THE DEAD HAND OF A SILENT PAST:

BRUEN, GUN RIGHTS, AND THE SHACKLES OF HISTORY

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ABSTRACT

In June 2022, the Supreme Court struck down New York's concealed carry licensing law on Second Amendment grounds. In that decision, New York State Rifle & Pistol Association v. Bruen*, the Court declared that future Second Amendment challenges should be evaluated solely with reference to text, history, and tradition. By requiring historical precedent for any modern regulation, that test is essentially* sui generis *in the Court's individual-rights jurisprudence. Yet it represents both an extension of an increasingly historically focused Supreme Court case law and a harbinger of potential doctrinal transformations in other domains.*

This Article critically assesses Bruen*'s test and, in the process, raises concerns about other areas of rights jurisprudence trending in ever more historically inflected directions. In critiquing* Bruen*'s method, the Article foregrounds the unsatisfying justifications for the novel test and several unworkable features. Centrally, it underscores how* Bruen*'s emphasis on historical silence imbues an absent past with more explanatory power than it can bear—or than the Court attempts to justify. The Article then synthesizes and analyzes the results from more than three hundred lower federal court decisions applying* Bruen*, which collectively reveal the test's fundamental unworkability.*

On top of that descriptive and critical work, the Article makes several prescriptive arguments about possible judicial and legislative responses to the decision. For judges, the Article endorses and amplifies arguments about the use of neutral historical experts appointed by

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courts, identifies ways that lower courts can usefully underline Bruen*'s gaps and mitigate its open texture, and suggests that courts are justified in reading* Bruen *narrowly. For lawmakers, it argues that when legislatures pass new gun laws, they ought to be explicit about four types of evidence for the law's constitutionality that track* Bruen*'s new demands: the purpose for the law, the expected burden on armed self-defense, the precise nature of the problem to which the law is directed, and the historical tradition from which the law springs.*

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INTRODUCTION

In June 2022, the Supreme Court issued its first Second Amendment decision in more than a decade. The Court's ruling in *New York State Rifle & Pistol Association v. Bruen*[1] invalidated a New York statute that restricted licenses to carry a concealed handgun to those

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

who could show a special need for self-defense.[2] Legal scholars and historians have begun assessing how the Court's use of historical sources squares with the complex historical tradition governing public carry of firearms.[3] Yet *Bruen*'s significance far outstrips its singular conclusion about public carry. The decision also mandated that lower courts abandon conventional tiers-of-scrutiny analysis in Second Amendment cases and instead review claims based *solely* on text, history, and tradition.[4] Thus, said the Court, if a challenger's activity falls within the "plain text" of the Second Amendment, then the claim prevails unless the government can "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[5] Demanding past regulatory precedent to support modern laws sets this test apart from other constitutional-rights contexts that employ historical inquiry.[6]

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2. *Id.* at 2156.

3. *See, e.g.*, Patrick J. Charles, *The Fugazi Second Amendment:* Bruen*'s Text, History, and Tradition Problem and How To Fix It*, 71 CLEV. ST. L. REV. 623, 624 (2022) [hereinafter Charles, *Fugazi Second Amendment*] (explaining that *Bruen* was "remarkable" because of "the manner historical evidence was marshalled, selected, and analyzed" since it did not "examine all the historical evidence objectively and at face value"); Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes:* Bruen*'s Originalist Distortions*, SCOTUSBLOG (June 27, 2022, 5:05 PM), https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions [https://perma.cc/3HYP-F9AM]; Albert W. Alschuler, *Twilight-Zone Originalism: The Supreme Court's Peculiar Reasoning in* New York State Pistol & Rifle Association v. Bruen, 32 WM. & MARY BILL RTS. J. (forthcoming 2023) (manuscript at 3), https://papers.ssrn.com/sol3/abstract_id=4330457 [https://perma.cc/6U83-RK8V] (arguing that "[i]n *Bruen*, Justice Thomas's opinion for the Court rejected "[*Heller*'s] standard" that "required courts to examine the amendment's text, traditional understandings of its meaning, and the strength of the interests advanced by the challenged regulations"); Brannon P. Denning & Glenn H. Reynolds, Essay, *Retconning* Heller*: Five Takes on* New York Rifle & Pistol Association, Inc. v. Bruen, 65 WM. & MARY L. REV. (forthcoming 2023) (manuscript at 2), https://papers.ssrn.com/abstract=4372216 [https://perma.cc/8LT5-5PPJ] (arguing that "the methodological changes to Second Amendment analysis" in *Bruen* were striking); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. (forthcoming 2023) (manuscript at 1), https://papers.ssrn.com/abstract=4408228 [https://perma.cc/TKW8-MU5H] (cautioning that *Bruen*'s "novel approach to historical decisionmaking raises unique challenges").

4. *Bruen*, 142 S. Ct. at 2127 (holding that "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context").

5. *Id.* at 2130.

6. *See infra* Part II.B. There may be some similar use of historical silence in structural constitutional cases, however. *See* Zivotofsky v. Kerry, 576 U.S. 1, 28 (2015) (relying on Congress's inaction with respect to presidential recognition of foreign sovereigns to find that power exclusive in the executive). I am grateful to Julian Mortenson for raising this example.

Bruen's historical mandate accepts that the litigation process will not produce a full picture of the past.[7] Yet, rather than urge caution about these limitations, *Bruen* sweeps aside longstanding concerns about "law-office history" with little more than a footnote.[8] In fact, given the speed of litigation, incentives of litigants, and ethical duties of lawyers,[9] the decision may practically guarantee Ctrl+F history—

7. *Bruen*, 142 S. Ct. at 2130 n.6 (stating that judges need not engage in wide-ranging historical inquiry and that, instead, they are "*entitled* to decide a case based on the historical record compiled by the parties" (emphasis added)); *cf.* Elias Neibart, *Originalism as Intellectual History*, HARV. J.L. & PUB. POL'Y PER CURIAM, Fall 2022, at 1 (2022) (imploring originalist judges to broaden their lens and "adopt a historical method that accounts for the totality of the historical experience").

8. *Bruen*, 142 S. Ct. at 2130–31 & n.6 (acknowledging difficulty but waving aside concerns about implementation). Scores of scholars have engaged with the "law-office history" critique, generating "a large literature on the proper use of history in constitutional argument." Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 644 (2013). For a sampling, see Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 119–32 (chronicling the long tradition of criticizing the Supreme Court's use of history); Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 935 (2015) (bemoaning many originalists' lack of meaningful engagement with professional historians); William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 810–11 (2019) (defending the instrumental use of history to solve legal questions); Jack M. Balkin, *Lawyers and Historians Argue About the Constitution*, 35 CONST. COMM. 345, 399–400 (2020) (identifying the ways that history can be useful to lawyers and arguing that the past can be deployed using the modalities of constitutional argumentation).

Many scholars, in fact, have debated the critique in the specific context of Second Amendment disputes. *See, e.g.*, Jack N. Rakove, *The Second Amendment: The Highest State of Originalism*, 76 CHI.-KENT L. REV. 103, 103 (2000) (criticizing legal scholarship deploying history to support gun rights); Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 626 (2008) (dismissing the purportedly historical-originalist inquiry in *Heller* as results-oriented and "little more than a lawyer's version of a magician's parlor trick—admittedly clever, but without any intellectual heft"); Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 242–43 (2008) (arguing that *Heller* appeals to contemporary beliefs and mores even as it uses the language of history and originalism to justify its results); David T. Hardy, *Lawyers, Historians and "Law Office History,"* 46 CUMB. L. REV. 1, 1 (2015) (arguing that historians manipulate historical material in legal cases concerning the Second Amendment); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Three: Critiquing the Circuit Courts Use of History-in-Law*, 67 CLEV. ST. L. REV. 197, 261 (2019) (arguing that, in many cases, federal courts of appeals in Second Amendment cases were making "incomplete, inaccurate, ahistorical, hyperbolic, or mythical" historical arguments).

9. *See* Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797, 826 (2023) ("The Court does not acknowledge or address the ethical obligations of attorneys to vigorously represent their clients, and the fact that these obligations will undoubtedly color the historic evidence presented to the Court."). In fact, *Bruen*'s insistence on the principle of party presentation can harm the search for an accurate understanding of the past. *See* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 453 (2009) (arguing that "the parties cannot be allowed to completely control the judiciary's

cursory keyword searching to wring easy answers from complex historical sources.[10] But those limits of historical inquiry in fast-paced litigation are not the only worries *Bruen*'s test generates.

Even more problematic, the decision places outsized importance on missing historical records. Under *Bruen*'s rule, the government cannot successfully defend a contemporary law implicating the Second Amendment unless it finds analogous laws enacted at the relevant time in American history.[11] This test means that the dead hands of the past bind not just through their actions but through their omissions.[12] If the nation's Founding generations declined to act, without regard to the grounds or reasons for their inaction, then contemporary lawmakers are shackled.[13] A Fifth Circuit decision applying *Bruen* exposed what this logic entails: no Founding-era laws, it found, are similar to modern laws that disarm people subject to domestic-violence restraining

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statements of law, or even the interpretive process, lest they undermine the federal courts' role to independently ascertain the meaning of legal texts for the benefit of all").

10. As District Judge Trauger explained in *United States v. Kelly*,

> Attempting to reconstruct past constitutional understandings through a litigation-driven process of keyword searches seems to rely on the assumption that the past was little more than a differently-dressed version of the present, ripe for easy one-to-one comparisons without regard for deep changes in political structure, unspoken institutional arrangements, or language. As far as the court can tell, that is not what actual historians, as opposed to litigants and litigators, believe.

No. 3:22-CR-00037, 2022 WL 17336578, at *4 n.6 (M.D. Tenn. Nov. 16, 2022).

11. *Bruen*, 142 S. Ct. at 2126.

12. The dead-hand problem has deviled constitutional theorists for decades, but its application in this context is all the more troublesome because of the strength with which *Bruen* imbues historical silences. *See infra* Part II.B. For discussion of the voluminous literature on the dead-hand problem, see, for example, Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1127 (1997) ("The first question any advocate of constitutionalism must answer is why Americans of today should be bound by the decisions of people some 212 years ago."); Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. L. ISSUES (forthcoming) (manuscript at 32) [hereinafter, DeGirolami, *Traditionalism Rising*], https://papers.ssrn.com/abstract=4205351 [https://perma.cc/BF9N-BW7Z] (acknowledging that "[i]n constitutional law, the question of tradition's justification is related to the broader so-called 'Dead Hand' problem").

13. *See* United States v. Rahimi, 61 F.4th 443, 461 (5th Cir. 2023) (stating that while disarming domestic abusers may serve important government interests, "*Bruen* forecloses any such analysis in favor of a historical analogical inquiry into the scope of the allowable burden on the Second Amendment right"), *cert. granted*, 143 S. Ct. 2688 (2023); *cf.* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1412–13 (2017) (arguing that "legislative novelty is not evidence and should not be used as evidence that a statute is unconstitutional on federalism or separation-of-powers grounds" but stating that issues of individual rights require separate treatment).

orders, so the federal law doing so violates the Second Amendment.[14] For good reason, almost no other area of individual-rights adjudication works this way.[15] In agreeing to review the Fifth Circuit's ruling just a year after it decided *Bruen*, the Supreme Court will have an opportunity to refine some of the ambiguities that have led to these types of rulings.[16]

There is something especially dissonant about *Bruen*'s novel method given the Justices' prior statements about the Second Amendment right. In 2010, in *McDonald v. City of Chicago*,[17] Justice Alito announced that the Court would not treat the Second Amendment "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees."[18] This statement came to be used as a demand that courts treat the Second Amendment as favorably as other fundamental rights, like the First Amendment's free-speech guarantee.[19] The demand was clear: legislatures, litigants, and lower courts should stop treating the Second Amendment differently than they treat other enumerated rights. And yet, rather than vindicating that vision, *Bruen* itself now subjects

14. *Rahimi*, 61 F.4th at 460–61 (finding a lack of historical analogues that would justify constitutionality under the new approach).

15. *See* Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 69 (2022) (remarking on *Bruen*'s novelty and underscoring that "[i]n other areas of constitutional law, a finding that a regulation implicates or burdens a fundamental right does not end the inquiry"); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 856 (2013) [hereinafter Miller, *Text, History, and Tradition*] (discussing the Supreme Court's use of a "historical test" in one of the only other areas to use it, the Seventh Amendment context and suggesting that the Supreme Court might apply similar analysis for Second Amendment questions).

16. *See* United States v. Rahimi, 143 S. Ct. 2688, 2688–89 (2023) (mem.) (granting certiorari).

17. McDonald v. City of Chicago, 561 U.S. 742 (2010).

18. *Id.* at 780. *Bruen*, with no hint of irony, repeated this invocation. *Bruen*, 142 S. Ct. at 2156.

19. Eric Ruben & Joseph Blocher, *"Second-Class" Rhetoric, Ideology, and Doctrinal Change*, 110 GEO. L.J. 613, 643 (2022) ("After *McDonald*, the argument that the Second Amendment is not a 'second-class' right was seized by advocates, commentators, politicians, and judges—many of them citing Justice Alito's opinion in contexts having nothing to do with the issue it was written to address."). The First Amendment, as a favored right, was an oft-invoked comparator. Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. 333, 337 (2021) [hereinafter Charles, *Constructing a Constitutional Right*] ("First Amendment elements, for example, have frequently been imported into Second Amendment analysis.").

Second Amendment claims to an entirely different set of rules.[20] As Professor Khiara Bridges rightfully notes, "It is not an exaggeration to describe this standard as creating a super-right."[21] Despite this change from its previous commitment to equal treatment, the *Bruen* Court did not explain why a different test should govern Second Amendment claims.

The Court's new approach is also inconsistent with the way the Court has invoked history and tradition in other recent cases.[22] The day after it decided *Bruen*, the Supreme Court overturned *Roe v. Wade*'s[23] protection for reproductive autonomy.[24] Justice Alito's opinion for the Court in *Dobbs v. Jackson Women's Health Organization*[25] praised the ability of contemporary Americans to enact their policy preferences through the democratic process.[26] For more than a century and a half after the Constitution's ratification, Alito observed, "each State was permitted to address this issue in accordance with the views of its citizens."[27] But *Roe* extinguished that authority, "confer[ring] a broad right"[28] that "abruptly ended th[e] political process" of popular dialogue over abortion laws.[29] *Roe*, Alito thrice repeated, was an

20. *See generally* Timothy Zick, *Second Amendment Exceptionalism: Public Expression and Public Carry*, 102 TEX. L. REV. (forthcoming 2023), https://ssrn.com/abstract=4510372 [https://perma.cc/27QD-FGNG] (explaining how *Bruen*'s framework differs from the First Amendment framework and protects guns more broadly than speech).

21. Bridges, *supra* note 15, at 69 (citation and quotation marks omitted).

22. *See* Part II.B.

23. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

24. *Dobbs*, 142 S. Ct. at 2242.

25. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

26. *Id.* at 2265. Not all the decision's readers were convinced by the majority's ode to letting the people decide. *See* David Landau & Rosalind Dixon, Essay, *Dobbs*, Democracy, and Dysfunction 5 (Aug. 9, 2022) (unpublished manuscript), https://papers.ssrn.com/abstract=4185324 [https://perma.cc/SH4P-MASS] (arguing that "a Court that is unwilling to deal with broader sources of state legislative dysfunction, such as partisan gerrymandering, should not have overruled *Casey*").

27. *Dobbs*, 142 S. Ct. at 2240; *cf.* McKee v. Cosby, 139 S. Ct. 675, 682 (2019) (Thomas, J., dissenting from denial of certiorari) ("We did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified. The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm.").

28. *Dobbs*, 142 S. Ct. at 2240.

29. *Id.* at 2241.

exercise of "raw judicial power."[30] Juxtaposing the method in *Dobbs* and *Bruen* is jarring.

Although *Bruen* dealt with a textually enumerated right "to keep and bear arms,"[31] whereas *Dobbs* dealt with the right to "due process of law,"[32] both decisions reasoned historically to ascertain whether the Constitution protected the claimant's right against the challenged regulation. One case searched the past for protections for a claimed right and declared that record barren.[33] The other searched the past for restrictions on a claimed right and declared that record barren.[34] For *Dobbs*, it was clear the absence of historical regulations prohibiting particular conduct did "not mean that anyone thought the States lacked the authority to do so."[35] Even if some "abortion was *permissible* at common law," Alito emphasized, that certainly did not entail "that abortion was a legal *right*."[36] For *Bruen*, on the other hand, the opposite inference governed. If gun-related conduct was permitted in early American society, it was a legal right.[37] Like a prescriptive easement over the state's regulatory authority, permitted conduct of yesteryear morphs into unassailably protected conduct today. In their oscillating methods, "*Bruen* reiterates the lesson that *Dobbs* teaches: the Court's historical investigation is not the value-free, apolitical exercise that the Court pretends it to be."[38]

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30. *Id.* at 2241, 2260, 2265 (quoting Roe v. Wade, 410 U.S. 179, 222 (White, J., dissenting)).

31. U.S. Const. amend. II.

32. U.S. Const. amend. XIV, § 1.

33. *Dobbs*, 142 S. Ct. at 2253 (declaring the past univocal on the point).

34. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022) (stating that its search for history turned up no support for New York's restriction).

35. *Dobbs*, 142 S. Ct. at 2255.

36. *Id.* at 2250; Robert J. Pushaw, Defending *Dobbs*: Ending the Futile Search for a Constitutional Right to Abortion 49 (Aug. 16, 2022) (unpublished manuscript), https://papers.ssrn.com/abstract=4190711 [https://perma.cc/PXC7-FAJ4] (arguing that even if some abortions were not prohibited, "that would merely indicate that some states would not criminally punish such early abortions – not that there was a constitutional right to them, and certainly not that there was a right that extended much later to the point of viability"); Ed Whelan, *Badly Botched 'Originalist Case for an Abortion Middle Ground'*, NAT'L REV. (Sept. 21, 2021), https://www.nationalreview.com/bench-memos/badly-botched-originalist-case-for-an-abortion-middle-ground [https://perma.cc/J33M-X3MC] ("When a state chooses to allow an action, it does not ordinarily imply that it lacks the power to prohibit the action. By contrast, when it chooses to bar an action, it ordinarily conveys its belief that it has the power to do so.").

37. *See Bruen*, 142 S. Ct. at 2122 (holding that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home).

38. Bridges, *supra* note 15, at 67–68. Maybe it could never be. *See* David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 389 (2015) [hereinafter Han,

Bruen and *Dobbs* are not alone in privileging historical material. The current Court increasingly makes history and tradition the touchstone of constitutional review.[39] And, because the Second Amendment lacks the jurisprudential "baggage"[40] of other constitutional rights (that is, accumulated precedent), the Justices have found it easier to redirect the law, undiluted by more pragmatic considerations.[41] Attending to the Second Amendment example can thus help shed light on possible upcoming moves in other areas of rights adjudication, such as free speech, establishment clause, and free exercise claims.[42] These lessons are urgent at a time when the fetters of stare decisis seem to be growing especially brittle.[43]

Transparency] (arguing that the "multiplicity of historical narratives vividly illustrates the openness of pure historical analysis and the extent to which value judgments drive such analyses").

39. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (insisting that, despite discarding a prior doctrinal test, "[a]n analysis focused on original meaning and history . . . has long represented the rule rather than some 'exception' within the 'Court's Establishment Clause jurisprudence'" (citation omitted)); Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. (forthcoming 2023) (manuscript at 27–37), https://papers.ssrn.com/abstract=4338811 [https://perma.cc/H884-6GJG] (discussing the Court's use of history and tradition within the *Bruen* decision); DeGirolami, *Traditionalism Rising*, *supra* note 12, at 2–3 (noting that "[c]onstitutional traditionalism is rising"); Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. (forthcoming 2023) (manuscript at 2–3), https://papers.ssrn.com/abstract=4366019 [https://perma.cc/3JVC-99N6] (discussing the Court's recent commitment to originalism); Erwin Chemerinsky & Barry P. McDonald, *Eviscerating A Healthy Church-State Separation*, 96 WASH. U. L. REV. 1009, 1012 (2019) (describing how the conservative Supreme Court Justices "frequently emphasize the importance of" evidence about "early historical understandings" in constitutional cases).

40. Transcript of Oral Argument at 44, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

41. *See* Charles, *Constructing a Constitutional Right*, *supra* note 19, at 334–35 (describing how courts after *Heller* grasped at other doctrine because they had few other places to turn); Richard H. Fallon, Jr., Selective Originalism and Judicial Role Morality 9 (Feb. 3, 2023) (unpublished manuscript), https://papers.ssrn.com/abstract=4347334 [https://perma.cc/E44T-5V7M] (arguing that in some instances "originalism functions as a potentially destabilizing tool or force in constitutional adjudication in the Supreme Court, available to upset existing doctrinal equilibria, but not as a recognized determinant of all decisions").

42. *See, e.g.*, Michael L. Smith & Alexander S. Hiland, *Using* Bruen *To Overturn* New York Times v. Sullivan, 50 PEPP. L. REV. 80, 84 (2023) (arguing that *Bruen*'s "approach to constitutional rights and focus on historical traditions will likely be employed in other cases—including those in the First Amendment context"); Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After* Bruen, 18 DUKE J. CONST. L. & PUB. POL'Y 59, 60–66 (2023) (assessing what a *Bruen*-inspired approach to the free-speech cases would look like).

43. *See* Pushaw, *supra* note 36, at 59 ("*Dobbs* illustrates that stare decisis in constitutional law is so malleable as to be almost useless as a constraint on decision-making."); Fallon, *supra*

In assessing *Bruen* in its larger context, this Article makes four primary contributions. First, it provides a critical examination of *Bruen*'s method. The test the Court announced remains underspecified on key metrics about how lower courts should find historical tradition: what it means to identify the *existence* of tradition; whether the *endurance* of that tradition matters; how, if it all, the *enforcement* of the tradition changes the analysis; and what role the *evolution* of tradition plays in the inquiry. Second, the Article places *Bruen* in the context of other history-focused rights and critiques the weight *Bruen* places on historical silence. By making the absence of past regulations dispositive, the Court relieves rights-claimers of any obligation to show historical protection for their conduct. Third, the Article underscores how *Bruen* has already generated—and is likely to continue generating—confused and confusing lower court precedent. From a comprehensive review of the more than three hundred federal court decisions issued in the year after *Bruen*, this Article analyzes the types and percentage of cases that have vindicated Second Amendment challenges. Fourth, the Article maps out how lawmakers and lower court judges can respond to *Bruen*'s approach. Lawmakers can generate legislative findings about a law's justification, potential burden, and the historical tradition in which it follows to support the law's defense in court; judges can employ consulting historians, fill the gaps in *Bruen*'s method in a way that facilitates democratic decision-making, and construe the decision narrowly.

Unpacking *Bruen* in this way shows how the ruling can inform ongoing discourse about the Supreme Court's methodological trajectory for constitutional rights. Standing as it does at the border between originalist and traditionalist interpretation,[44] *Bruen* calls for

note 41, at 38 (noting that "[c]ommentators agree increasingly that the legally obligatory force of stare decisis in the Supreme Court is vanishingly weak"); Daniel B. Rice, *Repugnant Precedents and the Court of History*, 121 MICH. L. REV. 577, 627 (2023) (underscoring the importance of a regularized stare decisis framework).

44. We might even call it "blended origino-traditionalism," DeGirolami, *Traditionalism Rising*, *supra* note 12, at 20, or "living traditionalism," Girgis, *supra* note 39, at 8, or, as one recent essay termed it, "Originalish," A.W. Geisel, Bruen Is Originalish 1 (Jan. 23, 2023) (unpublished manuscript), https://papers.ssrn.com/abstract=4335950 [https://perma.cc/2H9C-3LPR]; *cf.* Michael P. O'Shea, *The Concrete Second Amendment: Traditionalist Interpretation and the Right To Keep and Bear Arms*, 26 TEX. REV. L. & POL. 103, 106 (2022) (arguing that *Heller* "is best understood as the product of a fusion of originalist and traditionalist methods"). Several scholars have recently observed that *Bruen* contains elements of both originalist and non-originalist reasoning. *See* Barnett & Solum, *supra* note 39, at 19–23; Girgis, *supra* note 39, at 23

greater attention to the contours and limits of these projects.[45] So, too, does the decision shine light on a host of other persistent debates in constitutional theory, such as those over proportionality review and balancing tests,[46] as well as over antinovelty and historicism.[47] On top of that, in mandating a textualist first step, *Bruen* also elevates the centrality of recent research and scholarship that surfaces the intratextualist quarrels splitting the Court's textualist Justices at just the time that legal scholars have dubbed "textualism's defining moment."[48]

(noting that "[p]ost-ratification practices have guided both major cases defining the scope of the rights to keep and bear arms under the Second Amendment").

In general, traditionalism focuses on practices as key constituents of constitutional meaning, while originalism focuses on the public meaning of enacted text at the time of ratification as the key constituent of constitutional meaning. *See* Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1674 (2020) [hereinafter DeGirolami, *First Amendment*] ("No original meaning theory gives primacy to ancient and enduring practices as constituents of meaning, so that none is synonymous with traditionalism on that point at least.").

45. *See, e.g.*, Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 779 (2022) (describing originalism as a standard for what judges should be looking for, not a decision procedure for how to get there); Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1123 (2020) [hereinafter DeGirolami, *Traditions*] (identifying and elaborating on "a new method of constitutional interpretation: the use of tradition as constitutive of constitutional meaning"); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 35 (2019) (suggesting that "liquidation might turn out to be of importance to those who subscribe to various 'originalist' methods of constitutional interpretation"); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 21 (2015) (describing as a core feature of originalist families of constitutional theory the notion that "the communicative content of the constitutional text is fixed at the time of framing and ratification, but the facts to which the text can be applied change over time").

46. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 375–76 (2009) (discussing the use of means-end scrutiny and categorical reasoning in *Heller*); *see generally* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021) (arguing in favor of proportionality review and against a rights-as-trumps model).

