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# A Vague, Overconfident, and Malleable Approach to Constitutional Law

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# Historical Tradition

## A VAGUE, OVERCONFIDENT, AND MALLEABLE APPROACH TO CONSTITUTIONAL LAW

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INTRODUCTION

In *New York State Rifle & Pistol Association, Inc. v. Bruen*, the US Supreme Court overturned a century-old firearms licensing scheme that required those applying for concealed carry permits to demonstrate they had a special need for self-defense.[1] The Court did so without reference to the motivations for passing the law or the law's impact on public safety, reasoning that it was improper to look to the government's interest and whether the restriction was appropriately tailored to accomplish that interest.[2] Instead, the Court stated that applying the Second Amendment required a historical tradition approach—that is, where "the Second Amendment's plain text covers an individual's conduct," a law restricting that conduct must be "consistent with th[e] Nation's historical tradition of firearm regulation."[3]

This is significant, in part because of the approach the Court rejected. Many constitutional law questions involve applying some form of scrutiny to restrictions on constitutional rights: courts determine the level of government interest at play and evaluate whether the law achieves that interest in a manner that is not overbroad.[4] Where the Court applies strict scrutiny, the Court evaluates whether a law is enacted to achieve a compelling government interest and whether the law is

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1 N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2122–23, 2156 (2022).

2 *Id.* at 2129.

3 *Id.* at 2126.

4 *See* Ozan O. Varol, *Strict in Theory, But Accommodating in Fact?*, 75 MO. L. REV. 1243, 1245 (2010) (describing various areas of law in which the Supreme Court applies strict scrutiny).

narrowly tailored to achieving that interest.[5] In cases involving intermediate scrutiny, the Court evaluates whether there is an important government interest motivating the law, and then determines whether the law is substantially related to achieving that interest.[6] Before *Bruen*, most courts applied intermediate scrutiny to firearm restrictions.[7]

Applying strict or intermediate scrutiny allows courts to account for present-day circumstances, the nature of problems a government is trying to address, and the likelihood that a law will solve or mitigate these problems. In Second Amendment cases, the government's interest in gun control laws is often the prevention of harm.[8] In considering this interest and how gun restrictions may accomplish this interest, courts take into account the dangers guns may pose, harm caused by unlawful gun use, and other present-day circumstances.[9] These issues were fresh on everyone's mind at the time of the *Bruen* decision, which was issued less than one month after the mass shooting at an elementary school in Uvalde, Texas that left nineteen children and two teachers dead.[10]

The *Bruen* Court's historical tradition approach abandons all considerations of government interests and whether a law or regulation accomplishes government interests.[11] By adopting a historical tradition approach, the

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[5] *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (in the First Amendment context, holding that "a content-based restriction on political speech in a public forum must be subjected to the most exacting scrutiny," and that in such cases the government must show that a "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end") (emphases and citations omitted) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[6] *See* Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989) (in the First Amendment context, applying a lower level of scrutiny to "regulation[s] of the time, place, or manner of protected speech," and stating that time, place, and manner restrictions must "promote[] a substantial government interest that would be achieved less effectively absent the regulation").

[7] *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, 1496 (2018).

[8] *See, e.g.*, Harley v. Wilkinson, 988 F.3d 766, 769 (4th Cir. 2021) (upholding restriction on the possession of firearms by those convicted of misdemeanor domestic violence and recognizing government interest in reducing domestic gun violence), *abrogated by Bruen*, 142 S. Ct. 2111; Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen., 910 F.3d 106, 119 (3d Cir. 2018) (upholding ban on gun magazines that can hold more than ten rounds, recognizing the government's interest in protecting citizens' safety, and noting that large capacity magazines are often used in mass shootings), *abrogated by Bruen*, 142 S. Ct. 2111.

[9] *See, e.g.*, *N.J. Rifle & Pistol Clubs*, 910 F.3d at 120 (referencing a recent shooting in justifying the State's interest in disallowing large capacity magazines due to the speed at which they operate).

[10] *See What to Know About the School Shooting in Uvalde, Texas*, N.Y. TIMES (Aug. 25, 2022), https://www.nytimes.com/article/uvalde-texas-school-shooting.html [https://perma.cc/LM6Y-DZYH].

[11] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2129–30 (2022).

Court ruled that considerations with the aim of harm reduction are irrelevant to the constitutional inquiry. The Court justified this approach by contending that such analysis involves "difficult empirical judgments."[12]

In the place of an interest-balancing approach, the *Bruen* Court stated that courts must apply a one-step method to Second Amendment cases.[13] Where "the Second Amendment's plain text covers an individual's conduct, . . . [t]he government must justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[14]

At first, this historical tradition approach seems workable—perhaps even desirable. Courts and lawyers frequently rely on chains of precedent stretching far into the past when advancing everyday legal arguments.[15] Presumably the parties before the court will present evidence of historical regulations and restrictions, meaning that the burden of conducting the historical research will fall on the parties—leaving the court to simply make a decision in light of the evidence.[16] Additionally, the historical tradition approach seems objective: rather than courts engaging in a goal-oriented approach of researching and presenting empirical evidence regarding firearm regulations and harms caused by guns, courts can instead look to legal history and find clear answers on whether particular behaviors were traditionally regulated or restricted.

This article argues that these assumptions are misguided. The historical tradition approach to constitutional law is far more complex than the Court suggests, or we presume—as the Court's own shoddy historical analysis in *Bruen* illustrates. The historical tradition approach also leaves multiple avenues for attorneys and courts to frame and misrepresent historical evidence in ways that support their preferred outcomes, leaving questions unanswered about the significance of particular historical evidence. All of this is likely to cause confusion and diverging conclusions by lower courts in future cases should they make earnest attempts at applying the historical tradition approach.

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[12] *Id.* at 2130 (quoting McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2010) (plurality opinion)).

[13] *Id.* at 2129–30.

[14] *Id.*

[15] *See id.* at 2130 n.6 (making this point, and citing William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 810–11 (2019) in support).

[16] *Id.* ("Courts are . . . entitled to decide a case based on the historical record compiled by the parties.").

This article, in its pursuit to untangle the historical tradition, proceeds in four parts. Part I discusses the *Bruen* opinion and its context—particularly the Court's 2008 ruling in *District of Columbia v. Heller*.[17] Focusing on the Court's rejection of interest balancing and adoption of the historical tradition approach, this Part surveys the Court's various justifications for this methodology. This Part also details the *Bruen* Court's efforts to survey historical restrictions on firearm use and the Court's strategy of emphasizing evidence that supports its ruling while minimizing and dismissing contrary evidence.

Part II examines several aspects of the historical tradition test in which the Court uses its discretion and unstated assumptions to determine how evidence should be weighed and what evidence is relevant. Part II contemplates several arguments the Court and its defenders may make to justify these inconsistent approaches but notes that these arguments all boil down to a discretionary call regarding how to treat different types of constitutional rights. Part II then addresses the lack of guidance in *Bruen* for those who seek to draw analogies to historic restrictions. This broad latitude lends itself to inconsistent conclusions. Part II delves into several examples to illustrate the malleability of the historical tradition approach.

Part III takes issue with the *Bruen* Court's claim that the historical tradition approach is administrable and feasible for courts and attorneys. The Court attempted to dismiss concerns that courts and attorneys are not historians, arguing that limiting historical inquiry to legal issues avoids this problem and noting that courts can decide cases based on the historical records compiled by the parties before them.[18] But this ignores the reality that attorneys are advocates who will research, cite, and present historical evidence in a persuasive manner designed to further their clients' interests rather than present a complete historical record. The expectation that courts will be able to engage in accurate and thorough historical analysis relies on the assumption that attorneys are able to do the necessary accurate and thorough research, even on matters for which they have no prior expertise. It further relies on the additional assumption that the court will be able to derive the correct answer from competing sets of historical facts and arguments. This optimism is misplaced—especially since judges are not experts in historical analysis themselves.

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[17] District of Columbia v. Heller, 554 U.S. 570 (2008).

[18] *See Bruen*, 142 S. Ct. at 2130 n.6.

Part IV argues that the difficulty and discretion inherent in the historical tradition approach will be amplified in the lower courts. District courts, and even circuit courts of appeals lack the resources and attention from amici that the Supreme Court enjoys in its constitutional cases. As a result, inconsistent conclusions over historical traditions are likely—as are attempts by lower courts to seize on what dicta they might find in *Bruen* and *Heller* in order to avoid the historical tradition inquiry altogether.

## I. THE SUPREME COURT'S SECOND AMENDMENT JURISPRUDENCE

Much of the Supreme Court's Second Amendment jurisprudence is a relatively recent development. This Part summarizes the Court's holding in *District of Columbia v. Heller* that the Second Amendment protects an individual's right to bear arms,[19] and its incorporation of this right against the states in *McDonald v. City of Chicago*.[20] It then addresses the Court's opinion in *New York State Rifle & Pistol Association, Inc. v. Bruen*[21] and the Court's adoption of the historical tradition approach to the Second Amendment.

### A. Bruen's *Backdrop:* District of Columbia v. Heller *and* McDonald v. City of Chicago

In *District of Columbia v. Heller*, the Court addressed a Second Amendment challenge to a District of Columbia restriction against keeping handguns in homes unless they were disassembled and unloaded.[22] The Court noted the parties' differing interpretations of the Second Amendment: the District of Columbia argued that the Second Amendment only protected a "right to possess and carry a firearm in connection with militia service" while the respondent, Dick Heller, "argue[d] that [the Second Amendment] protecte[d] an individual right to possess . . . firearm[s] unconnected with [such] service."[23]

The Court began its analysis by noting that "[t]he Second Amendment is . . . divided into two parts: its prefatory clause and its operative clause."[24] The Court deemed the first part of the Second Amendment—"[a] well regulated Militia, being

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[19] *Heller*, 554 U.S. 570.
[20] McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) (plurality opinion).
[21] *Bruen*, 142 S. Ct. at 2126.
[22] *Heller*, 554 U.S. at 574–75.
[23] *Id.* at 577.
[24] *Id.*

necessary to the security of a free State,"[25]—to be a statement of purpose, rather than a limitation on the Second Amendment's scope.[26] The Court turned to the second part of the Second Amendment—"the right of the people to keep and bear Arms shall not be infringed"[27]—concluding that it protected the right of individuals, rather than only the militia, to possess and carry weaponry.[28] In arguing for this interpretation, rather than an interpretation specific to militia personnel or military use of weapons, the Court relied on a number of Founding-era sources, including dictionaries, preratification commentaries, and state constitutional provisions drafted before and after the Second Amendment's ratification.[29]

Throughout this analysis, the Court referenced state constitutional provisions to the extent that they illuminated the meaning of the phrase "keep and bear [a]rms."[30] For example, the Court cited state constitutional provisions identifying rights of citizens to bear arms in defense of themselves and the state.[31] From these provisions, the Court inferred that the phrase "bear [a]rms" was not limited to the use of weaponry in a military context, as bearing arms in defense of oneself and bearing arms in defense of the state were identified as two separate contexts, and a military-only reading would not make sense in the context of the phrase "in defense of [oneself]" contained in these state constitutional provisions.[32] The Court also noted that the references to defense of oneself indicated that the right to bear arms was derived from the right to self-defense.[33] The Court also analyzed post-Ratification sources, including commentary and case law, concluding that these sources further confirmed the Court's interpretation that the right to bear arms was an individual right grounded in the right of self-defense.[34]

The Court acknowledged that Second Amendment rights were not unlimited and that the right to keep and bear arms is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[35] The Court went on to state that

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25 U.S. CONST. amend. II.
26 *Heller*, 554 U.S. at 577–78, 599–601.
27 U.S. CONST. amend. II.
28 *Heller*, 554 U.S. at 589.
29 *Id.* at 579–92.
30 *Id.* at 581.
31 *Id.* at 584–85.
32 *Id.* at 584–86.
33 *Id.* at 602–03.
34 *Id.* at 605–26.
35 *Id.* at 626.

