

**Hearing before the Senate Judiciary Committee**  
**“After the Highland Park Attack:**  
**Protecting Our Communities from Mass Shootings”**  
**July 20, 2022**

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Chairman Durbin and Ranking Member Grassley, thank you for the opportunity to testify today. My name is Joseph Blocher, and I am the Lanty L. Smith Professor of Law at Duke Law School, where I am also faculty co-director of the Center for Firearms Law. I am testifying today in my personal capacity.

As this Committee considers laws and policies to keep Americans safe from the risk and reality of devastating mass shootings like what we saw in Highland Park on July 4, it does so in the wake of the Supreme Court’s decision in *New York State Rifle and Pistol Association v. Bruen*.<sup>1</sup> That case announced a new legal test governing constitutional challenges to any new gun laws that Congress or states might pass, as well as to laws already on the books—including Highland Park’s municipal assault weapons ban, which previously survived a Second Amendment challenge.<sup>2</sup> How the *Bruen* legal test is applied will have a significant impact on efforts to protect public safety, and it is critically important that the Committee and the American people understand this new judicial framework.

**Analogy, Discretion, and Evidence After *Bruen***

In *Bruen*, the Supreme Court struck down a New York law requiring that individuals seeking concealed carry permits for pistols or revolvers demonstrate that they have “proper cause” for such a permit. This holding will have an immediate and significant impact on the roughly 80 million people living in states with “may issue” laws like New York’s,<sup>3</sup> as it requires them to adopt “shall issue” laws like those in other states.<sup>4</sup>

But the broader and more lasting impact of *Bruen* will be in the new approach it adopted for evaluating Second Amendment challenges. The majority rejected the consensus legal framework applied throughout the federal courts of appeals—a test that combined historical analysis with consideration of contemporary costs and benefits. Instead, it held that modern gun laws, including those addressing problems unknown to the Founding generation, must be evaluated based on whether they are consistent with history.

My goal here is not to re-litigate *Bruen* (a case in which I filed a brief supporting neither side<sup>5</sup>), nor to criticize the use of history in interpreting the Second Amendment (an approach I support and

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<sup>1</sup> 142 S. Ct. 2111 (2022).

<sup>2</sup> *Friedman v. City of Highland Park*, 784 F.3d 406, 411 (7th Cir.) (2015).

<sup>3</sup> Adam Liptak, *Supreme Court Strikes Down New York Law Limiting Guns in Public*, N.Y. TIMES (Jun. 23, 2022), <https://www.nytimes.com/2022/06/23/us/supreme-court-ny-open-carry-gun-law.html>.

<sup>4</sup> *See Bruen*, 142 S. Ct. at 2138 n.9 (noting that “nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regimes”); *id.* at 2162 (Kavanaugh, J., concurring) (underscoring that “shall-issue licensing regimes are constitutionally permissible”).

<sup>5</sup> Along with Darrell A.H. Miller (Duke) and Eric Ruben (SMU), I filed an amicus brief urging the Court not to reject the two-part framework adopted throughout the federal courts of appeal. *See* Brief of Second Amendment Law Professors as

employ in my own scholarship<sup>6</sup>). Gun rights and regulation have co-existed since the Founding,<sup>7</sup> and a properly applied historical test should uphold a wide range of modern gun laws. What is problematic about *Bruen* is its reliance on an unguided form of historical-analogical reasoning<sup>8</sup> that invites the kind of judicial discretion that proponents of constitutional originalism and formalism regularly decry.<sup>9</sup>

Despite its purported reliance on history, *Bruen*'s new test does not eliminate considerations of contemporary evidence-based gun policy.<sup>10</sup> In fact, it affirmatively *requires* it. In order to apply *Bruen*'s analogical approach, legislators, judges, and scholars must continue to consider both the historical provenance of modern gun laws and their current effectiveness. The following testimony will attempt to make each of these points clear.

## I. *Bruen* rejected a legal framework that combined historical analysis with contemporary evidence—a test applied throughout the federal courts of appeals—in favor of a test based exclusively on historical analogies.

In order to appreciate what is unique about *Bruen*'s historical approach, it is important to understand the approach that the Court rejected: a two-part framework combining historical and contemporary analysis that was adopted throughout the federal courts in the wake of *District of Columbia v. Heller*.<sup>11</sup> That test relied on history but also recognized its limitations. *Bruen*, by contrast, prescribes a test based almost entirely on historical analogy, but fails to provide a sufficient principle to guide that analogical reasoning.

### A. The pre-existing framework relied on both history and contemporary evidence.

In *Heller*, which the Court called its “first in-depth examination of the Second Amendment,” the majority explicitly disclaimed any attempt “to clarify the entire field,” leaving it to lower courts to decipher the Amendment’s contours.<sup>12</sup> In more than 1,500 subsequent cases, state and federal courts did exactly that, resolving challenges to various forms of gun regulation while refining tests and

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Amici Curiae in Support of Neither Party, *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. \_\_\_ (2022) (No. 20-843), 2022 WL 2251305.

<sup>6</sup> See, e.g., JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* (2018) (describing intertwined history of gun rights and regulation); Joseph Blocher & Reva Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Under Heller*, 116 NW. U. L. REV. 139 (2021) (providing historical account of weapon regulations designed to preserve public safety); Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013) (describing traditional variation between gun regulation in urban and rural areas).

<sup>7</sup> See, e.g., BLOCHER & MILLER, *supra* note 6, at 19–21 (describing history of firearms regulation); ROBERT SPITZER, *GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS* 5 (2015) (“[W]hile gun possession is as old as America, so too are gun laws”); Duke Center for Firearms Law, *Repository of Historical Gun Laws*, online at <https://firearmslaw.duke.edu/repository/search-the-repository/> (as visited July 13, 2022) (containing more than 1,600 historical gun laws from the Medieval Age through the 1930s). Cf. *Heller v. District of Columbia*, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (“*Heller IP*”) (Kavanaugh, J., dissenting) (“Indeed, governments appear to have *more* flexibility and power to impose gun regulations under a test based on text, history, and tradition than they would under strict scrutiny. After all, history and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right, as the Court said in *Heller*.”).

<sup>8</sup> *Infra* Part I.

<sup>9</sup> *Infra* Part II. See also Joseph Blocher & Darrell A.H. Miller, *A Supreme Court Head-Scratcher: Is a Colonial Musket “Analogous” to an AR-15?*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/07/01/opinion/guns-supreme-court.html>.

<sup>10</sup> *Infra* Part III.

<sup>11</sup> 554 U.S. 570 (2008).