47. Litman, *supra* note 13, at 1427–34 (listing reasons to be skeptical about arguments for unconstitutionality grounded in novelty); Gienapp, *supra* note 8, at 935–36 (discussing debates over the role of historical analysis in originalist interpretation).

48. William Eskridge Jr., Brian Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. (forthcoming 2023) (manuscript at 6), https://papers.ssrn.com/abstract=4305017 [https://perma.cc/R99U-T8W9] (noting that while textualism is "now clearly ascendant" at the Supreme Court and beyond, it is also "splintering"); Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court, 2020–2022*, 38 CONST. COMMENT. (forthcoming 2023) (manuscript at 5), https://scholarship.law.georgetown.edu/facpub/2489 [https://perma.cc/G7T2-H89E] (finding "significant conflict among" textualist Justices themselves about the meaning of text in recent terms); Frederick Schauer, *Unoriginal Textualism*, 90 GEO.

Bruen, in short, is a constitutional kaleidoscope. Holding the opinion up to the light, turning it over at different angles—each new view reveals something important about the shifting methodological commitments of the current Justices and the possible changes on the horizon for extant constitutional law. But the decision also has immense and immediate implications for burgeoning Second Amendment doctrine itself. Since June 2022, lower courts have received *Bruen*'s message to supercharge the Second Amendment, but they have not yet located its Rosetta Stone. Their collective decisions in the months since the ruling have been scattered, unpredictable, and often internally inconsistent. In just the first year after the ruling, more than three hundred lower federal court decisions assessed whether new and settled regulations survive *Bruen*.[49] This Article presents an analysis of the early results from this set of disparate opinions.

More than two dozen of those rulings concluded that *Bruen*'s test invalidates state or federal laws under the Second Amendment.[50] The cases have generated divergent rulings on the legality of key federal laws, including whether individuals with felony convictions can be prohibited from owning guns,[51] whether those under felony indictment can be barred from acquiring new firearms,[52] whether those subject to domestic-violence restraining orders can be disarmed,[53] and whether the Second Amendment guarantees the right to a firearm with an obliterated serial number.[54] The decisions have also weighed in on the constitutionality of recently enacted state laws, like those regulating

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WASH. L. REV. 825, 826 (2022) (advocating a nonoriginalist form of textualism); *see generally* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020) (using the Supreme Court's opinion in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), to highlight the disagreement between "formalistic" and "flexible" textualists).

49. *See infra* Part III.

50. *See infra* Part III.

51. *Compare* United States v. Jackson, 69 F.4th 495, 501 (8th Cir. 2023) (holding that the law is constitutional), *with* Range v. Att'y Gen., 69 F.4th 96, 106 (3d Cir. 2023) (en banc) (holding that the law is invalid as applied to the challenger).

52. *Compare* United States v. Kelly, No. 3:22-CR-00037, 2022 WL 17336578, at *1 (M.D. Tenn. Nov. 16, 2022) (yes), *with* United States v. Quiroz, 629 F. Supp. 3d 511, 527 (W.D. Tex. 2022) (no).

53. *Compare* United States v. Bernard, No. 22-CR-03 CJW-MAR, 2022 WL 17416681, at *5–6 (N.D. Iowa Dec. 5, 2022) (yes), *with* United States v. Perez-Gallan, No. PE:22-CR-00427-DC, 2022 WL 16858516, at *15 (W.D. Tex. Nov. 10, 2022) (no).

54. *Compare* United States v. Reyna, No. 3:21-CR-41 RLM-MGG, 2022 WL 17714376, at *1 (N.D. Ind. Dec. 15, 2022) (no), *with* United States v. Price, 635 F. Supp. 3d 455, 457 (S.D. W. Va. 2022) (yes).

large-capacity magazines,[55] self-manufactured "ghost guns,"[56] and the sensitive places where guns can be outlawed.[57] The lower courts' disputes about outcomes have turned largely on disputes about how to apply *Bruen*'s new method.[58]

Additional circuit precedent will no doubt smooth over some of these jagged edges.[59] But close attention to these initial, faltering attempts to use *Bruen*'s test is important in its own right. It reveals the decision's underlying indeterminacy, underscoring how the test inflates judicial discretion at the same time it veils transparency.[60] The analysis also foregrounds the key points of ambiguity that the Court will need to resolve. "[T]he critical question lower courts now face," said one district judge, "is whether *Bruen* requires the regulatory landscape be trimmed with a scalpel or a chainsaw."[61] In practice, *Bruen* has meant that lower courts can simply choose whichever instrument they want in pruning each particular regulatory hedge before them.

This Article proceeds in four Parts. Part I examines *Bruen*'s new methodological framework. It traces the genealogy of the test *Bruen*

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55. *See, e.g.*, Oregon Firearms Fed'n, Inc. v. Brown, No. 2:22-CV-01815-IM, 2022 WL 17454829, at *1–2 (D. Or. Dec. 6, 2022) (upholding such a law).

56. Rigby v. Jennings, 630 F. Supp. 3d 602, 607–09 (D. Del. 2022) (upholding such a law).

57. United States v. Power, No. 20-PO-331-GLS, 2023 WL 131050, at *1 (D. Md. Jan. 9, 2023) (rejecting a challenge to guns on government property).

58. *See infra* Part III.

59. The few circuit decisions through July 2023 have only reinforced the impression that consensus seems unlikely. The Third Circuit already reversed a panel decision en banc and, in doing so, created a circuit split with the Eighth Circuit over the constitutionality of barring guns from those with disqualifying convictions. *Compare* Range v. Att'y Gen., 69 F.4th 96, 98 (3d Cir. 2023) (en banc) (holding the law unconstitutional as applied to the challenger), *with* United States v. Jackson, 69 F.4th 495, 505–06 (8th Cir. 2023) (upholding the law). The Eleventh Circuit has vacated a panel decision upholding an age restriction, setting the stage to review and possibly deem the law unconstitutional in an en banc opinion. *See* Nat'l Rifle Ass'n v. Bondi, 72 F.4th 1346, 1347 (11th Cir. 2023) (per curiam), *vacating & granting reh'g en banc* 61 F.4th 1317 (11th Cir. 2023). And the Supreme Court has agreed to review the Fifth Circuit's decision striking down the federal law barring firearm possession for those under a domestic-violence restraining order. *See* United States v. Rahimi, 143 S. Ct. 2688, 2688–89 (2023) (mem.) (granting certiorari).

60. By purporting to rely on objective historical evidence, but in reality picking and choosing which history to count, this kind of method obscures the value judgments inherent in its application. *See* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1134 (2023) [hereinafter Siegel, *Memory Games*] (arguing that some forms of historical method represent "a deeply antidemocratic mode of constitutional interpretation, not because it appeals to the past, but because it denies its own values as it is doing so").

61. United States v. Perez-Gallan, No. PE:22-CR-00427-DC, 2022 WL 16858516, at *13 (W.D. Tex. Nov. 10, 2022).

embraced—and the alternative it rejected—and unpacks the shape of the new method. Next, Part II argues this new method does not deliver on *Bruen*'s promise that it would constrain discretion and provide courts with clear guidance.[62] *Bruen* leaves key questions unanswered and sometimes unaddressed, forcing lower court judges to make haphazard, predictive guesses about how a majority of Justices will view a given regulation. Part III examines the blossoming lower court precedent, finding that the resulting decisions have been unpredictable and in frequent tension. Finally, Part IV identifies pathways for legislatures to enact and lower courts to implement the decision without voiding all reasonable attempts to regulate guns.[63]

I. BRUEN'S NEW METHOD

Bruen suggests it is recovering, rather than creating, the test it announced.[64] In fact, the Court's justification for adopting the history-*cum*-analogy framework was that *Heller* demanded it.[65] Because of that emphasis, this Part unpacks the methodological path from *Heller* to *Bruen*. Despite *Bruen*'s confidence about how to read the case, *Heller*

62. *But see* Mark W. Smith, NYSRPA v. Bruen: *A Supreme Court Victory for the Right To Keep and Bear Arms—and A Strong Rebuke to "Inferior Courts*,*"* HARV. J.L. & PUB. POL'Y PER CURIAM, Summer 2022, at 1, 7 (2022) ("*Bruen*'s focus on history is doubly important: it not only is theoretically sound, but it also provides *a clear interpretive command* to the lower courts in future Second Amendment cases." (emphasis added)). Nonetheless, similar analyses have underscored how historical or categorical tests in other areas of law fail to provide the promised stability, constraint, and consistency. *See, e.g.*, David L. Noll, *Constitutional Evasion and the Confrontation Puzzle*, 56 B.C. L. REV. 1899, 1899 (2015) (arguing that the Sixth Amendment case law following the Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004) "has not delivered on [the decision's] promises" to ease administration of the rules and apply original meaning faithfully to protect criminal defendants); Han, *Transparency*, *supra* note 38, at 391 (noting in the free-speech context that "the Court's apparent assumption that a *purely* historical approach can consistently bring meaningful, value-neutral objectivity and constraint into the analysis does not hold up to scrutiny").

63. *Cf.* Siegel, *Memory Games*, *supra* note 60, at 1193–1204 (identifying potential responses to the Court's ruling in *Dobbs*).

64. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126–27 (2022) (stating that *Heller* dictates the historical test); *cf.* SIMON SCHAMA, A HISTORY OF BRITAIN: THE BRITISH WARS 1603–1776, at 109 (2001) ("Revolutions invariably begin by sounding conservative and nostalgic, their protagonists convinced that they are suppressing, not unloosing, innovation.").

65. *See Bruen*, 142 S. Ct. at 2126 (stating, in describing the new test, that the Court did so to be "[i]n keeping with *Heller*"); *id.* at 2127.

was enigmatic to courts and commentators in the subsequent years.[66] Lower courts thus drew on their experience with other individual rights to fashion a test using the familiar tools of strict and intermediate scrutiny.[67] Part I.A describes this evolution and the reigning paradigm prior to *Bruen*. Part I.B examines the new history-and-analogy test *Bruen* prescribed.

A. Heller*,* McDonald*, and the Emerging Two-Part Framework*

In *Heller*, the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms unconnected to an organized militia.[68] On that basis, the Court struck down two District of Columbia laws that interfered with the right to keep an operable and accessible handgun in the home for purposes of self-defense.[69] *Heller*, however, was expressly noncommittal about how its new articulation of the Second Amendment should be applied in other circumstances.

The decision disavowed any intent to create a comprehensive framework, acknowledging that Justice Breyer's dissent "criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions."[70] The Court's response implicitly accepted that criticism. It did *not* retort that Breyer had mistakenly overlooked the test it established but instead responded that Breyer's proposed alternative was worse than leaving the question open.[71] Breyer had proposed that, in reviewing a Second Amendment challenge, courts should ask "whether the statute burdens a protected interest in a way

66. *See, e.g.*, Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 267 (2008) (observing that "the ruling itself was exceedingly narrow" and "the Court left numerous questions undecided").

67. *See* Charles, *Constructing a Constitutional Right*, *supra* note 19, at 346 ("Right after *Heller*, courts and commentators quickly began applying a two-step framework that was explicitly borrowed from the Court's First Amendment law.").

68. District of Columbia v. Heller, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

69. *Id.* at 635 (striking down D.C.'s handgun ban and requirement that firearms be secured with a trigger lock).

70. *Id.* at 634.

71. *Id.* ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.").

or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[72]

According to the majority, Breyer's interest-balancing approach proposed, "explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis)" of constitutional review.[73] The Court characterized Breyer as advocating for a test that "no other enumerated constitutional right" was subject to.[74] The Court said it could not employ that test without subverting the will of the Constitution's ratifiers.[75] The *Heller* majority emphasized that it would have time to flesh out the proper rules for Second Amendment challenges in future cases.[76] The dissent, it said, "chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible."[77] But, the Court insisted, that lack of clarification should not be surprising. "[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than . . . our first in-depth Free Exercise Clause case, left that area in a state of utter certainty."[78] For the *Heller* majority, many questions were appropriately left to another day: "[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us."[79]

Yet, as the *Bruen* Court read the decision, *Heller* did clarify quite a bit of the field. The decision's "methodological approach," according to *Bruen*, began with an ordinary-meaning textual analysis of the Second Amendment, continued on to confirm that conclusion was consistent with history, and then used history "to demark the limits on the exercise of that right."[80] *Bruen* acknowledged that the *Heller*

72. *Id.* at 689–90 (Breyer, J., dissenting); *see generally* GREENE, *supra* note 46 (cataloging the use of proportionality analysis in most other constitutional systems).

73. *Heller*, 554 U.S. at 634.

74. *Id.*

75. *Id.* at 634–35 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.").

76. *Id.* at 635.

77. *Id.*

78. *Id.*

79. *Id.*

80. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127–28 (2022).

majority said D.C.'s law would fail under any level of scrutiny, but *Bruen* emphasized that *Heller* did not actually *apply* means-end scrutiny to the challenged law.[81] Rather, said the *Bruen* majority, the important point in *Heller* was that D.C.'s law was "historically unprecedented."[82]

For the *Bruen* Court, the clearest indication that *Heller* rejected means-ends scrutiny was its response to Breyer's push for the interest-balancing approach.[83] *Bruen* equated Breyer's approach with the traditional tiers of scrutiny, writing that *Heller* ruled out "*any*" test that empowers judges to weigh interests and declined to engage in means-end scrutiny because doing so would be inconsistent with the entire premise of written constitutionalism.[84] Breyer's proposed test, said the Court, "simply expressed a classic formulation of intermediate scrutiny in a slightly different way," and *Heller*'s direct repudiation of that method signaled its rejection of means-end scrutiny altogether.[85] In sum, said the *Bruen* majority, "[w]hether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history."[86]

But, in the decade and a half after *Heller*, the lower courts had read the case differently.[87] Courts as well as commentators concluded that the Supreme Court had left the question about what test to use unspecified.[88] "The general consensus," observed one scholar in the

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81. *Id.* at 2128; *see also id.* at 2129 n.5 ("*Heller*'s passing observation that the District's ban would fail under any heightened 'standar[d] of scrutiny' did not supplant *Heller*'s focus on constitutional text and history. Rather, *Heller*'s comment 'was more of a gilding-the-lily observation about the extreme nature of D.C.'s law,' than a reflection of *Heller*'s methodology or holding." (alteration in original) (quoting Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1277 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

82. *Id.* at 2128. At least one court of appeals after *Heller* also invalidated a law on categorical grounds—without applying any form of scrutiny—but did not think that approach supplanted the use of means-end scrutiny in other cases. *See* Wrenn v. District of Columbia, 808 F.3d 81 (D.C. Cir. 2015).

83. *Bruen*, 142 S. Ct. at 2129.

84. *Id.* (emphasis added).

85. *Id.*

86. *Id.*

87. *Id.* at 2174 (Breyer, J., dissenting) (describing the circuit court convergence on the two-part framework as their understanding of *Heller*).

88. United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) ("Instead of resolving questions such as the one we must confront, the Justices have told us that the matters have been left open. . . . [Beyond its holdings,] [w]hat other entitlements the Second Amendment

immediate aftermath of the decision, "is that *Heller* failed to provide a framework by which lower courts could judge the constitutionality of gun control."[89] As a result, judges filled the perceived gap not by applying an "entirely different body of rules"[90] than what they used in other fundamental-rights contexts but by doing the precise opposite: employing the same framework used elsewhere in constitutional litigation over fundamental rights.[91]

For example, just weeks after *McDonald* incorporated the Second Amendment against the states, the Third Circuit upheld the federal law that bars possession of a firearm with an obliterated serial number.[92] Writing for the panel in *United States v. Marzzarella*,[93] Judge Anthony Sirica, a Ronald Reagan appointee, concluded that *Heller* suggested "a two-pronged approach to Second Amendment challenges."[94] First, courts should assess whether a challenged law burdens conduct within the scope of the Second Amendment. If so, then courts should apply strict or intermediate scrutiny.[95] The *Marzzarella* court expressly borrowed this framework from First Amendment case law.[96] Rather than treat the Second Amendment differently than other individual rights, the court believed that this test would make them equals.[97]

The Third Circuit was not alone in this understanding of *Heller*. In *United States v. Skoien*,[98] the Seventh Circuit confronted an early post-*Heller* challenge to the federal law barring firearm possession by those with a misdemeanor domestic-violence conviction.[99] In an opinion by

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creates, and what regulations legislatures may establish, were left open."); United States v. Booker, 570 F. Supp. 2d 161, 163 (D. Me. 2008) (remarking that *Heller* "consciously left the appropriate level of scrutiny for another day").

89. Blocher, *supra* note 46, at 378; *see also* Glenn H. Reynolds & Brannon P. Denning, Heller*'s Future in the Lower Courts*, 102 NW. U. L. REV. 2035, 2035 (2008) (noting the decision's lack of guidance).

90. McDonald v. City of Chicago, 561 U.S. 742, 780 (2010).

91. Charles, *Constructing a Constitutional Right*, *supra* note 19, at 335 (observing that lower courts had implemented the Second Amendment right by relying "heavily on the doctrinal scaffolding built around more established constitutional rights").

92. *See* United States v. Marzzarella, 614 F.3d 85, 87 (3d Cir. 2010).

93. United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010).

94. *Id.* at 89.

95. *Id.*

96. *Id.* at 89 n.4.

97. *Id.* at 89 n.4, 96–97.

98. United States v. Skoien, 587 F.3d 803 (7th Cir. 2009), *vacated*, No. 08-3770, 2010 WL 126762, at *1 (7th Cir. Feb. 22, 2010).

99. *Id.* at 805.

Judge Diane Sykes, a George W. Bush appointee, the court first observed that *Heller* "conspicuously declined to set a standard of review."[100] Despite that lacuna, and like the *Marzzarella* court, the panel "read *Heller* as establishing the following general approach to Second Amendment cases."[101] "First," said the panel, "some gun laws will be valid because they regulate conduct that falls outside the terms of the right as publicly understood when the Bill of Rights was ratified."[102] The government can prevail if it shows the conduct is unprotected.[103] "If, however, a law regulates conduct falling *within* the scope of the right, then the law will be valid (or not) depending on the government's ability to satisfy whatever level of means-end scrutiny is held to apply."[104]

Other courts soon followed these decisions by respected Republican-appointed jurists, who were generally considered jurisprudentially conservative, in adopting what came to be known as the "two-part framework."[105] After all, those judges' treatment of the claimed Second Amendment right in direct appeals from criminal convictions could hardly be called cavalier.[106] And so, given that it was informed by First Amendment jurisprudence, could be discerned from the outlines of *Heller*, and was consistent with *McDonald*'s injunction not to apply an entirely different set of rules, the two-part framework became firmly ensconced in Second Amendment law.[107] Eleven of the twelve geographic circuits expressly adopted it, and no federal court of appeals to confront the question rejected the two-part framework.[108]

Even vocal gun-rights advocates initially embraced the framework.[109] But that consensus began slowly shifting after then

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100. *Id.* at 808.

101. *Id.*

102. *Id.* at 808–09.

103. *Id.* at 809.

104. *Id.*

105. Charles, *Constructing a Constitutional Right*, *supra* note 19, at 347.

106. Indeed, the panel opinion Judge Sykes authored vacated the defendant's conviction and remanded the case for the district court to hold the government to its burden of satisfying intermediate scrutiny. *Skoien*, 587 F.3d at 816.

107. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2174 (2022) (Breyer, J., dissenting).

108. *Id.*

109. When they did have complaints, it was about the application—not the propriety—of means-end scrutiny. *See, e.g.*, Nordyke v. King, 644 F.3d 776, 785 (9th Cir. 2011) (observing in that Second Amendment case that the challengers "and their amici argue that *McDonald* requires this

Judge Brett Kavanaugh dissented from a D.C. Circuit panel decision applying the two-part framework to the District of Columbia's post-*Heller* gun regulations.[110] In his dissent, Kavanaugh argued that the two-part framework was inconsistent with *Heller* and *McDonald*.[111] On his reading, in rejecting Breyer's interest-balancing approach, those decisions also rejected any form of means-end scrutiny.[112] In its place, he read them to set up the following test: "Gun bans and gun regulations that are longstanding—or, put another way, sufficiently rooted in text, history, and tradition—are consistent with the Second Amendment individual right."[113] But if a challenged law lacks that historical pedigree, it violates the Second Amendment.[114] Historical analogy might sometimes be necessary, Kavanaugh conceded, "when legislatures seek to address new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed."[115] But his dissenting opinion did not offer details on performing that analogical task.

Notably, no one in the case appears to have asked the court to reject the two-part framework.[116] In responding to Kavanaugh's dissent, the panel's majority opinion—authored by conservative judge Douglas Ginsburg—expressed surprise: "If the Supreme Court truly intended to rule out any form of heightened scrutiny for all Second Amendment cases, then it surely would have said at least something to that effect."[117] But *Heller* "did not say anything of the sort; the plaintiffs in this case do not suggest it did; and the idea that *Heller* precludes

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Court to give strict scrutiny to the" challenged law "because *McDonald* held that the right to keep and to bear arms is 'fundamental'" and "laws burdening fundamental rights trigger strict scrutiny"), *vacated*, 664 F.3d 774 (9th Cir. 2011). Despite these calls, however, it is not the case that all fundamental rights merit strict scrutiny. *See generally* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227 (2006) (dismantling this claim).

110. Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1276 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("I read *Heller* and *McDonald* as setting forth a test based wholly on text, history, and tradition.").

111. *Id.*

112. *Id.* at 1273.

113. *Id.* at 1285.

114. *Id.*

115. *Id.* at 1275

116. *See id.* at 1265 (noting that "the plaintiffs . . . d[id] not suggest" that "the Supreme Court . . . intended to rule out any form of heightened scrutiny for all Second Amendment cases").

117. *Id.*

heightened scrutiny has eluded every circuit to have addressed that question since *Heller* was issued."[118]

B. Bruen*'s Replacement: The History-and-Analogy Test*

In *Bruen*, Kavanaugh's view prevailed. Justice Thomas's opinion for a six-Justice majority acknowledged the settled consensus in the lower courts on the two-step framework.[119] But, for the majority, that test contained "one step too many."[120] The first step, asking whether the regulation burdens conduct protected under the Second Amendment, was "broadly consistent with *Heller*."[121] But as for the second step, where courts applied intermediate or strict scrutiny, Thomas's majority opinion read *Heller* the same way Kavanaugh had. For them, no interest-balancing meant no means-end scrutiny.[122] The government, Thomas concluded, can no longer defend a law on the grounds that it "promotes an important interest."[123] Instead, the government bears the burden to prove that a challenged regulation "is consistent with this Nation's historical tradition of firearm regulation."[124] History is both the method of determining the meaning of constitutional text and the mechanism for implementing that meaning in concrete disputes, collapsing a distinction between interpretation and construction.[125]

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118. *Id.*

119. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2125 (2022).

120. *Id.* at 2127.

121. *Id.*

122. *Id.* at 2129 ("Not only did *Heller* decline to engage in means-end scrutiny generally, but it also specifically ruled out the intermediate-scrutiny test that respondents and the United States now urge us to adopt."); Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 845 (2023) (identifying the importance of Kavanaugh's opinion for the *Bruen* majority and stating that "[t]o heap attention on such an obviously non-precedential opinion is extraordinary—and impossible to square with any formal rule of precedent").

123. *Bruen*, 142 S. Ct. at 2126.

124. *Id.*

125. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010) (distinguishing between interpretation and construction and arguing that the difference is "real and fundamental"); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1658 (2005) (discussing metrics for choosing decision rules to implement operative constitutional provisions); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 153 (2004) (distinguishing "statements of judge-interpreted constitutional meaning from rules directing how courts should adjudicate claimed violations of such meaning"); *see generally* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001) (identifying the various methods for implementing the Constitution through doctrinal rules and tests).

The *Bruen* Court, however, insisted that its new test "accords with" the method the Court uses for adjudicating other constitutional rights.[126] In some free-speech challenges, the Court noted, the government must prove that speech is unprotected by pointing to "*historical* evidence about the reach of the First Amendment's protections."[127] And the same is true, *Bruen* proclaimed, for "many other constitutional claims."[128] All the Court was doing in *Bruen* was "adopt[ing] a similar approach" for Second Amendment questions.[129]

This claim to consistency across constitutional domains is not entirely convincing. To be sure, history is almost always an important part of the constitutional inquiry and can sometimes lend itself to only one answer.[130] But it is very seldom looked to in isolation. Lower courts after *Heller*, in fact, adopted the two-part framework used before *Bruen* precisely because it was drawn from the Supreme Court's free-speech jurisprudence.[131] That jurisprudence first questions the scope of coverage and then, if the First Amendment covers the conduct, applies traditional means-end scrutiny to ascertain the strength of protection.[132] The Supreme Court has consistently applied this two-part inquiry to free-speech cases, even in recent terms.[133] Yet *Bruen* invoked only one part of this inquiry to support making history alone decisive.[134] *Bruen* omitted any discussion of the commonly employed second stage, where means-end scrutiny is a prominent fixture of modern free-speech jurisprudence.[135]

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126. *Bruen*, 142 S. Ct. at 2130.

127. *Id.* (emphasis in original).

128. *Id.*

129. *Id.*

130. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 9–24 (1982) (describing historical argument as one main modality of constitutional interpretation).

131. Charles, *Constructing a Constitutional Right*, *supra* note 19, at 347.

132. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 267–82 (1981) (describing the "question of coverage" in the First Amendment context); *id.* at 273 ("We must always first ask, 'Is this speech?', regardless of whether we are going to determine thereafter if it is the type of speech that we deem to be free, protect absolutely, protect only strongly, or subject to a 'balancing of the interests.'").

133. *See, e.g.*, Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2046 (2021); Williams-Yulee v. Fla. Bar, 575 U.S. 433, 442 (2015).

134. *Bruen*, 142 S. Ct. at 2130.

135. *See* Bridges, *supra* note 15, at 69–70 (describing the contrast between *Bruen*'s method and First Amendment law); Blocher, *supra* note 46, at 386 (identifying some areas of categorical reasoning in First Amendment doctrine but underscoring that "balancing has largely displaced categorization as the preferred mode of First Amendment protection").

