 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY, *supra* note 101, at 160, 160 (describing an affidavit portraying Moravians as “Snakes in the Grass and Enemies to King George and His Subjects” and indicating Belcher’s intention to “immediately give orders that all the Arms & Amunition among the Moravians in this Province be seized & kept in safe Custody” if the information within the affidavit were to be confirmed).

195. See *infra* note 254.

196. *E.g.*, 2 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY: 1630-1692, at 101 (John Noble ed., 1904) (reporting 1640 court proceedings against individuals accused of selling arms and ammunition “to an Indian”); RECORDS OF THE COLONY AND PLANTATION OF NEW HAVEN, *supra* note 94, at 60 (reprinting a 1641 law fining any person who “shall furnish the Indians, whether directly or indirectly, with any amunition whatsoever”); *id.* at 206 (publishing a 1645 law expanding the same prohibition to include gun repair “without expresse order from the governour or comissioners for the collonye in wrightinge”); see also 10 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 687 (Frederick W. Ricord & Wm. Nelson eds., Newark, Daily Advertiser 1886) (reprinting a New Jersey law of 1776 disarming those convicted of libeling or defaming legislative acts made “for the defence or Security of the Rights & Privileges” of the colony); *id.* at 688 (printing a law from the same session disarming individuals deemed “Inimical to this or the other United American Colonies . . . Untill they shall satisfy said Authority, Select Men and Committee, or the Major Part of them that such Person or Persons are friendly to this and the other United Colonies.”). Some of these laws combined elements of multiple categories identified here, such as a 1700 Massachusetts law that appeared to bar Indians from entering apprenticeships without special permission from justices of the peace. See 1 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY, *supra* note 63, at 436.

197. 1 JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA 12-13 (H.R. McIlwaine ed., 1915).

198. Patrick M. Malone, *Changing Military Technology Among the Indians of Southern New England, 1600-1677*, 25 AM. Q. 48, 53 (1973) (quoting 1 HISTORICAL COLLECTIONS; CONSISTING OF STATE PAPERS, AND OTHER AUTHENTIC DOCUMENTS 312 (Ebenezer Hazard ed., Philadelphia, T. Dobson 1792)).

from repairing Indians' weapons without official approval.¹⁹⁹ Indian gunsmithing happened anyway.²⁰⁰ Authorities persisted with efforts to keep gunsmithing from Indians throughout the colonial era.²⁰¹ These laws

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199. *Id.* at 57; *The Laws and Liberties of Massachusetts, 1647*, in COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 95, 120 (Donald Lutz ed., 1998) (Massachusetts law of 1647); 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 182, at 255-56 (barring any direct or indirect means of giving Indians firearms and paraphernalia as of March 1642); 1 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 169, at 74 (ordering, in a law of 1642, “that no Smith within these libertyes . . . shall trade any Instrument or matter made of iron or steele with [Indians], nor deliver any that are allreddy made, without lycense from two Magistrats”); 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND, *supra* note 187, at 155 (ordering in 1647 that “if any person or persons, shall sell, give, deliver, or any otherwayes convey any powder, shott, lead, gunn, pistoll, sword, dagger, halberd or pike to the Indians” they must pay a fine, and then ordering that “if any person shall mend or repair their Guns . . . he shall forfeit the same penaltie”); *see also* 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, *supra* note 170, at 163 (approving a petition in 1646 for a colonial gunsmith to “amend” the gun of an Agawam tribe member). Of course, these gunmaking restrictions were in essence more specific prohibitions on trading “any munitions of War with the Indians,” which could be “punished by Death.” LAWS AND ORDINANCES OF NEW NETHERLAND, 1638-1674, at 47 (E.B. O’Callaghan ed., Albany, Weed, Parsons & Co. 1868); *id.* at 278 (reaffirming the ban on trading but lowering the penalty to “forfeiting all the wages he has earned or shall earn,” in addition to a fine of quadruple the value of whatever had been traded).
200. Spitzer, *supra* note 36, at 30 (noting these laws “were of limited effectiveness” due to the “difficulty of monitoring arms trading in early America,” the profitability of the arms trade and presence of French and Dutch traders, and Indian-settler alliances); Malone, *supra* note 198, at 53-54, 58 (noting the Narragansetts of Rhode Island had their own forge and blacksmith by 1675 at the latest).
201. *E.g.*, THE BOOK OF THE GENERAL LAWS OF THE INHABITANTS OF THE JURISDICTION OF NEW-PLIMOUTH 38 (Nathaniel Clerk ed., Boston, Samuel Green 1685) (“[W]hosoever shall sell or give, directly or indirectly any Arms, as Guns, Swords, Pistols, &c. unto any Indians without Licence first obtained from the General Court shall forfeit five times the value thereof; and whosoever shall lend any Gun to an Indian, or sell any Powder, Shot or Lead to them, shall forfeit twice the value thereof . . . [W]hatsoever Indians who have or shall have Guns, or other Arms, that have or shall manifestly appear to be unfaithful and treacherous to us, shall forfeit their Arms”); 5 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, *supra* note 77, at 304-05 (printing a law of 1680 “strictly inhibitting all persons from giving, selling, bartering, directly or indirectly, gunns, powder, shott, lead, armes, or aminition, to any Indean whatsoever, or mending or repayingr gunns, &c.,” but exempting public officials to license trade of gunpowder and ammunition with “our freind Indeans, for necessary use”); 2 THE STATUTES AT LARGE OF SOUTH CAROLINA 310 (Thomas Cooper ed., Columbia, A.S. Johnston 1837) (printing a law of 1707 criminalizing as a felony “any person whatsoever” who should “sell, give, or any other way dispose of any arms or ammunition of war, to any Indians who are open enemies to this Province,” and creating a licensure program for those who trade with Indians); THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY 103 (Aaron Leaming & Jacob Spicer eds., Philadelphia, W. Bradford 1752) (printing a 1675 law from the Province of New Jersey that “no Black-Smith, or Lock-Smith, or any
footnote continued on next page”)

sometimes distinguished between “friend” Indians and “enemy” Indians.²⁰² A Pennsylvania law enacted in 1763 threatened imprisonment and “thirty-nine lashes on his bare back” for anyone who “shall directly or indirectly give” firearms to Indians.²⁰³ Disobedience was common, in part because colonial officials sometimes offered their gunsmithing services to Indians in trade and diplomacy.²⁰⁴

Maryland, Virginia, and Pennsylvania disarmed Roman Catholics.²⁰⁵ Laws prohibited slaves from receiving or possessing weapons, although slave masters or local authorities could license exemptions.²⁰⁶ In South Carolina, for example, even “[f]ree negroes, and free persons of color” could be whipped for possessing a gun.²⁰⁷

Gunpowder.—As one of the most important components of an effective firearm, gunpowder was regulated throughout the colonial period.

other Person whatsoever within this Province, do make, mend or any way repair any Indians Gun or Guns” upon monetary fine).

202. *E.g.*, 5 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, *supra* note 77, at 304-05; 2 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 201, at 310; *see also supra* note 201.
203. 6 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 319-20 (James T. Mitchell & Henry Flanders eds., n.p., Wm. Stanley Ray 1899).
204. *See supra* note 93 and accompanying text.
205. 52 ARCHIVES OF MARYLAND 454 (J. Hall Pleasants ed., 1935) (requiring, in a law of May 1756, that “all Arms Gunpowder and Ammunition of what kind soever any Papist or reputed Papist within this Province hath or shall have in his House or Houses or elsewhere shall be taken from Such Papist or reputed Papist by Warrant” upon penalty of three months’ imprisonment); 7 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 187, at 35-39 (stating, in a law of 1756, that because “it is dangerous at this time to permit Papists to be armed,” Catholics who refuse to take an oath cannot have “any arms, weapons, gunpowder or ammunition,” and permitting justices of the peace to search any purported Catholic’s possessions and seize contraband weapons); 5 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 627 (James T. Mitchell & Henry Flanders eds., n.p., Wm. Stanley Ray 1898) (authorizing, in a law of 1759, officials to disarm “any papist or reputed papist” and “search as often as they shall receive information or have good cause to suspect the concealment of arms and ammunition in the houses of any papist or reputed papist,” and permitting three months’ imprisonment of violators).
206. *E.g.*, 3 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 459 (William Waller Hening ed., Philadelphia, Thomas DeSilver 1823) (requiring, in the Virginia slave code of 1705, that “no slave go armed with gun . . . without a certificate of leave in writing, for so doing, from his or her master, mistress, or overseer” upon penalty of twenty lashes); 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 404-05 (David J. McCord ed., Columbia, A.S. Johnston 1840) (South Carolina law of 1740); 23 THE COLONIAL AND STATE RECORDS OF NORTH CAROLINA 201, 383-84 (Walter Clark ed., 1904) (North Carolina slave codes of 1741 and 1753).
207. THE NEGRO LAW OF SOUTH CAROLINA 16 (John Belton O’Neill ed., Columbia, John G. Bowman 1848).