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[36]

Despite acknowledging that the right to keep and bear arms was not unlimited, the Court did not describe a method for determining these limits, concluding that the District of Columbia's handgun ban would fail "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."[37]

The Court addressed whether the Second Amendment applied to the states two years later in *McDonald v. City of Chicago*.[38] There, the petitioner sued over Chicago ordinances that prohibited the possession of firearms without proper registration and made it impossible to register most handguns—effectively banning the possession of handguns by Chicago residents.[39] A plurality of the Court held that the right to keep and bear arms was "deeply rooted in this Nation's history and tradition"[40] because "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day,"[41] noting *Heller*'s recognition that "self-defense [was] 'the *central component*' of the Second Amendment right."[42] Accordingly, the plurality held that the Second Amendment applied against the states through the Due Process Clause of the Fourteenth Amendment, and the Court ruled that Chicago's handgun ban violated the Second and Fourteenth Amendments.[43] Justice Thomas concurred in the judgment but argued that the Second Amendment applied to Chicago's handgun ban through the Fourteenth Amendment's Privileges or Immunities Clause rather than the Due Process Clause.[44]

In *Heller*, the Court repeatedly stressed it was seeking to determine the original public meaning of the Second Amendment and its terms.[45] As described above, the Court engaged in extensive historic analysis over how commentators, legislatures, and courts treated the right to bear arms—

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[36] *Id.* at 626–27.
[37] *Id.* at 628.
[38] McDonald v. City of Chicago, 561 U.S. 742 (2010) (plurality opinion).
[39] *Id.* at 750.
[40] *Id.* at 767 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).
[41] *Id.*
[42] *Id.* at 767–68 (quoting *Heller*, 554 U.S. at 599).
[43] *Id.* at 791.
[44] *Id.* at 806 (Thomas, J., concurring in part and concurring in the judgment).
[45] *See Heller*, 554 U.S. at 576–77, 593–95, 625.

concluding that these instances reflected an understanding that the phrase, "right to 'keep and bear [a]rms'" referred to an individual right to bear arms in self-defense.[46] From this, the Court concluded that this was the original meaning of the Second Amendment.[47] As will become evident, the Court's decision in *Bruen* continues to focus on the history, yet devotes little attention to whether this history is relevant to the meaning of the Second Amendment. Instead, the *Bruen* Court shifted to an analysis that begins and ends with an investigation of historical tradition.

### *B.* New York State Rifle & Pistol Association, Inc. v. Bruen

In *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Court addressed a New York law that prohibited many people from carrying handguns in public.[48] The law had been in place for over one hundred years and required people applying for a license to carry a concealed handgun to prove "good moral character" and show "proper cause."[49] New York's courts interpreted the proper cause requirement as requiring applicants for licenses to show they had "a special need for self-protection distinguishable from that of the general community."[50] General concerns about crime and self-defense did not suffice, nor did concerns that one was living or working in a high crime area.[51] Two petitioners had applied for unrestricted licenses to carry handguns in public but were denied.[52]

#### 1. Rejecting the Lower Courts' "Two-Step" Approach

The Court began its analysis by noting that since *Heller* and *McDonald*, courts of appeals developed a two-step test to address Second Amendment challenges.[53] At the first step, the government attempts to show that the restricted activity falls outside of the scope of the Second Amendment "right as originally understood," and if the regulated activity is outside

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[46] *See id.* at 579–92.
[47] *Id.* at 628.
[48] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022).
[49] *Id.* at 2123.
[50] *Id.* (quoting *In re* Klenosky, 428 N.Y.S.2d 256, 257 (App. Div. 1980)).
[51] *Id.*
[52] *Id.* at 2125.
[53] *Id.*

the original scope of the Second Amendment then the activity is deemed "categorically unprotected."[54]

If the regulated activity is within the scope of the Second Amendment, the next step is to analyze how close the activity is to the "core" of the right to keep and bear arms—typically thought of as the right to "self-defense *in the home*."[55] If a law or regulation encumbers "a 'core' Second Amendment right . . . courts apply 'strict scrutiny' and ask whether the [g]overnment can prove that the law is 'narrowly tailored to achieve a compelling governmental interest.'"[56] "Otherwise, [courts] apply intermediate scrutiny," which requires the government to demonstrate that "the regulation is 'substantially related to the achievement of an important governmental interest.'"[57]

The Court rejected "this two-step approach," claiming "it [was] one step too many."[58] In its place, the Court required the government to "prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[59] The Court drew on *Heller*, noting that to the extent the *Heller* Court recognized potential limits on the right to keep and bear arms, it did so by referring to longstanding restrictions, and the Court overturned the District of Columbia's handgun ban because it was "historically unprecedented."[60]

### 2. The "Historical Tradition" Approach

In the place of the two-step strict and intermediate scrutiny approaches to Second Amendment challenges, the *Bruen* Court stated that courts must apply a "historical tradition" approach.[61] The Court summed up this approach, stating:

> We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that

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[54] *Id.* at 2126 (internal quotations omitted) (quoting Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012)).

[55] *Id.* (emphasis in original) (quoting Gould v. Morgan, 907 F.3d 659, 671 (1st Cir. 2018)).

[56] *Id.* (quoting Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017).

[57] *Id.* (quoting Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 96 (2d Cir. 2012)).

[58] *Id.* at 2127.

[59] *Id.*

[60] *Id.* at 2128.

[61] *Id.* at 2130.

> the individual's conduct falls outside the Second Amendment's "unqualified command."[62]

The Court was aware that its historical tradition approach would raise criticism to the extent that it called on nonhistorian judges and attorneys to engage in historical analysis when arguing over the permissible scope of gun laws. The Court, however, dismissed this concern with little effort, acknowledging that while "historical analysis can be difficult," it is ultimately easier than "'mak[ing] difficult empirical judgments' about 'the costs and benefits of firearms restrictions.'"[63]

In a footnote, the Court elaborated on this point and responded to the dissenting justices' concerns. The Court argued that a judge's job is to resolve legal questions rather than abstract historical questions, and that legal questions were a subset of this "broader 'historical inquiry.'"[64] Additionally, the Court noted that the adversarial system accounted for these concerns and stated that "Courts are . . . entitled to decide a case based on the historical record compiled by the parties."[65] Shortly thereafter, the Court doubled down on its minimization of historical complexity—all but abandoning its initial lip service to the difficulties of historical analysis by claiming that applying constitutional principles to modern conditions "is an essential component of judicial decisionmaking under our enduring Constitution" and there was no reason this task could not be done in the Second Amendment context.[66]

The Court asserted that its historical tradition approach was in line with its approach to other constitutional rights. It did so by citing First Amendment doctrine, noting that when the

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[62] *Id.* at 2129–30 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)). The final quoted portion of the Court's methodological statement is from a footnote in the Court's opinion in *Konigsberg*, 366 U.S. at 50 n.10. There, the Court rejected a "literal reading" of the First Amendment that would provide for "absolute[]" protection of free expression and association. *Id.* at 49, 49 n.10. In doing so, the Court quoted at length from Justice Holmes's opinion in *Gompers*, where he argued that the significance of Constitutional provisions "is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Id.* at 50 n.10 (quoting Gompers v. United States, 233 U.S. 604, 610 (1914)). The *Konigsberg* Court used this language to reject an absolutist approach to First Amendment protection of speech and went on to suggest that the same argument would apply to "the equally unqualified command of the Second Amendment." *Id.* The Court therefore cites a prior endorsement of an approach similar, if not equivalent, to living constitutionalism rather than a confined, historic approach to the Second Amendment's scope of protection.

[63] *Bruen*, 142 S. Ct. at 2130 (quoting McDonald v. City of Chicago, 561 U.S. 742, 803–04 (2012) (Scalia, J., concurring) (internal citations and alteration omitted)).

[64] *Id.* at 2130 n.6 (quoting Baude & Sachs, *supra* note 15, at 810–11).

[65] *Id.*

[66] *Id.* at 2134 (internal quotation marks omitted) (quoting Heller v. District of Columbia, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

government seeks to restrict speech, it "bears the burden of proving the" restrictions are constitutional and that sometimes that burden involves pointing to historical evidence in demonstrating "whether . . . expressive conduct falls outside of the category of protected speech."[67] The Court, however, did not mention that in cases where a type of expression is not deemed to be unprotected speech, the historical analysis is only the beginning of the inquiry.

In the First Amendment context, if there is a threshold determination that speech does not fall into an unprotected category, the analysis then turns to whether the restriction on the protected speech is permissible under the First Amendment, which involves an interest balancing approach.[68] To cite just one example from the Court's complex First Amendment doctrine: if a law restricts speech based on its content, and the speech does not fall into a historic category of unprotected speech, the court applies strict scrutiny to determine whether the law is constitutional.[69] If the restriction instead regulates "the time, place, or manner of protected speech," the level of scrutiny is lower.[70] While the *Bruen* Court may be correct that some aspects of First Amendment doctrine require looking to historical practice, the Court's approach in these cases is not uniform and the First Amendment approach, as a whole, is not at all analogous to the historical tradition approach, which treats analysis of historical restrictions on gun use as the entire inquiry.[71]

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[67] *Id.* at 2130 (quoting United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 816 (2000)) (citing Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620 n.9 (2003)).

[68] *See* Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1299, 1317 (2007) (describing unprotected categories of speech and summarizing various levels of scrutiny employed in cases involving restrictions on commercial speech or "adult" speech).

[69] *See* Boos v. Barry, 485 U.S. 312, 321–22 (1988) (holding that "a content-based restriction on political speech in a public forum must be subjected to the most exacting scrutiny," and that in such cases the government must "show that [a] regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end") (internal quotations, emphasis, and citations omitted) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[70] Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989) (applying a lower level of scrutiny to "regulation[s] of the time, place, or manner of protected speech," and stating that time, place, and manner restrictions must "promote[] a substantial government interest that would be achieved less effectively absent the regulation") (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

[71] *See* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2207–11 (2015) (demonstrating that the Court rarely relied on history in defining and setting the scope of unprotected categories of speech).