In any event, *Bruen*'s new test appears itself to have two distinct stages.[136] At the first stage, *Bruen* directed courts to look to the text. "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[137] If a court concludes that the conduct is covered, the "presumpti[on]"[138] that the conduct is constitutionally protected can be rebutted only if the government is able to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[139] In other words, the first step appears to ask a coverage question about the scope of the Second Amendment by reference to the text, and the second step asks a protection question by reference to history and tradition.[140] And that first step, as *Bruen* suggested, is largely similar to the type of coverage question courts asked under the prior two-part framework.[141]

Applying this new test, the Court said, will "be fairly straightforward" in some range of cases.[142] For example, if a contemporary law addresses a general social problem that existed when the Second Amendment was ratified, then it raises alarm bells if the government defending that law cannot show "a *distinctly similar* historical regulation."[143] And it would be evidence that a contemporary law is unconstitutional if "earlier generations addressed" the same

136. *See, e.g.*, United States v. Tilotta, No. 3:19-CR-04768-GPC, 2022 WL 3924282, at *1 (S.D. Cal. Aug. 30, 2022). *But see* Antonyuk v. Hochul, No. 1:22-CV-0986 (GTS/CFH), 2022 WL 16744700, at *41 (N.D.N.Y. Nov. 7, 2022) (describing *Bruen*'s test as a "one-step, burden-shifting approach").

137. *Bruen*, 142 S. Ct. at 2129–30.

138. *Id.* at 2130.

139. *Id.*

140. An alternative way to read the opinion might be to see the first step as a general inquiry and the second step as a specification of the general rule such that "conduct subject to traditional restrictions isn't covered by the right." Adil Haque, @AdHaque110, TWITTER (Jan. 31, 2023, 6:21 AM), https://twitter.com/AdHaque110/status/1620427016368721921 [https://perma.cc/ZQB4-PJDY]; *see also* Hallie Liberto, *The Moral Specification of Rights: A Restricted Account*, 33 L. & PHIL. 175, 176 (2014) (describing a theoretical dispute in moral theory about whether the full specification of a right includes all of its exception or whether exceptions constitute justifiable infringements on a right).

141. *See* United States v. Sitladeen, 64 F.4th 978, 985 (8th Cir. 2023) (concluding that the panel was bound by pre-*Bruen* precedent that decided a case under the first step of the two-part framework because that is consistent with *Bruen*).

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

143. *Id.* (emphasis added).

problem using "materially different means" or if they sought to employ similar means but were rebuffed on constitutional grounds.[144]

Heller and *Bruen*, said the majority, were among those "relatively simple" cases because each challenged law responded to a gun-violence problem that the majority characterized as persisting since the Founding.[145] But other cases that deal with either social problems unknown to the Founding generation or dramatic technological change require a "more nuanced" approach.[146] There, *Bruen* stated, courts can use their expertise in the everyday legal task of drawing analogies. "Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'"[147] *Bruen* laid down two nonexhaustive principles of relevant similarity for the Second Amendment: first, whether the challenged law and a historical one burden self-defense in the same or similar ways, and second, whether the challenged and historical laws were justified on the same or similar grounds.[148] These "how" and "why" metrics were not meant to be comprehensive, *Bruen* acknowledged, but are important considerations in performing the required analogical reasoning.[149]

The Court insisted that the mandate to use analogical reasoning creates "neither a regulatory straightjacket nor a regulatory blank check."[150] It is not a blank check because courts cannot simply defer whenever the government introduces a vaguely similar historical analogue, which would risk treating outlier laws as paradigm cases.[151] But the mandate is also not a straightjacket because "analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*."[152] Thus,

144. *Id.*

145. *Id.* at 2132. According to *Bruen*, the problem they shared in common was "'handgun violence,' primarily in 'urban area[s].'" *Id.* at 2131 (alteration in original).

146. *Id.* at 2132.

147. *Id.* (quoting Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).

148. *Id.* at 2133.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* (emphasis in original).

even when the similarity does not make the precursor "a dead ringer" for a modern law, the similarity might make it "analogous enough."[153]

With a professed aim to show how this method should work in practice, *Bruen* used, as an example, the sensitive-places doctrine.[154] That doctrine, derived from dicta in *Heller*, removes from Second Amendment protection the right to keep and bear arms in select locations deemed "sensitive," like schools and government buildings.[155] *Bruen*'s statements here are a bit cryptic, but the Court said that, even though there were relatively few places deemed sensitive in the early Republic, it assumed those laws were constitutionally valid because it knew of "no disputes regarding the lawfulness of such prohibitions."[156] With that starting point, future courts could "use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible."[157]

Besides enjoining courts to "use analogies" to extend place-based prohibitions to "new and analogous" locations, it is not entirely clear how the example informs the history-*cum*-analogy method that *Bruen* ostensibly raised the example to illustrate. The Court did not, for example, examine the "how" and "why" of any purported extension of the sensitive-places doctrine, even though it centered such inquiries in its description of the new analogical method. Nor did *Bruen* discuss any of the locations to which lower courts extended the doctrine in the years after *Heller* to either ratify or renounce those extensions under its new method.[158]

All in all, the Court did little to quell the concerns about a test relying exclusively on historical methods. The majority maintained that "reliance on history" to implement constitutional rights is "more legitimate, and more administrable" than what took place under means-end scrutiny.[159] The Court's judgment on this point is

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *See generally* Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller, Essay, *"A Map Is Not the Territory": The Theory and Future of Sensitive Places Doctrine*, N.Y.U. L. REV. ONLINE (forthcoming 2023), https://papers.ssrn.com/abstract=4325454 [https://perma.cc/J2P5-AWJD] (discussing sensitive-place doctrine in light of *Bruen*).

159. *Bruen*, 142 S. Ct. at 2130.

comparative—it said the new test fosters these values more than the two-part framework.[160] Yet neither justification seems particularly well supported.

As for administrability, the majority appeared to believe that its test requires only those specialized skills that lawyers are trained to use. According to the Court, the "historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge."[161] The Court did acknowledge that historical inquiry can be hard.[162] But it claimed such difficulties recur in constitutional adjudication and saw "no reason why judges frequently tasked with answering these kinds of historical, analogical questions [in other contexts] cannot do the same for Second Amendment claims."[163]

In response to the dissent's argument that a search for historical answers would be unworkable, the majority announced itself "unpersuaded."[164] "The job of judges," said the *Bruen* majority, "is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies."[165] Those legal questions are to be resolved according to the general standards and principles governing litigation, such as burdens of proof, rules of evidence, presumptions and defaults, and the principle of party presentation.[166] "Courts are thus entitled," declared the *Bruen* Court, "to decide a case based on the historical record compiled by the parties."[167]

One puzzle that *Bruen* did not address is why the same default rules would not also alleviate concerns about litigating "'empirical judgments' about 'the costs and benefits of firearms restrictions,'"[168] which the majority dismissed as beyond the ken of courts. Judges, after all, are no more expert historians than expert empiricists. And so, even accepting that the circumscribed historical research necessary to

160. *Id.* at 2130–31.

161. *Id.* at 2132.

162. *See id.* at 2134 (acknowledging that employing "constitutional principles to novel modern conditions can be difficult" (quoting *Heller II*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting))).

163. *Id.*

164. *Id.* at 2130 n.6.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 2130 (quoting McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2010)).

answer legal questions is administrable, *Bruen* offers no reason to think its test *more* administrable than the alternative it replaced. And the lower court decisions applying *Bruen*'s test, discussed in Part III, give strong reason to believe the history-only test is, in fact, far *less* administrable than what it replaced.

As for legitimacy, *Bruen* said nothing explicit about what made its test more legitimate than the alternative. But originalist judges and scholars have long argued that searching for original meaning is the only legitimate method of interpretation and the only method that avoids a judge simply reading their own policy preferences into the document.[169] And, in reading *Bruen*'s critique of the two-part test, one can glean hints of this argument. "If the last decade of Second Amendment litigation has taught this Court anything," Thomas's majority opinion said, "it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of 'intermediate scrutiny' often defer to the determinations of legislatures."[170] That deference is not appropriate in Second Amendment cases.[171] What "demands our unqualified deference" is not the judgment of contemporary legislators acting on behalf of today's citizens, but the "interest balancing by the people" who ratified the Bill of Rights and the balance "struck by the traditions of the American people."[172] For the Court, then, its test is more legitimate because it aims to rely on the understanding of the Second Amendment's scope at the time it was enshrined in the Constitution and the traditions of long-dead Americans.[173]

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169. *See* Lee J. Strang, *Originalism and Legitimacy*, 11 KAN. J.L. & PUB. POL'Y, 657, 657 (2001) ("The legitimacy of originalism originates from the idea that the Constitution means what those who gave the Constitution authority understood the Constitution to mean (or what the language meant at the time of ratification)."); *cf.* DeGirolami, *First Amendment*, *supra* note 44, at 1666–67 (arguing that traditionalist interpretation, which he distinguishes from originalism, can be justified on democratic-accountability grounds).

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

171. *Id.* ("But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here.").

172. *Id.*

173. Even this description of the test is contestable, however, as *Bruen* may make post-ratification practice that is not evidence of original meaning an independent criterion. *See* Michael L. Smith, *Abandoning Original Meaning*, 86 ALB. L. REV. 43, 79 (2023) (arguing that in *Bruen* and other recent cases, the "references to historic practices alone, without any reasoning or discussion of original public meaning, are not original public meaning analysis, and are more in line with a 'traditionalism' approach to applying the Constitution").

Even though all of the conservative Justices joined Thomas's opinion, and thus likely agreed with these justifications for the test, several of their concurring opinions stressed the limited nature of the ruling. Justice Alito wrote separately to underscore that the Court's decision did not settle other Second Amendment questions or "disturb[] anything that we said in *Heller* or [*McDonald*] about restrictions that may be imposed on the possession or carrying of guns."[174] Justice Barrett's concurrence stressed that the Court did not decide exactly how the historical inquiry should be done.[175] Perhaps most significantly, Justice Kavanaugh, joined by Chief Justice Roberts, concurred to emphasize that the decision did not call into question licensing regimes with objective criteria that limited official discretion and did not upset the set of presumptively lawful regulations that *Heller* had approved.[176]

Bruen is no doubt correct that history can and does matter immensely in constitutional law. Sometimes it can even settle interpretive debates fairly definitively. But often, the history runs out. Conflicting interpretations of the past sometimes emerge and persist despite the best evidence available. Other times, insufficient historical evidence remains to illuminate alternative, competing claims to authority.[177] That is one reason why history often supplements other methods of constitutional argument and decisionmaking, rather than supplants them.[178] "Framing the analysis as purely historical bolsters the illusion that such an approach is, to a meaningful extent, more objective, constraining, and neutral than an approach that is forthrightly value-based."[179] However, relying purely on historical analysis often merely obscures the value judgments involved in the decision.[180]

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174. *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring).

175. *Id.* at 2162–63 (Barrett, J., concurring).

176. *Id.* at 2161–62 (Kavanaugh, J., concurring).

177. And that is to say nothing of the fact that, even with a document as old as our Constitution, "[n]ew evidence regarding the drafting and adoption history of constitutional provisions emerges with stunning frequency." Fallon, *supra* note 41, at 35.

178. *See generally* BOBBITT, *supra* note 130 (including historical argument among other types of constitutional arguments); *see also* Fallon, *supra* note 41, at 32 ("Through much of constitutional history, however, talk about original meanings or the Framers' intentions was merely one aspect of a flexible set of interpretive modalities.").

179. Han, *Transparency*, *supra* note 38, at 393.

180. *Id.*; Siegel, *Memory Games*, *supra* note 60, at 1175 (arguing that the Court's "history-and-traditions framework . . . . functions to conceal rather than to constrain discretion"). *But see*

II. BRUEN'S BLINDSPOTS

The prior Part described the *Bruen* test and its genesis. This Part explores underdeveloped portions of the test. Part II.A focuses on specification and implementation, highlighting both the important aspects of the test *Bruen* expressly left open and those it failed to settle without a whisper of recognition. It shows how *Bruen*'s underspecification led to an uneven application in that very case. Part II.B raises a justification critique. It homes in on how *Bruen* hands historical silence a megaphone to limit regulatory authority today with no real explanation as to why.

A. Specification of the Test

1. *Step One Puzzles*. First, *Bruen* leaves the step-one "plain text" inquiry unspecified. One lower court, for example, bemoaned that the "Court spent very little time . . . explaining how to assess whether the Second Amendment's plain text covers an individual's conduct."[181] And that is far from harmless, for, as several scholars have recently shown, debates are widespread among the self-proclaimed textualist Justices about how to decipher plain meaning in a variety of contexts.[182] Rather than explain how to conduct the inquiry, the Court simply looked at several dictionary definitions and contemporary case law to answer the plain-text questions before it.[183] To be fair, little was likely said in *Bruen* because little needed to be. Given *Heller*'s reading of the Second Amendment, concluding that "bear arms" refers to carrying arms outside the home was easier and quicker than answering other questions about the text's scope. But other cases present more nuanced textual questions, and *Bruen* leaves lower courts to figure out the interpretive step on their own.[184]

Lorianne Updike Toler & Robert Capodilupo, *The Constraint of History*, 46 HARV. J.L. & PUB. POL'Y 457, 457–58 (2023) (arguing that the use of historical sources can be constraining in the Supreme Court).

181. United States v. Love, No. 21-CR-42, 2022 WL 17829438, at *2 (N.D. Ind. Dec. 20, 2022).

182. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting) (disagreeing with Justice Gorsuch's textualist approach because "courts must follow ordinary meaning, not literal meaning"); Eskridge et al., *supra* note 48, at 7 ("In case after case, the Court's textualists have disagreed not just about results, but also about what textualism as a method entails."); Nourse, *supra* note 48, at 4 (identifying disputes among the textualist Justices); Grove, *supra* note 48, at 279–90 (describing various forms of textualism).

183. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2134–35 (2022).

184. *See infra* Part III.

More to the point, in asking how courts should go about deciphering plain meaning, questions arise as to the relationship between text and history. Does the textual interpretation take place apart from historical inquiry? Or, as *Bruen* suggested in praising step one of the framework it displaced, does this inquiry allow interpreting "the Second Amendment's text, *as informed by history*"?[185] But if that is right, and history pervades the threshold textual inquiry, what work is left for the second-stage inquiry into the government's proffered historical sources?

These are not abstract questions. *Heller*, after all, established that the term "arms" in the Second Amendment is quite expansive.[186] Quoting Founding-era dictionaries, *Heller* read the term to include "*any thing* that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another."[187] Thus, said Justice Scalia, "[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms."[188] On this definition, it seems suicide vests and suitcase nukes get prima facie—or presumptive—constitutional protection.[189] Is that the sort of threshold inquiry *Bruen* sets up?[190] Or does the plain-text inquiry include understandings about what was included in the term at the time of ratification—or even require recourse to *current* practices among today's armed citizens?[191] These questions could multiply for other terms in the amendment that

185. *Bruen*, 142 S. Ct. at 2127 (emphasis added).

186. District of Columbia v. Heller, 554 U.S. 570, 581 (2008).

187. *Id.* (quoting TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY 1 (1771)) (emphasis added).

188. *Id.*

189. Darrell A.H. Miller, *Second Amendment Equilibria*, 116 NW. U. L. REV. 239, 241 (2021) [hereinafter Miller, *Equilibria*] ("I am aware of no judicial officer who has endorsed a constitutional right to own and carry a hand grenade (or similarly lethal device), no matter how literally one reads 'to keep and bear Arms' to mean 'to have and carry weapons.'") (quoting *Heller*, 554 U.S. at 584)).

190. *See* Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 62. For example,

> A seventeen year old bringing a live hand grenade into his high school cafeteria fits within the plain text of "people" and "arms" and "bear." It cannot be that such behavior raises a *prima facie* Second Amendment case such that the school district must prove a longstanding tradition of keeping minor children from bringing explosives to school.

Id.

191. *Bruen*, 142 S. Ct. at 2134 ("Nor does any party dispute that handguns are weapons 'in common use' *today* for self-defense." (emphasis added)).

have vexed lower courts.[192] And they are likely to continue vexing those courts. After all, according to recent scholarship, textualists confront at least a dozen interpretive choices when reading a text,[193] and *Bruen*'s neglect of these issues will likely continue fostering the lower court confusion and discrepancies this Article surfaces.

Besides the interpretive openness, *Bruen* also did not expressly specify *what* must fall within the plain text. Does the first step include deciphering whether the challenged conduct, weapon, *and* person claiming a right are covered? Some lower courts have read the decision to say that the plain-text inquiry *only* includes conduct, not other determinations, such as those about the person or his weapon.[194] They base this conclusion on *Bruen*'s initial description of the test: "When the Second Amendment's plain text covers an individual's *conduct*, the Constitution presumptively protects that *conduct*."[195] As a result, said one trial court, questions about who counts as "the people" guaranteed a right to firearms are not a part of the plain-text inquiry; instead, "whether the Government can restrict [firearm possession] for a specific group would fall under *Bruen*'s second step: the historical justification for that regulation."[196]

But despite the abstract wording of its test, *Bruen* did, in fact, suggest all three facets are included in the first interpretive step. When it *applied* the new method it announced, *Bruen* was sure to examine whether all three aspects fell within the plain text of the Second Amendment:

> It is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of "the people" whom the Second Amendment protects. Nor does any party dispute that handguns are weapons "in common use" today for self-defense. We therefore turn to whether the plain text of the Second Amendment protects Koch's and Nash's proposed course of conduct—carrying handguns publicly for self-defense.

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192. United States v. Ramos, No. 21-CR-00395-RGK-1, 2022 WL 17491967, at *3 (C.D. Cal. Aug. 5, 2022) (observing that "before analyzing whether an individual's *conduct* is protected, a court must first determine whether the *individual himself* is protected—whether he is 'part of "the people"'").

193. *See generally* Eskridge et al., *supra* note 48 (exploring these questions in the statutory context).

194. United States v. Quiroz, 629 F. Supp. 3d 511, 516 (W.D. Tex. 2022).

195. *Bruen*, 142 S. Ct. at 2126 (emphasis added).

196. *Quiroz*, 629 F. Supp. 3d at 516.

> We have little difficulty concluding that it does.[197]

In other words, *Bruen* assessed "the people," the "arms," and the conduct ("keep and bear") at the initial stage. That appears to be the best reading of what the test requires. But the Court's description of the test as focused on "conduct"—as opposed to its application of the test to all three aspects—has understandably confused lower courts.

Finally, *Bruen* did not explain who bears the burden of proving coverage at the plain-text step. Does the challenger bear the burden of proving that their conduct, arms, and person fall within the plain text? Or does the government need to disprove these facts to win? It seems hard to imagine that the terrorist bearing a handheld chemical weapon on an airplane would have no initial burden to raise his Second Amendment challenge, though all aspects of the activity ostensibly fall within one type of "plain" reading of the amendment's text.[198] And *Bruen*'s statement that the government's burden to introduce history arises *after* this threshold showing implies a kind of burden-shifting.[199] Those hints point in favor of placing the plain-text burden on the challenger.

That said, there are other statements that could suggest the burden rests on the government. *Bruen* suggested the first step of the prior, displaced framework was appropriate and described that test as placing the burden on *the government* to justify its regulation by showing it regulated activity outside the amendment's scope; it then included a *but see* cite to contrary circuit precedent that had placed the burden on the challenger.[200] That might suggest the government bears the burden at the first step of the new test as well.

Although *Bruen* can be read both ways, the better reading appears to mandate at least some obligation for a challenger to show that his conduct, arms, and person are within the Second Amendment's scope; that best makes sense of *Bruen*'s emphasis on the government's burden

197. *Bruen*, 142 S. Ct. at 2126 (citations omitted).

198. Darrell A.H. Miller, *Second Amendment Traditionalism and Desuetude*, 14 GEO. J.L. & PUB. POL'Y 223, 241 (2016) [hereinafter Miller, *Traditionalism and Desuetude*].

199. *Bruen*, 142 S. Ct. at 2126, 2129–30.

200. *Id.* at 2126.

at the history-and-tradition stage and its language suggesting a shift in the burden once the plain-text hurdle is overcome.[201]

2. *Step Two Gaps.* On top of those plain-text puzzles, *Bruen* left gaps in the second part of its test. Start with the area *Bruen* expressly left open. The Court did not choose the time period within which governments would have to adduce history to defend their laws.[202] Specifically, the Court did not settle whether 1791—when the Second Amendment was ratified—or 1868—when the Second Amendment was incorporated through the Fourteenth Amendment—was the relevant benchmark.[203] It acknowledged the "ongoing scholarly debate" about this question but declined to adopt either view.[204]

Yet, despite this reservation, the Court sent mixed messages. For instance, it invoked *Heller* for the proposition that post–Civil War materials are not as relevant because they are too removed from the time when the Second Amendment was ratified.[205] That made sense in *Heller* because that case dealt with a federal law governed directly by the Second Amendment, and so there was no debate in that case that 1791 was the only relevant time to ascertain original public meaning. But *Bruen* confronted a state law governed by the Fourteenth Amendment's incorporation of the Second Amendment—so, unless the Court was deciding the issue it said it left open, *Bruen*'s quotation of *Heller* for this point is hard to understand. Similarly, later in the opinion, *Bruen* discounted an 1860 regulation in part because it was "enacted by a territorial government nearly 70 years after the ratification of the Bill of Rights."[206] But again, if 1868 were the right metric, then a law enacted just a few years before passage of the Fourteenth Amendment seems directly relevant to the public

201. *See* Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1324 (11th Cir. 2023) (noting that, under *Bruen*'s second stage, "the burden shifts to the government" to show historical tradition), *vacated, reh'g en banc granted*, 72 F.4th 1346 (11th Cir. July 14, 2023) (per curiam).

202. *Id.* at 2138.

203. *Id.*

204. *Id.* Some originalist scholars, for example, think that when evaluating constitutional provisions incorporated through the Fourteenth Amendment, the most appropriate period to rely on is the Reconstruction era. *See* Kurt Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441 (2022) (arguing that originalist methodology requires "an 1868 understanding of provisions in the Bill of Rights incorporated against the states").

205. *Bruen*, 142 S. Ct. at 2136.

206. *Id.* at 2147 n.22.

understanding of the scope of that right.[207] While those hints suggest 1791 might be the key, *Bruen* occasionally did credit later material. The Court pointed to Reconstruction-era sources that appeared to treat the right to carry as an important component of Fourteenth Amendment protections, and especially useful for previously enslaved Americans.[208] When confronted with questions that do turn on the answer to the appropriate year, lower courts will have to choose which era matters.[209]

Bruen also did not specify at least four other central aspects of the historical inquiry: (1) what it means to discover the *existence* of a historical tradition; (2) how the *endurance* of that tradition matters; (3) what the government must show about the *enforcement* of that tradition; and (4) how to deal with the *evolution* of tradition.[210] Though absent from the statement of its test, the Court appeared to make these factors salient at points in its application to New York's law.

a. Existence. To paraphrase Justice Alito's critique of *Casey*'s undue-burden standard, "[t]he difficulty of applying [*Bruen*]'s new rules surfaced in that very case."[211] In using the new method it announced, *Bruen* did not always consider the factors it emphasized—the comparability of both the laws' burdens and their justifications. The Court rejected nearly all the proffered practices, traditions, and putative analogues the government put forward, but often for reasons different than those its test made central.[212] In fact, *Bruen* also appeared to reject laws as analogous at least in part on grounds that did not distinguish those laws from New York's. For example, it said certain laws were not analogous because they still permitted the

207. *See id.* at 2154 (stating that it discounted "a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption" even though these five laws were passed in the years and decades immediately following the Fourteenth Amendment's ratification—1869, 1875, 1889, 1889, and 1890).

208. *Id.* at 2150.

209. *Cf.* Chemerinsky & McDonald, *supra* note 39, at 1024–25 (noting how constitutional understandings shifted in the First Amendment context between 1791 and 1868).

210. In her concurrence, Justice Barrett noted that the Court did not clarify how postratification practice can shed light on the original meaning of the Second Amendment. *Bruen*, 142 S. Ct. at 2162–63 (Barrett, J., concurring). She identified a number of questions that failure left unresolved, such as how old the practice must be, what form it must take, and whether practice can even settle the meaning of rights provisions. *Id.* at 2163.

211. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2273 (2022); *see also Bruen*, 142 S. Ct. at 2181 (Breyer, J., dissenting) ("[T]he Court's application of its history-only test in this case demonstrates the very pitfalls described above [in the dissent].").

212. *See Bruen*, 142 S. Ct. at 2179–80.

carrying of long guns (as did New York's challenged law)[213] and did not operate as a complete "*ban*[] on public carry" (neither did New York's law).[214] And, as Justice Breyer observed in dissent, despite "a laundry list of reasons to discount seemingly relevant historical evidence," the Court offered few reasons to accept rather than reject a proposed analogue.[215] How, then, should lower courts go about searching for precursors? In exploring the hints that can be gleaned from the Court's discussion of history, this section leaves to the side questions about the accuracy of *Bruen*'s historical claims. Stipulating for the purposes of this Article that its reading of history was correct, confusion still abounds.

Under *Bruen*, historical tradition is no doubt the most important determinant of constitutionality. But the concept is nebulous.[216] "Tradition is rarely simple and univocal; it is multifarious, evolving, and complicated."[217] Thirty years ago, commentators were observing that "[a] recurring issue in constitutional cases as well as in academic literature concerns the size of tradition, or the level of generality at which it is to be described and the number of practices it thereby can be said to embrace."[218] *Bruen* did not define the concept or provide guidance to lower courts tasked with finding traditions. How, then,

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213. *Id.* at 2144 ("[A]lthough the 'planter' restriction may have prohibited the public carry of pistols, it did not prohibit planters from carrying long guns for self-defense—including the popular musket and carbine.").

214. *Id.* at 2148 ("These laws were not *bans* on public carry, and they typically targeted only those threatening to do harm.").

