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Property v. Guns: The Level-of-Generality Problem in *Wolford*

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Introduction

In the summer of 2022, the Supreme Court decided *New York State Rifle & Pistol Association v. Bruen*, holding that the Second Amendment protects a general right to carry firearms in public for self-defense.[1] States with longstanding restrictions on public carry, like New York, California, and Hawaii, revised their firearm laws to comply with *Bruen*'s new framework while still legislating on their view of what would best protect public safety. Hawaii's response is now before the Supreme Court in *Wolford v. Lopez*,[2] one of several cases presenting federal courts with a novel question: May states flip the traditional presumption and require property owners to expressly consent before armed persons may enter private property open to the public?

The case pits two deeply-rooted American rights against one another: the right to carry guns and the right to exclude others from private property. *Bruen* commands courts evaluating Second Amendment challenges to determine whether a challenged regulation is "consistent with the principles that underpin our regulatory tradition."[3] The parties to *Wolford* have thus

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1. 142 S. Ct. 2111, 2134-35 (2022).
2. 116 F.4th 959 (9th Cir. 2024), *cert. granted*, 2025 WL 2808808 (U.S. Oct. 3, 2025) (No. 24-1046).
3. United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024) (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131-34 (2022)). There has been a proliferation of thoughtful scholarship about *Bruen*, but I do not engage in any sustained discussion of the test and its ambiguities here. For works that do, see J. Joel Alicea, Bruen *Was Right*, 174 U. PA. L. REV. 13 (2025); Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller, *"A Map Is Not the Territory": The Theory and Future of Sensitive Places Doctrine*, 98 N.Y.U. L.

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looked to history—specifically, to colonial-era hunting laws that limited when armed persons could enter another's land. But the parties disagree fundamentally about what those laws tell us. Are they anti-poaching statutes, concerned only with taking game? Or are they broader restrictions on armed entry onto private property? And what does it mean that most prevented hunting or the carrying of arms only on "enclosed" or "improved" land—does that describe only private property closed to the public, like residences, or would it also have captured the taverns, inns, and shops of the Founding era?

This Essay seeks to clarify what is really at stake by crystallizing the level-of-generality problem at the center of *Wolford*.[4] *Bruen* requires the government to justify modern gun regulation by identifying historical analogs "relevantly similar" in "how and why" they burden the right to armed self-defense,[5] yet the outcome often turns on how a court characterizes the relevant tradition—too specific and no analogue fits; too abstract and almost anything does. *Wolford* presents that problem on two dimensions. On the "why," labeling Founding-era statutes as "anti-poaching" can either narrow the inquiry to theft of game or, depending on historical context, capture a wider bundle of concerns including trespass, property damage, and violence (intentional or accidental) associated with armed strangers. In other words, even a narrow view of the purpose behind a law might reflect a much broader range of animating concerns. On the "how," translating Founding-era categories such as "enclosed" and "improved" into the modern idiom of "private property open to the public" risks importing zoning-era intuitions into a legal world that instead relied on visible signals of claim, possession, and notice. Reading the historical hunting statutes narrowly and in isolation from one another, one could miss the property principles that unify them.

Part I sets the stage by describing Hawaii's statute and the competing historical arguments advanced in the lower courts and now before the Supreme Court. Part II revisits the "why" and "how" prongs of *Bruen* through the lens of property history. It first examines what "poaching" entailed in the

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REV. ONLINE 438 (2023); Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023); Joseph Blocher & Reva B. Siegel, *The Ambitions of History and Tradition in and Beyond the Second Amendment*, 174 U. PA. L. REV. (forthcoming 2026) (available at https://perma.cc/A4RY-53EX).

4. For helpful discussions of the level-of-generality problem *Bruen* created, see Alicea, note 3 above at 50-64; Blocher & Siegel, note 3 above, at 9-38; *see also* Sherif Girgis, *Preexisting Rights: "History and Tradition" and Levels of Generality*, 140 HARV. L. REV. (forthcoming 2027) (manuscript at 1-7) (on file with author) (arguing that the levels-of-generality problem is "profound" because "[d]escribing historical speech or gun laws broadly would allow more regulation today; narrow descriptions would broaden the right" and that practices "as concrete events, don't have a correct level of generality" (emphasis omitted)).

5. *Bruen*, 142 S. Ct. at 2132-33.

eighteenth century and why contemporaries treated it as more than the taking of game. It then turns to "enclosure," "improvement," and related markers as legally-salient property signals—widely-understood proxies for claim and notice—and situates those markers alongside other ways legislatures have historically structured communication of owner intent. The conclusion returns to the level-of-generality problem to suggest what courts owe the public when they select one frame rather than another in cases where property rights and constitutional rights collide.

I. Hunting for Analogs

A. The Hawaii Statute

Hawaii's law is widely acknowledged as a response to *Bruen*, which established a two-step framework for evaluating Second Amendment challenges. First, courts must determine whether "the Second Amendment's plain text covers an individual's conduct."[6] If so, "the Constitution presumptively protects that conduct," and the government must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[7] The government must "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[8] Historical analogs need not be "dead ringers" but must be "relevantly similar" in "how and why" they burden the right to armed self-defense.[9]

After *Bruen* came down, Hawaii enacted Act 52 in 2023, which imposed new restrictions on where license holders could carry firearms.[10] Act 52's most controversial provision created a default no-gun rule for all private property: A person carrying a firearm may not "intentionally, knowingly, or recklessly enter or remain on private property of another person" unless given "express authorization . . . by the owner, lessee, operator, or manager."[11] That authorization can be "unambiguous written or verbal" or may be signaled through "clear and conspicuous signage at the entrance of the building or on the premises."[12] The law does not distinguish between private property closed

6. *Id.* at 2126.
7. *Id.* at 2130.
8. *Id.* at 2127.
9. *Id.* at 2132-33; *see* United States v. Rahimi, 144 S. Ct. 1889, 1901 (2024).
10. Wolford v. Lopez, 116 F.4th 959, 971 (9th Cir. 2024).
11. HAW. REV. STAT. § 134-9.5(a) (2024).
12. *Id.* at § 134-9.5(b).

to the public—like residences—and private property open to the public—like stores, restaurants, and parking lots.

Hawaii was not alone among the states in enacting this legislation. Indeed, New York had been the first, passing the Concealed Carry Improvement Act just one week after *Bruen* was decided.[13] This sort of legislation had been proposed even earlier—in 2020—by Ian Ayres and Fredrick Vars.[14] In a follow-up article, Ayres and Spurthi Jonnalagadda demonstrated empirically in a nationally-representative survey that a majority of American adults would prefer a default no-gun rule like the one New York adopted.[15] Several other states, including Hawaii, adopted their own versions.[16]

Six individuals and the Hawaii Firearms Coalition challenged Act 52 in federal court, arguing that it violated the Second Amendment both facially and as applied. In November 2023, the district court granted a preliminary injunction in part, concluding that the petitioners were likely to succeed on their claim that the private-property default rule violated the Second Amendment as applied to property "held open to the public."[17] The court reasoned that while property owners undoubtedly have a right to exclude armed visitors from purely private property, like homes, the Second Amendment's protection of public carry extends to privately-owned spaces that function as part of the public sphere. And critically, it found Hawaii had failed to identify a sufficient historical tradition supporting its default rule.[18]

On appeal, the Ninth Circuit reversed. In September 2024, the panel held that Hawaii's law "falls well within the historical tradition" of firearm regulation.[19] The panel identified what it called historical "dead ringers" for Hawaii's statute: a 1771 New Jersey law and an 1865 Louisiana law.[20] Both, the panel concluded, prohibited carrying firearms onto "all private property"

13. N.Y. PENAL LAW § 265.01-d (McKinney 2024); *Governor Hochul Signs Landmark Legislation to Strengthen Gun Laws and Bolster Restrictions on Concealed Carry Weapons in Response to Reckless Supreme Court Decision*, N.Y. STATE: GOVERNOR KATHY HOCHUL (July 1, 2022), https://perma.cc/MCM6-8PAZ; *see* Antonyuk v. James, 120 F.4th 941, 955-56 (2d Cir. 2024).

14. IAN AYRES & FREDRICK E. VARS, WEAPON OF CHOICE: FIGHTING GUN VIOLENCE WHILE RESPECTING GUN RIGHTS 84-93 (2020).

15. Ian Ayres & Spurthi Jonnalagadda, *Guests with Guns: Public Support for "No Carry" Defaults on Private Land*, 48 J.L. MED. & ETHICS 183, 186-88 (2020).

16. CAL. PENAL CODE § 26230(a)(26) (West 2023); N.J. STAT. ANN. § 2C:58-4.6(24) (West 2024); MD. CODE ANN., CRIM. LAW § 6-411 (West 2023); HAW. REV. STAT. § 134-9.5 (2024).