### 3. Applying the Historical Tradition Approach in *Bruen*

Before applying its historical tradition approach to the law at issue in *Bruen*, the Court noted that a "nuanced approach" may be required in "cases implicating unprecedented societal concerns or dramatic technological changes."[72] The Court asserted that historical analysis involves analogical reasoning, which lawyers and judges do on a regular basis.[73] While the Court acknowledged that analogies to historic regulations required some metric for determining which historical examples are relevant to present circumstances, it declined to provide a complete set of metrics.[74] Instead, the Court only identified two: "(1) whether modern and historical regulations impose a comparable burden on the right of armed self-defense and (2) whether that burden is comparably justified."[75]

Before getting to historical analogies, the Court took the initial step of determining whether carrying handguns in public for self-defense fell under the text of the Second Amendment.[76] The Court quickly concluded that it did, relying primarily on *Heller* in which the Court cited an array of dictionaries and its own precedent to conclude that to "bear arms" meant to "carry arms."[77] Notably, the *Bruen* Court engaged in virtually no analysis of Founding-era commentary, cases, or other sources to reach this conclusion. The only source the Court quoted was *Heller*, which, in turn, relied on the Court's precedent in a non-Second Amendment case that involved the analysis of the phrase "uses or carries a firearm."[78] The *Bruen* Court also reasoned that to "bear" arms "naturally encompasses public carry," reasoning that "gun owners do not wear a holstered pistol at their hip in

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[72] *Bruen*, 142 S. Ct. at 2132.

[73] *Id.*

[74] *Id.* at 2132–33.

[75] *Id.* at 2133 (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2012) (plurality opinion)) (numbering added).

[76] *Id.* at 2134.

[77] *Id.* at 2134–35.

[78] *See id.* at 2134 (quoting District of Columbia v. Heller, 554 U.S. 570, 584 (2008)). *Heller*, in turn, quoted Justice Ginsburg's dissent in *Muscarello v. United States*, in which the Court analyzed the language of 18 U.S.C. § 924(c)(1), which imposed a mandatory sentence for a defendant who, "in relation to any crime of violence or drug trafficking . . . uses or carries a firearm." Muscarello v. United States, 524 U.S. 125, 139 (1998) (Ginsburg, J., dissenting) (quoting 18 U.S.C. § 924(c)(1)); *Heller*, 554 U.S. at 584. The *Bruen* Court quoted Ginsburg's own quote of Black's Law Dictionary (1991 edition), which defined the right to "bear arms" as "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Bruen*, 142 S. Ct. at 2134 (omissions in original).

their bedroom or while sitting at the dinner table."[79] The Court concluded that limiting "the right to bear arms to the home would [eliminate] half of the Second Amendment's operative protections," noting that one may need to defend oneself outside of the home.[80]

With this brief textual analysis out of the way, the bulk of the Court's opinion concerned New York's efforts to demonstrate a historical tradition of regulating the carrying of firearms. The Court noted that "not all history is created equal," stating "evidence that long predates" the ratification of the Second and Fourteenth Amendments "may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years."[81] The Court also warned "against giving postenactment history more weight than it can rightly bear."[82] The Court recognized that postenactment practice may settle the meaning of "indeterminate 'terms [and] phrases' in the Constitution," particularly if there has been ongoing regulation since the Founding.[83] But the Court warned that the text still controls and the post-Ratification adoption of laws inconsistent with original meaning cannot alter the meaning of the text.[84]

The Court first addressed historic English regulations that New York and supporting amici cited in support of New York's law. The Court noted that New York cited the 1328 Statute of Northampton, which states people could not

> come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure.[85]

The Court stated that "the Statute of Northampton . . . ha[d] little bearing on the [scope of] the Second Amendment," as the Statute was enacted "more than 450 years before the ratification of the Constitution, and nearly 550 years before the adoption of the Fourteenth Amendment," although the Court later acknowledged that the statute remained in place for hundreds of years.[86] The Court further noted that it was unaware

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[79] *Bruen*, 142 S. Ct. at 2134.
[80] *Id.* at 2134–35.
[81] *Id.* at 2136.
[82] *Id.*
[83] *Id.* at 2136–37 (quoting Chiafalo v. Washington, 140 S. Ct. 2316, 2326 (2020)).
[84] *Id.* at 2137.
[85] *Id.* at 2139 (citing The Statute of Northampton, 2 Edw. 3 c. 3 (1328) (Eng.)).
[86] *Id.* at 2139, 2142.

of any evidence showing the statute applied to knives, which the Court asserted were "most analogous to modern handguns," noting that the statute seemed to focus on armor and lances.[87]

The Court acknowledged several decrees in the 1500s "decrying the proliferation of handguns" and statutes restricting the possession of handguns.[88] But the Court asserted that these weapons were viewed as ineffective, and that King Henry VIII was concerned "that handguns threatened Englishmen's proficiency with the longbow."[89] The Court also noted that in 1689, the English Parliament guaranteed Protestants, in the English Bill of Rights, the right to "have arms for defense . . . as allowed by Law."[90]

The Court then turned to colonial restrictions that New York cited in support of a historical tradition of regulating firearms.[91] It noted that New York identified "only three" such restrictions and it doubted whether three regulations were "suffic[ient] to show a tradition of public-carry regulation."[92] The Court then dismissed the statutes as inapplicable because they prohibited carrying "arms to terrorize the people," rather than prohibiting the carrying of firearms in general.[93] The Court acknowledged that an East New Jersey restriction "prohibited the concealed carry[ing] of 'pocket pistol[s]'" in general and "prohibited 'planter[s]' from carrying all pistols."[94] But the Court did not give this statute much weight, noting that pocket pistols were smaller than other pistols and therefore the statute was more appropriately characterized as a ban on "unusual or unlawful weapons" rather than a ban on handguns.[95] The Court also noted that the restriction on planters "did not prohibit [them] from carrying long guns."[96] The Court dismissed "three [other] late-18th-century and early-19th-century statutes" for similar reasons, concluding that they prohibited carrying "arms in a way that spreads 'fear' or 'terror'" rather than prohibiting the general concealed carry of firearms.[97]

The Court then addressed public-carry restrictions that proliferated after the ratification of the Second Amendment. It

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87 *Id.* at 2140.
88 *Id.*
89 *Id.*
90 *Id.* at 2141–42
91 *Id.* at 2142.
92 *Id.*
93 *Id.* at 2143.
94 *Id.* (alterations in original).
95 *Id.* at 2143–44.
96 *Id.*
97 *Id.* at 2144–45.

first addressed "common-law offenses of 'affray' or going armed 'to the terror of the people,'" but again dismissed such offenses as prohibiting only going armed in a manner that would tend to terrify people—not general restrictions on carrying firearms.[98] The Court acknowledged that some states "[i]n the early to mid-19th century" enacted laws prohibiting "the concealed carry of pistols and other small weapons[,] [b]ut" that there was "a consensus that States could not ban public carry altogether," citing Kentucky and Georgia cases that invalidated restrictions on carrying concealed weapons where the open carry of weapons was also prohibited.[99]

The Court then distinguished nineteenth century "surety statutes that required certain individuals to post bond before carrying weapons in public."[100] The Court noted that these statutes tended to apply only in circumstances where someone was more likely to use firearms in an unlawful manner, reasoning that these were not full-on prohibitions on carrying firearms because those subject to the laws merely had to pay a bond.[101] In response to New York's argument that the statutes were interpreted in a manner that deemed the mere carrying of firearms in public a reason to impose a surety requirement, the Court dismissed this reading as "counterintuitive," stating that the additional requirement that there was "reasonable cause to fear" that the guns would be misused would be rendered superfluous.[102]

The Court then turned to New York's discussion of restrictions on firearm use that were in place around the time the Fourteenth Amendment was adopted. Before getting to the restrictions, the Court reviewed public discourse from around the Reconstruction time period to "demonstrat[e] how public carry for self-defense remained a central component of the protection that the Fourteenth Amendment secured for all citizens."[103] The Court cited *Dred Scott v. Sandford*, noting the Court there had warned that if Black people were to be recognized as citizens of the United States, "they would be entitled to the privileges and immunities of citizens, including the right 'to keep and carry arms wherever they went.'"[104] The Court therefore relied on *Dred Scott* to support its conclusion

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[98] *Id.* at 2145–46.

[99] *Id.* at 2146–47 (emphasis omitted).

[100] *Id.* at 2148.

[101] *Id.* at 2148–49.

[102] *Id.* at 2149–50.

[103] *Id.* at 2150.

[104] *Id.* at 2150–51 (emphasis omitted) (quoting Dred Scott v. Sandford, 60 U.S. 393, 417 (1857)).

"that public carry[ing] [of firearms is] a component of the right to keep and bear arms."[105]

The Court argued that Reconstruction-era state regulations were similar to prior restrictions that prohibited people from carrying arms in a manner that would terrorize the people.[106] In support of its position, New York emphasized a Texas law prohibiting people from carrying pistols "unless [they had] reasonable grounds [to] fear[] an unlawful attack," but the Court dismissed this law and two relevant cases, interpreting them as outliers.[107] The Court refused to "give disproportionate weight to a single state statute and a pair of state-court decisions."[108]

The Court then addressed the final set of regulations that were enacted in the late 1800s—primarily "in the Western Territories."[109] The Court noted that these laws made up "[t]he vast majority of . . . statutes that" New York cited in support of its gun restrictions.[110] But the Court concluded that these restrictions did not justify New York's law.[111] The Court noted that the laws were part of territorial governance, which permitted temporary legislative innovations that tended to conflict with earlier approaches to firearm restrictions.[112] The Court also noted the small population of people affected by these laws, arguing that the laws "were irrelevant to more than 99% of the American population," and that these laws were therefore examples of outlier restrictions.[113] The Court also argued that because the "territorial laws were rarely subject to judicial scrutiny, we do not know the basis of their perceived legality."[114]

Following its survey of the historical evidence, the Court concluded that New York failed to identify a sufficient tradition that justified its modern licensing scheme.[115] The Court again emphasized its theme of dismissing regulations that were limited to situations where people carried arms with unlawful intent.[116] And the Court noted that the exceptions to this trend tended to be "a few late-in-time outliers."[117] Absent a historical tradition of regulations requiring people to demonstrate a

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105 *Id.* at 2151 (internal quotation marks and citation omitted).
106 *Id.* at 2152–53.
107 *Id.* at 2153.
108 *Id.*
109 *Id.* at 2153–54.
110 *Id.* at 2154.
111 *Id.*
112 *Id.*
113 *Id.* at 2154–55.
114 *Id.* at 2155.
115 *Id.* at 2156.
116 *Id.*
117 *Id.*

special need for self-defense, the Court concluded that New York's restriction violated the Fourteenth Amendment's protection of the right to keep and bear arms.[118]

## II. THE FALSE OBJECTIVITY OF THE HISTORICAL INVESTIGATION APPROACH

In setting forth the historical tradition approach, the Court rejected an interest-balancing approach, which it claimed would grant too much power to judges.[119] The Court emphasized that the enumeration of the Second Amendment took it "out of the [government's] hands" to determine "whether the right [was] really worth insisting upon."[120] In *Heller*, the Court warned that leaving it up to judges to determine whether a constitutional guarantee was useful would effectively eliminate the protection of that guarantee.[121]

The Court's emphasis on history and tradition and its dismissal of balancing tests and levels of scrutiny reflects the belief that grounding constitutional interpretation in history is an objective approach that constraints judges. Judges and scholars have long supported such objective methodology in constitutional interpretation—particularly in arguing for originalist approaches to constitutional interpretation.[122] Justice Scalia was a strong proponent of originalism and justified it, in part, on the ground that it was an objective approach to constitutional interpretation. Scalia asserted that originalism "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself" and that the historical research originalism required will "lead to a more moderate rather than a more extreme result."[123] Modern originalists agree, "argu[ing] that originalism is a principled

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[118] *Id.*

[119] *Id.* at 2129.