<sup>12</sup> *Id.* at 635.

standards to guide adjudication going forward.<sup>13</sup> And they came to a broad consensus, as *Bruen* recognized: “[T]he Courts of Appeals have coalesced around a ‘two-step’ framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.”<sup>14</sup> In fact, that framework was adopted by every federal court of appeals to consider the question.<sup>15</sup>

Under this consensus approach, courts would first “ask if the restricted activity is protected by the Second Amendment in the first place; and then, if necessary, [they would] ... apply the appropriate level of scrutiny.”<sup>16</sup> The first part of this framework was a “threshold question [of] whether the regulated activity falls within the scope of the Second Amendment,”<sup>17</sup> based on a “historical understanding of the scope of the ... right.”<sup>18</sup> “[I]f the historical evidence is inconclusive or suggests that the regulated activity is not categorically unprotected[,] then there must be a second inquiry into the strength of the government’s justification for restricting or regulating the exercise of Second Amendment rights.”<sup>19</sup> At this latter step, courts would “evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve.”<sup>20</sup>

This two-part framework neatly captures the basic structure of constitutional rights litigation: a threshold determination of whether the challenged government action implicates the Second Amendment at all, followed by application of the relevant legal standard. For example, many forms of “speech” are not recognized as such under the First Amendment, and therefore can be prohibited without resort to any form of scrutiny.<sup>21</sup> If and when the First Amendment is implicated, courts then consider whether the challenged government action can be justified under the appropriate legal test.<sup>22</sup> The same is true for litigation involving Equal Protection (discrimination must first be shown,

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<sup>13</sup> 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, 1437 (2018).

<sup>14</sup> *Bruen*, 142 S. Ct. at 2125.

<sup>15</sup> See *Worman v. Healey*, 922 F.3d 26, 33 (1st Cir. 2019), *cert. denied*, 141 S. Ct. 109 (2020); *Libertarian Party of Erie Cnty. v. Cuomo*, 970 F.3d 106, 127 (2d Cir. 2020), *cert. denied*, 2021 WL 2519117 (U.S. June 21, 2021); *Ass’n of N.J. Rifle & Pistol Clubs Inc. v. Att’y Gen. N.J.*, 974 F.3d 237, 242 (3d Cir. 2020); *Harley v. Wilkinson*, 988 F.3d 766, 769 (4th Cir. 2021); *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194, 206 (5th Cir. 2012); *United States v. Green*, 679 F.3d 510, 518 (6th Cir. 2012); *Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019); *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021); *United States v. Reese*, 627 F.3d 792, 800–801 (10th Cir. 2010); *GeorgiaCarry.Org*, 687 F.3d at 1260, n. 34; *United States v. Class*, 930 F.3d 460, 463 (D.C. Cir. 2019). See also *United States v. Adams*, 914 F.3d 602 (8th Cir. 2019) (acknowledging but not adopting the framework).

<sup>16</sup> *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 846 (2019).

<sup>17</sup> *Ezell v. City of Chicago*, 846 F.3d 888, 892 (7th Cir. 2017).

<sup>18</sup> *Jackson v. City and Cnty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014).

<sup>19</sup> *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019).

<sup>20</sup> *Id.* (internal quotation marks omitted).

<sup>21</sup> See, e.g., *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words. ...”).

<sup>22</sup> See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (holding that time, place, and manner restrictions on speech need not be the least restrictive alternatives); *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980) (holding that a regulation on commercial speech must directly advance a substantial governmental interest and be no more extensive than necessary to serve that interest).

followed by the appropriate level of scrutiny),<sup>23</sup> Due Process (the existence of the right must first be shown, followed by the relevant test),<sup>24</sup> and so on.<sup>25</sup>

It is no surprise, then, that the federal courts used this archetype to resolve Second Amendment claims. In keeping with *Heller*, they began at step one by considering the scope of the right to keep and bear arms as it was historically understood. *Heller*, after all, emphasized that history itself reveals limits on the reach of the right to keep and bear arms, for example in pointing out that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”<sup>26</sup> It went on to state that “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.”<sup>27</sup> It also endorsed the “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”<sup>28</sup> *Heller* thus recognized, as Justice Alito would put it in a later opinion, “that history supported the constitutionality of some laws limiting the right to possess a firearm, such as laws banning firearms from certain sensitive locations and prohibiting possession by felons and other dangerous individuals.”<sup>29</sup>

Applying that guidance, lower courts used a “textual and historical” inquiry,<sup>30</sup> in which they “look[ed] to tradition and history”<sup>31</sup> to assess whether the challenged law was within the scope of the Second Amendment. This “threshold question [of] whether the regulated activity falls within the scope of the Second Amendment”<sup>32</sup> was based on the “historical understanding of the scope of the ... right.”<sup>33</sup> And a regulation could be upheld without further analysis if “the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment.”<sup>34</sup> For example, pipe bombs, explosive devices, and the like fall outside the Second Amendment’s historical scope, and thus bans on possession of those devices can be upheld at step one.

It is important to stress the centrality of historical analysis in this inquiry, because it shows that Second Amendment doctrine already employed originalism and traditionalism before *Bruen*.<sup>35</sup> The courts of appeal agreed on this methodology; there was no circuit split.<sup>36</sup> But courts applying the two-

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<sup>23</sup> For example, *Washington v. Davis*, 426 U.S. 229 (1976), holds that facially neutral laws are subject to Equal Protection scrutiny only once discriminatory impact and intent have both been shown. If that threshold is cleared, the Court then applies the standard of scrutiny that corresponds to the type of discrimination at issue (race, sex, and so on).

<sup>24</sup> For example, *Washington v. Glucksberg*, 521 U. S. 702 (1997), holds that Due Process protects unenumerated rights that are “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” *Id.* at 721 (internal quotation marks omitted). If that threshold is cleared, the Court then applies whatever test corresponds to the right at issue.

<sup>25</sup> *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (applying tiers of scrutiny analysis to Free Speech and Free Exercise claims made by a high school football coach who sought to pray at midfield after games).

<sup>26</sup> 554 U.S. 570, 626 (2008).

<sup>27</sup> *Id.* at 626-27.

<sup>28</sup> *Id.* at 627.

<sup>29</sup> *N.Y. State Rifle & Pistol Ass’n, Inc. v. City of New York*, 140 S. Ct. 1525, 1540–1541 (2020) (Alito, J., dissenting).

<sup>30</sup> *Kanter*, 919 F.3d at 441.

<sup>31</sup> *Medina v. Whitaker*, 913 F.3d 152, 158 (D.C. Cir. 2019).