17. Wolford v. Lopez, 116 F.4th 959, 972-73 (9th Cir. 2024).

18. Wolford v. Lopez, 686 F. Supp. 3d 1034, 1072 (D. Haw. 2023), *aff'd in part, rev'd in part*, 116 F.4th 959.

19. *Wolford*, 116 F.4th at 995.

20. *Id.*

without the owner's consent and were enacted to prohibit "the carry of firearms on private property without consent."[21] The Ninth Circuit declined to rehear the case en banc, over two separate dissents joined by a total of eight judges.[22]

The Ninth Circuit's decision created a circuit split, though *Wolford* was the only decision directly concerning a default rule change issued after *United States v. Rahimi*. In an earlier decision, *Antonyuk v. James*, the Second Circuit struck down New York's nearly-identical no-gun default rule, which prohibited carrying firearms on private property open to the public without "clear and conspicuous signage" or "express consent" from the owner.[23] The Second Circuit read historical laws overall to support a "presumption against carriage on enclosed private lands, *i.e.*, private land closed to the public," but not property open to the public.[24] In *Kipke v. Moore*, a District of Maryland judge struck down similar Maryland legislation, reading the historical laws as insufficient to support the state's rule.[25] The Third Circuit followed suit in *Koons v. Attorney General of New Jersey*, invalidating New Jersey's version of the default rule,[26] though the circuit recently decided to rehear *Koons* en banc.[27]

B. The Historical Arguments

Each of these opinions relied on substantially the same historical evidence to determine (at *Bruen*'s command) whether the regulation was consistent with the "historical tradition that delimits the outer bounds of the right to keep and bear arms."[28] There is a relatively small set of historical laws pitting guns against property rights from the Founding period. Unsurprisingly—it is the eighteenth century we are talking about, after all—most of the laws are about hunting.[29]

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21. *Id.* (emphasis omitted).

22. Wolford v. Lopez, 125 F.4th 1230, 1231 (9th Cir. 2025). *Wolford* actually struck down California's default-rule change in part because it required signage of a specific size, meaning an owner could not consent verbally. 116 F.4th at 995-96.

23. 120 F.4th 941, 1042, 1046-48 (2d Cir. 2024).

24. *Id.* at 1046.

25. 695 F. Supp. 3d 638, 658-59 (D. Md. 2023).

26. 156 F.4th 210, 252 (3d Cir. 2025).

27. 162 F.4th 100 (3d Cir. 2025).

28. N.Y. State Pistol & Rifle Ass'n v. Bruen, 142 S. Ct. 2111, 2127 (2022). The *Wolford* opinion and briefs both discuss an 1865 Louisiana law, which the petitioners on appeal contend is wrong under *Bruen*. To simplify the analysis, I discuss only the evidence from the 1700s here.

29. *See* Maureen E. Brady, Eighteenth Century Hunting Laws, https://perma.cc/34G6-DP7R (archived Jan. 27, 2026) (collecting the Founding-era gun laws discussed in the court opinions and other similar historical laws).

These hunting laws varied somewhat in their coverage, but all concerned liability for hunting on another person's property. Several identified differently where a person would become liable: on "enclosed" land, "improved land," "seated plantations," or other variations. Most broadly, a New Jersey 1771 law prohibited hunting on "Lands not [one's] own, and for which the Owner pays Taxes."[30] These specifications are no big surprise: American jurisdictions early on developed different rules from England and from one another about the scope of customary hunting rights on private property.[31] Nevertheless, the idea that hunting was permitted on "unenclosed" land was evidently widespread enough that Pennsylvania delegates tried to put it into the federal Constitution.[32]

Some of the laws about hunting on another's land specifically prohibited "guns" or "dogs" as hunting technologies, while others did not.[33] Some prohibited hunting without permission, and others (like South Carolina's) actually seemed to allow hunting without permission on others' private property so long as it was within seven miles of the hunter's residence.[34] As Ayres and Vars recount in a recent article, these hunting default rules—in addition to their variation by the time of the Founding—have also been modified over time.[35]

There are important differences in how the opinions striking down the new default (*Antonyuk*, *Kipke*, and *Koons*) and the one in which it was upheld (*Wolford*) view the historical analogs. The key differences involve how to view

30. An Act for the Preservation of Deer and Other Game, and to Prevent Trespassing with Guns (Dec. 21, 1771), *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY 343, 344 (Samuel Allinson ed., 1776).

31. *Compare id.* (prohibiting hunting on "[l]ands not [one's] own"), *with* PA. CONST. of 1776, Plan or Frame of Gov't, § 43 (establishing the right for inhabitants to hunt and fowl in seasonable times on their own lands and on other unenclosed private lands), VT. CONST. of 1777, ch. II, § XXXIX (same), *and* An Act for the Preservation of Deer, and to Prevent the Mischiefs Arising from Hunting at Unseasonable Times (Aug. 23, 1769), *reprinted in* 4 STATUTES AT LARGE OF SOUTH CAROLINA 310, 311 (Thomas Cooper ed., 1838) [hereinafter 1769 South Carolina Act] (circumscribing hunting rights to within seven miles of the hunter's residence).

32. THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS (1787), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 145, 150-51 (Herbert J. Storing ed., 1981).

33. *See, e.g.*, Act of Dec. 5, 1768, ch. 88, 1768 N.C Sess. Laws 239, 240 ("[N]o white Person whatsoever shall, on any Pretence, presume to hunt with Dogs, or other wise . . ."); Act of Oct. 24, 1728, ch. VII, 1728 Md. Laws 11, 13 (forbidding "hunting with Guns or Dogs, within any inclosed Grounds").

34. 1769 South Carolina Act, *supra* note 31, at 311.

35. Ian Ayres & Fredrick E. Vars, *Tell Me What You Want: An Affirmative-Choice Answer to the Constitutional Concern About Concealed-Carry on Private Property*, 17 J. LEGAL ANALYSIS 105, 112 (2025).

two different, though related, portions of the colonial regulations. To begin, the opinions differed in interpreting the rationale for the hunting rules, leading the circuits to split on the "why" under *Bruen*.[36] And moreover, the opinions differed on the meaning of the limitation to certain categories of "enclosed" or "improved" property, leading the courts to disagree about the "how" of the hunting regulations under *Bruen*.[37]

First, the rationale for the hunting rules. Most of the judges striking down the new default rule, as well as the judges dissenting from rehearing in *Wolford*, emphasize that the purpose of the colonial hunting laws was to prohibit "unlawful" hunting, rather than armed trespass.[38] As the district court in *Antonyuk* put it, the laws mostly appear to be "'anti-poaching-laws,' aimed at preventing hunters (sometimes only hunters who are convicted criminals) from taking game off of other people's lands (usually enclosed) without the owner's permission."[39] As many of these laws expressly discuss unlawful hunting or specific types of game, the argument runs, they cannot be the basis for laws meant to prevent gun violence more generally.

In contrast, the *Wolford* majority viewed these laws as establishing a "tradition of arranging the default rules that apply specifically to the carrying of firearms onto private property."[40] Although some of the laws were specific to poaching, the Ninth Circuit emphasized the broader 1771 New Jersey law—which referenced "preven[ting] trespass[] with guns"—as helping to clearly support the state's broader purpose.[41] Interestingly, although it struck down the default rule in *Koons*, the Third Circuit likewise did not view the hunting analogs as being strictly about poaching, at least in the sense of carrying away game, though they ultimately struck down the law. The majority opinion recites numerous sources, including Blackstone's *Commentaries*, that

36. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132-33 (2022); *see* Wolford v. Lopez, 125 F.4th 1230, 1245 (9th Cir. 2025) (VanDyke, J., dissenting from the denial of rehearing en banc) (chronicling other decisions and arguing that the Ninth Circuit opinion "unnecessarily created a circuit split").

37. *See Bruen*, 142 S. Ct. at 2132-33.

38. *See* Antonyuk v. James, 120 F.4th 941, 1046 (2d Cir. 2024); *Wolford*, 125 F.4th at 1238 (VanDyke, J., dissenting from the denial of rehearing en banc); Kipke v. Moore, 695 F. Supp. 3d 638, 658-59 (D. Md. 2023); Koons v. Platkin, 673 F. Supp. 3d 515, 618 (D.N.J. 2023); *see also* Koons v. Att'y Gen. N.J., 156 F.4th 210, 296 (3d Cir. 2025) (Porter, J., concurring in the judgment in part and dissenting in part) ("[A]s each of the anti-poaching laws and their English antecedents show, the sole purpose was to protect the 'vert and venison' for the King's (or another property owner's) own hunting.").