[120] *Id.* (internal quotation marks and emphasis omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).

[121] *Heller*, 554 U.S. at 634.

[122] *See* Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 712 (2011) (noting that early originalists, including Robert Bork and Raul Berger, "argued that originalism was the only neutral and objective approach to interpretation and thus, the only approach that was consistent with the judicial role in a democratic society"); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 611 (2004) (noting that "[a]n abstract text may be subject to judicial manipulation, but its meaning is historically determined"); Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 471 (2016) ("Public meaning originalists search for 'objective' meaning, or the meaning that a reasonable founding-era reader *would* have assigned to the text in light of the linguistic and other relevant context of the time.").

[123] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

[and neutral] theory of constitutional interpretation" that does not just lead to conservative results.[124]

Casting the historical tradition approach in a similarly objective light is misleading. Depending on the circumstances, the Court applies the approach in different ways to achieve different outcomes. And the approach itself is vague and undefined, leaving open questions over what evidence counts in arguing for a particular historical tradition and how much evidence is enough to establish such a tradition.

### *A. Differing Approaches to the Absence of Regulations*

Under the historical tradition approach in *Bruen*, the government bears the burden to justify its restrictions on the right to keep and bear arms. The Court stated that "[t]he government must . . . justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[125] As applied in *Bruen*, the historical tradition approach required the government to provide evidence of restrictions on carrying firearms. The Court, in criticizing low numbers of laws or examples of such restrictions, implied that the absence of regulation supported an inference that any unregulated activity was affirmatively protected by the right to keep and bear arms.[126] Moreover, the Court dismissed concerns that the absence of recorded cases involving carry restrictions was evidence that the laws were generally followed, stating that the government bore the burden to prove this "tradition of regulation."[127]

This approach to a historical tradition of regulation is inconsistent with the Court's approach in *Dobbs v. Jackson Women's Health Organization*[128]—an opinion issued the day after *Bruen*.[129] In *Dobbs*, the Court ruled that a Mississippi restriction on abortion did not violate the Fourteenth Amendment, and there was no constitutional right to abortion.[130] Citing its earlier opinion in *Washington v. Glucksberg*, the Court stated that in recognizing any new component of the liberty

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[124] Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 30 (1991); Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 251–67 (2018) (giving examples of how originalism may lead to results favored by liberals and progressives).

[125] *Bruen*, 142 S. Ct. at 2130.

[126] *See e.g.*, *id.* at 2142 (expressing doubt that only "three colonial regulations could suffice to show a tradition of public-carry regulation" (emphasis omitted)).

[127] *Id.* at 2149 n.25

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

[129] *Bruen*, 142 S. Ct. 2111 (ruling issued on June 23, 2022); *Dobbs*, 142 S. Ct. 2228 (ruling issued on June 23, 2022).

[130] *Id.* at 2283–84.

interests protected by the Due Process Clause, any right identified would need to be "objectively, deeply rooted in this Nation's history and tradition."[131] The Court then canvassed historic examples of restrictions on abortion, including pre-Founding commentary and reports of cases, and laws passed following the Fourteenth Amendment's ratification and concluded that there was an evidentiary consensus that the government could criminalize abortion.[132]

The Court noted that the Solicitor General opposed this conclusion and argued "that history supports an abortion right because the common law's failure to criminalize abortion before quickening[133] means that 'at the Founding and for decades thereafter, women generally could terminate a pregnancy, at least in its early stages.'"[134] The Court dismissed this argument, arguing that even if states in the 1700s and 1800s "did not criminalize pre-quickening abortion," this did not demonstrate a belief that "[s]tates lacked the authority to do so."[135]

The notion that the failure to criminalize a particular activity is not evidence that people thought the States lacked the authority to do so can be applied to contradict much of the Court's analysis in *Bruen*. In particular, historic situations where carrying firearms was prohibited (*e.g.*, going armed with the intent to terrorize) can be analogized to criminalizing abortion in some instances (*e.g.*, pre-quickening). Just because the government did not criminalize the carrying of firearms in general does not imply the conclusion that the government could not have done so.

To be sure, the *Bruen* Court noted some cases in which bans on concealed carry and open carry were deemed unconstitutional by state courts under state constitutional provisions.[136] In these instances, the rulings supplied evidence that the government lacked authority to prohibit the carrying of firearms. This evidence, however, must be weighed against other cases in which restrictions on the carrying of firearms were affirmatively upheld—examples that the Court attempted to

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[131] *Id.* at 2247 (internal quotation marks omitted) (quoting Washington v. Glucksberg, 521 U.S. 702, 703 (1997)).

[132] *Id.* at 2249–53.

[133] "Quickening" was the term historically used to describe "the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy." *Id.* at 2249.

[134] *Id.* at 2255 (quoting Brief for the United States as Amicus Curiae Supporting Respondents at 27, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4341731, at *27).

[135] *Id.*

[136] *See* N.Y. State Rifle & Pistol Ass'n., Inc. v. Bruen, 142 S. Ct. 2111, 2146–47 (2022).

minimize.[137] Additionally, whether these rulings apply to the Second Amendment remains questionable—particularly where the state constitutional provisions at issue are different from the Second Amendment.[138] These considerations are further examples of how the Court may exercise its discretion to pick and choose relevant evidence in conducting its historical inquiry, an issue discussed in greater detail below.

The Court's likely basis for inconsistent inferences about the absence of laws is that *Bruen* dealt with behavior that was explicitly described in the text of an amendment, while *Dobbs* involved the right to seek an abortion which is not explicitly mentioned in the Fourteenth Amendment. At least that is how the Court states the *Bruen* test: "When the Second Amendment's *plain text* covers an individual's conduct, the Constitution presumptively protects that conduct."[139] While the Court did not address claims of inconsistency between Bruen and Dobbs, were it to do so, it would likely argue that its varying approaches to the absence of regulation arises from the right to abortion's absence in the text of the Fourteenth Amendment. The Court may contend that in cases where a right is not explicitly mentioned, the more restrictive approach to historical tradition is warranted.

Such an approach, however, appears inconsistent with the Court's formulation of the historical tradition approach in *Dobbs*. There, the Court highlighted two other instances where the Court looked to history and tradition to conclude whether a particular right was deeply rooted in the country's history and tradition: *Timbs v. Indiana*, which involved the protection against excessive

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[137] *See id.* at 2147 n.20 (acknowledging that the Indiana Supreme Court upheld a statute prohibiting the concealed carrying of firearms and declared that the statute was "not unconstitutional," but noting that the "reasons for upholding it are unknown" because the opinion was a one-sentence order) (first internal quotation marks omitted) (quoting and citing State v. Mitchell, 3 Blackf. 229, 229 (1833) (acknowledging that Arkansas also upheld a prohibition on the concealed carrying of firearms, "but without reaching a majority rationale")); *id.* at 2147 (recognizing that Tennessee had banned the "public[ ] or private[ ]" carrying of pistols, but noting that the Tennessee Supreme Court later upheld "a substantively identical successor provision" while reading the "language to permit the public carry of larger, military-style pistols because any categorical prohibition on their carry would 'violat[e] the constitutional right to keep arms'") (quoting Andrews v. State, 50 Tenn. 165, 187 (1871)).

[138] *See* Nunn v. State, 1 Ga. 243, 249, 251 (1846) (invalidating state prohibition on the concealed and open carrying of firearms, ruling that prohibiting open carrying was unconstitutional under the state constitution), *cited in Bruen*, 142 S. Ct. at 2147); Bliss v. Commonwealth, 12 Ky. 90, 90 (1822) (invalidating state prohibition on concealed and open carrying of firearms on basis of state constitutional provision stating that "the right of the citizens to bear arms in defense of themselves and the state, shall not be questioned" (quoting KY. CONST. art. V, § 23 (1799)), *cited in Bruen*, 142 S. Ct. at 2147).

[139] *Bruen*, 142 S. Ct. at 2129–30 (emphasis added).

fines;[140] and *McDonald v. City of Chicago*, which involved the right to possess handguns in the home.[141] The *Dobbs* Court recognized that both *Timbs* and *McDonald* involved the Fourteenth Amendment's protection of "rights that are expressly set out in the Bill of Rights, and it would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution."[142] By framing the historical inquiry in this way, the Court suggests that the approach it took in *Dobbs* to determine the existence and scope of constitutional rights is the same as the approach it took in *Timbs* and *McDonald* and, by extension, *Bruen*, which all involved the scope of rights set forth in the text of the Constitution.

More fundamentally, even if the Court ultimately relies on the plain text distinction to justify inconsistent approaches to historical tradition, the choice to make this distinction is ultimately a matter of discretion. The Court may wish to presume that the absence of regulation does not demonstrate the existence of an unenumerated right because taking an alternative approach could result in the proliferation of unenumerated rights. While this may be a colorable argument in support of the Court's rights-restricting approach in *Dobbs*, it does not rest on history or text—it is a policy judgment. The Court could just as easily take a more liberal approach to rights, adopting a method that, like *Bruen*, requires a government seeking to restrict a particular behavior that affects a particular claimed right to demonstrate a historical tradition of governments doing so.

In two cases, issued a day apart,[143] the Supreme Court took diametrically opposed approaches over what inferences to draw from the lack of historical restrictions on a particular behavior. In *Dobbs*, the Court inferred that the absence of regulation was not evidence that the government could not restrict a particular behavior.[144] But in *Bruen*, the Court inferred the opposite, concluding that the absence of regulation, or the partial restriction of the concealed carrying of firearms, inferred the existence of a right to carry firearms.[145] The Court did not take sufficient efforts to explain these opposing inferences. But when the Court and its defenders eventually do so, the attempts at

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140 Timbs v. Indiana, 139 S. Ct. 682, 689 (2019).
141 McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (plurality opinion).
142 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247 (2022).
143 *See supra* note 129 and accompanying text.
144 *Dobbs*, 142 S. Ct. at 2284.
145 *Bruen*, 142 S. Ct. at 2156.

justifying the inconsistent approaches will likely reveal a Court making decisions based on a choice over what rights to prioritize.

