Spring 2022 *Harvard Journal of Law & Public Policy Per Curiam* No. *9*

THE UNCONSTITUTIONALITY OF UNFINISHED RECEIVER BANS

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Introduction

There is a long and storied tradition in the United States of privately manufacturing firearms. In fact, at the time of the founding, there were no large-scale firearm manufacturers. Rather, prospective firearm purchasers would either have to make the weapon themselves or find a blacksmith to create a one-off firearm for them.[2] Private firearms were very precise—much more so than what governments could typically afford to provide for their own troops. They were so precise, in fact, that ammunition would have to be made at home to custom match the individual firearm.[3]

In the past, making a firearm at home was an arduous process. A barrel would have to be hammered out of an iron sheet and then welded.[4] The stock would be hand carved from wood.[5] The firing mechanism would have to be fashioned from iron.[6] And the gunpowder for ammunition would be made using foraged sulfur and the charcoal from campfires. This was a time-consuming process that more closely resembled the craftsmanship of an expensive mechanical watch than the computer-controlled machining of the firearm factory today.

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[1] Harvard Law School, J.D. class of 2022; B.S., Montana State University, 2018. Special thanks to Professor Jack Goldsmith for his comments on an early draft of this paper, and to the staff of JLPP Per Curiam for all their helpful edits.
[2] Brief for the Madison Soc'y Found., Inc. as Amicus Curiae Supporting Plaintiffs-Appellants at 6, Def. Distributed v. U.S. Dep't of State, 2016 WL 5383110 (5th Cir. 2016) (No. 15-507559).
[3] *Id.* at 11.
[4] *Id.* at 6. (citing Gary Brumfield, *Rifle Barrel Making: The 18th Century Process*, FLINTRIFLESMITH (Mar. 25, 2021), https://www.flintriflesmith.com/ToolsandTechniques/barrelmaking.htm).
[5] *Id.* at 7.
[6] *Id.*

Some still engage in this historical process of firearm building.[7] Today, though, the prospective firearm manufacturer has less laborious options for doing so. They can purchase components to build a firearm from pre-built parts.[8] They can also print firearms using one of many commercially available 3D printers.[9] The relative ease with which firearms can be made using modern technology has led to the concern that convicted felons may circumvent their inability to purchase a firearm by making one at home.[10] In response, a number of states have introduced laws to limit the ability of citizens to construct their own firearms.[11]

Given the intriguing technology involved, the legal implications of 3D printed firearms and laws related to them have captured the attention of commentators and scholars.[12] However, a more common, yet less flashy, method has gone largely under the radar: The uses of an unfinished receiver (colloquially known as an 80% lower). This paper examines the constitutionality of legal restrictions on the use of unfinished receivers. Many arguments against such restrictions are based on equal protection or due process,[13] but this paper will focus on their Second Amendment implications.

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[7] *Id.* ("Wallace Gusler, retired Master Gunsmith at Colonial Williamsburg, began as a sawmill worker and later turned to creating custom flintlock firearms.").
[8] *See, e.g.*, 80 PERCENT LOWER RIFLE KITS, https://www.80-lower.com/ar-15-rifle-kits/ [https://perma.cc/B373-48TN].
[9] John Biggs, *What You Need To Know About The Liberator 3D-Printed Pistol*, TECHCRUNCH (May 6, 2013), http://techcrunch.com/2013/05/06/what-you-need-to-know-about-the-liberator-3d-printed-pistol [https://perma.cc/3KLD-9FSV].
[10] Scott J. Beigel Unfinished Receiver Act, 2021 Sess. Law News of N.Y. Ch. 519 (West).
[11] *Id.*
[12] *See, e.g.*, James B. Jacobs & Alex Haberman, *3D-Printed Firearms, Do-It-Yourself Guns, & the Second Amendment*, 80 LAW & CONTEMP. PROBS. 129 (2017).
[13] Zachary Bright, *State judge temporarily blocks portion of new law banning 'ghost guns'*, THE NEVADA INDEPENDENT (July 28th, 2021, 2:00 AM), https://thenevadaindependent.com/article/state-judge-temporarily-blocks-portion-of-new-law-banning-ghost-guns [https://perma.cc/V4LU-DU44].

Part I of this paper examines unfinished receivers and laws regulating them. Part II lays out the proper way to review Second Amendment restrictions. Part III uses this review framework to argue that bans on unfinished receivers are unconstitutional.

I. Unfinished Receivers and Their Legal Context

To function, a firearm generally must have a receiver (sometimes split into a lower and upper receiver), a firing assembly, a chamber, and a barrel.[14] During operation, the receiver accepts ammunition, the firing assembly uses a firing pin to strike the primer of the ammunition in the chamber, and upon firing, the bullet travels down the barrel towards the target.[15] When a firearm is broken down into its constituent parts, under current federal law, only the lower receiver is legally classified as "the firearm."[16] This means that purchasing a lower receiver bears all of the legal restrictions of buying a completed firearm, while purchasing any other component bears none.