39. Antonyuk v. Hochul, 639 F. Supp. 3d 232, 340 (N.D.N.Y. 2022).

40. Wolford v. Lopez, 116 F.4th 959, 995 (9th Cir. 2024).

41. *Id.* at 994-95 (quoting An Act for the Preservation of Deer and Other Game, and to Prevent Trespassing with Guns (Dec. 21, 1771), *in* ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY 343, 343 (Samuel Allinson ed., 1776)).

characterized poachers as presenting more general risks of violence.[42] Together with laws regulating the nighttime carrying of guns near roads, the Third Circuit saw these laws as generally meant "[t]o address concerns raised by armed trespass."[43]

Second, the opinions view the limitations in these laws to certain categories of land somewhat differently. With the exception of New Jersey's 1771 law, and perhaps a 1738 Virginia law protecting "patented" lands, the historical antecedents all limit liability for hunting on another's land to something like "enclosed" or "improved" property. The opinions striking down the default seem to view the limitation to "enclosed" or "improved" property as describing something like residential properties closed to the public, supporting a generally broad public carry right in other spaces. Judge Lawrence VanDyke's dissent from the denial of rehearing in *Wolford* expressly characterizes "enclosed" land as "a narrow subset" of properties.[44] The district court in *Koons* likewise concluded that the hunting laws established only that one could not hunt on the "improved or enclosed lands of a plantation, not private property more generally."[45] And the Second Circuit expressly translated "enclosed private lands" as "private land closed to the public."[46] For these judges, the best analogy for commercial properties open to the public seems to be unimproved or unenclosed land.[47]

The *Wolford* majority actually saw it the same way, asserting that the provisions involving "enclosed" or "improved" land describe only "a subset of private property," likely not "property that was generally open to the public."[48] They thus rely on the New Jersey law, which limits hunting rights broadly on "Lands not [one's] own . . . for which the Owner pays Taxes."[49] In her Supreme

42. *Koons*, 156 F.4th at 230-31.

43. *Id.* at 232-33.

44. *Wolford*, 125 F.4th at 1238 (VanDyke, J., dissenting from the denial of rehearing en banc).

45. Koons v. Platkin, 673 F. Supp. 3d 515, 620 (D.N.J. 2023).

46. Antonyuk v. James, 120 F.4th 941, 1046 (2d Cir. 2024).

47. These opinions tend to equate enclosed and improved land to land not held open to the public, implying that the best analog for commercial property is the opposite: unenclosed or unimproved land. *See, e.g., id.* at 1047 ("[T]he historical record indicates that 'land,' 'improved or inclosed land' and 'premises or plantations' would have been understood to refer to private land not open to the public. The State has produced no evidence that those terms were in fact otherwise understood to apply to private property open to the public or that the statutes were in practice applied to private property open to the public." (footnote omitted)).

48. Wolford v. Lopez, 116 F.4th 959, 994 (9th Cir. 2024).

49. *Id.* (quoting An Act for the Preservation of Deer and Other Game, and to Prevent Trespassing with Guns (Dec. 21, 1771), *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY 343, 344 (Samuel Allinson ed., 1776)).

Court briefing, the respondent now emphasizes a different reading of "enclosed" or "improved." She notes that "inns, taverns, and other privately owned businesses that might have been public at the Founding" would certainly have been included in the category of "improved" and "enclosed" property.[50] Citing dictionary evidence, she states that "improved" property describes "used" or "occupied" property, and "enclosed" property that which was "separated 'from common ground into distinct possessions.'"[51]

At oral argument in the Supreme Court, the parties repeated their different framings of these different sets of issues. The petitioners repeatedly cast the respondent's analogs as "antipoaching laws,"[52] while the respondent insisted that the same enactments were broader, encompassing armed entry as well as the taking of game.[53] The petitioners, as well as the federal government, characterized broadly-recognized hunting rights on unenclosed land as supportive of a right to carry on "property open to the public,"[54] while the respondent contended that commercial properties would qualify as "improved" or "enclosed" under historical definitions.[55]

In limited pages and time, the parties have only been able to scratch the surface of these questions: the question of rationale and the question of enclosure and improvement. The next part turns to additional evidence. The historical development of property law teaches that even if the problem these statutes addressed was poaching, that word described a more serious problem than a few carted-off deer. And the vernacular of "enclosure" and "improvement"—and indeed, even the payment of taxes—code onto a well-understood tradition of property signaling, meant to define for both owners and third parties key signals of possession. I describe these two issues, which both raise the level-of-generality problem, in turn.

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50. Respondent's Brief at 31-32, Wolford v. Lopez, No. 24-1046 (U.S. Dec. 17, 2025), 2025 U.S. S. Ct. Briefs LEXIS 4611, at *48-49.

51. *Id.* at 31 (first quoting *Improved*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), https://perma.cc/75LL-YZCJ; and then quoting *Inclosure*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), https://perma.cc/X5KF-LLQK).

52. *E.g.*, Transcript of Oral Argument at 5, Wolford v. Lopez, No. 24-1046 (U.S. Jan. 20, 2026). For the first time at oral argument, the petitioners asserted that the historical poaching laws had self-defense "exemptions," *id.* at 26-27, but there appears to be no historical support for that claim.

53. *Id.* at 102-03 (contending that the suggestion the historical laws were "limited to poaching" was "just wrong").

54. *Id.* at 20; *see also id.* at 50 (arguing that if an owner "did not enclose" land, that absence of a signal functioned as "an open invitation to carry").

55. *Id.* at 85-86.

II. Revisiting "Why" and "How"

A. Why: The Problem with Poaching

One of the points of disagreement among the *Wolford* petitioners and respondent is how to characterize the *purpose* of limiting hunting rights on enclosed land. The respondents characterize these laws as being at least in part about armed entry. The petitioners claim these laws are only about poaching. But this raises a historical question: What was "poaching" in the eighteenth century—and what was the harm in it?

Even the word's origins suggest a multiplicity of answers. Dictionaries list several potential etymologies for "poach," reflecting different conceptions of the harm. One interpretation of the Old French term *pocher* is "to put in a bag"—the same root as "pocket" and "pouch."[56] As the colloquial use of "pocket" for "steal" suggests, one reason to limit poaching sounds in conversion—that is, the wrongful taking of another's property. Hunting on another's land specifically deprived the owners of one of the rights associated with ownership: the right to wildlife hunted and killed on the land. English doctrine treated animals ferae naturae, wild by nature, as unowned until captured or killed. But if captured or killed on private property, the animal generally belonged to the owner of the realty. This principle is known as "ratione soli," or "by reason of the soil." Laws authorizing hunting on unenclosed property were codifying an American customary right that had not existed in England.[57] For a variety of reasons—surely both the seeming vastness of the American landscape and the need for fledgling settlers to hunt for sustenance—many American colonies permitted hunting on certain limited categories of others' private property.[58] But to be sure, one of the harms of poaching is the same today as it was then: unlawfully taking game from the land of another, taking a resource that belongs rightfully to someone else.

Another interpretation of the etymology reads *pocher* as meaning "to poke out," gouge, or prod—related to the English word "poke." This derivation evokes trespass—thrusting past the boundary of another. Poaching regulations also had an anti-trespass rationale, as trespassers could cause a range of direct and indirect harms beyond simply taking game. They might damage crops, buildings, or livestock, both directly and through their negligent hunting practices. Several of the colonial-era hunting laws make that plain. For instance, South Carolina's 1769 law prohibited hunters from hunting beyond

56. *Poach*, OXFORD ENGLISH DICTIONARY (2006).

57. Blades v. Higgs (1865) 11 Eng. Rep. 1474; 11 H.L. Cas. 621; *see* Chester Kirby, *The English Game Law System*, 38 AM. HIST. REV. 240 (1933).

58. Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703, 712 (1976).

seven miles from their "place of residence" unless given permission from the owner, if farther.[59] The rationale was to limit "idle, loose and disorderly persons" from "wandering up and down the [Province]," leaving deer carcasses to rot, and drawing "wolves and other beasts of prey" onto private property.[60] A South Carolina historian wrote in 1859 that this rule was because of "a large class of roving vagabonds . . . [who] spent their whole time sauntering alone through the woods, visiting their Indian mistresses, and shooting deer at all seasons . . . to the great destruction of that useful animal, and detriment of the growing up-country settlements."[61] The people, "anxious" both "to preserve their deer, and to get rid of the vagrants," pressed for the law.[62] Beyond the problem of rotting carcasses, the South Carolina law also recited that some poachers engaged in the "dangerous practice" of carrying "lighted torches through the woods,"[63] thereby putting property at serious risk of fire.

Trespassers could thus cause dangers to real property itself. But as the reference to "idle" types suggests,[64] poachers were also associated with serious social violence. In England, game laws had been instruments of class privilege, reserving hunting rights to wealthy landowners.[65] Poaching became associated with lower-class resistance to these restrictions, and organized bands of poachers in the eighteenth century considered it a mode of—sometimes violent—resistance.[66] An English folk song dating to about 1776 put this violence in light terms:

59. 1769 South Carolina Act, *supra* note 34, at 311. The law is mentioned in *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244, 352 (S.C. Const. Ct. App. 1818).