Gunpowder was inherently dangerous to make and store due to its flammability and explosiveness. Accidents with gunpowder led to injuries to life, limb, and property, while large quantities could be weaponized as bombs. Colonies routinely regulated the manufacture and storage of gunpowder to avoid these issues, including through inspections and outright prohibitions affecting both lawful citizens and dangerous persons.²⁰⁸

C. Regulating Gunmaking at the Founding: 1763-1820

At the Founding, gunmaking regulation included identification, labor, standard setting, inspection and licensing, prohibitions on gunmaking by and for dangerous persons, and regulations on gunpowder. These regulations can be understood within a larger history of contemporary regulations of products manufacturing.²⁰⁹

Identification.—Firearms made around the time of the American Revolution were routinely die stamped or engraved by the gunmaker.²¹⁰ Indeed, several colonies required this of contracted weapons, even into the War.²¹¹ Branding indicated both the firearm’s quality and its ownership as property.²¹² All

208. *E.g.*, 2 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 68 (James T. Mitchell & Henry Flanders eds., n.p., Clarence M. Busch 1896) (“That no person within the said town of Philadelphia . . . presume to keep in their houses, shops or warehouses more than six pounds of gunpowder”); 7 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 206, at 69 (printing a law of 1719 regulating gunpowder storage in Charleston); 4 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, pt. 2, at 320 (Nathaniel B. Shurtleff ed., Boston, William White 1854) (“Whereas the Court hath encouraged & authorized some persons to make gunpowder”); 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, *supra* note 170, at 16, 24-26 (discussing enforcement of a 1642 law requiring licenses to sell gunpowder); 1 JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA, *supra* note 197, at 13 (law of 1619); 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 182, at 255-56 (law of 1642); *see also* William Bradford, *Morton and Merry Mount (1628)*, in 1 COLONIAL PROSE AND POETRY 50, 54 (William P. Trent & Benjamin W. Wells eds., 1901) (lamenting Europeans instructing Indians in powder making); Letter from George Clinton, N.Y. Gov., to the Lords of Trade & Plantations (June 5, 1744), in 6 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK 254, 255 (John Romeyn Brodhead & E.B. O’Callaghan eds., Albany, Weed, Parsons & Co. 1855) (prohibiting exporting powder and supplying powder to the enemy French).

209. *See generally* William J. Novak, *Public Economy and the Well-Ordered Market: Law and Economic Regulation in 19th-Century America*, 18 LAW & SOC. INQUIRY 1, 10-13 (1993) (collecting statutes from the eighteenth and nineteenth centuries regulating the making of goods).

210. BROWN, *supra* note 52, at 325, 347.

211. 1 MOLLER, *supra* note 47, at 109-30 (describing marking requirements in various colonies).

212. *Id.*; *see also id.* at 122 (describing a firearm numbering system implemented by Pennsylvania officials).

muskets made for the Provincial Service in Philadelphia were required to be stamped with a “P”; muskets made at Valley Forge were stamped “V. Forge” and with the date of manufacture.²¹³ Localities had their own requirements. In Connecticut, for example, muskets needed to be “marked with the name or initial letters of the maker’s name” as well as the letters “S C,” for State of Connecticut.²¹⁴ In Maryland, gun barrels were ordered to be stamped with “Maryland.”²¹⁵ The Continental Congress ordered its weapons to be stamped “C P,” likely for Continental Property.²¹⁶ George Washington later ordered military weapons be marked with “U. STATES.”²¹⁷ At least one colony required the labeling or tracking of impressed or confiscated weapons to facilitate their return or compensate their owners.²¹⁸ Many firearms made for military use during the Revolution came with proving requirements.²¹⁹ Gun confiscation sometimes came with requirements that its owner label the gun in order to receive payment later.²²⁰ In the early nineteenth century, at least one state required that firearms be “marked and stamped” by the manufacturer and proved as safe by a public official.²²¹

213. SAWYER, *supra* note 52, at 120.

214. BROWN, *supra* note 52, at 325 (quoting PETERSON, *supra* note 46, at 183); *see also* 1 MOLLER, *supra* note 47, at 109; 15 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 17 (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard Co. 1890) (requiring, in a law of 1775, that certain guns have “a good substantial lock, well mounted with brass and marked with the name or initial letters of the maker’s name”).

215. 1 BISHOP, *supra* note 104, at 591; *see also* Letter from W. Smallwood, Maj. Gen., to the Maryland Council of Safety (Oct. 1776), in 12 ARCHIVES OF MARYLAND 357, 363 (William Hand Browne ed., Baltimore, Friedenwald Co. 1893) (“I directed Captain Hindman to get me a stamp made in Philadelphia and the arms shall be stampd &c.”).

216. SAWYER, *supra* note 52, at 121.

217. BROWN, *supra* note 52, at 326; JAMES E. HICKS, U.S. MILITARY FIREARMS: 1776-1956, at 12 (1962).

218. *E.g.*, 15 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 214, at 420 (printing, in a law of June 1776, a requirement “[t]hat the fire-arms taken from persons belonging to this Colony who are enemies to this country, and in the hands of the committees of inspection or others, shall be marked with the initial letters of the owners names,” then appraised, tracked, repaired, recorded, and returned to the committee of inspection pending further orders).

219. 1 MOLLER, *supra* note 47, at 109-31 (describing proving requirements in various colonies); *e.g.*, 11 ARCHIVES OF MARYLAND 155 (William Hand Browne ed., Baltimore, Friedenwald Co. 1892) (printing a report by Thomas Ewing to the Maryland Council of Safety in February 1776, stating that pursuant to the Council’s orders he had “prov’d all the guns made by the Gunsmiths in Town, as below, in Company with Mr Vanbibber, who ha[d] seen them several times try’d in England,” and that he had “a proof stamp with which [he] stamp’d all that prov’d good, which stamp [he] w[ould] not deliver to any without [the Council’s] orders”).

220. *E.g.*, 1 MOLLER, *supra* note 47, at 109-10 (discussing a Connecticut law).

221. Act of Feb. 28, 1814, ch. 192, §§ 1-2, 1814 Mass. Acts 464, 464-65.

Labor.—As in the colonial period, apprenticeships served as the main gateway into the gunmaking profession and persisted until the mid-nineteenth century.²²² Apprenticeships were enforced through private contract and far-ranging public laws.²²³ By 1800, a dozen states and many municipalities had apprenticeship laws, which detailed the legal obligations, remedies, and powers of masters and apprentices.²²⁴ As one historian noted, state laws “codified practices inherited from the English common law,” with modifications for social and economic conditions of the early republic.²²⁵ In Maryland, the state’s apprenticeship law of 1793 required registration of apprenticeships,²²⁶ and James Davis’s 1774 manual for justices of the peace suggests that in North Carolina, courts were required not only to approve an orphan’s apprenticeship, but also to keep records of the apprenticeship arrangements.²²⁷ The legality of the apprenticeship system went largely unquestioned. As one scholar noted, “courts and legislatures fully upheld the legality of apprenticeship” into the nineteenth century.²²⁸

Labor regulations ramped up during the Revolution, when authorities resorted to “[e]very means to obtain arms,” including confiscation of guns and aggressive recruitment or even impressment of gunsmiths.²²⁹ For instance, a 1775 Virginia law expressly authorized “impressing any artificers that may be judged necessary for the public service.”²³⁰ During the Revolution, gunmaking

222. See *supra* notes 57-71 (discussing apprenticeships).

223. *Id.*; see, e.g., 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 109, at 194-200 (printing, from 1779, “An Act Concerning Guardians, Infants, Masters, and Apprentices”). Compare 6 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, *supra* note 203, at 246-49 (printing, from 1763, “An Act for the Regulation of Apprentices Within This Province”), with 7 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 360-63 (James T. Mitchell & Henry Flanders eds., 1900) (printing, from 1770, a nearly identical statute).

224. RORABAUGH, *supra* note 58, at 50-53.

225. *Id.* at 51.

226. See *id.* at 190.

227. THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 273, 386-87 (James Davis ed., Newbern, James Davis 1774) (“All Apprentices bound by the Court, must be by Indenture, in the Name of the Chairman of the Court, and his Successors, of the one Part, and the Master or Mistress of the other Part; which must be acknowledged in Court, and recorded, and a Counterpart kept in the Clerk’s Office.”).

228. See Elbaum, *supra* note 57, at 346-48.

229. PETERSON, *supra* note 46, at 180; Greenlee, *supra* note 40, at 54-62 (documenting several of the efforts); DEYRUP, *supra* note 53, at 36; 1 MOLLER, *supra* note 47, at 196-97 (noting locally and nationally authorized confiscation from loyalists); cf. Whisker, *supra* note 36, at 88-89 (discussing the impressment of craftsmen from various trades for making arms during the Revolution).

230. 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 103, at 24-25.

became a public project: Multiple colonies established public gunmaking plants to arm their militias, with mixed success.²³¹

Desperation prompted regulation.²³² Public authorities required gunmakers to make certain guns, such as muskets and bayonets, and to stop making other guns, such as rifles.²³³ For example, a resolution passed in 1775 by the Lancaster Committee threatened any gunsmiths in the manufacturing capital of Lancaster County who refused “to go to work and make their proportion of the firelocks and bayonets required” by law would be labeled “enemies to their country,” would have their tools “taken from them,” and would “not be permitted to carry on their trades until they shall engage to go to work.”²³⁴ By 1776, Lancaster officials were preventing gunsmiths from performing any work other than gunmaking “until the public Necessities [were] supplied.”²³⁵ And the Continental Congress, in May 1776, ordered Lancaster gunmakers to hand over all their muskets and gun locks to ensure the “more expeditious arming” of troops.²³⁶ Some colonies took a lighter tack,

231. 1 MOLLER, *supra* note 47, at 107-08; 1 BISHOP, *supra* note 104, at 572, 591-92 (describing the establishment of plants in Pennsylvania and Maryland).

232. Cf. Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 DREXEL L. REV. 1, 50 (2024) (“The disarmament laws were wartime measures enacted by desperate governments on the brink of destruction and facing a perilous arms shortage.”); *supra* note 102 and accompanying text (discussing colonial desperation for firearms).