Unfinished lower receivers, officially labelled "receiver blanks" by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), require machining at home to transform them into a usable firearm receiver.[17] When the unfinished receiver is purchased, it is little more than a chunk of metal or polymer in the vague shape of a lower receiver.[18] Only after milling out the cavity for the firing assembly, and drilling holes for the safety lever, hammer pin, and trigger pin, can the lower receiver be installed with the requisite components to complete the firearm.[19]

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[14] Howard Hall, *Internal Ballistics Part 1—Cycle of Operation and Firearm Function*, AEGIS (June 9, 2014), https://aegisacademy.com/blogs/test-blog-post/internal-ballistics-part-1-cycle-of-operation-and-firearm-function [https://perma.cc/A8HN-TFE9].
[15] *Id.*
[16] 27 C.F.R. § 478.11 (2021).
[17] Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Are "80%" or "unfinished" receivers illegal?*, https://www.atf.gov/firearms/qa/are-%E2%80%9C80%E2%80%9D-or-%E2%80%9Cunfinished%E2%80%9D-receivers-illegal [https://perma.cc/4JB8-XNUM].
[18] 80 PERCENT LOWER, https://www.80-lower.com/80-percent-lower [https://perma.cc/N2FE-JKRW].
[19] *Id.*

Many suppliers of unfinished receivers also sell jigs and other tools to make the job easier for the home manufacturer.[20] Still, each of these steps require some level of sophisticated machinery, such as a mill, router, and drill press.

Because the unfinished receiver is purchased in an unusable state, the ATF does not consider it to be a firearm.[21] This means that purchasing one does not require a background check,[22] that a Federal Firearms License ("FFL") is not required to sell one,[23] and that serialization is not federally required.[24] Further, there are no federal restrictions on finishing the machining of the lower receiver and assembling it into a complete firearm. The Gun Control Act of 1968[25] requires a license to manufacture only with the intent to sell, so manufacturing a firearm for personal use without an FFL is legal under current federal law.[26] Because of this, unfinished receivers allow a knowledgeable individual with machining tools to build a fully functioning, unserialized firearm at home.

Since firearms built this way are unserialized, they are more difficult to trace than factory-built ones, or even to prove the existence of.[27] Some have argued that this quality makes them more likely to be used in a crime and have pushed for laws banning the home-construction

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[20] *See, e.g.*, 80 PERCENT LOWER UNFINISHED RECEIVER JIG, https://www.80-lower.com/80-lower-jig [https://perma.cc/R3F9-X5LM].
[21] Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Are "80%" or "unfinished" receivers illegal?*, https://www.atf.gov/firearms/qa/are-%E2%80%9C80%E2%80%9D-or-%E2%80%9Cunfinished%E2%80%9D-receivers-illegal [https://perma.cc/4JB8-XNUM].
[22] 18 U.S.C. §921(s) (2018).
[23] 18 U.S.C. §923(a).
[24] 18 U.S.C. §923(i).
[25] Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968).
[26] 18 U.S.C. §923.
[27] Annie Karni, *Ghost Guns: What They Are, and Why They Are an Issue Now*, N.Y. TIMES (Apr. 9, 2021), https://www.nytimes.com/2021/04/09/us/politics/ghost-guns-explainer.html [https://perma.cc/VVX9-BYBX].

of firearms.[28] Advocates of these laws have labelled unserialized, home-built firearms "ghost guns" because they are supposedly untraceable or invisible to the law.[29]

In response to these lobbying efforts, a handful of states have enacted laws to restrict access to home-built firearms.[30] Some states have taken a modest approach, simply requiring home builders to serialize their firearms.[31] Others have acted more aggressively, criminalizing the mere possession or sale of an unfinished receiver.[32]

California, for example, requires any home firearm builder to apply to the California Department of Justice for a unique serial number for their weapon.[33] They ban the sale or transfer of any home built firearm that has not received a serial number.[34] California also requires any sale of a "firearm precursor part" (including unfinished receivers) to be conducted through licensed vendors, pursuant to a background check.[35] Thus, while not outright banning them, California treats incomplete lower receivers more like operational firearms.

On the other end of the spectrum, in 2021, Nevada enacted one of the strictest legislations on home-built firearms to date.[36] The new law makes it a crime to import or sell an unfinished and unserialized frame or receiver.[37] It also criminalizes selling, or simply assembling, an

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[28] Giffords Law Center to Prevent Gun Violence, *Ghost guns—dangerous, homemade untraceable firearms—are increasingly being used to circumvent both federal and state gun laws and kill innocent people*, https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/ghost-guns [https://perma.cc/TPR5-E32E].
[29] Karni, *supra* note 27.
[30] Giffords Law Center to Prevent Gun Violence, *supra* note 28 (listing California, Connecticut, Hawaii, Nevada, New Jersey, New York, Rhode Island, Virginia, and Washington, and well as the District of Columbia).
[31] *See, e.g.*, CAL. PENAL CODE §29180(b)(1).
[32] *See* Nev. Assemb. 286, 2021 Leg., 81st Sess. (Nev. 2021) (banning unfinished receivers in Nevada); Scott J. Beigel Unfinished Receiver Act, 2021 Sess. Law News of N.Y. Ch. 519 (West) (banning unfinished receivers in New York); D.C. CODE ANN. §§7-2501.01, 7-2502.02, 22-4515(a) (West 2001) (banning unfinished receivers in the District of Columbia).
[33] CAL. PENAL CODE §29180(b)(1).
[34] CAL. PENAL CODE §29180(d)(1).
[35] Cal. S. 118, 2019 Leg., Reg. Sess. §§21-37 (Cal. 2020).
[36] *See* Nev. Assemb. 286, 2021 Leg., 81st Sess. (Nev. 2021).
[37] *Id.* §§3-3.5.