### *B. The Court's Discretion in Deciding What Evidence Counts*

The *Bruen* Court identified two metrics for determining whether a historical regulation is comparable to a present restriction on keeping and bearing arms: "(1) whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and (2) whether that regulatory burden is comparably justified."[146] The Court declined to "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment."[147]

These two broad notions for guiding analogies to prior restrictions leave a great deal of room for the Court to determine what evidence is analogous. The Court's refusal to provide any further methods suggests that this broad formulation is intentional. Under a charitable reading, a refusal to set out a detailed set of features may be desirable as it leaves flexibility for future courts to develop a more detailed approach to Second Amendment questions.

This positive aspect is undermined by two significant drawbacks. First, the metrics the Court identified are so broad and imprecise that they offer almost no clarification at all. The first one, for example, does little more than replace the term "analogous" with "comparable." Such imprecision crosses the line from flexibility to anarchy. Second, while the Court only identified two metrics for comparing prior regulations with present restrictions on carrying firearms,[148] the Court's choices of what evidence to count and how to weigh evidence of prior regulations reveal a host of additional metrics that the Court employed, along with other considerations that the Court was keen to avoid. By failing to make these considerations explicit, it is up to the Court to decide what evidence is relevant or irrelevant, leaving the Court with wide discretion to shape the evidence to support the desired conclusion.

One example of the Court exercising its discretion in choosing what evidence to consider is its initial critique of New York's reliance on the Statute of Northampton.[149] The Court criticized this reliance by arguing that the Statute was old and enacted more than 450 years before the Constitution's

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[146] *Id.* at 2118 (numbering added).
[147] *Id.* at 2132.
[148] *Id.* at 2118.
[149] *Id.* at 2139.

ratification.[150] Weighing the relevance of laws based on their date of enactment makes sense. But how to engage in this weighing analysis remains a mystery in light of the Court's inconsistent approaches to similar evidence in different cases. In *Bruen*, the Court's critical treatment of the Statute of Northampton is inconsistent with its treatment of similarly ancient law and commentary in *Dobbs v. Jackson Women's Health Organization*—an opinion issued the day after *Bruen*.[151] In *Dobbs*, the Court did not hesitate to cite ancient prohibitions on abortion as evidence of a longstanding tradition of restriction—referring to "English cases dating all the way back to the 13th century" and "Henry de Bracton's 13-century treatise" for examples of how abortion was criminalized and punished in the past.[152] By failing to lay out guidelines regarding the age of historical regulations and how this relates to analogical reasoning, the Court itself engaged in inconsistent analysis of historic sources.

The *Bruen* Court also failed to address how to treat the longstanding nature of particular regulations in weighing their relevance to present cases. Returning to the Statute of Northampton—while the Court focused on the date of the Statute's enactment, the Court barely referenced the fact that the statute endured for hundreds of years, into the 1700s.[153] In weighing evidence of analogous prior regulations or restrictions, the length of time that prior restrictions were in place is a relevant consideration. Endurance of a law over time indicates, at the very least, that there was no notable effort to rescind or substantially alter the law. Other metrics, such as the frequency of efforts to prosecute under historic laws, and the success of these efforts, are important as well, but it is a mistake to simply neglect to engage with the fact that a law was in place for centuries.

And, as with the Court's treatment of medieval-era evidence, the Court engaged in inconsistent practices regarding the relevance of how long a historical statute remained in place. After neglecting to engage with the fact that the Statute of Northampton remained in place for centuries,[154] the Court

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[150] *Id.*

[151] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022); *see supra* note 129 and accompanying text.

[152] *Id.* at 2249.

[153] *See Bruen*, 142 S. Ct. at 2142 (acknowledging that the Statute of Northampton survived subsequent legal developments such as the English Bill of Rights and noting commentary on the Statute from the 1700s); *see also id.* at 2183 (Breyer, J., dissenting) (noting that the Statute of Northampton "remained in force for hundreds of years, well into the 18th century").

[154] *Id.* at 2139.

addressed New York's citation to restrictions on the carrying of firearms in the Western Territories in the late nineteenth century.[155] One of the Court's reasons for giving "little weight" to these restrictions is their short duration.[156] Because the laws were better characterized "as passing regulatory efforts by not-yet-mature jurisdictions on the way to statehood," they were not "part of an enduring American tradition of state regulation."[157]

The *Bruen* Court did not state at the outset of its analysis that the length of time that a historic law or regulation was in place is relevant to its strength as evidence of a historical tradition. The *Bruen* Court overlooked this consideration in distinguishing and minimizing the evidentiary value of the Statute of Northampton.[158] But the Court paid attention to the length of time that regulations were in place when the evidence undermines the notion of a historical tradition of restricting the right to carry firearms.[159] All of this supports the conclusion that the Court's underdefined historical test is vulnerable to manipulation by a court wishing to selectively cite evidence in a manner that supports a desired outcome.

A broader example of the Court's exercise of discretion to limit the scope of relevant evidence is how the opinion framed the inquiry in the first place. When the Court initially described its metrics for identifying relevant analogies, it seems that a wide range of evidence may be considered. After all, the Court noted, it is looking to "historical regulations impos[ing] a comparable burden on the right of armed self-defense and" justifications for that burden.[160] The Court, however, may import a restrictive approach through how it characterizes the "comparable" qualifier, and *Bruen* demonstrated such an approach.[161] The Court did not consider earlier laws and regulations that restricted the carrying of firearms *in some way* to be relevant to its inquiry.[162] Instead, to be a relevant example of a prior restriction on firearms, a historical restriction must restrict the concealed carrying of firearms in a universal or general manner—meaning restrictions that only apply in certain circumstances are of no evidentiary value.[163]

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155 *Id.* at 2154–55.
156 *Id.* at 2155.
157 *Id.*
158 *Id.* at 2139.
159 *Id.* at 2155.
160 *Id.* at 2133.
161 *Id.*
162 *Id.* at 2139, 2153–55.
163 *Id.*

This restrictive approach is evident in the Court's consistent refusal to consider historic regulations that restricted the right to carry firearms in a manner that tends to terrify other people.[164] The Court rejected these as examples demonstrating a historical tradition of restricting firearm usage because the restrictions are specific to particular circumstances or intentions behind carrying firearms.[165] In doing so, it appears that historical examples the Court would accept as demonstrating a historical tradition need to be universal or near-universal restrictions on the carrying of firearms. Indeed, the Court appears to go even further than the New York restriction on the concealed carry of handguns when it notes that some historic restrictions are not applicable because they permitted the carry of some firearms other than handguns.[166]

In rejecting examples of historic restrictions on the carrying of firearms, the Court effectively required New York to present evidence of a historical tradition of universal or near universal restrictions on the carrying of firearms regardless of intention. By framing the scope of the requisite historical tradition in this restrictive manner, the Court set New York up for failure. By contrast, had the Court framed New York's burden as needing to demonstrate the existence of the historical tradition of restrictions on the carrying of firearms, virtually all of New York's evidence would have been relevant in demonstrating this tradition. A restriction on the carrying of firearms—even if it only applies in certain circumstances—is still a restriction on the carrying of firearms. It is a matter of discretion for the Court to determine how narrowly or broadly to frame relevant historical examples when implementing the historical tradition approach. By exercising this discretion to greatly restrict the scope of relevant evidence, the *Bruen* Court could have easily dismissed most evidence contrary to its ultimate conclusion.[167]

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[164] *Id.* at 2143–46, 2152–53.

[165] *Id.*

[166] *See id.* at 2147 (minimizing the impact of Tennessee's restriction on carrying belt or pocket pistols by noting that the Tennessee Supreme Court later read the restriction to permit carrying "larger, military-style pistols"); *see also id.* at 2144 (refusing to give "meaningful weight" to a statute restricting "planters" (i.e., "a farmer or plantation owner who settled new territory") from carrying pistols because, among other reasons, the statute "did not prohibit planters from carrying long guns for self-defense") (internal quotations omitted) (citing RICHARD M. LEDERER, JR., COLONIAL AMERICAN ENGLISH: A GLOSSARY 175 (1985); HAROLD L PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA, 1526–1783 208 (1956)).

[167] The Court took a similar approach in *Dobbs* as well, albeit more explicitly, rejecting attempts at "justify[ing] abortion through appeals to a broader right to autonomy and to define one's 'concept of existence.'" Dobbs v. Jackson Women's Health

### C. *The Absence of a Clear Threshold Necessary to Establish a Historical Tradition*

Another aspect of the historical tradition approach that is unexplained and invites subjective manipulation is the threshold of evidence necessary to demonstrate a historical tradition of regulation. Under *Bruen*'s historical tradition approach, the government must show that the regulation it defends "is consistent with the Nation's historical tradition of firearm regulation."[168] How much evidence is sufficient to prove such a historic tradition is not addressed.

The Court did provide a few examples of some of its other precedents that involve historic analysis in determining the scope of constitutional rights. It noted that in determining whether expressive conduct constitutes protected or unprotected speech, a "government must generally point to historical evidence about the reach of the First Amendment's protections" to demonstrate that the speech is unprotected.[169] It cited *United States v. Stevens* for the proposition that to demonstrate speech is constitutionally unprotected, there must be a showing that the speech is in a category of unprotected speech that has been restricted for a long time.[170] The Court also cited its approach to the Confrontation Clause, quoting precedent in which it stated that exceptions to the Confrontation Clause must have been established as of the Founding.[171] It also cited to its Establishment Clause jurisprudence, recognizing that in those cases the "Court 'look[s] to history for guidance.'"[172] None of these citations or quotations clarify what threshold of historic evidence is needed to prove the existence of a particular historical tradition.

Despite failing to set forth any guidance on what a sufficient showing of historical tradition may look like, the Court pressed forward with addressing the question before it with the historical tradition approach. One might hope that despite the Court's abstract formulations of how to engage in historical

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Org., 142 S. Ct. 2228, 2258 (2022) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)). By rejecting this broader conception of the historic right and narrowing the focus of the inquiry to the right to an abortion, the Court was able to curtail the scope of relevant evidence in conducting its evaluation of historical traditions on restricting abortions. *See id.* at 2257–58.

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

169 *Id.* (emphasis omitted).

170 *Id.* (citing United States v. Stevens, 559 U.S. 460, 468–71 (2010)).

171 *Id.* (citing Giles v. California, 554 U.S. 353, 358 (2008)).

172 *Id.* (plurality opinion) (quoting Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019)).

reasoning that its practice will clarify things. Even if a rule is vague, one might learn more about the rule itself by seeing how it is employed. Those who hold this hope will be disappointed upon reading *Bruen*, as the Court's approach to sufficient historic evidence was inconsistent within its opinion.

The Court took a restrictive approach in addressing arguments by New York and amici that reference historic restrictions on carrying of firearms.[173] In particular, the Court addressed three colonial era restrictions on carrying firearms, remarking that "we doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation."[174] While the Court had not previously indicated what number of restrictions would be sufficient, its remark supports at least one reference point: three historic regulations on behavior is not enough to show a historic tradition of restricting that behavior.

