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# ***Garland v. Cargill: It’s a Duck! Except at the Supreme Court . . .***

*Maureen Johnson*

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## **Garland v. Cargill: It's a Duck! Except at the Supreme Court . . .**

*Maureen Johnson\**

*Garland v. Cargill may go down as one of the most notorious cases ever handed down by the Supreme Court. By a 6-3 tally, “bump stocks”—which essentially turn semi-automatic weapons into machine guns—were deemed outside the purview of the National Firearms Act of 1934 (NFA). Initially, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) determined that bump stock-converted weapons did not fall within the statutory definition of a machine gun. Amidst a bipartisan outcry following the 2017 Las Vegas Massacre, the ATF changed course, determining that bump stock conversions were indeed “machine guns” and therefore prohibited by the NFA. In her dissent, Justice Sotomayor called it like it was: “When I see a bird that walks like a duck, swims like a duck, and quacks like a duck, I call that bird a duck.”*

*Whether intended or not, Cargill greenlights the path by which would-be assassins and insurrectionists can easily and legally arm themselves with the functional equivalent of machine guns. Cargill also enables both madmen and common criminals to up their firepower to match or even best that of law enforcement. While Congress presumably could reinstate the ban, that window could be closing under the “dangerous and unusual” Second Amendment carveout. Gun lobbyists are already floating arguments that, so long as an item is readily commercially available, it is not “unusual,” and therefore protected against categorical prohibition.*

*This Article argues for a change in the social and legal rhetoric surrounding gun reform to center indirect victims. Surprisingly, that corresponds to historical limitations on the scope of the Second Amendment. Of course, the individual and societal right to be free from undue terror needs to be balanced against the right to bear arms. That balance existed at the Founding. The open issue regarding the continued legality of bump stocks arguably offers the perfect baby step to return to the ideals of the Founders, set aside tribalism, and come together for the common good.*

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## I. INTRODUCTION

*Garland v. Cargill* may go down as one of the most perplexing and inherently dangerous cases ever handed down by the Supreme Court. In a 6-3 tally, “bump stocks”—which essentially turn semiautomatic weapons into machine guns—were deemed outside the purview of the National Firearms Act of 1934 (NFA).<sup>1</sup> The dispute arose from shifting interpretations of the NFA by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).<sup>2</sup> Initially, and despite a 1968 amendment specifically targeting conversions, the ATF determined bump stock-converted weapons did not fall within the statutory definition of a machine gun.<sup>3</sup> That changed on a dime following the 2017 Las Vegas Massacre. A killer, holed up on an upper floor of the Mandalay Bay Resort, used bump stocks to shoot over a thousand rounds, targeting attendees at a country music festival.<sup>4</sup> Fifty-eight were left dead, with over eight hundred others injured.<sup>5</sup>

Amidst bipartisan outcry, the ATF did what it should have done from the outset. The ATF determined bump stock conversions, which drastically raise the rapid-fire potential of semiautomatic weapons, were indeed “machineguns” and therefore prohibited by the NFA.<sup>6</sup> “Drastically” is not an overstatement. Matching the firepower of machine guns, bump stock conversions can fire at a rate of up to eight hundred rounds per minute with a single pull of the trigger.<sup>7</sup> In her dissent, Justice Sotomayor called it like it was, in what would become an instant classic in terms of Supreme Court rhetoric: “When I see a bird that walks like a duck, swims like a duck, and quacks like a duck, I call that bird a duck.”<sup>8</sup>

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<sup>1</sup> *Garland v. Cargill*, 602 U.S. 406, 412–14 (2024).

<sup>2</sup> *Id.*

<sup>3</sup> See *infra* Section II.B.

<sup>4</sup> Miles Kohrman, *The Las Vegas Mass Shooter Had 13 Rifles Outfitted with Bump Stocks. He Used Them to Fire 1,049 Rounds.*, THE TRACE (Aug. 3, 2018), <https://www.thetrace.org/newsletter/las-vegas-mass-shooting-bump-stocks-route-91/> [<https://perma.cc/K47K-R6KL>].

<sup>5</sup> Khaled A. Beydoun, *Lone Wolf Terrorism: Types, Stripes, and Double Standards*, 112 NW. U. L. REV. 1213, 1214–15 (2018) (discussing the Las Vegas Massacre and “lone wolf” killings); see also discussion *infra* Section II.A.

<sup>6</sup> There are apparently three ways to properly spell “machine guns.” The NFA uses “machineguns” while the more common spelling is “machine guns.” It is also proper to hyphenate. This Article uses the more common two-word spelling, except when quoting a source. See *Cargill*, 602 U.S. at 413.

<sup>7</sup> *Cargill*, 602 U.S. at 434 (Sotomayor, J., dissenting).

<sup>8</sup> *Id.* at 430. The author wishes to give a shout-out to Ryan Ghassemi, a student in her UCI class whose final project was drafting an amicus brief in *Cargill*. The first words

Notably, Justice Alito's concurrence even acknowledged "[t]here can be little doubt that the Congress that enacted [the NFA] would not have seen any material difference between a machinegun and a semiautomatic rifle equipped with a bump stock."<sup>9</sup> Justice Alito punted the ball to Congress, suggesting it remedy the situation by amending the NFA to specifically include bump stocks.<sup>10</sup> Given the log jam in Congress, that suggestion had little more than a hope and a prayer. Nor is it clear amending the NFA resolves the issue.<sup>11</sup> As noted in *District of Columbia v. Heller*, and discussed in passing at oral argument in *Cargill*, the constitutionality of the NFA has yet to be challenged at the Supreme Court.<sup>12</sup> But such challenges are already percolating in the lower courts. At issue is the "dangerous and unusual" Second Amendment carveout that long has been presumed to cover the NFA's prohibition on machine guns. Yet, as Justice Breyer warned in his dissent in *Heller*, this exception is cast in the conjunctive, meaning that a weapon must be both dangerous *and* unusual.<sup>13</sup> In other words, once a dangerous weapon becomes readily available, it is no longer "unusual" and can no longer be categorically prohibited. That argument gains traction every day and every dollar that bump stocks flood the

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of his brief, turned in well before *Cargill* was handed down, foreshadowed Justice Sotomayor's dissent: "If it walks like a duck, if it talks like a duck, it's a duck."

<sup>9</sup> *Id.* at 429 (Alito, J., concurring) (citing 26 U.S.C. § 5845(b)). Justice Alito explained, "There is a simple remedy for the disparate treatment of bump stocks and machineguns. Congress can amend the law—and perhaps would have done so already if ATF had stuck with its earlier interpretation. Now that the situation is clear, Congress can act." *Id.* Arguably, Congress *did* act. Congress had at least implicitly delegated the power to interpret the statute to the ATF, and the ATF had done so for decades. See Mia Romano & Dru Stevenson, *Litigating the Bump-Stock Ban*, 70 U. KAN. L. REV. 243, 250–58 (2021) (discussing the implication of the *Chevron* doctrine on the delegation of authority giving rise to the ATF's determination that bump stocks fell within the purview of the NFA).

<sup>10</sup> *Cargill*, 602 U.S. at 429 (Alito, J., concurring).

<sup>11</sup> *Cargill* could be an example of what scholar Barry Friedman calls "judicial decision—popular response—judicial re-decision." BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 382 (2009). The Supreme Court might be floating *Cargill* to gage public support for broadening the list of weapons that cannot be categorically banned. In other words, if there is no real response to lifting a ban on devices that deliver machine gun firepower, that would seem to give the Supreme Court license to rule more expansively: for instance, ruling that it is constitutionally impermissible to ban semiautomatic weapons, or even automatic weapons like machine guns. See discussion *infra* Section III.B.

<sup>12</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008); Transcript of Oral Argument, *Garland v. Cargill*, 602 U.S. 406 (2024) (No. 22-976) [hereinafter *Cargill* Oral Argument].

<sup>13</sup> See *id.* at 721 (Breyer, J., dissenting).

gun market. Once bump stock conversions are deemed to fall within the Second Amendment arsenal of constitutionally protected weapons because they can be purchased at commonplace local retailers, it is not a far leap to bring their functional equivalent—fully automatic machine guns—back into the fold.

*Cargill* must be analyzed in tandem with a second gun reform case handed down just one week later: *United States v. Rahimi*.<sup>14</sup> In that case, the Supreme Court rejected a facial challenge to a federal statute temporarily prohibiting individuals subject to a domestic violence restraining order from possessing firearms.<sup>15</sup> *Cargill* should also be viewed in the broader context of the cascade of polarizing Supreme Court cases that followed. Waiting in the wings was *Trump v. United States*,<sup>16</sup> which appears to convey broad presidential immunity for even indisputable criminal acts peripherally related to the exercise of presidential powers, and *Loper Bright Enterprises v. Raimondo*,<sup>17</sup> involving the soon-to-be-overruled *Chevron* doctrine that had been criticized for providing deference to agency determinations. While the *Chevron* doctrine was not addressed in *Cargill*, it hovered over the decision.<sup>18</sup> Did the ATF not know what it was talking about when it corrected course and deemed bump stock conversions the statutory equivalent of machine guns? The Supreme Court could and should have given at least some level of deference to the ATF's determination, especially given Justice Alito's recognition that the ATF ultimately interpreted the statute in the *exact* manner intended by the 1934 Congress.

A cynic might contend that the Supreme Court simply was not going to hand gun lobbyists a two-for-two defeat in the same term. *Rahimi* was near unanimous, with but a single dissent by Justice Thomas, who drafted the *Cargill* majority opinion.<sup>19</sup> A more generous take would be that the Justices were grappling with how to clarify Second Amendment jurisprudence, and the chips fell where they may. But future historians will not ignore the societal backdrop—in particular, the highly-charged and

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<sup>14</sup> *United States v. Rahimi*, 144 S. Ct. 1889 (2024).

<sup>15</sup> *Id.* at 1898 (concluding that 18 U.S.C. section 922(g)(8) is constitutional on its face).

<sup>16</sup> *Trump v. United States*, 603 U.S. 593 (2024).

<sup>17</sup> *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

<sup>18</sup> Technically, as recognized by the Solicitor General, the *Chevron* doctrine was not at play. Reply Brief for the Petitioners at 20, *Garland v. Cargill*, 602 U.S. 406 (2024) (No. 22-976).

<sup>19</sup> *Garland v. Cargill*, 602 U.S. 406, 406 (2024).

ongoing political rhetoric permeating the 2024 presidential campaign, a spillover from the violent discourse and civil unrest surrounding the 2020 election. There were calls for violence against numerous public and private figures.<sup>20</sup> Seeds were planted that any loss at the ballot box could only be explained by corruption and fraud.<sup>21</sup> There was a growing and palpable concern over a “violent revolution.”<sup>22</sup> In fact, just one day after *Cargill* was handed down, Steve Bannon, a public figure who long had alluded to violent civil unrest, riled attendees at a political rally with the following: “Are we at war? Is this a political war to the knife? Are you prepared to leave it all on the battlefield in 2024?”<sup>23</sup> Bannon ended by shouting, “Ladies and gentlemen, it’s very simple: Victory or death!”<sup>24</sup> Two weeks later, directly following the *Trump* decision, the president of the Heritage Foundation, author of the “Project 2025” policy agenda, sparked fury by announcing the country was in the process of a “second American Revolution, which will remain bloodless if the left allows it to be.”<sup>25</sup>

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<sup>20</sup> Maggie Astor, *Heritage Foundation Head Refers to ‘Second American Revolution,’* N.Y. TIMES (July 3, 2024), <https://www.nytimes.com/2024/07/03/us/politics/heritage-foundation-2025-policy-america.html> [<https://perma.cc/KMH4-2ASS>] (referencing actual violence, such as the January 6 attack on the Capitol and the white supremacist rally in Charlottesville, as well as threats of violence to public figures, including the former chairman of the Joint Chiefs of Staff and the New York Attorney General).

<sup>21</sup> See Daniel Arkin, *Trump Says He’ll Accept 2024 Results if They’re ‘Fair and Legal’ While Airing False 2020 Fraud Claims*, NBC NEWS (June 27, 2024, 8:12 PM), <https://www.nbcnews.com/politics/donald-trump/trump-says-accept-2024-results-fair-legal-airing-false-2020-fraud-clai-rcna159372> [<https://perma.cc/HFY8-2MDT>].

<sup>22</sup> Astor, *supra* note 20. “Project 2025” refers a blueprint that spans over nine hundred pages, outlining a drastic “overhaul [of] the federal government under a Republican president.” *Id.*; see also HERITAGE FOUNDATION, A MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE (Paul Dans & Steven Groves eds., 2023).

<sup>23</sup> Tim Hains, *Bannon: ‘November 5th Is Judgment Day, January 20th, 2025 Is Accountability Day,’* REAL CLEAR POLS. (June 16, 2024), [https://www.realclearpolitics.com/video/2024/06/16/bannon\\_november\\_5th\\_is\\_judgment\\_day\\_january\\_20th\\_2025\\_is\\_accountability\\_day.html](https://www.realclearpolitics.com/video/2024/06/16/bannon_november_5th_is_judgment_day_january_20th_2025_is_accountability_day.html) [<https://perma.cc/UZ86-2WGT>] (providing the full text of and commentary on Steve Bannon’s address in Detroit, Michigan); see also discussion *infra* Section III.B.

<sup>24</sup> *Id.*

<sup>25</sup> Astor, *supra* note 20. Trump denied knowledge of the divisive agenda of Project 2025, despite the preamble identifying a large number of his former and existing advisors listed as contributors. Steve Contorno, *Trump Claims Not to Know Who Is Behind Project 2025. A CNN Review Found at Least 140 People Who Worked for Him Are Involved*, CNN POL., <https://www.cnn.com/2024/07/11/politics/trump-allies-project-2025/index.html> [<https://perma.cc/MRV7-DTKC>] (July 11, 2024, 2:45 PM). On July 24, 2024, it was reported that Senator J.D. Vance, Trump’s vice-presidential pick, would author a foreword to a soon-to-be released book by the head of Project 2025. See Rachel Dobkin, *JD Vance Foreword in Project 2025 Leader’s Book Raises Eyebrows*, NEWSWEEK,

Violent rhetoric paused for a nanosecond when former president and then-candidate Donald Trump was grazed by a bullet during an assassination attempt at a rally in Butler, Pennsylvania, two days prior to the Republican National Convention.<sup>26</sup> Both Trump and President Joe Biden called for unity, but others sowed even more discord, like Congresswoman Marjorie Taylor Green, who posted on X: “The Democratic party is flat out evil, and yesterday they tried to murder President Trump.”<sup>27</sup> Social media reflected a stark partisan split; some vowed revenge as others claimed the assassination was a “false flag.”<sup>28</sup> On “far-fringe platforms,” the call for violence was “intense and immediate.”<sup>29</sup> Then, on July 21, 2024, President Biden dropped out of the presidential race, stirring angst and ire amongst many Republicans and prompting threats of lawsuits to challenge a replacement candidate.<sup>30</sup> All of this happened barely over a month after the Supreme Court’s decision in *Cargill*.<sup>31</sup>

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<https://www.newsweek.com/jd-vance-kevin-roberts-project-2025-book-foreword-1929753>  
[\[https://perma.cc/Z2F6-J3VR\]](https://perma.cc/Z2F6-J3VR) (July 24, 2024, 2:00 PM).

<sup>26</sup> The assassination attempt occurred on July 13, 2024. Michael Levenson, *What We Know About the Assassination Attempt Against Trump*, N.Y. TIMES (July 30, 2024), <https://www.nytimes.com/article/shooting-trump-rally.html> [<https://perma.cc/3YM5-V37R>]. One attendee was killed and two others were injured. *Id.* The gunman, who shot from atop a nearby warehouse, was also killed. *Id.* As Secret Service agents led Trump off the stage, he raised and pumped his fist to the crowd. *Id.*

<sup>27</sup> Chris Brennan, *Republican Reaction to Trump Shooting Only Sows More Division. Our Leaders Must Stop It.*, USA TODAY (July 15, 2024, 5:11 AM), <https://www.usatoday.com/story/opinion/columnist/2024/07/15/trump-assassination-attempt-maga-republican-statements/74397739007/> [<https://perma.cc/HE28-CTHH>]. Mike Collins, a House Representative from Georgia, called for a Pennsylvania district attorney “to charge Biden ‘for inciting an assassination.’” *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Jessica Guynn, *Trump Shooting Inflamed an Already Divided Nation. Can America Turn Down the Heat?*, USA TODAY, <https://www.usatoday.com/story/news/politics/elections/2024/07/14/trump-rally-shooting-social-media/74402514007/> [<https://perma.cc/4R5Y-ULAR>] (July 15, 2024, 6:48 PM) (identifying the militia group, The Proud Boys, as calling for “civil war and violence”). Experts expressed fear that images and verbiage—such as Trump’s fist-pumping and use of the term “fight” as he was led offstage—could have an “incredibly dangerous” effect. Tatyana Tandanpolie, *Experts Fear GOP’s Post-Shooting Trump Idolization Could Have “Incredibly Dangerous” Effect*, SALON (July 19, 2024, 3:00 PM), <https://www.salon.com/2024/07/19/experts-fear-gops-post-idolization-could-have-incredibly-dangerous-effect/> [<https://perma.cc/TG83-BW3E>]. That fear need not be interpreted as faulting Trump for what might be a spontaneous reaction. Rather, it should be viewed as a potential contributing factor to the escalating danger of political violence.

<sup>30</sup> Other contributing factors to the escalated threat of violence include the immediate and continued efforts to block the run of a replacement candidate. Just a handful of days after President Biden’s faltering debate performance on June 27, 2024, the Heritage Foundation announced its intent to file lawsuits in three key swing states: Wisconsin, Nevada, and Georgia. See Stephen Collinson, *Biden’s*



In short, America was a powder keg. Whether intended or not, *Cargill* greenlit the path by which future mass-murderers, including would-be assassins and insurrectionists, easily and legally could arm themselves with the functional equivalent of

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*Disastrous Debate Pitches His Reelection Bid into Crisis*, CNN POL., <https://www.cnn.com/2024/06/28/politics/biden-trump-presidential-debate-analysis/index.html> [<https://perma.cc/J4UM-DW2P>] (June 28, 2024, 4:00 PM); Caroline Vakil and Yash Roy, *Here's How the Process to Replace Biden Would Work if He Withdraws*, POLITICO (July 6, 2024, 6:00 AM), <https://thehill.com/homenews/campaign/4757220-joe-biden-kamala-harris-donald-trump-withdraw/> [<https://perma.cc/EHM7-94BR>]. On July 21, 2024, just hours before President Biden bowed out of the presidential race, Republican Speaker of the House Mike Johnson echoed this sentiment. See David Cohen, *Republicans Could File Challenges if Biden Replaced, Speaker Johnson Says*, POLITICO (July 21, 2024, 10:31 AM), <https://www.politico.com/news/2024/07/21/biden-johnson-2024-elections-laws-00169973> [<https://perma.cc/L3R4-637C>] (“House Speaker Mike Johnson reiterated Sunday that any attempt by Democrats to sub in a new candidate in place of President Joe Biden is likely to be met by legal challenges.”). These efforts could have been laying the groundwork for future political maneuvers, had Trump not been re-elected, potentially including Speaker Johnson’s refusal to play his role in certifying the election results. That possibility came into sharper focus when Vice President Kamala Harris became the official Democrat nominee for president, choosing Minnesota Governor Tim Walz as her running mate. See Steven Shepard, *Dems Officially Nominate Harris, Walz*, POLITICO (Aug. 6, 2024, 7:34 PM), <https://www.politico.com/news/2024/08/06/democrats-officially-nominate-harris-walz-00172966> [<https://perma.cc/DW47-K6XG>]. Even before then, state officials made clear that any legal efforts to block a new ticket would fail. See Vakil and Roy, *supra* note 30 (noting “officials from [Wisconsin, Nevada, and Georgia] cast doubt on Heritage’s claims, saying that the state deadlines have not yet passed, allowing for a change to be made”). But that did not dispel the then-existing threat of extended political chaos and violence well beyond election day, especially given Trump’s contention that the Harris/Walz ticket was an unconstitutional “coup,” disenfranchising Democrat voters who cast their ballot for Biden in the pre-convention primaries. Brett Samuels, *Trump Stokes Fears with ‘Unconstitutional’ Harris Talk*, THE HILL (Aug. 10, 2024, 12:00 PM), <https://thehill.com/homenews/campaign/4821089-donald-trump-kamala-harris-unconstitutional/> [<https://perma.cc/6GMW-EAXJ>]. Ultimately, Trump became the President-elect, beating Harris by 312 to 226 electoral votes, lulling some fears about the transfer of power but raising a new array of concerns. James M. Lindsay, *The 2024 Election by the Numbers*, COUNCIL ON FOREIGN RELS. (Dec. 18, 2024, 3:14 PM), <https://www.cfr.org/article/2024-election-numbers> [<https://perma.cc/S25M-95E4>]; see Kathryn Watson et al., *What Could Trump’s Second Term Bring? Deportations, Tariffs, Jan. 6 Pardons and More*, CBS NEWS, <https://www.cbsnews.com/news/second-trump-presidency-implication/> [<https://perma.cc/RCM7-F24Y>] (Nov. 9, 2024, 7:33 AM).

<sup>31</sup> On July 16, 2024, at a Las Vegas conference hosted by the National Association for the Advancement of Colored People, President Biden called for bringing back the ban on assault weapons, including AR-15s—the weapon used by the shooter in the Trump assassination attempt. Francis Vinall, *Biden, Citing Attack on Trump, Renews Call for Assault Weapons Ban*, WASH. POST (July 17, 2024, 3:16 AM), <https://www.washingtonpost.com/politics/2024/07/17/biden-assault-weapons-ban-ar15-trump/> [<https://perma.cc/ST8A-B3JR>]. Ultimately, the conference turned out to be President Biden’s last campaign appearance before dropping out of the race just five days later on July 21, 2024. See Zolan Kanno-Youngs, *From Buoyant to Frail: Two Days in Las Vegas as Biden Tests Positive*, N.Y. TIMES (July 18, 2024), <https://www.nytimes.com/2024/07/18/us/politics/biden-covid-democrats.html> [<https://perma.cc/CF5K-MCPU>].

machine guns. It also enabled madmen and common criminals to up their firepower to match or best that of law enforcement. Of course, as affirmed in *Rahimi*, once an individual actually harms or terrorizes others, they can be prevented from owning a gun *in the future*.<sup>32</sup> And Congress presumably *could* pass a law banning bump stocks. But as of June 14, 2024, machine guns were there for the taking, dangling like a carnival prize for any militia group or lone-wolf type.