60. 1769 South Carolina Act, *supra* note 34, at 311; *see* Act of May 5, 1722, *reprinted in* THE ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY, FROM THE TIME OF THE SURRENDER OF THE GOVERNMENT IN THE SECOND YEAR OF THE REIGN OF QUEEN ANNE, TO THIS PRESENT TIME, BEING THE TWENTY FIFTH YEAR OF THE REIGN OF KING GEORGE THE SECOND 100 (Samuel Nevill ed., 1752); Act of Dec. 3, 1768, ch. 13, 1768 N.C. SESS. LAWS 168, 169 (describing problem of hunters on lands not their own committing various harms, from leaving carcasses that drew wolves to burning fences).

61. JOHN H. LOGAN, A HISTORY OF THE UPPER COUNTRY OF SOUTH CAROLINA: FROM THE EARLIEST PERIODS TO THE CLOSE OF THE WAR OF INDEPENDENCE 28 (1859).

62. *Id.*

63. 1769 South Carolina Act, *supra* note 34, at 311.

64. Concerns about "idleness" were often thinly-masked concerns about the poor. Maureen E. Brady, *Cottages as Public Nuisances: The Long History of Land Use Regulation of the Poor*, 73 DEPAUL L. REV. 241 (2024).

65. Lund, *supra* note 58, at 703-04.

66. *See* William Savage, *Poachers in the 18th Century*, PEN & PENSION (Oct. 18, 2018), https://perma.cc/TFY2-7XX3.

> When I was bound apprentice, in famous Lincoln-sheer
> Full well I served my master for more than seven year,
> Till I took up with poaching, as you shall quickly hear:—
> Oh! 'tis my delight of a shiny night, in the season of [the year.]
> As me and my comrades were setting of a snare,
> 'Twas then we seed the gamekeeper—for him we did not care,
> For we can wrestle and fight, my boys, and jump o'er everywhere:—
> Oh! 'tis my delight of a shiny night, in the season of the year.[67]

Indeed, the Third Circuit opinion in *Koons* even cites English sources discussing how "unlawful hunting" led to "rebellions, insurrections, riot, robberies, murders and other inconvenience."[68] One historian of Norfolk, England, identified in local writings from 1783 to 1787 several accounts: a letter urging people to stop buying poached game, a fatal beating by poachers, and a confrontation between fourteen poachers and sixteen watchmen that resulted in multiple gunshot wounds.[69]

American rules, which were more tolerant of hunting on unenclosed land, may have mitigated some of the class warfare that characterized hunting in England. But the association between poaching and violence persisted: Colonial newspapers regularly recounted stories of confrontations between poachers and owners.[70] Indeed, the very first recorded murder among English colonists on the North American continent—as early as 1630—might have involved a poaching dispute.[71]

That violence could be intentional, but it could also be inadvertent. Newspapers recount numerous "melancholy accidents" in which guns went off

67. The Lincolnshire Poacher, *in* ANCIENT POEMS, BALLADS AND SONGS OF THE PEASANTRY OF ENGLAND: TAKEN DOWN FROM ORAL RECITATION AND TRANSCRIBED FROM PRIVATE MANUSCRIPTS RARE BROADSIDES AND SCARCE PUBLICATIONS 216-17 (Robert Bell ed., 1857).

68. Koons v. Att'y Gen. N.J., 156 F.4th 210, 231 (quoting 1 Hen. 7 c. 7).

69. Savage, *supra* note 66.

70. *From the London Gazette*, PA. GAZETTE, Mar. 20, 1753, at 1; *Extract of a Letter from Edingburgh, Oct. 27*, N.Y.J., Dec. 28, 1769, at 5; *see The Effects of Habitual Misery, Exemplified in the Life of a Disabled Soldier*, PROVIDENCE GAZETTE, Mar. 6, 1767, at 1 (recounting a poacher's confrontation with a justice of the peace).

71. John Billington's murder of John Newcomen in 1630 evidently was over a "former quarrel," which later sources have sometimes interpreted as involving conflict over hunting. John Navin, *John Billington and His Family (c. 1582-1630): Doomed 'Knave' of Plymouth Plantation*, *in* THE HUMAN TRADITION IN THE ATLANTIC WORLD, 1500-1850, at 13, 21-22 (Karin Racine & Beatriz G. Mamigonian eds., 2010). Another source from a descendant of Billington contends that the family's oral history attributes the conflict either to stolen livestock or the stealing of game from hunting traps. Julia L. Ernst, *The Mayflower Compact: Celebrating Four Hundred Years of Influence on U.S. Democracy*, 95 N.D. L. REV. 1, 53 & n.350 (2020).

on hunting trips, injuring the carrier,[72] fellow hunters,[73] or innocent third parties.[74] A Philadelphia newspaper from 1739 described a neighbor who accidentally shot and killed another neighbor—after having wounded the same victim *twice before*.[75] In South Carolina, three men out hunting stopped at a woman's house, accidentally shooting her in the neck.[76] Even the story of Davy Crockett's life, albeit not published until 1834, contains an anecdote about a hunter shooting a person he mistook for a deer.[77]

The implications of this evidence are simple. Even accepting the narrower frame that Founding-era poaching laws were "about poaching" actually tells us very little. Poaching encompassed multiple, overlapping harms: the conversion of the landowner's qualified property interest in game (*ratione soli*), the trespass onto private property with attendant risks of damage, and the violence and disorder associated with unknown armed persons intruding on another's land. To say a law regulated "poaching" does not resolve whether its animating concern was theft, trespass, violence, or—most plausibly—all three at once.

Although not pursued by the petitioners, briefs from the federal government and Joel Alicea offer an alternative approach to *Bruen*'s "why," and an alternative use of the anti-poaching laws, especially when read against their English forebears. Citing St. George Tucker's edition of Blackstone's *Commentaries*, they note that English poaching laws may have been pretextual, aimed more at disarming the people than protecting the gentry's rights to game.[78] From this, they argue that the true "why" of Hawaii's law is that it seeks to disarm, regardless of what the text says, and history would judge that harshly.

There are two things to disentangle there. To begin, while American jurisdictions through custom enabled some hunting on certain private property, they still had plenty of the anti-poaching provisions cited above—meaning the risk of pretext was evidently not so enormous as to deter similar laws. Maybe, though, the broader point stands: Courts should be sensitive to

72. PETER MANSEAU, MELANCHOLY ACCIDENTS: THREE CENTURIES OF STRAY BULLETS AND BAD LUCK 19 (2016).

73. *Id.* at 21, 25, 35, 42, 51, 63, 66.

74. *Id.* at 40, 59.

75. *Id.* at 5.

76. *Id.* at 40.

77. DAVID CROCKETT, A NARRATIVE OF THE LIFE OF DAVID CROCKETT, OF THE STATE OF TENNESSEE 20-21 (Philadelphia, E.L. Carey & A. Hart 1834). An 1810 newspaper from Long Island recounts a similar accident. MANSEAU, *supra* note 72, at 71.

78. Brief for J. Joel Alicea as Amicus Curiae Supporting Petitioners at 12-13, Wolford v. Lopez, No. 24-1046 (U.S. Nov. 24, 2025), 2025 U.S. S. Ct. Briefs LEXIS 4843, at *18-19; Brief for the United States as Amicus Curiae Supporting Petitioners at 12-13, Wolford v. Lopez, No. 24-1046 (U.S. Nov. 24, 2025), 2025 U.S. S. Ct. Briefs LEXIS 4193, at *21-22.

laws that serve as a pretext for broad disarmament, an evident concern for the Founding generation. It is notable that at oral argument, at least two justices expressed some skepticism as to whether the Second Amendment analysis should start inquiring into pretext, especially given its deemphasis in other areas of constitutional law.[79] The pretext analysis seems like yet another iteration of the level-of-generality problem: Should a court make a judgment call about whether the law means what it says or abstract away to some higher principle that may have motivated it? The problem only deepens when we turn to the other half of the Second Amendment analysis.

B. How: The Meaning of Enclosure and Improvement

1. The Anachronism of "Property Open to the Public"

The other disagreement concerns "how" these hunting laws burdened the right to bear arms: Was hunting limited only on a narrow subset of truly private property, or more broadly across private lands? In advancing the former position, both the petitioners and several appellate opinions contend that—because they protect rights to hunt on "unenclosed" or "unimproved" land—the hunting laws actually support the idea that hunters could access "private property open to the public."[80] But that is not a stable Founding-era legal category, and translating it backwards distorts both the historical record and the analogical inquiry. If that category did not emerge until well after 1791, then basing the *Bruen* analysis on that property-rights distinction weakens any claim to a meaningful historical analog.

More modern cases bring into view the category between private and public that the petitioners want to establish in Second Amendment law. But quite clearly, "private property open to the public" is mostly a twentieth-century creation. That is not because commerce or invitations to enter were new, but because it crystallized into a distinct doctrinal category only after modern public-accommodations law and twentieth-century cases on freedom of expression on private land.[81] The roots of public-accommodations law lay in the rules applicable to innkeepers and later common carriers, who were

79. Transcript of Oral Argument at 38-45, Wolford v. Lopez, No. 24-1046 (U.S. Jan. 20, 2026).

80. Brief of Petitioners at 26, 33-34, Wolford v. Lopez, No. 24-1046 (U.S. Nov. 17, 2025), 2025 U.S. S. Ct. Briefs LEXIS 4110, at *49-51; *e.g.*, Antonyuk v. James, 120 F.4th 941, 1046 (2d Cir. 2024); Wolford v. Lopez, 125 F.4th 1230, 1238 (9th Cir. 2025) (VanDyke, J., dissenting from the denial of rehearing en banc).

81. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1293 (1996); *see also* Marsh v. Alabama, 326 U.S. 501 (1946); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

restricted in their capacity to refuse service—though largely on the rationale that travelers turned away at night would be in grave danger.[82] Joe Singer has painstakingly reconstructed the history of public accommodations, tracking its deep but contested roots, especially where race was concerned.[83] Well into the 1960s, there was unease about how the Fourteenth Amendment's guarantees of equal treatment interacted with private-property rights.[84]

Similarly, a few twentieth-century opinions on federal or state speech rights, like *Marsh v. Alabama* and *Pruneyard Shopping Center v. Robins*, recognized that private-property owners might have to yield their rights to exclude against countervailing constitutional rights.[85] And to be sure, in recent opinions on the Takings Clause, the Court has observed that by opening property to the public, an owner may lose the ability to claim regulations granting access to third parties go so far as to require compensation.[86] There is an equitable flavor to these rules: Having permitted more entrants, the owner is estopped from claiming the government is requiring them to suffer too many. Notably, though, in assessing the rules that apply to "property open to the public," state law has always received primacy, and courts have hesitated to ignore private-property rights, even as against weighty federal constitutional interests.[87] It was California law, rather than the First Amendment, that entitled the leafleteers to access the mall in *Pruneyard*.[88] By contrast, the federal opinions have been reluctant to extend constitutional rights beyond private boundaries, cautious to observe that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes."[89] In all but a couple states, the rights to speak, protest, and assemble do not extend to the places where the petitioners wish to exercise their rights to carry.

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82. *See* JOHN E. H. SHERRY, THE LAWS OF INNKEEPERS: FOR HOTELS, MOTELS, RESTAURANTS, AND CLUBS 38-39 (3d ed. 1993); Steven Sutherland, Note, *Patron's Right of Access to Premises Generally Open to the Public*, 1983 U. ILL. L. REV. 533, 539 (1983).

83. Singer, *supra* note 81.

84. *Id.* at 1302.

85. *Pruneyard*, 447 U.S. at 81; *Marsh*, 326 U.S. at 506 ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."); *see also* State v. Schmid, 423 A.2d 615, 622 (N.J. 1980) (finding speech rights on private property under New Jersey law but expressing uncertainty as to how the First Amendment and private property interact).

86. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2076-77 (2021) (citing others).

87. Maureen E. Brady, *Property and Projection*, 133 HARV. L. REV. 1143, 1208-09 (2020).

88. 447 U.S. at 81 (recognizing the significance of state constitutional or statutory provisions construed to give outsiders limited rights to use private property when determining the scope of their expressive rights).

89. Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 569 (1972).

In addition to finding "property open to the public" an unrecognizable category, the Founding generation would have found the boundaries between purely private property and commercial uses highly porous. Historical land use maps demonstrate that "property open to the public" was likely inseparable from "private property" more generally, even in America's most urbanized places. In an era before either widespread land use regulation or private-law controls, residential and commercial uses certainly mingled.[90] The denizens of colonial New Haven, who were mapped in 1748, were identified by professions that they appear to have engaged in on their home lots.[91] Manuscript maps of Boston drawn in the Revolutionary period (to illustrate fire damage) show buildings like "Pattens' House & Malthouse" or a "Loan Office" amid houses.[92] There are some buildings clearly labeled for public uses, like churches or theaters. But many of the activities that take place in public settings today—banking, shopping, tailoring—took place in living rooms and front yards where an owner's intent controlled. The neighborhood clockmaker surely did not have to abide by the same rules as an innkeeper in dictating who could access property when. Treating "open to the public" as a separate property category risks smuggling modern zoning-era intuitions into the Founding era.

2. Making Claims Visible

For the Founders, a more coherent way of categorizing land is the one that the hunting statutes *actually* describe. Those categories—enclosed, improved, cultivated—functioned as widely-recognized proxies for claim, control, and notice. Many early property laws outside the hunting context drew a distinction between these categories, including those that distinguished between land that was "sown" or "planted" and land that was not.[93] For example, in at least four separate colonies, landowners were only entitled to

90. While private land use controls were coming into use in the eighteenth century, covenants really flourished only much later. Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1617-21 (2021).

91. *Plan of the City of New Haven Taken in 1748*, YALE UNIV. LIBR. (Jan. 18, 2024), https://perma.cc/T6Q2-SHSL.

92. *Manuscript Map of the 1787 Fire of Boston, Massachusetts*, MASS. HIST. SOC'Y, https://perma.cc/5CCA-3DP2; *Manuscript Map of Boston (Mass.), 20 Sept. 1794*, MASS. HIST. SOC'Y, https://perma.cc/TN7D-ZTUR; *see also* Commonwealth v. Estabrook, 27 Mass. (10 Pick.) 293 (1831) (describing case involving a man operating a tavern in a building next to his dwelling); Pennsylvania v. Kirkpatrick, 1 Add. 193 (1794) (describing mill and appurtenant dwelling house).

93. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1272 (1996).

compensation for government takings for public roads when the land condemned was enclosed or improved.[94]

Enclosure, improvement, and cultivation were fundamentally signals of an owner's claim: They communicated to strangers that the lands were not commons and that entry was presumptively regulated by the owners' will (and by law). Many laws attempted to incentivize owners to enclose, improve, and plant. Rules encouraging development helped stabilize settlement and discourage remote speculators from hoarding property.[95] The hunting laws could be viewed as another example in that vein: An owner derelict in improving property would lose his capacity to object to hunters. But laws requiring enclosure and fencing also quite obviously helped to mitigate conflict between owners and third parties. Many colonists viewed encouraging "neighborliness" about property rights, and limiting property conflicts, as crucial to the success of fledgling settlements.[96] This was another reason to tie hunting rights to visible signals of ownership. By making hunting unlawful only on visibly-claimed land, owners and would-be hunters could more readily understand the rules.

The other rules about enclosure clarify something else. Several of the appellate opinions, and Judge VanDyke's dissent from the denial of rehearing in *Wolford*, treat "enclosed" and "improved" land as a "narrow" category.[97] Measured by sheer land mass, that is true—even in the year 2026, most of the United States is undeveloped. And in 1791, the proportion of unenclosed land was surely higher.

But this framing is misleading. The relevant question is not what percentage of total land was enclosed, but what percentage of used, inhabited property fell within these categories. And the rules in 1791 were actually much stricter about requiring enclosure than they are today, meaning the vast bulk of inhabited private property probably qualified. Many earlier laws made fencing any "lot"—any private property—compulsory, or else owners would owe fines or, in dramatic cases, forfeit their property.[98] A 1657 law in what would become New York mandated fencing in order to help both the

94. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 695-96 & n.6 (1985). Albeit from a different constitutional context, Josh Windham has made similar points in criticizing the Fourth Amendment's "open fields" doctrine, treating "closed" land as synonymous with "land people use and mark as private." Joshua Windham, *The Open Fields Doctrine Is Wrong*, 32 GEO. MASON L. REV. F. 1, 3 (2024).

95. *See* Hart, *supra* note 93, at 1259-65.

96. *See* Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872, 919 (2019).

97. *See supra* notes 44-47 and accompanying text.

98. Hart, *supra* note 93, at 1259-65.

government and inhabitants "know and see what lands have been granted and what remain still to be granted."[99] While private woodlands and certain pastures were often left unenclosed, the mine-run of lots in close proximity would have fallen into this not-so-narrow grouping.

What is the opposite of claimed land? Well, certainly unclaimed land, which would include not just as-yet-unsettled property like woodlands and pasture but also property held in common. The enclosure movement, which took place beginning mostly over the seventeenth century, "eliminated common rights to use land in favor of reallocating it as (typically fenced or hedged) private property."[100] Enclosure was accelerating in the mid-eighteenth century in England, and it would be very fresh for anyone alive in 1791. Enclosure was complicated and contested, viewed alternately as necessary for optimal use of the land and as creating devastating wealth inequalities, displacing poor farmers and others who relied on the common for subsistence.[101] Even amid enclosure, unenclosed commons persisted well into the colonial and post-Revolutionary periods—one need only look at the "Boston Common" or the "New Haven Green" to see them.