215. *Id.*

216. Miller, *Traditionalism and Desuetude*, *supra* note 198, at 225–26 (underscoring that, in the Second Amendment context, "the Court's imprecise appeal to tradition poses a host of familiar conceptual and interpretive problems," such as those about whose tradition matters, what period of time, what level of abstraction, and how to incorporate conflicting traditions); R. George Wright, *On the Logic of History and Tradition in Constitutional Rights Cases*, 32 S. CAL. INTERDISC. L.J. 1, 4 (2023) (highlighting previous critiques about the indeterminacy of tradition).

217. William N. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 193, 194 (2009). Law is fundamentally a tradition-based enterprise, Martin Krygier, *Law as Tradition*, 5 L. & PHIL. 237, 241 (1986), and "tradition is itself a source of substantive norms, models, linguistic practices, ways of speaking and inhabiting the world that legal participants . . . adopt as their own perspective towards the world and its evaluation," Felipe Jiménez, *Legal Principles, Law, and Tradition*, 33 YALE J.L. & HUMAN. 59, 69 (2022).

218. Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 72 (1995); *see also* DeGirolami, *First Amendment*, *supra* note 44, at 1162 (describing as a crucial question how narrowly or broadly to construe a tradition in applying a traditionalist methodology).

should courts determine whether a historical tradition exists?[219] Suggestions in the majority's decision point in multiple, sometimes conflicting directions about which past regulations actually matter. The number, nature, age, coverage area, and prior judicial approval of historical laws all seem to have mattered at different points. But the clues can only be gathered from hints in the Court's assessment of New York's law; the majority does not give direct guidance on these issues.

Take the majority's description of analogical reasoning. It said there that a modern law need not be a "dead ringer" or "historical twin" (singular) but only *an* established and representative "analogue" (singular) to allow the modern regulation "to pass constitutional muster."[220] Those statements suggest that while a dead ringer or historical twin may not be *necessary*, a solitary one would be *sufficient*. And, relatedly, it suggests that if the government could show it did in fact have *an* analogue, then the modern law would be upheld.[221] Elsewhere, the Court said the government at times needed to show "*a* distinctly similar historical regulation."[222] But, when later confronted with something admittedly like that, the Court backtracked. It would "not give disproportionate weight to a single state statute and a pair of state-court decisions."[223] So the test, as applied, appears to mean that more than one dead-ringer—or at least distinctly similar historical regulation—is required to make enough history.

Adding to the confusion, the Court vacillated on just what the historical precedent must be. It morphed seamlessly and silently from requiring an "analogue" to proclaiming another piece of proffered history insufficient because it provided "little evidence of an early American *practice*."[224] Though the Court said nothing about what might constitute a "practice," the term seems to connote an amorphous

219. *See* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 84 (2012) [hereinafter Han, *Autobiographical Lies*] (noting that, in assessing categorical exceptions from the free-speech clause, the Court has not explained "what exactly constitutes a 'longstanding tradition' sufficient to recognize the exclusion of speech" (footnote omitted)).

220. *Bruen*, 142 S. Ct. at 2133.

221. *Cf.* United States v. Holton, No. 3:21-CR-0482-B, 2022 WL 16701935, at *2 (N.D. Tex. Nov. 3, 2022) (recognizing that, under *Bruen*, "[o]nly a 'historical analogue' is required, not a 'historical twin'").

222. *Bruen*, 142 S. Ct. at 2131 (emphasis added).

223. *Id.* at 2153.

224. *Id.* at 2142 (emphasis added).

but steady regularity nowhere defined in the opinion.[225] Then, in distinguishing away a different piece of evidence, the Court remarked that it doubted whether "three colonial regulations could suffice to show a tradition."[226]

These statements raise a host of questions. Is an analogue different than a practice? Are both (or either) different than a tradition? Were the discarded colonial regulations deficient because they were numerically insufficient (three precursors can never be enough to constitute a tradition) or temporally unilluminating (colonial laws were passed too long before ratification)? And how firm is the Court's "doubt" about their sufficiency? The Court's shifting descriptions of the required history—analogue, practice, tradition, precursor—confuse and complicate the inquiry.[227]

Plus, as the colonial examples illustrate, *Bruen* also stated that the historical precedent can be neither too old nor too new. Even medieval laws that found their way into the common law of newly independent states were rejected as too old.[228] At the other end, laws from the late 1800s were viewed as suspiciously recent, and any from the twentieth century were off-limits unless they were evidence of an ongoing tradition that began earlier.[229] In prior work, I have referred to this boundary setting as commanding a search for a kind of "goldilocks history."[230] And it is worth underscoring that, by discounting later

225. *Cf.* DeGirolami, *First Amendment*, *supra* note 44, at 1658 ("Age and endurance are what makes a practice a tradition."); J. Joel Alicea, *Practice-Based Constitutional Theories*, 133 YALE L.J. (forthcoming) (manuscript at 22), https://papers.ssrn.com/abstract=4353789 [https://perma.cc/ZGR7-H38R] ("[T]he term 'practice' is often understood by constitutional theorists as a broad concept, which can encompass various phenomena."). Justice Barrett noted a similar question left open by the Court's description of practice: "What form must practice take to carry weight in constitutional analysis?" *Bruen*, 142 S. Ct. at 2163 (Barrett, J., concurring).

226. *Bruen*, 142 S. Ct. at 2142 (emphasis omitted).

227. J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1617 (1990) (identifying some puzzles of traditionalist methods, asking: "What is tradition? How do we determine its boundaries or entailments, and what is its normative status?").

228. *Bruen*, 142 S. Ct. at 2139 (dismissing the medieval Statute of Northampton as too old to matter).

229. *Id.* at 2153–54, 2154 n.28.

230. Jake Charles, Bruen, *Analogies, and the Quest for Goldilocks History*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (June 28, 2022), https://firearmslaw.duke.edu/2022/06/bruen-analogies-and-the-quest-for-goldilocks-history [https://perma.cc/E2HC-JMNE]; *see* United States v. Love, No. 1:21-CR-42-HAB, 2022 WL 17829438, at *3 (N.D. Ind. Dec. 20, 2022) ("Reviewing courts, then, must find the goldilocks of historical analogues: not too old, not too new, but just right.").

evidence, *Bruen* (like *Dobbs*) discounts evidence from precisely that period in American history when excluded voices started becoming full members of the political community with a say in the legislative process.[231]

Yet even on the question of age, the Court sent mixed signals by expressly affirming the constitutionality of modern nondiscretionary laws governing concealed carry licenses (i.e., "shall issue" laws, as opposed to the "may issue" law in New York).[232] The majority did not suggest those laws could satisfy its history-only test. And, as Professor Adam Samaha underscores, they probably could not.[233] Not only is public-carry licensing a modern invention, but the kinds of nondiscretionary regimes that the Court preserved actually *postdate* the discretionary ones the Court struck down.[234] That has led even some otherwise sympathetic commentators to ask: "Under the Court's announced methodology, how in the world could only the later, rather than the earlier, of two very late 'traditions' reflect the original meaning of the Second Amendment?"[235] Instead of historical grounds, *Bruen* seemed to justify nondiscretionary laws on the same kind of pragmatic grounds it elsewhere dismissed.[236]

Even if *Bruen* had clearly delineated the number of laws required, the time periods that should bookend a historical search, and the nature of what exactly courts should be looking for, the Court occasionally used other reasons to reject past regulations. In discussing

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231. *See* Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 901 (2023) ("The tradition-entrenching methods the Court employed to decide *Bruen* and *Dobbs* elevate the significance of laws adopted at a time when women and people of color were judged unfit to participate and treated accordingly by constitutional law, common law, and positive law.").

232. *Bruen*, 142 S. Ct. at 2138 n.9 (blessing shall-issue laws).

233. Adam M. Samaha, *Is* Bruen *Constitutional? On the Methodology That Saved Most Gun Licensing*, 98 N.Y.U. L. REV. (forthcoming 2023) (manuscript at 4), https://papers.ssrn.com/abstract=4241007 [https://perma.cc/G4MG-WUSZ] ("[T]he majority's treatment of this history presented approximately zero reasons for distinguishing shall-issue from may-issue licensing of firearms.").

234. *Id.*; *see also* Bridges, *supra* note 15, at 71 (highlighting that "these regimes are modern innovations").

235. Nelson Lund, Bruen*'s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC. REV. 279, 292 (2022).

236. *Id.* (noting that "the Court does not provide so much as a shred of evidence that any kind of licensing requirements had ever been imposed on the general population before the 20th century"); *Bruen*, 142 S. Ct. at 2138 n. 9 (discussing the salutary purposes behind nondiscretionary licensing laws and the minimal burden they impose on gun owners).

territorial laws, for example, *Bruen* afforded them little to no weight because territories were provisional and temporary, and the laws they passed applied to "miniscule territorial populations."[237] But territories might warrant even more weight than state laws and cases because these jurisdictions were directly bound by the Second Amendment from the start.[238] *Bruen* also dismissed these laws because they were rarely challenged on constitutional grounds—an apparent reason to reject them, not respect them.[239] On that point, it is difficult to square the Court's dismissal of these laws on the grounds that they went unchallenged with its express acceptance of sensitive-place laws on those very same grounds.[240]

In the end, *Bruen*'s test for establishing the existence of a relevant historical tradition appears to be largely ad hoc. The Court treats the bevy of laws that might support New York's in isolation—as "solitary"[241] and "exceptional."[242] It characterizes potentially supportive regulations as "uniquely severe,"[243] "unusually broad,"[244] or "extreme restriction[s],"[245] and then dismisses them all as "outliers."[246]

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237. *Bruen*, 142 S. Ct. at 2154.

238. Andrew Willinger, *The Territories Under Text, History, and Tradition*, 101 WASH. U. L. REV. (forthcoming) (manuscript at 61 n.328), https://papers.ssrn.com/abstract=4372185 [https://perma.cc/FUG8-BF7Y] (arguing that, by rejecting the relevance of territorial laws, "courts will be presented with a history of regulation that purports to be complete, but in fact omits the very jurisdictions that were actually subject to the Second Amendment at the time").

239. *Bruen*, 142 S. Ct. at 2155 ("[B]ecause these territorial laws were rarely subject to judicial scrutiny, we do not know the basis of their perceived legality.").

240. *Id.* at 2133 (stating that because the Court was "aware of no disputes regarding the lawfulness of such prohibitions" it could "therefore . . . assume it settled that these locations were 'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment").

241. *Id.* at 2144 ("[W]e cannot put meaningful weight on this solitary statute.").

242. *Id.* at 2154 ("The exceptional nature of these western restrictions is all the more apparent when one considers the miniscule territorial populations who would have lived under them.").

243. *Id.* at 2147 ("Finally, we agree that Tennessee's prohibition on carrying 'publicly or privately' any 'belt or pocket pisto[l],' 1821 Tenn. Acts ch. 13, p. 15, was, on its face, uniquely severe.").

244. *Id.* at 2148 n.24 ("It is true that two of the antebellum surety laws were unusually broad in that they did not expressly require a citizen complaint to trigger the posting of a surety.").

245. *Id.* at 2147 n.22 ("This extreme restriction is an outlier statute enacted by a territorial government nearly 70 years after the ratification of the Bill of Rights, and its constitutionality was never tested in court.").

246. *Id.* at 2153 ("But the Texas statute, and the rationales set forth in *English* and *Duke*, are outliers."); *id.* at 2156 ("Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for

Yet, as Professors Joseph Blocher and Darrell Miller detail, *Bruen* does not simply find these laws as outliers; it makes them so.[247] "*Bruen*'s outliers are the product of decisions both inside and outside the Court, motivated by express and assumed judgments about how to count, and what counts."[248] The Court's categorization transformed what might otherwise be considered different aspects of an enduring tradition into isolated segments of social policy. And it leaves lower courts floundering for guidance.

b. Endurance. Related to questions about the existence of a relevant analogue, *Bruen* conveyed nothing express about how long a law must endure to count as an input in the historical calculus. Some scholars have argued that in the Court's other cases using a traditionalist methodology, a practice's "duration, understood as a composite of age and continuity," has been a central feature of decision-making, with duration on something like a sliding scale of authoritativeness.[249] For *Bruen*, the issue went unaddressed. In discussing how the government could rely on analogues to uphold a contemporary law, it said the government needed one that was "well-established and representative," but how those adjectives apply to any past law are subject to serious debate.[250] *Bruen* also quoted *Heller*'s description of several laws as safe under its ruling because they were "longstanding,"[251] but it failed to grapple with the critiques of *Heller*'s appendage of that label to laws first passed in the 1960s.[252]

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personal defense."); *id.* ("Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to demonstrate a special need for self-protection distinguishable from that of the general community in order to carry arms in public." (citation and quotation marks omitted)).

247. Miller & Blocher, *supra* note 190, at 64 ("A central defect of *Bruen* is the suggestion that its 'outliers' were simply found. They weren't. They were created.").

248. *Id.*; *see also* Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 933 (2014) (identifying and discussing various kinds of outlier-suppressing Supreme Court opinions).

249. *See* DeGirolami, *Traditions*, *supra* note 45, at 1165; DeGirolami, *First Amendment*, *supra* note 44, at 1658 ("Where practices are less old, less continuous, or less dense (continuity and density being the two elements of endurance), they bear decreasing interpretive authority on traditionalist premises.").

250. *Bruen*, 142 S. Ct. at 2133.

251. *Id.*

252. C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698–99 (2009); *see also* United States v. Nutter, 624 F. Supp. 3d 636, 641 (S.D. W. Va. 2022) ("As the Fourth Circuit and many commentators have recognized, though, there is not clear

Bruen dismissed one colonial regulation, at least in part, on the ground that it lasted less than a decade.[253] It also said that several "territorial restrictions deserve little weight because they were . . . short lived."[254] The "transitory"[255] and "temporary"[256] nature of those laws counted against them. It is not hard to see why some lower courts have subsequently dismissed as irrelevant laws that were not long-lasting enough.[257] Yet, in stating the test it mandated lower courts apply, *Bruen* gave no guidance on how long a given law (or set of laws) had to endure to qualify as relevant historical precedent. A test that demands an overly long duration for past regulations to qualify threatens to discount probative evidence simply because state experimentation and policy choices responded to changing facts on the ground.[258]

c. Enforcement. What if there is an enduring tradition of laws that have gained widespread acceptance and govern a large population? Is that enough or does the government have to prove those laws were consistently enforced? And if so, with what frequency? *Bruen* did not address, let alone answer, these questions.[259] But the majority did seem to make enforcement and punishment occasionally important. If a historical law carried a small penalty, that may be a sign it did not impose an analogous burden to a contemporary law under the

historical evidence that those 'longstanding' prohibitions, dating to the early 20th century, existed in similar form in the founding era.").

253. *Bruen*, 142 S. Ct. at 2144 ("At most eight years of history in half a Colony roughly a century before the founding sheds little light on how to properly interpret the Second Amendment.").

254. *Id.* at 2155.

255. *Id.*

256. *Id.*

257. Christian v. Nigrelli, No. 22-CV-695 (JLS), 2022 WL 17100631, at *8 (W.D.N.Y. Nov. 22, 2022) (faulting the government for failing to introduce evidence about how long a proffered law lasted).

258. A troubling instance of that is the Fifth Circuit's rejection of proposed analogues on the ground that states later changed those laws—one more than a half-century after initial enactment. *See* United States v. Rahimi, 61 F.4th 443, 458 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023).

259. And yet, given the nature of historical records, it might be difficult to locate sufficient evidence even if a given law had been frequently enforced. *See* Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121, 130–31 n.53 (2015) (explaining why historical enforcement records might be difficult to find or no longer in existence).

relevant-similarity burden metric.[260] If it was not consistently enforced, perhaps that would be another reason to think it imposed a small burden, or perhaps that is an independent reason to reject the law.[261] After highlighting the meager penalty a surety bond imposed, for example, the Court continued, "Besides, respondents offer little evidence that authorities ever enforced surety laws."[262] That statement makes it seem as if lack of enforcement (or lack of evidence of enforcement) would be an independent reason to reject those regulations as analogous.[263]

Furthermore, *Bruen* seemed to make race-based enforcement relevant in important yet uncertain ways.[264] Dueling amicus briefs before the Court focused alternatively on how New York's law served to *protect* Black New Yorkers who bear the brunt of gun violence[265] and how enforcement of New York's gun laws serves to *subordinate* Black New Yorkers who bear the brunt of policing and prosecution for gun-related offenses.[266] The Court itself cited racist laws enforced against Black Americans in the Civil War era as a sign of the right to

260. *Bruen*, 142 S. Ct. at 2149 ("[W]e have little reason to think that the hypothetical possibility of posting a bond would have prevented anyone from carrying a firearm for self-defense in the 19th century.").

261. The Court has occasionally dismissed unenforced laws as anachronistic on a desuetude rationale that *Bruen* may make relevant in the search for proper analogues. *See, e.g.*, Miller, *Traditionalism and Desuetude*, *supra* note 198, at 228 ("The thrust of these arguments is that superannuated, unenforced, or under-enforced regulations do not shape the Second Amendment and cannot undermine broader and more abstract Second Amendment values."); Sunstein, *supra* note 66, at 264 (discussing how the law struck down in *Griswold* had long been unenforced and that, while the law before *Heller* had not been similarly dormant, "both decisions operated in accordance with a national consensus at the expense of a law that counted as a sharp deviation from it").

262. *Bruen*, 142 S. Ct. at 2149.

263. *Id.* at n.25 ("[G]iven all of the other features of surety laws that make them poor analogues to New York's proper-cause standard, we consider the barren record of enforcement to be simply one additional reason to discount their relevance.").

264. *See* Daniel S. Harawa, NYSRPA v. Bruen: *Weaponizing Race*, 20 OHIO ST. J. CRIM. L. 163, 169 (2023) (noting the majority's selective invocation of race and arguing that some of the opinion's "historical omissions are curious except for the fact that they do not support the narrative thread woven throughout the Court's Second Amendment cases suggesting that gun control is racist"); *id.* at 170 ("What work is race doing [in] the Court's Second Amendment jurisprudence? In many ways, it resembles the worst of what Professor Derrick Bell coined 'interest convergence.'" (citation omitted)).

265. *See* Brief of the NAACP Legal Def. & Educ. Fund, Inc., and the Nat'l Urb. League as Amici Curiae in Support of Respondents at 1, *Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843).

266. *See* Brief of the Black Att'ys of Legal Aid et al. as Amici Curiae in Support of Petitioners at 5, *Bruen*, 142 S. Ct 2111 (2022) (No. 20-843).

public carry for recognized citizens, and it even quoted the anticanonical *Dred Scott v. Sandford*[267] case approvingly for the proposition that granting Black Americans citizenship would entitle them to the right to public carry.[268] In raising these issues, the Court may have been inviting an inquiry into how historical laws were enforced in racially disparate ways when lower courts search for a historical tradition.[269] But the Court's lack of clear guidance about the role race should play in assessing modern regulations—or their historical progeny—creates more confusion for lower courts implementing the test.

d. Evolution. How should courts treat evolution in the tradition governing some aspect of firearms regulation? Does an earlier tradition necessarily trump a later one, or might a later one be considered the more mature view of the scope of the right? Some evolutions certainly seem to matter. *Bruen* is clear that "when it comes to interpreting the Constitution, not all history is created equal."[270] If an old practice became "obsolete in England at the time of the adoption of the Constitution and never was acted upon or accepted in the colonies," then it cannot count in favor of the contemporary law.[271] "English common-law practices and understandings at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution."[272] So evolutions that occurred before ratification do not freeze the prior understanding in time. Similarly, evolutions that too far postdate ratification do not count. Much as the existence of a

267. Dred Scott v. Sandford, 60 U.S. 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

268. *See Bruen*, 142 S. Ct. at 2151 (noting "Southern abuses violating blacks' right to keep and bear arms").

269. *See* United States v. Hicks, No. 21-CR-00060, 2023 WL 164170, at *7 (W.D. Tex. Jan. 9, 2023) (declining to rely on historical laws "based on race, class, and religion"); Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537, 538 (2022) (arguing that a historical "approach is significantly complicated by the fact that many gun laws adopted over the course of American history were racially motivated"); *cf.* W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1194 (2022) (exploring the problem of how badly motivated laws should influence current court review). Apart from the constitutional dimensions, the questions surrounding race and gun law enforcement in the modern period present vexing policy questions. *See* Jacob D. Charles, *Firearms Carceralism*, 108 MINN. L. REV. (forthcoming) (on file with author).

270. *Bruen*, 142 S. Ct. at 2136.

271. *See id.* (citation and quotation marks omitted).

272. *Id.*

tradition cannot be too old or too new, an evolution in how guns are regulated cannot be too old or too new. Notwithstanding this confusion, some lower courts have made the evolution of a regulatory tradition a key part of their analysis.[273]

B. Silence in the Past

Because *Bruen* requires the state to establish a historical tradition, it gives monumental weight to the absence of positive law. *Bruen*, for example, treated the fact that many Americans were permitted to carry guns in public without a showing of need as proof that they had an inalienable right to do so. For *Bruen*, historical permission ripened into a right. "[T]hose who sought to carry firearms publicly and peaceably in antebellum America were generally free to do so," it said.[274] As a result, *Bruen* treated later regulation of historically permitted conduct as *inconsistent* with a previously understood right. For example, the Court conceded that an 1871 Texas regulation was analogous to New York's law because that statute made the right to gun-carrying contingent on showing reasonable grounds to fear an attack.[275] The Court even acknowledged two contemporaneous Texas Supreme Court decisions upholding the law against constitutional challenge.[276] Yet it proclaimed that it would not give those precedents "disproportionate weight" because they purportedly "contradict[ed] the overwhelming weight of other evidence regarding the right to keep and bear arms for defense in public."[277] But the Court cited no evidence to even *suggest* that any similar statutes were declared—or would have been considered—unconstitutional. There were no cases striking down similar laws on constitutional grounds or other evidence that states declined to enact similar regimes because doing so was thought to be unconstitutional. Instead, the "other evidence" of the right to carry seems to be the fact that other states simply had *not* adopted such restrictions.[278] An old law, even one admittedly analogous, was dismissed simply because it regulated previously permitted conduct.

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273. *See infra* Part III.B.2.

274. *See Bruen*, 142 S. Ct. at 2146.

275. *See id.* at 2153.

276. *Id.*

277. *Id.* (citation and quotation marks omitted).

278. *See id.* (stating that because "only one other State, West Virginia, adopted a similar public-carry statute before 1900," "[t]he Texas decisions therefore provide little insight into how postbellum courts viewed the right to carry protected arms in public").

1. *The Absence of Evidence.* This argument from silence points to a deeper confusion in the test the decision employed—and the unwarranted assumptions on which it relies. Under *Bruen*'s test, it appears that if the government cannot point to past legal regulation (that is, enacted laws), it cannot regulate today.[279] That hardly seems justified. To be sure, there is good reason to think that the presence of analogous historical regulations would provide evidence that a modern law *is* constitutional. After all, courts can presume (absent other evidence) that historical legislatures acted within the scope of their powers when they legislated.[280] But *Bruen* does not stop at making historical laws *sufficient* for a modern law's constitutionality; instead, it makes historical laws *necessary*.[281] And yet, for the absence of evidence (of regulations) to serve as evidence of absence (of regulatory authority), the Court must make assumptions about historical lawmaking that do not seem justified.

Specifically, it must assume that historical legislatures always legislated to the maximum extent of their constitutional authority, at least with respect to guns.[282] Without that assumption, the absence of past regulation tells us nothing about what our ancestors thought their elected representatives *could* do.[283] As Professor David Han has underscored for similar assumptions in pockets of free-speech doctrine, "[T]he mere fact that the government *chose* to regulate in these particular areas did not mean that, as a historical matter, it could *not* have regulated . . . more broadly if it had wanted to do so."[284] Past

279. Justice Breyer made a similar objection in *Heller*, but it apparently went unheeded. District of Columbia v. Heller, 554 U.S. 570, 718 (2008) (Breyer, J., dissenting) ("[W]e must look, not to what 18th-century legislatures actually *did* enact, but to what they would have thought they *could* enact.").

280. Barnett & Solum, *supra* note 39, at 9 (noting that one role of historical evidence in ascertaining original meaning is the notion that, "[a]bsent evidence to the contrary, it is reasonable to assume that [early legislatures'] actions were consistent with the text, especially if their actions went uncontested").

281. Alschuler, *supra* note 3, at 10–11.

282. *See* Litman, *supra* note 13, at 1427 ("The idea that legislative novelty suggests that prior Congresses believed that similar legislation was unconstitutional is premised on the notion that if Congress possessed a particular power, it would have exercised it."). Indeed, in the statutory context, the Supreme Court has often been careful to consider the context of congressional deliberations before reading too much into legislative inaction. *See* William N. Eskridge Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 70–71 (1988) (describing various sets of statutory cases that rely on congressional silence).

283. Alschuler, *supra* note 3, at 10–11 (underscoring this logical fallacy in *Bruen*).

284. Han, *Transparency*, *supra* note 38, at 386.

generations may have declined to regulate for any number of reasons that do not illuminate the question of constitutionality.[285] To take just a few possible reasons, laws on the topic may have been considered unnecessary given the prevailing social conditions or impractical given the politics, logistics, or expense involved. Different constituents or legislators may have had disparate views on the reasons for declining to enact legislation.[286] In some cases, a given regulatory solution may have simply never occurred to our forebears. Unless there is strong reason to believe the lack of evidence is always because earlier generations considered a type of regulation *unconstitutional*, *Bruen*'s test loses normative and explanatory force.