unserialized firearm.[38] Violations of the new law are classified as a gross misdemeanor for first time offences, and felonies for subsequent offenses.[39] Unlike California's laws, which seek to expand typical firearm regulations to firearm components, Nevada's law is intended to operate as a total ban on home-built firearms.

Most other states that have enacted legislation relating to unfinished receivers impose restrictions falling somewhere between California's and Nevada's. For example, the New York legislature passed the Scott J. Beigel Unfinished Receivers Act, which criminalizes possession of an unfinished receiver except for licensed gunsmiths.[40] Connecticut allows sales of unfinished receivers only between FFLs and prohibits those barred from owning firearms from possessing unfinished receivers.[41] The District of Columbia bars possession or transfers of unfinished receivers.[42]

The laws outlined above all restrict firearm ownership in some way. They limit the ability to acquire a firearm by manufacturing or assembling it,[43] and in some cases even bar the purchase of privately manufactured firearms.[44] How then, do these laws interact with the Second Amendment's guarantee that "the right of the people to keep and bear Arms, shall not be infringed"?[45]

II. Reviewing Second Amendment Restrictions

The Supreme Court has yet to provide a definitive test that can be applied to all Second Amendment restrictions. In fact, for over two-hundred years, the Court said little on the

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[38] *Id.* §§4-5.
[39] *Id.* §3.5(2).
[40] Scott J. Beigel Unfinished Receiver Act, 2021 Sess. Law News of N.Y. Ch. 519 (West).
[41] Conn. Pub. Act No. 19-6 (2019).
[42] D.C. CODE ANN. §§7-2501.01, 7-2502.02, 22-4515(a) (West 2001).
[43] *See* Nev. Assemb. 286, 2021 Leg., 81st Sess. §§4-5 (Nev. 2021).
[44] *See* CAL. PENAL CODE §29180(d)(1).
[45] U.S. Const. amend. II.

subject.[46] Then, in 2008, the Court decided *District of Columbia v. Heller*, in which it confirmed that the Second Amendment included an individual right to self-defense.[47] Just two years later, in *McDonald v. City of Chicago*, the Court found that the Second Amendment is incorporated against the states.[48] However, in each of these cases, the Supreme Court failed to articulate a general standard of review for Second Amendment regulations. Rather, the Court simply noted that while rational basis would be inappropriate, some limitations to the right to keep and bear arms could be presumptively constitutional.[49]

This has led to a deep divide among scholars, practitioners, and even judges, as to the appropriate methodology for evaluating Second Amendment claims.[50] Out of this divide, however, and in the Supreme Court's silence, the circuit courts have advanced a general framework that is remarkably consistent in theory, even if the circuits vary in its application.[51] Circuit courts generally apply a two-part test, in which courts first ask "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee" and if it does, then ask whether the restriction passes a certain level of scrutiny.[52]

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[46] *See* District of Columbia v. Heller (Heller I), 554 U.S. 570, 626 (2008) ("For most of our history the [issue] did not present itself."). Prior to *Heller I*, only three Supreme Court cases raised Second Amendment issues. *See* United States v. Miller, 307 U.S. 174, 178 (1939) (upholding the constitutionality of a federal ban on shotguns less than eighteen inches long); Presser v. Illinois, 116 U.S. 252, 253, 265 (1886) (upholding the constitutionality of a state law restricting gun ownership for those not in militia service); United States v. Cruikshank, 92 U.S. 542, 553 (1876) (finding that the Second Amendment only constrained the federal government).

[47] *Heller I*, 554 U.S. at 595.

[48] 561 U.S. 742, 778 (2010).

[49] *Heller I*, 554 U.S. at 628. One of *Heller*'s most controversial aspects is Scalia's inclusion, in dicta, of presumptively constitutional limitations on the Second Amendment right. *Id.* at 688 (Breyer, J., dissenting) (listing "prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales").

[50] *See* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1451-52 (2018)

[51] Post-*Heller* Litigation Summary, Giffords Law Center (Feb. 9, 2022), https://giffords.org/lawcenter/gun-laws/litigation/post-heller-litigation-summary/.