"Unenclosed land" and "unimproved land" were not equivalent to "property open to the public." "Enclosure" and "improvement" were visible ways a party could claim possession;[102] "open to the public" is a later category, used to limit an owner's reasons for refusing entry. In the eighteenth century, uses like shops, taverns, and inns were plainly on land considered claimed, and thus within the reach of at least some of these laws. The scope of any implied license to enter—armed or unarmed—was mediated by visible indicia of claim and by community-notice conventions. Certainly some "property open to the public" would have been considered enclosed; a 1694 Massachusetts law, for example, referred to "houses, warehouses, mills, cranes, wharffs [sic], tanyards, arable, pasture and meadow ground, and *all other lands inclosed or under improvement*, other than such as lye common to the use of the inhabitants in general, that the owners have not particular benefit by."[103] Albeit from a later period, nineteenth-century sources routinely used notions of improvement

99. *Id.* at 1264 (quoting Ordinance of Jan. 16, 1657, *reprinted in* LAWS AND ORDINANCES OF NEW NETHERLAND, 1638-1674, at 294, 295 (E.B. O'Callaghan trans., Albany, N.Y., Weed, Parsons & Co. 1868)).

100. Brady, *supra* note 64, at 255-56.

101. Frank A. Sharman, *An Introduction to the Enclosure Acts*, 10 J. LEGAL HIST. 45, 66-67 (1989).

102. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT ch. 5, §§ 31, 52 (Richard Cox ed., Harlan Davidson 1982) (1689).

103. Act of June 18, 1694, ch. 2, 1694 Mass. Acts 165, 167 (emphasis added).

and enclosure to refer to unfenced (but claimed) land, including land containing commercial buildings.[104]

The 1771 New Jersey law characterized as an "outlier" fits quite comfortably with that tradition: An owner who pays taxes and is in "[p]ossession" of property is clearly claiming it, and the New Jersey law forbade hunting on that sort of property.[105] Both historically and today, many states have required the payment of taxes for a person to adversely possess property successfully.[106] Paying taxes is one way an owner "flies his or her flag" to indicate a claim to possession, just like enclosure or improvement. It is sufficient to put a person—in the adverse-possession context, the true owner—on notice of another party's claim to possession or title.

Indeed, this explains why the New Jersey analog disallowed hunting on private property but allowed hunting on "waste and unimproved Lands."[107] The *Wolford* petitioners seem to read "waste" to mean merely "unused" property open to the public, but "waste" was also used as a term of art for unpossessed *common* land not susceptible of ordinary cultivation.[108] *Pierson v. Post*, the "fox case" famous among generations of law students, confirms as much. The dispute over who owned a fox began with a hunt on "wild and uninhabited, unpossessed and *waste* land" on Long Island, signaling that background landownership rules could not determine entitlement to the fruits of the hunt.[109] English law from Queen Elizabeth to the time of Blackstone likewise treated "waste" as common land, prohibiting building "cottages" "singly on the waste," or erecting impermanent structures on common property.[110]

It is true that *some* unenclosed or unimproved land was common land open to the public. And true, some unenclosed or unimproved land was private

104. *E.g.*, Wiggin v. Baptist Soc'y, 43 N.H. 260, 261 (1861) ("The word improved is sometimes, perhaps locally, used in the sense of cultivated. Its more usual signification is used, occupied, used or employed to good purpose, turned to profitable account." (citation omitted)); Osborne v. Canadian Pac. Ry. Co., 32 A. 902, 903 (1895) ("'Improved' is not a technical word, having a precise legal meaning, when applied to real estate, but may mean land that is occupied.").

105. An Act for the Preservation of Deer and Other Game, and to Prevent Trespassing with Guns (Dec. 21, 1771), *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY 343, 344 (Samuel Allinson ed., 1776).

106. CAL. CIV. PROC. CODE § 325(b) (West 2026); MONT. CODE ANN. § 70-19-411 (West 2025); IND. CODE ANN. § 32-21-7-1(a) (West 2026); UTAH CODE ANN. § 78B-2-214 (West 2025).

107. Brief of Petitioners at 33, Wolford v. Lopez, No. 24-1046 (U.S. Nov. 17, 2025), 2025 U.S. S. Ct. Briefs LEXIS 4110, at *49.

108. Brady, *supra* note 64, at 254.

109. 3 Cai. R. 175, 175 (N.Y. Sup. Ct. 1805) (emphasis added) (internal quotation marks omitted).

110. Brady, *supra* note 64, at 254.

property that had not been built upon or visibly claimed. But it is a poor analogy to imply that hunting rights on unenclosed property say anything about guns and modern buildings. In the Founding period, there were plenty of properties open to the public that would have been considered improved or enclosed, and thus presumptively off-limits to hunters carrying guns. The privilege to hunt on unenclosed land turned on signals of claim and customary notice; claims about property "open to the public" turn on a modern license-to-enter category that would not have been recognizable in 1791.

That leaves one other problem. If, as I see it, the petitioners' efforts to recharacterize "unenclosed" land as "property open to the public" fail, then it opens the door to another issue: Why *stop* at property open to the public? Why should any default privilege attach only to "public-facing" private property rather than to all unfenced private property, including residences and homes?

Once the argument is unmoored from historically salient signals of claim, there is no easy answer. Louisiana and South Carolina, for example, affirmatively ban carrying concealed weapons in another's private residence without permission.[111] But those laws date to the twentieth century.[112] A strict interpretation of "enclosure" that means "fenced-off," as opposed to occupied, cannot help but raise these sorts of problems—problems that balancing might once have solved but where history struggles to provide clear commands.

The answer lies in recognizing that Founding-era property law was not organized around modern categorical distinctions like "open to the public" versus "purely private." It was instead organized around signals—visible markers that communicated an owner's claim and intent. The question is not which modern property category best maps onto "enclosed" or "improved," but rather which modern legal framework best captures the Founders' approach to structuring entry rights. As the next section demonstrates, legislatures have long exercised authority to define which signals count as effective notice and when entry becomes unlawful.

3. The State and Signaling Regimes

As I have explained, "enclosure," "improvement," and "cultivation"—even the payment of taxes—functioned as ways an owner could signal possession. Modern litigants implicitly accept that legislatures may structure similar signaling rules today. Even petitioners who object to Hawaii's default do not seem to doubt the state's capacity to specify what counts as effective notice—allowing owners, for example, to exclude guns by posting "No Trespassing" or

111. AYRES & VARS, *supra* note 14, at 87.

112. LA. STAT. ANN. § 40:1379.3 (West 2025) (first added 1979); *see also* S.C. CODE ANN. § 23-31-225 (1976), *repealed by* 2024 S.C. Acts 111 (repealed section is preserved in substance by the 2024 act).

"No Firearms." The point here is not that any particular default is therefore constitutional. It is narrower and methodological: Once *Bruen* turns the analysis on historical practice, it becomes important to recognize that property law has long operated through publicly-recognized conventions of notice, and that legislatures have repeatedly defined which signals third parties must heed and when entry becomes culpable.

That observation also exposes a tension in the petitioners' methodological premise. If the absence of a Founding-era analog is dispositive, why is the state free to define what counts as effective notice at all? If our analysis is truly limited to 1791, there is little precedent for modern boundary-signage regimes either. The historical record instead reflects shifting, jurisdiction-specific choices about how owners provide notice to strangers—sometimes through postings in customary public places, sometimes through signs on the land itself, and sometimes through rules that require affirmative permission. Tracing those shifting notice conventions helps clarify what is doing the work in today's arguments about "default" rules.

What history supports the contrary default rule? Perhaps it is just that posted no-trespass or no-firearms signs have a *longer* history. Sources often cite North Carolina's Founding-era posting law as an early example,[113] but that posting law required notice in public locations, not boundary signage.[114] At that level of abstraction, the salient point is not "posting" as such, but the legislature's determination of what counts as notice to strangers—and, correlatively, when a stranger's entry becomes culpable. The first instantiation of the modern default rule appears to be from Ohio, but not until 1877, which forbade certain hunting on others' lands "upon which there is set up in some conspicuous place, a board inscribed in legible English characters thus, 'No shooting or hunting allowed on these premises," prescribing that any person who pulls "down or defaces any such board, or the letters thereon, shall be fined,' &c."[115]

But by that time—after the Civil War—there were already a variety of other options. In 1852, Delaware prohibited hunting birds and rabbits "upon land not owned or occupied" by the hunter, "without license from the owner of occupant thereof"[116]—effectively a prohibition on hunting those animals on

113. Richard M. Hynes, *Posted: Notice and the Right to Exclude*, 45 ARIZ. ST. L.J. 949, 954 n.24 (2013); Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 582 n.189 (2004).

114. An Act to Prevent the Several Species of Hunting Therein Mentioned, ch. XXXIII, 1784 N.C. Sess. Laws, 57, 58 [hereinafter 1784 North Carolina Act].