But that is not all. There may be less-than-benign reasons for past legislative inaction. Sometimes, for example, our ancestors did not regulate because they did not deem a group's interests worthy of protection. Ratifying these reasons by tying the hands of today's legislators seems particularly problematic. Consider, in this light, domestic violence. For the most part, our forebears (at least those who had the power to make law) for far too long considered at least some forms of spousal abuse a private matter.[287] The nation's leaders often did not protect women's right to be free from terror and violence; instead, at the Founding, they protected a "husband's legal prerogative to inflict marital chastisement."[288] Today, state and federal laws generally proscribe firearm possession for certain types of domestic abusers.[289] Under federal law, for instance, individuals convicted of misdemeanor crimes of domestic violence are permanently barred

285. Alschuler, *supra* note 3, at 10–12.

286. *See* Girgis, *supra* note 39, at 17–18 ("[P]olitical decisions often reflect—and are often allowed to reflect—motivations other than legal beliefs. . . . Political actors are often 'entirely ignorant of the relevant constitutional issue, apathetic to it, or aware of it, yet act based on policy, politics, or other legal authority,' or under pressure. (citation omitted)).

287. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122–23 (1996).

288. *Id.* at 2127; *see also* United States v. Ryno, No. 3:22-cr-00045-JMK, 2023 WL 3736420, at *2 (D. Alaska May 31, 2023) (explaining that "the lack of a distinctly similar firearm regulation stems from two American historical roots: (1) the societal norms accepting domestic violence; and (2) the limited legal frameworks for addressing domestic violence").

289. *E.g.*, CAL. FAM. CODE §§ 6218, 6389 (2022); TEX. PENAL CODE §§ 22.01(a)–(b), 46.04(b) (2022); 18 U.S.C. § 922(g)(9).

from owning guns,[290] while those under a domestic-violence restraining order cannot possess guns while the order is in effect.[291]

Bruen draws these contemporary laws into question. For example, stringently applying *Bruen*'s test, a Fifth Circuit panel said the lack of similar past regulations means that domestic abusers today cannot be disarmed during the pendency of a restraining order.[292] Some criminal defendants have expressly argued that because "domestic violence hardly was a prosecutable crime during the Founding era, let alone a crime worthy of disarmament," contemporary laws that disarm them are unconstitutional.[293] *Bruen* thus appears to imbue not just the Founders' laws but the Founders' values with veto power over lawmakers today.[294]

Even when there are no malevolent explanations for past inaction, the absence of historical statutes still does not often signal a view on constitutional authority. For example, apparently no Founding-era regulations forbade or even tightly regulated private cannon possession.[295] In that light, imagine a challenge to the current federal regulations that impose registration, taxation, and recordkeeping requirements on the private possession of cannons.[296] Under *Bruen*, the barren historical record might be the ballgame.[297] But it is remarkably

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290. 18 U.S.C. § 922(g)(9).

291. *Id.* § 922(g)(8).

292. United States v. Rahimi, 61 F.4th 443, 460–61 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023).

293. United States v. Farley, No. 22-CR-30022, 2023 WL 1825066, at *2 (C.D. Ill. Feb. 8, 2023).

294. *See* United States v. Nutter, 624 F. Supp. 3d 636, 641 (S.D. W. Va. 2022) ("The absence of stronger laws may reflect the fact that the group most impacted by domestic violence lacked access to political institutions, rather than a considered judgment about the importance or seriousness of the issue."); Alschuler, *supra* note 3, at 69–70 (arguing, in the context of domestic violence, that "the Supreme Court construed the Second Amendment to demand adherence to a long 'tradition' of legislative *inaction*, however shameful this tradition and however determined to end it the people's elected representatives eventually became").

295. David Harsanyi, *Sorry, Mr. President, But Americans Could Always Buy Cannons*, NAT'L REV. (Feb. 3, 2022, 3:28 PM), https://www.nationalreview.com/corner/sorry-mr-president-but-americans-could-always-buy-cannons [https://perma.cc/T3VB-DRZM].

296. *See Firearms – Guides – Importation & Verification of Firearms – National Firearms Act Definitions – Destructive Device*, BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, https://www.atf.gov/firearms/firearms-guides-importation-verification-firearms-national-firearms-act-definitions-1 [https://perma.cc/A3LY-ZENQ] (describing the requirements for lawful private possession of devices that include cannons).

297. One might, however, argue that cannons do not constitute "arms" and so do not fall within the "plain text" at all. *See* Charles C.W. Cooke, *Americans Can Still Buy Cannon*, NAT'L

easy to see how the fact that there were no private-cannon-ownership laws is most easily explained as a case in which such laws would have been considered unnecessary because there was not a perceived problem for the law to solve.[298] Indeed, it seems hard to imagine that anyone in the eighteenth or nineteenth centuries would doubt that the states' broad police powers could have been invoked to regulate such possession if private artillery became a pressing social concern, as it might have if large numbers of innocent bystanders were routinely killed or maimed by indiscriminate cannon fire.[299]

Relatedly, there are situations in which *legal* regulation may have been unnecessary because social mores or customs were sufficient to check potentially problematic or unwanted conduct.[300] This may well explain the absence of more early regulations governing weapons-carrying.[301] For example, in 1843, the North Carolina Supreme Court explained that:

> No man amongst us carries [a gun] about with him, as one of his every day accoutrements—as a part of his dress—and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment.[302]

Even in the antebellum South, social mores appear to have obviated the need for greater legal oversight of gun-carrying in public spaces.[303]

REV. (Feb. 3, 2022, 4:59 PM), https://www.nationalreview.com/corner/americans-can-still-buy-cannon [https://perma.cc/8RZD-T2B7] ("[W]hether cannon count as 'arms' or 'ordnance' under the original public meaning of the Second Amendment would be interesting to debate." (alteration in original)).

298. *See* Hanson v. District of Columbia, No. CV 22-2256, 2023 WL 3019777, at *16 (D.D.C. Apr. 20, 2023) (using personal jetpacks as an example of a curiosity that has not generated much regulatory interest because it is impractical, not because of a widespread belief that regulating jetpacks is beyond the government's power).

299. Charles, *Fugazi Second Amendment*, *supra* note 3, at 684–87, 698–701 (explaining the broad authority to regulate under the police powers doctrine).

300. Miller, *Equilibria*, *supra* note 189, at 247 (underscoring that "[t]here may be practices that went unregulated because everyone . . . considered them so aberrational that they didn't need to be specifically prohibited").

301. Mark Anthony Frassetto, *The Myth of Open Carry*, 55 U.C. DAVIS L. REV. 2515, 2518 (2022) (arguing that the lack of regulations on open carry in early America was a reflection that such carrying was rare and that there was a "strong social stigma attached to openly carrying arms").

302. State v. Huntly, 25 N.C. 418, 422 (1843).

303. Charles, *Fugazi Second Amendment*, *supra* note 3, at 657–59 (describing an 1878 Missouri case decrying gun-carrying into places of social intercourse).

Just as laws may have been considered unnecessary, there are certainly cases where regulations were thought to be lawful but impractical because, for example, few people wanted them. Some manifestly constitutional laws are just unpopular. National Prohibition, authorized by its own constitutional amendment, proved spectacularly unlikeable and was later repealed.[304] States, counties, and cities, however, still enjoy authority to ban alcohol sales. The fact that few *exercise* that power is a function of such laws' unpopularity, not their unconstitutionality.[305]

Under *Bruen*, these reasons run together. Whether inaction results from lack of necessity, impracticality, limited foresight or ingenuity, disregard for marginalized populations, or other reasons altogether is irrelevant. The absence in the past is all that appears to matter. One judge evaluating a gun law post-*Bruen* has pointed this discrepancy out: "[A] list of the laws that *happened to exist* in the founding era is, as a matter of basic logic, not the same thing as an exhaustive account of what laws would have been theoretically *believed to be permissible* by an individual sharing the original public understanding of the Constitution."[306] Not only does this rule make

304. *See* Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 172 (2006) (describing the demise of Prohibition as occurring because it was out of touch with popular values).

305. The same could be said about mandatory military service. *See* H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 428 (2000) ("The need for a whole nation in arms has—in all likelihood, permanently—disappeared. At the same time, conscription has become so unpopular as to border on being politically unfeasible."); Perpich v. Dep't of Def., 496 U.S. 334, 341 (1990) (describing how the Militia Act of 1792's "detailed command that every able-bodied male citizen between the ages of 18 and 45 be enrolled [in the militia] and equip himself with appropriate weaponry was virtually ignored for more than a century, during which time the militia proved to be a decidedly unreliable fighting force" (footnote omitted)). So, despite the constitutional *authority* to impress citizens into military duty, "there would be many objections to mandatory military service in the United States" today. Chris Chambers Goodman, *The Devolution of Democratic Citizenship*, 30 CORNELL J.L. & PUB. POL'Y 671, 701 (2021).

306. United States v. Kelly, No. 22-CR-00037, 2022 WL 17336578, at *2 (M.D. Tenn. Nov. 16, 2022); *see also* United States v. Now, No. 22-CR-150, 2023 WL 2717517, at *7 (E.D. Wis. Mar. 15, 2023) (recognizing that "there are also many reasons other than that it would infringe the right to keep and bear arms why legislatures might not have acted to regulate such acquisitions—including practical limitations on enforcement or views on the role of the legislature"), *report & recommendation adopted*, No. 22-CR-150, 2023 WL 2710340 (E.D. Wis. Mar. 30, 2023); Or. Firearms Fed'n v. Kotek, No. 2:22-CV-01815-IM, 2023 WL 4541027, at *36 n.28 (D. Or. July 14, 2023) (explaining that "[i]t would be a mistake to treat this absence of evidence as evidence of [the challenged law's] unconstitutionality").

permissibility hinge on enacted laws, but it also reduces tradition to this set of past legislation. But, as Professor Reva Siegel observes, "A tradition consists in more than statutes."[307] And so, as one commentator underscored before *Bruen*, "[I]f tradition is to become an intelligible basis for a decision, a court must peer beyond law books and regulations and look at actual practice to identify the scope of constitutional protection."[308] It is not clear *Bruen* requires courts to do so.

In treating every kind of conduct with guns as protected if it went unregulated in the past, *Bruen* eliminates any category of historically lawful but regulable conduct. Like the process of adverse possession, permitted conduct at the Founding has ripened into an unassailable right that forecloses legislative authority today. And, for just that reason, *Bruen*'s test all but eliminates a challenger's obligation to show the claimed conduct was understood as historically protected under the Second Amendment. Instead, *Bruen* created a presumption of unconstitutionality for any firearm-involved conduct left unregulated by law in the eighteenth century.[309]

2. *Textual Indeterminacy*. A *Bruen* defender might respond that the plain-text prong allays this worry because it ensures only protected rights are at issue. But that cannot be the case. *Bruen* adverts to precedent, not historical understanding, to ascertain textual meaning at the first step.[310] And, as noted above,[311] that precedent—*Heller*—interpreted the text extremely broadly; *Bruen*, for its part, makes no effort to cabin those definitions. *Bruen* also does the precise opposite of looking to history in analyzing the plain text. It keys constitutional protection for "arms" to contemporary practices grounded in the choices of living Americans;[312] it fleshes out the meaning of "bear" by reference to the need for self-defense in public *today* by those

307. Siegel, *Memory Games*, *supra* note 60, at 1192.

308. Miller, *Traditionalism and Desuetude*, *supra* note 198, at 228.

309. This has not been lost on advocates, who have, for example, grounded arguments in the fact a particular type of weapon "existed unregulated at the time the Second Amendment was adopted." United States v. Saleem, No. 3:21-cr-00086-FDW-DSC, 2023 WL 2334417, at *6 (W.D.N.C. Mar. 2, 2023).

310. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2134–35 (2022).

311. *See supra* Part II.A.1.

312. *See Bruen*, 142 S. Ct. at 2134–35.

Americans that "hazard greater danger outside the home than in it,"[313] like the Chicagoans (who did not exist at the Founding) who face more risks in a "rough neighborhood" than in their "apartment on the 35th floor of the Park Tower" (which also did not exist at the Founding).[314] Beyond that, the bare text of the twenty-seven-word Second Amendment is just too indeterminate on its own to settle the questions of what comes within its ambit.[315]

The Second Amendment protects the right "to keep and bear arms," but the unadorned text cannot fully answer what the right encompasses. *Heller*, for example, made clear that "dangerous and unusual weapons" are not protected "arms,"[316] but nothing in the text alone would suggest such a reading. And while *Bruen* read "bear" to include "carry"[317]—and some commentators, therefore, think the New York case an easy one[318]—linguistic analysis of the phrase "bear arms" in the relevant historical era challenges this easy inference.[319] The text alone seems to settle little. And that is not surprising. Even for other

313. *Id.* at 2135.

314. *Id.* (quoting Moore v. Madigan, 702 F.3d 933, 937 (7th Cir. 2012)).

315. I am grateful to Aaron Tang for conversations about this point. For an exposition of this argument in dialogue over originalism, see Eric J. Segall, *The Concession That Dooms Originalism: A Response to Professor Lawrence Solum*, 88 GEO. WASH. L. REV. ARGUENDO 33, 41 (2020) (arguing that because contentious constitutional text is often indeterminate, "original meaning does not and will not lead to persuasive choices among various plausible outcomes in most litigated cases (at least absent strong judicial deference to the political branches)"). *Cf.* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247 (2022) (explaining that "[h]istorical inquiries" of the type the Court undertook "are essential whenever we are asked to recognize a new component of the 'liberty' protected by the Due Process Clause because the term 'liberty' alone provides little guidance" and that "'Liberty' is a capacious term").

316. District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

317. *Bruen*, 142 S. Ct. at 2134–35.

318. Lund, *supra* note 235, at 280 (arguing that "*Bruen* was an easy case" despite critiquing the Court's use of an exclusively historical test).

319. Every analysis of the large databases of early American language usage of which I am aware has concluded that "bear arms" was most commonly used in the relevant historical time period to refer to actions in a military context. *E.g.*, Neal Goldfarb, A (Mostly Corpus-Based) Linguistic Reexamination of *D. C. v. Heller* and the Second Amendment 18 (Mar. 6, 2023) (unpublished manuscript), https://papers.ssrn.com/abstract=3481474 [https://perma.cc/MG73-JWT7] ("[E]vidence that was not readily available when *Heller* was decided shows that Scalia's statement was very much an oversimplification. Although *bear* was sometimes used in the way that Scalia described, it was not synonymous with *carry* and its overall pattern of use was quite different."); James C. Phillips & Josh Blackman, *The Mysterious Meaning of the Second Amendment*, ATLANTIC (Feb. 28, 2020), https://www.theatlantic.com/ideas/archive/2020/02/big-data-second-amendment/607186 [https://perma.cc/F6K6-SEFS] ("In roughly 90 percent of our data set, the phrase *bear arms* had a militia-related meaning, which strongly implies that *bear arms* was generally used to refer to collective military activity, not individual use.").

fairly specific constitutional provisions, courts and commentators have long rejected the notion that the bare, literal text provides all the answers. The First Amendment, for example, displays an "apparent simplicity" with its mere thirteen words dedicated to freedom of speech and press.[320] Justice Hugo Black took those words literally and embraced an absolutist position that tolerated *no law* abridging the freedom of speech.[321] But that position placed enormous pressure on how to define "speech," which Black was criticized for reading to exclude some clearly expressive activities.[322] And it did not solve the analytical problems either because "[a]sking whether activity is speech or conduct rather than whether 'speech' is protected or unprotected merely changes the vocabulary used in close cases without making the outcome any more certain."[323]

In short, despite a textual hook for gun rights in the Constitution, the Second Amendment's text alone cannot justify *Bruen*'s requirement that any regulation today must find grounding in prior positive law. *Bruen* should, but never did, require a threshold showing that the challenged activity was considered immune from regulation.[324] In many other areas of constitutional law, even those that are historically inflected, the Court's jurisprudence requires the rights-claimer to show historical support for their claimed right—to show that the conduct was not just permitted but understood *as a right*.[325] In the realm of substantive due process, for example, the Court requires "a

320. Donald L. Beschle, *An Absolutism That Works: Reviving the Original "Clear and Present Danger" Test*, 8 S. ILL. U. L.J. 127, 127 (1983).

321. Tinsley E. Yarbrough, *Justice Black and His Critics on Speech-Plus and Symbolic Speech*, 52 TEX. L. REV. 257, 257 (1974).

322. *Id.* at 258 (noting that "Justice Black came in for increasing criticism for what some persons viewed as an undue willingness to allow governmental control of expression" in cases involving picketing and similar activity as well as symbolic speech).

323. Beschle, *supra* note 320, at 130; *see also id.* at 129 (arguing that the rejection of Justice Black's absolutist reading "is understandable in light of the fact that speech can quite obviously be the cornerstone of an enormous amount of activity which is within the range of legitimate state concern to regulate").

324. *Cf.* Girgis, *supra* note 39, at 35 ("For an activity to be a 'deeply rooted' right, . . . it isn't enough for that activity to be widely *permitted* by the states. For instance, while states have never banned ice cream, that doesn't make ice cream consumption a constitutional right." (citation omitted)).

325. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323, 2336 (2022) (observing that, at least in the arena of unenumerated rights, "[f]or originalists like Justice Scalia—and seemingly Justice Neil Gorsuch as well—it won't do to reason from historical silence on some matter to a conclusion that the matter must have been viewed as constitutionally sacrosanct" (footnote omitted)).

careful description of the asserted fundamental liberty interest" and finds protected "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."[326] The Court undertook just that inquiry in its decision the day after *Bruen*.[327] "Although a prequickening abortion was not itself considered homicide," Justice Alito wrote in *Dobbs*, "it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*."[328] The Court recognized—indeed, it relied on—the distinction between mere uncriminalized conduct and constitutionally protected conduct.[329] For the *Dobbs* majority, "the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so."[330]

In *Dobbs*, in short, the absence of evidence in the historical record meant the Constitution left abortion unprotected. The same absence in the historical record in *Bruen* meant the Constitution left gun rights fully protected. Professor Aaron Tang has criticized this disjunction and argued in support of a right to abortion by showing that pre-viability abortion was left largely unregulated at common law.[331] Critics of a right to abortion faulted Tang for making the same argument that *Bruen* embraced: "When a state chooses to allow an action, it does not ordinarily imply that it lacks the power to prohibit the action. By contrast, when it chooses to bar an action, it ordinarily conveys its belief that it has the power to do so."[332] The Supreme Court did not consistently apply an approach to the absence of historical evidence in

326. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022) (stating in the Substantive Due Process context that, "in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue").

327. *Dobbs*, 142 S. Ct. at 2228; N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2111 (2022).

328. *Dobbs*, 142 S. Ct. at 2250.

329. *Id.* at 2251 ("[W]e are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy.")

330. *Id.* at 2255.

331. Aaron Tang, The Originalist Case for an Abortion Middle Ground 15 (Sept. 13, 2021) (unpublished manuscript), https://papers.ssrn.com/abstract=3921358 [https://perma.cc/UMW7-LAHA].

332. Whelan, *supra* note 36; *see also* John Finnis & Robert George, Indictability of Early Abortion c. 1868, at 4–5 (Oct. 11, 2021) (unpublished manuscript), https://papers.ssrn.com/abstract=3940378 [https://perma.cc/EJ2L-FNC5] (making a similar argument against Tang's thesis).

these two cases issued one day apart.[333] And the fact that gun rights have clearer protection in the Bill of Rights cannot explain the difference because the text alone does not change what past legislative silence can tell us.

Indeed, even for enumerated rights, the Court typically requires an initial showing that the conduct was historically understood to be protected. This happens, for instance, with the Seventh Amendment civil-jury right that the Court has tied to a historical methodology.[334] In that context, "the Court has fashioned a test that relies primarily on historical analogues to determine *the kinds of suits that trigger a jury-trial right* and the constitutionality of procedural innovations that control the jury."[335] In other words, history helps dictate when the right even shows up. *Bruen*, by contrast, demanded no evidence that the conduct at issue—there, carrying a concealable firearm in public without any special need—was historically understood as immune from regulation. Whether dealing with an enumerated or unenumerated right, history can be useful for original public meaning when it shows what the ratifying generation understood that right to encompass. But bare text plus historical silence does not get there.

By magnifying the importance of historical silence, *Bruen* embraced a novelty-skepticism characteristic of traditionalist modes of interpretation.[336] But it did not justify this methodological choice or explain its frame of reference. Why, for example, require a practice or tradition of *regulating* firearms in the challenged way rather than require a practice or tradition of *protecting the right* in the claimed way?[337] Writing before *Bruen*, Professor Michael O'Shea underscored

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333. *See* Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1112 (2023) (arguing that applying *Bruen*'s "approach to the abortion context would suggest that the complete absence of pre-quickening abortion bans at the Founding forecloses similar regulation today").

334. Although this right is implemented using a historical test, *Bruen* strangely never mentions it.

335. Miller, *Text, History, and Tradition*, *supra* note 15, at 872 (emphasis added).

336. *See* DeGirolami, *Traditions*, *supra* note 45, at 1165 ("[A] practice's recency or novelty renders a traditionalist interpreter more skeptical about it."); Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1564 (2004) (arguing, in the substantive due process context, that "[t]radition alone cannot provide a workable standard" and that "no legal doctrine that made mere novelty the test of a statute's unconstitutionality could survive").

337. Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing "Standard Model" Moving Forward*, 39 FORDHAM URB. L.J. 1727, 1860 (2012) (explaining that an alternative to the approach *Bruen* eventually adopted

in the Second Amendment context how traditions can be used in two distinct ways: as the basis for rights-limiting arguments or rights-constitutive arguments.[338] In the former, a longstanding government practice can serve to defeat a claim that government regulation today violates individual rights.[339] In this rights-limiting frame, a regulatory tradition is a sufficient justification for the government to prevail. In the latter, "practices can . . . be used to make *positive* arguments about rights,"[340] by, for example, showing that individuals consistently practiced activity they understood to be their right. In this rights-constitutive frame, practices can give rise to at least presumptive evidence that the conduct is immune from regulation. Both of these frames make sense of historical inference: Analogous legislation in the distant past implies lawmakers thought such laws were constitutional; practices or traditions that regard some activity as a right also evidence constitutional understandings.

But *Bruen*'s test does not leverage either of these uses of historical tradition. While *Bruen* did suggest that the government wins when there is a historical tradition of regulation, it makes such a tradition a *necessary* condition and not simply a sufficient one. Similarly, *Bruen* did not point to practices or traditions of gun-carrying or the understanding of such conduct as immune from regulation to support the existence of an unencumbered public-carry right today.

Instead of using either of these frames, *Bruen* makes tradition relevant in a third way that O'Shea does not mention: as what we might call power-constitutive. The traditions of historical gun regulation constitute—and thereby circumscribe—the power of the government today to regulate guns. Those traditions constitute and delimit the scope of contemporary legislative power. This is quite different from the rights-constitutive model, which takes popular practices of constitutional rights and public understanding of their protection to enshrine a constitutional baseline, or even the rights-limiting frame,

would have been for a historical test to "place the burden on the challenging party to provide historical evidence that the above mentioned areas of regulation were perceived as violating the right to keep and bear arms").

338. O'Shea, *supra* note 44, at 114–16; DeGirolami, *Traditionalism Rising*, *supra* note 12, at 7 (amplifying these two avenues).

339. O'Shea, *supra* note 44, at 114.

340. *Id.* at 116.

which makes past regulation sufficient to justify authority today.[341] *Bruen* made no effort to unearth any widespread practices of gun-carrying that ought to be respected or beliefs about the protected nature of such conduct; the Court was content to find the matter relatively unregulated at various points in history and announce that it should be ever so.[342] In short, *Bruen* started from the baseline that gun-related conduct is constitutionally protected—without requiring evidence for that baseline—and permitted only those regulations that are analogous to ones in the distant past.

III. BRUEN IN THE LOWER COURTS

Given the pieces of the test requiring further elaboration, it is no surprise that the initial wave of lower court implementation has been unpredictable. These lower court decisions in the months after *Bruen* compound the critique in the prior sections: they have reached inconsistent conclusions about what the test requires and how it works in practice. Close attention to these cases helps underscore how the test fails to constrain judicial decisionmaking, obscures value judgments that drive the reasoning, leaves conscientious lawmakers uncertain about the scope of their authority, and creates disuniform legal rules across the country as courts reach irreconcilable judgments.

Federal courts adjudicated almost four hundred Second Amendment claims in the twelve months after *Bruen* was decided. Part III.A presents statistics about the success rates and types of claims that have been decided in the year after *Bruen*, and Part III.B analyzes the cases more closely and holistically.

A. The Big Picture

This subpart presents the analysis of an in-depth review of lower court attempts to apply *Bruen*. The analysis comes from a review of every federal court decision citing *Bruen* from the day it was decided

341. *Id.* at 117 ("The consistent choice of a potential rights-holder to engage in a practice over time, combined with the popular understanding that the practice enacts or embodies a constitutional principle, provides a reason for courts to treat the practice itself as presumptively constitutionally protected against abrogation . . . .").

342. *See* Frassetto, *supra* note 301, at 2525–26 (arguing that the "broader claim to a right to always carry guns to protect against generalized risks requires more proof than the absence of regulation in several states" and that "[i]f gun rights advocates want to use this regional tradition to block states from regulating the carrying of weapons in public, they should at least be required to show some historical tradition of consistently openly carrying guns in public").

(June 23, 2022) until one year later (June 22, 2023)—about 470 cases in all.[343] That set of cases was then narrowed to decisions that addressed Second Amendment claims, excluding those that cited *Bruen* only for broad methodological points or narrow procedural ones or that cited the case while examining non–Second Amendment claims (for example, in First Amendment cases). Out of the remaining 334 cases, 22 cases were excluded in which the court disposed of the case without reaching the Second Amendment claim, such as dismissing it on subject matter jurisdiction grounds or remanding the case to a lower court.[344] With the remaining cases, each was classified by the type of claim at issue, which most often concerned the validity of a statute or regulation but occasionally concerned discrete government actions. Some cases had multiple claims, but many only had one. Then it was determined whether the court vindicated a Second Amendment claim in the decision.