<sup>32</sup> *Ezell v. City of Chicago*, 846 F.3d 888, 892 (7th Cir. 2017).

<sup>33</sup> *Jackson v. City and Cnty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014).

<sup>34</sup> *Id.*

<sup>35</sup> See, e.g., Mark Anthony Frassetto, *Judging History: How Judicial Discretion in Applying Originalist Methodology Affects the Outcome of Post-Heller Second Amendment Cases*, 29 WM. & MARY BILL RTS. J. 413 (2020) (emphasizing the relevance of historical analysis and analogy pre-*Bruen*).

<sup>36</sup> See *supra* note 15.

part framework also recognized—as any originalist approach must—that the historical record does not provide all the answers. And thus the second step of the framework permitted courts, having reviewed the historical record, to also consider contemporary evidence about how well the challenged regulation was tailored to serve the relevant government interest—in other words, to consider its “means” and “ends,” or “how” and “why.”

The two-part framework made the burden on the government higher when the challenged regulation came closer to the “core” of the right to keep and bear arms. As one court explained, “[a] regulation that threatens a right at the core of the Second Amendment—for example, the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family—triggers strict scrutiny.”<sup>37</sup> But courts would apply intermediate scrutiny “if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right.”<sup>38</sup>

Again, this is a standard way of evaluating constitutional rights claims. Content-based speech regulations are subject to strict scrutiny under the First Amendment, meaning that they must be narrowly tailored to serve a compelling government interest.<sup>39</sup> Other forms of speech regulation—like those on the time, place, and manner of speaking—are subject to less stringent tests.<sup>40</sup> Similarly, Equal Protection applies different scrutiny to racial discrimination than it does to age discrimination.

This familiar constitutional framework was widely viewed by the lower courts—by judges appointed by presidents from both political parties—as consistent with *Heller*. It gave a privileged place to history and tradition while providing courts with tools to resolve cases where the history was silent or ambiguous. Thus the methodological question before the Court in *Bruen* was *not* whether history matters in Second Amendment adjudication. More than a decade before *Bruen*, courts acknowledged that “historical meaning enjoys a privileged interpretive role in the Second Amendment context.”<sup>41</sup> For the *Bruen* majority, however, this privileged interpretive role was not enough.

## B. *Bruen* instead prescribes a test of historical analogy—without coherently specifying how it is to be applied.

*Bruen* opens by holding that the right to keep and bear arms extends outside the home, a proposition that lower courts had overwhelmingly held or assumed to be true, and which the parties did not contest.<sup>42</sup> That holding, in and of itself, thus did not disrupt much existing doctrine. But in setting rules to determine which gun laws are consistent with a right to keep and bear arms outside the home, *Bruen* announced a new approach to Second Amendment doctrine, indicating that *all* of the answers must be tied to history:

In keeping with *Heller*, we hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the

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<sup>37</sup> Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 195 (5th Cir. 2012) (citation omitted).

<sup>38</sup> United States v. Torres, 911 F.3d 1253, 1262 (9th Cir. 2019) (internal quotation marks omitted).

<sup>39</sup> Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and maybe justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

<sup>40</sup> See *supra* note 22.

<sup>41</sup> United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011).

<sup>42</sup> *Bruen*, 142 S. Ct. at 2122.

regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”<sup>43</sup>

There are significant difficulties with this approach, as the dissent and many commentators pointed out.<sup>44</sup> It rejects the two-part framework that had applied throughout the federal courts, thereby calling into question a body of constitutional doctrine honed in more than 1,500 cases. It provides the Second Amendment with an almost unique degree of insulation from modern regulatory demands—despite the obvious and visceral nature of those demands. It directs judges to construct constitutional doctrine based on the historical record, despite the fact that “[h]istory and tradition do not speak with one voice” on gun regulation,<sup>45</sup> and sometimes are entirely silent.<sup>46</sup> And its own reading of that history is questionable.<sup>47</sup>

Many of these are criticisms familiar from the debate about originalism—an approach to constitutional interpretation that treats the meaning of the Constitution as being fixed in history. But one need not reject originalism to criticize *Bruen*, nor should originalists fully celebrate it. Where the opinion falls short is not only its choice of a history-focused test—though that is problematic—nor its actual treatment of the historical record—though that, too, raises serious concerns. Whatever one’s views on originalism as a theory, *Bruen* represents its failed application in practice: the Court failed to articulate a coherent approach to the historical analogies that its approach demands.

As the majority recognizes—indeed, repeatedly emphasizes—application of its new methodology will come down not simply to identifying historical examples but to making analogies.<sup>48</sup> That is the core of *Bruen*’s approach, and yet the majority fails to provide an adequate principle of relevant similarity to guide it.

This is a fundamental defect precisely because reasoning by analogy inevitably depends on a principle of relevant similarity: something that makes the comparators either similar or dissimilar to

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<sup>43</sup> *Id.* at 2126 (internal citation omitted). The Court later reiterated this test nearly word for word: “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 the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’” *Id.* at 2129-30 (internal citation omitted).

<sup>44</sup> See *supra* note 10. See also Randy Barnett, *A Minor Impact on Gun Laws but a Potentially Momentous Shift in Constitutional Method*, SCOTUSBLOG (Jun. 27, 2022), <https://www.scotusblog.com/2022/06/a-minor-impact-on-gun-laws-but-a-potentially-momentous-shift-in-constitutional-method/> (questioning how the history, text, tradition test will play out and why restrictive shall-issue regimes might survive where may-issue regimes have not); George F. Will, *The Supreme Court’s Gun Ruling Is a Serious Misfire*, WASH. POST (Jun. 23, 2022), <https://www.washingtonpost.com/opinions/2022/06/23/supreme-court-gun-ruling-misfire/> (“[T]here is an American tradition even older than the nation of striking a ‘delicate balance between the Second Amendment’s twin concerns for self-defense and public safety.’”) (quoting amicus brief filed in *Bruen* by former federal appellate judge J. Michael Luttig and others supporting the constitutionality of New York’s law on originalist grounds).

<sup>45</sup> *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012).

<sup>46</sup> *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting) (“[W]hen legislatures seek to address new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed, there obviously will not be a history or tradition of banning such weapons or imposing such regulations.”).

<sup>47</sup> See, e.g., Isaac Chotiner, *The Historical Cherry-Picking at the Heart of the Supreme Court’s Gun-Rights Expansion*, NEW YORKER (Jun. 23, 2022), <https://www.newyorker.com/news/q-and-a/the-historical-cherry-picking-at-the-heart-of-the-supreme-courts-gun-rights-expansion> (interviewing Adam Winkler); Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen’s Originalist Distortions*, SCOTUSBLOG (Jun. 27, 2022), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/>.