[52] United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); *see also* Worman v. Healey, 922 F.3d 26, 33 (1st Cir. 2019); GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs, 788 F.3d 1318, 1322 (11th Cir. 2015); N.Y. State Rifle & pistol Ass'n v. Cuomo, 804 F.3d 242, 253 (2d Cir. 2015); United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d

It is within these steps that the divide becomes clearer. Step one sometimes involves a historical analysis that looks to the intended scope of the Second Amendment at the time of the founding.[53] Yet other scholars have suggested that "originalism has had a limited role in post-*Heller* Second Amendment litigation."[54] Step two breaks down even further. Because *Heller* declined to apply a specific standard of scrutiny—beyond barring rational basis review[55]—circuit courts have been free to apply any heightened level they choose. In the view of some judges, post-*Heller* cases have been nearly unanimous in finding that intermediate scrutiny is always appropriate when considering Second Amendment regulations.[56] Others disagree, and have asked how close a law comes to the "core" of the Second Amendment right to determine whether to apply intermediate or strict scrutiny.[57] As this disagreement shows, there is no settled test for determining either the scope of the Second Amendment or the appropriate level of scrutiny to apply to regulations of its right "to keep and bear arms."[58]

Nevertheless, Supreme Court precedent can be instructive in determining how to properly utilize the circuit courts' two-part tests. In determining whether an individual right to bear arms

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185, 194 (5th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1252 (D.C. Cir. 2011); Ezell v. City of Chicago, 651 F.3d 684, 702-03 (7th Cir. 2011); United Sates v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800-01 (10th Cir. 2010). In each of these, the relevant circuit court adopted a variation of the two-part test. Only the Eighth Circuit has yet to adopt a form of the test. *See* Lauren Devendorf, *Second-Class Citizens Under the Second Amendment: the Case for Applying Strict Scrutiny to Lifetime Firearm Bans for Individuals Previously Committed to Mental Institutions*, 106 CORNELL L. REV. 501, 508 (2021). The Federal Circuit does not hear Second Amendment cases due to its specialized nature. *See, e.g.,* 28 U.S.C. §1295 (describing the Federal Circuit's specialized jurisdiction).

[53] *See* Jackson v. City & Cty of San Francisco, 746 F.3d 953, 960 (9th Cir. 2014), cert. denied, 135 S. Ct. 2799 (2015) (noting that step one asks whether "the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment").

[54] Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1200 (2015) ("The emerging consensus in the lower courts uses original meaning only as a threshold test, which screens out some claims, but contemplates that laws—even those limiting the extent to which individuals can exercise the textually recognized right to keep and bear arms—may be sustained upon sufficient justification.").

[55] *Heller I*, 554 U.S. at 628.

[56] *See* Silvester v. Harris, 843 F.3d 816, 823 (9th Cir. 2016).

[57] *See* Tyler v. Hillsdale Cty.Sheriff's Dep't. (Tyler II), 837 F.3d 679, 690-91 (6th Cir. 2016) (en banc).

[58] U.S. Const. amend. II.

for self-defense was included within the scope of the Second Amendment, the Court in *Heller* conducted a historical analysis.[59] It first looked to the post-ratification commentary, and subsequently to caselaw both preceding and following the Civil War.[60] The Court placed great weight on the contemporary interpretations that "[t]he right to self defence [sic] is the first law of nature,"[61] as well as later interpretations that the Second Amendment right appeared to be a personal one.[62] Because the Supreme Court in *Heller* and its progeny analyzed the scope of the Second Amendment in its historical context, step one of the circuit courts' two part tests should be interpreted as many rightly have: as a question of history.[63]

Step two ostensibly complies with *Heller's* use of tiered scrutiny over any sort of "judge empowering interest balancing inquiry."[64] Nonetheless, there is some scholarly consensus that, in practice, circuit courts "have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned, . . . applying it in a way that . . . leads to all but the most drastic restrictions on guns being upheld."[65] This standard, which more closely resembles the rational basis test that the Court expressly disavowed in *Heller*, is clearly in tension with Supreme Court precedent.[66] A better application of step two, in which a court asks how close to the "core" of the

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[59] *See Heller I*, 554 U.S. at 605-19.
[60] *Id.*
[61] *Id.* at 606 (citing 2 Tucker's Blackstone 143).
[62] *See* Aldrige v. Commonwealth, 4 Va. 447, 449 (Va. Gen. Ct.) (claiming that restrictions could be placed on "free blacks'" right to bear arms, without claiming that they were prevented from doing so in militia service); United States v. Sheldon, in 5 Transactions of the Supreme Court of the Territory of Michigan 337, 346 (W. Blume ed. 1940) ("The constitution of the United States also grants to the *citizen* the right to keep and bear arms." (emphasis added)).
[63] *See, e.g.,* United States v. Torres, 911 F.3d 1253, 1258 (9th Cir. 2019) (interpreting the first step to ask whether the challenged law "regulates conduct that historically has fallen outside the scope of the Second Amendment"); *Jackson*, 746 F.3d at 960 (asking in step one whether the "prohibitions . . . fall outside the historical scope of the Second Amendment").
[64] *Heller I*, 554 U.S. at 634 (internal quotation marks omitted).
[65] Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706-07 (2012); *see* Brief for Firearms Policy Coalition, Inc. et al. as Amici Curiae Supporting Petitioners at 10, *Jackson*, 135 S. Ct. at 2799 (No. 14-704) ("De Facto Interest-Balancing Is Now The Prevailing Rule In The Lower Courts.").
[66] *Heller I*, 554 U.S. at 628.