Not so fast. Making this inference contradicts the Court's analysis earlier in the *same opinion* where the Court addresses restrictions on carrying firearms in "sensitive places."[175] Recall that in *Heller*, the Court noted that "the right secured by the Second Amendment is not unlimited."[176] The Court then elaborated that its opinion did not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[177]

In *Bruen*, the Court used restrictions on possessing firearms in "sensitive places" as an example of a historic tradition of restrictions that were consistent with the Second Amendment right to keep and bear arms.[178] Addressing these restrictions, the Court stated:

> Although the historical record yields relatively few 18th- and 19th-century "sensitive places" where weapons were altogether prohibited—*e.g.*, legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions. See D. Kopel & J. Greenlee, The "Sensitive Places" Doctrine, 13 Charleston L. Rev. 205, 229–236, 244–

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[173] *Id.* at 2142–43 (rejecting arguments regarding historical restrictions advanced by "Respondents, their *amici*, and the dissent" and citing Brief for Professors of History and Law as Amici Curiae Supporting Respondents, *Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843), 2021 WL 4353025).

[174] *Id.* at 2142.

[175] *See id.* at 2133–34.

[176] District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

[177] *Id.* at 626–27.

[178] *See Bruen*, 142 S. Ct. at 2133.

> 247 (2018); see also Brief for Independent Institute as *Amicus Curiae* 11–17. We therefore can assume it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment. And courts can 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.[179]

The Court's "relatively few" language belies the sheer lack of restrictions the Court considered in its analysis. Delving into the sources cited in the paragraph above reveals *only two examples* of colonial and Founding-era restrictions on the carrying of firearms in sensitive places:[180] Maryland statutes enacted in 1647 and 1650 that "forbade arms carrying in either house of the legislature," and a provision in Delaware's 1776 constitution that prohibited taking arms to polling places.[181] From this, it seems that the Court was willing to conclude that two examples of restrictions of carrying guns in "sensitive places" is sufficient to establish a historic tradition of constitutionally permissible restrictions—contradicting its later analysis that *three* restrictions are not enough to establish the existence of a historical tradition.

All of this illustrates how the Court gave no meaningful guidance on how much evidence is necessary to establish a historic tradition of restrictions that effectively limit the scope of the right to keep and bear arms. In distinguishing historic evidence contrary to its ultimate holding, the Court took a restrictive approach, asserting that three examples are inadequate to demonstrate a tradition. But in upholding its prior decisions on the limits of the Second Amendment's scope with regard to sensitive places, the Court was far more lenient, finding that two examples of regulations were enough to demonstrate a historic tradition of regulation. The Court's failure to explain how a party may demonstrate a historic tradition of regulation, coupled with its contradictory approach in different contexts, is a stark illustration of the imprecise and subjective nature of the historical tradition approach. And due to the Court's own inconsistent approach to the issue, looking to its conduct for guidance is no help at all for those who must apply the historical tradition approach in future cases.

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179 *Id.* (emphasis omitted).

180 *See id.*

181 David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 203, 233 (2018); *see also* Brief of The Independent Institute as Amicus Curiae Supporting Petitioners, *Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843), 2021 WL 3127146, at *11–13.

## III. THE COURT'S MISPLACED CONFIDENCE IN HISTORICAL ANALYSIS

In setting forth its historical tradition approach, the Court dismissed concerns about the difficulty of conducting historical analysis when determining the constitutionality of challenged laws. Indeed, the Court asserted that "reliance on history to inform the meaning of constitutional text . . . is . . . more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearm restrictions,' especially given their 'lack [of] expertise' in the field."[182] The Court's tendency to place confidence in historical analysis—particularly in attorneys' and courts' capacity to engage in such analysis—is misplaced.

### A. *The Difficulty of Determining and Implementing the Law of the Past*

In *Bruen*, the Court acknowledged that "[h]istorical analysis can be difficult."[183] It noted that such analysis may involve "nuanced judgments about which evidence to consult and how to interpret it."[184] And the Court further recognized that "applying constitutional principles to . . . modern conditions can be difficult" in close cases.[185]

Despite these acknowledgements, the Court concluded that the historical analysis required by its chosen interpretive methodology was more legitimate and administrable than the alternative of judges making empirical judgments about the costs and benefits of firearm restrictions.[186] The Court minimized the scope of the challenge it faced, noting that it was not engaged in "resolv[ing] historical questions in the abstract" but rather "resolv[ing] legal questions presented in particular cases or controversies."[187] Quoting William Baude and Stephen Sachs's article, "Originalism and the Law of the Past," the Court asserted that resolving historical legal questions "is a refined subset' of a

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[182] *Bruen*, 142 S. Ct. at 2130 (quoting McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2010) (plurality opinion)).

[183] *Id.* (alteration in original) (quoting McDonald v. City of Chicago, 561 U.S. 742, 803 (2010) (Scalia, J., concurring)).

[184] *Id.* (quoting *McDonald*, 561 U.S. at 803–04 (Scalia, J., concurring)).

[185] *Id.* at 2134 (quoting Heller v. District of Columbia, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

[186] *Id.* at 2130.

[187] *Id.* at 2130 n.6 (emphasis omitted).

broader 'historical inquiry,' and it relies on 'various evidentiary principles and default rules' to resolve uncertainties."[188]

The only evidentiary principle or default rule that the Court noted as an example in this explanation was "the principle of party presentation."[189] In the context of analyzing history and tradition, the Court stated that "[c]ourts are . . . entitled to decide a case based on the historical record compiled by the parties."[190] In other words, courts need not concern themselves with the complexities of historical analysis and investigation—it is sufficient to rely on whatever efforts the parties before the courts undertake.

But this only makes things worse. With the appeal to the principle of party presentation, the Court confirmed that decisions regarding the meaning of Constitutional provisions—decisions that may affect the lives and conduct of millions of Americans—will be based on the presentations of attorneys in an adversarial dispute. The Court assumed that itself and the lower courts will be able to parse through the one-sided collections of evidence and citations that the parties muster and reach an accurate historical conclusion. 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.[191] As a result, the Court says nothing about how (or whether it is even possible) to determine an accurate historical picture of a constitutional provision or the legal treatment of certain behavior over centuries worth of history based on the one-sided presentations of nonhistorian attorneys.

Those defending the methodology will likely argue that historical analysis of legal facts is more directed and less complex than expert historical analysis. Indeed, the Court relies on a *Law and History Review* article by William Baude and Stephen Sachs for this precise assertion.[192] Baude and Sachs argue that "originalism is unexceptional" because "it simply reflects a decision by today's law to grant continuing force to the law of the past"—a routine exercise that lawyers and judges perform when basing legal arguments in present cases on law

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[188] *Id.* (quoting Baude & Sachs, *supra* note 15, at 810–11).

[189] *Id.* (quoting United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020)).

[190] *Id.*

[191] *See* MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 1983) (requiring a lawyer to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf").

[192] *Bruen*, 142 S. Ct. at 2130 n.6 (citing Baude & Sachs, *supra* note 15, at 810–11).

and legally relevant facts dating back to the distant past.[193] They argue that, in determining facts about legal history, "lawyers are not seeking internalist explanations of change over time, but rather internalist conclusions about the substance of past law, which is what current law happens to make relevant."[194] To the extent that one must derive historical understandings of particular constitutional provisions, the investigation and immersion to make these determinations is limited to "immersion into *legal* culture" only.[195] While there may be uncertainty or questions left unanswered by the framers and ratifiers of the Constitution, many of these issues "were addressed by myriad statutes, proposed bills, court cases, treatises, and arguments of counsel or of congressmen," which creates "a relatively narrow range of plausible answers" to present questions of constitutional meaning.[196] As an illustration, Baude and Sachs repeatedly refer to the practice of tracing a chain of title to determine who owns a particular piece of land—this, they contend, is an example of routine legal activity that involves inquiries into historic facts.[197]

Baude and Sachs's analogy to chain of title inquiries is illuminating, although not in the manner they intend. To an extent, interpreting the Constitution is much like tracing a chain of title. Many constitutional provisions are clear: the president serves for terms of four years, needs to be thirty-five years of age to qualify for the office, and shall receive a compensation that will not be increased or diminished during the president's time in office.[198] These provisions have been implemented for centuries in a consistent manner. So, too, are many chains of title clear and easy to trace—one simply needs to go to the record books and look back over the chain of deeds and transfers.

Those are the simple cases, the cases with which litigators never get involved. But sometimes things get messy. Deeds contain references to landmarks that no longer exist or have shifted over time by distances that nobody can measure with precision. Sometimes the chain of title includes written instruments that are illegible or subject to multiple interpretations—is that bit of chicken scratch in the description of the property a "10," a "40," or a "90"? The imprecision results

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193 Baude & Sachs, *supra* note 15, at 810.

194 *Id.* at 814 (emphasis omitted).

195 *Id.* at 814–15.

196 *Id.* at 815–16.

197 *Id.* at 809–10, 812.

198 *See* U.S. CONST. art. II, § 1, cl. 1, 5, 7.

in disputes over boundaries. Lawsuits are filed. Experts are called in. Sometimes an answer is found. Sometimes the boundaries of the property remain undetermined, requiring a judge or jury to simply decide, or the parties to settle.

This is what interpreters face when the historical tradition approach requires interpreters to address cases that have never before been directly litigated[199] or cases that involve broad terminology like "cruel and unusual punishment" or "equal protection," which have been interpreted in inconsistent and contradictory manners over time.[200] Moreover, it seems unclear how simply looking to the law of the past is a method that may be implemented in situations where the court got the law wrong because at that point, an independent determination must be made to get the court back on the correct track. In situations involving historical evidence that is contradictory, vague, difficult, or even impossible to locate, the routine task of tracing law back to its historic origins is far more complex than Baude, Sachs, and the Court suggest.

### *B. The Hidden Complexity of Historic Analogies*

The *Bruen* Court suggested that undertaking a historical analysis will not be a significant challenge for courts and judges because doing so involves analogical reasoning, "a commonplace task for any lawyer or judge."[201] But the Court's explanation (or lack thereof) regarding how to engage in proper analogical reasoning demonstrates the hidden complexity of the method. At the start, the Court refused to "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment," effectively leaving it up to the lower courts to develop their own doctrines of permissive analogizing in Second Amendment cases.[202] The Court did note two metrics for determining whether a historical regulation is comparable to a present restriction on keeping and bearing arms: (1) "whether modern and historical regulations impose a comparable burden

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[199] *See* District of Columbia v. Heller, 554 U.S. 570, 625 (2008) (stating that "[i]t should be unsurprising that such a significant matter"—the scope of the Second Amendment—had been unresolved for so long and noting other areas of constitutional law that the Court did not confront until the 1900s).

[200] *Cf.* Brown v. Bd. of Educ., 347 U.S. 483 (1954), *with* Plessy v. Ferguson, 163 U.S. 537 (1896) (interpreting the Fourteenth Amendment's Equal Protection Clause in diametrically opposed manners); *also cf* Furman v. Georgia, 408 U.S. 238 (1972), *with* Gregg v. Georgia, 428 U.S. 153 (1976) (holding that the Eighth Amendment prohibits the imposition of the death penalty, and then reinstating the death penalty as not prohibited by the Eighth Amendment).