What possibly could go wrong?

The legal and social rhetoric regarding gun reform needs to change. Too often, the battle focuses on the rights of gun owners. But what about the victims, both direct and indirect? They, too, have rights.<sup>33</sup> And the price they pay pales in comparison to the impact of limited restrictions on others, such as banning machine guns and their functional equivalent. Sure, Kid Rock might enjoy shooting up a case of Bud Light at eight hundred rounds per minute.<sup>34</sup> But is that transient enjoyment worth giving militia groups access to machine guns? Is it worth the life and limbs of innocent people—including children and law enforcement officers—destined to fall victim to bump stock conversions as a direct result of the Supreme Court's decision in *Cargill*?

In the aftermath of a mass murder, advocates for gun reform typically focus on the danger of putting weapons in the hands of the deranged, such as the killer responsible for the Las Vegas Massacre. Despite the uptick, gruesomeness, and prevalence of

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<sup>32</sup> United States v. Rahimi, 144 S. Ct. 1889, 1896, 1902 (2024).

<sup>33</sup> Leila Nadya Sadat & Madaline M. George, *Gun Violence and Human Rights*, 60 WASH. U. J. L. & POL'Y 1, 3–4 (2019) (pointing out that “gun violence often focuses on *gun* rights . . . [b]ut what about *human* rights?”). These authors list several competing rights including “[t]he right to learn, worship, attend a concert or movie, or simply go the bank without the fear and uncertainty of becoming the next victim of a mass shooting.” *Id.* at 4.

<sup>34</sup> Famously, Kid Rock joined in the backlash and boycott against Bud Light after the company demonstrated support for Dylan Mulvaney, a transgender rights activist who had shared her gender-transition journey in a TikTok series called “Days of Girlhood.” Jonah Valdez, *Kid Rock Joins Transphobic Backlash to Bud Light's Partnership with Dylan Mulvaney*, L.A. TIMES (Apr. 4, 2023, 2:17 PM), <https://www.latimes.com/entertainment-arts/story/2023-04-04/kid-rock-bud-light-dylan-mulvaney-transgender> [<https://perma.cc/8G7A-TB7F>]. In response, Kid Rock posted a video of himself shooting up three cases of Bud Light with a rifle. *Id.* Michael Che, a comedian known for his “Weekend Update” segment on *Saturday Night Live*, had a humorous retort relating to gun reform: “[W]hat if we got trans people.. hear me out.. to do ads for guns..?” Matt Wilstein, *Michael Che Just Solved Gun Violence with One Instagram Post*, THE DAILY BEAST, <https://www.thedailybeast.com/snls-michael-che-just-solved-gun-violence-with-one-instagram-post> [<https://perma.cc/ZTU3-ASJ3>] (Jan. 12, 2024, 12:35 PM).

mass murders, that argument is not moving the needle.<sup>35</sup> An emerging argument, which actually has its roots in the past, focuses on *indirect* victims: a society pummeled not just by bullets, but by the collective toll of fear and exposure to gun violence. That was a driving—and presumably constitutional—force behind the passage of the NFA in 1934 during the days of Al Capone. Implicit in the passage and general acceptance of the NFA is the recognition that there are competing individual and societal rights of equal or paramount importance to Second Amendment rights. Even at the Founding, competing rights were *of course* balanced to arrive at solutions that were in the best interest of society. Somewhere along the way from the Founding to 1934 to today, individual and societal rights to live free from undue terror have been shelved in favor of an ever-broadening interpretation of the Second Amendment that all but ignores the rights of indirect victims.

“Blind, but now I see.” This famous line from “Amazing Grace” has its place in civil rights litigation.<sup>36</sup> Professor Charles Calleros describes how advancements in civil rights often follow a “recognizable historical pattern.”<sup>37</sup> As eloquently explained, “a pattern first of denying a civil right, then recognizing the right, and later wondering—with some embarrassment—how we could ever have voiced uncertainty about the right” is a common progression of civil rights movements.<sup>38</sup> Put simply, once society recognizes a truism, that truism is difficult to unsee, and it is hard to understand why it was not seen before.

This Article posits that looking through the lens of a future observer can be a powerful tool to expose the flaws of existing social and legal arguments, specifically including the Supreme Court’s decision in *Cargill* and the subsequent congressional failure to immediately reinstate the ban. If we can see today how a future observer easily would view our actions and inaction as bordering on crazy, we can learn from that clarity and adjust accordingly. As such, the broader social and legal context is presented here in time capsule form, including commentary from

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<sup>35</sup> See discussion *infra* Section III.C.

<sup>36</sup> See Julia Franz & Trey Kay, *The Complicated Story Behind the Famous Hymn ‘Amazing Grace,’* THEWORLD (April 21, 2017), <https://theworld.org/stories/2017/04/21/long-story-amazing-grace> [https://perma.cc/H65V-JXRW].

<sup>37</sup> Charles R. Calleros, *Advocacy for Marriage Equality: The Power of a Broad Historical Narrative During a Transitional Period in Civil Rights*, 2015 MICH. ST. L. REV. 1249, 1253.

<sup>38</sup> *Id.*

two befuddled future observers considering the flawed logic of *Cargill* and the inexplicable failure of Congress to act.

Part II explores the backdrop of the *Cargill* decision, including the Second Amendment and the historical grounds underlying the right to bear arms. Part III addresses the showdown over bump stocks. Each of these Parts relies heavily on the briefing, oral arguments, and court opinions in *Cargill* and *Rahimi*, as that best captures the rhetoric before the Supreme Court when these decisions were handed down. Part IV looks at the broader social context, including the chaotic end to the 2023 Term and the prescient danger of politically charged violence. This Part also explores how gun reform can be reframed to forge a new bipartisan approach, reconciling the interests of gun owners and the public at large. This includes centering indirect victims and doing more to remedy the root causes of gun violence. It also includes a discussion of the counter-perspective and the need to listen to one another. Unity. The open issue regarding the continued legality of bump stocks arguably presents the perfect baby step to return to the ideals of the Founders, set aside tribalism, and come together for the common good.

## II. THE BACKDROP: THE HISTORICAL AND LEGAL BASIS FOR RESTRICTION OF SECOND AMENDMENT “GUN RIGHTS”

The year is 2075. Our two future observers, Artemis and Diana, settle in for their afternoon review of key U.S. Supreme Court cases, including consideration of the pre-existing social and legal context.<sup>39</sup> Artemis wanders over to a small electronic metal box perched atop a table, an “Instant Memory imPlanter” (IMP). Scrolling through options generated from their browser history, Artemis selects: Supreme Court Decisions, 2024.

IMP can best be described as the 2075 version of ChatGPT, but with a twist. Instead of cranking out a response to a prompt by hobbling together word snippets, IMP imPlants a wide variety of data directly into a human user’s memory bank and does so in a highly sensory manner. In a moment’s time, a user absorbs a

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<sup>39</sup> Artemis and Diana are the respective Greek and Roman goddesses of the hunt. Ruthann Robson, *Before and After Sappho: Eudaemonia*, 21 L. & LITERATURE 354, 355 (2009) (referring to Artemis as the “[g]oddess of the hunt”); David C. Krajicek, *Nobody Loves a Crime Reporter*, 2003 J. INST. JUST. & INT’L STUD. 33, 36 (noting that Diana was the Roman equivalent of Artemis); see generally Marie Adornetto Monahan, *The Role of Women in the Development of the First Court of Justice*, 25 CUMB. L. REV. 577 (1995) (discussing legal themes resonating with Greek mythology).

vast amount of relevant media content, such as that contained in books, websites, and other entertainment and information platforms. IMP easily imPlants sights and sounds, such as Oscar-nominated films and Billboard Hot 100 songs, and even tastes and smells. IMP impishly starts things off with a sensory suggestion.

IMP: Would you like to begin with an imPlanted memory of a “Frappuccino,” a refreshing coffee-based iced beverage served at Starbucks, a popular coffee shop and meeting place in the 2020s?

ARTEMIS: That would be very nice, IMP. Is there a particular Supreme Court case you might suggest we imPlant? Maybe something that could change the course of history?

IMP: How about *Garland v. Cargill*? The Supreme Court ruled that “bump stocks,” devices that essentially converted semiautomatic weapons into machine guns, capable of shooting eight hundred rounds per minute, were not “machineguns” within the meaning of the National Firearms Act of 1934.

DIANA: Oh right, that case caused quite a stir. Though IMP, I believe we’ve caught you in an error. You must mean *eighty* rounds per minute, not eight hundred. Even that would be more than a bullet a second.

IMP: Rechecking data. . . I am correct. The firepower of the bump stocks at issue in *Cargill* made it possible for an attached weapon to fire four hundred to eight hundred shots per minute, which was on par with machine guns in the 2020s.<sup>40</sup>

Artemis and Diana exchange a quizzical look as they take their seats, leaning back against two cushioned lounges on either side of IMP.

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<sup>40</sup> Cargill Oral Argument at 40 (petitioners’ attorney referencing four hundred to eight hundred rounds per minute); *see also id.* at 55 (Cargill’s attorney, Jonathan F. Mitchell, conceding the same); Larry Buchanan et al., *What Is a Bump Stock and How Does It Work?*, N.Y. TIMES, <https://www.nytimes.com/interactive/2017/10/04/us/bump-stock-las-vegas-gun.html> [<https://perma.cc/GT2Z-4C28>] (June 14, 2024) (discussing bump stocks and embedding audio recordings demonstrating the rate of fire in both the Las Vegas Massacre and the Orlando Pulse Nightclub Massacre, the latter of which took forty-nine lives on June 12, 2016).

DIANA: That seems a little crazy. How could that not be a machine gun?

ARTEMIS: (*dryly*) “Gun rights.”

IMP: Guns don’t have rights; people do.

DIANA: Good point, IMP.

To begin the first of three sessions, Artemis and Diana insert their index fingers into two devices resembling modern-day oximeters. Through joint thought-command, IMP knows the answer to its initial inquiry without Artemis or Diana ever saying a word. They close their eyes to begin their first session, enjoying an imPlanted memory of a 2020s Frappuccino.<sup>41</sup>

#### A. The Founding Fathers and the Second Amendment Right to Bear Arms

“The British are coming – The British are coming.”<sup>42</sup> Paul Revere races through the countryside of Massachusetts, heading for Lexington on his famous midnight ride, sounding the alarm for ordinary citizens—the minutemen—to take up arms in the colonists’ battle for independence.<sup>43</sup> Far from a polished, well-tooled militia, like the “British Redcoats,” they were instead often a hapless band of “poor, untrained, half-armed farmers.”<sup>44</sup> There was no National Rifle Association (NRA), nor any indication that gun manufacturers were leveraging power to sell muskets for sport. Rather, guns were needed to survive, both individually and collectively as a state.<sup>45</sup> Government-issued weaponry largely did not exist, making it necessary for

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<sup>41</sup> The author’s use of this conversational technique was inspired by the scholarly works of Derrick Bell. *See, e.g.*, DERRICK A. BELL JR., *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

<sup>42</sup> Randall Niles, *The Midnight Ride of Paul Revere*, *DRIVE THRU HIST.* (June 28, 2022), <https://drivethruhistory.com/the-midnight-ride-of-paul-revere/> [<https://perma.cc/YU9K-7L9R>].

<sup>43</sup> *See id.*

<sup>44</sup> Todd B. Adams, *Should Justices Be Historians? Justice Scalia’s Opinion in District of Columbia v. Heller*, 55 U.S.F. L. REV. 301, 318 (2021) (citing ESTHER FORBES, *JOHNNY TREMAIN* 281 (Kindle ed. 2010)). Adams discusses Justice Scalia’s theory of originalism at length, including a review of the weaponry available at the Founding. *See id.* at 318–20.

<sup>45</sup> For an interesting discussion of the olde English rationales for allowing, but limiting, the right of citizens to bear arms, see Robert Hardaway et al., *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate over the Right to Bear Arms*, 16 ST. JOHN’S J. LEGAL COMMENT 41, 74–75 (2002) (noting that “the arms provision was in actuality a militia provision, permitting individual access to arms for the limited reason of common defense”).

individual citizens to secure their own arms. Indeed, “[a] person’s role in the militia depended on their weapon.”<sup>46</sup> Colonists who could only bring “hunting rifles” to the match were constrained to fight as “skirmishers.”<sup>47</sup>

Against this backdrop, the plain text of the Second Amendment was drafted: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>48</sup> Interpretation looks to the “normal and ordinary” meaning of the chosen language at the time of enactment.<sup>49</sup> Although “militia laws of the founding period . . . required militia members to ‘keep’ arms in connection with militia service,” the Supreme Court rejected the notion that the Founders intended to limit the right to bear arms to only those serving in a militia.<sup>50</sup> Rather, the right belonged to the people at large. This was consistent with how things were handled across the pond.<sup>51</sup> As noted by Blackstone, “[b]y the time of the founding, the right to have arms had become fundamental for English subjects.”<sup>52</sup> It extended not only to the defense of the state, but for self-defense and self-preservation, specifically including the right to protect oneself “against both public and private violence.”<sup>53</sup> Writing for the majority in *Heller*, Justice Scalia noted that of the nine state constitutions protecting the right to bear arms, “at least seven unequivocally protected an individual citizen’s right to self-defense.”<sup>54</sup>

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<sup>46</sup> Adams, *supra* note 44, at 319. Adams notes, “If a person did not have a musket . . . they might not fight at all.” *Id.* As put by George Washington: “I have not a Musket to spare to the Militia who are without Arms . . . [I]t will be needless for those to come down who have no Arms, except they will consent to work upon the Fortifications . . .” *Id.* (citing George Washington, *To the Pennsylvania Council of Safety*, in THE PAPERS OF GEORGE WASHINGTON (Univ. of Va. Press, digital ed. 2008)), <https://rotunda.upress.virginia.edu/founders/default.xqy?keys=GEWN-print-03-07-02-0323> [<https://perma.cc/QU7M-YECF>].

<sup>47</sup> *Id.* (adding that “skirmishers . . . did not have a role in the line”).

<sup>48</sup> U.S. CONST. amend. II; see generally Dru Stevenson, *Revisiting the Original Congressional Debates About the Second Amendment*, 88 MO. L. REV 455, 470–514 (2023) (considering contemporaneous debates about the scope and language of the Second Amendment).

<sup>49</sup> *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008).

<sup>50</sup> *Id.* at 582–85, 627 (discussing how members of the militia “would bring the sorts of lawful weapons that they possessed at home to militia duty”).

<sup>51</sup> *Id.* at 582–83.

<sup>52</sup> *Id.* at 593–94.

<sup>53</sup> *Id.* at 594. *But see id.* at 655–62 (Stevens, J., dissenting) (arguing that the Second Amendment only proscribed infringements on the right to maintain a well-regulated military).

<sup>54</sup> *Id.* at 600–03 (majority opinion). Justice Stevens’ dissent framed this legal point more broadly:

Until today, it has been understood that legislatures may regulate the civilian

Still, there were limits, both at the Founding and today. Just as the First Amendment right of free speech was not unlimited, neither were the rights granted under the Second Amendment.<sup>55</sup> As Justice Scalia plainly explained in *Heller*, “[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”<sup>56</sup> Central to this finding was the fact that common-sense restrictions on the possession of firearms were commonplace.<sup>57</sup> Put in perspective by Justice Scalia, “the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>58</sup>

The havoc that ensues when bad actors have access to extraordinary weaponry was seen well before *Heller*, namely when machine guns became the weapon of choice for gangsters, prompting the passage of the NFA in 1934.<sup>59</sup> Albeit in dicta, the *Heller* court recognized the presumed constitutionality of the NFA.<sup>60</sup> In particular, Justice Scalia addressed a dissenting argument, presented by Justice Stevens, relying on precedent that held the right to bear arms was limited in two ways at the Founding: to those *servicing* in the military and to weapons *used*

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use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court’s announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations.

*Id.* at 679–80 (Stevens, J., dissenting). Justice Stevens feared that striking the District’s gun regulation “may well be just the first of an unknown number of dominoes to be knocked off the table.” *Id.*; *cf. id.* at 722 (Breyer, J., dissenting) (noting “the unfortunate consequences” of the *Heller* decision, including that the decision “threatens to throw into doubt the constitutionality of gun laws throughout the United States”).

<sup>55</sup> *Id.* at 595 (majority opinion).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 626–27, 632 (referencing both common-sense restrictions in the modern era, such as prohibitions on firearm possession by “felons and the mentally ill,” and Founding-era laws that “restricted the firing of guns within . . . city limits to . . . some degree”); *see also id.* at 683–87 (Breyer, J., dissenting) (commenting on the regulation of gunpowder storage).

<sup>58</sup> *Id.* at 626 (majority opinion).

<sup>59</sup> It is generally agreed that the influx of mob use of machine guns prompted the passage of the NFA. *See, e.g.,* Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 746–47 (2002) (discussing congressional testimony regarding a prohibition on “fully automatic machine guns—the then-freely available weapon of choice for gangsters such as Al Capone and John Dillinger”); *see also* discussion *infra* Sections II.B–C.

<sup>60</sup> *See Heller*, 554 U.S. at 621–25.



by the militia.<sup>61</sup> Scoffing at this argument, Justice Scalia countered, “That would be a startling reading of the opinion, since it would mean that the National Firearms Act’s restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare.”<sup>62</sup>

Notably, and resonating with sensibilities of both yesteryear and today, Justice Scalia found that the language in the Second Amendment pertaining to the maintenance of a militia as necessary for the “security of a free state” was meant to refer to the “polity,” as opposed to the security, of individual states: for example, one state defending itself against another.<sup>63</sup> An additional rationale was that a well-regulated militia was “useful in repelling invasions and *suppressing* insurrections.”<sup>64</sup> It therefore would turn the Second Amendment on its head to ensure access to particularly lethal weaponry that could be used to overturn the government or to wreak havoc on society.

#### B. Mobsters, Machine Guns, and the Motives Behind the 1934 NFA and the 1968 Amendment Targeting Conversions

February 14, 1929. Four mobsters, two disguised as police officers, enter a warehouse on Chicago’s South Side to ambush a rival bootlegger.<sup>65</sup> But this is no ordinary ambush. Two of the mobsters are armed with Thompson sub-machine guns, which would be widely known as “Tommy Guns” before the day was done.<sup>66</sup> Seven men are lined up, faces against the garage wall.<sup>67</sup> Shots ring out as the gunmen use automatic fire to spray bullets left and right from a 20-round box magazine and a 50-round

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<sup>61</sup> *Id.* at 636–39 (Stevens, J., dissenting) (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)).

<sup>62</sup> *Id.* at 624 (majority opinion).

<sup>63</sup> *Id.* at 597; *see also* THOM HARTMANN, *THE HIDDEN HISTORY OF GUNS AND THE SECOND AMENDMENT* 106 (Elissa Rabellino ed., 2019) (dismissing the notion that the Second Amendment was enacted “so that the early colonists could wage war against their own government just like they had the British”). Hartmann also discusses the historical and present-day relation between racism and gun rights. *See, e.g., id.* at 6–17.

<sup>64</sup> *Heller*, 554 U.S. at 597 (emphasis added).

<sup>65</sup> *See* Christian Bush, *Modern Scofflaws: An Examination of Alcohol Resale Law and the Bourbon Black Market*, 18 J.L. ECON. & POL’Y 1, 6 (2023) (describing the St. Valentine’s Day Massacre and noting that “the public reacted with disgust for the criminal underworld and the Prohibition laws that incentivized it”).

<sup>66</sup> *See* Romano & Stevenson, *supra* note 9, at 245 n.12 (identifying the St. Valentine’s Day Massacre as “one of two events in the 1920s to early 1930s that attracted the attention of lawmakers”); *see also* Brief for the Petitioners at 2, *Garland v. Cargill*, 602 U.S. 406 (2024) (No. 22-976).

<sup>67</sup> *See* Bush, *supra* note 69.

drum.<sup>68</sup> The victims are riddled with gunshots, even after they lay on the ground, two of their faces obliterated.<sup>69</sup> The battle was over Chicago's bustling liquor business and the gunmen were settling a score for the notorious Al Capone.<sup>70</sup> The event, dubbed the "St. Valentine's Massacre," was met with disgust by the public.<sup>71</sup>

No doubt, the 1920s and 1930s brought terror to the streets of Chicago, New York, and any other city or town with mafia activities.<sup>72</sup> Gangsters embracing the use of machine guns would later be glorified in movies such as *The Godfather* and *Bonnie and Clyde*.<sup>73</sup> Yet for the vulnerable citizens exposed to such bloodshed in real time, the threat was mind-numbing.

As documented by historian Patrick J. Charles in a brief relied upon by Justice Sotomayor in her dissent,<sup>74</sup> machine guns came onto the scene no later than 1861 with the invention of the "Gatling gun." This new line of weaponry did not catch the attention of lawmakers until the 1920s.<sup>75</sup> There were two reasons for the delay. Early iterations of machine guns "were almost exclusively owned and operated by the military and law enforcement agencies."<sup>76</sup> And, even had machine guns been readily available to the public, the "large size and heavy weight" rendered them unsuitable.<sup>77</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *See id.*; *see also* DIERDRE BAIR, AL CAPONE, HIS LIFE, LEGACY, AND LEGEND 138 (2016) (describing "horrific photographs" and the "bathetic stories about the only survivor, a dog belonging to one of the victims").

<sup>70</sup> *See* Bush, *supra* note 69. Other than references to generally known gangsters, such as Al Capone, the author purposefully has chosen not to mention the names of the killers.

<sup>71</sup> *See id.*

<sup>72</sup> *See id.* (noting one of the consequences of the Prohibition was "the rise of organized crime in major cities"); *see also* JOHN J. BINDER, AL CAPONE'S BEER WARS: A COMPLETE HISTORY OF ORGANIZED CRIME IN CHICAGO DURING PROHIBITION 282–85 (2017).

<sup>73</sup> *See* Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 161 (2005) (discussing movies "portray[ing] criminals not as heroes, but in an undeniably attractive light, like *The Godfather* trilogy, *Bonnie and Clyde*, *The Silence of the Lambs*, *Reservoir Dogs*, and even *Young Guns*, to name just a few"). For a compelling discourse on how glorifying "lawless" conduct can "suggest violence is society's necessary recourse," *see* John Denvir, *The Slotting Function: How Movies Influence Political Decisions*, 28 VT. L. REV. 799, 799–800 (2004) (focusing on *The Godfather* franchise).