<sup>48</sup> The *Bruen* majority uses versions of the word “analogy” nearly thirty times.

one another.<sup>49</sup> In fact, the *Bruen* majority seems to recognize as much: “[B]ecause ‘[e]verything is similar in infinite ways to everything else,’ one needs ‘some metric enabling the analogizer to assess which similarities are important and which are not.’”<sup>50</sup>

Having made this recognition, though, the majority fails to meaningfully grapple with its implications. The point is that “analogy,” standing alone, is not a determinate mode of reasoning. Whether something is or is not analogous turns entirely on the principle of relevant similarity one employs: the characteristics that matter for the purposes of comparison—or, to use the majority’s phrase, the “metric.”<sup>51</sup>

In some contexts, the principles of relevant similarity will be relatively clear; established by rule, practice, or experience. The majority is therefore right to say that reasoning by analogy is a “commonplace task for any lawyer or judge.”<sup>52</sup> Indeed, in many ways legal reasoning just *is* analogical reasoning.<sup>53</sup> Lawyers and judges constantly compare authorities, holdings, rules, and facts, arguing that one or another is a better fit for the question in hand. A fundamental function of legal education and practice is to understand which similarities are relevant and which are not, and of course there will always be hard cases where the principles of relevant similarity might be unclear or contested. It therefore would not be fair to criticize an approach to analogy for failing to provide a complete account of all relevant similarities. But neither can an approach to analogy succeed *without* such principles, and that is where *Bruen* falls flat.

In fact the majority essentially acknowledges as much, saying with considerable understatement: “While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen’s right to armed self-defense.”<sup>54</sup> Citing *Heller* and *McDonald v. Chicago*’s emphasis on individual self-defense as the central component of the right to keep and bear arms, the Court says that “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry.”<sup>55</sup>

Restated, this test appears to require that two categories of things—“modern and historical regulations”—be compared across two metrics: the burdens they impose on “armed self-defense” and their justifications. Just *how* “comparable” the modern and historical gun laws must be remains unclear, except that “remote” resemblance is not enough but that the laws do not have to be “*twin[s]*”:

To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not uphold

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<sup>49</sup> Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745 (1993) (“The major challenge facing analogical reasoners is to decide when differences are relevant.”).

<sup>50</sup> *Bruen*, 142 S. Ct. at 2132 (quoting Frederick Schauer & Barbara Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 254 (2017)) (internal citations omitted). See also LARRY ALEXANDER & EMILY SHERWIN, *DEMISTIFYING LEGAL REASONING* 76-83 (2008) (“Similarities are infinite; therefore some rule or principle is necessary to identify important similarities.”).

<sup>51</sup> Sunstein, *supra* note 49, at 774 (“At the very least one needs a set of criteria to engage in analogical reasoning. Otherwise one has no idea what is analogous to what.”).

<sup>52</sup> *Bruen*, 142 S. Ct. at 2132.

<sup>53</sup> See Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 501 (1948) (“The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation.”); Sunstein, *supra* note 49, at 741 (“Reasoning by analogy is the most familiar form of legal reasoning.”).

<sup>54</sup> *Bruen*, 142 S. Ct. at 2132-33.

<sup>55</sup> *Id.* (internal citations, quotation, and emphasis omitted).

every modern law that remotely resembles a historical analogue, because doing so risk[s] endorsing outliers that our ancestors would never have accepted. On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.<sup>56</sup>

Other than rejecting the extreme positions, this passage says simply—and somewhat tautologically—that the two laws must be “analogous enough.”

That leaves the central question unanswered: How can and will courts evaluate the “how” and “why” of “modern and historical regulations”? The remainder of this testimony will focus on two points. First, analysis of the historical record will involve a substantial amount of judicial discretion and ideology<sup>57</sup>—precisely what the Court says its approach will limit, but which its own treatment of the historical record demonstrates. Second, despite the majority’s suggestion that history holds all the answers, the test it articulates will still require legislators, judges, and others to consider contemporary evidence.

## II. The historical-analogical approach is indeterminate and invites judicial discretion.

An under-specified analogical test like *Bruen*’s raises serious problems of administrability and invites judicial discretion and ideology to seep into decision-making. As Chief Justice Roberts noted in another constitutional context, an “analogue test” can “launch courts on a difficult line-drawing expedition” to answer questions such as: “Is an e-mail equivalent to a letter? Is a voicemail equivalent to a phone message slip?”<sup>58</sup> Such a test would keep “judges guessing for years to come.”<sup>59</sup> These problems are especially evident when the relevant cases involve major technological change, as Justice Alito noted in a Fourth Amendment case when he concluded that “it is almost impossible to think of late-18th-century situations that are analogous to” GPS searches.<sup>60</sup>

Unfortunately, the *Bruen* majority did not heed these warnings, adopting a historical test that vindicates the fear that, in the words of a gun rights scholar, “[p]retending to find the answers in history and tradition will encourage either covert judicial policymaking, which is just what reliance on

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<sup>56</sup> *Id.* (internal citations, quotation, and emphasis omitted).

<sup>57</sup> Cf. Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 HASTINGS L.J. 75, 122–28 (2018) (identifying difficulties of historical-analogical reasoning in Fourth Amendment cases); Frederick Schauer, *Analogy in the Supreme Court: Lozman v. City of Riviera Beach, Florida*, 2013 SUP. CT. REV. 405, 431 (“Once we see that there is no logical or even empirical error in observing that a blue car is in some respects like a blue coat and in those respects unlike a red car, the door is open for a realist understanding of the role of analogical reasoning in judicial decisions.”).

<sup>58</sup> *Riley v. California*, 573 U.S. 373, 401 (2014).

<sup>59</sup> *Id.* (quoting *Sykes v. United States*, 564 U.S. 1, 34 (2011) (Scalia, J., dissenting)). See also *Ross v. Bernhard*, 396 U.S. 531, 538, n. 10 (1970) (analogizing modern causes of action to those that existed at common law in applying the Seventh Amendment “requir[es] extensive and possibly abstruse historical inquiry” that is “difficult to apply”).