[201] *Bruen*, 142 S. Ct. at 2132.

[202] *See id.*

on the right of armed self-defense, and" (2) "whether that regulatory burden is comparably justified."[203] These, the Court stated, are the key considerations to drive analogical inquiries.[204]

These seemingly simple two steps belie hidden complexities. The first step—determining a comparable burden on the right of armed self-defense—veers into tautological territory. Remember, the Court is providing metrics for determining whether a prior restriction on firearms is analogous to a present restriction. The first metric is that the restriction poses a "comparable burden" on self-defense. While the Court mentions self-defense, this metric essentially substitutes "analogous" with "comparable" and does little more. As discussed in Part II, this failure to define the scope of permissible analogical reasoning leaves the Court with a wide range of discretion to determine what historic regulations are, in the Court's view, "comparable," and which should be dismissed as irrelevant.

This failure to define comparable regulations, coupled with the second metric—determining whether a prior metric has a comparable justification—also sets the Court up to make mistakes and overlook relevant considerations in drawing historic analogies. For example, New York raised the Statute of Northampton as an example of a historic restriction on the right to carry arms.[205] The Court noted that the statute, when enacted, did not prohibit handguns, as they had not yet appeared in Europe.[206] Instead, the Court determined that the statute appeared to focus on armor and weapons like "the 'launcegay,' a 10- to 12-foot-long lightweight lance."[207] The Court contrasted these arms with daggers, noting that nearly everyone carried daggers on their belt in medieval times.[208] The Court noted that knights carried daggers for warfare, but civilians also carried them "'for self-protection,' among other things."[209] The Court noted that New York did not present any evidence that the Statute applied to medieval equivalents of handguns.[210]

While knives may be used for defense, both historically and in the present day, knives have numerous other functions as well. Anyone exposed, even peripherally, to modern everyday

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[203] *Id.* at 2133.
[204] *Id.*
[205] *Id.* at 2139.
[206] *Id.* at 2140.
[207] *Id.*
[208] *Id.*
[209] *Id.* (quoting H. PETERSON, DAGGERS AND FIGHTING KNIVES OF THE WESTERN WORLD 12 (2001)).
[210] *Id.*

carry culture (EDC) knows that knives are a big deal and regaled for their numerous functions, including opening packages, cutting rope, cutting threads or tags on clothing, eating meat, or assisting in tasks associated with fishing or camping.[211]

But even more significantly, in medieval times, carrying knives served similar functions, and were particularly common as eating utensils—as modern utensils like forks were not introduced to Europe until the sixteenth century and remained primarily in use by the wealthier and higher class until well into the 1600s.[212] In the centuries preceding the fork's introduction, knives and spoons were the utensils of choice, and people carried knives on their person for constant use "as an eating utensil."[213] The utility of knives beyond weapons of self-defense weakens the Court's attempt to analogize historical treatment of knives with modern treatment of handguns. It further suggests that the absence of laws restricting knives may not have been based in a recognition of the right to self-defense, as this was only one of knives' many functions.

The Court's hasty, unexplained assertion that the Statute of Northampton was not comparable to modern restrictions on firearms because there was no evidence presented that the statute applied to knives demonstrates the need for nuanced, thorough historical examination. It's not enough for the Court to claim that it is simply analyzing legal history and to leave things up to the parties. The Court still has the role of analyzing the parties' arguments and evidence, and an eye to historic context is necessary for the Court to determine whether the parties have engaged in proper analogical reasoning. The Court's incomplete analysis of knife use and regulation is but one example of the Court's failure to engage in thorough historical analysis.[214]

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211 Ashley Edwards, *What Is an EDC Knife and Why Do You Need It?*, DIG THIS DESIGN (Mar. 16, 2021), https://digthisdesign.net/diy-design/outdoor/what-is-an-edc-knife-and-why-do-you-need-it/ [https://perma.cc/C8HY-E57T]; *Why You Should Always Carry a Pocket Knife*, GALLANTRY (July 5, 2016), https://gallantry.com/blogs/journal/guide-to-everyday-carry-pocket-knives# [https://perma.cc/64VM-LPKY].

212 *See* HENRY PETROSKI, THE EVOLUTION OF USEFUL THINGS 8 (1992); Sara Goldsmith, *The Rise of the Fork*, SLATE (June 20, 2012, 6:00 AM), http://www.slate.com/articles/arts/design/2012/06/the_history_of_the_fork_when_we_started_using_forks_and_how_their_design_changed_over_time_.html [https://perma.cc/JX2M-LF54].

213 TERENCE SCULLY, THE ART OF COOKERY IN THE MIDDLE AGES 170 (1995).

214 *See* 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/385Q-YQG5] (describing other instances of erroneous historical analysis in *Bruen*).

The *Bruen* Court cited Baude and Sachs in support of the contention that historical legal analysis is a legitimate and preferable method for determining the scope of the Second Amendment's protections.[215] Baude and Sachs acknowledge difficulties that judges may face in conducting complex or nuanced historical analysis and respond that judges nevertheless are able to decide complex antitrust and toxic tort cases by referring to other people's discoveries rather than conducting the analysis themselves.[216] Why not treat history the same way?[217]

This analogy fails to account for how these other complex cases tend not to impact the law itself—instead serving to resolve factual disputes between parties before the court. Complex questions of fact and causation are matters for the jury to ultimately decide after being presented with the evidence, evidence that often includes expert testimony. These complex questions of fact are typically decided by the jury and tend to be case specific.[218]

But cases involving questions of constitutional law—particularly ones before the Supreme Court—impact people's rights and the power of state and local governments across the country. Such cases, because appeals courts do not directly hear new evidence, do not involve expert testimony, nor cross examination regarding any evidence or opinions that are presented to the Court. Unless otherwise ordered, oral arguments for each side of a case before the Supreme Court last for thirty minutes.[219] Courts frequently face complex questions of fact. But the procedures, resources, and requirements that courts may impose upon parties to parse out these questions, coupled with the fact that rulings on specific sets of facts tend not to have precedential impact due to their application to particular parties and sets of events, strain the analogy to Supreme Court practice and historical investigation into questions of constitutional law.[220]

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[215] *Bruen*, 142 S. Ct. at 2130 n.6.

[216] Baude & Sachs, *supra* note 15, at 816.

[217] *Id.*

[218] *See* Margaret L. Moses, *The Jury-Trial Right in the UCC: On a Slippery Slope*, 54 SMU L. REV. 561, 565 (2001).

[219] *Oral Arguments*, SUP. CT. U.S., https://www.supremecourt.gov/oral_arguments/oral_arguments.aspx [https://perma.cc/7FQP-49ZP].

[220] *See* Steven Lubet, *The Supreme Court's Selective History*, HILL (July 27, 2022, 8:00 AM), https://thehill.com/opinion/judiciary/3575292-the-supreme-courts-selective-history/ [https://perma.cc/6V5A-2ZMK] (describing the limited time the Supreme Court has during a term to perform the research necessary to engage in thorough historical analysis).

The Court's confidence in the ability of courts and attorneys to engage in historical analysis is misplaced. The task at hand is far more complex than the Court suggests and will likely lead to further errors in analysis as the test is applied in lower courts. The Court's broad historical tradition approach also opens multiple avenues for manipulation, allowing a court to pick and choose evidence it deems to be relevant and reach desired outcomes. The following Part illustrates several of the ways in which the historical tradition approach may be manipulated.

## IV. THE HISTORICAL TRADITION APPROACH IN THE LOWER COURTS

The historical tradition approach to determining the scope of constitutional rights rests on mistaken assumptions about the ease of historical investigation and opens the door for subjective analysis by giving courts multiple avenues to exercise discretion in interpreting and weighing historic evidence. The preceding arguments demonstrate how these issues are apparent at the Supreme Court level within the *Bruen* opinion and in cases issued shortly after *Bruen*. This Part addresses how these problems are likely to be amplified in the lower courts.

The *Bruen* Court set forth its historical tradition approach as an alternative to courts "mak[ing] difficult empirical judgments" about the costs and benefits of gun control measures.[221] The historical tradition approach, the Court contended, is "more legitimate, and more administrable, than" the empirical alternative.[222] As noted above, however, the Court's assertion that courts can engage in historical analysis with relative ease is misplaced. Courts will be faced with dueling sets of historical claims and citations compiled by attorneys seeking to present the best possible case for their clients' positions. And even historical analysis that is narrowed to legal facts implicates background considerations and facts that courts are likely to overlook or miss due to their lack of historic expertise.[223]

These problems are daunting enough for the Supreme Court, but they will be even more pronounced in the lower courts. The Supreme Court controls its docket and hears far fewer cases each year than federal circuit courts.[224] Trial courts face even more time pressure than courts of appeals and "must

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[221] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2130 (2022).

[222] *Id.*

[223] *See supra* Section II.A–B.

[224] Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J. L. & PUB. POL'Y 257, 272 (2022).

shoulder significant responsibilities relating to case management and the fact-finding process."[225] Lower courts also have less access to amicus briefing when compared to the Supreme Court, meaning that the historical record presented to these courts may be less developed or complete than what results from the myriad of briefs filed in Supreme Court constitutional cases.[226] All of this makes it more probable that courts will reach incorrect, or differing, conclusions regarding the history of gun restrictions. This, in turn, will lead to fragmentation of the constitutional law and incorrect historical views gaining the force of law and becoming the basis for overturning laws and regulations.

It's already started. In *United States v. Rahimi*, the Fifth Circuit addressed the constitutionality of 18 U.S.C. § 922(g)(8), which prohibits those subject to domestic violence restraining orders from possessing firearms.[227] The court found that the respondent's right to possess "a pistol and a rifle easily falls within the purview of the Second Amendment," and proceeded to determine whether the United States could demonstrate a sufficient historical tradition of restrictions on firearm possession.[228] The court rejected evidence of laws that historically prohibited "people considered to be dangerous" from possessing firearms, noting that those laws did not involve "individualized findings of 'credible threats' to . . . potential victims" and that they were passed to protect public safety more broadly rather than specific individuals.[229] To be clear, this reasoning is ill conceived and nonsensical. The court concluded that because the present restriction on firearms involved more safeguards—such as an individualized determination of dangerousness and a specific victim who is at risk—broader historical restrictions do not support a history or tradition in the case of a narrower, present restriction. And yet, under *Bruen*'s undertheorized history and tradition approach, the Fifth Circuit found this form of argument sufficient. After surveying and rejecting other historical restrictions, the court concluded that

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[225] *Id.* at 338.

[226] *See* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 23 (2009); *see also* Ellena Erskine, *We Read All the Amicus Briefs in New York State Rifle So You Don't Have To*, SCOTUSBLOG (Nov. 2, 2021, 4:41 PM), https://www.scotusblog.com/2021/11/we-read-all-the-amicus-briefs-in-new-york-state-rifle-so-you-dont-have-to/ [https://perma.cc/W8BD-BG3D] (noting that more than eighty amicus briefs were filed with the Supreme Court in *Bruen*).