<sup>74</sup> *See, e.g.*, Garland v. Cargill, 602 U.S. 406, 430 (2024) (Sotomayor, J., dissenting).

<sup>75</sup> Brief for Patrick J. Charles as Amicus Curiae Supporting Petitioners at 4–5, Garland v. Cargill, 602 U.S. 406 (2024) (No. 22-976) [hereinafter Charles Brief].

<sup>76</sup> *Id.* at 5.

<sup>77</sup> *Id.*

Then came the Tommy Gun.<sup>78</sup> A toggle flipped the mode from semiautomatic to fully automatic. In the former, it discharged at a rate of a “100-round drum magazine in a minute.” When fully automatic, that same 100-round magazine was dispelled in just over four seconds, translating to approximately 25 bullets per second.<sup>79</sup> The shooter had the option of switching back to single-fire mode by simply releasing the trigger. This arguably could be even more terrifying as it reduced the need to reload, which essentially was the only time potential victims were safe and the shooter was vulnerable. In either mode, the Tommy Gun packed a monumental punch in terms of lethality.<sup>80</sup>

While initially marketed as an “anti-bandit” gun, bandits, like Al Capone and John Dillinger, quickly recognized the sizable advantage Tommy Guns gave them over both their street rivals and their common enemy, the police.<sup>81</sup> Public and private settings literally became battlefields. It wasn’t just the rat-a-tat-tat of a pistol. It was the continuous fire of what had to have been the deadliest weaponry ever placed in the hands of civilians. Newspaper headlines captured the mania and provided the gory details, all of which shocked and frightened everyday people trying to live their everyday lives.<sup>82</sup> It wasn’t just “gangsters” getting killed; it also was the boys in blue and innocent, law-abiding citizens.<sup>83</sup>

Not surprisingly, the public demanded change. Even the NRA agreed that machine guns needed to be prohibited.<sup>84</sup> In its November 1926 magazine, *American Rifleman*, the NRA urged that “laws should be amended to prohibit the use of machine-guns, howitzers, and field artillery by civilians—honest or otherwise.”<sup>85</sup> While there were quibbles over wording to ensure

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 6.

<sup>80</sup> *See id.*

<sup>81</sup> *See id.* at 9.

<sup>82</sup> *See id.* at 9 & n.18.

<sup>83</sup> *See* Stephanie Cooper Blum, *Drying Up the Slippery Slope: A New Approach to the Second Amendment*, 67 *BUFF. L. REV.* 961, 983–84 (2019) (“[G]angsters during Prohibition were more violent than prior criminals, rendering local law enforcement largely ineffective.”); *Eliot Ness*, ATF, [atf.gov/our-history/eliot-ness](https://perma.cc/495D-D4AC) [https://perma.cc/495D-D4AC] (last visited Nov. 15, 2024) (“The massacres often resulted in the injury or death of innocent bystanders.”).

<sup>84</sup> Charles Brief, *supra* note 75, at 10–11, 11 n.23.

<sup>85</sup> *Id.* at 11 n.23; *see also id.* at 12 n.28 (citing *Firearms Sales May Be Limited by Florida Law*, TAMPA DAILY TIMES, Mar. 17, 1933, at 7A) (noting “NRA Secretary-Treasurer

semiautomatic weaponry—such as hunting rifles—were not swept into the fold, the goal was to ensure the dreaded Tommy Gun and all similar weaponry were off-limits to the general public.<sup>86</sup>

Ultimately, Congress passed the NFA in 1934.<sup>87</sup>

Congress revisited the NFA in 1968, following an alarming “increas[ed] rate of crime and lawlessness,” coupled with the growing use of firearms.<sup>88</sup> Notably, the definition was amended to specifically capture any creative attempts to convert semiautomatic (or other) weapons into machine guns. The new definition covered any “combination of parts designed and intended[] for use in converting a weapon into a machinegun.”<sup>89</sup> Thus, while it would still be decades until commercial bump stocks make their debut in 2002,<sup>90</sup> Congressional intent was to ensure—as much as possible—that the terrifying times of Al Capone and the Tommy Gun were over.

### C. Other Legislation Limiting the Right to Bear Arms: The Brady Bill and the 1994 Ban on Assault Weapons

Gangsters and Tommy Guns provided the impetus for legislative change in the 1930s.<sup>91</sup> Shock and fear made way for the perfect argument that could be presented at just the right time and in just the right manner.<sup>92</sup> Simply put, it did not take a

C.B. Lister express[ed] support for any law that ‘absolutely prohibited to all except the military and police’ the use and possession of machine-guns”).

<sup>86</sup> Charles Brief, *supra* note 75, at 9–10, 12 (explaining that, later in the debate, “pushback came from several sporting, hunting, and shooting organizations”). Charles further notes that no group “opposed outlawing the possession or use of machine guns by private individuals” and such groups were “emphatically supportive of such legislation.” *Id.* at 12. The concern was that semiautomatic weapons fell within the scope of the proposed language. *See id.*

<sup>87</sup> The Gun Control Act of 1968, 18 U.S.C. § 921; *see also* James B. Jacobs, *Why Ban “Assault Weapons?”*, 37 CARDOZO L. REV. 681, 683–84 (2015) (discussing the passage and scope of the Act, which rendered “‘gangster weapons’—e.g., machineguns, sawed-off shotguns, and silencers—illegal”).

<sup>88</sup> Brief for the Petitioners, *supra* note 66, at 2–3.

<sup>89</sup> 26 U.S.C. § 5845(b); *see* Cargill Oral Argument, *supra* note 40, at 41–42.

<sup>90</sup> *See* Tess Saperstein, *High Caliber, Yet Under Fire: The Case for Deference to ATF Rulemaking*, 26 N.Y.U. J. LEGIS. & PUB. POL’Y 483, 495–97 (2024) (discussing the ATF’s consideration of the Akins “Accelerator” in 2002, an earlier version of the bump stock devices at issue in *Cargill*).

<sup>91</sup> Charles Brief, *supra* note 75, at 9, 12.

<sup>92</sup> This phrasing refers to the rhetorical construct of *kairos*. *See* Linda L. Berger, *Creating Kairos at the Supreme Court: Shelby County, Citizens United, Hobby Lobby, and the Judicial Construction of Right Moments*, 16 J. APP. PRAC. & PROCESS 147, 153 (2015) (noting “kairos often plays the ah-ha-moment role in narrative”); *see also* Rachel Croskery-Roberts, *It’s About Time: Kairos as a Dynamic Frame for Crafting Legal Arguments and Analyzing Rhetorical Performances in the Law*, 33 S. CAL. INTERDISC. L.J.

constitutional scholar to convince the public that the Second Amendment could not possibly mean machine guns should be placed in the hands of common criminals, let alone sophisticated mafioso. The most persuasive arguments often are simple: common sense coupled with an innate sense of what is just or fair. Such arguments resonate in both the heart and mind, opening the door for transformative change.<sup>93</sup>

While America loves its guns,<sup>94</sup> there have been at least two relatively recent instances when shock and empathy have budged open the door for significant national reform: the 1993 Brady Bill and the 1994 assault weapons ban.<sup>95</sup> The circumstances surrounding these exceptions include the attempted assassination of President Ronald Reagan,<sup>96</sup> as well as early instances of the gunning down of innocent children.<sup>97</sup> Gun restrictions were put in place as a direct result of shock and public outcry.<sup>98</sup> The same held true for the Las Vegas Massacre, the largest mass murder in U.S. history. Until now.

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57, 59–60, 67–68, 74 (2023) (discussing ancient Greek origins of *kairos*). In Greek mythology, “Kairos is the youngest son of Zeus” and the “god of the ‘fleeting moment,’ the god of ‘opportunity’” who is “usually pictured with wings and winged feet to demonstrate the concept of the fleeting or passing moment.” *Id.* at 74.

<sup>93</sup> See Scott Fraley, *A Primer on Essential Classical Rhetoric for Practicing Attorneys*, 14 LEGAL COMM’N & RHETORIC: JALWD 99, 107–08 (2017) (recognizing *kairos* is the “proper time to advance a legal argument, both in the sense of societal time (when society is ready for it) and in the context of a specific argument (when the argument will make the most impact)”; see also Ruth Anne Robbins, *Fiction 102: Create a Portal for Story Immersion*, 18 LEGAL COMM’N & RHETORIC: JALWD 27, 55 (2021) (noting that persuasion “always depends on the audience’s receptivity” and that a “story must be told at a moment in time when the audience is ready to receive it”).

<sup>94</sup> See Michael G. Lenett, *Taking a Bite Out of Violent Crime*, 20 U. DAYTON L. REV. 573, 573–74 (1995) (acknowledging the “special relationship” between Americans and guns, referencing, inter alia, “John Wayne, Rambo, and Bonnie and Clyde,” and noting that “America has developed a high tolerance for gun crime, enduring more of it than any other industrialized nation”).

<sup>95</sup> See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 227 (2008). Professor Siegel also considers the “Culture Wars” surrounding gun legislation and the Supreme Court. See *id.* at 201–02.

<sup>96</sup> See *id.* at 227 (correlating these events with the election of President Bill Clinton, which put a “supporter of gun control [in] the White House”).

<sup>97</sup> See, e.g., Jeffrey A. Roth & Christopher S. Koper, *Impacts of the 1994 Assault Weapons Ban: 1994–96*, NAT’L INST. JUST.: RSCH. BRIEF, Mar. 1999, at 1 (describing the Stockton schoolyard shooting of 1989); see also Lenett, *supra* note 94, at 609 (discussing motivations for the 1994 ban on assault weapons).

<sup>98</sup> See Siegel, *supra* note 95, at 226–27; see also *id.* at 202–03 (noting that “[c]ontemporary debate over gun control began in the 1960s, when President Lyndon B. Johnson called for restrictions on firearms sales in the wake of President [John F.] Kennedy’s assassination,” further escalating with the assassinations of civil rights leaders Dr. Martin Luther King, Jr., and Senator Robert F. Kennedy).

The impetus for the 1994 assault weapons ban, which would sunset a decade later in 2004,<sup>99</sup> included a mass school shooting in Stockton, California in 1989.<sup>100</sup> A gunman, armed with a semiautomatic rifle, entered a crowded schoolyard on a sunny and otherwise normal day and opened fire on nearly four hundred children.<sup>101</sup> It took only two minutes, during which the killer discharged over one hundred rounds, to kill five children and wound twenty-nine others and a teacher.<sup>102</sup> In short order, California became the first state to pass a law banning semiautomatic weapons.<sup>103</sup> Other state bans on assault weapons also have been driven by local gun massacres, including the Sandy Hook mass shooting at an elementary school in Newton, Connecticut.<sup>104</sup>

True shock can push the needle.<sup>105</sup> Neuroscientists might consider this an example of System 1 versus System 2 responses. The former refers to immediate reactions, usually driven by emotions and preexisting perceptions; the latter is reasoned aftermath.<sup>106</sup> The greater the shock, the longer it takes for emotionally driven reactions to dissipate.<sup>107</sup> When trauma is severe, simply rethinking the events can both refresh and deepen the emotionally driven response.<sup>108</sup> That might be why there are

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<sup>99</sup> Lenett, *supra* note 94, at 609.

<sup>100</sup> *Id.* at 573. Lenett specifically identified the Stockton schoolyard shooting as a motivation behind the 1994 ban, noting it “hit a sore nerve in the general public.” *Id.* at 573–75.

<sup>101</sup> *Id.* at 573.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 580–83 (noting that California banned sale of assault weapons, followed shortly thereafter by New Jersey, Hawaii, Connecticut, and Maryland).

<sup>104</sup> *Id.* at 574–75; Jacobs, *supra* note 87, at 683 (“The December 2012 Sandy Hook Elementary School massacre in Newton, Connecticut triggered a new round of proposals for banning assault weapons as a strategy for preventing school shootings—or at least minimizing casualties.”).

<sup>105</sup> See Lenett, *supra* note 94, at 574 (“[E]very so often, an event or series of events—mob violence, assassination—jars the national consciousness and incites public demand for reasonable and measured gun control.”); see also *id.* at 577 (listing mass murders in the late 1980s and early 1990s).

<sup>106</sup> See Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693, 705 (2014) (explaining that a person’s immediate reactions “operate without conscious awareness or conscious control”).

<sup>107</sup> See TAYLOR S. SCHUMANN, WHEN THOUGHTS AND PRAYERS AREN’T ENOUGH: A SHOOTING SURVIVOR’S JOURNEY INTO THE REALITIES OF GUN VIOLENCE 1–5, 51–63 (2021).

<sup>108</sup> See Sara E. Gold, *Trauma: What Lurks Beneath the Surface*, 24 CLINICAL L. REV. 201, 207–10 (2018) (considering the enduring impact and effects of trauma); see also Negowetti, *supra* note 106, at 706–07 (discussing “schemas,” meaning deeply ingrained thought patterns in the context of implicit racial and other biases).

state bans on assault weapons but no current federal ban.<sup>109</sup> It is much more personal when the trauma is in your backyard. For example, while the Sandy Hook Massacre occurred in 2012, it hardly seems like a distant memory to Connecticut residents, in particular, those living in Newton.<sup>110</sup>

Sadly, another cohort is that the degree of shock needed for an emotional response increases exponentially over time. Consider James Bond movies. Film students have long been taught that the flashy traditional opening needs to get bigger and better with every new iteration; screenwriters rise to the occasion, creating an even higher bar to beat in each subsequent chapter of the franchise.<sup>111</sup> A similar phenomenon exists due to the constant pace of recent mass murders. Unless the death toll is unusually high or the circumstances particularly gruesome or distinctly memorable, a mass murder can grab headlines for a few days and then be tossed atop the heap of all the mass murders that came before.<sup>112</sup>

There was sufficient public outcry to nationally ban bump stocks in 2017. The open questions are whether there will be sufficient outcry after the Supreme Court's ruling in *Cargill* to reinstate the ban and whether it will take an additional tragedy (or tragedies) to evoke that response.

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<sup>109</sup> Jacobs, *supra* note 87, at 683.

<sup>110</sup> The author of this Article lived in Connecticut a decade after the Sandy Hook Massacre and can personally attest to the lingering effects on both local communities and the state as a whole. See also CHRIS MURPHY, *THE VIOLENCE INSIDE US: A BRIEF HISTORY OF AN ONGOING AMERICAN TRAGEDY* 64–67 (2020) (discussing the tragedy and how America is “lagging” behind other countries on gun reform, from the perspective of a U.S. senator from Connecticut); Jacobs, *supra* note 87, at 683 (noting the national response to the 2012 Sandy Hook Massacre).

<sup>111</sup> The author of this Article recalls learning this tactic in a 2007 class taught by the legendary Professor Howard Suber at the UCLA School of Theater, Film, and Television. Professor Suber extensively explores cinematic storytelling in numerous publications. See HOWARD SUBER, *THE POWER OF FILM*, at xxiii (2006); see, e.g., Brian D. Johnson, *James Bond: The Evolution of an Iconic Franchise—and the Coolest Secret Agent of All Time*, *MACLEAN'S* (Oct 6, 2021), <https://macleans.ca/culture/james-bond-the-evolution-of-an-iconic-franchise-and-the-coolest-secret-agent-of-all-time/> [<https://perma.cc/G27E-2UNE>] (discussing how budgets increased and digital effects overtook stunts in the opening scenes of the James Bond franchise).

<sup>112</sup> The cycle of public outrage at a mass murder yielding no legislative results has been ongoing. See Katherine L. Record & Lawrence O. Gostin, *What Will It Take? Terrorism, Mass Murder, Gang Violence, and Suicides: The American Way, or Do We Strive for a Better Way?*, 47 U. MICH. J.L. REFORM 555, 557 (2014); see also Vinall, *supra* note 31 (“Revulsion at high-profile shootings have largely not resulted in increased controls.”).

## III. THE SHOWDOWN: A TOMMY GUN? OR NOT?

“Two plus two is four,” says one lawyer. “But is it?” quizzically asks another. After a sufficient amount of caffeine, a handful of lawyers could probably come up with a myriad of arguments as to why this simple premise could be viewed from a different perspective, yielding a different answer. A recent cartoon captures similar nonsensicalness in the specific context of *Cargill*.<sup>113</sup> Two schoolchildren crouch under desks amidst a torrent of gunfire.<sup>114</sup> One says to the other, “We’re okay . . . SCOTUS says a bump stock is not a machine gun.”<sup>115</sup> The nonsensicalness arises from the fact that arguing over whether a weapon is deemed a “machine gun” misses the point; the danger arises from firepower, not nomenclature.

The battle over bump stocks turned on the phrase “by a single function of the trigger.”<sup>116</sup> As explained more below, there was no dispute that a shooter need only pull and hold the trigger *once* to achieve automatic firepower comparable to that of a machine gun.<sup>117</sup> The counterargument posited that what mattered was the *inner trigger mechanism*.<sup>118</sup> Put differently, a “single function of the trigger” should be viewed from the perspective of the gun—not the shooter—even though Congress intended just the opposite.

In our futuristic world, Artemis and Diana settle in for the second session of their memory imPlant of *Cargill*. This session focuses on the decision itself and the then-existing context, both legal and societal.

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<sup>113</sup> Richard Galant, *Opinion: The Simple Thing Supreme Court Can't Agree On*, CNN (June 16, 2024, 8:39 AM), <https://www.cnn.com/2024/06/16/opinions/machine-gun-by-any-other-name-supreme-court-column-galant/index.html> [<https://perma.cc/9K7A-6NRS>].

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* (referencing Justice Sotomayor’s dissent and making an allegory to Shakespeare: “That which we call a rose by any other word would still smell as sweet”).

<sup>116</sup> *Garland v. Cargill*, 602 U.S. 406, 415 (2024).

<sup>117</sup> *See infra* Section III.B.

<sup>118</sup> *Cargill*’s attorney argued that the phrase “single function of the trigger” must be construed to mean “the trigger’s function and not [] what the shooter *does* to the trigger.” *Cargill* Oral Argument at 50, 85, *Garland v. Cargill*, 602 U.S. 406 (2024) (No. 22-976) (emphasis added).



A. The 2017 Las Vegas Massacre and the Public Outcry to Ban Bump Stocks

Some days it's tough just gettin' up  
 Throwin' on these boots and makin' that climb  
 Some days I'd rather be a no show, lie low  
 'Fore I go outta my mind  
 But when she says baby (baby)  
 Oh, no matter what comes ain't goin' nowhere  
 She runs her fingers through my hair  
 And saves me  
 Yeah, that look in her eyes got me comin' alive  
 And drivin' me a good kinda crazy  
 When she says baby  
 Oh, when she says baby.

— Jason Aldean<sup>119</sup>

October 1, 2017. The annual Route 91 Harvest Country Music Festival takes place at an outdoor venue in Paradise, Nevada, steps away from the Mandalay Bay Resort and the iconic Las Vegas Strip.<sup>120</sup> The sound of electric guitars and country twang fills the air. Country music star Jason Aldean begins the final set with a love song, “When She Says Baby.”<sup>121</sup> Couples cradle, swaying together as the crowd sings along, the laid-back ballad capturing their truth. Then the unthinkable. Some presume it’s fireworks, but it becomes clear torrents of bullets are raining down, felling those on stage and throughout the venue.<sup>122</sup> The music stops but the terror continues. On frantic radio calls, emergency personnel characterize it as “automatic fire.”<sup>123</sup> In a little over eleven minutes, over a thousand rounds take their toll.<sup>124</sup> Sixty victims would pass, with another eight hundred and fifty suffering injuries, most from bullets or shrapnel.<sup>125</sup>

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<sup>119</sup> Jason Aldean, *When She Says Baby*, on NIGHT TRAIN (Broken Bow Recs. 2012).

<sup>120</sup> Mallory Simon, *10 Las Vegas Survivors and Their Six Hours of Hell*, CNN, <https://www.cnn.com/2017/10/05/us/inside-the-las-vegas-massacre/index.html> [<https://perma.cc/BWG3-SN5D>] (Oct. 5, 2017, 6:08 PM).

<sup>121</sup> *Id.*

<sup>122</sup> *See id.*

<sup>123</sup> CBS News, *11 Minutes | Official Trailer*, YOUTUBE (Sept. 14, 2022), <https://www.youtube.com/watch?v=HV-epVYBRzs> [<https://perma.cc/AH3K-9BX2>] (responding police officers describing “automatic fire”).

<sup>124</sup> Kohrman, *supra* note 4.

<sup>125</sup> Initial reports indicated that fifty-eight victims passed in the immediate aftermath. Rio Lacanlale, *Las Vegas Woman Becomes 60th Victim of October 2017 Mass Shooting*, LAS VEGAS REV.—J., <https://www.reviewjournal.com/crime/shootings/las-vegas-woman-becomes-60th-victim-of-october-2017-mass-shooting-2123456/>

The extraordinary firepower was made possible by bump stocks. The massacre, which tallied up as the deadliest mass murder in American history, shocked the nation and the world. How could one person impose such carnage? Many, if not most, likely had never even heard of bump stocks prior to this event. Both the guns and the bump stocks were legally purchased, which seemed to make no sense.<sup>126</sup> Following the attack, there were calls for renewing the ban on assault weapons altogether, or at least banning bump stocks.<sup>127</sup> Initially, even the NRA was open to some reform.<sup>128</sup>

Pushback. In the face of this extreme loss of life and limb, Congress could not reach a consensus.<sup>129</sup> The ban on bump stocks

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[<https://perma.cc/LBB8-X7UN>] (Sept. 17, 2020, 6:53 PM). There was also some dispute, especially early on, as to exactly how many were injured. *Id.* Many reports suggested the number ranged from 800 to 850. *See, e.g.*, Mary Clare Jalonick, *Republicans Block Bill to Outlaw Bump Stocks for Rifles After Supreme Court Lifts Trump-Era Ban*, AP NEWS, <https://apnews.com/article/bump-stocks-senate-vote-schumer-las-vegas-shooting-6684089f5080bfa97f99b967fd234f60> [<https://perma.cc/4SGE-ZKM7>] (June 18, 2024, 2:41 PM) (referencing 850 victims); Russ Bynum, *How Bump Stocks Ended up Before the U.S. Supreme Court*, PBS NEWS (Feb. 28, 2024, 3:15 PM), <https://www.pbs.org/newshour/politics/how-bump-stocks-ended-up-before-the-u-s-supreme-court> [<https://perma.cc/CJ2M-CD4U>] (detailing the history of bump stocks, the Las Vegas Massacre, and the journey of the *Cargill* case to the Supreme Court).