Second Amendment a law encroaches,[67] can also be determined from *Heller*. There, the Court explained that "the sorts of weapons protected were those in common use at the time."[68] Later cases have elaborated that the relevant time is that of the judicial review.[69] This standard, which the Court has reiterated in subsequent cases,[70] has been accepted by many lawyers as determinative.[71] Therefore, the appropriate standard for how close a law is to the core of the Second Amendment—and subsequently the required scrutiny—is how common the regulated weapon or conduct is. This standard allows those arms protected by the Second Amendment to evolve as technology progresses, placing the amendment on equal footing with others in the Bill of Rights.[72]

This version of the two-part test brings the circuit courts' case law into harmony with the Supreme Court's precedent in *Heller* and *McDonald*. Thus, a proper formulation of the two-part

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[67] *Tyler II*, 830 F.3d at 690-91.
[68] *Heller I*, 554 U.S. at 627 (internal quotation marks omitted); *see* Nicholas Griepsma, *Concealed Carry Through Common Use: Extending Heller's Constitutional Construction*, 85 GEO. WASH. L. REV. 284, 310 (2017) (describing the benefits of the "common use test").
[69] Caetano v. Massachusetts, 577 U.S. 411, 420 (2016) (Alito, J., concurring). To suggest otherwise would undermine *Heller*'s protection of handgun ownership based on their popularity at the time of the case. *Heller I*, 554 U.S. at 629.
[70] *See, e.g.*, *id.* at 411-12 (per curiam) (discussing the lower court's error in applying the common use test). Some justices have expressed explicit support for the standard. Justice Alito, joined by Justice Thomas, said that after *Heller*, "the pertinent Second Amendment inquiry is whether [the arms] are possessed by law-abiding citizens for lawful purposes *today*." *Id.* at 420 (Alito, J., concurring).
[71] *See* Brief for the Firearms Policy Coalition, et al., as Amicus Curiae in Support of Plaintiffs-Appellants, Rupp, et al. v. Becerra, No. 19-56004, 6-7 (9th Cir. 2020) (noting that the relevant Second Amendment inquiry is whether the arms are in common use); Jake Charles, *Heller and the Vagaries of History*, Second Thoughts (Sept. 16, 2019), https://sites.law.duke.edu/secondthoughts/2019/09/16/heller-and-the-vagaries-of-history [https://perma.cc/2G7Z-42CK] (distinguishing the "common use test" from the "quintessential self-defense weapon test"); Griepsma, *supra* note 68, at 310 (arguing that the "common use test" offers the most consistent standard of review, and should be applied to protect concealed carry); Cody J. Jacobs, *End the Popularity Contest: A Proposal for Second Amendment "Type of Weapon" Analysis*, 83 TENN. L. REV. 231, 245-47 (2015) (describing the issues presented by *Heller*'s "common use" test); Jordan E. Pratt, *Uncommon Firearms as Obscenity*, 81 TENN. L. REV. 1, 4 (2014) (recounting the ambiguities of "*Heller*'s common use test"); Nicholas J. Johnson, *The Second Amendment in the States and the Limits of the Common Use Standard*, HARV. L. & POL'Y REV. ONLINE, https://harvardlpr.com/online-articles/the-second-amendment-in-the-states-and-the-limits-of-the-common-use-standard (describing the limits of the "common use standard").
[72] *Heller I*, 554 U.S. at 582 ("Just as the First Amendment protects modern forms of communications and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." (internal citations omitted)).

test can be stated as follows: in step one, a court asks whether under the historical understanding of the Second Amendment, an activity is within the scope of the amendment; in step two, a court asks whether the regulated activity is a common one today,[73] and if so, applies strict scrutiny to the challenged law.

III. Bans on Unfinished Receivers Are Unconstitutional

To evaluate the constitutionality of these state regulations of unfinished receivers, the first question is whether the laws fall within the guarantee of the Second Amendment.[74] A historical analysis is necessary to determine whether the regulated conduct has historically fallen outside the scope of the amendment.[75]

At the founding, there was no centralized firearm manufacturing industry. Rather, individual blacksmiths crafted firearms for sale, and every gun was handmade and unique.[76] Even Remington Arms, one of the largest firearm manufacturers today, began life when its founder, Eliphalet Remington, began hand-building rifles in 1816.[77] It was not until the mid-nineteenth century that names such as Colt, Winchester, and Smith & Wesson brought large-scale production to the world of firearms.[78]

Those that crafted earlier firearms were not necessarily gunsmiths by trade. In fact, many were primarily employed as blacksmiths, craftsmen, or even professionals.[79] Anthony Jankofsky,