Before presenting the results, some caveats about coverage and classification are in order. First, even though the analysis sought to be as broad as possible by including all federal rulings that even cited *Bruen*, only those cases reported to Westlaw showed up in the results. It is possible there were unreported district court orders that did not appear in the data set. Second, in coding cases, inevitable judgment calls had to be made about what to do with certain types of decisions, such as magistrate reports and recommendations, emergency relief (temporary restraining orders and preliminary injunctions), decisions

343. The analysis was done using Westlaw's citing reference tool with date and jurisdictional restrictions that limited the universe to cases in federal court that were issued prior to June 23, 2023. That search returned 472 cases, though in at least one instance a single case counts twice because the Fifth Circuit issued a revised opinion that did not change much of substance from its original, and both are in the total set of cases. *See* United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023) (withdrawing and replacing *United States v. Rahimi*, 59 F.4th 163 (5th Cir. 2022)), *cert. granted*, 143 S. Ct. 2688 (2023). The analysis in this Part only counts *Rahimi* once.

344. In one instance, this Part's analysis classifies a case as vindicating a Second Amendment challenge even though the court ultimately dismissed the complaint on standing grounds because the court included a lengthy statement of "judicial dictum" about why it would have found the challenged laws unconstitutional. Antonyuk v. Bruen, 624 F.3d 210, 245 (N.D.N.Y. 2022) (finding that it must dismiss for lack of standing); *id.* at 245–59 (announcing that "[w]hat follows in this Decision and Order is 'judicial dictum,'" and then analyzing each of the plaintiffs' claims on the merits). True to form, it did later declare most of those laws unconstitutional after the standing threshold was met. Antonyuk v. Hochul, No. 1:22-CV-0986, 2022 WL 16744700, at *86 (N.D.N.Y. Nov. 7, 2022).

that were later vacated, and other similar decisions.[345] In general, all decisions that confronted a Second Amendment claim were included in the tally, even if they were only preliminary, nonbinding, or later vacated.

Below, the data are presented in two different ways: first, as the number of *decisions* in which a court vindicated one or more claims and second, as the number of *claims* that courts have vindicated.[346] The first method usefully underlines the scale of challenges in the wake of *Bruen*, whereas the second more accurately conveys the type and variety of claims that are succeeding.

345. *See, e.g.*, Range v. Att'y Gen. U.S., 53 F.4th 262 (3d Cir. 2022), *vacated, reh'g en banc granted*, 56 F.4th 992 (3d Cir. 2023).

346. In grouping claims, particularly in civil lawsuits, the analysis does not separate out every single statutory provision a plaintiff challenged as a different claim. Rather, when there were numerous provisions challenged in civil suits, they were grouped by topic. So, for example, even though plaintiffs challenged numerous individual places New York and New Jersey designated as a "sensitive place," all sensitive-place challenges in the same lawsuit were grouped as one claim. In one instance, it was necessary to piece together the statutory provisions under which the defendant was charged from the court's description of the conduct because the court did not identify the code sections. *See* United States v. Tilotta, No. 19-CR-04768, 2022 WL 3924282, at *1 (S.D. Cal. Aug. 30, 2022) (dismissing defendant's motion to dismiss an eight-count indictment). In another instance, when a plaintiff in a civil lawsuit challenged the National Firearms Act's treatment of short-barrel rifles and shotguns generally, the claim was classified as a challenge to the provision of the NFA criminalizing unregistered possession of such weapons, which was the most challenged NFA provision in the data set. *See* Miller v. Garland, No. 23-CV-195, 2023 WL 3692841, at *11 (E.D. Va. May 26, 2023).

Table 1. Second Amendment Decisions Post-*Bruen* (6/23/2022–6/22/2023)[347]

	Any Invalidation	No Invalidation	Success Rate
Civil Cases[348] n=59 (18.9%)	18	41	30.51%
Criminal Cases n=253 (81.1%)	10	243	3.95%
Total n=312 (100%)	28	284	8.97%

347. The spreadsheet compiling the data used for Table 1 is available at https://firearmslaw.duke.edu/wp-content/uploads/2023/07/One-Year-CASES-6.29.2023.xlsx [https://perma.cc/JJP8-J7K8].

348. This category includes habeas corpus petitions.

Table 2. Second Amendment Claims Post-*Bruen* (6/23/2022–6/22/2023)[349]

	Invalidation	No Invalidation	Success Rate
Civil Claims[350] n=81 (21.6%)	33	48	40.74%
Criminal Claims n=294 (78.4%)	11	283	3.74%
Total n=375 (100%)	44	331	11.73%

349. The spreadsheet compiling the data used for Tables 2 and 3 is available at https://firearmslaw.duke.edu/wp-content/uploads/2023/07/One-Year-CLAIMS-6.29.2023.xlsx [https://perma.cc/UJ75-MXLW].

350. This category includes habeas corpus petitions. In this subcategory, one case may be slightly skewing results. The *Antonyuk* case had three rounds of decisions, each with different rationales and justifications. Each decision also had three categories of claims, and each held at least some provisions within each of the three categories—licensing/permit requirements, sensitive places, and private property default switch—unconstitutional. *See* Antonyuk v. Bruen, 624 F. Supp. 3d 210, 245–59 (N.D.N.Y. 2022); Antonyuk v. Hochul, 635 F. Supp. 3d 111, 132–48 (N.D.N.Y. 2022); Antonyuk v. Hochul, No. 1:22-CV-0986, 2022 WL 16744700, at *42–79 (N.D.N.Y. Nov. 7, 2022). That one case therefore constitutes nine of the successful civil claims. In addition, the challengers claimed that many different places New York designated as "sensitive" were unconstitutional, but because of how they were grouped together as a sensitive-place claim in this analysis, the fact that the court did not invalidate every single one is not reflected in the list showing that the sensitive-place claim prevailed. Excluding *Antonyuk* altogether would lead to a lower, 29.6 percent success rate (24/81). If only one of the *Antonyuk* decisions were counted, instead of all three, then the success rate would be 33.33 percent (27/81).

The next chart shows the major types of claims among the 375 claims and their corresponding success rates.[351]

Table 3. Claim Categories & Success Rates Post-*Bruen* (6/23/2022–6/22/2023)

Claim Types	Number of Claims	Successful Claims and Rate
Age Restriction	5	3 (60%)
License/Permit Requirements	5	3 (60%)
Ghost Gun[352]	5	2 (40%)
Bail/Probation Conditions	6	0 (0%)
Private Property Default Switch	6	6 (100%)
Obliterated Serial Number	9	1 (11.1%)
Sentence Enhancement (Guidelines)	11	0 (0%)
Assault Weapon/Large-Capacity Magazine	12	4 (33.3%)
National Firearms Act	12	0 (0%)
Unlawful Gun Use in a Crime	13	0 (0%)
False Statement in Gun Buying[353]	13	0 (0%)
Sensitive Place	15	8 (53.3%)
Felony Indictment Possession Prohibition	22	4 (18.2%)
Miscellaneous[354]	33	7 (21.2%)
Federal Possession Prohibition – 922(g)	208	6 (2.9%)
TOTAL	375	44 (11.73%)

351. A full 161 claims concerned the federal felon-in-possession law—18 U.S.C. § 922(g)(1)—representing more than 40 percent of all claims in the data set. This percentage is higher than some longer-term empirical studies on Second Amendment claims have shown, indicating that the category might be overrepresented in this initial picture. *See* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right To Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1481 (2018) (reporting that 24 percent of the more than 1,100 challenges in the authors' eight-year data set were to the felon-in-possession statute).

In reading these data, it is important to underscore that these are not all the post-*Bruen* challenges that were waged in the first twelve months after the ruling, but only those decisions that were *issued* in that time. Some challenges were not yet adjudicated by the time this analysis was conducted. And for some of the decisions that were issued, the challenges were first brought before *Bruen*. Nonetheless, this big-picture overview does underline the types and variety of claims that are finding success and suggests how disruptive *Bruen* has been.

For comparison's sake, the only major empirical study about the effects of *Heller* showed that 0 out of 70 Second Amendment claims were successful in the first six months after it came down, and only 11 (out of 327) challenges prevailed in the two and a half years after the ruling.[355] The 44 successful claims in the first year after *Bruen* are staggering in comparison. It took until 2013 before the 2008 *Heller* decision would generate as many successful challenges.[356]

B. A Closer Look

The prior subpart presented big-picture conclusions about the nature, variety, and success rates for different types of claims. This subpart unpacks those challenges in more detail, showing the different ways that lower courts are reading and applying *Bruen*'s standard. From assessing each of these challenges, this subpart surfaces and

352. This group includes not only claims against state ghost gun regulations but also a challenge to federal regulations requiring serialization in more circumstances. *See* Morehouse Enters., LLC v. Bureau of Alcohol, Tobacco, Firearms & Explosives, No. 22-cv-116, 2022 WL 3597299, at *8 (D.N.D. Aug. 23, 2022).

353. This group includes not only 18 U.S.C. § 922(a)(6) but also 18 U.S.C. § 924(a)(1)(A) claims.

354. The success rate in this group is not very meaningful because the set contains a wide variety of different types of challenges. The successful challenges in this group were to: an indefinite gun seizure, *Frein v. Pennsylvania State Police*, 47 F.4th 247, 253 (3d Cir. 2022); restrictions on how guns can be transported in automobiles, *Koons v. Reynolds*, No. 22-7464, 2023 WL 128882, at *1 (D.N.J. Jan. 9, 2023); three requirements for new handguns included in California's Unsafe Handgun Act, *Boland v. Bonta*, No. SACV 22—01421-CJC, 2023 WL 2588565, at *1 (C.D. Cal. Mar. 20, 2023) (microstamping, a chamber load indicator, and a magazine disconnect mechanism); a liability insurance requirement, *Koons v. Platkin*, No. 22-7463, 2023 WL 3478604, at *3–4 (D.N.J. May 16, 2023); and the law that criminalizes transferring a firearm to a person having reasonable cause to believe they are an unlawful drug user, *United States v. Connelly*, No. EP-22-CR-229(2)-KC, 2023 WL 2806324, at *12–15 (W.D. Tex. Apr. 6, 2023).

355. Ruben & Blocher, *supra* note 351, at 1486 tbl. 8.

356. *Id.*

synthesizes problems lower courts have encountered with the new framework itself as well as the dual inquiries into text and history.

As a threshold issue, courts have remarked on the considerable difficulty that a test focused solely on history imposes on lower courts handling quick-paced litigation "on a drastically shorter timetable than the higher courts."[357] Many have voiced concern over the feasibility or administrability of *Bruen*'s test.[358] One lamented that "[b]y . . . announcing an inconsistent and amorphous standard, the Supreme Court has created mountains of work for district courts that must now deal with *Bruen*-related arguments in nearly every criminal case in which a firearm is found."[359] Some judges have questioned why it makes sense to set yesterday's laws as the boundary marker for today's authority.[360] As one Indiana federal judge said, "The United States Constitution, as amended and as imperfect as it was, is the legacy of [] eighteenth-century Americans; it insults both that legacy and their memory to assume they were so short-sighted as to forbid the people, through their elected representatives, from regulating guns in new ways."[361]

Several courts have underscored that the traditions from which *Bruen* requires them to draw were formed nearly exclusively by white men in an era when women and nonwhite men did not have a voice in the laws that bound them.[362] After analyzing the public understanding

357. United States v. Charles, 633 F. Supp. 3d 874, 885–86 (W.D. Tex. 2022).

358. United States v. Butts, No. CR 22-33-M-DWM, 2022 WL 16553037, at *2 n.2 (D. Mont. Oct. 31, 2022) (criticizing the way the Court's test sets out searching for accurate historical facts but "[r]ecognizing that 'originalism' is apparently the method by which the Constitution is currently to be interpreted"); United States v. Jackson, No. ELH-22-141, 2023 WL 2499856, at *11 (D. Md. Mar. 13, 2023) (noting that "historians continue to explore, discover, interpret, and *disagree* about more complex historical matters, including the Founders' intent").

359. United States v. Love, No. 1:21-CR-42-HAB, 2022 WL 17829438, at *4 (N.D. Ind. Dec. 20, 2022).

360. United States v. Kelly, No. 22-cr-00037, 2022 WL 17336578, at *5 n.7 (M.D. Tenn. Nov. 16, 2022).

361. United States v. Holden, 2022 WL 17103509, at *7 (N.D. Ind. Oct. 31, 2022) (making this criticism despite holding that the federal law barring receipt of a firearm while under felony indictment unconstitutional and dismissing an indictment based on the defendant's false statement that he was not under felony indictment).

362. State v. Philpotts, 194 N.E.3d 371, 373 (Ohio 2022) (Brunner, J., dissenting) (table opinion). The dissent argued that

> [T]he glaring flaw in any analysis of the United States' historical tradition of firearm regulation in relation to Ohio's gun laws is that no such analysis could account for what the United States' historical tradition of firearm regulation would have been if women

at the time of the Second Amendment's ratification, one West Virginia federal judge put the point frankly:

> In 1791, the drafters of the Constitution considered the undersigned's ancestors as legal property. They, along with free Blacks, were prohibited from possessing firearms. The popular conception of the Second Amendment at the time it was enacted clearly did not encompass *all* people having access to firearms to defend themselves and fight for freedom from tyranny.[363]

Despite these concerns, lower court judges have sought to follow *Bruen*'s demands, implementing the historical test "whether," as one judge said, "the courts are actually well-suited to that inquiry or not."[364] Sometimes those courts have even read *Bruen* to mandate conclusions they think are wrong or harmful.[365] But their collective experience so

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> and nonwhite people had been able to vote for the representatives who determined these regulations.

Id.

363. United States v. Nutter, 624 F. Supp. 3d 636, 645 n.10 (S.D. W. Va. 2022); *see also* United States v. Smith, No. 22-cr-20351, 2023 WL 2215779, at *4 (E.D. Mich. Feb. 24, 2023) ("An honest search for an 'American' tradition on gun regulation is especially challenging, given that well over half of the American population—including women, Blacks, and others—were generally excluded by law from political participation at the time of the Second Amendment's passage and for decades thereafter.").

364. *Kelly*, 2022 WL 17336578, at *3.

365. *Holden*, 2022 WL 17103509, at *7 (stating that "[t]his opinion was drafted with an earnest hope that its author has misunderstood [*Bruen*]. If not, most of the body of law Congress has developed to protect both public safety and the right to bear arms might well be unconstitutional."); *see also* United States v. Quiroz, 629 F. Supp. 3d 511, 513 (W.D. Tex. 2022) ("There are no illusions about this case's real-world consequences—certainly valid public policy and safety concerns exist. Yet *Bruen* framed those concerns solely as a historical analysis."); Worth v. Harrington, No. 21-cv-1348, 2023 WL 2745673, at *17 (D. Minn. Mar. 31, 2023) ("If the Court were permitted to consider the value of these goals and how well Minnesota's age requirement fits the ends to be achieved, the outcome here would likely be different."); United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *1–2 (S.D. Miss. June 28, 2023) (criticizing the *Bruen* decision and originalism more broadly but concluding that the Second Amendment forbids disarming individuals with felony convictions).

The *Holden* case may even be an example of what Professor Brannon Denning refers to as judicial "uncivil obedience," where the court applies the letter of the *Bruen* decision to display its breadth. Brannon P. Denning, *Can Judges Be Uncivilly Obedient?*, 60 WM. & MARY L. REV. 1, 7 (2018) (describing a phenomenon in which lower courts "press the logic of Supreme Court opinions to their limits, applying them in potentially far-reaching and disruptive ways with a view to critiquing them and perhaps affecting the future direction of Supreme Court doctrine"). *Bullock* might also fall in that camp; I am less sure *Quiroz* or *Worth* should be so classified.

far casts serious doubt on *Bruen*'s assertion that its test is more "administrable" than the two-part framework it replaced.[366]

On top of these background concerns with the test, courts have faced practical obstacles. For example, even before engaging *Bruen*'s two-part test, lower courts do not agree about the threshold question of when the test is even triggered. That disagreement concerns, at least in part, *Bruen*'s effect on some of *Heller*'s categorical carve-outs.[367] In *Heller*, the Court asserted that its decision did not call into question a host of "presumptively lawful" regulations the majority deemed "longstanding."[368] Those included prohibitions on firearm possession by "felons and the mentally ill," certain place-based restrictions, and "laws imposing conditions and qualifications on the commercial sale of arms."[369] Because *Bruen* only expressly invoked the place-based restrictions, litigants have argued that the decision undermined any presumption the other laws might have had to constitutionality.[370] One district court has expressly held as much, writing that "this is where *Bruen* conflicts with *Heller*."[371] Other courts, by contrast, have said

366. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022); *Kelly*, 2022 WL 17336578, at *6 (suggesting that *Bruen*'s test is not very administrable, but that ultimately "the question of how manageable a precedent it will be can begin to be answered in the laboratories of administrability that are the U.S. district courts"); United States v. Jackson, No. ELH-22-141, 2023 WL 2499856, at *11 (D. Md. Mar. 13, 2023) (stating that "the conflicting lower court decisions that have applied *Bruen*'s test to § 922(n), only to reach divergent conclusions, give reason to suggest that a history-only test is not readily administrable").

367. *See* Kevin G. Schascheck II, *The Procedural Vitality of* Heller*'s Presumptively Lawful Categories*, 11 BELMONT L. REV. (forthcoming 2023), https://papers.ssrn.com/abstract=4371268 [https://perma.cc/YQG4-CF3J] (arguing that *Heller*'s carve-outs survive, at least in some form, post-*Bruen*).

368. District of Columbia v. Heller, 554 U.S. 570, 626–27, 627 n.26 (2008).

369. *Id.*

370. *E.g.*, United States v. Collette, 630 F. Supp. 3d 841, 842 (W.D. Tex. 2022) (noting that the defendant challenged § 922(g)(1)'s constitutionality using *Bruen*'s framework); *see also* Pratheepan Gulasekaram, *The Second Amendment's "People" Problem*, 77 VAND. L. REV. (forthcoming 2024) (manuscript at 22–31), https://papers.ssrn.com/abstract=4366188 [https://perma.cc/3DZP-7SV8] (exploring how *Bruen* alters the inquiry into who is entitled to Second Amendment protection).

371. *Collette*, 630 F. Supp. 3d at 844. The court noted,

> *Heller* called proscriptions against felons possessing guns 'presumptively lawful.' In contrast, because possession is covered by the Second Amendment's plain text, *Bruen* makes a felon's possession of a firearm 'presumptively constitutional.' *Bruen* is the controlling standard, but this conflict—the presumption of constitutionality—is what places the heavy burden on the Government.

Id. (footnotes omitted); *see also* United States v. Jackson, 622 F. Supp. 3d 1063, 1066 (W.D. Okla. 2022) ("This Court declines to read into *Bruen* a qualification that Second Amendment rights belong only to individuals who have not violated any laws." (footnote omitted)).

Bruen did not overrule *Heller*'s presumption,[372] while still others have suggested that such presumptively lawful regulations instead fail at the first step of *Bruen*'s new test.[373] Once courts reach the test, each step has proved difficult to apply.

1. *The Plain-Text Prong.* Despite their confusion about when the test is triggered, there is broad agreement among courts that "simply because a law involves firearms does not mean that the Second Amendment is necessarily implicated."[374] But in actually assessing the first step of *Bruen*'s test—whether the "plain text" covers the challenged activity—courts have disagreed over the nature of the inquiry.[375] As noted above, because *Bruen* itself concerned a claim to constitutionally protected *conduct*,[376] it stated that the first prong assesses whether "the Second Amendment's plain text covers *an individual's conduct.*"[377] Some courts have thought that statement means the plain-text prong *only* concerns conduct, not whether the person claiming a right or the weapon they claim protection for is

372. *See, e.g.*, United States v. Davis, Nos. 5:19-159-DCR, 5:22-224-DCR, 2023 WL 373172, at *2 (E.D. Ky. Jan. 24, 2023) ("*Bruen* did nothing to change the prohibition on the possession of firearms by felons, which remains well-settled law."); United States v. Young, No. 22-054, 2022 WL 16829260, at *7 (W.D. Pa. Nov. 7, 2022) ("*Bruen* reinforces, rather than casts into doubt, the prohibitions on felons in possession of firearms (or in this case ammunition) and affirms the legal underpinnings of the *Heller* and *McDonald* opinions."); United States v. Ingram, 623 F. Supp. 3d 660, 664 (D.S.C. 2022) ("By distinguishing non-law-abiding citizens from law-abiding ones, the dicta in *Heller* and *McDonald* clarifies the bounds of the plain text of the Second Amendment.").

373. United States v. Hill, No. H-22-249, 2022 WL 17069855, at *5 (S.D. Tex. Nov. 17, 2022) ("[T]he much more plausible explanation for why felon-in-possession statutes are 'presumptively lawful' is because they fail at the first step—they are not covered by the plain text of the Second Amendment.").

374. United States v. Tilotta, No. 3:19-CR-04768-GPC, 2022 WL 3924282, at *6 (S.D. Cal. Aug. 30, 2022). Oddly, and quite wrongly, one Third Circuit panel stated that "the Supreme Court recently instructed us to closely scrutinize *all* gun restrictions for a historically grounded justification." Frein v. Pa. State Police, 47 F.4th 247, 254 (3d Cir. 2022); *see also* Def. Distributed v. Bonta, No. CV 22-6200-GW-AGRx, 2022 WL 15524977, at *3 n.6 (C.D. Cal. Oct. 21, 2022) (observing that the Third Circuit's statement "is, quite simply, wrong"), *adopted*, No. CV 22-6200-GW-AGRx, 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022).

375. *E.g.*, Nat'l Ass'n for Gun Rts., Inc. v. City of San Jose, 618 F. Supp. 3d 901, 915 (N.D. Cal. 2022) (stating that *Bruen* "provided limited guidance on how to define the proposed course of conduct" to ascertain coverage at the plain-text stage).

376. *See supra* Part II.A.1.

377. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022) (emphasis added).

covered by the plain text.[378] Others have read *Bruen*'s plain-text prong to require coverage for the person, weapon, *and* conduct, as the better reading suggests.[379] The narrow reading—that the plain-text prong only asks about conduct—would mean many more claims get presumptive protection, like nearly all types of weapons and all manner of challengers.

In assessing who bears the burden at this first stage, courts have not been entirely clear. None expressly said that the government bears the burden at this stage. One court, though, has suggested the government bears the burden of proving justifications that would exclude a person from plain-text coverage.[380] By contrast, several courts have instead placed the onus on the challenger to prove plain-text coverage,[381] but whether this translates to a direct holding about the burden in *Bruen*'s first step is complicated by the fact that some of these came up in a procedural setting—a request for a preliminary injunction—that may diverge from merits burdens.[382] Another court rejected a criminal defendant's challenge at step one, suggesting he

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378. *See, e.g.*, United States v. Quiroz, 629 F. Supp. 3d 511, 521–22 (W.D. Tex. 2022) ("Indeed, Bruen's first step mentions only 'conduct.' So as this Court reasoned above, 'who' may keep and bear arms is relegated to step two.").

379. *Supra* Part II.A.1; *see also* Antonyuk v. Hochul, No. 1:22-CV-0986, 2022 WL 16744700, at *42 (N.D.N.Y. Nov. 7, 2022) (finding, on the plain-text prong, that "(1) Plaintiff Sloane is part of 'the People' protected by the amendment, (2) the weapons in question are in fact 'arms' protected by the amendment, and (3) the regulated conduct (i.e., bearing a handgun in public for self-defense) falls under the phrase 'keep and bear'"); United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023) (rejecting the notion that the plain-text prong focuses only on conduct); United States v. Alaniz, 69 F.4th 1124, 1128 (9th Cir. 2023) (stating that *Bruen*'s plain-text inquiry focuses on the person, weapon, and conduct).

380. United States v. Goins, No. 22-CR-00091-GFVT-MAS-1, 2022 WL 17836677, at *5 (E.D. Ky. Dec. 21, 2022) ("The Government has not carried its burden to establish that Congress can categorically disarm felons because they lack virtue.").

381. *See* Or. Firearms Fed'n v. Kotek, No. 2:22-CV-01815-IM, 2023 WL 4541027, at *5 n.4 (D. Or. July 14, 2023) ("While *Bruen* does not specify that the plaintiff bears the burden of showing that the challenged conduct falls within the plain text of the Second Amendment, this Court finds that is the most logical reading of the Supreme Court's opinion.").

382. Ocean State Tactical, LLC v. Rhode Island, No. 22-CV-246 JJM-PAS, 2022 WL 17721175, at *12 (D.R.I. Dec. 14, 2022) (stating, in the context of a preliminary injunction motion, that "[a]lthough it is their burden to show that large-capacity magazines fall within the purview of the Second Amendment, the plaintiffs offer no expert opinion on the meaning of the word 'Arms'"); *see also* Or. Firearms Fed'n, Inc. v. Brown, No. 2:22-CV-01815-IM, 2022 WL 17454829, at *9 (D. Or. Dec. 6, 2022) (stating, in the same context, that "[w]hile magazines in general are necessary to the use of firearms for self-defense, Plaintiffs have not shown, at this stage, that magazines specifically capable of accepting more than ten rounds of ammunition are necessary to the use of firearms for self-defense"), *appeal dismissed*, No. 22-36011, 2022 WL 18956023 (9th Cir. Dec. 12, 2022).

failed to satisfy his burden because his "historical evidence [was] too sparse and too weak to justify recognizing an unwritten right to commercially sell arms."[383] At least one plaintiff has acknowledged that the challenger bears the burden at the first step.[384] Still, courts have not progressed much further in reaching a consensus about who bears the burden at step one.[385]

When they assess the amendment's words, courts have disagreed about just what conduct, people, and arms the plain text protects. With respect to conduct, some courts have been stingy, refusing to find activities that may be "implicit"[386] in the right to keep and bear arms (like manufacturing them[387] or selling them[388]) to be included in the plain text of "keep and bear."[389] Others have been more generous, finding conduct that is a "precursor"[390] or "condition precedent"[391] to

383. United States v. Flores, No. H-20-427, 2023 WL 361868, at *4 (S.D. Tex. Jan. 23, 2023).

384. *See* Oral Argument at 15:25, Hardaway v. Nigrelli, No. 22-2933 (2d Cir. argued Mar. 20, 2023), https://www.ca2.uscourts.gov/decisions [https://perma.cc/FV47-LKYH] (explaining the plaintiffs' understanding that *Bruen*'s burden-shifting framework "begins by placing the burden on the plaintiffs to show that their course of conduct comes within the plain meaning of the text").