<sup>126</sup> Julie Turkewitz & Jennifer Medina, *Las Vegas Police Release Final Report on Massacre, with Still No Idea of Motive*, N.Y. TIMES (Aug. 3, 2018), <https://www.nytimes.com/2018/08/03/us/las-vegas-shooting-final-report.html>

[<https://perma.cc/3UFP-TZ86>] (noting that the killer “purchased all weapons and ammunition legally” and “did not commit a crime until he fired the first round into the crowd”). The police report indicated that “887 people sustained documented injuries.” *Id.*

<sup>127</sup> In 2017, following the Las Vegas Massacre, there was broad public support to ban bump stocks. David T.S. Jonas, *Take the Politics out of Political Significance: The Case for Using Objective Metrics in Major Questions Analysis*, 31 GEO. MASON L. REV. 339, 382–83 (2023) (referencing a poll by NPR and Ipsos, finding that “83% of respondents either strongly favored or somewhat favored banning firearm attachments such as bump stocks ‘that allow rifles to rapidly fire similar to an automatic weapon’”).

<sup>128</sup> Nicholas Bogel-Burroughs & Jack Healy, *The Bump Stock Ban Stemmed from a Horrific Mass Shooting*, N.Y. TIMES (June 14, 2024), <https://www.nytimes.com/2024/06/14/us/bump-stock-vegas-shooting-supreme-court.html> [<https://perma.cc/8X9B-KBNA>] (noting “wide political agreement” and that “[w]ithin days of the shooting, the National Rifle Association endorsed stronger restrictions”).

<sup>129</sup> *See* Sadat & George, *supra* note 33, at 20–21 (discussing Congress’ failure to act and the ATF’s subsequent ban on bump stocks). Some argue that resistance derives from untrue “myths” advanced by special interest groups like the NRA. *See generally* THOMAS GABOR & FRED GUTTENBERG, *AMERICAN CARNAGE: SHATTERING THE MYTHS THAT FUEL GUN VIOLENCE* (2023) (debunking thirty-seven myths to combat misinformation about gun violence). Guttenberg’s daughter, Jaime, was a victim of the 2018 Parkland Massacre. *Id.* His book includes a passionate foreword by the head coach of the Golden State Warriors basketball team, Steve Kerr, who also experienced gun violence in his family. Steve Kerr, *Foreword* to THOMAS GABOR & FRED GUTTENBERG, *AMERICAN CARNAGE: SHATTERING THE MYTHS THAT FUEL GUN VIOLENCE* 12, 12–17 (2023).

ultimately came down during President Trump's first term. Per an ATF press release, Trump directed Attorney General Jeff Sessions "to dedicate all available resources to . . . propose for notice and comment a rule banning all devices that turn legal weapons into machineguns."<sup>130</sup> On December 18, 2018, the ATF, crediting Trump, announced an immediate ban.<sup>131</sup> The press release also made clear that bump stocks did indeed transform otherwise legal weapons into "machineguns." As set forth in the press release:

President Donald Trump is a law and order president, who has signed into law millions of dollars in funding for law enforcement officers in our schools, and under his strong leadership, the Department of Justice has prosecuted more gun criminals than ever before as we target violent criminals. We are faithfully following President Trump's leadership by making clear that bump stocks, *which turn semiautomatics into machine guns*, are illegal, and we will continue to take illegal guns off of our streets.<sup>132</sup>

The final rule implemented by the ATF specifically determined that "single function of the trigger' mean[t] single pull of the trigger and analogous motions."<sup>133</sup> The ATF further directed that anyone in possession of a bump stock needed to either surrender the weapon to law enforcement or destroy the device in a manner that "render[ed] the device incapable of being readily restored to its intended function."<sup>134</sup>

Cargill, a gun shop owner, bought two bump stocks during the ATF's rulemaking process.<sup>135</sup> He dutifully surrendered the bump stocks to the ATF following the adoption of the final rule. That same day, he filed suit, thereby forging the trail that would eventually drop bump stocks at the door of the Supreme Court.<sup>136</sup>

#### B. The Briefing in *Cargill*: Two Competing Frames for the Phrase "Single Function of a Trigger"

When the facts are not on your side, argue the law. When the law is not on your side, argue the facts. When neither is on your

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<sup>130</sup> Press Release, Off. of Pub. Affs., Department of Justice Announces Bump-Stock-Type Devices Final Rule (Dec. 18, 2018), <https://www.justice.gov/opa/pr/departement-justice-announces-bump-stock-type-devices-final-rule> [<https://perma.cc/GH3G-955F>] (referencing the prior February 20, 2018, press release).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (emphasis added).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Brief for the Petitioners, *supra* note 66, at 11.

<sup>136</sup> *Id.*

side, pound your fist on the table. The origin of this tongue-in-cheek legal adage may not be clear, but it certainly describes the dilemma facing Cargill's attorneys when everyone and anyone viewed bump stocks as turning semiautomatic weapons into illegal machine guns. But there is one more trick in every lawyer's toolbox. In any given case, the essence of a dispute can be distilled down to "what's really going on" (WRGO).<sup>137</sup> If the legal issue spells doom for your client, reframe.

In terms of a traditional Second Amendment challenge, Cargill faced insurmountable hurdles from prior precedent and the longstanding presumed constitutionality of the NFA. However, recent law *had* favored gun lobbyists. Just two years prior, in *Heller*, the Supreme Court substantially shored up the Second Amendment by requiring that any statute restricting the right to bear arms must be "consistent with this Nation's historical tradition of firearm regulation."<sup>138</sup> In terms of weaponry not in existence at the time of enactment, the government must prove there was an analogue demonstrating the relevant similarity between the modern-day law and acceptable regulations at the Founding.<sup>139</sup>

Still, there was no requirement that there be an exact fit. As previously established in *Bruen*, "analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*."<sup>140</sup> Both *Bruen* and *Heller* acknowledged the constitutionality of colonial prohibitions on "dangerous and unusual" weapons.<sup>141</sup> That served as the precise justification for the NFA's ban of machine guns, which was passed nearly a century prior, albeit never constitutionally challenged.<sup>142</sup> Moreover, there was no dispute that the 1934 Congress intended to prohibit machine guns of any

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<sup>137</sup> Maureen Johnson, *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions*, 49 IND. L. REV. 397, 460–61 (2016) (discussing competing WRGOs and other practitioner tips); Maureen Johnson, "That Little Girl Was Me": *Kamala Harris and the Civil Whites of 1964 and Beyond*, 33 CARDOZO L. REV. 577, 626–27 (2022) (explaining the correlation between *kairos* and WRGOs); see also ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES 1 (2d ed. 2014) (expressing the need to immediately grab the reader's attention with a concise, powerful theme).

<sup>138</sup> N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022).

<sup>139</sup> *Id.* at 28–30.

<sup>140</sup> *Id.* at 30.

<sup>141</sup> *Id.* at 47 (citing *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)).

<sup>142</sup> *Heller*, U.S. at 624.

kind and that bump stocks converted semiautomatic weapons into the functional equivalent of machine guns. Just like the Tommy Gun and modern-day, military-grade machine guns, bump stock conversions achieve automatic fire with but a single pull of the trigger.<sup>143</sup>

Slam dunk for the Solicitor General?

The *Cargill* briefing and oral arguments presented two very different views of WRGO. Cargill was effectively boxed out from arguing that bump stocks did not convert a semiautomatic weapon into the functional equivalent of a machine gun. As explained in the Solicitor General's brief, once the trigger is pulled, the "cycle continues until the shooter moves his trigger finger, stops maintaining forward pressure with his non-trigger hand, or exhausts the ammunition."<sup>144</sup> This mechanism is used in Tommy Guns, which first prompted the passage of the NFA in 1934. A shooter could discharge one shot, multiple shots, or maintain continuous shooting until the ammunition was spent.<sup>145</sup> All that is necessary is for the shooter to maintain pressure by holding down the trigger and keeping the weapon steady. As explained in the Solicitor General's brief:

A semiautomatic rifle equipped with a bump stock fires multiple shots "by a single function of the trigger." It allows a shooter to initiate a bump-firing sequence with a single motion—either pulling the trigger, or sliding the rifle forward in order to press the trigger against the trigger finger. That single motion sets off a cycle—*fire, recoil, bump, fire*—that enables the rifle to fire hundreds of rounds a minute.<sup>146</sup>

Facing these apparent roadblocks, Cargill reframed the issue.<sup>147</sup> Instead of trying to challenge the constitutionality of

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<sup>143</sup> Cargill Oral Argument, *supra* note 40, at 54–55 (explaining that guns with bump stocks carry the same amount of firepower as machine guns). Cargill's attorney refused to concede that there had been more than one shot fired per the "function of the trigger," but did not contest that the shooter only had to pull the external metal portion of the trigger once; instead, Cargill's attorney claimed the true "trigger" was the internal mechanism. *Id.* at 51–55. In his words, "the phrase 'single function of the trigger' can only be construed grammatically to focus on the trigger's function, and not on what the shooter does to the trigger." *Id.* at 50.

<sup>144</sup> Brief for the Petitioners, *supra* note 66, at 5–7.

<sup>145</sup> Charles Brief, *supra* note 75, at 4–7.

<sup>146</sup> Brief for the Petitioners, *supra* note 66, at 22–23 (emphasis added) (citations omitted) (quoting 26 U.S.C. § 5845(b)).

<sup>147</sup> Of course, Cargill was not the only litigant to advance this argument, which was consistent with prior reasoning advanced by gun lobbyists and accepted by the ATF prior to its changed position. See Brief for the Respondent at 8–12, *Garland v. Cargill*, 602 U.S. 406 (2024) (No. 22-976).

the NFA under the Second Amendment<sup>148</sup> or counter the argument that bump stocks converted weapons into the functional equivalent of a machine gun, Cargill honed in on the *manner* by which bump stocks achieved this end.<sup>149</sup> Therein came the laser-sharp focus on the phrase “single function of the trigger.”<sup>150</sup> The Solicitor General, the 1934 Congress, and likely anyone without a pony in the race interpreted this as including one pull of the trigger by the shooter, albeit held down to maintain continuous fire.<sup>151</sup> Cargill took a different tack—the trigger is engaged separately for each shot because the internal hammer mechanism causes the trigger to be “bumped” into the shooter’s stationary finger by each recoil prior to the release of the next shot in the firing sequence.<sup>152</sup>

Say that again?

As Cargill explained, the firing sequence for a semiautomatic rifle includes three steps: (1) “The shooter activates the trigger”; (2) “The trigger releases the hammer, which springs forward and causes a single bullet to be fired”; and (3) “The shooter releases or disengages the trigger, causing the trigger to reset and allowing the hammer and trigger to return to a cocked position.”<sup>153</sup> Per Cargill, “[a] bump stock does not change any of this,”<sup>154</sup> adding “[t]he only difference with a bump stock is that this shooting cycle repeats itself more quickly, as the bump stock facilitates rapid firing through repeated ‘bumps’ of the trigger into the shooter’s finger.”<sup>155</sup> However, rifles with bump stocks can fire four hundred to eight hundred shots within a minute: in effect, making the rate at which a shooter’s “stationary” finger is bumped equal to four hundred to eight hundred bumps per

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<sup>148</sup> Notably, while Cargill did not make a Second Amendment challenge, this argument *was* made in amici briefs. See Reply Brief for the Petitioners, *supra* note 18, at 19 (“Some of respondent’s amici, though not respondent himself, argue that a ban on bump stock devices would violate the Second Amendment.”); see also Cargill Oral Argument, *supra* note 40, at 104–05 (revealing that Cargill’s attorney had no position as to whether bump stocks are protected by the Second Amendment because he did not brief the issue).

<sup>149</sup> Reply Brief for the Petitioners, *supra* note 18, at 15.

<sup>150</sup> Brief for the Petitioners, *supra* note 66, at 18.

<sup>151</sup> See *id.* at 20.

<sup>152</sup> Brief for the Respondent, *supra* note 147, at 38–39. At oral argument, Cargill’s attorney plainly stated: “[R]apid fire is not the test under the statute. It’s not whether it fires rapidly. It’s whether it fires more than one shot automatically . . . by a single function of the trigger.” Cargill Oral Argument, *supra* note 40, at 71.

<sup>153</sup> Brief for the Respondent, *supra* note 147, at 19–20.

<sup>154</sup> *Id.* at 20.

<sup>155</sup> *Id.* at 20–21.

minute. A bump stock device also has a ledge to ensure the shooter's trigger finger remains stationary, meaning the shooter's finger certainly does *not* pull the trigger more than once, let alone at a rate of four hundred to eight hundred times per minute.<sup>156</sup> The bump stock also “comes with a rectangular ‘receiver module’ that guides and regulates the weapon's recoil.”<sup>157</sup> Still, per Cargill, four hundred to eight hundred bumps of the trigger against the shooter's stationary finger—a finger held stationary by the bump stock itself—would nevertheless constitute four hundred to eight hundred separate functions of the trigger.<sup>158</sup>

Oral arguments were held on February 28, 2024. Principal Deputy Solicitor General Brian H. Fletcher led off with a reference to the Las Vegas Massacre and an explanation that once a single pull of the trigger engages continuous shooting, it remains continuous so long as the shooter “maintains steady forward pressure.”<sup>159</sup> The main concern from the conservative Justices seemed to be whether anyone could be prosecuted for failing to timely destroy or turn in their bump stocks pursuant to the ATF's order. For example, Justice Gorsuch was concerned for the scores of individuals who may have purchased bump stocks prior to the 2018 prohibition in reliance on the ATF's prior interpretation. Specifically, Justice Gorsuch questioned whether the shift in the ATF's position “would render between a quarter of a million and a half million people federal felons.”<sup>160</sup> Fletcher assured the Justices that no one had or would be prosecuted for failing to comply with the rule. He further noted the five-year statute of limitations was set to run in a month.<sup>161</sup> As a practical matter, that meant there would be no such prosecutions as the statute presumably would (and ultimately did) run before the issuance of the Supreme Court's opinion.

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<sup>156</sup> Brief for the Petitioners, *supra* note 66, at 5–6 (“A bump stock also includes a stationary finger rest (also known as the ‘extension ledge’) on which the shooter places his finger while shooting.”).

<sup>157</sup> *Id.*

<sup>158</sup> Brief for the Respondent, *supra* note 147, at 20–21 (arguing that multiple shots in a single sequence still constitute “distinct ‘functions’ of the trigger”).

<sup>159</sup> Cargill Oral Argument, *supra* note 40, at 3.

<sup>160</sup> *Id.* at 19–23 (Justice Gorsuch's line of questioning); *see also id.* at 27–30 (Justice Kavanaugh's discussion of mens rea as it pertains to potential prosecutions); *id.* at 34–35 (Justice Alito's remarks on potential prosecutions). Interestingly, in terms of Supreme Court banter, the line of questioning by Justice Gorsuch was marked by what may well become a signature stylistic hallmark, when he pointedly asked, “Thoughts?” *Id.* at 19–20; *see also id.* at 67–68 (same).

<sup>161</sup> *Id.* at 24.

Generally speaking, and despite nearly two hundred references to “function” or “single function of the trigger,” it appeared that the Justices understood there was only one volitional act by the shooter necessary for a weapon equipped with a bump stock to engage in automatic fire.<sup>162</sup> Justice Barrett commented, “[I]ntuitively, I am entirely sympathetic to your argument . . . it seems like, yes, that this is functioning like a machine gun.”<sup>163</sup> Even Justice Thomas, who would be tapped to write the majority opinion, appeared to recognize Congress intended to rid the streets of weapons capable of machine gun rapid-fire.<sup>164</sup> There was almost no discussion at all about whether the ATF overstepped its bounds.<sup>165</sup>

By contrast, *Rahimi*, the other Supreme Court case from the 2023 Term that captured the attention of gun lobbyists, involved a straightforward traditional Second Amendment challenge.<sup>166</sup> The alleged facts were especially egregious, which appeared to weigh upon the Justices’ minds at oral argument.<sup>167</sup> As ultimately incorporated into the Supreme Court opinion, *Rahimi* allegedly engaged in extreme physical abuse of his girlfriend (C.M.), which included several instances when *Rahimi* brandished his weapon and fired shots at C.M. and others.<sup>168</sup> In seeking a restraining order, C.M. reported numerous other assaults and detailed how *Rahimi*’s conduct endangered their

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<sup>162</sup> See *id.* at 127–28.

<sup>163</sup> *Id.* at 13. Yet Justice Barrett also noted the Fifth Circuit “looked at it from the perspective of the gun and the machinery of the gun.” *Id.* at 15.

<sup>164</sup> Justice Thomas added, “And there was significant damage from machineguns, carnage, people dying, et cetera. And behind this is a notion that the bump stock does the exact same thing. So, with that background, why shouldn’t we look at a broader definition of ‘function,’ one suggested by the . . . government, as opposed to just the narrow one you suggest?” *Id.* at 49–50.

<sup>165</sup> However, Justice Gorsuch did express his concerns about the ability of a private citizen, realistically, to challenge the ATF’s determination absent prosecution. See *id.* at 19–22.

<sup>166</sup> See Dahlia Lithwick, *Zackey Rahimi Is the Perfect Poster Boy for the Gun Lobby at the Supreme Court*, SLATE (Nov. 7, 2023, 5:45 AM), <https://slate.com/news-and-politics/2023/11/zackey-rahimi-gun-lobby-poster-boy-supreme-court.html> [<https://perma.cc/AR4C-LKKR>]; *United States v. Rahimi*, 144 S. Ct. 1889 (2024).

<sup>167</sup> See Transcript of Oral Argument, *Rahimi*, 144 S. Ct. 1889 (2024) (No. 22-915) [hereinafter *Rahimi* Oral Argument].

<sup>168</sup> *Rahimi*, 144 S. Ct. at 1894–95. Additional details include that when C.M. tried to flee during an argument, *Rahimi* “grabbed her by the wrist, dragged her back to his car, and shoved her in, causing her to strike her head against the dashboard.” *Id.* at 1895. When he noticed a bystander was watching, he retrieved a gun from under the passenger seat. *Id.* As C.M. took this opportunity to escape, he fired at her, later threatening that “he would shoot her if she reported the incident.” *Id.*



young child.<sup>169</sup> Not surprisingly, the trial court judge granted the restraining order, finding Rahimi constituted a “credible threat,” a prerequisite to restricting him from possessing a firearm.<sup>170</sup> Following the trial court’s order, Rahimi allegedly “threatened a different woman with a gun” and ultimately was identified by state police as the “suspect in a spate of at least five additional shootings.”<sup>171</sup> After that, Rahimi was allegedly involved in a road rage incident, where he fired at a truck driver “several times.”<sup>172</sup> On a separate occasion, he pulled a gun and shot into the air at a roadside diner when a friend’s credit card was declined.<sup>173</sup> At oral argument, these facts prompted Chief Justice Roberts to candidly ask Rahimi’s attorney, “[Y]ou don’t have any doubt that your client’s a dangerous person, do you?”<sup>174</sup>

Given how both *Heller* and *Bruen* came out in favor of gun lobbyists, the conventional wisdom was that a conservative-leaning Supreme Court might do the same with both *Cargill* and *Rahimi*. While *Cargill* might have been the better bet as to which case would hand gun lobbyists their first real loss in decades, the opposite turned out to be true.<sup>175</sup>

### C. The Decisions: *Cargill* and *Rahimi*

Holmes, Brandeis, Harlan, Black, Douglas, and Scalia. These well-known Supreme Court Justices have been dubbed the “Great Dissenters.”<sup>176</sup> Justice Sotomayor may well be added to

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* When the police obtained a warrant to search Rahimi’s home, “they discovered a pistol, a rifle, ammunition—and a copy of the restraining order.” *Id.*

<sup>174</sup> Rahimi Oral Argument, *supra* note 167, at 79.

<sup>175</sup> Gun activists have exerted substantial pressure against any limitation of the Second Amendment. For example, the NRA has pressured legislators by utilizing a “scoring” or rating system, which monitors politicians’ votes and factors them into approval ratings. See Allen Rostran, *The Past and Future Role of the Second Amendment and Gun Control in Fights over Confirmation of Supreme Court Nominees*, 3 NE. U.L.J. 123, 161 (2011); Vinall, *supra* note 31 (discussing the difficulty of enacting gun reform); Esther Ness, *Moving Beyond Thoughts and Prayers: A New and Improved Federal Assault Weapons Ban*, 44 FORDHAM INT’L L.J. 1087, 1108–09 (2021) (discussing leverage on politicians).

<sup>176</sup> William D. Blake & Hans J. Hacker, “*The Brooding Spirit of the Law*”: *Supreme Court Justices Reading Dissents from the Bench*, 31 JUST. SYS. J. 1, 1 (2010). Blake and Hacker quote Chief Justice Hughes as noting, back in 1936, that a dissent is “an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.” *Id.* (quoting CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1936)); see also Christopher W. Schmidt & Carolyn Shapiro, *Oral Dissenting on the Supreme Court*, 19 WM. & MARY BILL RTS. J. 75, 94 (2010).

the list. In what was at least once a relatively rare move, she read her dissent in *Cargill* from her seat in the staid public chambers of the Supreme Court.<sup>177</sup> It was not just a protest against a technical or dry interpretation of a rule of law. It was frank recognition that lives were going to be lost, blood would be spilt, and it was the Supreme Court that was going to allow that to happen. In fact, it was the Supreme Court that was opening the door.<sup>178</sup>

Lock, stock, and barrel, Justice Thomas' majority opinion followed the WRGO served up by Cargill and the gun lobbyists. It does not matter how fast or furious bullets fly out of the chamber.<sup>179</sup> So long as they come out one at a time, it's just "a single function of the trigger."<sup>180</sup> With diagrams, Justice Thomas focused on the internal mechanism and laid out how semiautomatic guns fired a single shot at a time.<sup>181</sup> Then, echoing Cargill's brief, Justice Thomas declared, "Nothing changes when a semiautomatic rifle is equipped with a bump stock," meaning the internal firing mechanism continues to be reset prior to the discharge of the next bullet.<sup>182</sup>

Yet the majority's prior explanation of bump stocks acknowledged that a shooter's trigger finger remained "stationary" during continuous shooting; specifically, the trigger

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<sup>177</sup> Mark Walsh, *Two Oral Dissents and More Opinion Days to Come*, SCOTUSBLOG (June 27, 2024, 5:17 PM), <https://www.scotusblog.com/2024/06/two-oral-dissents-and-more-opinion-days-to-come/> [<https://perma.cc/DC5P-MLMK>]; see also Abbie VanSickle, *Behind the Curtain at the Supreme Court*, N.Y. TIMES (June 24, 2024), <https://www.nytimes.com/interactive/2024/06/27/us/supreme-court-chamber-photos.html> [<https://perma.cc/DV9Y-TJ7F>] (noting that, "[a]s with much of the building, the chamber appears older than it is"). VanSickle further elucidated, "As Judith Resnik and Dennis Curtis, professors at Yale Law School, explained in their book, 'Representing Justice,' it 'was designed to look old—as if it had been in place since the country's founding.'" *Id.*; see also discussion *supra* Section III.B (discussing oral dissents in the 2023 Term).