233. WHISKER, *supra* note 36, at 71-72; see, e.g., 10 THE COLONIAL AND STATE RECORDS OF NORTH CAROLINA, *supra* note 104, at 539 (urging, in April 1776, the establishment of public manufactories to produce “good and sufficient muskets and bayonets”); 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW-YORK, *supra* note 118, at 75 (“Ordered, That Col. McDougall have such arms as are or may be provided for his regiment, reduced to the length of the King’s muskets, and that he have steel ramrods, made for such of them as have not already steel ramrods; and ordered that every gunsmith in the city of New-York, on application to him made for that purpose, do immediately make such alterations, repairs and ramrods for the said muskets . . . in preference to any other work or business whatsoever.”).

234. 13 PENNSYLVANIA ARCHIVES, *supra* note 110, at 299; cf. Letter from Will Atlee, Chairman, Lancaster Committee, to the General Committee (Jan. 29, 1776), in 13 PENNSYLVANIA ARCHIVES, *supra* note 110, at 509, 510 (noting the disruption to gunmaking caused by the military enlistment of many gunsmith apprentices, which prompted the Lancaster Committee to “interfere” with military leadership to permit the apprentices “to return & work with their Masters”).

235. Letter from J. Yeates, Chairman, Lancaster Committee, to the General Committee (Apr. 11, 1776), in 13 PENNSYLVANIA ARCHIVES, *supra* note 110, at 518, 519 (“Our Gun-Smiths particularly, feel the Want of Cash as we have precluded them (or attempted it) from all other Work, until the public Necessities are supplied.”).

236. 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 384 (Worthington Chauncey Ford ed., 1906).

merely “recommend[ing]” gunsmiths take up manufacture of firearms.²³⁷ Elsewhere, regulations were total. In Virginia, the public arms manufactory at Fredericksburg relied on the labor of an unknown number of slaves.²³⁸

Standard Setting.—During the Revolution, local governments commonly set standards for weapons. One regulation forcing all New York City gunsmiths to repair weapons specified that the weapons should be “the length of the King’s muskets.”²³⁹ A 1776 North Carolina law also spelled out specific dimensions for firearms.²⁴⁰ Other colonial governments and committees of safety, empowered to procure weapons for the war effort, continued to specify firearm dimensions down to the inch in their contracts with gunmakers and orders for soldiers.²⁴¹ Authorities also dictated to impressed gunmakers which weapons to make and which weapons not to make.²⁴²

237. *E.g.*, THE JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS IN 1774 AND 1775, at 62-63 (Boston, Dutton & Wentworth 1838); *see, e.g.*, Proceedings of the New-York Committee of Safety (Mar. 30, 1776), in 5 AMERICAN ARCHIVES: FOURTH SERIES, *supra* note 105, at 1418, 1418.

238. HIGGINBOTHAM, *supra* note 101, at 309.

239. 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW-YORK, *supra* note 118, at 75. Robert Churchill has argued that state seizures of weapons gradually disappeared after the 1780s, suggesting the full force of impressment power was a pre-Founding relic. Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 150-55 (2007). Some historians have disputed Churchill’s interpretation of evidence. *See* Saul Cornell, Comment, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 LAW & HIST. REV. 197, 197-98 (2007). Other historians have argued that the confiscation power had wider and deeper origins in imperial, local, prerogative, statutory, and emergency powers. *See* William G. Merkel, Comment, *Mandatory Gun Ownership, the Militia Census of 1806, and Background Assumptions concerning the Early American Right to Arms: A Cautious Response to Robert Churchill*, 25 LAW & HIST. REV. 187, 195 (2007).

240. 10 THE COLONIAL AND STATE RECORDS OF NORTH CAROLINA, *supra* note 104, at 539.

241. 1 MOLLER, *supra* note 47, at 107-30 (detailing the specifications by state); *e.g.*, 15 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 214, at 17 (stating, in a law of 1775, the need for arms “of the following dimensions, *viz*: the length of the barrel of the gun three feet and ten inches, the diameter of the bore from inside to inside three-quarters of an inch, the length of the blade of the bayonet sixteen inches, the length of the socket four inches and one quarter; that the barrels of the guns to be of a suitable thickness, with iron ramrods, with a spring in the lowest loop to secure the ramrods; a good substantial lock, well mounted with brass and marked with the name or initial letters of the maker’s name”).

242. *See supra* notes 233-34 and accompanying text; *see also* Letter from J. Yeates, Chairman, Lancaster Committee, to the General Committee (Apr. 11, 1776), *supra* note 235, at 518 (“We perceive clearly that your Body have judged with the greatest Propriety, in fixing the Number of Muskets made by each Workmen, as the Proportion by which the Rifles are to be furnished.”).

After the War, the federal government sought to bolster the quality and quantity of its weapons. In 1792, Congress enacted the Militia Acts, which established a national military.²⁴³ The Second Militia Act of 1792 required “every free able-bodied white male citizen of the respective states” to enroll in his state militia and to “provide himself with a good musket or firelock” within six months of enrollment—not clarifying how a citizen should go about “providing himself with the arms” required.²⁴⁴ The law specified that “all muskets for arming the militia as herein required, shall be of bores sufficient for balls of the eighteenth part of a pound.”²⁴⁵ Like its antecedents during the Revolutionary War, this rule indirectly regulated gunmaking by establishing a sort of manufacturing guideline, though available evidence suggests far from perfect compliance.²⁴⁶ From the 1790s to the 1830s, the federal government—which stimulated and subsidized the nascent arms industry—imposed production standards on public arms makers at the national armories and on private contracted gunmakers.²⁴⁷

Inspection and Licensing.—Many colonies appointed qualified inspectors—often gunsmiths—to examine and test firearms and gunpowder.²⁴⁸ States often required inspections of militia arms by public officials one to four times a year.²⁴⁹ A 1775 Connecticut law empowered a military officer to summon “all under his command,” as well as “all others dwelling within the limits of his company who are by law obliged to keep arms,” to inspect all arms for “deficiency.”²⁵⁰ Colonies also inspected weapons considered for impressment.²⁵¹ After the Revolution, states continued to inspect militia

243. Act of May 2, 1792, ch. 28, 1 Stat. 264; Act of May 8, 1792, ch. 33, 1 Stat. 271.

244. § 1, 1 Stat. at 271-72; *see also infra* note 348.

245. § 1, 1 Stat. at 271-72.

246. *See* SPITZER, *supra* note 36, at 37; Letter from Henry Knox, U.S. Sec’y of War, to the Speaker of the U.S. House of Representatives (Dec. 10, 1794), *supra* note 133, at 69-71; H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 285 n.78, 292 n.54 (2002) (discussing compliance with the Militia Acts between 1792 and 1830); Marcus Armstrong, *The Militia: A Definition and Litmus Test*, 52 ST. MARY’S L.J. 1, 45-47 (2020).

247. REGELE, *supra* note 83, at 8, 11, 52.

248. BROWN, *supra* note 52, at 325; *e.g.*, 15 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 214, at 190-92 (requiring, in a 1775 law, the manufacture, inspection, and licensing of gunpowder); 8 RECORDS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 18-19 (John Russell Bartlett ed., Providence, Cooke, Jackson & Co. 1863) (establishing, in a 1776 law, packing and inspection requirements for any person who sells gunpowder made in the state, including to mark the cask with the two first letters of the manufacturer’s name and the letters “U.S.A.”).

249. *E.g.*, Act of Apr. 4, 1786, ch. 25, 1786 N.Y. Laws 220, 222.

250. 15 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 214, at 138.

251. *See supra* note 188.

members' firearms.²⁵² In 1814, Massachusetts required that all musket and pistol barrels made in the state be first tested or "proved" by a state inspector in order to ensure quality and safety.²⁵³

Prohibitions on Gunmaking by and for Dangerous Persons.—Laws disarming loyalists and "non-associators" who refused to take an oath supporting the revolutionaries or who took up arms for the Crown, as well as other dangerous persons, were some of the most onerous restrictions on gunmaking and gunpowder making.²⁵⁴ Not only were disarmed persons prohibited from gunmaking, but making or furnishing a gun or gunpowder for an enemy of the state was criminalized as "treason" and punishable by death.²⁵⁵ These laws were

252. See, e.g., Act of Mar. 11, 1806, ch. 187, § 6, 1806 N.J. Laws 536, 540. See generally REGELE, *supra* note 142, at 74-76 (discussing state and private arms making, and subsidies and regulations thereof, in the first half of the nineteenth century).

253. Spitzer, *supra* note 149, at 74.

254. E.g., 5 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 479 (Boston, Wright & Potter 1886) (1776 Massachusetts law); 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 11 (James T. Mitchell & Henry Flanders eds., 1903) (requiring, in a 1776 law, officials to seize all arms of "non-associators" and to redistribute them to revolutionary soldiers, but also to "give to the owners receipts for such arms, specifying the amount of the appraisement," because "the non-associators in this state ha[d] either refused or neglected to deliver up their arms"); *id.* at 112-13 (requiring, in a 1777 law, disarmament of all people eighteen and older who refuse a loyalty oath); *id.* at 348 (empowering, in a 1779 law, officials "to disarm any person or persons who shall not have taken any oath or affirmation of allegiance to this or any other state"); Act of Sept. 20, 1777, ch. 40, § 20, 1777 N.J. Laws 84, 90 (authorizing authorities "to deprive and take from such Persons as they shall judge disaffected and dangerous to the present Government, all the Arms, Accoutrements and Ammunition which they own or possess"); 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 103, at 281-82 (requiring, in a 1777 law, all who refuse to take a loyalty oath to the United States "to be disarmed"); 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW-YORK, *supra* note 118, at 504 (disarming, in 1776, "persons on Nassau island [Long Island], disaffected and inimical to the American cause"); *id.* at 567-68 (authorizing, in 1776, a committee to investigate alleged disaffection in Kings County, and resolving, "in case they find it well founded, that they be empowered to disarm and secure the disaffected inhabitants"); PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775, & 1776, at 175 (Baltimore, James Lucas & E.K. Deaver 1836) (authorizing, on June 28, 1776, the disarming of "disaffected persons" in Somerset County).