385. United States v. Trinidad, No. 21-398, 2022 WL 10067519, at *3 (D.P.R. Oct. 17, 2022) (acknowledging that, at the plain-text step, "[i]t is not clear whether [the challenger] bears the burden of showing that his conduct falls within the scope of the Second Amendment").

386. United States v. King, No. 5:22-CR-00215-001, 2022 WL 17668454, at *3 (E.D. Pa. Dec. 14, 2022) ("[I]n determining whether the Act violates the Second Amendment, the Court looks at the Second Amendment's plain text; it does not consider 'implicit' rights that may be lurking beneath the surface of the plain text.").

387. *See* Def. Distributed v. Bonta, No. CV 22-6200-GW-AGRx, 2022 WL 15524977, at *4 (C.D. Cal. Oct. 21, 2022) (stating that "you will not find a discussion of" an implicit right to self-manufacture firearms "in the 'plain text' of the Second Amendment"), *adopted*, No. CV 22-6200-GW-AGRx, 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022).

388. United States v. Tilotta, No. 3:19-CR-04768-GPC, 2022 WL 3924282, at *5 ("The plain text of the Second Amendment does not cover Mr. Tilotta's proposed course of conduct to commercially sell and transfer firearms . . . . Further, textually, the ordinary meaning of 'keep and bear' does not include 'sell or transfer.'").

389. *See* Gazzola v. Hochul, No. 1:22-CV-1134, 2022 WL 17485810, at *14 (N.D.N.Y. Dec. 7, 2022) ("Plaintiffs fail to present any support for their contention that the individual right secured by the Second Amendment applies to corporations or any other business organizations. It does not.").

390. *See* United States v. Holden, No. 3:22-CR-30 RLM-MGG, 2022 WL 17103509, at *3 (N.D. Ind. Oct. 31, 2022) ("Receiving a firearm is necessarily a precursor to keeping or bearing a firearm, so Mr. Holden's conduct is presumptively protected by the Second Amendment.").

391. *See* United States v. Stambaugh, No. CR-22-00218-PRW-2, 2022 WL 16936043, at *3 (W.D. Okla. Nov. 14, 2022) ("[T]he Second Amendment's plain text covers receiving a firearm—receipt is the condition precedent to keeping and bearing arms.").

enumerated activity (like acquiring a gun[392] or manufacturing one[393]) to fall within the plain text.[394] Some courts have even made astonishing claims about the plain text, such as that it protects "the . . . right to 'bear' arms for self-defense *on private property* outside of [one's] own home"[395] or that it protects "carrying a concealed handgun for self-defense in public *in nursery schools and preschools*."[396] Nothing in *Bruen* provides guidance on how to answer these interpretive questions, and the mounting literature on the new textualism at the Supreme Court highlights that the meaning of a written instrument is rarely "plain."[397]

As with conduct, courts have disagreed about what people and arms fall within the "plain text." In assessing categories of people-based prohibitions, lower courts have issued diverging decisions about whether undocumented immigrants,[398] eighteen- to twenty-year-

392. *See id.* (discussing the acquisition of firearms as an activity falling within the Second Amendment's protections); United States v. Quiroz, 629 F. Supp. 3d 511, 516 (W.D. Tex. 2022) (rejecting the government's "rigid, sterile reading" of the plain text that would exclude acquisition).

393. Rigby v. Jennings, 630 F. Supp. 3d 602, 615 (D. Del. 2022) ("[T]he right to keep and bear arms implies a corresponding right to manufacture arms. Indeed, the right to keep and bear arms would be meaningless if no individual or entity could manufacture a firearm.").

394. *See* Or. Firearms Fed'n, Inc. v. Brown, No. 2:22-CV-01815-IM, 2022 WL 17454829, at *9 (D. Or. Dec. 6, 2022) ("The Second Amendment covers firearms and items 'necessary to use' those firearms." (citation omitted)).

395. Christian v. Nigrelli, No. 22-CV-695 (JLS), 2022 WL 17100631, at *7 (W.D.N.Y. Nov. 22, 2022) (emphasis added).

396. Antonyuk v. Hochul, No. 1:22-CV-0986, 2022 WL 16744700, at *68 (N.D.N.Y. Nov. 7, 2022) (citation, quotation marks, and brackets omitted).

397. *See supra* note 48 (collecting sources).

398. *Compare* United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023) (no), *with* United States v. Carbajal-Flores, No. 20-CR-00613, 2022 WL 17752395, at * 3 (N.D. Ill. Dec. 19, 2022) (yes).

olds,[399] unlawful drug users,[400] individuals with felony convictions,[401] and those facing felony charges are part of "the people."[402]

With respect to covered "arms," courts have so far agreed that machine guns are not covered because they are dangerous and unusual[403] while disagreeing about whether large-capacity magazines[404] and firearms with obliterated serial numbers[405] fall within the plain text. Again, *Bruen* does not make any of these conflicting decisions obviously right—or obviously wrong. Indeed, across a span of different areas of law, the textualist Justices themselves "are frequently in

399. *Compare* Firearms Pol'y Coal., Inc. v. McCraw, 623 F. Supp. 3d 740, 748 (N.D. Tex. 2022) (yes), *with* Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1324 (11th Cir. 2023) (stating that it is not clear eighteen- to twenty-year-olds are protected but assuming they are for that case because the parties did not contest it), *vacated, reh'g en banc granted*, 72 F.4th 1346 (11th Cir. 2023) (per curiam).

400. *Compare* United States v. Seiwert, No. 20-CR-443, 2022 WL 4534605, at *2 (N.D. Ill. Sept. 28, 2022) (agreeing with the government that "unlawful users of controlled substances fall outside the Second Amendment's protection"), *with* Fried v. Garland, No. 4:22-CV-164-AW-MAF, 2022 WL 16731233, at *5 (N.D. Fla. Nov. 4, 2022) (assuming that unlawful users of marijuana "are included in 'the people' the Second Amendment protects").

401. *Compare* United States v. Riley, 635 F. Supp. 3d 411, 424 (E.D. Va. 2022) ("A plain reading of the text demonstrates that 'the people' remains limited to those within the political community and not those classified as felons."), *with* United States v. Carrero, 635 F. Supp. 3d 1210, 1212 (D. Utah 2022) ("This court declines to read 'the people' so narrowly. Instead, it follows courts from within the Tenth Circuit, which have observed that convicted felons fall within 'the people' as contemplated by the First and Fourth Amendments." (citation and quotation marks omitted)).

402. *Compare* United States v. Perez-Garcia, 628 F. Supp. 3d 1046, 1053 (S.D. Cal. 2022) ("As a person who has been charged with a crime based on a finding of probable cause, Mr. Perez-Garcia would not be considered a 'law-abiding' or responsible citizen, so he is outside the plain text of the Second Amendment." (footnote omitted)), *with* United States v. Stambaugh, No. CR-22-00218-PRW-2, 2022 WL 16936043, at *2 (W.D. Okla. Nov. 14, 2022) (holding that *Heller* and *Bruen* neither "explicitly nor implicitly remove[] those merely *accused* of a felony by a grand jury from 'the people' entitled to the protection of the Second Amendment"), *and* United States v. Combs, No. 5:22-136-DCR, 2023 WL 1466614, at *3 (E.D. Ky. Feb. 2, 2023) ("[E]ven assuming that Combs is not a law-abiding, responsible citizen, the Constitution presumptively protects his right to possess a firearm under the plain text of the Second Amendment.").

403. *See* United States v. Hoover, 635 F. Supp. 3d 1305, 1325 (M.D. Fla. 2022) ("Notably, '[s]ince *Heller* was decided, every circuit court to address the issue has held that there is no Second Amendment right to possess a machine gun.'" (citation omitted)).

404. Or. Firearms Fed'n, Inc. v. Brown, No. 2:22-CV-01815-IM, 2022 WL 17454829, at *9 (D. Or. Dec. 6, 2022) ("Plaintiffs have failed to show that magazines capable of accepting more than ten rounds of ammunition are covered by the plain text of the Second Amendment.").

405. *Compare* United States v. Price, 635 F. Supp. 3d 455, 461 n.3 (S.D. W. Va. 2022) (reasoning that there are not historical analogues to regulations of removed serial numbers), *with* United States v. Reyna, No. 3:21-CR-41 RLM-MGG, 2022 WL 17714376, at *4–5 (N.D. Ind. Dec. 15, 2022) (determining that guns with removed serial numbers are not "common weapons used for lawful purposes" and thus not within the scope of the Second Amendment).

disagreement—not merely about *how* to apply text-based interpretive principles to resolve hard cases, but also about *what* the relevant rules are."[406] A bare injunction to apply the "plain text" papers over all the interpretive debates that help determine the answer. As one court pointed out after sifting through several plain-text rulings in Second Amendment cases, "The diverging conclusions reached by the opposing camps largely depends upon the level of generality employed."[407]

2. *The Historical-Tradition Prong.* When a court does find the plain-text prong satisfied, it moves on to consider whether the government has proved that its regulation is part of the nation's historical tradition. Here, too, courts have encountered problems deciphering the rules for *Bruen*'s test. They have struggled with how to incorporate the metrics the Court deemed relevant to analogical reasoning (the why and the how) and when to conduct that analogical reasoning at all. Courts have also advanced no further in generating consensus about the factors *Bruen* left unspecified concerning the existence, endurance, enforcement, and evolution of historical precedent.

At the threshold of step two, courts are inconsistent in what they read *Bruen* to require in their search for historical precedent. Some treat *Bruen* as mandating an initial inquiry into the nature of the social problem the challenged law addresses, with the answer leading to one of two different degrees of scrutiny. They require very similar historical precedent if the same general problem has persisted since the Founding but follow a "more nuanced" approach if the social problem is novel.[408] Some courts reading the test this way have said that reasoning by analogy occurs only in cases calling for the nuanced

406. Eskridge et al., *supra* note 48, at 6.

407. Reese v. Bureau of Alcohol Tobacco Firearms & Explosives, No. 6:20-CV-01438, 2022 WL 17859138, at *10 (W.D. La. Dec. 21, 2022).

408. United States v. Quiroz, 629 F. Supp. 3d 511, 517 (W.D. Tex. 2022). In *Quiroz*, the court stated,

> If a challenged regulation addresses a general societal problem that has persisted since the 18th century, this historical inquiry is straightforward. But other regulations may require a more nuanced approach. In those cases, courts can reason by analogy, which involves finding a historical analogue that is relatively similar to the modern regulation.

Id. (citation, quotation marks, and footnotes omitted).

approach.[409] They have thus applied a dual-track test to judge the closeness of similarity required based on the social problem at issue.[410]

Other courts, however, state or assume that analogical reasoning takes place no matter the nature of the social problem.[411] Still others suggest that the "more nuanced" approach *Bruen* calls for is not about reasoning by analogy but about how flexibly to view tradition. The nuanced approach, said one judge, "essentially" requires the court to "broaden its conception of what constitutes an 'analogue' and focus its attention on the justification for, and burden imposed by, it."[412] *Bruen*'s own ambiguity helped create this confusion, as it first described its test as calling for the use of analogies in the "nuanced" class of cases, then deemed the case before it a straightforward and not nuanced one, but then nonetheless searched for analogies when it applied the test to New York's law.[413]

When the nature of the "societal problem" meant to be addressed by contemporary and historical laws is viewed as important, lower courts also diverge in deciphering it. Some courts view the matter at a high level of abstraction—treating all regulations as serving the same broad purpose of reducing gun violence.[414] Others, even when they

409. *E.g.*, *id.*

410. United States v. Power, No. 20-PO-331-GLS, 2023 WL 131050, at *2 (D. Md. Jan. 9, 2023); United States v. Lewis, No. CR-22-368-F, 2023 WL 187582, at *2 (W.D. Okla. Jan. 13, 2023) (agreeing with the defendants' arguments that "the Court, in *Bruen*, articulated two distinct levels of scrutiny that are potentially applicable to an assessment of the adequacy of the analogue").

411. Firearms Pol'y Coal., Inc. v. McCraw, 623 F. Supp. 3d 740, 753 (N.D. Tex. 2022) ("Courts use analogical reasoning to determine whether a modern regulation is constitutional."); United States v. Padgett, No. 3:21-cr-00107-TMB-KFR, 2023 WL 2986935, at *7 (D. Alaska Apr. 18, 2023) (rejecting dual paths); United States v. Jackson, No. ELH-22-141, 2023 WL 2499856, at *12 (D. Md. Mar. 13, 2023) (stating that "*Bruen*'s history inquiry does not split neatly into" separate inquiries depending on the nature of the social problem at issue).

412. Antonyuk v. Hochul, No. 22-CV-0986, 2022 WL 16744700, at *41 (N.D.N.Y. Nov. 7, 2022).

413. *Lewis*, 2023 WL 187582, at *2 n.2 (observing this problem in that "[t]he majority opinion speaks of 'analogies' and 'analogues' in discussing *both* the 'distinctly similar' and 'relevantly similar' standards discussed in this order").

414. *Antonyuk*, 2022 WL 16744700, at *43–57 (describing every aspect of the law in question as addressed at "non-self-defensive handgun violence (whether intentional or accidental, and whether in the home or outside the home) that is caused in some way by the possession or use of a handgun by someone who also possesses a concealed-carry license"); *cf.* Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, No. 3:22-CV-410, 2023 WL 3355339, at *21 (E.D. Va. May 10, 2023) (striking down a firearm age restriction and stating that "[s]ince time immemorial, teenagers have been, well, teenagers. The 'general societal problem' of teenage impetuousness and rashness far proceeded the Founding." (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022))).

describe the problem a modern law addresses more narrowly, are apt to find that the same problem existed in the Founding era, no matter how implausible that may be.[415] By treating the problem as continuing across time, these courts fault the government for failing to find close precedent in the historical record.[416]

Indeed, some courts appear to put the government on two horns of a dilemma with respect to the societal problem. If the government seeks to draw analogies with historical laws like surety statutes that addressed a societal problem common to our forebears' and today's communities, the court might use that against them. As one judge said, "by analogizing" between modern and historical laws that approach the same problem using different methods, "the Government undercuts its argument, thus taking the wind out of its own sails."[417] But if the government underscores the differences across time, it might also undermine any argument for the similarity between an old law and a new one.[418]

Beyond those problems with conceptualizing the inquiry, when courts do reason by analogy, they confront inevitable level-of-generality problems.[419] "The critical question lower courts face," one court said, "is how strictly should *Bruen* be followed?"[420] Unfortunately, it lamented, "how strict—or loose—an interpretation *Bruen* requires hasn't been clarified, leaving important questions"

415. United States v. Perez-Gallan, No. PE:22-CR-00427-DC, 2022 WL 16858516, at *10 (W.D. Tex. Nov. 10, 2022) ("Domestic violence, or violence against anyone for that matter, is not just a modern problem.").

416. *Id.*

417. *Id.*

418. Advocates, too, have tried to capitalize on this argument. *See* Plaintiffs' Response to Defendant's Brief Re: Court's Order Entered on December 15, 2022, at 5, Rhode v. Becerra, No. 18-cv-00802 (S.D. Cal. Feb. 21, 2023) ("As a practical matter, the State cannot promote its Ammunition Laws as 'cutting edge' and then defend them as consonant with historical tradition. There is no squaring that circle.").

419. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) ("The selection of a level of generality necessarily involves value choices."); Winkler, *Racist Gun Laws*, *supra* note 269, at 541 (contending that in Second Amendment cases the level of generality "problem is even worse" than in other contexts). *But see* William Baude & Stephen E. Sachs, *The "Common-Good" Manifesto*, 136 HARV. L. REV. 861, 873 (2023) (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)) (arguing that the level-of-generality problem with respect to originalism in particular "is a very old objection, and . . . it is partly generic, partly answered, and partly irrelevant").

420. United States v. Charles, 633 F. Supp. 3d 874, 883 (W.D. Tex. 2022).

unanswered.[421] "The unique test the Supreme Court announced in *Bruen*," said another court, "does not provide lower courts with clear guidance as to how analogous modern laws must be to founding-era gun laws," causing "disarray among the lower courts when applying the new framework."[422] As commentators have long underlined, "[a]ny analysis premised on a historical inquiry can operate in radically different ways based on the level of generality taken."[423] One recent study, for example, highlighted a "staggering range of conclusions by originalists about how to choose a level of generality at which to seek the original meaning."[424] In post-*Bruen* cases, courts have occasionally been grudging in finding a historical law analogous. The Fifth Circuit, for example, dismissed historical laws that barred firearm possession based on group identity because the federal law it confronted was *narrower* than those general laws.[425] One district court similarly rejected a proposed analogue because the historical law was more comprehensive than the more limited modern law it reviewed.[426] Another court, after chronicling laws establishing the permissibility of barring guns in schools and colleges, said—without further explanation—that it still could not "find these historical statutes analogous to a prohibition on 'summer camps.'"[427] Some courts, in short, speak in the language of analogical reasoning but actually demand a historical doppelganger.

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421. *Id.*

422. United States v. Bartucci, No. 1:19-cr-00244-ADA-BAM, 2023 WL 2189530, at *4 (E.D. Cal. Feb. 23, 2023).

423. *E.g.*, Han, *Autobiographical Lies*, *supra* note 219, at 86.

424. Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 532 (2017).

425. United States v. Rahimi, 61 F.4th 443, 457 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023). Discussing a potential historical precursor, the court stated,

> Laws that disarmed slaves, Native Americans, and disloyal people may well have been targeted at groups excluded from the political community—i.e., written out of "the people" altogether—as much as they were about curtailing violence or ensuring the security of the state. Their utility as historical analogues is therefore dubious, at best. In any event, these laws fail on substance as analogues to [the current law], because out of the gate, *why* they disarmed people was different. The purpose of laws disarming "disloyal" or "unacceptable" groups was ostensibly the preservation of political and social order, not the protection of an identified person from the threat of "domestic gun abuse," posed by another individual.

Id. (internal citations omitted).

426. Boland v. Bonta, No. SACV 22-01421-CJC, 2023 WL 2588565, at *7 (C.D. Cal. Mar. 20, 2023) ("Whereas [chamber load indicator] and [magazine disconnect mechanism] requirements are effectuated by checking only a few examples of a particular handgun model, proving laws were effectuated by examining each firearm manufactured.").

427. Antonyuk v. Hochul, 635 F. Supp. 3d 111, 143 (N.D.N.Y. 2022).

Other courts have disclaimed an approach that "demands too much specificity in the historical tradition."[428] For instance, one court said that "it suffices to show that analogous statutes . . . were known to the American legal tradition."[429] Another upheld a law on the ground that there was "sufficient evidence which intimates an understanding at the time of ratification" that certain groups could be disarmed.[430] Still another found "that the government's reliance on *general* historical tradition is sufficient to satisfy its burden."[431] Once again, nothing in *Bruen* justifies or condemns any one of these inconsistent levels of abstraction. A prominent proponent of traditionalist interpretation argues that debates over narrowing or broadening a tradition are a feature, not a bug, of the method, but it is hard to see the value in forcing lower courts to make these calls in the first instance without any Supreme Court guidance.[432]

In searching for the *existence* of a historical tradition,[433] courts have also produced inconsistent and unpredictable standards. The number of laws, coverage area, and age all appear to matter but not always in clear and certainly not in uniform ways. First, courts do not agree on the number of historical laws required. As one court asked:

> [H]ow many analogues are necessary? While some of the language in *Bruen* suggests the answer is one—the Supreme Court repeatedly uses the singular "analogue" when discussing the required evidence—at other times the Supreme Court suggests two or even three historical analogues are not enough. Each district court must

428. Fried v. Garland, No. 22-cv-164-AW-MAF, 2022 WL 16731233, at *6 (N.D. Fla. Nov. 4, 2022).

429. United States v. Daniels, 610 F. Supp. 3d 892, 897 (S.D. Miss. 2022).

430. United States v. Riley, No. 1:22-cr-163, 2022 WL 7610264, at *12 (E.D. Va. Oct. 13, 2022).

431. United States v. Kays, 624 F. Supp. 3d 1262, 1267 (W.D. Okla. 2022) (emphasis added); *see also* United States v. Jackson, 622 F. Supp. 3d 1063, 1067 (W.D. Okla. 2022) (emphasis added) (using the same language).

432. DeGirolami, *Traditions*, *supra* note 45, at 1163 (arguing that under-determinacy in defining traditions "is not a methodological flaw. Indeed, it is a healthy feature of the method, inasmuch as it demonstrates traditionalism's suppleness in the face of new facts and practices.").

433. Relying on several dictionaries, one court said tradition "often involves the passing on of a belief or custom from one generation to another." Antonyuk v. Hochul, 635 F. Supp. 3d 111, 131 (N.D.N.Y. 2022).

> determine whether the proposed analogues are analogue-enough, or if they require the presence of the analogue cavalry to carry the day.[434]

Another court noted that *Bruen* struck down a law enacted in seven jurisdictions stretching back a century and stated that "[i]f such was a failure of analogs or tradition in *Bruen*, the State's argument must also fail here."[435] One more court found unconvincing that the record "establishes (at most) that . . . approximately twenty jurisdictions (of the then 45 states) enacted laws."[436] Others have balked at that demand and "decline[d] to adopt a 'majority of the states' standard," stating instead that three analogous historical laws are sufficient to meet the government's burden.[437] In short, while the number of laws can be dispositive, there is no consistency in what courts require. Indeed, one court said an entirely different search applied to questions about sensitive-place laws, which that court said *Bruen* had already decided was a traditional kind of regulation.[438]

Second, concerning coverage area, at least one court has read *Bruen* to require separate inquiries into (1) whether history shows a *well-established* tradition, which it said requires counting the number of jurisdictions with such laws, and (2) how *representative* those laws were, which requires assessing the population they governed.[439] Plus, for that court, while three *state* laws might be enough, territorial and local laws were discounted.[440] And when it came to coverage area, that court was "confident" that, under *Bruen*, laws governing "less than 15" percent of the population "would not suffice to be representative of the Nation."[441] While the court did not specify what percentage of the population would be enough, it suggested a law from a "state that

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434. United States v. Love, No. 1:21-CR-42-HAB, 2022 WL 17829438, at *3 (N.D. Ind. Dec. 20, 2022) (citations omitted).

435. Hardaway v. Nigrelli, No. 22-CV-771, 636 F. Supp. 3d 329, 347 n.16 (W.D.N.Y. 2022). That court cited four state laws, two territorial laws, and "[a] few additional municipal enactments of similar vintage" but did not quote or cite the language of these laws. *Id.* at 347 n.17.

436. Firearms Pol'y Coal., Inc. v. McCraw, 623 F. Supp. 3d 740, 756 (N.D. Tex. 2022).

437. *Antonyuk*, 635 F. Supp. 3d at 132.

438. United States v. Power, No. 20-po-331-GLS, 2023 WL 131050, at *11 n.7 (D. Md. Jan. 9, 2023).

439. Antonyuk v. Hochul, No. 1:22-CV-0986, 2022 WL 16744700, at *7 n.5 (N.D.N.Y. Nov. 7, 2022).

440. *Id.* at *44 ("[T]o the extent these laws come from a handful of cities, the Court has trouble finding that they constitute part of this Nation's tradition of firearm regulation, because . . . they do not appear accompanied by similar laws from states.").

441. *Id.* at *67.

contained over 20 percent of the national population at the time, present[ed] a credible case for representativeness."[442] Other courts have recognized that the new test appears to require courts to "consider *where*, along with *when* and *how many*, when reviewing proposed historical analogues."[443]

Third, with respect to age, courts have not been uniform. Despite *Bruen*'s express reservation of the question, many lower courts have functionally treated 1791 as the only date that matters, discounting laws enacted around the time of the Fourteenth Amendment.[444] "If this were not the case," observed one court, "the Second Amendment could mean one thing *vis a vis* federal laws, and entirely something else *vis a vis* state and local laws."[445] *Bruen* had, of course, entertained that argument, but still said it was not deciding the question.[446] Most lower courts discount laws "from the 17th or 20th centuries" as too remote.[447] One rejected as insufficiently illuminating laws enacted "near the last decade of the 19th century."[448] Another imposed what the judge himself described as an "arbitrary" end date of 1888.[449] Still another dismissed as too late a law dating to 1836 (incidentally, the year the Second Amendment's author, James Madison, died).[450] By contrast, an Eleventh Circuit panel expressly held that, when reviewing a state law, "the more appropriate barometer is the public understanding of the

442. *Id.* at *77.

443. United States v. Love, No. 1:21-CR-42-HAB, 2022 WL 17829438, at *3 (N.D. Ind. Dec. 20, 2022).

444. *See, e.g.*, Hardaway v. Nigrelli, 636 F. Supp. 3d 329, 348 & n.20 (W.D.N.Y. 2022) (reviewing the constitutionality of a state law and yet discounting laws that "were passed nearly a century after the Second Amendment's ratification in 1791," and underscoring that "the State points to no such American law that existed between the founding and 1870").

445. Hardaway v. Nigrelli, 639 F. Supp. 3d 422, 441 (W.D.N.Y. 2022).

446. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2138 (2022) (declining to address the issue).

447. *See, e.g.*, *Antonyuk*, 2022 WL 16744700, at *44.

448. *Id.* at *61.

449. Motion Hearings Department 5A at 30, Duncan v. Bonta, No. 3:17-cv-01017-BEN-JLB (S.D. Cal. Dec. 12, 2022) ("So why don't we limit it to—how about this? How about, let's say, 20 years—how about an arbitrary and capricious number that I'm going to give you? Twenty years after the Second Amendment was incorporated by the Fourteenth Amendment—or the Fourteenth Amendment was adopted.").