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[73] *Caetano*, 577 U.S. at 420 (Alito, J., concurring).
[74] *See Marzzarella*, 614 F.3d at 89.
[75] *Torres*, 911 F.3d at 1258.
[76] Brief for the Madison Soc'y Found., Inc. as Amicus Curiae Supporting Plaintiffs-Appellants at 6, Def. Distributed v. U.S. Dep't of State, 2016 WL 5383110 (5th Cir. 2016) (No. 15-507559).
[77] Remington, *This is Remington Firearms*, https://www.remarms.com/about-us [https://perma.cc/SV64-YCNG].
[78] *See* Colt, *The Colt Story*, https://www.colt.com/timeline [https://perma.cc/35LS-TM69]; Winchester Repeating Arms, *The Complete History of Winchester Repeating Arms*, https://www.winchesterguns.com/news/historical-timeline.html [https://perma.cc/5Y9X-4C53]; Smith & Wesson, *Our Story*, https://www.smith-wesson.com/ourstory [https://perma.cc/H3Z4-V94Q].
[79] Henry J. Kauffman, EARLY AMERICAN GUNSMITHS 1650-1850, at 4-5 (1952).

a locksmith from South Carolina, advertised that he created guns on the side in 1777.[80] Meanwhile, Ignatius Leitner, an attorney from Pennsylvania, advertised in 1800 that besides drawings "deeds, mortgages . . . and administrators accounts," he also made "rifles, still cocks . . . [and] gun mountings."[81] These advertisements illustrate the strong tradition of gun-making in early America as "primarily a civilian activity."[82]

The framers of the Second Amendment understood this tradition to be within its ambit. One contemporary delegate to the Continental Congress noted his opinion that "Americans ought to be more industrious in making [firearms] at home."[83] This general view by the framers was informed by their experience in the Revolutionary War, in which "gun-making at home was *essential* to the Continental Army."[84]

Further, this tradition did not just include those smiths who hammered components from raw iron. Rather, just as it is today with unfinished receivers, it was often more practical and efficient for home gun-makers to assemble pre-made components than to start with raw materials.[85] The colonial-era home firearm-builders purchased firing mechanisms from continental Europe, barrels from England, and stocks from local carpenters.[86] Over two-centuries have passed since then, and technology has advanced. Today, firearm-builders purchase unfinished receivers, mill them out, and assemble them with a trigger assembly, stock, upper receiver, and barrel, to build an AR-15. The technological advancements, however, do not

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[80] *Id.* at 10.
[81] *Id.* at 61.
[82] *Stop Gun Violence: Ghost Guns: Testimony of Ashley Hlebinsky Before the Subcomm. on the Constitution*, 117th Cong. (2021).
[83] Letter from Joseph Hewes to Samuel Johnston (Feb. 13, 1776), *in* 10 COLONIAL RECORDS OF N.C. 447 (William L. Saunders, ed., 1890).
[84] *Testimony of Ashley Hlebinsky*, *supra* note 81 at 6.
[85] *Id.*
[86] *Id.* at 5.

remove these components from the tradition of home gun-making that is protected by the Second Amendment.[87]

The tradition of home firearm manufacturing was an integral part of what it meant at the founding "to keep and bear arms."[88] Further, the history of purchasing components to assemble firearms at home draws a clear analogy to the methods employed by those who construct guns using unfinished receivers today. For these reasons, the ability to manufacture guns at home using firearm components or "precursor parts" such as unfinished receivers is within the scope of the Second Amendment.

Once a regulation has been determined to burden activity protected by the Second Amendment, the two-part test next looks to the applicable level of scrutiny to be applied.[89] As discussed above, strict scrutiny is to be applied whenever the regulation burdens the "core" of the Second Amendment.[90] Under *Heller*, the activities found at the core of the amendment should be viewed as those commonly performed by "law-abiding citizens for lawful purposes today."[91] If it is, a court should apply strict scrutiny. Otherwise, a court might use intermediate scrutiny.

While it is impossible to quantifiably estimate just how prolific the practice is—because most home gun-makers do not report their privately manufactured and held firearms—the data that exists suggests that it is widespread even to this day.[92] The ATF has released that during 2019, law enforcement recovered approximately 10,000 privately manufactured firearms.[93] The

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[87] *See id.* at 6.
[88] U.S. Const. amend. II.
[89] *See Marzzarella*, 614 F.3d at 89.
[90] *Tyler II*, 837 F.3d at 690.
[91] *Caetano*, 577 U.S. at 420 (Alito, J., concurring) (emphasis removed); *see Heller I*, 554 U.S. at 629 (holding that handgun ownership is protected because they "are the most popular weapon chosen by Americans for self-defense").
[92] *See Testimony of Ashley Hlebinsky*, *supra* note 81 at 6 ("Despite the emergence of armories, mass production, and the innovation of prominent manufacturers, the role of the individual never went away and still exists today.").
[93] Zusha Elinson, *Ghost-Gun Company Raided by Federal Agents*, WALL ST. J. (Dec. 11, 2020 at 7:40 am ET). It is worth noting that not all of these are recovered because of their use in a crime, but could be uncovered because of red flag laws or through searches on other grounds.

agency further estimates that it recovered a total of approximately 350,000 firearms in the same year, meaning that roughly three-percent were privately manufactured.[94] While this statistic is by no means overwhelming, it provides an insight into the prevalence of privately manufactured firearms. If the statistic for the American firearm population generally is similar to that of those the ATF recovered, then of the estimated 393 million privately owned firearms in the United States, around twelve million are home-built. Even if this number is quite inaccurate—as it likely is—the fact that an entire industry has been built on supplying components to home gun-makers reinforces its scale.[95] While *Heller* neglected to describe *how* common was "common," advocates for regulation of privately manufactured firearms appear to concede that they are widespread.[96] In fact, it is the prevalence of these firearms that concerns them, so it would be difficult for them to argue that home-built firearms are not, to some extent, "in common use."