<sup>178</sup> In a May 25, 2024, interview at Harvard University's Radcliffe Institute for Advanced Study, Justice Sotomayor shared how deeply she was affected by impactful Supreme Court decisions that did not turn out the way she believed they should. Marina Pitofsky, *You Have to Shed the Tears: Justice Shares that She Cries After Some Supreme Court Cases*, USA TODAY (May 27, 2024), <https://www.usatoday.com/story/news/politics/2024/05/27/sonia-sotomayor-cries-supreme-court/73868167007/> [<https://perma.cc/68L7-T9HJ>]. Justice Sotomayor confessed, "There are days that I've come to my office after an announcement of a case and closed my door and cried." *Id.* She added, "There have been those days. And there are likely to be more." *Id.*

<sup>179</sup> *Garland v. Cargill*, 602 U.S. 406, 421 (2024).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*; see also Brief for the Respondent, *supra* note 147, at 20 ("A bump stock does not change any of this, and the shooting cycle of a bump stock–equipped semi-automatic rifle is exactly the same as a semi-automatic weapon without the bump stock.").

finger is kept “stationary” by a “ledge” at the exterior locus.<sup>183</sup> The majority also conceded that the exact purpose of bump stocks was to achieve the same level of firepower as outlawed machine guns.<sup>184</sup> As explained by Justice Thomas:

Shooters have devised techniques for firing semiautomatic firearms at rates approaching those of some machineguns. One technique is called bump firing. A shooter who bump fires a rifle uses the firearm’s recoil to help rapidly manipulate the trigger. The shooter allows the recoil from one shot to push the whole firearm backward. As the rifle slides back and away from the shooter’s stationary trigger finger, the trigger is released and reset for the next shot. Simultaneously, the shooter uses his nontrigger hand to maintain forward pressure on the rifle’s front grip. The forward pressure counteracts the recoil and causes the firearm (and thus the trigger) to move forward and “bump” into the shooter’s trigger finger. This bump reengages the trigger and causes another shot to fire, and so on.<sup>185</sup>

Justice Thomas further stated that “[a] bump stock does not alter the basic mechanics of bump firing” because “the trigger still must be released and reengaged to fire each additional shot.”<sup>186</sup>

Early on in the opinion, and again at the end, the majority criticized the ATF for reversing its prior categorization of bump stocks as not falling within the purview of the NFA.<sup>187</sup> Specifically, the majority pointed out that “[o]n more than 10 separate occasions over several administrations, ATF consistently concluded that rifles equipped with bump stocks cannot ‘automatically’ fire more than one shot ‘by a single function of the trigger.’”<sup>188</sup> The majority then tied the ATF’s shift in position to the public outcry following the Las Vegas Massacre.<sup>189</sup> Of course, the issue of the ATF’s shift in position had been addressed at oral argument and there was an obvious answer that the majority opinion ignored. As pointed out by Principal Deputy Solicitor General Fletcher, “courts do not hesitate to correct government errors in interpreting statutes; an agency certainly should be afforded the same opportunity.”<sup>190</sup>

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<sup>183</sup> See *Cargill*, 602 U.S. at 411–12.

<sup>184</sup> See *id.*

<sup>185</sup> *Id.* at 411. The notion that the firepower supplied by bump stocks is comparable to that of some machine guns comes from Cargill’s brief. See Brief for the Respondent, *supra* note 147, at 3 (“Experts have devised ways for semi-automatic rifles to fire at rates approaching those of machineguns.”).

<sup>186</sup> See *Cargill*, 602 U.S. at 412.

<sup>187</sup> *Id.* at 411–12, 428.

<sup>188</sup> *Id.* at 412.

<sup>189</sup> *Id.* at 412–13.

<sup>190</sup> Cargill Oral Argument, *supra* note 40, at 20.

Additionally, as noted above, Justice Alito's concurrence confirmed that the ATF's *corrected* interpretation indeed tracked congressional intent. It bears repeating that Justice Alito expressly wrote: "There can be little doubt that the Congress that enacted 26 U.S.C. § 5845(b) would not have seen any material difference between a machinegun and a semiautomatic rifle equipped with a bump stock."<sup>191</sup>

The better-reasoned opinion is the passionate dissent penned by Justice Sotomayor, joined by Justices Kagan and Jackson. What mattered to these dissenters—and what would have mattered to the 1934 Congress—was whether bump stock conversions were the type of high-powered weaponry intended to be taken out of the hands of the general public.<sup>192</sup> Unlike the majority, Justice Sotomayor led with the devastating loss of life that had occurred in the Las Vegas Massacre, directly attributing the extraordinary lethality and mass injuries to the use of bump stocks.<sup>193</sup> She provided a solid legal basis as to why such weaponry fell within the NFA's ban on machine guns. As reflected in Justice Sotomayor's colloquial and very fitting "duck" analogy, the ordinary meaning of "single function of the trigger," both in 1934 and today, certainly covered one pull of the trigger by the shooter resulting in continuous rapid-fire akin to that of a machine gun.<sup>194</sup> She also alluded to life-and-death consequences. As powerfully stated:

On October 1, 2017, a shooter opened fire from a hotel room overlooking an outdoor concert in Las Vegas, Nevada, in what would become the deadliest mass shooting in U.S. history. Within a matter of minutes, using several hundred rounds of ammunition, the shooter killed 58 people and wounded over 500. He did so by affixing bump stocks to commonly available semiautomatic rifles. These simple devices harness a rifle's recoil energy to slide the rifle back and forth and repeatedly "bump" the shooter's stationary trigger finger, creating rapid-fire. *All the shooter had to do was pull the trigger and press the gun forward. The bump stock did the rest.*

. . . .

Today, the Court puts bump stocks back in civilian hands. To do so, it casts aside Congress's definition of machinegun and seizes upon one that is inconsistent with the ordinary meaning of the statutory text

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<sup>191</sup> *Cargill*, 602 U.S. at 429 (Alito, J., concurring) (referencing the "horrible shooting spree in Las Vegas in 2017").

<sup>192</sup> *See id.* at 445–46 (Sotomayor, J., dissenting).

<sup>193</sup> *See id.* at 429–30.

<sup>194</sup> *See id.* at 430 (quoting 26 U.S.C. § 5845(b)).

and unsupported by context or purpose. *When I see a bird that walks like a duck, swims like a duck, and quacks like a duck, I call that bird a duck.* A bump-stock-equipped semiautomatic rifle fires “automatically more than one shot, without manual reloading, by a single function of the trigger.” Because I, like Congress, call that a machine gun, I respectfully dissent.<sup>195</sup>

Justice Sotomayor then painted the picture of the terror that prompted Congress to prohibit machine guns in the first place, including how “[g]angsters like Al Capone used machineguns to rob banks, ambush the police, and murder rivals.”<sup>196</sup> She had an answer to the question regarding the arguably peculiar wording of the phrase “single function of the trigger,” which she backed up with legislative history.<sup>197</sup> Machine guns sometimes did (and certainly could) rely upon different mechanisms to initiate fire, including pushing a button instead of pulling a trigger.<sup>198</sup> Congress wanted to make sure that the statute covered any and all existing or future methods that could be used to deliver the devastation of a traditional machine gun.<sup>199</sup> Notably, even Cargill’s attorney admitted at oral argument that the language was chosen because of these distinct possibilities.<sup>200</sup> Justice Sotomayor also persuasively argued that the important analysis under the statute is not the internal mechanism, but “how a person can fire” the weapon, such as the “human act of the shooter’s initial pull.”<sup>201</sup> If but a single pull—albeit continuous—results in rapid-fire, then a bump stock-equipped semiautomatic rifle is no different than a 1934 Tommy Gun. Ruling otherwise “eviscerates Congress’s regulation of machineguns and enables gun users and manufacturers to circumvent federal law.”<sup>202</sup>

Justice Sotomayor’s final point focused on the majority’s “evasion” of congressional intent, relying on Justice Scalia’s

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<sup>195</sup> *Id.* at 429–30 (emphasis added) (quoting 26 U.S.C. § 5845(b)).

<sup>196</sup> *Id.* at 430–31 (citing Charles Brief, *supra* note 75, at 5).

<sup>197</sup> *Id.* at 436–37.

<sup>198</sup> *Id.* at 435, 438.

<sup>199</sup> *Id.* at 431–33.

<sup>200</sup> *Id.* at 437–38. Cargill’s attorney “even agreed that Congress used the word ‘function’ to ensure that the statute covered a wide variety of trigger mechanisms, including both push and pull triggers.” *Id.* at 438.

<sup>201</sup> *Id.* at 434–35.

<sup>202</sup> *Id.* Justice Sotomayor further noted, “This is not a hard case.” *Id.* at 435. She highlighted Senate hearings, including testimony by the then-president of the NRA that the “distinguishing feature of a machine gun [was] that by a single pull of the trigger the gun continues to fire.” *Id.* at 436–37 (citation omitted).

“presumption against ineffectiveness.”<sup>203</sup> Interestingly, in *Abramski v. United States*, Justice Scalia “declin[ed] to read a gun statute in a way that would permit ready ‘evasion,’ ‘defeat the point’ of the law, or ‘easily bypass the scheme.’”<sup>204</sup> Yet that was exactly what the *Cargill* majority did, given that the NFA’s clear intent was to capture “weapons that shoot rapidly via a single action of the shooter.”<sup>205</sup> *Of course* that would include a “bump-stock-equipped AR-15” that even a relative novice could fire “at a rate of 400 and 800 rounds per minute with a single pull of the trigger.”<sup>206</sup>

Justice Sotomayor bookended her dissent with a final reference to the tragedy of the Las Vegas Massacre and the inevitable and lethal consequences of the majority decision, all of which clearly were worthy of both a written and oral dissent. As she passionately concluded:

Congress’s definition of “machinegun” encompasses bump stocks just as naturally as M16s. Just like a person can shoot “automatically more than one shot” with an M16 through a “single function of the trigger” if he maintains continuous backward pressure on the trigger, he can do the same with a bump-stock-equipped semiautomatic rifle if he maintains forward pressure on the gun. *Today’s decision to reject that ordinary understanding will have deadly consequences.* The majority’s artificially narrow definition hamstring the Government’s efforts to keep machineguns from gunmen like the Las Vegas shooter. I respectfully dissent.<sup>207</sup>

As noted above, Justice Alito’s concurrence essentially punted the ball back to Congress to reinstate the ban by amending the NFA to expressly ban bump stocks. *Rahimi* bolsters the argument that *if* Congress takes Justice Alito’s cue, such a ban would withstand constitutional challenge.<sup>208</sup> *Rahimi*,

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<sup>203</sup> *Id.* at 442 (citing *Abramski v. United States*, 573 U.S. 169, 181–82 (2014)).

<sup>204</sup> *Id.* Justice Sotomayor added that this was discussed in a text written by Justice Scalia and constitutional practitioner and scholar Bryan Garner. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 63 (2012).

<sup>205</sup> *Cargill*, 602 U.S. at 442 (Sotomayor, J., dissenting).

<sup>206</sup> *Id.* at 443.

<sup>207</sup> *Id.* at 446 (emphasis added) (citation omitted).

<sup>208</sup> See *United States v. Rahimi*, 144 S. Ct. 1889, 1897, 1902 (2024) (“[America’s] tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others.”). In theory, Justice Alito’s invitation suggests that he would find an amendment banning bump stocks constitutional, though, even had this reasoning been included in the majority opinion, it would have been classic dicta as the constitutionality of the NFA was not even challenged. See *Cargill*, 602 U.S. at 429 (Alito, J., concurring). If Justice Alito resigns, his replacement on the bench certainly might point that out. Nor can it be ignored that none of the other Justices joined Justice Alito’s concurrence.

like *Heller* and *Bruen*, engaged in a historical overview of the Second Amendment, going back to the Founding and affirming that the constitutionality of a gun regulation turns on “whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.”<sup>209</sup> The *Rahimi* court found that the Fifth Circuit misread *Bruen* to require a “‘historical twin’ rather than a ‘historical analogue.’”<sup>210</sup> A modern-day law, including restrictions on modern-day weapons, is constitutional so long as it is “relevantly similar” to the type of common-sense restrictions instituted in the past.<sup>211</sup> As explained in *Rahimi*:

[S]ome courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber. As we explained in *Heller*, for example, the reach of the Second Amendment is not limited only to those arms that were in existence at the founding. Rather, it “extends, prima facie, to all instruments that constitute bearable arms, even those that were not [yet] in existence.” By that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791. *Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers.*

As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is “relevantly similar” to laws that our tradition is understood to permit, “apply[ing] faithfully the balance struck by the founding generation to modern circumstances.”<sup>212</sup>

Notably, the *Rahimi* court rejected *Rahimi*’s suggestion that *Heller* stood for the proposition that it was unconstitutional to prohibit possession of a firearm in one’s own home.<sup>213</sup> *Rahimi* had argued that he should at least be permitted to keep a firearm inside his home for protection.<sup>214</sup> Implicit in the rejection of *Rahimi*’s argument is that weapons kept *inside* the home make it *outside* of the home, and therefore prohibitions can be put in

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<sup>209</sup> *United States v. Rahimi*, 144 S. Ct. 1889, 1897–98 (2024) (first citing *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008); and then citing *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 26–31 (2022)); see generally *id.* at 1899–1902.

<sup>210</sup> *Id.* at 1903 (quoting *Bruen*, 597 U.S. at 30).

<sup>211</sup> See *id.* at 1898, 1901 (quoting *Bruen*, 597 U.S. at 29).

<sup>212</sup> *Id.* at 1897–98 (emphasis added) (citations omitted).

<sup>213</sup> *Id.* at 1902.

<sup>214</sup> *Id.* (“*Rahimi* argues *Heller* requires us to affirm, because [the statute] bars individuals subject to restraining orders from possessing guns in the home, and in *Heller* we invalidated an ‘absolute prohibition of handguns . . . in the home.’”) (citation omitted).

place if there exists sufficient danger to others.<sup>215</sup> Although far from a done deal, the presumed constitutionality of a ban on machine guns, as well as the functional equivalent, such as bump stock-converted semiautomatic weapons, would likely apply to both existing and newly enacted federal and state laws.<sup>216</sup> In the interim, bump stocks are up for grabs, at least in those states that do not have an independent ban.

#### IV. THE AFTERMATH: BUMP STOCKS TAKE THEIR PLACE IN THE READILY AVAILABLE GUN MARKET

June 14, 2024. Seemingly minutes after the Supreme Court posted its ruling, a banner was added to the homepage of an online store selling bump stocks. It declared: “WE ARE USA LEGAL!!! Supreme Court lifts the ban! We are experiencing high volume. Please be patient for the next few days.”<sup>217</sup>

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<sup>215</sup> As discussed in Section II.A, *Heller*, examining *Miller*, recognized that it would be “startling” to find the NFA unconstitutional. See *District of Columbia v. Heller*, 554 U.S. 570, 624–25 (2008).

<sup>216</sup> See Andrew Chung, *With One Major Gun Case Looming, US Supreme Court Sidesteps Others*, REUTERS (July 2, 2024, 8:52 AM), <https://www.reuters.com/legal/us-supreme-court-rebuffs-challenge-illinois-assault-weapon-bans-2024-07-02/> [<https://perma.cc/6SFQ-D8SB>]. On July 2, 2024, dodging the issue for the 2024–2025 term, the Supreme Court denied certiorari in a case challenging an Illinois state ban on assault-style rifles. *Id.* The ban was put in place following a “massacre at a 2022 Independence Day parade in the Chicago suburb of Highland Park.” *Id.* The Supreme Court, however, heard oral arguments on an appeal regarding “ghost guns” on October 8, 2024, “challenging the government’s authority to regulate ‘ghost guns’ under the Gun Control Act of 1968.” Taonga Leslie, *Garland v. VanDerStok*, AM. CONST. SOC’Y: SCOTUS UPDATE (Oct. 8, 2024), [https://www.acslaw.org/scotus\\_update/garland-v-vanderstok/](https://www.acslaw.org/scotus_update/garland-v-vanderstok/) [<https://perma.cc/5KVJ-H63P>]; see also *Ghost Guns*, BRADY, <https://www.bradyunited.org/resources/issues/what-are-ghost-guns> [<https://perma.cc/S3GT-QXWP>] (explaining that ghost guns are “unserialized (and therefore untraceable) firearms that are put together by components purchased either as a kit or as separate pieces”). ATF rules currently prohibit “parts and kits for ghost guns, which can be assembled at home in minutes.” Chung, *supra* note 216; see also Amy Howe, *Supreme Court Temporarily Reinstates Rule Regulating “Ghost Guns,”* SCOTUSBLOG (Aug. 8, 2023, 1:27 PM), <https://www.scotusblog.com/2023/08/supreme-court-temporarily-reinstates-ban-on-ghost-guns/> [<https://perma.cc/WU3P-WLRN>]. Notably, the lower court blocked the ATF’s prohibition on “ghost guns,” meaning such weapons would again be legal, and four of the nine Justices (Justices Thomas, Alito, Gorsuch, and Kavanaugh) wanted to leave the lower court’s ruling in place pending final Supreme Court resolution. *Id.* As of December 18, 2024, the Supreme Court has not issued a ruling in *VanDerStok*. See generally *VanDerStok v. Garland*, 86 F.4th 179 (5th Cir. 2023).

<sup>217</sup> The backdrop read: “LOOKING FOR BUMPSTOCKS? WE GOT ‘EM,” followed by a clickable arrow. *Veteran Created. Veteran Owned.*, AM. BUMPSTOCK, <https://bumpstock.com/> [<https://perma.cc/Y7EN-TFJY>] (last visited June 14, 2024); see also Clayton Vickers, *Bump Stock Ruling Could Trigger Booming Rapid-Fire Marketplace*, YAHOO NEWS (May 21, 2024, 3:00 AM), <https://www.yahoo.com/news/bump->



When the Supreme Court talks, people listen. When a Supreme Court decision changes the law, it has real-life consequences. There were up to an estimated half a million bump stocks purchased prior to the ATF ban. That number could go much higher in the aftermath of *Cargill*.<sup>218</sup> Congress could intervene, albeit within constitutional limits, but they would have to actually *act* to do so. That seemed almost impossible amidst a political climate fraught with chaos and division, worsened by other polarizing Supreme Court decisions, and despite a narrowly avoided assassination attempt on a presidential candidate. The futility is not lost on Artemis and Diana.

ARTEMIS: It makes no sense to ban machine guns and not ban the functional equivalent.

DIANA: And there was a straightforward fix—Justice Alito’s concurrence. Congress could have just reinstated the ban.

ARTEMIS: All they had to do was utilize the “unanimous consent” parliamentary feature. They could have done that the next day.

IMP: You are both correct. That was an option.<sup>219</sup>

DIANA: *United States v. Trump*. When was that handed down?

IMP: *United States v. Trump* was handed down on July 1, 2024, two weeks and three days after *Cargill*. Twelve days later, on July 13, 2024, a gunman attempted to assassinate Donald J. Trump, the former

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stock-ruling-could-trigger-100000879.html?fr=sycsrp\_catchall [https://perma.cc/E5DU-KW4V] (discussing the potential public safety danger if bump stocks were legalized).

<sup>218</sup> Three days after the decision in *Cargill*, the inventor of the bump stocks at issue announced the sale of his business, previously characterized as somewhat smalltime. See Brian New, *After Supreme Court Strikes Down Ban, Bump Stock Inventor Puts Business Up for Sale*, CBS NEWS (June 18, 2024, 6:25 AM), <https://www.cbsnews.com/texas/news/after-supreme-court-strikes-down-ban-bump-stock-inventor-puts-business-up-for-sale/> [https://perma.cc/AYW4-XHZS]; see also Tiffany Hsu, *Bump Stock Innovator Inspired by People Who ‘Love Full Auto,’* N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/business/bump-stock-innovator.html> [https://perma.cc/ARK8-Y9QM]. Presumably, the timing of the cash-out signaled that the value of the company was enhanced by the Supreme Court decision, thereby indicating a potential ramp-up in production.

<sup>219</sup> See Igor Bobic, *Republicans Oppose Banning Bump Stocks Used in Las Vegas Shooting*, YAHOO NEWS (June 18, 2024, 3:20 PM), <https://www.yahoo.com/news/republicans-oppose-banning-bump-stocks-192026005.html> [https://perma.cc/4UMF-B2EN] (discussing New Mexico Senator Martin Heinrich’s attempt to pass a bill banning bump stocks within days of the *Cargill* decision).

president, then-nominee for the Republican party, who would become the President-elect within a few months. Trump was grazed by a bullet. A spectator was killed, and two others were critically wounded.

ARTEMIS: Did the shooter use a bump stock?

IMP: No. The shooter, who was 20 years old, used an AR-15, a semiautomatic rifle, which his father had purchased six months prior. The shooter was killed by Secret Service agents almost immediately after he fired seven to eight bullets in under ten seconds.<sup>220</sup>

DIANA: What if the AR-15 had been equipped with a bump stock?

IMP: Accuracy might have been compromised, but more shots could have been fired. Using six hundred shots per minute for the calculation, then the shooter could have fired one hundred shots in ten seconds.

Artemis and Diana shake their heads, dismayed and exasperated.

ARTEMIS: How could they not see what could be coming?