255. *Republica v. Carlisle*, 1 U.S. (1 Dall.) 35, 37 (1778); *In re Charge to Grand Jury—Treason*, 30 F. Cas. 1032 (C.C.S.D.N.Y. 1861); 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, *supra* note 254, at 46 (criminalizing, in a 1777 law, furnishing "enemies with arms or ammunition," under penalty of "high treason and . . . death"); 24 THE COLONIAL AND STATE RECORDS OF NORTH CAROLINA 84-89 (1777 North Carolina law); see also, CLARK, *supra* note 143, at 164.

expressly tied to public safety, evidenced by exemptions for those allied with the revolutionary cause.²⁵⁶

Gunpowder.—Public officials continued to regulate gunpowder as a practical danger to people and property by requiring inspections and labeling. These regulations were common throughout the Founding era and across states.²⁵⁷

III. *Bruen* Applied: Modern Gunmaking Regulations

This Part discusses the constitutionality of modern gunmaking regulations in light of the Second Amendment quartet: *Heller*, *McDonald*, *Bruen*, and *Rahimi*. Part III.A describes how these cases have transformed gun-regulation adjudication and sketches what I call *Rahimi*'s jurisprudence of "emergence." Part III.B explores how courts have grappled with the constitutionality of gunmaking regulation after *Bruen*. It highlights two major questions before courts. First, does the plain text of the Second Amendment encompass gunmaking? And, if so, which contemporary gunmaking regulations are consistent with the Nation's historical tradition of firearm regulation? After describing the state of Second Amendment jurisprudence, Parts III.C and III.D provide answers to these questions.

256. See, e.g., 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, *supra* note 254, at 110-13 (exempting, in a 1777 law, "officers and soldiers in the continental army, merchants and marines trading in the ports of this state from foreign powers in amity with the United States and not becoming resident"); 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 103, at 283 (making a similar exemption).

257. E.g., 15 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, *supra* note 214, at 190-92 (regulating, in a 1775 law, the manufacture, inspection, and licensing of gunpowder); 8 RECORDS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND, *supra* note 248, at 18-19; Act of Oct. 4, 1776, ch. 6, § 1, 1776 N.J. Laws 6, 6 ("That any Person who, from and after the Publication of this Act, shall offer any Gun-Powder for Sale, without being previously inspected and marked as is herein after directed, shall forfeit, for every such Offence, the Sum of Five Shillings a Pound for every Pound weight so offered for Sale, and so in Proportion for greater or lesser Quantity . . ."); Act of Dec. 6, 1783, ch. 104, 1783 Pa. Laws 161 (regulating the private storage of gunpowder), *reprinted in* 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 209 (James T. Mitchell & Henry Flanders eds., 1906); Act of Apr. 18, 1795, ch. 337, § 1, 1794 Pa. Laws 764, 764 (regulating the storage of "all gun-powder manufactured within this state"); Act of Feb. 7, 1811, 1811 N.J. Laws 300; Act of June 21, 1820, ch. 25, 1820 N.H. Laws 274; Act of Mar. 19, 1821, ch. 25, 1821 Me. Laws 98.

A. The Second Amendment Quartet

Firearms jurisprudence changed after *District of Columbia v. Heller*, a landmark 2008 case involving a D.C. ban on handgun possession.²⁵⁸ In a 5-4 decision, the Court held the ban was a violation of the Second Amendment right to keep and bear arms.²⁵⁹ Using an originalist methodology to uncover the meaning of the Second Amendment at the time of its ratification in 1791, the Court found a broad right to possess firearms for self-defense purposes.²⁶⁰ The Court surveyed English and American laws from the colonial period into the twentieth century, inaugurating a history-and-tradition test for Second Amendment jurisprudence.²⁶¹ Still, the Court concluded that “the right secured by the Second Amendment is not unlimited.”²⁶² A right to gunmaking was not mentioned or discussed. Two years later, the Court expanded *Heller* in *McDonald v. City of Chicago*, which incorporated the Second Amendment right to keep and bear arms against the states via the Fourteenth Amendment.²⁶³ In another 5-4 decision, the Court held as unconstitutional a pair of laws in Chicago and suburban Oak Park that banned the possession of handguns in the home.²⁶⁴

Then, in 2022, the Court changed Second Amendment jurisprudence in *New York State Rifle & Pistol Association v. Bruen*.²⁶⁵ In a 6-3 decision, the Court held as unconstitutional a century-old New York law that required applicants seeking a license to carry a handgun in public to show “special need.”²⁶⁶ The law contravened the country’s tradition of not requiring proper cause to carry guns. The Court held that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”²⁶⁷

258. 554 U.S. 570, 573 (2008).

259. *Id.* at 635.

260. *See id.* at 602.

261. *See, e.g., id.* at 576-86.

262. *Id.* at 626.

263. 561 U.S. 742, 750 (2010).

264. *Id.* at 750, 791.

265. 142 S. Ct. 2111 (2022).

266. *Id.* at 2122.

267. *Id.* at 2126 (quoting *Konigsberg v. State Bar*, 366 U.S. 36, 49 n.10 (1961)).

Under the new *Bruen* test, a court evaluating a gun regulation must first ask, as a threshold question, whether “the Second Amendment’s plain text covers an individual’s conduct.”²⁶⁸ If so, then the Constitution presumptively protects that conduct, unless the government shows that the regulation “is consistent with the Nation’s historical tradition of firearm regulation.”²⁶⁹ In practice, courts first identify the specific “course of conduct” at issue.²⁷⁰ Then, courts perform a textual analysis to see if the Second Amendment’s plain words cover the conduct.²⁷¹ If the text as publicly understood in 1791 does cover the conduct, then the burden shifts to the state to justify the regulation by showing it is consistent with the historical tradition of firearm regulations.²⁷² The state may do so in several ways, including by showing that the problem addressed by the modern laws has persisted over time and that the modern regulation is “relevantly similar” to past regulations.²⁷³

In effect, courts must survey the history of that problem and the history of efforts to regulate it by looking at the “how” and “why” of past and present regulations.²⁷⁴ The *Bruen* Court identified three possibilities, based on the depth and nature of the historical record. First, if past regulations cannot be found, their absence becomes “relevant evidence that the challenged regulation is inconsistent with the Second Amendment.”²⁷⁵ Second, “if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.”²⁷⁶ Third, “if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.”²⁷⁷

The Court applied *Bruen* for the first time in *United States v. Rahimi*, a case upholding the lawfulness of a federal statute disarming individuals subject to a

268. *Id.* at 2129-30.

269. *Id.* at 2130.

270. *E.g., id.* at 2134 (identifying the “course of conduct” as “carrying handguns publicly for self-defense”).

271. *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 114-19 (2023).

272. *Bruen*, 142 S. Ct., at 2135.

273. *See id.* at 2131-32 (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).

274. *Id.* at 2132-33; *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) (“Why and how the regulation burdens the right are central to this inquiry.”); Blocher & Ruben, *supra* note 271, at 123-25.

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

276. *Id.*

277. *Id.*

domestic violence restraining order.²⁷⁸ The Court concluded that a modern law regulating firearms “must comport with the *principles* underlying the Second Amendment.”²⁷⁹ Emphasizing that a “historical *twin*” is not required,²⁸⁰ the Court found in two bodies of historical regulations—surety laws and “going armed” laws—adequate support for the modern federal statute.²⁸¹ The analogy required some assembly. The Court read the surety laws to supply some of the basis for the analogical “why”: These laws “provided a mechanism for preventing violence before it occurred” by “target[ing] the misuse of firearms.”²⁸² The “going armed” laws, meanwhile, supplied some of the analogical “how”: These laws “punish[ed] those who had menaced others with firearms” with “forfeiture of the arms . . . and imprisonment.”²⁸³ The Court held that historical surety laws and “going armed” laws, “*taken together*,” established an enduring “principle[.]” permitting domestic violence offenders to be disarmed after a judicial finding that the individual represents a credible threat to another’s safety.²⁸⁴ Some early commentators have viewed *Rahimi* as a retreat from hidebound historicism toward a flexible, principles-based jurisprudence.²⁸⁵ The “taken together” formulation—joining multiple laws to arrive at a valid principle—suggests a fledgling doctrine of Second Amendment emergence, in which the principle justifying modern regulations is an emergent property not found in its constituent laws.²⁸⁶

278. *Rahimi*, 144 S. Ct., at 1901-03.

279. *Id.* at 1898 (emphasis added).

280. *Id.* at 1903 (quoting *Bruen*, 142 S. Ct., at 2133).

281. *Id.* at 1899-1901.

282. *Id.* at 1900.

283. *Id.* at 1900-01 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *149).

284. *See id.* at 1898, 1901 (emphasis added) (capitalization altered). In dissent, Justice Thomas criticized this “piecemeal approach,” which “requires combining aspects of surety and affray laws to justify” the modern regulation in question. *Id.* at 1941, 1944 (Thomas, J., dissenting) (decrying the Court for “mixing and matching historical laws—relying on one law’s burden and another law’s justification”).