<sup>60</sup> *United States v. Jones*, 565 U.S. 400, 420 (2012) (Alito, J., concurring); *id.* at 420, n.3 (noting the possibility of “a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach’s owner,” but that “this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.”).



history and tradition is supposed to prevent, or ill-supported historical stories in defense of results that could honestly and responsibly be justified through normal means-end scrutiny.”<sup>61</sup>

Indeed, even in the course of a single opinion the Court does not apply its own analogical principles consistently, substituting different principles of relevant similarity when doing so serves to expand gun rights. For example, the majority is quick to conclude that the Second Amendment extends to modern weapons that were, of course, unknown to the Framers: “We have already recognized in *Heller* at least one way in which the Second Amendment’s historically fixed meaning applies to new circumstances: Its reference to ‘arms’ does not apply ‘only [to] those arms in existence in the 18th century.’”<sup>62</sup> This is because “even though the Second Amendment’s definition of ‘arms’ is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense.”<sup>63</sup>

When it comes to categories of arms covered by the Second Amendment, then, it appears that the principle of relevant similarity is whether the instrument “facilitate[s] armed self-defense.” That is a far more generous principle than the “how” and “why” principles that the majority applies to evaluating modern gun *laws* in comparison to their historical counterparts. The symmetric principle of similarity, one would think, should be that the Second Amendment allows modern gun laws that facilitate public safety. And that metric would lead to a very different analysis than the stringent historical one that the court ends up applying. In other words, the Court’s analogical reasoning is—by its own terms—more forgiving when it comes to accepting modern forms of arms than when it comes to accepting modern forms of gun regulation. The opinion itself thus demonstrates the malleability of its supposedly constraining approach.

Notably, the two factors that the majority identifies as a basis for comparison between modern and historical laws—“how” they burden self-defense and “why” they were justified—are effectively synonyms for the “means” and “end” of the laws, which could be evaluated more openly under a tiers-of-scrutiny type analysis. And yet the majority insists that there is a difference between its analogical inquiry and a more transparent means-end scrutiny:

This does not mean that courts may engage in independent means-end scrutiny under the guise of an analogical inquiry. Again, the Second Amendment is the “product of an interest balancing *by the people*,” not the evolving product of federal judges. Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances, and contrary to the dissent’s assertion, there is nothing “[i]roni[c]” about that undertaking. It is not an invitation to revise that balance through means-end scrutiny.<sup>64</sup>

This is a difficult passage to parse. To say that the Second Amendment was the “product of an interest balancing by the people,” as *Heller* did,<sup>65</sup> is not the same as saying that those same people

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<sup>61</sup> See Nelson Lund, *The Proper Role of History and Tradition in Second Amendment Jurisprudence*, 30 U. FLA. J.L. & PUB. POL’Y 1, 26 (2020). Professor Lund filed a brief supporting the petitioners in *Bruen*. Brief of Professors Robert Leider and Nelson Lund, and the Buckeye Firearms Association as Amici Curiae in Support of Petitioners, N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 597 U.S. \_\_\_ (2022) (No. 20-843), 2022 WL 2251305.

<sup>62</sup> *Bruen*, 142 S. Ct. at 2132 (internal citations omitted).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2133 n.7.

<sup>65</sup> *Heller*, 554 U.S. at 625.

performed such an interest balancing with regard to particular gun regulations—or even that we would have to respect their balance if they had.<sup>66</sup>

It is also unclear how the “balance” should be articulated or evaluated. The level of generality—itself not compelled by any legal principle—will be entirely outcome-determinative. Consider, for example, that many historical gun laws applied strict rules regarding Native Americans and those who refused to take loyalty oaths.<sup>67</sup> What “balance” does that reflect? That those particular groups can be disarmed, or that “dangerous” persons can be disarmed, or that outsiders to the political community can be disarmed, or something else entirely? Any of those principles is defensible, and they point in very different directions when it comes to the constitutionality of modern gun regulation.

#### A. Evaluating historical burdens on armed self-defense involves significant judicial discretion.

*Bruen*’s analogical test directs judges to consider the burdens that historical regulations placed on “armed self-defense.” This inquiry is malleable and manipulable in ways that invite judicial discretion and intuitionism.

First, judges might discount or minimize—based largely on supposition—the burdens imposed by historical gun laws. *Bruen* itself demonstrates as much, for example in discounting the evidentiary value of an early Massachusetts law that regulated the public carriage of arms by requiring that anyone who carried publicly without “reasonable cause” post a surety, or bond.<sup>68</sup> The majority held that the law—despite serving as an explicit example of states’ limiting public carry to those with cause—was not relevant in evaluating the constitutionality of New York’s public carry law because the burden of a surety or bond requirement was supposedly dissimilar to that imposed by New York’s permit requirement.<sup>69</sup> In the same vein, the Court declined to give weight to historical laws that it concluded were underenforced,<sup>70</sup> or which only prohibited the use of arms to “terrorize” others.<sup>71</sup> As *Bruen* demonstrates, the analysis of burdens imposed by historical gun regulation will largely be determined by judicially-selected presumptions and burden-shifting.

Second, any approach to analogical reasoning involves picking potential comparators—the historical examples that might be eligible for comparison to modern counterparts. Again, *Bruen* itself shows how judges’ decisions in this regard can be outcome-determinative. The majority concluded that “not all history is created equal,”<sup>72</sup> and that even foundational weapons restrictions like the 1328 Statute of Northampton, which restricted public carry, “ha[ve] little bearing on the Second Amendment adopted in 1791.”<sup>73</sup> (Notably, the day after *Bruen* the same basic lineup of Justices handed down a decision in *Dobbs v. Jackson Women’s Health* that reached back centuries for historical evidence

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<sup>66</sup> See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 296–97 (2007) (“[C]onstitutional interpretation is not limited to those applications specifically intended or expected by the framers and adopters of the constitutional text.”).

<sup>67</sup> Joseph Blocher & Catie Carberry, *Historical Gun Laws Targeting “Dangerous” Groups and Outsiders*, in *NEW HISTORIES OF GUN RIGHTS AND REGULATION: ESSAYS ON THE PLACE OF GUNS IN AMERICAN LAW AND SOCIETY* (Joseph Blocher, Jacob D. Charles, & Darrell A. H. Miller, eds.) (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3702696](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3702696).

<sup>68</sup> *Bruen*, 142 S. Ct. at 2148-49.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 2149.

<sup>71</sup> *Id.* at 2150.

<sup>72</sup> *Id.* at 2136.

<sup>73</sup> *Id.* at 2139.

they said undermined *Roe v. Wade*.<sup>74</sup>) This kind of historical slicing is likely to be a major feature of Second Amendment adjudication going forward. Already, some judges have trimmed the historical record to exclude laws and cases that would otherwise be quite important to showing the historical acceptance of significant burdens on self-defense.<sup>75</sup> The effect of doing so is to stack the deck against modern gun laws by making the burdens they impose appear to be anomalous.