DIANA: Say it ain't so, Artemis.<sup>221</sup>

Artemis and Diana sink back in their lounges to begin the final session of their imPlant. This session includes the immediate reaction to *Cargill*, as well as the broader social and legal context. This session ends with a look at emerging legal and

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<sup>220</sup> See Rachel Sharp, *Explosive Devices Reported in Trump Gunman's Car After Failed Rally Assassination Attempt 'Using Father's Gun,'* YAHOO NEWS (July 14, 2024, 10:59 AM), [https://www.yahoo.com/news/explosive-devices-reported-trump-gunman-161210534.html?fr=sycsrp\\_catchal](https://www.yahoo.com/news/explosive-devices-reported-trump-gunman-161210534.html?fr=sycsrp_catchal) [<https://perma.cc/6M2P-K57W>]. There could have been several practical reasons why the killer chose not to use a bump stock, including that he may have been limited to his father's artillery. Alternately, there may simply have not been sufficient time between the *Cargill* ruling on June 14, 2024, and the shooting on July 13, 2024, for the shooter to obtain the additional accessories and ammunition necessary for the conversion.

<sup>221</sup> The final discourse is a popular cultural reference to the idiom, "Say it ain't so, Joe," which traces its roots to a 1919 gambling scandal where members of the White Sox betrayed public trust by allegedly throwing a World Series game. See Scott Chiusano, *Say It Ain't So, Joe: Remembering the 1919 Black Sox and Baseball's Biggest Scandal*, N.Y. DAILY NEWS, <https://www.nydailynews.com/2015/10/09/say-it-aint-so-joe-remembering-the-1919-black-sox-and-baseballs-biggest-scandal/> [<https://perma.cc/X83X-JZK5>] (Apr. 9, 2018, 7:57 AM). A dismayed and disillusioned young fan posed the question to "Shoeless Joe" Jackson, hoping to make sense out of the senseless. See *id.*

factual arguments that could reframe the national conversation on gun reform.

A. Immediate Reaction: Amidst a Chaotic End of the 2023–2024 Term, and Despite the Extreme Lethality and Enduring Trauma of the Las Vegas Massacre, Congress Fails to Reinstate the Ban

Shock rippled through the nation when the Supreme Court announced *Cargill*. No one felt it more than survivors of the Las Vegas Massacre. At least two were quoted as saying it felt like “a slap in the face.”<sup>222</sup> As further shared by survivor Megan O’Donnell Clements:

It feels very dismissive of what people went through that day when 58 people died, because I can tell you right now that 58 people wouldn’t be dead if the shooter hadn’t had the aid of that bump stock . . . So that feels . . . like a slap in the face.<sup>223</sup>

The *Las Vegas Sun* ran a scathing editorial, emphasizing the impact not just on the direct victims but the entire Las Vegas community:

We know better than most about the chaos and carnage a bump stock can inflict. The Oct. 1, 2017, Route 91 Harvest Festival shooting put the deadly power of bump stocks on display for all to see, as the deadliest mass shooting in modern American history unfolded on what is arguably the most famous stretch of road in the world.

The ease with which a lone gunman used weapons equipped with bump stocks to kill 60 people and injure more than 500 others in the span of 11 minutes would have been unbelievable had we not seen it

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<sup>222</sup> Sarah Mueller, ‘Frustrating’: A Delaware Survivor of the Las Vegas Mass Shooting Reacts to Supreme Court Overturning Bump Stocks Ban, WHY (June 16, 2024), <https://why.org/articles/delaware-survivor-las-vegas-mass-shooting-react-supreme-court-bump-stocks-decision/> [<https://perma.cc/4CRJ-NDPH>]. Survivor Brittany Quintero shared, “It feels like another slap in the fact, to be honest.” Kayla Epstein, *Supreme Court Gun Ruling Stuns Las Vegas Shooting Survivors*, BBC (June 14, 2024), <https://www.bbc.com/news/articles/c033d5323540> [<https://perma.cc/7ACT-QR2R>]. Heather Gooze, who previously testified before Congress, told the harrowing story of how she used her finger to plug a hole in a victim’s head in an attempt to save his life: “I had my finger in the bullet hole . . . in the back of their head.” *Id.* She also explained how she “watched people’s lives change right in front of [her] face, as well as [her] own [life].” *Id.*

<sup>223</sup> Mueller, *supra* note 222; see also Sahara Sajjadi, *AZ Survivor of Las Vegas Massacre Reflects on Return of Bump Stocks*, TUCSON.COM, [https://tucson.com/news/state-regional/az-survivor-of-las-vegas-massacre-reflects-on-return-of-bump-stocks/article\\_bd22ed19-e09f-5dd7-9c10-f401f2a87398.html](https://tucson.com/news/state-regional/az-survivor-of-las-vegas-massacre-reflects-on-return-of-bump-stocks/article_bd22ed19-e09f-5dd7-9c10-f401f2a87398.html) [<https://perma.cc/UJ5A-MLZE>] (June 30, 2024) (describing heart-wrenching details of the events and noting that at least one survivor, a gun owner, who did *not* want the ban lifted, was still suffering trauma and kept his guns “locked and loaded”).

with our own eyes and felt it in the fears, tears and heartache of our grieving friends, family and neighbors.

Within days of the shooting, the Bureau of Alcohol, Tobacco and Firearms reinterpreted the National Firearms Act of 1934 and Gun Control Act of 1968 – both of which were intended to outlaw machine guns and parts that can be used to convert a weapon into a machine gun – and issued a ban on bump stocks.

It was a logical step.

If a bump stock allows a semiautomatic gun to fire bullets at the same rate and with the same power as a fully automatic machine gun, then the law should apply. Moreover, the government's responsibility to protect public safety and security would seem to give it the authority to ban weapons and attachments that serve no purpose beyond inflicting mass casualties.

*Yet here we are.*<sup>224</sup>

Following the Supreme Court's ruling, Senators Susan Collins and Martin Heinrich led a bipartisan effort, introducing a bill to immediately reinstate the ban. Their effort was blocked by Pete Ricketts, a Republican senator from Nebraska.<sup>225</sup>

Groundhog Day.

Despite the horrific loss of life and broad, popular support for prohibiting the type of weaponry used by the Las Vegas Massacre killer, members of Congress fell in line with the NRA, which not only declared the ruling in *Cargill* a “victory for the rule of law,” but also dismissed Justice Sotomayor's well-reasoned dissent as “cute.”<sup>226</sup> Republican Senator Tom Cotton would go a step

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<sup>224</sup> *Court Misses Mark with Ill-Advised Ruling to Strike Ban on Bump Stocks*, LAS VEGAS SUN (June 16, 2024, 2:00 AM), <https://lasvegassun.com/news/2024/jun/16/court-misses-mark-with-ill-advised-ruling-to-strik/> [<https://perma.cc/PB3V-YMWM>] (emphasis added).

<sup>225</sup> Jalonick, *supra* note 125. Trump, reversing his prior position, plainly signaled opposition to a federal ban. See Alison Durkee, *Republicans Poised to Kill Bump Stock Ban—Even After Many Once Supported Restrictions*, FORBES (June 18, 2024, 8:16 AM), <https://www.forbes.com/sites/alisondurkee/2024/06/18/republicans-poised-to-kill-bump-stock-ban-even-after-many-once-supported-restrictions/> [<https://perma.cc/KN3K-R9ZY>]. For example, Senator J.D. Vance, who would join Trump on the presidential ticket a few weeks later, said the push for a ban amounted to “legislating in a way that solves fake problems.” *Id.* As discussed in the main text, Senator Vance's statement provoked outrage from Jacky Rosen, a Democratic senator from Nevada. See *infra* notes 229–230 and accompanying text. Meanwhile, Florida Senator Rick Scott opposed a federal ban, stating he was “fine with it being a states issue.” Durkee, *supra* note 225. Other Republicans, including Texas Senator John Cornyn and North Carolina Senator Thom Tillis, expressed a willingness to support a ban but asserted that their opposition was due to the failure of the Democrats to seek a bipartisan solution. See *id.*

<sup>226</sup> Frank Miniter, *Why the U.S. Supreme Court Stopped an ATF Bump-Stock Ban*, NRA: AM.'S 1ST FREEDOM (June 18, 2024), <https://www.americas1stfreedom.org/content/why-the-u-s-supreme-court-stopped-an-atf-bump-stock-ban/> [<https://perma.cc/CF5H-G56P>]. At least

further, suggesting that a ban on bump stocks “treads close to the line” of violating the Second Amendment.<sup>227</sup> J.D. Vance, Republican Senator from Ohio and future Trump running mate and Vice President-elect, joined the chorus, dismissing the notion that bump stocks contributed to the death toll.<sup>228</sup> Nevada Senator Jacky Rosen, whose constituents were harmed in the onslaught, clapped back.<sup>229</sup> In what was deemed an unusual “fiery response” for the ordinarily mild-mannered Democrat, Senator Rosen brought it home, literally:

Let him come to Las Vegas. Let him see the memorial for those people who died. Let him talk to those families. It's not a fake problem. Those families are dead . . . Las Vegas was changed forever because of what the shooter did, and the bump stocks helped him. And let JD Vance come – and I'm going to take him to the memorials. We're going to talk to – talk about our first responders, our ambulance drivers, our police, our firefighters, people at the blood bank, regular people. Shame on him. Shame on him for disrespecting the dead.<sup>230</sup>

The Supreme Court's decision and the failure of Congress to act grabbed headlines for a few days. But the news cycle switched

one scholar has recognized that the NRA has encouraged anti-government militias. *See* Siegel, *supra* note 95, at 228–29 (“Under [Neal] Knox and [Tanya K.] Metaksa's leadership, the NRA was openly entangled with militias that believed they had a constitutional right to fight against the federal government.”). It was only after the Waco standoff in 1993 and the Oklahoma City bombing in 1995 that the NRA began to distance itself from such militants. *See id.* at 229–30.

<sup>227</sup> Sarah Fortinsky, *Sen. Cotton Says Banning Bump Stocks 'Treads Close to the Line' of Being Unconstitutional*, THE HILL (June 16, 2024, 10:50 AM) <https://thehill.com/homenews/senate/4724511-tom-cotton-bump-stocks-supreme-court-second-amendment/> [<https://perma.cc/26KY-NNVJ>]. For a discussion regarding other arguments that machine guns and/or their functional equivalents should not properly be characterized as “unusual,” see *supra* Section III.B.

<sup>228</sup> Senator Vance, just weeks away from being tapped as the Republican vice presidential nominee, opposed reinstating the ban: “I think that we have to ask ourselves: Where is the real gun violence problem in this country, and are we legislating in a way that solves fake problems?” Bobic, *supra* note 219. Specifically addressing the Las Vegas Massacre, Vance added, “The question is: How many people would have been shot alternatively?” *Id.*

<sup>229</sup> Frank Thorp V & Sahil Kapur, *'Shame on Him for Disrespecting the Dead': Nevada Senator Erupts After Sen. JD Vance's Bump Stock Remarks*, NBC NEWS (June 17, 2024, 6:24 PM), <https://www.nbcnews.com/politics/congress/sen-jacky-rosen-erupts-sen-jd-vances-bump-stock-comments-rcna157646> [<https://perma.cc/R8RB-DTEE>].

<sup>230</sup> *Id.* Following the *Cargill* decision, Democratic Representative Dina Titus from Nevada introduced bipartisan legislation, a bill called “Closing the Bump Stock Loophole Act,” to codify the ATF's ban. Dick Cooper, *Rep. Titus Releases Statement Following Supreme Court Ruling on Bump Stocks*, CONGRESSWOMAN DINA TITUS (June 14, 2024), <https://titus.house.gov/news/documentsingle.aspx?DocumentID=3636> [<https://perma.cc/YSF7-X5RZ>]. She sent a letter, signed by sixty-two members of Congress, to Speaker of the House Mike Johnson, “urging” him to bring the bill to the floor for a vote. *Id.*

to the dizzying displays of other major Supreme Court decisions that would be handed down in the next two weeks, including a never-before-seen blitz of oral dissents.<sup>231</sup> On June 26, 2024, Justice Sotomayor read her dissent in *SEC v. Jarkesy*, voicing her concern that the Supreme Court was curtailing agency rights and shifting power to the judiciary.<sup>232</sup> The next day, Justice Jackson read her *Moyle v. United States* opinion, concurring in part and dissenting in part, where the Supreme Court failed to reach the merits and instead only temporarily blocked Idaho from enforcing a near-total abortion ban—one that had been challenged as skirting federal requirements for emergency care when a woman's health or life is in danger.<sup>233</sup> Justice Jackson emphatically warned that “storm clouds loom ahead.”<sup>234</sup>

One day later, on June 28, 2024, Justice Sotomayor took the bench to read her dissent in *City of Grants Pass v. Johnson*, where the Supreme Court sided with a municipality regarding an outdoor sleeping ban that arguably was selectively enforced only against the unhoused, thereby criminalizing the status of homelessness.<sup>235</sup> That day ended with Justice Kagan reading her

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<sup>231</sup> Joan Biskupic, *Oral Dissents Are Back in Vogue at the Supreme Court as Liberals Lament Latest Rulings*, CNN (June 29, 2024, 2:00 AM), <https://www.cnn.com/2024/06/29/politics/supreme-court-dissents-sotomayor-kagan-jackson/> [<https://perma.cc/74YD-KWKL>].

<sup>232</sup> *Id.*; see also Lawrence Hurley, *Liberal Justice Sotomayor Bemoans ‘Dismantling’ of Federal Agency Power as Supreme Court Curbs SEC*, NBC NEWS (June 27, 2024, 7:14 AM), <https://www.nbcnews.com/politics/supreme-court/supreme-court-curbs-sec-powers-enforce-securities-laws-rcna143446> [<https://perma.cc/5B83-9S6R>]. *Jarkesy* involved the constitutionality of an SEC proceeding where a monetary fine was imposed by an in-house SEC judge, and the defendant was not given the opportunity for a jury trial. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2126–27 (2024). In curtailing the power of administrative law judges to hear such cases, Justice Sotomayor cautioned, “Make no mistake: Today’s decision is a power grab.” *Id.* at 2175 (Sotomayor, J., dissenting).

<sup>233</sup> Debra Cassens Weiss, *‘Storm Clouds Loom Ahead’ After Supreme Court Dismisses Abortion Dispute, Justice Jackson Says*, ABA J. (June 27, 2024, 11:04 AM), <https://www.abajournal.com/web/article/storm-clouds-loom-ahead-after-supreme-court-dismisses-abortion-dispute-justice-jackson-says> [<https://perma.cc/UQ9H-SCA2>].

<sup>234</sup> *Id.*; see also *Moyle v. United States*, 144 S. Ct. 2015, 2026 (2024) (Jackson, J., dissenting). *Moyle* involved the Emergency Medical Treatment and Active Labor Act. *Id.* at 2023. The majority opinion failed to address the merits of the case. See *id.* at 2025. Yet, as noted by Justice Jackson in her dissent, Justice Alito “suggest[ed], at least in this context, that states have free reign to nullify federal law.” *Id.* at 2026. As to the many women imperiled by the uncertainty, Justice Jackson declared that the Court “owe[s] them—and the Nation—an answer.” *Id.* at 2026–27.

<sup>235</sup> *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2228 (2024) (Sotomayor, J., dissenting) (explaining that “[s]leep is a biological necessity, not a crime,” yet the statute at issue punishes unhoused people for that simple act). According to Joan Biskupic, “Gorsuch, who sits at Sotomayor’s immediate right on the bench, kept his head turned toward her, listening impassively” while the other Justices “stared out at spectators or

dissent in *Loper Bright Enterprises*, which dealt the death blow to the longstanding *Chevron* doctrine that gave deference to certain administrative agency determinations.<sup>236</sup> Pointing out that such agencies have far more expertise than judges, Justice Kagan, joined by Justices Sotomayor and Jackson, stated, “In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden . . . .”<sup>237</sup> Justice Kagan bluntly added that “[t]he majority disdains restraint, and grasps for power,” and “[i]f opinions had titles, a good candidate for [this one] would be Hubris Squared.”<sup>238</sup> In sum, the Supreme Court has turned itself into an “administrative czar.”<sup>239</sup>

All of this judicial turmoil occurred amidst the substantial political backlash of the presidential debate on June 27, 2024, which dominated media coverage as calls intensified for President Biden to step aside from the race.<sup>240</sup> The media covered this political fallout nearly twenty-four hours a day, seven days a week until July 1, 2024, when the Supreme Court handed down the long-awaited decision regarding presidential immunity in *Trump v. United States*.<sup>241</sup> Chief Justice Roberts authored the

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down at notes, perhaps anticipating the next opinions, and dissents, to be revealed.” Biskupic, *supra* note 231.

<sup>236</sup> *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting) (“For 40 years, [the *Chevron* doctrine] has served as a cornerstone of administrative law . . . [but t]oday, the Court flips the script.”). Recognizing prior criticism, Justice Gorsuch noted, “Today, the Court places a tombstone on *Chevron* no one can miss.” *Id.* at 2275 (Gorsuch, J., concurring).

<sup>237</sup> *Id.* at 2295 (Kagan, J., dissenting); see also Kelsey Reichmann & Ryan Knappenberger, *After Scathing Kagan Dissent, Experts Warn of Fallout from Chevron Overturn*, COURTHOUSE NEWS SERV. (June 28, 2024), <https://www.courthousenews.com/after-scathing-kagan-dissent-experts-warn-of-fallout-from-chevron-overturn/> [<https://perma.cc/QDB2-JC94>] (characterizing Kagan’s dissent as having “excoriated” her colleagues as she “warned of an impending massive shock to the administrative system”).

<sup>238</sup> *Loper Bright Enters.*, 144 S. Ct. at 2295 (Kagan, J., dissenting) (observing that “[a] longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority”); see also Reichmann & Knappenberger, *supra* note 237; Biskupic, *supra* note 231.

<sup>239</sup> *Loper Bright Enters.*, 144 S. Ct. at 2295 (Kagan, J., dissenting).

<sup>240</sup> Natasha Korecki et al., *‘Babbling’ and ‘Hoarse’: Biden’s Debate Performance Sends Democrats into a Panic*, NBC NEWS, <https://www.nbcnews.com/politics/2024-election/biden-debate-performance-democrats-panic-rcna157279> [<https://perma.cc/Y6BZ-BEK4>] (June 27, 2024, 8:38 PM); see also Tracy Mumford et al., *Why Tonight’s Debate Is Different, and New Supreme Court Rulings*, N.Y. TIMES (June 27, 2024), <https://www.nytimes.com/2024/06/27/podcasts/trump-biden-debate-supreme-court.html> [<https://perma.cc/XJY5-RUBK>] (hosting a discussion on the presidential debate and recent Supreme Court decisions).

<sup>241</sup> *Trump v. United States*, 603 U.S. 593 (2024).

majority opinion, announced in the last slot on the final day of the term.<sup>242</sup> While the Court held that presidents are not immune for purely personal conduct, they are arguably immune for any act that is in any way related to official conduct.<sup>243</sup> More precisely, the majority held that immunity for official acts, which includes “speaking to and on behalf of the American people . . . extends to the ‘outer perimeter’ of the President’s official responsibilities, covering actions so long as they are ‘not manifestly or palpably beyond [his] authority.’”<sup>244</sup>

The majority appeared to suggest there was a different standard—“presumptive immunity”—for corrupt conduct involving *both* official and unofficial acts.<sup>245</sup> Yet here, too, there was a trick-of-the-tongue in terms of evidentiary limitations. In theory, presidential immunity would not extend to known violations of the law that fall outside of presidential authority, such as hatching a plot with the Department of Justice to illegally target political opponents. However, a president would still effectively be immune given that the majority opinion mandated that any evidence pertaining to a president’s conduct, whenever they wear their presidential hat, cannot be presented in a criminal prosecution. The rationale was that the potential use of such evidence at a later date could pose a “danger[] of intrusion on the authority and functions of the Executive Branch.”<sup>246</sup> Moreover, “[i]n dividing official from unofficial conduct, courts may not inquire into the President’s motives.”<sup>247</sup> Courts similarly are precluded from “deem[ing] an action unofficial merely because it allegedly violates a generally applicable law.”<sup>248</sup> In other words, a president need not be bothered by a blurred line between official and unofficial acts. As further rationalized by the majority, “[i]f official conduct for which the President is immune may be scrutinized to help secure his conviction, *even on charges that purport to be based only on his unofficial conduct*, the ‘intended effect’ of immunity would be defeated.”<sup>249</sup>

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<sup>242</sup> *See id.*

<sup>243</sup> *Id.* at 615–17.

<sup>244</sup> *Id.* at 618 (alteration in original).

<sup>245</sup> *Id.* at 642.

<sup>246</sup> *Id.* at 624 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982)).

<sup>247</sup> *Id.* at 618.

<sup>248</sup> *Id.* at 619.

<sup>249</sup> *Id.* at 631 (emphasis added) (quoting *Nixon*, 457 U.S. at 756). The majority added, “The President’s immune conduct would be subject to examination by a jury on the basis of generally applicable criminal laws. Use of evidence about such conduct, even when an



How can a president possibly be convicted for criminal acts falling outside the scope of presidential authority if the prosecution is precluded from offering evidence of the president's conduct? What if a president threatened members of his Cabinet with a Tommy Gun? Given that a president has absolute authority to hold Cabinet meetings and fire Cabinet members, and therefore would have been engaged *at least in part* in an official act, evidence of the decidedly unofficial method of accomplishing that goal could not be presented at trial.<sup>250</sup>

Justice Sotomayor would have the last word for the 2023 Term. In a *tour de force*, she delivered one more scathing oral dissent, joined by Justices Kagan and Jackson, with an aligned concurrence by Justice Barrett.<sup>251</sup> And again, Justice Sotomayor read her dissent from the bench, with a firecracker start and a firecracker finish, both of which echoed themes from her dissent in *Cargill*, as well as the other passionate oral dissents read by Justices Kagan and Jackson that marked the end of the 2023 Term. Again, the Supreme Court was shifting the balance of power, ignoring both common sense and the clear intent of the Founders. As summarized in the first paragraph of Justice Sotomayor's dissent:

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indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decisionmaking will be distorted." *Id.*

<sup>250</sup> Justice Jackson uses a similar analogy in her dissent, contemplating how a president would be effectively immune from liability if he killed the Attorney General by "poisoning him to death." *Id.* at 694 n.5 (Jackson, J., dissenting). In that circumstance, the issue "is not whether the President has exclusive removal power, but whether a generally applicable criminal law prohibiting murder can restrict *how* the President exercises that authority." *Id.*

<sup>251</sup> See *id.* at 650, 657 (Barrett, J., concurring in part; then Sotomayor, J., dissenting). Justice Barrett declined to sign onto Section III.C of the majority opinion, which pertained to the evidentiary exclusion discussed above. *Id.* at 650 (Barrett, J., concurring in part). As such, this critical part of the opinion tallied up to the boys versus the girls. See Adam Liptak, *Justice Amy Coney Barrett's Independent Streak Marked Supreme Court Term*, N.Y. TIMES (July 8, 2024), <https://www.nytimes.com/2024/07/08/us/politics/amy-coney-barrett-supreme-court-justice.html> [<https://perma.cc/REV6-7MG4>]. In stepping away from the majority, Justice Barrett wrote that she "agree[d] with the dissent," noting the "Constitution does not require blinding juries to the circumstances surrounding conduct for which Presidents *can* be held liable." *Trump*, 603 U.S. at 655 (Barrett, J., concurring). In particular, Justice Barrett presented the example of a president illegally taking a bribe, recognizing the common-sense reality that "excluding from trial any mention of the official act connected to the bribe would hamstring the prosecution." *Id.* at 655–56. In other words, "[t]o make sense of charges alleging a *quid pro quo*, the jury must be allowed to hear about both the *quid* and the *quo*, even if the *quo*, standing alone, could not be a basis for the President's criminal liability." *Id.* at 656.