285. *See, e.g.*, Saul Cornell, *The John Roberts Balancing Act Is Back, at Least for Guns*, SLATE (June 25, 2024, 3:26 PM), <https://perma.cc/E8HB-9M2R> (calling *Rahimi* a “correction” of *Bruen*, and one “still highly solicitous of gun rights and hostile to modern legal tools that acknowledge that consequences matter”); Linda Greenhouse, Opinion, *The Supreme Court Steps Back from the Edge*, N.Y. TIMES (June 26, 2024), <https://perma.cc/T5MQ-9SLT> (“There is quite a difference between a principle that ‘fits comfortably’ on the one hand and an analogous regulation that has to be a near-perfect match on the other. . . . It’s tempting to conclude that these justices wanted to reinterpret *Bruen* while not expressly disavowing it.”); Josh Blackman, *Some Commentary from the Left on Rahimi, VOLOKH CONSPIRACY* (June 26, 2024, 9:54 AM), <https://perma.cc/V5CC-T8P5> (“I think everyone realizes that the Court reinterpreted *Bruen*.”).

286. For a discussion of emergence in law, see generally Brian Tamanaha, *Law’s Evolving Emergent Phenomena: From Rules of Social Intercourse to Rule of Law Society*, 95 WASH. U.L. REV. 1149, 1149-50 (2018).

The Second Amendment quartet did not resolve many questions.²⁸⁷ But its bottom line is clear: Courts must comb through history to analogize modern laws to historical ones.²⁸⁸

B. The Quartet's Progeny

In the months after *Bruen*, a flurry of lawsuits challenged local, state, and federal gun regulations.²⁸⁹ A handful of cases have challenged restrictions on gunmaking, with more on the way.²⁹⁰ A large number of laws implicate gunmaking, including federal regulations and laws found in more than a dozen states and many municipalities relating to ghost guns, gun-assembly kits, 3D-printed guns, and the serialization of firearms.²⁹¹ In California, for example, ghost gun kits must be sold by a licensed vendor, 3D-printed guns must be detectable by a metal detector, and any assembled firearms must have a unique serial number granted by the state.²⁹² Likewise, New Jersey requires anyone who 3D-prints guns to be licensed, and forbids the distribution of 3D-printing instructions to unlicensed gunmakers.²⁹³ Rhode Island has taken an even tougher stance, banning 3D-printed guns entirely.²⁹⁴ Municipalities have enacted similar laws.²⁹⁵

Federal law permits individuals to make guns for their own personal use, provided the gun not be sold and the maker does not give the gun to anyone forbidden by statute from possessing a gun.²⁹⁶ Under federal law, owners of

287. See, e.g., *Rahimi*, 144 S. Ct. at 1929 (Jackson, J., concurring) (listing unresolved questions).

288. See *id.* at 1910 (Gorsuch, J., concurring) (“Among all the opinions issued in this case, its central messages should not be lost. The Court reinforces the focus on text, history, and tradition, following exactly the path we described in *Bruen*.”).

289. Melissa Quinn, *In Wake of Supreme Court Second Amendment Decision, Uncertainty Plagues Gun Laws New and Old*, CBS NEWS (Feb. 7, 2023, 12:42 PM EST), <https://perma.cc/7SQ9-UUZU>; Lindsay Whitehurst & Alanna Durkin Richer, *After Supreme Court Ruling, It's Open Season on US Gun Laws*, AP NEWS (Aug. 4, 2022, 7:46 PM PDT), <https://perma.cc/AHR5-2VX9>.

290. E.g., *Palmer v. Sisolak*, No. 21-cv-002682024, 2024 WL 4432818 (D. Nev. Oct. 4, 2024).

291. See *supra* notes 15-19. For a roundup of state laws from a gun control advocacy organization, see GIFFORDS, *supra* note 15.

292. CAL. PENAL CODE § 29180 (West 2022); cf. HAW. REV. STAT. § 134-10.2 (2022) (requiring serial numbers on self-made firearms).

293. N.J. STAT. ANN. § 2C:39-9(l) (West 2022).

294. 11 R.I. GEN. LAWS § 11-47-8(e) (2023).

295. E.g., Vince Lattanzio, *Philadelphia Votes to Ban 3-D Printed Guns*, NBC 10 PHILA. (updated Nov. 22, 2013, 8:10 AM), <https://perma.cc/LN7A-Y4Y2>; Julia Wick, *L.A. City Council Votes to Ban “Ghost Guns,”* L.A. TIMES (updated Nov. 30, 2021, 3:40 PM PT), <https://perma.cc/U534-NR14>.

296. See 18 U.S.C. § 922(g) (listing prohibited persons).

homemade guns not intended for sale or distribution do not need a license.²⁹⁷ And “unfinished” parts may be purchased online and assembled like IKEA furniture, no special skill required.²⁹⁸ Congress has considered, but not passed, multiple bills to regulate ghost guns directly.²⁹⁹ Under President Biden, the ATF has used rulemaking to crack down on ghost guns. In 2023, the ATF published new rules broadening the definition of a “firearm” to include more firearm parts and partially completed firearms commonly sold online, and to clarify how to serialize guns made for sale.³⁰⁰ Thanks to advances in gunmaking, gun assembling, and gun printing, homemade guns have been used in a growing number of crimes nationwide.³⁰¹

Already, a court split has formed on two main questions. Does the plain text of the Second Amendment cover gunmaking? And, if so, then what kinds of regulations does the history of gunmaking regulation justify today?

So far, ghost gun cases have mostly focused on *Bruen’s* first step: whether gunmaking is covered by the plain text of the Second Amendment.³⁰² Several federal district courts have held that gunmaking is covered by the plain text. In *Rigby v. Jennings*, a gun rights organization sued to enjoin a series of recent Delaware laws prohibiting the manufacture of “untraceable” firearms, or guns without serial numbers, and the manufacture of 3D-printed firearms and

297. ATF, *Does an Individual Need a License to Make a Firearm for Personal Use?*, <https://perma.cc/8SQW-N3VX> (last updated Mar. 17, 2020); ATF, *DO I NEED A LICENSE TO BUY AND SELL FIREARMS? GUIDANCE TO HELP YOU UNDERSTAND WHEN A FEDERAL FIREARMS LICENSE IS REQUIRED UNDER FEDERAL LAW 2-4 (2023)*, <https://perma.cc/39QZ-9ZAX>; Transcript of Oral Argument at 37, *Garland v. VanDerStok*, 144 S. Ct. 1390 (2024) (No. 23-852).

298. Clarence Page, Opinion, *What the Right Doesn’t Get About “Ghost Guns,”* CHI. TRIB. (updated Apr. 19, 2022, 10:24 PM), <https://perma.cc/2LLZ-EJ2F>; see also SPITZER, *supra* note 36, at 143-47 (building an AR-15 in a few hours).

299. Victoria Sheber, Note, *Ghost Guns: What Prosecutors Should Do to Combat the New Frontier of Untraceable Violence*, 59 AM. CRIM. L. REV. ONLINE 55, 64 (2022).

300. 27 C.F.R. § 478.12(c)-(d).

301. For a partial catalog of the dozens of shootings in the United States involving a ghost gun, see EVERYTOWN FOR GUN SAFETY, *supra* note 14. Police recovered a ghost gun used in the killing of UnitedHealthcare chief executive Brian Thompson in New York City. Corey Kilgannon, *Pistol Taken from Suspect was a Fully Homemade Weapon, Officials Say*, N.Y. TIMES (Dec. 10, 2024), <https://perma.cc/CEA6-YTXV> (“If the gun used in the New York assassination really was 3-D printed, it would certainly be the highest-profile crime ever committed with one . . .”).

302. William Baude and Robert Leider have argued *Bruen’s* test follows the traditional two-step approach of state courts in Second Amendment cases. William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1465, 1486 (“At the first step, a court had to determine whether the conduct fell within the scope of the right. If it did not, then the challenge was doomed at the outset because the government may regulate unprotected conduct without constraint.” (footnote omitted)).

firearm parts by unlicensed manufacturers.³⁰³ In a short opinion, the U.S. District Court for the District of Delaware concluded the Second Amendment implies a corresponding right to make arms. “Indeed,” wrote Judge Noreika, “the right to keep and bear arms would be meaningless if no individual or entity could manufacture a firearm.”³⁰⁴ In turn, the state had failed to meet its burden to show that the manufacturing regulation comported with the Nation’s history and tradition of firearms regulation.³⁰⁵

Likewise, in *Boland v. Bonta*, a case concerning the right to purchase certain kinds of guns prohibited under California law, the U.S. District Court for the Central District of California held that the plaintiffs had passed the threshold question from *Bruen* because “keep and bear” broadly includes the precursor right to buy firearms.³⁰⁶ “The Second Amendment also protects attendant rights that make the underlying right to keep and bear arms meaningful,” wrote Judge Cormac Carney. “Those attendant rights include the right to acquire state-of-the-art handguns for self-defense.”³⁰⁷ The U.S. District Court for the Southern District of California came to a similar conclusion in *Duncan v. Bonta*, holding that the Second Amendment’s plain text covers manufacturing commonly owned gun magazines.³⁰⁸

Meanwhile, a different Central District judge thought differently. In *Defense Distributed v. Bonta*, a Texas-based gun designer and gun machine manufacturer sued to invalidate a new California law requiring a license to possess or transfer a computerized milling machine to manufacture firearms.³⁰⁹ Defense Distributed claimed that the new law failed the *Bruen* test because the regulated machines “are the modern-day manifestation of firearm milling technology, technology that has never before been regulated in American history.”³¹⁰ But Judge George Wu held that history irrelevant, since the plain text “plainly does not” cover the self-manufacture of firearms.³¹¹ According to the court, the *Bruen* inquiry is “plain-text analysis *first, then*

303. 630 F. Supp. 3d 602, 607-10 (D. Del. 2022); *see, e.g.*, DEL. CODE ANN. tit. 11, § 1463(b)-(c) (West 2021).