Third, even as they distinguish away historical examples, judges may be inclined to treat a lack of historical evidence—which of course could simply be a matter of contingency—as conclusive of a law’s unconstitutionality. Consider, for example, *Bruen*’s suggestion that the putative lack of historical evidence of certain gun laws shows that they were unconstitutional, instead of representing a simple gap in the historical record, or a political choice to address those societal problems in other ways:

For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.<sup>76</sup>

In addition to transforming a lack of evidence into evidence of unconstitutionality, the room for judicial discretion is evident. What does it mean for a historical regulation to be “distinctly similar”? What are “materially different means”? For that matter, what is a “general societal problem”?

The answers to these questions depend entirely on a judge’s choice of a level of generality, which invites results-oriented reasoning. If, for example, one defines the “general societal problem” as “gun violence”—a broad level of generality—then it will be harder to justify modern regulations whose burdens on self-defense are not “distinctly similar” to predecessors. But one might also define the modern “general societal problem” as “mass shootings” or “school shootings”—a lower level of generality—and thereby lessen the need for a distinctly similar historical forbear. Both of those levels of generality are accurate descriptions of the “how” and “why” of contemporary gun regulation, but they lead to very different conclusions, and the choice between them is far more opaque than the standard forms of means-end scrutiny.

The same malleability can arise in defining the relevant right against which the burden should be measured. In *Bruen*, the Court had no trouble concluding that the “plain text” of the Amendment covers “carrying handguns publicly for self-defense.”<sup>77</sup> In keeping with some other courts and

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<sup>74</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2249 (2022) (citing Henry de Bracton’s thirteenth-century legal treatise as evidence of historical precedent for regulating abortion).

<sup>75</sup> See, e.g., *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); *Peruta v. County of San Diego*, 742 F.3d 1144, 1174 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016).

<sup>76</sup> *Bruen*, 142 S. Ct. at 2131.

<sup>77</sup> See *id.* at 2134 (holding that “the plain text of the Second Amendment protects Koch’s and Nash’s proposed course of conduct—carrying handguns publicly for self-defense”).

scholars,<sup>78</sup> the majority found this result to be compelled by the “plain text” of the word “bear.”<sup>79</sup> And it proceeded to evaluate both historical and modern burdens by reference to that particular aspect of the right to keep and bear arms—in other words, measuring the burden of New York’s law against the ability to carry handguns publicly for self-defense, not against the right to keep and bear arms as a whole. Those burdens would have looked less significant if the Court had defined the relevant conduct more broadly to include home possession of guns, which was not impacted by New York’s law.<sup>80</sup>

Perhaps more importantly for future cases, the “plain text” of the Second Amendment’s twenty-seven words simply do not address most gun rights claims. The plain text of the word “Arms” does not distinguish between the handguns that *Heller* holds are covered by the Amendment and the “dangerous and unusual weapons” that *Heller* excludes.<sup>81</sup> Those lines must be drawn based on historical and other considerations, not the unadorned “plain text.” Nor does the Second Amendment contain any locational language whatsoever, making it hard to identify relevant historical comparators for “sensitive places”—a category of locations in which *Heller*, *McDonald*, and *Bruen* all agree guns can be prohibited.<sup>82</sup> To the degree that the heavy historical burden that *Bruen* prescribes is triggered only by cases involving the “plain text” of the Second Amendment—as the apparently conditional use of the word “when” suggests<sup>83</sup>—it has little role to play in most cases involving the right to keep and bear arms.

Perhaps the most that can be said is that textual and historical arguments are intertwined. The stronger the textual argument in favor of the right (as, in the Court’s view, was true in *Bruen* and *Heller*), the higher the historical burden on the government to justify the regulation. That seems consistent with the majority’s acknowledgement that “[w]hile the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach.”<sup>84</sup> It is essentially a more roundabout way of conducting the same inquiry that courts used to do under the two-part framework, only laundered through historical analysis.

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<sup>78</sup> Some have concluded that the word “bear”—distinct from the word “keep”—indicates a constitutionally enshrined protection of public carry. *See, e.g., Moore*, 702 F.3d at 936 (“The right to ‘bear’ as distinct from the right to ‘keep’ arms is unlikely to refer to the home. To speak of ‘bearing’ arms within one’s home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home.”); *Young v. Hawaii*, 992 F.3d 765, 831 (9th Cir. 2021) (O’Scannlain, J., dissenting) (“The evidence that the Second Amendment’s Framers and ratifiers understood the right to bear arms to encompass public carry is not only lexical, but logical.”).

<sup>79</sup> *Bruen*, 142 S. Ct. at 2135 (“The Second Amendment’s plain text thus presumptively guarantees petitioners Koch and Nash a right to “bear” arms in public for self-defense.”).

<sup>80</sup> *See generally* Joseph Blocher, *Bans*, 129 YALE L.J. 308 (2019).

<sup>81</sup> *Heller*, 554 U.S. at 627. *Cf.* Bryan Garner (@BryanAGarner), Twitter (May 25, 2022, 4:11 PM). <https://twitter.com/BryanAGarner/status/1529555870031527939> (“If, alas, we can’t repeal the Second Amendment, let’s say its meaning extends only to technologies of the caliber (ahem) that existed when it took effect: muskets that required eight seconds to reload between shots. The Second Amendment has nothing to do with assault rifles.”). Garner is editor-in-chief of *Black’s Law Dictionary*, and co-authored two books with Justice Scalia: *Making Your Case: The Art of Persuading Judges* (2008) and *Reading Law: The Interpretation of Legal Texts* (2012).

<sup>82</sup> *Heller*, 554 U.S. at 626; *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010); *Bruen*, 142 S. Ct. at 2133-34.

<sup>83</sup> *Bruen*, 142 S. Ct. at 2126 (“[W]hen the Second Amendment’s plain text covers an individual’s conduct . . . the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.”) (emphasis added).

<sup>84</sup> *Id.* at 2132.

B. The justifications for gun laws have remained relatively constant throughout history, though judges can characterize those justifications in many different ways.

The second of *Bruen*'s analogical metrics focuses on how historical and modern gun laws have been “justified.” By this, the majority seems to mean the purpose or public interest underlying those laws.

Unsurprisingly, the broad justifications for historical gun regulation are consistent with modern ones: the preservation of public safety, including—but not limited to—the prevention of physical harm. The majority in *Bruen* did not dispute that historical laws regulating public carry, including the Massachusetts surety law, were designed to prevent physical harm.<sup>85</sup> The same is obviously true of modern laws.