Today's decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law. . . . [T]he Court gives former President Trump all the immunity he asked for and more. Because our Constitution does not shield a former President from answering for criminal and treasonous acts, I dissent.<sup>252</sup>

Justice Sotomayor squarely tackled that trick-of-the-tongue by which the majority claimed something was one thing when it clearly was not. She pointed out that, given the evidentiary gymnastics in the majority opinion, any corrupt act engaged in by a president in their official capacity was shielded from prosecution.<sup>253</sup> As a practical matter, the evidentiary exclusion of any conduct involving any use of presidential powers, even if blatantly illegal, meant that a president could grossly misuse those presidential powers—including condoning, engaging in, or even authorizing violence—with no criminal culpability.<sup>254</sup> That was tantamount to absolute immunity, and a president would effectively be a “king.”<sup>255</sup> These concerns, and the aligned concerns of Justice Barrett, were left unaddressed in the majority opinion, thereby suggesting the breadth truly was as broad as it seemed.<sup>256</sup> The potential for *future* usurpation of power and violence was not lost on Justice Sotomayor. As explained in her fiery finish:

[T]he long-term consequences of today's decision are stark. The Court effectively creates a law-free zone around the President, upsetting the status quo that has existed since the Founding. *This new official-acts immunity now “lies about like a loaded weapon” for any President that wishes to place his own interests, his own political survival, or his own*

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<sup>252</sup> *Trump*, 603 U.S. at 657 (Sotomayor, J., dissenting). Notably, Justice Sotomayor omitted “respectfully” from her ending line, which is typically interpreted as a vitriol protest “signal[ing] . . . to the world at large that the majority opinion does not deserve legitimation.” Note, *From Consensus to Collegiality: The Origins of the “Respectful” Dissent*, 124 HARV. L. REV. 1305, 1325 (2011).

<sup>253</sup> *Trump*, 603 U.S. at 685 (Sotomayor, J., dissenting).

<sup>254</sup> In Justice Sotomayor's words: “Whether described as presumptive or absolute, under the majority's rule, a President's use of any official power for any purpose, even the most corrupt, is immune from prosecution. That is just as bad as it sounds, and it is baseless.” *Id.* at 659. Although Justice Barrett did not formally join the dissent, this was the exact point she made in her concurrence. See *supra* note 251 and accompanying text.

<sup>255</sup> *Trump*, 603 U.S. at 685 (Sotomayor, J., dissenting).

<sup>256</sup> Legal excerpts opined that the failure to discuss the concerns raised by the dissenting Justices was unusual and telling. See Aysha Bagchi, *Democracy Turns into a Dictatorship: Experts Warn About SCOTUS Presidential Immunity Ruling*, USA TODAY (July 11, 2024, 5:11 AM), <https://www.usatoday.com/story/news/politics/elections/2024/07/11/donald-trump-immunity-supreme-court-powers/74332048007/> [<https://perma.cc/B8VS-QVQM>].

*financial gain, above the interests of the Nation.* The President of the United States is the most powerful person in the country, and possibly the world. When he uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.

Let the President violate the law, let him exploit the trappings of his office for personal gain, let him use his official power for evil ends. Because if he knew that he may one day face liability for breaking the law, he might not be as bold and fearless as we would like him to be. That is the majority's message today.

Even if these nightmare scenarios never play out, and I pray they never do, the damage has been done. The relationship between the President and the people he serves has shifted irrevocably. In every use of official power, *the President is now a king above the law.*<sup>257</sup>

Justice Kagan summed up her dissent ominously: "With fear for our democracy, I dissent."<sup>258</sup>

Against this chaotic backdrop, the initial outcry over *Cargill*—decided just two weeks prior—morphed from a sizable roar to little more than a whimper. Ironically, at this exact same time, the threat of violent civil unrest dramatically increased.

#### B. Implications: The Potential Impact of Legalized Bump Stocks (and Machine Guns) on General Criminality and Armed Rebellions

"Victory or death." As noted above, this was the battle cry heard just one day after *Cargill* was handed down when Steve Bannon barked this catchphrase at a political rally in Detroit, Michigan.<sup>259</sup> Bannon talked about the "MAGA army" and "judgment day."<sup>260</sup> The focus was on the 2020 and 2024

<sup>257</sup> *Trump*, 603 U.S. at 684–86 (Sotomayor, J., dissenting) (emphasis added) (internal citations omitted).

<sup>258</sup> *Id.* at 686.

<sup>259</sup> Hains, *supra* note 23. Similar incendiary rhetoric was repeated again and again on Bannon's podcast, *The War Room*. See Sarah Smith, *Steve Bannon Says 'Maga Army' Ready, as He Reports to Prison*, BBC NEWS (July 1, 2024), <https://www.bbc.co.uk/news/articles/c80ek470d99o.amp> [<https://perma.cc/H9DZ-GEJT>]. In a BBC interview before going to prison, Bannon asserted that the "Maga army" was ready. *Id.* He proclaimed, "I'm going to be more powerful in prison than I am now." Sara Murray, Katelyn Polantz & Devan Cole, *Steve Bannon Begins Serving 4-Month Sentence in Federal Prison for Defying Congressional Subpoena*, CNN, <https://www.cnn.com/2024/07/01/politics/steve-bannon-report-to-prison/index.html> [<https://perma.cc/H9DZ-GEJT>] (July 1, 2024, 11:19 PM).

<sup>260</sup> Hains, *supra* note 23; Smith, *supra* note 259.

presidential elections and how supporters needed to fight a “war to the knife” to take back their country.<sup>261</sup> Instead of vilifying those who violently stormed the Capitol on January 6, 2021, they were deemed “patriots,” worthy of presidential pardons.<sup>262</sup> Sure, some may have been gawkers, but there were plenty who were armed and ready.<sup>263</sup> America watched live as police were bloodied and maimed. Some in the crowd brought gallows to hang Vice President Mike Pence if he dared certify the results.<sup>264</sup> Others used bear spray and a broad array of other weapons to beat past Capitol police who were doing their best to hold the line.<sup>265</sup> The Proud Boys and Oath Keepers, militant groups whose leaders later would be convicted of sedition, riled the crowd.<sup>266</sup> Employing military tactics, they spearheaded breaking through the doors of Congress. Once inside, the rioters menacingly hunted for Nancy Pelosi, the Speaker of the House.<sup>267</sup>

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<sup>261</sup> Zachary B. Wolf, *Trump's Former Top Strategist Pushes the 2024 Election as a 'Victory or Death!' War*, CNN (June 18, 2024, 12:00 AM), <https://www.cnn.com/2024/06/18/politics/bannon-trump-election-what-matters/index.html> [<https://perma.cc/BVY5-W29E>].

<sup>262</sup> See Hains, *supra* note 23; Ryan J. Reilly & Olympia Sonnier, *Trump Says He May Free Every Jan. 6 Rioter. His Team Is Eyeing 'Case-by-Case' Pardons.*, NBC NEWS (April 30, 2024, 9:38 AM), <https://www.nbcnews.com/politics/donald-trump/trump-pardon-jan-6-capitol-rioters-rcna149900> [<https://perma.cc/R8EB-CH6N>].

<sup>263</sup> During a congressional hearing regarding the events of January 6, 2021, Cassidy Hutchinson, a White House aide, testified that President Trump was informed that some rally attendees remained outside of the security perimeter “because they had weapons and didn’t want to pass through metal detectors.” Carl Hulse, *Six Takeaways from Cassidy Hutchinson's Explosive Testimony*, N.Y. TIMES, <https://www.nytimes.com/live/2022/06/28/us/jan-6-hearing-today> [<https://perma.cc/VDX6-W94F>] (Oct. 23, 2024).

<sup>264</sup> Scott MacFarlane, *Newly Obtained Video Shows Movement of Group Suspected of Constructing Jan. 6 Gallows Hours Before Capitol Siege*, CBS NEWS, <https://www.cbsnews.com/news/jan-6-gallows-construction-new-video/> [<https://perma.cc/8CFK-QJEN>] (Mar. 18, 2024, 8:55 PM).

<sup>265</sup> Tom Dreisbach & Tim Mak, *Yes, Capitol Rioters Were Armed. Here Are the Weapons Prosecutors Say They Used*, NPR (Mar. 19, 2021, 5:06 AM), <https://www.npr.org/2021/03/19/977879589/yes-capitol-rioters-were-armed-here-are-the-weapons-prosecutors-say-they-used> [<https://perma.cc/W9UH-XMDF>].

<sup>266</sup> See Tom Dreisbach, *Jan. 6 Defendants Celebrate Trump's Win and Anticipate Pardons*, NPR (Nov. 7, 2024, 4:38 PM), <https://www.npr.org/2024/11/07/nx-s1-5181581/2024-election-trump-capitol-riot-pardons> [<https://perma.cc/QN95-5BNY>].

<sup>267</sup> See Brendan Williams, *Divided We Fall: The Concerted Attack on U.S. Democracy*, 59 WILLAMETTE L. REV. 121, 122–23 (2003). Williams describes the attack on the Capitol where insurrectionists roamed the halls calling, “Where are you, Nancy?” *Id.* at 123. Similar verbiage was used in a later attack on Speaker Pelosi’s husband, Paul Pelosi, when a politically-motivated intruder broke into their home and assaulted him with a hammer, resulting in a skull fracture. *Id.* at 122; see also Joe Fitzgerald Rodriguez, Heather Knight & Tim Arango, *Man Who Attacked Nancy Pelosi's Husband Is Convicted in California Trial*, N.Y. TIMES (June 21, 2024), <https://www.nytimes.com/2024/06/21/us/pelosi-attack-depape-verdict.html> [<https://perma.cc/E98U-M4GL>].

Lawmakers raced for safety, fearing for their lives. And the threat existed well beyond the grounds of the Capitol. Militants were holed up in a Virginia motel with a cache of rifles and other firepower, prepared to transport the weapons to the Capitol at a moment's notice.<sup>268</sup>

Imagine what might have ensued if the insurrectionists were armed with bump stock conversions—the functional equivalent of machine guns—when they stormed through the doors of the U.S. Capitol.<sup>269</sup>

The January 6, 2021, attack on the Capitol was not the only violent show of force against the government, and it would not be the last. During the ramp-up to the 2020 presidential election, militants stormed the Michigan State Capitol, brandishing long guns and threatening lawmakers over COVID-19 mandates.<sup>270</sup> Later, others were arrested for plotting to kidnap and presumably execute Gretchen Whitmer, the Governor of Michigan.<sup>271</sup> Following heated and violent rhetoric after an FBI search of former President Trump's residence at Mar-a-Lago (for wrongfully withheld classified documents), an Ohio man issued a "call to arms" on social media and attacked a local FBI field office.<sup>272</sup> Again, imagine the terror that could have ensued had

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<sup>268</sup> See Ryan J. Reilly & Daniel Barnes, *Oath Keeper Testifies About Massive Gun Pile Stashed in Hotel on the Eve of Jan. 6*, NBC NEWS (Oct. 12, 2022, 12:26 PM), <https://www.nbcnews.com/politics/justice-department/oath-keeper-testifies-massive-gun-pile-stashed-hotel-eve-jan-6-rcna51749> [<https://perma.cc/BRX6-2BMS>].

<sup>269</sup> In terms of pardon power, the *Trump* majority clearly stated, "The President's authority to pardon . . . is 'conclusive and preclusive,' 'disabling the Congress from acting upon the subject.'" *Trump v. United States*, 603 U.S. 593, 608 (2024) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952)). Two paragraphs down, the majority added, "Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority." *Id.* at 609 (emphasis added). In other words, if a president, or presidential candidate subsequently elected, encouraged supporters to engage in violence, then he presumably would have unfettered power to pardon such supporters for any violation of federal law.

<sup>270</sup> Louis Casiano, *Michigan Protesters Storm State Capitol in Fight over Coronavirus Rules: 'Men with Rifles Yelling at Us'*, FOX NEWS (Apr. 30, 2020, 5:34 PM), <https://www.foxnews.com/us/michigan-lansing-coronavirus-protest-capitol-guns-rifles> [<https://perma.cc/L3A6-M66F>].

<sup>271</sup> Mitch Smith, *Two Men Convicted in Plot to Kidnap Michigan's Governor*, N.Y. TIMES (Aug. 23, 2022), <https://www.nytimes.com/2022/08/23/us/verdict-trial-gretchen-whitmer-kidnap.html> [<https://perma.cc/3A93-88PW>] (also noting the intent was to "instigate a national rebellion").

<sup>272</sup> Elizabeth Wolfe et al., *An Armed Man Tried to Enter the FBI's Cincinnati Office and Was Fatally Shot After a Standoff with Police. Here's What We Know*, CNN, <https://www.cnn.com/2022/08/12/us/fbi-cincinnati-office-armed-suspect-what-we-know/index.html> [<https://perma.cc/X55K-2BS8>] (Aug. 12, 2022, 7:06 PM). The man wore body armor and carried an AR-15 rifle and a nail gun. *Id.* His posts, which reflected his

these individuals been able to legally purchase bump stocks. Now they can. While seventeen states and the District of Columbia prohibit the sale of bump stocks within their jurisdictional limits,<sup>273</sup> the frank reality is that unless and until there is a national ban, bump stocks are available to anyone, anywhere.<sup>274</sup>

Add to the mix the danger of putting machine guns, or their functional equivalents, in the hands of criminals, thereby arming them with equal or greater firepower than law enforcement.<sup>275</sup> That motivated the passage of the NFA in 1934. And the terror was not just from organized crime. Bonnie and Clyde were their own two-person team of bank robbers. Imagine if modern-day “smash-and-grab” or home invasion criminals added machine guns to their respective arsenals.<sup>276</sup> Whether it be mobsters, common criminals, or insurrectionists, is the Second Amendment really so elastic that it entitles citizens to brandish machine gun weaponry that can be used to terrorize other citizens or overthrow the government?

While the constitutionality of the NFA seemed beyond the reach of a Second Amendment challenge when *Cargill* was handed down, and Justice Alito did expressly invite Congress to enact legislation to reinstall the ban, the seeds have been planted to take the Second Amendment in a different direction. The legal basis to ban machine guns and *a fortiori* bump stock conversions, lies in the recognized ability of government entities to ban “dangerous and unusual” weapons.<sup>277</sup> Yet, as noted in Justice Breyer’s dissent in *Heller*, that would *not* cover weapons—no

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belief that the 2020 election had been stolen, became “increasingly politically violent and revolution-minded” just prior to the attack. *Id.* He urged others to join with him and “get whatever you need to be ready for combat.” *Id.*

<sup>273</sup> *What Are Bump Stocks?*, GIFFORDS, <https://giffords.org/what-are-bump-stocks/> [<https://perma.cc/BR6M-K33F>] (Nov. 1, 2024) (identifying California, Connecticut, Delaware, Florida, Hawaii, Iowa, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, Rhode Island, Vermont, Virginia, Washington, and Washington, D.C. as jurisdictions where the sale of bump stocks is prohibited).

<sup>274</sup> For example, when California banned semiautomatic weapons, they still could be purchased in neighboring states. See Lenett, *supra* note 94, at 580–81.

<sup>275</sup> For a discussion of possible consequences, see Brandon del Pozo & Barry Friedman, *Policing in the Age of the Gun*, 98 N.Y.U. L. REV. 1831, 1836 (2023) (noting “the law of guns is on a collision course with the law of policing, the growing ripples of which are being felt all over the country” and examining “how the rapid deregulation and rampant possession of firearms is going to affect policing”).

<sup>276</sup> See Ira P. Robbins, *Deconstructing Burglary*, 57 U.C. DAVIS L. REV. 1489, 1517 (2024) (describing smash-and-grab criminals as “[p]erpetrators, sometimes traveling in large groups, smash[ing] windows or otherwise enter[ing] retail stores”).

<sup>277</sup> *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (citation omitted).

matter how dangerous—that were not unusual.<sup>278</sup> Justice Breyer argued the majority had settled upon the untenable, namely that *but for* the longstanding NFA ban, the majority would have to find that the Second Amendment afforded protection for the possession of machine guns and like instrumentalities, were they to become commonly marketed.<sup>279</sup> In an eerily prophetic hypothetical that has applicability to bump stocks, Justice Breyer cautioned:

According to the majority’s reasoning, if Congress and the States lift restrictions on the possession and use of machineguns, and people buy machineguns to protect their homes, the Court will have to reverse course and find that the Second Amendment *does*, in fact, protect the individual self-defense-related right to possess a machinegun. On the majority’s reasoning, *if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so.* In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing the Framers intended such circular reasoning.<sup>280</sup>

Specifically discussing bump stocks, one emerging scholar recently explored the notion that the more a weapon or accessory becomes used and readily available, the better an argument can be made that possession warrants Second Amendment protection.<sup>281</sup> In other words, even presuming bump stock conversions are “dangerous,” they will not be “unusual” if a sufficient number of Americans purchase them. The longer it takes Congress to prohibit bump stocks, the more bump stocks flood the market.<sup>282</sup> And as noted above, the constitutionality of the NFA has never really been litigated. If bump stocks conversions get taken out of the “unusual” bucket, an argument can be made that their functional equivalent—*actual machine guns*—should also be unrestricted.

The National Association for Gun Rights (NAGR) already tested an argument based on common use in a challenge to Connecticut’s ban on certain firearms and accessories,

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<sup>278</sup> See *id.* at 720–21 (Breyer, J., dissenting).

<sup>279</sup> See *id.*; see also Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization and the Second Amendment*, 46 CUMB. L. REV. 33, 70 (2016) (discussing Justice Breyer’s argument in the context of gun silencers).

<sup>280</sup> *Heller*, 554 U.S. at 721 (Breyer, J., dissenting) (second emphasis added).

<sup>281</sup> See Oliver Krawczyk, *Dangerous and Unusual: How an Expanding National Firearms Act Will Spell Its Own Demise*, 127 DICK. L. REV. 273, 304–06 (2022).

<sup>282</sup> See *id.*

specifically including large capacity magazines.<sup>283</sup> Round one was whether a preliminary injunction should be issued. The district court declined the invitation. As noted at the very top of the court's opinion, Connecticut's law was passed following the devastating shooting at the Sandy Hook Elementary School, where the killer used a semiautomatic gun to "fire[] 154 shots in less than five minutes," killing twenty-six people, most of whom were young children.<sup>284</sup> The NAGR advanced several arguments that pushed *Heller* to the extreme. Per the NAGR, any weapon or accessory that somehow falls into "common use" cannot be restricted regardless of its potential for fatality.<sup>285</sup> In that circumstance, the weapon's danger is irrelevant—even if the weapon is the "most dangerous weapon on earth"—as it would not be "unusual."<sup>286</sup> The court soundly rejected this argument, though it can be expected that the argument will make its way to the Supreme Court, especially if accessories like bump stocks become relatively common.<sup>287</sup>

Put simply, while machine guns are still prohibited, there is no guarantee the NFA will withstand constitutional challenge. And even if the ban on machine guns were to stand, there certainly is no guarantee bump stock conversions would be off-limits if they become commonplace. That danger grows exponentially with each bump stock purchased and with every day that passes following the lifting of the ban. The enormity of the issue begs the question: could the divide over gun legislation be bridged by

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<sup>283</sup> See *Nat'l Ass'n for Gun Rights v. Lamont*, 685 F. Supp. 3d 63, 71 (D. Conn. 2023).

<sup>284</sup> *Id.* at 70–71; see also Megan B. Mavis & Matthew D. Shapiro, *Second Amendment Interpretation and a Critique of the Resistance to Common-Sense Gun Regulation in the Face of Gun Violence: This Is America*, 46 W. STATE L. REV. 85, 100 (2019) (noting the killer "murdered twenty first-grade children and six adults").

<sup>285</sup> *Nat'l Ass'n for Gun Rights*, 685 F. Supp. 3d at 102.

<sup>286</sup> *Id.* But see Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 63–64 (1992). Professor Andrew Jay McClurg, back in 1992, illustrated the absurdity of such an argument. As posed in syllogistic terms, "The Second Amendment protects an individual's right to keep and bear any type of arm. A nuclear weapon is a type of arm. Therefore, the Second Amendment protects an individual's right to keep and bear nuclear weapons." *Id.*

<sup>287</sup> See *Nat'l Ass'n for Gun Rights*, 685 F. Supp. 3d at 102. There is at least one cohort of gun owners who use bump stocks for sport. In an episode of the popular series, *Parts Unknown*, chef and travel documentarian Anthony Bourdain visited Virginia and spoke with gun enthusiasts who were using gun modifications to turn rifles into fully automatic weapons for sport target practice at a backyard gathering; the footage was juxtaposed against ten seconds of "brutal" footage from the Las Vegas Massacre. Jennifer Neal & Nathan Thornburgh, *Parts Unknown Fan Recap: West Virginia*, ANTHONY BOURDAIN PARTS UNKNOWN (Apr. 30, 2018), <https://explorepartsunknown.com/west-virginia/parts-unknown-fan-recap-west-virginia/> [<https://perma.cc/8HWA-C5YK>].



reframing the constitutional issue? And could that begin by simply listening to and respecting each other's rights?