304. *Rigby*, 630 F. Supp. 3d at 615.

305. *Id.* at 615.

306. 662 F. Supp. 3d 1077, 1080-81 (C.D. Cal. 2023).

307. *Id.* at 1085.

308. 695 F. Supp. 3d 1206, 1233 (S.D. Cal. 2023), *stay granted*, 83 F.4th 803 (9th Cir. 2023).

309. No. CV 22-6200, 2022 WL 15524977, at *1 (C.D. Cal. Oct. 21, 2022), *adopted*, No. CV 22-6200, 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022); CAL. PEN. CODE § 29185 (West 2022).

310. *Defense Distributed*, 2022 WL 15524977, at *2 (quoting First Amended Complaint for Declaratory and Injunctive Relief ¶ 6, *Defense Distributed*, 2022 WL 15524977 (No. CV 22-6200)).

311. *Id.* at *4.

history if necessary.”³¹² Because the plaintiff’s argument failed the plain-text threshold, it could succeed only by recognizing a “penumbra” of rights implicit in the Second Amendment.³¹³ Other courts have viewed *Bruen* differently. For example, in *Frein v. Pennsylvania State Police*, the Third Circuit concluded that *Bruen* “instructed [courts] to closely scrutinize all gun restrictions for a historically grounded justification.”³¹⁴

Most recently, in *VanDerStok v. Garland*, the Fifth Circuit heard a challenge to new ATF regulations that would change the definition of firearm parts under the Gun Control Act of 1968.³¹⁵ *Bruen* was not directly relevant to the litigation: The lawsuit concerned the propriety of legislative delegation under the Gun Control Act and not the constitutionality of regulations on private arms manufacturing or possession.³¹⁶ Still, *Bruen* loomed large. The panel cited Joseph Greenlee for the proposition that “[t]he tradition of at-home gunmaking predates this nation’s founding, extends through the revolution, and reaches modern times.”³¹⁷ Without citing any laws or primary sources, the court stated, “there were no restrictions on the manufacture of arms for personal use in America during the seventeenth, eighteenth, or nineteenth centuries.”³¹⁸ And because the new ATF rule would impose “substantial limits on the well-known and previously unregulated right” of law-abiding citizens to lawfully own or use firearms, the ATF had exceeded its statutory authorization by supplanting Congress and “essentially rewrit[ing]” the Gun Control Act.³¹⁹

This case, which was recently heard on appeal by the U.S. Supreme Court,³²⁰ has not resolved two key questions: How should *Bruen* be applied? And what is the history of gunmaking?

312. *Id.* at *3 n.5.

313. *See id.* at *4.

314. 47 F.4th 247, 254 (3d Cir. 2022).

315. 86 F.4th 179, 182-87 (5th Cir. 2023), *cert. granted*, 144 S. Ct. 1390 (2024).

316. *Id.* at 183.

317. *Id.* (citing Greenlee, *supra* note 40, at 48); *see also id.* at 200 (Oldham, J., concurring) (“[H]omemade firearms have a rich history and tradition, dating back to the Founding.” (citing Greenlee, *supra* note 40, at 45-71)).

318. *Id.* at 185 (majority opinion) (quoting Greenlee, *supra* note 40, at 78).

319. *Id.* at 194, 197.

320. For background on the case in the popular press, see Adam Liptak, *Supreme Court to Hear Challenge to Biden’s Limits on “Ghost Guns”*, N.Y. TIMES (Apr. 22, 2024), <https://perma.cc/86S3-WX4X>; and Abbie VanSickle, *Majority of Supreme Court Appears Receptive to Biden Administration Limits on “Ghost Guns”*, N.Y. TIMES (Oct. 4, 2024), <https://perma.cc/T5NE-HPWL>. In their brief to the Court, Respondents Defense Distributed, Polymer80, and the Second Amendment Foundation argued in the alternative to their main delegation argument that the Second Amendment protects “the individual right to make Arms.” *See* Brief of Respondents at 28-32, *Garland v.* *footnote continued on next page*

C. The Plain Text

This Subpart makes two core arguments as to why the plain text of the Second Amendment does not cover gunmaking.³²¹ First, early colonial and English history fail to surface evidence that contemporaries understood the plain text of the Second Amendment to include arms making. And second, even if the right to “keep and bear” arms includes a federal constitutional right to obtain arms, history suggests such a right to obtain does not necessarily require a right to manufacture.

1. The plain meaning of “keep and bear” does not include gunmaking

The Court has never addressed whether the Second Amendment includes a right to create or make firearms.³²² To answer that question, I begin with the text. The Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”³²³ The relevant rights are to “keep arms” and to “bear arms.”³²⁴ “Keep arms” means to “have weapons.”³²⁵ “Bear arms” means to “wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.”³²⁶ Nowhere does the plain text mention the making of arms. Nor does it contemplate *how* weapons may be obtained at all. If indeed, “the text controls,” an initial plain-text reading would seem, at the very least, inconclusive.³²⁷

To the extent that the Second Amendment’s meaning reflects the English tradition, historical evidence does not support the idea that the English right contemplated or protected gunmaking.³²⁸ Rather, history cuts the other way.

VanDerStok, 144 S. Ct. 1390 (2024) (No. 23-852). None of the Justices picked up on this thread during the October oral argument; in fact, the Second Amendment was never mentioned. Transcript of Oral Argument, *Garland v. VanDerStok*, 144 S. Ct. 1390 (2024) (No. 23-852).

321. The analysis here focuses on the text as understood in 1791. *See supra* note 27.

322. *See generally* *District of Columbia v. Heller*, 554 U.S. 570, 576-86 (2008) (surveying text, history, and tradition but not addressing gunmaking).

323. U.S. CONST. amend. II.

324. *See Heller*, 554 U.S. at 582.

325. *Id.*

326. *Id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

327. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2137 (2022).

328. *See supra* note 151 and accompanying text; *see also* PATRICK J. CHARLES, *ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY* 70 (2018) (“[A]t the outbreak of the American Revolution the Founding Fathers’ understanding of the right to arms was rooted in the English experience. . . . For the
footnote continued on next page”).

English gunmaking was controlled by a web of public and private regulations.³²⁹ Public laws, strenuous requirements of apprenticeships, semi-permeable class and kinship networks, and the inherent difficulty and dangerousness of gunmaking meant that gunmaking required skill in a wide variety of crafts, including blacksmithing, woodworking, metalworking, and pyrotechnics.³³⁰ For their part, early Americans practiced and regulated gunmaking differently than their contemporaries in England.³³¹ Still, despite abandoning guilds—and contrary to claims by the Fifth Circuit³³²—early Americans regulated gunmaking in several ways, including through apprenticeships, inspections, labeling rules, impressment, and standard setting of arms.³³³ In the late eighteenth century, state laws governing apprenticeships largely borrowed from the common law tradition of English apprenticeships.³³⁴ Indeed, throughout the eighteenth century, American magistrates resolving apprenticeship disputes relied on legal guides based expressly on English common law.³³⁵ And, of course, Americans inherited the arms—and arms makers—themselves, importing from England not just a tradition of gunsmithing but a legion of actual guns.³³⁶ To the extent that early Americans did not regulate gunmaking more directly or more comprehensively, silence in the historical record may be due to the fact that early Americans did not think *they* needed to regulate gunmaking.³³⁷ Instead,

most part, American conceptions of arms bearing were one and the same with English conceptions.”).

329. See *supra* Part II.A.

330. GILL, *supra* note 40, at 17-18 (discussing how gunsmiths combined firearm making and repairing with other crafts); BROWN, *supra* note 52, at 248; BERGER, *supra* note 80, at 50; Holman J. Swinney, *New York State Gunmakers (Part I): A Partial Checklist*, 32 N.Y. HIST. 91, 91 (1951). Moreover, due to periods of low demand for gun parts or whole firearms, gunsmiths were almost always adept at other trades, including locksmithing, woodworking, building household furniture and tools, and metallurgy. See Swinney, *supra*, at 91; Crews, *supra* note 51, at 52-53.

331. See WHISKER, *supra* note 36, at 67-71; see also *supra* note 36.

332. See *supra* note 318 and accompanying text.

333. See *supra* Parts II.B.-C.

334. See *supra* notes 224-25 and accompanying text.

335. RORABAUGH, *supra* note 58, at 52; e.g., CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE 17-20 (James Parker ed., Woodbridge, James Parker 1764) (summarizing, in a legal treatise updated frequently throughout the century, English common law governing apprenticeships); see also *supra* notes 59-71.

336. See *supra* Parts I.A.-B.

337. Cf. *United States v. Rahimi*, 144 S. Ct. 1889, 1905 (2024) (Sotomayor, J., concurring) (“Under the dissent’s approach, the legislatures of today would be limited not by a distant generation’s determination that such a law was unconstitutional, but by a distant generation’s failure to consider that such a law might be necessary.”).

they could rely on regulations created and enforced by those who made the guns for them: Europeans.

In sum, then, available evidence suggests the text's original meaning does not contemplate the conduct of manufacturing firearms.