Supreme Court caselaw suggests that it is common use *today* that is determinative.[97] Still, the historical proliferation of privately manufactured firearms illustrates how their use is firmly cemented in the American tradition, surviving the industrial revolution and remaining common to this day. It can be seen from history that home gun-making using components or precursor parts was considered a common activity at the time of the founding.[98] In the American colonies alone, an estimated 3,000 individual gunsmiths were manufacturing firearms.[99] It is unknown

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[94] Firearms Trace Data - 2019, Bureau of Alcohol, Tobacco, Firearms, and Explosives, https://www.atf.gov/resource-center/firearms-trace-data-2019.
[95] *See* 80% LOWERS, www.80-lower.com; 80% ARMS, www.80percentarms.com; GRID DEFENSE, www.ghostrifles.com; 5D TACTICAL, www.5dtactical.com; PALMETTO STATE DEFENSE, www.psdmfg.com.
[96] Anna M. Kaplan, *New York State Legislature Passes Nation's Toughest Restrictions on Dangerous, Untraceable Firearms Designed to Evade Background Checks*, THE NEW YORK STATE SENATE (June 8, 2021), https://www.nysenate.gov/newsroom/press-releases/anna-m-kaplan/new-york-state-legislature-passes-nations-toughest [https://perma.cc/5M2J-GSLR].
(quoting NY state Senator Brad Hoylman, who referenced the large amount of ghost guns recovered by law enforcement as a reason to support NY's legislation).
[97] *Caetano*, 577 U.S. at 420 (Alito, J., concurring).
[98] *Testimony of Ashley Hlebinsky*, *supra* note 81 at 6.
[99] GEORGE D. MOLLER, 1 AMERICAN MILITARY SHOULDER ARMS 107 (2011).

how many additional private individuals crafted weapons solely for themselves. What the history teaches us definitively, however, is that during the Revolutionary War, individual craftsmen (both traditional gunsmiths and those of other trades and professions) built most of the weapons used.[100] The *Heller* court gave great weight to the Second Amendment's protection of "arms in common use at the time."[101] At the founding, there was no firearm in more common use than that built at home.[102] Even though mass-produced firearms have increased in popularity since then, privately manufactured firearms have maintained their commonness throughout the centuries.[103]

Because building firearms at home is a common activity, and subsequently, privately manufactured firearms are commonly used, their regulation would properly be subject to strict scrutiny. Under this standard, the Government must prove that its law "furthers a compelling interest and is narrowly tailored to achieve that interest."[104] While it is possible that states have a compelling interest in regulating unfinished receivers, many of their laws are not narrowly tailored such that they would survive strict scrutiny.

States assert a variety of interests in their regulation of unfinished receivers. Some are procedural, such as enforcing background check laws by not letting felons obtain a firearm by building it.[105] Others are general appeals to safety from spiking gun violence.[106] States have an

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[100] *See* Brief for the Madison Soc'y Found., Inc. as Amicus Curiae Supporting Plaintiffs-Appellants at 6, Def. Distributed v. U.S. Dep't of State, 2016 WL 5383110 (5th Cir. 2016) (No. 15-507559) (citing 1775 Va. Acts Dec. Interreg. Ch. 3, 9 HENING'S LAWS OF VIRGINIA 94); *see also* HENRY J. KAUFFMAN, EARLY AMERICAN GUNSMITHS 1650–1850 at 4–5, 10, 14, 55 (1952) (describing advertisements by locksmiths, jewelers, and lawyers for hand-made firearms).
[101] *Heller I*, 554 U.S. at 624 (internal quotation marks omitted).
[102] *See generally* Brief for the Madison Soc'y Found., Inc. as Amicus Curiae Supporting Plaintiffs-Appellants, Def. Distributed v. U.S. Dep't of State, 2016 WL 5383110 (5th Cir. 2016) (No. 15-507559)
[103] *Testimony of Ashley Hlebinsky*, *supra* note 81 at 1.
[104] *Cf.* Citizens United v. FEC, 130 S. Ct. 876, 898 (2010) (internal quotation marks omitted).
[105] Kaplan, *supra* note 95.
[106] *Id.*

inherent interest in enforcing their own laws,[107] and state and federal courts have long viewed public safety as a compelling state interest.[108] So, the state interest requirement may be satisfied.