450. United States v. Stambaugh, No. CR-22-00218-PRW-2, 2022 WL 16936043, at *4 (W.D. Okla. Nov. 14, 2022) ("The United States thus rests its argument on laws enacted between forty-five and eighty years after the Second Amendment was adopted. But the Court considers this history too far removed from 1791 . . . .").

right when the States ratified the Fourteenth Amendment and made the Second Amendment applicable to the States."[451]

As with the search for the *existence* of a tradition, some courts have been exacting in requiring it to be of long (but unspecified) *endurance*. Those courts have said it is noteworthy that *Bruen* conducted a "search for an *enduring* tradition."[452] The very definition of the term, proclaimed that court, "requires 'continuity'" because tradition is "the opposite of one-offs, outliers, or novel enactments."[453] Discounting laws the state invoked to support its regulation in that case, the court said those historical laws were insufficient because "[t]he cited enactments are of unknown or limited duration, and the State has not met its burden to show *endurance* (of any sort) *over time*."[454] The court rejected the argument that "endurance is not an important consideration" because, it said, *Bruen* searched for one "[a]nd the Court gave little weight to territorial enactments that, like the territories themselves, were 'short lived.'"[455] But that court, like *Bruen*, gave no guidance on how long a law had to last to qualify as a relevant precursor.

Few courts have expressly relied on whether a law was consistently *enforced* to judge whether it constituted an appropriate analogue.[456] But some have noted a law's *evolution* as a possible reason to give less weight to restrictive laws. For example, in striking down a state law barring guns in churches and places of worship, one court was unimpressed with historical laws doing the same, at least in part because "[a]s to Georgia and Missouri, the enactments apparently evolved in any event, to allow church leaders to decide the issue for their own churches."[457] An appellate panel cited the fact that laws had evolved years or decades after ratification to discount their

451. Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1323 (11th Cir. 2023), *vacated, reh'g en banc granted*, 72 F.4th 1346 (11th Cir. 2023) (per curiam).

452. Hardaway v. Nigrelli, 639 F. Supp. 3d 422, 441 (W.D.N.Y. 2022); Christian v. Nigrelli, No. 22-CV-695, 2022 WL 17100631, at *8 (W.D.N.Y. Nov. 22, 2022) (emphasis added).

453. *Hardaway*, 639 F. Supp. 3d at 442; *Christian*, 2022 WL 17100631, at *8.

454. *Christian*, 2022 WL 17100631, at *8 (footnotes omitted); *see also Hardaway*, 639 F. Supp. 3d at 442 ("These enactments are of unknown duration, and the State has not met is burden to show *endurance* (of any sort) *over time*." (footnote omitted)).

455. *Hardaway*, 639 F. Supp. 2d at 442; *Christian*, 2022 WL 17100631, at *8 n.18.

456. United States v. Rahimi, 59 F.4th 163, 178 (5th Cir. 2023), *withdrawn and superseded by* 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023).

457. Hardaway v. Nigrelli, 636 F. Supp. 3d 329, 348 n.19 (W.D.N.Y. 2022).

significance.[458] One district court, however, rejected the notion that later evolution undermined the weight of a proposed analogue.[459] "By design, legislatures may alter the form and substance of laws—so long as they remain consistent with the Constitution. The unsurprising fact that the form of gun laws has changed over time shouldn't by itself cast doubt on their constitutionality . . . ."[460]

* * *

This trek through the burgeoning case law shows that lower courts are fractured. They have reached divergent conclusions about the constitutionality of major state and federal laws. In seeking to apply *Bruen* faithfully, they have created their own bespoke subrules to implement *Bruen*'s underspecified test. The result is a patchwork of decisions that leaves constitutional standards subject to the vagaries of district court filing practices. Of course, some of this disruption is inevitable whenever the Supreme Court issues a major new ruling.[461] However, the early returns show disagreement not only about how to apply the test to particular laws but also over fundamental questions about when it applies at all and what it requires the government to show in each case. That kind of disagreement is unlikely to be resolved by future circuit court decisions, which will likely only continue creating divergent precedent in their respective jurisdictions.[462]

IV. RESPONDING TO BRUEN & BEYOND

This Part begins a conversation about initial tools that courts, elected representatives, and engaged citizens can use to work within *Bruen*'s new standard. In doing so, it generates arguments that, by

458. *Rahimi*, 59 F.4th at 177.

459. United States v. Silvers, No. 5:18-cr-50-BJB, 2023 WL 3232605, at *10 n.9 (W.D. Ky. May 3, 2023) ("That these commonwealths amended their laws to remove the forfeiture provision 4 and 56 years after ratification, respectively, doesn't necessarily suggest that they did so based on a view that forfeiture was inconsistent with the U.S. Constitution.")

460. *Id.* at *13.

461. *See, e.g.*, Tyson A. Crist, Stern v. Marshall: *Application of the Supreme Court's Landmark Decision in the Lower Courts*, 86 AM. BANKR. L.J. 627, 627 (2012) (exploring the "upheaval" in the lower courts in response to the Supreme Court's major decision in *Stern v. Marshall*, 564 U.S. 462 (2011)).

462. *Compare* United States v. Jackson, 69 F.4th 495, 501 (8th Cir. 2023) (upholding the federal law barring gun possession for individuals with felony convictions), *with* Range v. Att'y Gen., 69 F.4th 96, 106 (3d Cir. 2023) (en banc) (striking down the law as applied to the challenger).

extension, might be used in other rights contexts in which the Court has demanded a resort to historical inquiry.[463]

A. Judicial

Lower court judges cannot, of course, simply ignore Supreme Court decisions that require them to undertake complex endeavors and make difficult judgment calls.[464] But their opinions can provide proof that a method the Court thought would be administrable or consistent is proving to be anything but.[465] Courts can also highlight the costs to institutional resources and judicial capacity in applying a new method.[466] By doing so, these courts can provide crucial data points for the future, when the Supreme Court might come to rethink whether the test *Bruen* mandated should be continued, curtailed, refined, or replaced altogether.[467]

Several lower courts since *Bruen* have powerfully critiqued the Court's method, which may be valuable to the Justices when and if they revisit the test, perhaps as early as in the upcoming case *United States v. Rahimi*.[468] But these judges' proposed solutions for dealing with the problems the test generates may be even more immediately influential to other lower court judges. In confronting a Second Amendment challenge to the federal law barring firearm possession for individuals with felony convictions, the court in *United States v. Bullock*[469] underscored concerns about adversarial history and suggested that "[a]n expert may help the Court identify and sift through authoritative sources on founding-era firearms restrictions."[470] It asked the parties

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463. *See* Siegel, *Memory Games*, *supra* note 60, at 1141.

464. Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 203 (2014) ("Absent a formal overruling, Supreme Court decisions remain indefeasibly binding on all inferior tribunals; finding a precedent to be controlling brings the inquiry to its end.").

465. United States v. Kelly, No. 22-cr-00037, 2022 WL 17336578, at *6 (M.D. Tenn. Nov. 16, 2022) (highlighting that *Bruen* called its test more administrable than the two-part framework but expressing doubt about that).

466. *Id.* at *3 ("[I]n cases at the Supreme Court level, or which involve well-funded civil advocacy litigants, that compiled historical record may indeed be rich and voluminous. Legal wrangling about guns, however, does not only exist under the bright lights of those high-profile settings. In fact, those cases are the exceptions, and cases like this one are the rule.").

467. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2272 (2022) (reconsidering and overruling prior case law it deemed erroneous).

468. United States v. Rahimi, 143 S. Ct. 2688, 2688–89 (2023) (mem.) (granting certiorari).

469. United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175 (S.D. Miss. Oct. 27, 2022).

470. *Id.* at *3.

for supplemental briefing on whether it should appoint a consulting historian pursuant to Federal Rule of Evidence 706, which expressly permits a judge to appoint "any expert."[471] Other judges have followed a similar course.[472]

But not all courts have been sanguine about the prospect of appointed historians. One court thought it would prove impractical to appoint an expert in the thousands of federal gun prosecutions each year that may now be open to challenge under *Bruen*.[473] Another thought the adversarial method was sufficient; the government can produce analogues, said that trial court, and "judges appear uniquely qualified at interpreting the meaning of statutes."[474]

Contra the critics, there seems little downside to appointed historians when they can be found—and much upside. Two decades ago, lawyer-historian Jonathan Martin argued that Rule 706 could help mitigate problems of dueling expert historians and the distorting effects on historical methods when historians serve the ends of one party in litigation.[475] Litigating on the payroll of one party "compels historians to generate uncharacteristically categorical and unequivocal assertions."[476] But professional history generally eschews such confidence. "The complexity of the past, the indeterminacy of the historical record, and the contingency of human experience push historians toward a method that produces knowledge that is necessarily multivalent, subtle, and revisable."[477] An appointed historian can help

471. Fed. R. Evid. 706(a) ("On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing.").

472. *See* Baird v. Bonta, No. 19-cv-00617-KJM-AC, 2022 WL 17542432, at *9 (E.D. Cal. Dec. 8, 2022) (ordering the parties to provide supplemental briefing that shows cause "why the court should not appoint its own expert witness to collect and survey evidence of the 'historical tradition'").

473. *Kelly*, 2022 WL 17336578, at *3 n.5 (acknowledging that, while "[o]ne court has suggested appointing a consulting expert," the judge "doubts that it can be scaled to the level that would be required by the federal courts' massive docket of gun prosecutions").

474. Antonyuk v. Hochul, No. 22-CV-0986, 2022 WL 16744700, at *41 n.72 (N.D.N.Y. Nov. 7, 2022).

475. *See* Jonathan D. Martin, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1522 (2003) (arguing that Rule 706 "will remove historians from the adversary process" and prevent any distortions that may arise when parties call on historians).

476. *Id.* at 1542.

477. *Id.* at 1535.

inform a judge about how complicated and contested the historical landscape can be. But even when they do not appoint historians, judges can and must closely inspect the claims of expertise by individuals the parties hold forth as experts.[478] In doing so, judges can lessen the chances of inscribing one-sided history into constitutional law.[479]

Beyond interrogating and appointing experts, courts can also fill in details that *Bruen* left open in a way that preserves legislative discretion. On the existence of tradition, courts can raise the level of abstraction,[480] relax the required analogousness, identify additional metrics for relevant similarity, and underscore the novelty of today's social problems and the monumental technological changes since the Founding—all consistent with *Bruen*'s commands. They can observe the paucity of records relating to historical enforcement as both a practical and theoretical obstacle to mandating the government produce such information.[481] Most of all, they can highlight that the bare absence of a similar law in the past should not doom legislation today where other evidence suggests the Founding generation would not have considered such a law beyond the state's police power. As one lower court judge said, "[I]t would make no sense to divine constitutional significance from non-existent legislation concerning non-existent problems."[482] If silence is going to bind, courts should be ecumenical in searching for history before declaring the record void.

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478. Ocean State Tactical v. Rhode Island, No. 22-CV-246, 2022 WL 17721175, at *7 (D.R.I. Dec. 14, 2022) ("In this case, the credentials of the proffered experts weigh heavily in the Court's view of which opinions to accept where there is a conflict. The Court must discount to some extent the declaration of both the plaintiffs' experts because neither has been engaged in relevant *neutral* scholarly research."); Or. Firearms Fed'n v. Kotek, No. 2:22-cv-01815-IM, 2023 WL 4541027, at *15–16 (D. Or. July 14, 2023) (describing the qualifications of the proffered experts and underscoring that "[d]efendants' experts come from neutral academic backgrounds and possess no economic interest in the sale of [large-capacity magazines]").

479. *See* Shawn Hubler, *In the Gun Law Fights of 2023, a Need for Experts on the Weapons of 1791*, N.Y. TIMES (Mar. 14, 2013), https://www.nytimes.com/2023/03/14/us/gun-law-1791-supreme-court.html [https://perma.cc/DR79-MPEN] (describing the various experts who have appeared in Second Amendment cases post-*Bruen*).

480. For an example of a court doing this well, see United States v. Now, No. 22-CR-150, 2023 WL 2717517, at *8 (E.D. Wis. Mar. 15, 2023) ("The relevant level of similarity between § 922(n) and historical analogues is that of uncommonly dangerous or unvirtuous persons. To focus only on persons under indictment is to assess the question too narrowly." (internal citation omitted)), *report & recommendation adopted*, 2023 WL 2710340 (E.D. Wis. Mar. 30, 2023).

481. *See* Ruben & Cornell, *supra* note 259, at 130–31 n.53 (2015) (explaining why enforcement records for old statutes and regulations may not be found easily today).

482. Hanson v. District of Columbia, No. 22-2256, 2023 WL 3019777, at *16 (D.D.C. Apr. 20, 2023).

As another put it, "[T]he court must, based on the available historical evidence, not just consider what earlier legislatures did, but imagine what they could have imagined."[483]

Finally, courts can engage in the time-honored practice of "narrowing Supreme Court precedent from below."[484] As Professor Richard Re argues, that "approach would acknowledge that the precedent must remain binding in circumstances where it unmistakably applies, while also reducing the precedent's scope of application in cases of precedential ambiguity."[485] Professor Re, in fact, uses the lower court case law after *Heller* as an example of legitimate narrowing from below. The Court's decision there was ambiguous, he argued, and thus "even if lower courts have not adhered to the best reading of *Heller*, they have interpreted the decision reasonably."[486]

Like *Heller*, *Bruen* has "left vast room for interpretation."[487] The Court provided little clarity on a multitude of issues now arising in its aftermath. One could read parts of the developing post-*Bruen* case law so far as engaged in narrowing from below. In the scores of federal court decisions upholding the bar against felon firearm possession, even for nonviolent felons, courts have often held that *Bruen* left intact prior case law affirming the ban's constitutionality—even though the Court conspicuously failed to include the same affirmations of the felon ban that *Heller* and *McDonald* had.[488] One court noted the interpretive ambiguity over *Bruen*'s scope and concluded, à la Professor Re, that "a reasonable interpretation of *Bruen* is that it does not obfuscate the requirement that, as a threshold matter, to receive

483. United States v. Kelly, No. 22-cr-00037, 2022 WL 17336578, at *2 (M.D. Tenn. Nov. 16, 2022).

484. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 924 (2016) (acknowledging that "narrowing from below happens all the time").

485. *Id.* at 923.

486. *Id.* at 962.

487. *See id.* (describing *Heller*).

488. Jake Charles, Bruen, *Analogies, and the Quest for Goldilocks History*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (June 28, 2022), https://firearmslaw.duke.edu/2022/06/bruen-analogies-and-the-quest-for-goldilocks-history [https://perma.cc/E2HC-JMNE] ("[*Bruen*] does not repeat the assurances from both *Heller* and *McDonald* that there are a set of laws that are presumptively constitutional, like laws prohibiting certain people from possessing guns or regulations on the commercial sale of arms.").

Second Amendment protection, one must first and foremost be law-abiding."[489]

B. Legislative

Just as there are judicial responses, legislators have tools to work with as well. To be sure, *Bruen* limits legislatures more than *Heller* had.[490] But the decision does not leave lawmakers without options for enacting many gun laws their constituents favor. The case should, however, change how officials legislate concerning guns.[491] In particular, legislatures enacting gun regulations in the post-*Bruen* world should take care to create a legislative record that supports any new law. Optimally, that record should contain four types of findings or announcements: first, the precise purpose of the law (that is, *Bruen*'s why factor); second, the anticipated burden on protected interests (that is, *Bruen*'s how factor); third, the specific social problem to which the law is directed; and fourth, the historical tradition or support for the law.[492]

The first two types of evidence are directly relevant to how a court will review the law's constitutionality.[493] While government litigators can debate those issues in court, even without express legislative findings, an established record will only help support the efforts to defend a law. Through hearings, committee reports, testimony from experts, and other means, legislatures can describe the goals of the legislation and explain how the law leaves open sufficient avenues for the exercise of constitutionally protected conduct.[494] It is not clear

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489. United States v. Perez-Garcia, No. 22-CR-158-GPC, 2022 WL 17477918, at *3 (S.D. Cal. Dec. 6, 2022).

490. *Compare* District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (stating that, despite its decision, governments still retain "a variety of tools for combating th[e] problem" of gun violence), *with* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022) (repeating no such assurances). *See also* Sunstein, *supra* note 66, at 248 (arguing that "*Heller* is a narrow ruling with strong minimalist features").

491. *See* Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 7 & n.11 (2016) (noting that legislators facing an originalist set of Justices may need to make arguments sounding in originalism on instrumental grounds).

492. Although several of these aspects are considerations that mattered under the two-part framework, *Bruen* insisted that attention to the means and ends of the laws did not convert its test into interest-balancing. *See Bruen*, 142 S. Ct. at 2133 n.7.

493. *See supra* Part I.B.

494. Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 VA. L. REV. 1759, 1788 (2022) (recognizing, pre-*Bruen*, that "that current Second Amendment and privacy doctrines embody an adequate alternatives principle, as do other civil liberties"); *cf.*

whether courts will defer to those findings,[495] but evidence- and expert-backed conclusions about the justifications for the law and the projected impact on Second Amendment conduct should at least bolster the government's arguments—and make it more difficult for trial courts to substitute their own conjectures about a given law.

The last two categories address aspects that are relevant to how the *Bruen* test is applied in practice.[496] Lower courts, so far, have often guessed at the societal problems a law means to address, often characterizing it at a high level of generality and missing nuance that might matter. For example, one court reviewing a challenge to the federal law barring firearm possession for those subject to a domestic-violence restraining order tersely concluded that "[d]omestic violence, or violence against anyone for that matter, is not just a modern problem."[497] And because the problem had historically been addressed differently, the contemporary regulation was immediately suspect.[498] Detailing the precise social problem a modern law addresses—like the myriad ways we now understand domestic abusers to wield weapons as tools of coercion and intimidation, as well as to inflict physical harm—can support arguments that a given law should be upheld.

Similarly, a legislature's statement that it intends to tap into a specific historical tradition of firearms regulation can help support arguments for a law's constitutionality. Modern legislatures can begin the quest for analogies that *Bruen* requires in court by highlighting the type of tradition it has relied on. This record might guard against a court constricting the analogical reasoning it is willing to deploy too narrowly—or at the very least expose that the choice of how strictly or narrowly to draw the analogy is not a neutral, adjudicative one.[499] This

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Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1790 (2016) (discussing different ways that courts can assess the substantiality of burdens on protected conduct in the religion context).

495. Some certainly will not. *See* Koons v. Reynolds, No. 22-7464, 2023 WL 128882, at *7–8 (D.N.J. Jan. 9, 2023) (dismissing evidence about the legislature's rationale for enacting a law on the grounds that *Bruen* forbids consideration of the harms guns can cause).

496. *See supra* Part I.B.

497. United States v. Perez-Gallan, No. 22-CR-00427-DC, 2022 WL 16858516, at *10 (W.D. Tex. Nov. 10, 2022).

498. *Id.*

499. *See* Han, *Autobiographical Lies*, *supra* note 219, at 88. As Han argues,

> There is no purely 'neutral' means of historical analysis. A court can characterize the speech in question in multiple ways and craft analogies to 'longstanding tradition' at varying levels of generality and abstraction. In the end . . . it is a court's sense of these values that will influence how it conducts the historical analysis.

country's historical tradition provides fertile ground for legislatures today to regulate in the public interest. "The sovereign imperative to regulate weapons in the name of public peace and public order is an ancient one, even as the prerogative—and the harms that the display of weapons can inflict—evolves with the structure of society itself."[500]

Legislatures and advocates can, to be sure, continue to critique *Bruen*'s test with a view toward future changes in its standards. In the meantime, they can use *Bruen*'s test and rely on the historically established right to protect their citizens through law. "For centuries," write Professors Joseph Blocher and Reva Siegel, "gun laws have ensured citizens' sense of safety, their trust in public institutions, and their ability to engage in constitutionally salient conduct like education, speech, assembly, and voting."[501] Citizens today can, in short, advocate for laws designed to protect interests that the common law and laws of the early Republic have always sought to protect: public peace and safety. They can do so, not in spite of *Bruen*, but in conformance with it. If history and tradition dictate the scope of regulatory authority today, properly viewing the breadth of that authority means recognizing how broadly our forebears understood their authority to guard against the harms to civic life from unregulated private arms.

Therefore, even accepting *Bruen*'s assertion that the 1791 interest-balancing between rights and regulation controls,[502] contemporary regulations can seek to maintain the initial balance struck when firearms were less ubiquitous and less lethal. For example, Professor Darrell Miller advocates an "equilibrium-adjustment theory" for Second Amendment doctrine that necessarily requires regulatory adjustments as the risks of harm from technological and social changes increase.[503] If, as *Heller* and *Bruen* emphasize, the balance between rights and harms was set at the Founding, it is all the more important for legislatures enacting gun laws today to emphasize that stricter laws can maintain, not undermine, the balance those generations

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Id.

500. Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under* Heller, 116 NW. U. L. REV. 139, 172 (2021).

501. *Id.* at 197.

502. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 n.7 (2022) ("Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances . . . .").

503. Miller, *Equilibria*, *supra* note 189, at 244.

established.[504] Deferring to and maintaining this initial interest-balancing is not only consistent with *Bruen*'s injunction but also consistent with the sort of review the Court has commanded in other contexts that rely on historical inquiry.[505]

CONCLUSION

"[I]n requiring courts to strike down gun regulations even when they might be narrowly tailored to accomplish the most compelling of governmental interests," Professor Khiara Bridges argues, *Bruen* "has rendered the right to bear arms the most protected of rights in the Constitution."[506] The Court's historical test has the potential to significantly expand the Second Amendment's scope. No matter how compelling the state's interest, no matter how narrowly tailored its regulation, *Bruen*'s new method appears to dictate that a modern gun law cannot stand without adequate grounding in the distant past. As one lower court said, "*Bruen* did not . . . erase societal and public safety concerns—they still exist—even if *Bruen*'s new framework prevents courts from making that analysis."[507]

Bruen continues in a line of cases that increasingly makes history decisive.[508] But it leaves fundamental questions about the basic details unanswered. Applied too stringently, it would require that tentative, nuanced, and multifaceted interpretations of the past be flattened to

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504. *Id.* at 256 ("Technological and social change can upset the balance among these different categories of actors, requiring legal efforts to restore the initial distribution of force and authority.").

505. *See* Han, *Transparency*, *supra* note 38, at 383 (noting, in the context of free-speech cases, that although the Court suggests "the traditionally recognized categories of low-value speech *reflect* categorical judgments as to speech value and harm, such judgments were effectively made and set in stone when the First Amendment was ratified, and neither courts nor legislatures are free to revise this initial understanding" (footnote omitted)).

506. Bridges, *supra* note 15, at 70.

507. United States v. Quiroz, 629 F. Supp. 3d 511, 526–27 (W.D. Tex. 2022); *accord* United States v. Price, 635 F. Supp. 3d 455, 460–61 (S.D. W. Va. 2022) ("Any modern regulation that does not comport with the historical understanding of the right is to be deemed unconstitutional, regardless of how desirable or important that regulation may be in our modern society.").

508. United States v. Kelly, No. 22-cr-00037, 2022 WL 17336578, at *3 (M.D. Tenn. Nov. 16, 2022). The *Kelly* court cautioned,

> What is left, then, is the necessity of deciding serious criminal cases—involving pressing questions of individual liberty and public safety—based on the arguments of non-historian lawyers, citing cases by non-historian judges, who relied on arguments by other non-historian lawyers, and so on in a sort of spiral of law office history.

Id. (citation and quotation marks omitted).

notch narrow, short-term litigation victories today.[509] And without further revision, it is a recipe for the kind of simmering chaos already stewing in the lower courts.[510] That should alarm *Bruen*'s defenders. After all, according to the Supreme Court, an "important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner."[511] Without significant refinement by the courts of appeals and a uniformity among them that seems elusive, *Bruen*'s method will continue proving unworkable in practice. The Court itself will have an opportunity to address the problematic features of the test when it hears *United States v. Rahimi*.

More worrisome than its open texture, however, is the fact that the decision deems historical silence an important standard without inquiring into the reasons for legislative lacunae. Without offering justification for doing so, *Bruen* elevates mere unregulated conduct to the status of an inviolate constitutional right. Justice Oliver Wendell Holmes once called it "revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV."[512] How much more disturbing, then, to *discredit* a rule of law because it was *not* laid down in a bygone era. Lower courts and legislators cannot alter *Bruen*'s test, but they can adjudicate and legislate in a way that preserves a role for contemporary citizens' authority to engage in self-defense through law.[513]

Although *Bruen* frontloads history more than many other cases, it is not an isolated decision. The modern Supreme Court frequently invokes history as a basis for its decisions.[514] One result of the historical turn in a host of recent cases is to place greater authority in the federal courts, with the Supreme Court firmly planted at the apex of American

509. Siegel, *Memory Games*, *supra* note 60, at 1196–97 (criticizing how originalist method "models meaning as univocal and consensual rather than plural, contested, and evolving").

510. *See supra* Part III.

511. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2272 (2022); *see also* Pushaw, *supra* note 36, at 34 (critiquing the consistency and workability of *Casey*'s undue-burden standard).

512. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

513. Blocher & Siegel, *supra* note 500, at 201.

514. Chad Flanders, *Flag* Bruen*-ing:* Texas v. Johnson *in Light of the Supreme Court's 2021-22 Term*, 2022 U. ILL. L. REV. ONLINE 94, 95; Siegel, *Memory Games*, *supra* note 60, at 1175 ("The history-and-traditions framework is a claim on constitutional memory, a memory game that rationalizes the exercise of power. It functions to conceal rather than to constrain discretion.").

policymaking. As Professor Mark Lemley describes, whatever the tools it has used to reach its decisions in the most recent terms, "[t]he common denominator across multiple opinions in the last two years is that they concentrate power in one place: the Supreme Court."[515] Professor Lemley's conclusion suggests that *Bruen*'s indeterminacy may not be a complete oversight. After all, the more indeterminate the test, the more authority the Court retains to reach whatever conclusion it wants. But though the Supreme Court may desire to sit as a superlegislature over nationwide gun policy, lower courts, legislators, and citizens need not easily cede the people's ultimate authority.

515. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022).