2. "Keep and bear" may include obtaining, but not necessarily manufacturing

The right to carry arms nonetheless may include an *implicit* right to obtain arms.³³⁸ Some courts have found the right to acquire an arm to be a prerequisite to keeping and bearing arms. In *Teixeira v. County of Alameda*, for instance, the Ninth Circuit concluded that "the right to purchase and to sell firearms is part and parcel of the historically recognized right to keep and to bear arms."³³⁹ A gun store owner therefore had standing to assert a "right to acquire arms on behalf of his potential customers."³⁴⁰ "[T]he Second Amendment," the court found, "protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense."³⁴¹ Other courts have found the Second Amendment protects commercial activities required to obtain guns.³⁴² After all, arms must be made somewhere. If an individual has a right to possess something, that individual must also have the right to get the thing she may rightfully possess. Therefore the right to obtain an arm may be a prerequisite to the right to carry an arm.³⁴³ Here, the "unqualified command" of the Second Amendment is read maximally, and

338. See *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc) ("[T]he core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms." (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011))).

339. *Teixeira v. Cnty. of Alameda*, 822 F.3d 1047, 1056 (9th Cir. 2016), *aff'd on reh'g en banc*, 873 F.3d 670 (9th Cir. 2017).

340. *Teixeira*, 873 F.3d at 678.

341. *Id.* at 677; cf. *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 967 (9th Cir. 2014) (holding that the right to possess firearms implies a corresponding right to obtain bullets, since "without bullets, the right to bear arms would be meaningless").

342. *E.g.*, *Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930, 938 (N.D. Ill. 2014) (noting that the Second Amendment "right must also include the right to acquire a firearm," and that "the most fundamental prerequisite of legal gun ownership [is] that of simple acquisition"); *Mance v. Holder*, 74 F. Supp. 3d 795, 807 n.8 (N.D. Tex. 2015) ("[O]perating a business that provides Second Amendment services is generally protected by the Second Amendment . . ."); *Radich v. Guerrero*, No. 14-CV-00020, 2016 WL 1212437, at *7 (D. N. Mar. I. Mar. 28, 2016) (concluding the Second Amendment "must protect an eligible individual's right to purchase a handgun, as well as the complimentary [sic] right to sell handguns").

343. Blackman, *supra* note 36, at 496.

elastically, to include implicit or ancillary rights.³⁴⁴ Scholars such as Josh Blackman have glossed *Heller* to support such a right to obtain guns.³⁴⁵ Justice Thomas came close to endorsing this argument in his concurrence in *Luis v. United States*,³⁴⁶ a case about ammunition. Arguing that constitutional rights “implicitly protect those closely related acts necessary to their exercise,” Justice Thomas suggested that the right to keep and bear arms “implies a corresponding right to obtain the bullets necessary to use them.”³⁴⁷

But even if this argument is accepted, it does not necessarily follow that a right to obtain includes the right to manufacture. Self-manufacturing a firearm is not necessary to preserve the right, because *obtaining* is not the same as *making*. Guns may be obtained two ways: (1) making a gun oneself, or (2) receiving a gun made by someone else (whether imported, purchased domestically, or received as a gift or inheritance).³⁴⁸ Multiple roads to gun possession exist; even if one road is closed, other routes lead to the same destination. Recognizing a right to obtain guns is a non-sequitur: The rights to “keep and bear arms”—that is, to protect oneself³⁴⁹—may be preserved by the right to receive guns in commerce or as a gift.³⁵⁰ So long as a robust import or aboveboard domestic market exists, the

344. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (quoting *Konigsberg v. State Bar*, 366 U.S. 36, 49 n.10 (1961)).

345. Blackman, *supra* note 36, at 491-92 (reading *Heller* to hold that “the District of Columbia could not deny residents the ability to *obtain*, and register a firearm” (emphasis added)). Blackman was involved in the *VanDerStok* case as counsel for several of the respondents. *See* Brief of Respondents, *supra* note 320.

346. 578 U.S. 5 (2016).

347. *Id.* at 26 (Thomas, J., concurring) (quoting *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 967 (9th Cir. 2014)).

348. Pre-Founding statutes and the first Militia Acts enacted by Congress are ambiguous on the distinction. *See supra* notes 243-46 and accompanying text (describing the Militia Acts of 1792). Many state laws similarly required a militia member to “provide himself” with arms and ammunition, failing to specify *how*. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 509 (2004) (quoting Act of Apr. 3, 1778, ch. 33, 1777 N.Y. Laws 62); *e.g.*, 1 *THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY*, *supra* note 63, at 128 (noting, in a 1693 law, militia members must “provide themselves with arms and ammunition”); *see also* Report from Joseph B. Varnum to H. Dearborn, Speaker of the U.S. House of Representatives (Apr. 2, 1806), *supra* note 133, at 198. *But see* 1 *THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY*, *supra* note 63, at 130-31 (noting that if “any person, who is by law obliged to provide arms and ammunition, cannot *purchase* the same by such means as he hath” then he can be directed by public officials to raise the value other ways, including through labor (emphasis added)).

349. *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024) (reaffirming that the Second Amendment “secures for Americans a means of self-defense”).

350. *See* Smith, *supra* note 36, at 84 (“Because people would still have constitutionally-protected access to traditional firearms, a government ban on 3D printed firearms would probably not substantially burden the right to self-defense in the home.”).

rights to “keep and bear” have not been infringed. The First Amendment offers an illustration.³⁵¹ The freedom of speech permits the state to implement reasonable restrictions on the time, place, and manner of speech.³⁵² Such restrictions close some avenues to speech but necessarily do not foreclose speech altogether; they are lawful so long as they leave open “ample alternative modes of communication.”³⁵³ By analogy, reasonable restrictions on making guns do not curtail the right so long as the restrictions permit *some* lawful gunmaking or gun importing.

This understanding of “keep and bear” comports with the historical reality of gunmaking and gun markets. Due to a shortage in domestic gunmaking capacity, guns in the colonies and early republic were mostly imported from Europe.³⁵⁴ Even during the Seven Years War and Revolutionary War, which stimulated an unprecedented demand for small arms, Americans did not make most of their weapons.³⁵⁵ Rather, their weapons were imported from abroad. And imports continued long after the peace.³⁵⁶ At no point in American history has self-manufacturing a gun been a prerequisite to obtaining a gun. Given this history, early Americans would have understood their right to “keep and bear” arms as requiring gun purchasing.³⁵⁷ But even the right to purchase has its limits. The Court has long recognized that, in the words of David B. Kopel, “[t]here is a right to the commercial sale of arms, but it is a right that may be regulated by ‘conditions and qualifications.’”³⁵⁸ The right to obtain, in other words, is not unqualified.³⁵⁹

351. *Cf.* N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2130 (2022) (observing that “*Heller* repeatedly compared the right to keep and bear arms” to “the freedom of speech in the First Amendment”).

352. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

353. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984).

354. *See supra* Part I. The history relayed in Part I demonstrates how claims that “*all* firearms in the early republic were made by blacksmiths or specialized gunsmiths until the founding of Remington Arms in 1816” are incomplete at best. James B. Jacobs & Alex Haberman, *3D-Printed Firearms, Do-It-Yourself Guns, & The Second Amendment*, 80 LAW & CONTEMP. PROBS. no. 2, 2017, at 129, 137 (2017) (emphasis added).

355. *See supra* notes 96-119 and accompanying text.

356. 1 BISHOP, *supra* note 104, at 607 & n.1; *supra* notes 122-29 and accompanying text.

357. *See supra* note 77 and accompanying text.

358. David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?*, 127 HARV. L. REV. F. 230, 236 (2014) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)); *see also* N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2162 (2022) (Kavanaugh, J., concurring) (“[N]othing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms.” (quoting 554 U.S. at 626-27)).

359. *See United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024) (“[T]he right was never thought to sweep indiscriminately.”).

D. The Nation’s Historical Tradition of Gunmaking Regulation

Some courts have already held that the Second Amendment’s plain text covers gunmaking.³⁶⁰ This Subpart argues that even if a federal constitutional right to gunmaking exists, this right does not necessarily invalidate reasonable gunmaking regulations under the historical step of the *Bruen* inquiry.

California’s ghost gun law is a useful example.³⁶¹ The law requires anyone manufacturing or assembling a firearm to obtain a unique serial number from the U.S. Department of Justice, engrave or affix the number onto the firearm, and then register the firearm with the state.³⁶² Failure to mark and register a firearm carries penalties up to one year in jail and \$1,000, with each unregistered firearm deemed a separate offense.³⁶³

These gunmaking regulations may seem disconnected from historical methods of regulating gunmaking. But California’s regulations fit within the “why” and the “how” of past regulations.³⁶⁴ The modern “why” matches the historical “why”: tracing guns to their owners and makers and curtailing personal and collective violence by confining gunmaking to trustworthy, law-abiding citizens.³⁶⁵ Just as early Americans required gunsmiths to prove their trustworthiness and safety through apprenticeships and compulsory labor, modern laws ensure gunmaking remains a safe, regulated activity for law-abiding citizens.

The “how” also matches. As noted, historical regulations were extensive. These included private and public rules and norms on who could make guns (including apprenticeships), who could not make guns (dangerous persons),³⁶⁶

360. See *supra* Part III.B.

361. CAL. PENAL CODE § 29180 (West 2022).

362. *Id.* § 29180(a)-(b).

363. *Id.* § 29180(g).

364. See *supra* note 274 and accompanying text (discussing the “how” and “why” formulations).

365. See Press Release, Governor Gavin Newsom, Governor Newsom Strengthens California’s Nation-Leading Gun Safety Laws (Sept. 26, 2023), <https://perma.cc/JC2U-Y47D>; cf. *United States v. Rahimi*, 144 S. Ct. 1889, 1901 (2024) (concluding a modern federal statute “restricts gun use to mitigate demonstrated threats of physical violence, just as the surety and going armed laws do”).