But it is also important to note that weapons laws historically were used not only to preserve life, but to protect the public peace.<sup>86</sup> The Statute of Northampton, for example, forbade anyone to bring “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 ...”<sup>87</sup> Discussing the Statute, William Blackstone wrote that “riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land.”<sup>88</sup>

The “peace” that the law protected encompassed more than physical safety—to ride armed in fairs and markets was an offense to the crown itself (there being at the time no broader body politic).<sup>89</sup> And as Blackstone made clear, “terrifying the good people of the land”—not just attacking them—was itself “a crime against the public peace.” Or, as William Hawkins put it in 1716, “where a Man arms him[s]elf with dangerous and unu[s]ual Weapons, in [s]uch a Manner as will naturally cau[s]e a Terror to the People,” he commits “an Offence at the Common Law” and violates “many Statutes.”<sup>90</sup>

Whether these laws imposed *burdens* comparable to modern laws like New York’s is a matter of historical debate; *Bruen* concluded that they did not. But even those who read the historical record narrowly agree that terror, not just physical violence, could justify regulating the carrying of weapons.<sup>91</sup> Second Amendment advocate Stephen Halbrook recently concluded, “the right to bear arms does not include the carrying of dangerous and unusual weapons to the terror of one’s fellow citizens.”<sup>92</sup>

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<sup>85</sup> *Id.* at 2148-49.

<sup>86</sup> These issues are discussed in more detail in Blocher & Siegel, *supra* note 6, from which the following analysis is drawn.

<sup>87</sup> Statute of Northampton, 1328, 2 Edw. 3, c. 3 (Eng.).

<sup>88</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*149. Notably, this discussion comes in Book 4, Chapter 11, of the Commentaries, which is titled “Of Offenses Against the Public Peace.” *See also* State v. Huntly, 25 N.C. 418, 420 (1843) (statute of Northampton does not create the offense, but merely recognizes a common law crime).

<sup>89</sup> Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law*, 80 LAW & CONTEMP. PROB. 11, 26 (“Merely traveling with arms impugned the majesty of the crown ...”).

<sup>90</sup> 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135 (1716). Some prominent authorities specifically connected this rule to the legal interests of the unarmed. *See, e.g.*, JOSEPH KEBLE, AN ASSISTANCE TO JUSTICES OF THE PEACE, FOR THE EASIER PERFORMANCE OF THEIR DUTY 147 (London, W. Rawlins 1683 (“Yet may an Affray be, without word or blow given; as if a man shall shew himself furnished with Armour or Weapon which is not usually worn, it will strike fear upon others that are not armed as he is; and therefore both the Statutes of Northampton made against wearing Armour, do speak of it.”)).

<sup>91</sup> Stephen P. Halbrook, *Going Armed With Dangerous and Unusual Weapons to the Terror of the People: How the Common Law Distinguished the Peaceable Keeping and Bearing of Arms* 4-7 (2016) (presented at the Firearms & the Common Law Tradition conference), [http://www.stephenhalbrook.com/law\\_review\\_articles/going\\_armed.pdf](http://www.stephenhalbrook.com/law_review_articles/going_armed.pdf) (“In sum, it was an offense under the Statute of Northampton to go or ride armed in a manner that creates an affray or terror to the subjects.”); David B. Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. J.L. & PUB. POL’Y 127, 135-36 (2016) (“Everyone in the case [of *Rex v. Knight*] agreed that the Statute of Northampton outlawed only carrying in a terrifying manner.”).

<sup>92</sup> Stephen P. Halbrook, *The Common Law and the Right of the People to Bear Arms: Carrying Firearms at the Founding and in the Early Republic*, 7 LINCOLN MEM. U. L. REV. 100, 135 (2020).

Precisely what actions “naturally cau[s]e a Terror to the People” (to take Blackstone’s phrase) may be a factual and contextual question with debatable answers, but the government interest in regulating weapons to prevent terror and preserve public order has ancient common law antecedents—which persisted in the Founding era—recognized by advocates on all sides of the modern gun debate.

This concept, stripped of its royal finery, developed in the United States as “the peace,” and remained more capacious than simply freedom from physical harm.<sup>93</sup> Some states (at least seventeen by the middle of the nineteenth century) essentially copied Northampton’s “to the terror” prohibition,<sup>94</sup> and “[l]egal commentators, both in popular justice of the peace manuals and learned treatises, treated the Statute of Northampton as a foundational principle for enforcing the peace.”<sup>95</sup> A range of laws regulating the carrying of weapons were enacted to preserve peace and prevent terror.<sup>96</sup>

This account of the common law shows how an understanding of regulating arms in the service of preserving peace and preventing intimidation could evolve over time to include laws that restricted types of weapons, the locations in which weapons could be carried, and the modes in which persons could carry weapons. As the Georgia Supreme Court put it in an 1874 decision: “The preservation of the public peace, and the protection of the people against violence, are constitutional duties of the legislature, and the guarantee of the right to keep and bear arms is to be understood and construed in connection and in harmony with these constitutional duties.”<sup>97</sup> The court’s separate enumeration of “public peace” and “protection of the people against violence” shows that the two concepts were distinct.

In short, the historical justifications for gun regulation appear to be in accord with their modern counterparts: the preservation of public safety, including but not limited to physical life. There should therefore be little dispute on this prong of *Bruen*’s analogical approach—governments today seek to preserve people’s lives and communities’ safety, just as they did in generations past. And yet requiring that truism to be proven through historical analogy increases the room for judicial discretion and ideology, since relevant similarity will depend entirely on the level of generality at which judges conduct the inquiry.<sup>98</sup> For example, a judge might conclude that the public safety justification discussed above is not specific enough and require that the justification be historically proven in a more specific way: as an attempt to keep schools safe, for example, or to disarm domestic abusers in particular. Historical evidence of those more particularized governmental interests will be harder to show, thus making it harder to complete the analogy and calling the modern gun law into question.

By abandoning the framework developed by lower courts and failing to articulate a constraining principle of relevant similarity, the Supreme Court has introduced substantial uncertainty into Second Amendment doctrine. Its approach to historical sources will enable broad judicial

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<sup>93</sup> See generally LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* (2009); Alfred L. Brophy, *For the Preservation of the King’s Peace and Justice: Community and English Law in Sussex County, Pennsylvania 1682-1696*, 40 AM. J. LEGAL HIST. 167 (1996). See also Cornell, *supra* note 89, at 31-32 (“The offense was now one that harmed the body politic, not the King’s Majesty.”).