[227] United States v. Rahimi, No. 21-11001, 2023 WL 1459240, at *1 (5th Cir. Feb. 2, 2023).

[228] *Id.* at *5–8.

[229] *Id.* at *7–8.

the government failed to meet its burden and ruled that section 922(g)(8) was unconstitutional.[230]

The Fifth Circuit is one of several courts to have found section 922(g)(8) unconstitutional following *Bruen*. The Eastern District of Kentucky reached the same conclusion on the same day.[231] Other courts have taken a different approach, concluding that there is a history and tradition of restricting those convicted or accused of domestic violence from possessing firearms.[232]

Federal law prohibiting those under felony indictment from possessing firearms is also in doubt following *Bruen*. Several courts have concluded that this restriction is unconstitutional and unsupported by a historical tradition of analogous restrictions.[233] Others have reached the opposite conclusion.[234]

In *Firearms Policy Coalition, Inc. v. McCraw*, the United States District Court for the Northern District of Texas struck down Texas's law prohibiting those aged eighteen to twenty years old from carrying handguns for self-defense outside the home.[235] In dismissing Texas's examples of historical regulations, the court seized on the *Bruen* Court's failure to define a threshold for demonstrating a historical tradition of restricting the right to carry firearms. It found that evidence of twenty-two historical restrictions on the purchase or use of firearms by those under the age of twenty-one in place shortly before and after the ratification of the Fourteenth Amendment were insufficient to establish a historical tradition of restricting eighteen-to-twenty-year-olds from carrying firearms.[236] This is a significant extension beyond the *Bruen* Court's suggestion that three laws would not suffice to demonstrate a tradition.[237] By the McCraw court's logic, twenty-

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230 *Id.* at *10.

231 United States v. Combs, No. 5:11-136-DCR, 2023 WL 1466614 at *5 (E.D. Ky. Feb. 2, 2023).

232 *See* United States v. Kays, No. CR-22-40-D, 2022 WL 3718519, *3–4 (W.D. Okla. Aug. 29, 2022) (finding that section 922(g)(8) "is consistent with the longstanding and historical prohibition on the possession of firearms by felons"); United States v. Bernard, No. 22-CR-03 CJW-MAR, 2022 WL 17416681, at *7 (N.D. Iowa. Dec. 5, 2022) (18 U.S.C. § 922(g)(9), which prohibits those convicted of domestic violence from possessing firearms, "is consistent with the Nation's historical tradition of firearm regulation . . . because at the time of the adoption of the Second Amendment the Nation kept arms from citizens who posed a danger to society").

233 *See* United States v. Hicks, No. W:21-CR-00060-ADA, 2023 WL 164170, at *4–7 (W.D. Tex. Jan. 9, 2023); United States v. Stambaugh, No. CR-22-00218-PRW-2, 2022 WL 16936043, at *3–6 (W.D. Okla. Nov. 14, 2022); United States v. Holden, No. 3:22-CR-30 RLM-MGG, 2022 WL 17103509, at *3–5 (N.D. Ind. Oct. 31, 2022).

234 *See* United States v. Rowson, No. 22 Cr. 310 (PAE), 2023 WL 431037, at *21–25 (S.D.N.Y. Jan. 26, 2023); *Kays*, 2022 WL 3718519, at *3–4.

235 Firearms Pol'y Coal., Inc. v. McCraw, No. 4:21-cv-1245-P, 2022 WL 3656996, at *4 (N.D. Tex. Aug. 25, 2022).

236 *Id.* at *3.

237 *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2142 (2022).

two is not enough either. The court also took advantage of *Bruen*'s failure to clearly define what history ought to be considered in the historical traditional analysis—noting the lack of evidence of Founding-era restrictions on the use of firearms by those under the age of twenty-one.[238]

Courts will likely recognize their limits and seek to avoid the complexities of historical analysis wherever possible. One way of doing so is to seize onto dicta from *Bruen* and elsewhere and argue that assurances of the validity of laws that were not before the Court are nevertheless safe based on the Court's proclamations. In *Clifton v. United States Dept. of Justice*, the District Court for the Eastern District of California addressed a lawsuit by a plaintiff who was hospitalized pursuant to a mental health hold in 2001.[239] In 2020, the plaintiff applied for a position as a deputy sheriff and was rejected after the Sheriff's Department noted that the plaintiff's prior hospitalization triggered a lifetime ban on possessing firearms under federal law.[240] The court noted that, in the wake of *Bruen*, subjecting restrictions on firearm possession to intermediate scrutiny no longer seemed to be a permissible approach, and historic analysis was required.[241] But the court avoided engaging in any sustained historical analysis of the law at issue, citing instead to Justice Kavanaugh's concurrence in *Bruen* in which he stated that "longstanding prohibitions on the possession of firearms by felons and the mentally ill" would not be affected by the Court's ruling.[242] In light of "the presumptive constitutionality of" the law, coupled with the district court's concern that it would be irresponsible to address the *Bruen* holding before it has been applied by lower courts, the court avoided ruling on the constitutionality of the federal law restricting those previously committed for mental health reasons from owning firearms.[243] The *Clifton* court's focus on the language of Supreme Court opinions rather than engagement in historical analysis illustrates a potential approach courts may take in light of the Court's adoption of the historical tradition approach. By avoiding original historical analysis in favor of relying on the proclamations or dicta of the Supreme Court in *Heller* and *Bruen*, lower courts can play it safe. Courts may take this approach out of concern over getting the history

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[238] *McCraw*, 2022 WL 3656996, at *4.

[239] Clifton v. U.S. Dep't of Just., No. 1:21-cv-00089-DAD-EPG, 2022 WL 2791355, at *1 (E.D. Cal. July 15, 2022).

[240] *Id.* at *2.

[241] *Id.* at *10.

[242] *Id.* (quoting *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring)).

[243] *Id.*

wrong, or out of a hope to find a shortcut around the historical tradition analysis, by analogizing cases before them to proclamations of the Supreme Court in its *Bruen* opinion.

Beyond the danger of erroneous historical analysis, lower courts are likely to reach diverging opinions because of the lack of guidance regarding what laws are appropriately analogous. The Court's refusal to set forth a detailed set of rules for historical analogies beyond broad notions of comparable burdens and justifications leaves lower courts with little guidance on how to engage in analogical reasoning regarding historical restrictions on firearm use.[244]

This Part will not reiterate prior points on the discretion and lack of clear standards set forth in *Bruen*. But to the extent that *Bruen* leaves it to courts' discretion to decide what historical evidence is relevant when determining whether a tradition of regulation exists, there is a likelihood of divergent outcomes. This has already happened under the minimal guidance the Court provided in *Heller*.

For example, in *Tyler v. Hillsdale County Sheriff's Department*, the Sixth Circuit addressed a challenge to 18 U.S.C. § 922(g)(4) and concluded that historic evidence did not "support the proposition that [those] who were once committed due to mental illness are forever ineligible to regain their Second Amendment rights."[245] In *Mai v. United States*, the Ninth Circuit reached the opposite conclusion regarding the same law, noting that a federal prohibition of firearm possession by those once committed "had been on the books for decades when the Court decided *Heller*" and that "historical evidence supports the view that society did not entrust the mentally ill with the responsibility of bearing arms."[246] Both of these cases went on to apply intermediate scrutiny to the law—a step that *Bruen* subsequently stated is impermissible.[247]

With no scrutiny analysis permitted in Second Amendment cases, the historical tradition analysis becomes the one step that Courts must follow to determine the constitutionality of firearm restrictions. As discussed above, courts may take a broad or narrow view in determining whether historic laws are appropriate analogies to present restrictions

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[244] *Bruen*, 142 S. Ct. at 2132–33.

[245] Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 688–89 (6th Cir. 2016).

[246] Mai v. United States, 952 F.3d 1106, 1114–15 (9th Cir. 2020).

[247] *See Tyler*, 837 F.3d at 693–99 (applying intermediate scrutiny); *Mai*, 952 F.3d at 1115–21 (applying intermediate scrutiny); *Bruen*, 142 S. Ct. at 2129–30 (holding that engaging in a scrutiny analysis is impermissible and claiming that *Heller* rejected the intermediate scrutiny approach to gun restrictions).

and, in doing so, control the landscape of evidence relevant to the court's determination. Courts may or may not give weight to historic restrictions depending on how long they have been around, as the *Bruen* Court did not consider the lifespan of the Statute of Northampton but did note the lifespan of laws in the Western Territories.[248] These are only two ways in which courts may take advantage of the malleable historical tradition approach set forth in *Bruen*.

## CONCLUSION

*Bruen* marks a significant shift in constitutional law. Restrictions on the right to keep and bear arms are no longer subject to strict or intermediate scrutiny—instead, their validity is to be determined based on whether present laws fit into a historic tradition of analogous restrictions.

At first glance, this approach may appear to be objective and straightforward. Its defenders will likely claim as much, arguing that the historical tradition approach avoids the uncertainty of interest balancing tests and that *Bruen* provides a roadmap for analogical reasoning regarding the Second Amendment.[249] Rather than engage in an analysis of the complex public safety considerations and the unpredictable cost-benefit analysis of the impacts of gun regulations, judges are to look to history and determine whether present restrictions are consistent with traditional historical restrictions.

As this article demonstrates, the *Bruen* Court's assurances that the historical tradition approach is administrable and predictable are fantasies. The *Bruen* Court itself left out key historic facts in its analysis, and all but conceded that insufficient historical evidence is an acceptable outcome in noting that it will reach decisions in constitutional cases based on evidence presented by the parties before it.[250] And the historical tradition approach involves multiple layers of

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[248] *Bruen*, 142 S. Ct. at 2142, 2155.

[249] *See* Josh Blackman, *Bruen, Originalism, and Post-Enactment Practice*, REASON (June 27, 2022, 2:30 PM), https://reason.com/volokh/2022/06/27/bruen-originalism-and-post-enactment-practice/ [https://perma.cc/YZJ5-HXQR] ("Justice Thomas's majority opinion in *Bruen* provides a roadmap of how to use originalism based on analogical reasoning–that is, how to look at practices from prior to ratification of the Second Amendment."); Nicholas Tomaino, *The Conservative Supreme Court Has Arrived*, WALL ST. J. (July 1, 2022, 4:28 PM), https://www.wsj.com/articles/the-conservative-court-has-arrived-paul-clement-dobbs-bruen-religion-administrative-state-justice-roberts-alito-thomas-11656692402 [https://perma.cc/Z78M-72NG] (characterizing the lower courts as improvising a test for determining whether laws are consistent with the Second Amendment prior to the Court's decision in *Bruen*).

[250] *Bruen*, 142 S. Ct. at 2130 n.6.

discretion through which courts can pick and choose how to frame the investigation, emphasize evidence the courts wish to be deemed relevant, and minimize evidence that is contrary to desired conclusions. Perhaps as time goes on, the Court will clarify the historical tradition approach and make its assumptions explicit. Until then, confusion, contradiction, and avoidance of the method will likely continue in the lower courts.