366. After *Rahimi*, it remains unclear to what extent courts can rely on laws targeting groups of individuals for disarmament. The *Rahimi* holding is facially narrow: “When an *individual* poses a clear threat of physical violence to another, the threatening *individual* may be disarmed.” *Rahimi*, 144 S. Ct. at 1901 (emphasis added). As Justice Gorsuch noted in his concurring opinion, the Court did not resolve how to handle “other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem . . . ‘not “responsible.””” *Id.* at 1910 (Gorsuch, J., concurring) (quoting *id.* at 1903 (majority opinion)). Moreover, the Court did not address—or even cite—disarmament laws that were facially racist, prejudicial, or xenophobic. Only Justice
footnote continued on next page

who had to make guns (impressed gunmakers), for whom guns could not be made (dangerous persons), and how military guns and components could be made (including via detailed regulations of gun size, formal and informal requirements that guns be labeled, restrictions on making gunpowder, and lessons imparted by masters to apprentices).³⁶⁷ It is tempting to minimize the history of state regulatory power by viewing these regulations in isolation. For example, gunsmith impressment might be written off as an emergency wartime measure irrelevant to peacetime regulations;³⁶⁸ public-private regulation of apprenticeships might seem irrelevant in the modern age of statutory lawmaking.³⁶⁹

But these powers cannot be understood in isolation. The Court has recognized what might be called a doctrine of Second Amendment emergence: the idea that the whole is greater than and different from the sum of its parts.³⁷⁰ In *Rahimi*, the Court held that, “*taken together*,” historical surety laws and “going armed” laws established an enduring “principle[]” that permitted a modern regulation.³⁷¹ So too here. Taken together, and in their historical context, past laws reveal a system of gunmaking regulation more robust than apparent from any individual regulation. Consider the sum of powers to inspect arms, to confiscate arms, to impress gunmakers, to require gun labeling (at least for military weapons), and to control the terms of apprenticeships. Together, these powers suggest that authorities were capable of vetting those seeking to make guns, of overseeing at least some segment of domestic manufacturing to the extent safety demanded, and of halting gunmaking upon failure to follow standards.³⁷² These emergent powers contain the lesser power of regulating serial numbers on firearms. So even if the Second Amendment’s

Thomas, in dissent, raised doubts about the laws that countenanced the “historical evils” of, for instance, disarming newly freed slaves. *Id.* at 1946 (Thomas, J., dissenting).

367. *See supra* Parts II.B.-C.

368. However, the frequency of public efforts to compel arms making underscores how authorities have long treated gunmaking as a regulable undertaking linked to public defense and general welfare. *See supra* note 186.

369. *But see* Hochman, *supra* note 37; Michael Ramsey, *Josh Hochman: Public and Private Historical Traditions of Firearm Regulation*, ORIGINALISM BLOG (Aug. 4, 2023, 6:09 AM), <https://perma.cc/3UVG-BG9R> (endorsing Josh Hochman’s argument that there is “no reason” to limit the history-and-tradition inquiry to formal statutes).

370. *See* Peter A. Corning, *The Re-Emergence of “Emergence”: A Venerable Concept in Search of a Theory*, COMPLEXITY, Dec. 19, 2002, at 18, 21-22, 26-27; *supra* note 286 and accompanying text.

371. *Rahimi*, 144 S. Ct. at 1898, 1901 (emphasis added) (capitalization altered). *But see supra* note 284 (describing Justice Thomas’s criticism of this approach).

372. This use of historical evidence to identify the boundaries of the Second Amendment right is an example of what Justice Barrett termed “original contours” history. *See Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring).

plain text does cover gunmaking, reasonable regulations requiring, for example, gunmakers to obtain a license may pass constitutional scrutiny under *Bruen*—so long as those regulations are applied consistently, according to objective criteria.³⁷³

* * *

The *Bruen* inquiry, like any voyage into the past, proceeds along a dark road through rough and rugged terrain. Historical sleuths might just opt for a detour. And not only by ending the inquiry at the plain-text threshold,³⁷⁴ but by redefining the problem itself.³⁷⁵ Advocates of gun regulation might argue that the modern problem of untraceable homemade weapons has no true historical antecedent.³⁷⁶ As the Court explained in *Bruen*, when a modern regulation concerns a “general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence” that the modern regulation is unconstitutional.³⁷⁷ However, when “dramatic technological changes” create an altogether *new* problem, courts need a “more nuanced approach.”³⁷⁸

Ghost guns might seem to be a prime candidate for such an approach. Under one reading of Founding-era history, eighteenth-century lawmakers were concerned that gunmaking was too costly and too difficult—and that a dearth of guns imperiled public safety.³⁷⁹ Today, many policymakers are concerned that gunmaking is too easy and too accessible—and that an overabundance of self-made guns imperils public safety.³⁸⁰ If viewed this way,

373. See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2161-62 (2022) (Kavanaugh, J., concurring) (reading *Bruen* to permit the use of objective, nonarbitrary criteria to “require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements”).

374. See Blocher & Ruben, *supra* note 271, at 118 (“[C]ourts after *Bruen* will have a[n] . . . incentive to resolve cases at the threshold with a ‘plain-text’ holding in order to avoid the complications of the historical-analogical inquiry.”).

375. *Cf. Bruen*, 142 S. Ct. at 2133 (stating analogical reasoning under *Bruen* should not become a “regulatory straightjacket”).

376. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 721-22 (2008) (Breyer, J., dissenting) (“Given the purposes for which the Framers enacted the Second Amendment, how should it be applied to modern-day circumstances that they could not have anticipated?”).

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

378. *Id.* at 2132.

379. See HAAG, *supra* note 69, at 12 (“The gun industry emerged out of the need for more domestically produced guns, especially more guns for the national defense . . .”); *supra* notes 105, 137 and accompanying text.

380. See *supra* note 15 (listing recent ghost gun regulations); *cf. HARSANYI*, *supra* note 87, at 35 (“[M]odern Americans do not concern themselves with shortages of weapons . . .”).

the problems are not the same. But under a “more nuanced approach,” courts would look to the “private or quasi-public” antecedents of modern regulations to determine the Nation’s historical tradition of firearm regulation.³⁸¹ It is clear that early Americans *did* regulate gunmaking in a number of public and quasi-public ways—that is, in ways recognizable to early Americans.³⁸² These rules, like statutes, are part of “our Founders’ law.”³⁸³ They might seem less legible today, but that does not make them less legitimate. It means only that the full meaning of our history has not yet been uncovered.³⁸⁴ It means, in other words, that the ongoing project of acquainting ourselves with the Founders’ law remains unfinished.

Conclusion

After *Bruen*, the validity of gunmaking regulations will depend on how courts interpret “history and tradition.” Early Americans regulated gunmaking in several ways, including through apprenticeships, arms inspections, labeling rules, labor impressments, and standard setting. These regulations were not identical to modern ones. Yet, individually and together, they formed a tradition of gunmaking regulation. It is not clear to what extent this tradition matters in modern litigation. The Court has suggested that the Second Amendment’s plain text controls. And the evidence is not strong that the Second Amendment as originally understood covers gunmaking at all.

Whatever its role, the historical inquiry into gunmaking presents a special irony. Today’s gunmaker does not need to know anything about the history of the craft.³⁸⁵ This represents a major departure from our past. Under the apprenticeship model that dominated gunmaking at the Founding, masters had a legal obligation to teach their apprentices everything they knew.³⁸⁶ The master’s “greatest obligation,” noted one historian, was to give to the apprentice “a full and comprehensive understanding of what had come

381. See Hochman, *supra* note 37, at 1726 (proposing such a methodology).

382. See Novak, *supra* note 209, at 31-32 (discussing market regulations between Independence and the Civil War as “stringent,” “extremely detailed,” and centrally concerned with “the welfare of the people”).

383. N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2136 (2022).

384. *Cf.* United States v. Rahimi, 144 S. Ct. 1889, 1923 (2024) (Kavanaugh, J., concurring) (“Second Amendment jurisprudence is still in the relatively early innings . . .”).

385. See, e.g., Andy Greenberg, *I Made an Untraceable AR-15 “Ghost Gun” in My Office—and It Was Easy*, WIRED (June 3, 2015, 7:00 AM), <https://perma.cc/VY5X-2H7Z> (documenting how a journalist who had no experience with or mastery of firearms or power tools built his own fully functional AR-15 in just six hours using a kit of online-ordered parts, an engineering fabrication machine, YouTube videos, and a \$2,272 budget).

386. WHISKER, *supra* note 36, at iv, 5; Dolgin, *supra* note 57, at 1125-26.

before.”³⁸⁷ Technology has ended this obligation, severing the bond between past and present.³⁸⁸ At the very moment history became central to firearms jurisprudence, technology made that history irrelevant to the actual work of gunmaking. In that way, at least, modern gunmaking may well be unprecedented.

387. WHISKER, *supra* note 36, at iv.

388. For a small sample of the many free internet resources related to gunmaking, see Mark McDaniel, *How to (Legally) Make Your Own Off-the-Books Handgun*, REASON (May 31, 2018), <https://perma.cc/BB4N-2WD7>; Ryan Cleckner, *How to Build a Glock at Home: Step by Step Guide*, GUN UNIV. (Mar. 24, 2022), <https://perma.cc/7T6V-DX78>; Midwest Gun Works, *How to Assemble an AR15 Lower*, YOUTUBE (Aug. 13, 2021), <https://perma.cc/9X43-YDPW>; and Midwest Gun Works, *How to Assemble an AR15 Upper*, YOUTUBE (Feb. 3, 2022), <https://perma.cc/3G9U-YWRR>.