However, many of the state laws are not narrowly tailored to this interest. Nevada's law, for example, criminalizes the sale of unfinished receivers as well as their use in assembling a completed firearm.[109] This is drastically overinclusive if the goal is to prevent felons from obtaining firearms or preventing the use of privately made firearms in crime. A less restrictive, yet policy satisfying alternative, is to bar the sale of unfinished receivers to felons, and apply to their sale the same background check requirements as completed firearms.[110] Further, the language of the act, which applies to "unfinished frame[s] or receiver[s]," is so broad that it could conceivably be applied to a broad range of fabrications, if one could conceivably intend to turn it into a frame or receiver.[111] This could plausibly apply to *any* piece of material that could be further machined into a firearm receiver.[112] Because there are less restrictive alternatives to this broad ban that would be at least as effective in achieving the state's interest, Nevada's law would fail strict scrutiny analysis.[113]

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[107] Potrero Hills Landfill, Inc. v. Cnty. Of Solano, 657 F.3d 876, 883 (9th Cir. 2011) (noting the state's vital interest in carrying out its executive functions).
[108] *See* United States v. Salerno, 481 U.S. 739, 745, 749 (1987) (finding public safety and crime prevention compelling state interests for the purpose of strict scrutiny review); State v. Roundtree, 952 N.W.2d 765, 782 (Wis. 2021) ("Historically, laws that dispossessed the violent served the compelling state interest in public safety.")
[109] Nev. Assemb. 286, 2021 Leg., 81st Sess. §§3-5 (Nev. 2021).
[110] *See* Conn. Pub. Act No. 19-6 (2019).
[111] Nev. Assemb. 286, 2021 Leg., 81st Sess. §6(9) (Nev. 2021).
[112] The most intricate and time-consuming machining of unfinished receivers occurs at home during the final steps. Previously, the unfinished receiver is barely more than an aluminum paperweight, and any other suitable block of metal could conceivably take its place. Because the state laws do not dictate how *close* to finished the unfinished receiver must be, the laws are incoherently overbroad.
[113] *See* In re Nat'l Sec. Letter v. Sessions, 863 F.3d 1110, 1125 (9th Cir. 2017). Nevada's law found its way into courts during the summer of 2021. A federal judge rejected the argument that the law violated Nevadan's Second Amendment rights, but then a state judge found that the law violated the Nevada Constitution's due process clause. https://thenevadaindependent.com/article/state-judge-temporarily-blocks-portion-of-new-law-banning-ghost-guns

Other states with similarly restrictive statutes would face the same result. Like Nevada, New York's law is strikingly broad.[114] At its extreme, it makes it illegal to sell an unfinished receiver to anyone other than a licensed gunsmith,[115] making unfinished receivers—typically little more than a solid block of aluminum[116]—more heavily restricted than complete firearms.[117] The District of Columbia similarly prohibits possession of unfinished receivers.[118] These regulations represent a class of state laws that are almost certainly unconstitutional.

Some other states have enacted less exacting legislation that may straddle the line of constitutionality. California, for example, primarily requires that privately manufactured firearms be registered with the state and receive a serial number.[119] This might be narrowly tailored to the state's interest, since it meets the policy objective without removing a citizen's ability to assemble the firearm in the first place. However, the California law also bans sales of privately manufactured firearms,[120] which seems to place it on grounds closer to Nevada's. Connecticut, along with requiring the affixing of a serial number, makes the standards for possessing an unfinished receiver the same as that for owning a firearm.[121] This standard seems to be tailored quite closely to the state interest in enforcing its own firearm possession laws.

Thus, while some state laws may survive constitutional review, those that extend to total bans on the possession of unfinished receivers could not. The ability to build a firearm at home is firmly within the scope of the Second Amendment, and its prolific tradition puts it at the core of

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[114] Scott J. Beigel Unfinished Receiver Act, 2021 Sess. Law News of N.Y. Ch. 519 (West).
[115] *Id.* §3(10).
[116] 80% Lower, *What is an unfinished receiver Receiver*, https://www.80-lower.com/80-percent-lower [https://perma.cc/EJU6-793D].
[117] In New York, citizens who are not gunsmiths may possess completed firearms if they obtain a license. N.Y. PENAL LAW §§265.01-b, 400.00.
[118] D.C. CODE ANN. §§7-2501.01, 7-2502.02, 22-4515(a) (West 2001).
[119] CAL. PENAL CODE §29180(b)(1).
[120] CAL. PENAL CODE §29180(d)(1).
[121] Conn. Pub. Act No. 19-6 (2019).

the amendment's protection. To remove the ability to possess key firearm components or to assemble a firearm at home would be in direct contradiction with the fundamental right within the Second Amendment.[122]

Conclusion

When it comes to state regulations on unfinished receivers, the breadth of the restrictions varies. However, when the state law amounts to a ban on the possession of firearm components, it is almost certainly unconstitutional under the original meaning of the Second Amendment. Because practice of assembling firearms at home stretches back to the founding, when almost all firearms were privately manufactured, the drafters of the amendment would have understood that the right of the people to bear arms would require a right for them to first construct them.

On the other hand, states do have a compelling interest in enforcing their own laws and protecting the public safety. Thus, for states seeking to regulate unfinished receivers in the future, great care must be made to tailor their laws to these interests. Otherwise, they risk unduly and unconstitutionally burdening their citizens' fundamental Second Amendment rights.

[122] The *Heller* court noted that that at the time of the founding, the right to have arms was fundamental. *Heller I*, 554 U.S. at 593-94. As discussed above, the arms bore at the founding were overwhelmingly privately manufactured, meaning that the right to bear arms, as understood at the founding, necessarily requires the right to privately manufacture.