### C. Reframing the Constitutional Issue: The Individual and Societal Right to Be Protected from Terror

"I check for escape routes wherever I go . . . A balloon popped at a gay bar I was at, and the whole place went silent . . . I think about it every day."<sup>288</sup> These are but a few comments of many solicited by *The New York Times* for a 2024 article highlighting the impact of gun violence not just on direct victims, but indirect victims too.<sup>289</sup> Readers were asked "whether the threat of gun violence has affected their mental state or the way they lead their lives."<sup>290</sup> In a recent poll, seven out of ten reported experiencing stress, the highest percentage was amongst women, Latino, and Black respondents.<sup>291</sup> As *The New York Times* summarized:

Some readers said the sheer number of shootings in America has left them numb or resigned. A more sizable group described feeling frustrated, angry and helpless. Some said they now avoid crowded events and public transportation, scan public venues for nearby escape routes or stay at home more often. A handful said they had moved to different cities or even to another country to try to escape the threat.

Fear was a unifying thread, regardless of whether someone had directly encountered gun violence.<sup>292</sup>

Social rhetoric pertaining to gun reform typically centers the direct victims. From the children gunned down at Sandy Hook to the children at Uvalde, our hearts naturally turn to the tragic loss of life.<sup>293</sup> In a better world, this alone would move the needle

<sup>288</sup> Christina Caron, *Gun Violence Has Changed Us*, N.Y. TIMES, <https://www.nytimes.com/interactive/2023/03/26/well/mind/gun-violence-shootings.html?smid=nytcore-ios-share&referringSource=articleShare> [<https://perma.cc/NZ3M-KYK7>] (Mar. 29, 2023).

<sup>289</sup> See Mavis & Shapiro, *supra* note 284, at 120. These authors provide an excellent summary of many instances of gun violence, including mass murders. They note that, as of 2019, "the public has now been desensitized to the reality that at any point in time, a person, armed with a firearm, may pose a threat to you in your home, at work, or at school." *Id.* at 120.

<sup>290</sup> *Id.* More than six hundred responses were received. *Id.*

<sup>291</sup> *Id.* (citing the Harris Poll for the American Psychological Association).

<sup>292</sup> *Id.*

<sup>293</sup> Nicholas Bogel-Burroughs, *An Uvalde Pediatrician Says He Will 'Never Forget What I Saw' After the Shooting*, N.Y. TIMES, (June 8, 2022), <https://www.nytimes.com/2022/06/08/us/valde-pediatrician-shooting.html> [<https://perma.cc/S7GA-SVQY>]. In emotional and graphic testimony before Congress, Dr. Roy Guerrero, a pediatrician, described how two of the children's bodies were "pulverized" and "decapitated" by the sheer torrent of bullets. *Id.*

toward sensible gun reform. But it has not. The catchphrase, “Guns don’t kill people. People kill people,” sums it up.<sup>294</sup> Gun lobbyists characterize mass murders as one-offs by crazed madmen. But if the history of the NFA is instructive, there is a different way to view this issue: from the perspective of *indirect* victims, including society at large.<sup>295</sup>

In the 1930s, when Al Capone and his henchmen terrorized Chicago by shooting members of rival mobs, it is reasonable to presume that many, if not most, Americans really did not care about the *gangsters* that ended their day in a body bag. But they did care about the police officers and law-abiding citizens caught in the crossfire.<sup>296</sup> The chance of being a direct victim may have been low, but the chance of being an *indirect* victim was inevitable and inescapable. The same reasoning applies today. It is not just the carnage of direct victims; it also is the cumulative toll on society.<sup>297</sup>

On June 25, 2024, just nine days after *Cargill* was handed down, Surgeon General Dr. Vivek Murthy issued an advisory declaring gun violence a public health crisis.<sup>298</sup> One of the most alarming findings was that, since 2020, gun violence has been the leading cause of death for children and adolescents ages one through nineteen.<sup>299</sup> Over half of Americans (54%) have reported that they or a family member have experienced a “firearm related incident” and 21% have been threatened with a firearm.<sup>300</sup> A full 19%, nearly one in five, have a family member

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<sup>294</sup> See Geoffrey S. Corn, *Deterring Illegal Firearms in the Community: Special Needs, Special Problems, and Special Limitations*, 43 CARDOZO L. REV. 1515, 1517 (2022) (“[G]uns don’t kill people. People kill people,” is the common catchphrase” of gun rights proponents, reflecting the argument that the “‘problem’ is not access to firearms, but the people who use them.”); see also Siegel, *supra* note 95, at 208 (noting an argument *against* gun control centers on the notion that “[l]aw abiding people, and particularly gun owners, are tired of being blamed for crime”).

<sup>295</sup> See Corn, *supra* note 294, at 1515 (arguing that gun violence is a “public health crisis,” especially for “densely populated and economically challenged communities”). “The threat of becoming the intended or innocent victim of gun violence in these communities has become so pervasive that it only seems to make the headlines when the numbers are truly shocking to the general public.” *Id.*

<sup>296</sup> See BAIR, *supra* note 69, at 138 (discussing how “general indifference came to a swift . . . end” following the public shock caused by the extensive and graphic media coverage of the St. Valentine’s Massacre, which finally “galvanized” public officials to take action).

<sup>297</sup> See, e.g., Corn, *supra* note 294, at 1515.

<sup>298</sup> U.S. SURGEON GEN., U.S. PUB. HEALTH SERV., FIREARM VIOLENCE: A PUBLIC HEALTH CRISIS IN AMERICA (2024).

<sup>299</sup> *Id.* at 3.

<sup>300</sup> *Id.* at 5.

who has died by gunshot.<sup>301</sup> The advisory pointed to the indirect impact of gun violence on the public at large, as reflected in a 2023 study.<sup>302</sup> The numbers were staggering and similar to those cited in *The New York Times* article. As set forth in the advisory with emphasis:

Nearly 6 in 10 U.S. adults say that they worry “sometimes,” “almost every day,” or “every day,” about a loved one being a victim of firearm violence. Such high levels of exposure to firearm violence for both children and adults give rise to a cycle of trauma and fear within our communities contributing to the nation’s mental health crisis.<sup>303</sup>

One manner of reframing the societal issue might rest in that oft-quoted language in the Declaration of Independence regarding the reciprocal American ideal of “life, liberty, and the pursuit of happiness.”<sup>304</sup> This simple core principle of freedom lies at the heart of what both laypersons and scholars understand to embody American exceptionalism.<sup>305</sup> It reflects governmental respect for individual rights, as well as each individual’s respect for the government and the rights of others.<sup>306</sup> Therein lies the competing interests that could

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<sup>301</sup> *Id.* The latter statistic includes suicide. Additional statistics establish that 17% of Americans have witnessed someone being shot, 4% have used a firearm in self-defense, and 4% have been injured by a firearm. *Id.*

<sup>302</sup> Shannon Schumacher, *Americans’ Experiences with Gun-Related Violence, Injuries, and Deaths*, KFF (Apr. 11, 2023), <https://www.kff.org/other/poll-finding/americans-experiences-with-gun-related-violence-injuries-and-deaths/> [https://perma.cc/Y9NB-L6QT].

<sup>303</sup> U.S. SURGEON GEN., U.S. PUB. HEALTH SERV., *supra* note 299, at 5; *see also id.* at 14–18 (discussing the “collective toll” on communities).

<sup>304</sup> *See* Philip Schuster & David Park, *Shocking the Conscience: Whether the Right to Bear Arms Overrides the Due Process Right to Life*, 56 WILLAMETTE L. REV. 109, 117 (2020) (arguing the life and liberty language in the Due Process Clause of the Fourteenth Amendment creates a substantive right to be free from exposure to extreme gun violence). As argued by these scholars, “Substantive Due Process guarantees for citizens are triggered when gun violence or mass shootings become ‘continual, intrusive,’ and ‘shock the conscience.’” *Id.* (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 879 (2010) (Stevens, J., dissenting)).

<sup>305</sup> For a discussion of the interrelation between judicial constitutional interpretation and general societal understanding of constitutional principles, *see* Katie R. Eyer, *The Declaration of Independence as Bellwether*, 89 S. CAL. L. REV. 427, 428–29 (2016). Eyer notes that while the phrase “life, liberty and the pursuit of happiness” is in the Declaration of Independence and not the Constitution, the phrase “remains one of the most oft-invoked principles of American ‘constitutional’ text.” *Id.* at 428. Eyer further explains that such phrases “have long played—and continue to play—an outsized role in popular engagement with constitutional values.” *Id.* at 429 (footnote omitted).

<sup>306</sup> Per Eyers, as of 2016, the phrase “‘life, liberty and the pursuit of happiness’ can be found 145 times since 1980 in the presidential speeches and documents archived at the American Presidency Project at the University of California at Santa Barbara.” *Id.* at 428–29 n.4. By contrast, “the phrase that actually appears in the Constitution—‘life, liberty, and property’— appears only seven times in the database during that same time

ultimately be reconciled in a revised judicial construction of the Second Amendment. Gun restrictions *do* hamper the rights of those who enjoy guns, whether for self-defense or sport. Yet *access* to guns, in particular, access to machine guns and their functional equivalent, impinges on the rights of others to live their lives in peace. The WRGO is that there is no practical manner to prohibit access in advance to only those who would use machine guns and bump stocks to terrorize others.

The heavy hand and bulging purse of gun lobbyists often is blamed for the lack of gun reform. Social scientists point to a related hurdle: polarization of political views. Medical doctor Jonathan M. Metzl argues that “[p]ublic health is the *lingua franca* through which liberal America understands guns and the traumas they engender.”<sup>307</sup> The problem, *inter alia*, is tribalism. Liberals may understand themselves, but they do not necessarily understand or appreciate a key fact about the “500 million guns bought and carried by more people in ever-more locales across the” United States.<sup>308</sup> The way these gun owners see it, the “vast majority of guns carried in parks, bars, airports, busses, and other public settings, [a]re not involved in shooting or crimes.”<sup>309</sup> And they are right. This is one reason why many of the arguments for gun reform that rely upon mass murder tragedies fall flat to many in this demographic.<sup>310</sup>

Still, Dr. Metzl sees a way that reasonable gun reform laws can gain favor: by “[t]ying] gun safety to the defense of the American public square.”<sup>311</sup> To that end, Dr. Metzl heralds the new wave of activism that involves efforts directed toward public health, community healing, and improving overall safety. The

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frame.” *Id.*; *see also id.* at 428 n.2 (referencing scholarly discussions about the role the Declaration of Independence should play in constitutional interpretations).

<sup>307</sup> Jonathan M. Metzl, *Guns Are Not Just a Public Health Problem*, TIME (Feb. 5, 2024, 7:00 AM), <https://time.com/6660478/gun-control-america-public-health/> [<https://perma.cc/S47C-9CZ8>].

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *See* Joseph Blocher, *Hunting and the Second Amendment*, 91 NOTRE DAME L. REV. 133, 134–35 (2015). Blocher explains that “roughly half of American gun-owners identify hunting or sport shooting as their primary reason for owning a gun” and that “[h]unting and recreational uses like target shooting and ‘plinking’ have long been the primary reasons for gun ownership in the United States.” *Id.* at 133–34. Plinking is described as “shooting at informal targets like tin cans.” *Id.* at 134 n.6. Another major reason is self-defense. *Id.* at 134 n.8. This bolsters Dr. Metzl’s assertion that gun owners likely believe only a very small percentage of guns are purchased for criminal purposes. Metzl, *supra* note 307.

<sup>311</sup> Metzl, *supra* note 307.

idea is to reduce the need to keep or carry guns for protection.<sup>312</sup> However, as Dr. Metzl observes, such efforts often target urban rather than rural areas. For the latter, the need to have guns can be amplified by geographics, such as relative isolation and the consequent lack of protection by law enforcement.<sup>313</sup> There can also be particular resistance because these constituents are often ignored, except when asked or ordered to comply with public health mandates, such as vaccines.<sup>314</sup> An additional concern is the polarization arising from the current heated political rhetoric, which could also motivate some to keep their guns near for protection. These underlying divisions need to be fixed to move forward with gun reform aimed at improving community safety for all.<sup>315</sup> As explained by Dr. Metzl:

I've come to believe that in the current moment, when democracy itself is at stake, gun safety needs to improve people's lives in ways that they can see and feel, strengthen the concrete undergirding civil society, and allow blue and red state Americans to imagine broader coalitions based on shared interest rather than on shared anxieties.

In the long run, gun laws by themselves will have relatively little effect in changing the contours of the American gun debate if they don't go hand-in-hand with material investments that take seriously people's safety concerns, and *reward community cohesion over armed tribalism*.<sup>316</sup>

As Dr. Metzl seems to allude, polarization gives rise to a prescient concern about overheated political rhetoric. That concern translated to a potential five-alarm fire following the assassination attempt on then-former President Trump and the availability of bump stock conversions to others fomenting political violence. Could everyone agree that the public square is safer without public access to machine guns and their functional equivalent? Put more plainly, are police officers and ordinary citizens safer? The answer in 1934 was to limit such weaponry to only the military and law enforcement. Most Americans likely would want the same today. Still, as Dr. Metzl acknowledged, most weapons are *not* used for illegal purposes. Most gun owners are *not* terrorists. But the point is not to take guns away from

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<sup>312</sup> *Id.*

<sup>313</sup> Ness, *supra* note 175, at 1107–08 (noting “distrust of the government” is persistent and recognizing that rural residents are aware that the police may take longer to reach them in an emergency and therefore “believe it is more efficient to handle the situation themselves”).

<sup>314</sup> See Metzl, *supra* note 307.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* (emphasis added).

those who would use guns wisely and with respect for the rights of others. The point is to restrict access in advance for those who would use guns for illegal purposes. When that danger becomes so great, it indirectly—and *significantly*—impacts society as a whole, respectful conversations seem appropriate.

Presuming this reasoning resonates on a societal level, the obvious legislative and judicial answer is a balancing test. While the Supreme Court has repeatedly rejected the notion of balancing interests in Second Amendment challenges, isn't that exactly what was at play in terms of the restrictions put in place at the Founding?<sup>317</sup> The constitutional argument for a balancing test already exists; it just needs to be reframed. While it is no doubt proper to look for an analogue in terms of comparable *laws* existing at Founding, it would seem equally appropriate to look for an analogue in terms of *reasoning*—including balancing competing interests—when such prohibitions were put in place.<sup>318</sup>

Your right to swing your fist ends where my nose begins.<sup>319</sup>

The core principle behind the Second Amendment is fixed in time and will never change. The purpose was and is to protect ourselves and others from common enemies, whether that be lions, tigers, and bears, a mob of marauders, or the armed forces of a foreign sovereign.<sup>320</sup> The Second Amendment never intended to facilitate attacks by an individual, group, or one state against another. That was already acknowledged in *Heller*.<sup>321</sup> Both at the Founding and now, the legitimacy and constitutionality of any given law, of course, entails balancing the benefits and burdens

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<sup>317</sup> See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 22–23 (2022) (citing *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (rejecting an “interest-balancing inquiry”)).

<sup>318</sup> Blum, *supra* note 83, at 962 (arguing that “gun rights and reasonable regulation is what this country has been doing for over 200 years, until the present impasse”) (emphasis omitted). Blum adds, “We often study history so we don't repeat it, but sometimes we need to study history to remind ourselves that the past is worth repeating.” *Id.* Per Blum, the Second Amendment should be rewritten to state: “Every person has the right to keep and bear arms, subject to reasonable regulations for public safety.” *Id.* (emphasis omitted).

<sup>319</sup> Danaya C. Wright, *The Logic and Experience of Law: Lawrence v. Texas and the Politics of Privacy*, 15 U. FLA. J. L. & PUB. POL'Y 403, 411 (2004) (discussing the nose-fist adage and judicial use of this “truism”); see also David B. Ezra, *Smoker Battery: An Antidote to Second-Hand Smoke*, 63 S. CAL. L. REV. 1061, 1105 (1990) (discussing the adage in the context of exposure to second-hand smoke and finding “the argument that the right to smoke extends to the right to contact others with smoke is unworkable”).

<sup>320</sup> See *Heller*, 554 U.S. at 595–98.

<sup>321</sup> See *id.* at 597–98; see also discussion *supra* Section II.A.

impacting the greater good.<sup>322</sup> When it comes to machine guns and bump stocks, balancing competing interests reflects the overarching and fundamental American ideal of freedom and the concordant, inalienable, and reciprocal right to life, liberty, and the pursuit of happiness. Those ideals beat in the heart of our Framers and are embedded in the DNA of all subsequent generations through a living, breathing, and evolving interpretation of the core principles of our Constitution.

In an America hell-bent on punching each other in the nose, valuing the rights of others can wither. Democracy teeters when one side or the other goes too far and in a manner that seeks to shut out the other. That exposes the fragility of democratic rule. But it can also champion the strength of democratic rule when the course corrects. The polarizing debate over “gun rights” and “gun reform” could be the perfect opportunity to begin breaking down tribal blinders.<sup>323</sup> As our future observers likely easily can see from a hindsight view fifty years from now, the correct constitutional resolution was never banning all guns, but neither was it legalizing the functional equivalent of machine guns. Recognizing the answer lies somewhere in the middle might be exactly what is needed to chip away at partisan politics.

#### V. CONCLUSION

Our future observers, Artemis and Diana, have a distinct advantage over today’s mere mortals. They know what happened in the aftermath of the tumultuous times that marked the end of the 2023–2024 Term. If nothing happens and Congress passes a ban on bump stocks, then *Cargill* might be an interesting footnote in Supreme Court history. But if Congress does not act and an armed mob, common criminals, or deranged mass murderers use bump stocks legalized by the Supreme Court to slaughter helpless victims, *Cargill* could go down as one of the Supreme Court’s worst and bloodiest decisions. As bluntly put by Justice Sotomayor, that blood will be on the hands of the Justices signing on to the majority opinion in *Cargill*.<sup>324</sup> Blame will also fall on legislators, as well as the populace, for not demanding more.

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<sup>322</sup> See *Heller*, 554 U.S. at 635 (recognizing that the Second Amendment “is the very product of an interest balancing by the people”).

<sup>323</sup> See DONALD V. GAFFNEY, COMMON GROUND: TALKING ABOUT GUN VIOLENCE IN AMERICA 37–68 (2019) (discussing how to have respectful conversations about gun reform, including questions and reflections).

<sup>324</sup> *Garland v. Cargill*, 602 U.S. 406, 446 (2024) (Sotomayor, J., dissenting) (“Today’s decision . . . will have deadly consequences.”).

It is this author's hope that such events will never transpire. But *if* they do, future generations will scratch their heads in befuddlement. How could we possibly not have seen that coming? How could we possibly have failed to agree on the relatively simple proposition that any device that essentially converts a weapon into a machine gun should be prohibited under the NFA? After witnessing the Las Vegas Massacre and the scores of other mass murders before and since, how could we possibly not have immediately reinstated the ban before the ink in *Cargill* ran dry?<sup>325</sup>

Turning back to our future observers, a tranquil healing *Solfeggio* rain chime gently awakens Diana and Artemis from their slumber and signals the impending end to their imPlant session. They have borne witness to the context and greater societal impact of *Cargill*, both ugly and nice. IMP offers an additional option:

IMP: Historical presentation ended. Though I could re-run the underlying components to envision the impact of *Cargill* under different circumstances.

ARTEMIS: Alternate outcomes?

IMP: Exactly. I can predict what the impact of *Cargill* would have been under different scenarios based on the historically known contributing factors.

DIANA: Tell us more.

IMP: I can predict what would have happened if Kamala Harris had won the 2024 U.S. presidential election, if Congress had immediately banned bump stocks, or even if the Las Vegas Massacre had never occurred.

Artemis and Diana exchange a mischievous lets-stump-IMP wink.

ARTEMIS: IMP, what if we didn't change any of that, but America embraced anti-tribalism?

DIANA: Everyday Americans came together to enact reasonable gun regulations for the common good?

IMP sputters, omitting a plume of electronic smoke, to Artemis and Diana's bemusement.

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<sup>325</sup> See Calleros, *supra* note 38, at 1253 (discussing the "recognizable historical pattern" whereby societal blinders to injustice deteriorate into surprise and even embarrassment).



IMP: Data overload. Prompt override. You're trying to trick me. Isn't that exactly what happened?

ARTEMIS/DIANA: (*touching hands*) Thank God, yes.

Democracy should not be about who wins. If one side continually won, especially to the exclusion of the other, that would be abhorrent. Democracy is about *both* sides winning.<sup>326</sup> For gun reform, that requires reframing the underlying issues, recognizing the interests of both direct and *indirect* victims, and coming together to listen to each other and find a unified solution for the greater good. Competing rights must be respectfully examined and balanced.<sup>327</sup> Envision an America where political victory laps are replaced with grace, and seemingly irreconcilable differences are met with compromise. The challenge is maintaining the balance by which we can all live our lives in joy, not despair. No doubt, that was and is the blessing and vision of our Founders. Having respectful conversations about banning bump stocks and keeping in place the ban against machine guns is a start. A necessary, simultaneous step is working on healing divisions and imagining a future where all communities—rural, urban, and blends of the two—are safe and sound.

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<sup>326</sup> But see Nick Visser, *Alito Says One Side of Political Fight Is 'Going to Win,' Private Event Recordings Reveal*, HUFFPOST (June 11, 2024, 12:38 AM), [https://www.huffpost.com/entry/samuel-alito-private-remarks-politics\\_n\\_6667bf9fe4b019027bc758ba](https://www.huffpost.com/entry/samuel-alito-private-remarks-politics_n_6667bf9fe4b019027bc758ba) [<https://perma.cc/W5RG-K7FX>]. In a secretly-recorded conversation with Lauren Windsor, a self-described “advocacy journalist,” Justice Alito discussed the deep political divide, stating, “One side or the other is going to win . . . [T]here are differences on fundamental things that really can't be compromised.” *Id.*; Keziah Weir, *Lauren Windsor Has a “Substantial Amount” of Secret Recordings She Hasn't Released Yet*, VANITY FAIR (July 2, 2024), <https://www.vanityfair.com/news/story/lauren-windsor-secret-recordings> [<https://perma.cc/ZU3R-VPE9>].

<sup>327</sup> In 2021, the “Unite” organization, headed by Tim Shriver, began developing the Dignity Index, which is “an eight-point scale for measuring how we talk to each other when we disagree.” *Ease Divisions. Prevent Violence. Solve Problems.*, THE DIGNITY INDEX, <https://www.dignity.us/about> [<https://perma.cc/Z728-VNRY>] (last visited Oct. 16, 2024). The focus is not so much on the message as it is on the *manner* by which the message is delivered, for instance, with or without contempt. The first step is using the index “as a tool for judging others.” *Id.* The next step is using the index as a mirror to see oneself. *Id.* The index discourages reacting to others with contempt; if we replace contempt with dignity, we can begin to have meaningful conversations. *See id.*