115. State v. Shannon, 36 Ohio St. 423, 424 (1881) (quoting Act of May 5, 1877, ch. 8, § 33, 1877 Ohio Laws 273).

116. For the Protection of Fish, Oysters and Game, ch. 55, § 12, *reprinted in* REVISED STATUTES: THE STATE OF DELAWARE 153 (Dover, Samuel Kimmey 1852).

private property without owner permission, a license.[117] Well before Ohio passed its signage law, in 1873, Delaware reenacted a more specific version of the law that also declared hunters of these animals on private property a "common nuisance."[118]

The materials most often cited offer limited support for a claim that the modern signage-at-the-boundary default rule has a long Founding-era pedigree, as opposed to older regimes that supplied notice through publicly-recognized signaling conventions. Failing that, maybe the concession rests on some notion that the default rule is a *majority* rule, a sort of general-law approach to trying to understand permissible limits on carry rights.[119] In 2004, twenty-nine states required landowners to post to exclude hunters.[120] By 2013, it was only twenty-six, and even then, posting in some of these states was required only on land meeting certain criteria, such as a size minimum.[121] Further, even among laws requiring posting, there are myriad variations in the types of signs or notice that suffice.[122] In contrast, at least in 2004, twenty-one states required permission for any entry onto any private land, posted or not.[123] This is not exactly what one would call a uniform approach among the states, or even a majority one. And posting laws were emerging and changing across the nineteenth and twentieth centuries, meaning different prevailing views in any given chunk of time.[124] The upshot is that historical and contemporary practice both reflect legislative choice among notice defaults—precisely the kind of choice legislatures routinely make in structuring property interactions.

What the other default rules *do* make clear is that governments have long had the power to clarify how an owner can express intent to third parties (and how third parties ought to interpret various signals).[125] In that regard, Hawaii's default rule is fairly structurally familiar: It specifies which signals suffice to communicate an owner's will to strangers and thereby defines the scope of the

117. *License*, BLACK'S LAW DICTIONARY (12th ed. 2024).

118. Act of Apr. 9, 1873, ch. 421, 14 Del. Laws 401, 404 (1873).

119. *See* Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J. F. 1010, 1017-18 (2023).

120. Sigmon, *supra* note 113, at 584.

121. Hynes, *supra* note 113, at 952 n.10.

122. Sigmon, *supra* note 113, at 558-60.

123. *Id.* at 560.

124. The Department of Agriculture used to publish updates on game laws, informing hunters of changes like county-specific rules about consent and new state laws on posting. *See, e.g.*, U.S. DEP'T OF AGRIC., GAME LAWS FOR 1905: A SUMMARY OF THE PROVISIONS RELATING TO SEASONS, SHIPMENT, SALE AND LICENSES 12 (1905).

125. I leave to the side the question of whether these sorts of rules "compel speech," but for a good treatment of the subject, see generally Ayres & Vars, *supra* note 35, at 128-32.

entrant's license. It is one of many laws passed since the eighteenth century that explains what an owner must do to effectively signal to outsiders. These rules also protect third parties, who can use these signals to avoid trespassing—contravening the owner's intentions—and its attendant liabilities and dangers.[126]

Long before 1791, it was obvious that states and localities could pass rules about marking property in particular ways to indicate something about an owner's activities, claims, or intentions. Colonial and early state statutes routinely declared the significance of stones and blazed or marked trees.[127] Properties were required to be marked in certain ways during disease outbreaks.[128] There were also rules for signals on certain categories of personal property. Elaborate statutes mandated brands or earmarks on animals and the recording of those markings.[129] Early in American history, states also declared how individual owners could effectively signal their intent to claim timber through marking and notching.[130]

Another category of laws required signage for inns or places of entertainment. Colonial statutes mandated that tavern keepers display signs indicating their establishments. By the mid-seventeenth century, Massachusetts required that "every person so licenced for common

126. There is an abundant literature on the importance of property rules and laws as communication devices, akin to language. *See, e.g.*, Robert C. Ellickson, *The Inevitable Trend Toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose*, 19 WM. & MARY BILL RTS. J. 1015 (2011); Carol M. Rose, *Introduction: Property and Language, or, the Ghost of the Fifth Panel*, 18 YALE J.L. & HUMANS. 1 (2006); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003).

127. In surveying the Northwest Territory, the federal government set out detailed requirements about marking trees. 43 U.S.C. § 751. *See also* THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT PRIOR TO THE UNION WITH NEW HAVEN COLONY, MAY, 1665, at 7, 69, 393-94 (J. Hammond Trumbull ed., Hartford, Brown & Parsons 1850); Bounds of Lands to Be Every Fower Years Renewed by the View of the Neighbours (1661), *reprinted in* 2 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 101-02 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823); Brady, *supra* note 96, at 905.

128. Act of Feb. 2, 1732, ch. 13, *reprinted in* 2 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 621-22 (Boston, Wright & Potter 1874); Stanley M. Aronson & Lucile Newman, *God Have Mercy on This House: Being a Brief Chronicle of Smallpox in Colonial New England*, *in* SMALLPOX IN THE AMERICAS 1492 TO 1815: CONTAGION AND CONTROVERSY 1, 1, 4 (Charles Beatty ed., 2002).

129. VIRGINIA DEJOHN ANDERSON, CREATURES OF EMPIRE: HOW DOMESTIC ANIMALS TRANSFORMED EARLY AMERICA 126-29, 137, 217 (2004).

130. As an example, by 1813, New York required logs being floated downstream in the Hudson to be marked; this paperback catalogs them. RICHARD C. MERRILL, LOG MARKS ON THE HUDSON (2007).

entertainment shall have some inoffensive Signe obvious for strangers direction," upon penalty of losing their license.[131] Likewise, Connecticut's law in 1673 required that "every person licensed for Common Entertainment shall have some suitable Signe set up in the view of all Passengers for the direction of Strangers where to go, where they may have entertainment."[132] In an era of lower literacy, symbols—including eagles and men on horses—communicated that a traveler could find welcome in the nearby building.[133] On a less salutary note, tavern signs might also have communicated that the pure-of-heart should shield their eyes; such signs often appeared in regulations addressing public drunkenness more broadly.

What unites all these examples? They are all instances of the state creating standardized frameworks for owners to express information about their property. Boundaries, ownership of chattels, disease risk, public-accommodation status—the specific content varied but the regulatory form was constant. Legislatures could and did require property owners to communicate in particular ways to make their intentions clear and to facilitate the smooth operation of property markets and public safety.

While later evidence may be less probative for Second Amendment purposes, it is notable that in the many decades since the American Revolution, states have uncontroversially passed rules about communications on property. Apart from the much-discussed hunting examples, regulations relating to both smoking and speech are instructive. Historically speaking, smoking seems to have been presumptively allowed, barring a posting—much like the hunting laws in many states. But that presumption began to legislatively shift in the mid-twentieth century, as information about the dangers of smoking and secondhand smoke became more well-known.[134] A combination of public and private initiative shifted the default.[135] Several states passed laws that

131. In-keepers, Tippling, Drunkenes (1645), *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS: REPRINTED FROM THE COPY OF THE 1648 EDITION IN THE HENRY E. HUNTINGTON LIBRARY 30 (1929).

132. THE BOOK OF THE GENERAL LAWS FOR THE PEOPLE WITHIN THE JURISDICTION OF CONNECTICUT: COLLECTED OUT OF THE RECORDS OF THE GENERAL COURT 35 (Cambridge, Samuel Green 1673).

133. *Virtual Exhibition: Inn & Tavern Signs of Connecticut*, CONN. MUSEUM OF CULTURE & HIST., https://perma.cc/S7P5-ND4F (archived Mar. 8, 2026); *see* ALICE MORSE EARLE, STAGE-COACH AND TAVERN DAYS 138 (1915).

134. *See* SARAH MILOV, THE CIGARETTE: A POLITICAL HISTORY 1-2 (2019).

135. *Id.* at 160-200 (recounting the politics of the "nonsmokers' rights movement"); *id.* at 202 ("Workplace smoking restrictions became part of a positive feedback loop that expanded non-smoking as the social default.").

prohibited smoking in public spaces, subject to certain exceptions and requirements.[136] Today, some even require the posting of specific signage.[137]

While smoking is not a constitutional right,[138] speech is. And yet, there are also many examples of states setting defaults about speakers. Everyday practice reflects the same: People routinely rely on signaling, like "No Solicitation," as a legally-meaningful way to structure the terms of entry. The Supreme Court has even upheld a property owner's right to exclude handbillers where the owner's policy against handbilling was most clearly communicated to them on-site by a security guard (though there was also a sign notifying shopping area visitors that the streets were not "[p]ublic [w]ays").[139] More recently, there have been numerous trespass cases involving signs that ban filming, photography, and videography.[140]

Notably, the Supreme Court's own First Amendment opinions arguably set the default rule in modern society that one cannot protest or leaflet on private property without the owner's permission,[141] subject to some state exceptions.[142] There is a potentially countervailing line of precedent, though. Back in 1943, in *Martin v. Struthers*, the Supreme Court invalidated a city's attempt to prohibit leafletting on all private property.[143] The opinion contains broad language about the importance of the First Amendment, but there are plain differences between that law and regulations like Hawaii's. First, the access right claimed in *Martin* encompassed only the path to the front door, not rights to the interior, an arguably higher degree of intrusion.[144] But more

136. *E.g.*, ARIZ. REV. STAT. ANN. § 36-601.01 (2026) (effective 2007); MINN. STAT. ANN. § 144.416 (West 2026) (effective 1975) (requiring signage if certain proprietors of businesses tolerate smoking); Michael B. Cabral, *Smoked Out: Massachusetts Bans Smoking in Restaurants and Bars*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 401, 414 (2005).

137. *E.g.*, FLA. STAT. § 386.206(3) (2025); S.C. CODE ANN. § 44-95-30 (2026).

138. *See* Operation Badlaw, Inc. v. Licking Cnty. Gen. Health Dist. Bd. of Health, 866 F. Supp. 1059, 1063, 1067 (S.D. Ohio 1992) (considering smoking ban and declining to find that "choosing to smoke in public or semi-public places is a 'privacy right' deserving of special constitutional protection").

139. Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 555-56, 567 (1972).

140. *E.g.*, Commonwealth v. Bradley, 232 A.3d 747, 751 (Pa. Super. Ct. 2020); Brown v. Guinee, No. 19-00415, 2022 WL 877208, at *3 (D. Ariz. Mar. 7, 2022), *aff'd*, No. 22-15426, 2023 WL 4422302 (9th Cir. July 10, 2023); United States v. Gray, No. 6:23-mj-2348, 2024 WL 5186880, at *4 (M.D. Fla. Dec. 20, 2024).

141. Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976); *see id.* at 518-20 (citing *Lloyd Corp., Ltd.*, 407 U.S. at 567-70).

142. *See* Brady, *supra* note 87, at 1208-09 (discussing California and New Jersey rules on speaking on private property).

143. Martin v. City of Struthers, 319 U.S. 141, 148-49 (1943).

144. *See id.* at 141-42.

importantly, *Martin* noted that besides the leafleteer's speech rights, the city ordinance banning leafletting inhibited "the right of the individual householder to determine whether he is willing to receive her message."[145] The leafletting ban offered no opt-out, no way for owners to signal a contrary intent. Indeed, the opinion compared the ban unfavorably against laws that would criminalize leafletting only where the owner "appropriately indicated" their desire to be let alone, suggesting the Constitution would be less concerned with a regulation that left the "decision . . . with the homeowner himself."[146]

Of course, the fact that states may structure notice and consent regimes does not mean they may do so in a way that functionally extinguishes a constitutional right. *Bruen* itself recognized that licensing regimes cannot be administered for "abusive ends" (for example, through hefty fees or lengthy delays designed to thwart public carry).[147] The same idea supplies a limiting principle here: A state could not use a signaling regime as a way of functionally destroying the Second Amendment, just as it could not effectively ban core First Amendment activity. But Hawaii's mechanism is comparatively modest. Apart from the fact that much public property is unaffected, Hawaii asks only that armed entrants obtain unambiguous consent to enter property, which proprietors can convey cheaply and quickly through ordinary signage or simple verbal authorization.[148] Indeed, in a technologically-enabled world, it is easy to imagine how citizens might map the scope of carry rights the same way applications currently enable individuals to see how they can access public lands without trespassing (as easily as Waze or Google Maps might enable them to avoid road closures).[149]

At some level, all the arguments over how to view both the historical and modern laws return us to that "level-of-generality" problem: Is the Hawaii gun law one that clarifies owner intent to third parties, or is it a law designed to sharply curtail public carry rights? The answer is surely both. The challenge is that outside the gun context, contests between property rights and constitutional rights have involved careful balancing with appropriate respect for the sanctity of property rights. Balancing lurks in the background of *Wolford*, too. I suspect the real reason that the petitioners are unlikely to challenge the effectiveness of the more traditional default rule about guns and hunting—prohibited on private property if there are "no-trespass" signs—is

145. *Id.* at 143.

146. *Id.* at 147-48.

147. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2138 n.9 (2022).

148. *See* HAW. REV. STAT. § 134-9.5(b) (2025).

149. *Cf.* Ben Ryder Howe, *It's Public Land. But the Public Can't Reach It.*, N.Y. TIMES (updated Nov. 28, 2022), https://perma.cc/9WQR-MGL7 (describing the function of the OnX map for hunters seeking to access public property and avoid trespass).

because the law is more narrowly tailored to protect gun rights, especially as compared with the new default. Even the scholarly work endorsing *Bruen* acknowledges that it collapses into ends-means analyses of the legitimacy of the government's interest and the degree of burden on the right.[150]

Hawaii's law surely applies broadly. But framed in property terms, it is one of a plethora of laws aimed at clarifying an owner's wishes. Whichever default one chooses, it precludes the need for employees to inform visitors of contrary policies where not posted, reducing confrontation and unpredictability for owner and visitor alike. That is in fact what property rules often are intended to do—help structure interactions at the boundaries to protect both owner interests and good-faith passers-by. The Founders surely had a capacious view of the right to possess and carry firearms, but they had an equally capacious view of the state's role in defining property-signaling regimes because of the way that protected both property and liberty rights.

Conclusion

The level-of-generality problems at the heart of *Wolford* are hard, and the historical evidence only deepens questions about the "why" and "how" of colonial hunting laws. Poaching encompassed theft, trespass, and violence all at once. "Enclosed" and "improved" property—even the "payment of taxes"—signaled claim and possession in ways that cut across modern distinctions between "public" private property and its alternative.

What courts owe the public when confronting this sort of ambiguity is not a pretense of historical certainty. It is instead transparency about level-of-generality choices and honesty about what the historical record does and does not resolve. It is conceivable that, as a footnote in *Bruen* suggests, when

150. *See* Alicea, *supra* note 3, at 39 ("'Why' a regulation exists and 'how' it regulates armed self-defense could just as easily be framed as the 'end' a regulation seeks to achieve and the 'means' it uses to achieve that end."). Alicea suggests that, unlike the unbridled judgment calls entailed by modern means-ends balancing, the historical approach offers "principled ways to navigate" the level-of-generality problem. *Id.* at 51. The framework he offers from there requires immersion in the "legal and intellectual history of the period" to see "[i]f the ratifiers would have understood a feature [of a historical analog] to be normatively salient," or constitutive of the core of the right, and thus unchangeable. *Id.* at 53-55. This framework does not go too far when two foundational rights—the right to keep and bear arms and the right to enjoyment of one's property—are pitted against one another, as opposed to the other examples with which the paper grapples (e.g., whether it is normatively salient that a law was passed on a Tuesday). Indeed, Alicea's application of his framework as an amicus in *Wolford* repeats the petitioners' ahistorical mistakes, including the conflation of property open to the public with unenclosed land. Brief for Amicus Curiae J. Joel Alicea in Support of Petitioners and Reversal at 22, Wolford v. Lopez, No. 24-1046 (U.S. Nov. 24, 2025), 2025 U.S. S. Ct. Briefs LEXIS 4843, at *32.

confronted with "multiple plausible interpretations" of some historical event or analog, courts should "favor the one that is more consistent with the Second Amendment's command."[151] That presumption in favor of the constitutional right might seem obvious when there are no constitutional rights on the other side, but it needs much more justification to explain why Second Amendment rights receive primacy above property rights and to thwart the state's role in enabling their elaboration and protection.[152]

Wolford pits two of the most closely-held constitutional values against one another: the right to bear arms and the right to control access to property, and the state has long played a substantial part in defining the rules for the latter. When history is genuinely contested and competing constitutional values are in tension, courts should acknowledge the hard choices, rather than claiming history clearly dictates the answer. The stakes for gun laws are obvious: *Bruen*'s framework will continue to generate disputes in which courts must characterize historical laws to determine whether modern regulations are "consistent with the principles that underpin our regulatory tradition."[153] More generally, though, as the current Supreme Court elevates history and tradition and spreads its rejection of balancing to other areas—including other areas of property law[154]—it is imperative to grapple with the multitude of ways that a single historical purpose, or even a fence, can be viewed. Whether balancing can truly be replaced by anything more definitive is an open question.

151. *Bruen*, 142 S. Ct. at 2141 n.11.

152. Recent work by Sherif Girgis offers a novel framework for navigating the level-of-generality problem. Girgis proposes that courts treat historical customs as "unreasoned precedents," assuming their reasonableness and identifying the principle that "most plausibly justifies" them. Girgis, *supra* note 4, at 37. That framework might favor Hawaii—if the colonial hunting laws are best explained by a principle permitting regulation of armed entry on claimed private land, a modern default rule extending that logic is at least arguably within scope—but it might not, since Girgis also instructs courts to prefer narrower principles and to give only weak updating force to sparse or inconsistent historical records, both of which characterize the evidence here. Either way, *Wolford* is a good and hard test case for Girgis's framework.

153. United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024) (citing *Bruen*, 142 S. Ct. at 2131-34).

154. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) ("Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and [the balancing test from Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978)] has no place."); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427-28 (2022) (replacing earlier approaches to the Establishment Clause with an approach looking to "historical practices and understandings" (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).