<sup>94</sup> Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEV. ST. L. REV. 373 (2015); Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1719–20 (2016).

<sup>95</sup> Cornell, *supra* note 89, at 19.

<sup>96</sup> These and other examples are collected and discussed in Eric M. Ruben, *Justifying Perceptions in First and Second Amendment Doctrine*, 80 LAW & CONTEMP. PROBS. 149, 167–69 (2017), which similarly explores the government’s power to regulate guns in the interests of perceived safety.

<sup>97</sup> *Hill v. State*, 53 Ga. 472, 476–77 (1874).

<sup>98</sup> *Cf. Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 560 (6th Cir. 2011) (“Level of generality is destiny in interpretive disputes[.]”) (Sutton, J., concurring in part and in the judgment), *abrogated by Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

discretion—precisely what the Court purports to avoid—while still requiring, as it must, consideration of contemporary evidence of gun laws’ effectiveness, as the following Part discusses in more detail.

### III. *Bruen*’s analogical test not only permits but requires consideration of contemporary evidence regarding gun laws.

Despite the rigidity of its historical test, *Bruen* repeatedly emphasizes—as *Heller* did—that it permits various forms of gun regulation. Its analogical approach does not impose a “regulatory straightjacket,”<sup>99</sup> and although the majority notably does not fully reproduce (as the Court’s decision in *McDonald* had done) *Heller*’s discussion of “presumptively lawful” gun restrictions it does discuss some of those exceptions with approval.<sup>100</sup>

Significantly, concurring opinions signed by three of the Justices who joined the six-Justice majority (and who were thus necessary to making it even a plurality) emphasized their understanding that *Heller*—including its approval of various forms of regulation—remains good law. Justice Alito said as much in his concurring opinion:

[T]oday’s decision therefore holds that a State may not enforce a law, like New York’s Sullivan Law, that effectively prevents its law-abiding residents from carrying a gun for this purpose.

That is all we decide. Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller* or *McDonald v. Chicago*, about restrictions that may be imposed on the possession or carrying of guns.<sup>101</sup>

Justice Kavanaugh, in a concurring opinion joined by Chief Justice Roberts, wrote separately “to underscore two important points about the limits of the Court’s decision.”<sup>102</sup> The first was that it did not address all licensing regimes for public carry—only “the unusual discretionary licensing regimes, known as ‘may-issue’ regimes, that are employed by 6 States including New York.”<sup>103</sup> Second, “as *Heller* and *McDonald* established and the Court today again explains, the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. Properly interpreted, the Second Amendment allows a ‘variety’ of gun regulations.”<sup>104</sup> He then went on to reproduce the “longstanding prohibitions” paragraph from *Heller* and *McDonald*.<sup>105</sup>

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<sup>99</sup> *Bruen*, 142 S. Ct. at 2133.

<sup>100</sup> *Id.* at 2133-34 (discussing “sensitive places” restrictions).

<sup>101</sup> *Id.* at 2157 (Alito, J., concurring) (internal citations omitted).

<sup>102</sup> *Id.* at 2161 (Kavanaugh, J., concurring).

<sup>103</sup> *Id.* (Kavanaugh, J., concurring).

<sup>104</sup> *Id.* at 2162 (Kavanaugh, J., concurring) (internal citations and quotation marks omitted).

<sup>105</sup> Specifically, the concurring opinion quoted this text:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. ... [N]othing 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

Whether these reassurances signal anything meaningful about the Supreme Court’s willingness to uphold other forms of gun regulation is difficult to say. But taken at their word, the majority and concurring opinions emphasize that gun regulation remains a prerogative of democratic government. Despite the methodological uncertainty it introduces, *Bruen* directs lower courts to continue considering both historical and contemporary evidence regarding gun laws’ goals and effectiveness.

#### A. Modern evidence is necessary to evaluate modern burdens on armed self-defense under *Bruen*’s test.

The plain text of *Bruen*’s own test requires contemporary evidence to play an essential role in Second Amendment doctrine, despite the opinion’s suggestion that its test is purely historical. Quite simply, there is no way to compare modern and historical burdens on armed self-defense without evidence to illustrate the former side of the comparison. Logically speaking, history alone cannot show the “burden” that modern gun laws place on “armed self-defense.”

Although it is somewhat opaque on this point, the Court actually seemed to be taking this presentist approach when it emphasized what it considered to be the strictness of New York’s law and the supposed commonality of armed self-defense. The majority highlighted the relative strictness of the New York law’s proper cause requirements, concluding that “special need” standard is “demanding.”<sup>106</sup> Justice Alito blended present and future in writing, “*Today*, unfortunately, many Americans have good reason to fear that they *will be* victimized if they are unable to protect themselves.”<sup>107</sup> In these ways, at least—all of which, it should be noted, worked in favor of broadening gun rights—the majority was willing and able to consider contemporary evidence and even predictions about the future.

As the dissent pointed out, there was actually no record evidence regarding the operation of New York’s statute—what percentage of permit applications were rejected, for example—which

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qualifications on the commercial sale of arms. [Footnote 26: We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.]

“We also recognize another important limitation on the right to keep and carry arms. Miller said, as we have explained, that the sorts of weapons protected were those in common use at the time. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons.” *Heller*, 554 U.S. at 626–627, and n. 26, 128 S.Ct. 2783 (citations and quotation marks omitted); *see also McDonald*, 561 U.S. at 786, 130 S.Ct. 3020 (plurality opinion).

*Id.*

<sup>106</sup> *Id.* at 2123.

<sup>107</sup> *Id.* at 2161 (Alito, J., concurring) (emphasis added). Specifically, Justice Alito cites a brief to the effect that “[a]ccording to survey data, defensive firearm use occurs up to 2.5 million times per year.” *Id.* Notably, empirical efforts to identify the prevalence of defensive gun uses vary by orders of magnitude. Compare Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 184 tbl.2 (1995) (basing 2.5 million figure on phone survey designed by authors) with MICHAEL R. RAND, U.S. DEP’T OF JUSTICE, GUNS AND CRIME: HANDGUN VICTIMIZATION, FIREARM SELF-DEFENSE, AND FIREARM THEFT 1-2 (1994) (estimating 80,000 defensive uses, based on the National Crime Victimization Survey). *See also* Philip J. Cook, *The Great American Gun War: Notes from Four Decades in the Trenches*, 42 CRIME & JUST. 19, 21, 43–44 (2013) (calling the 2.5 million figure “far-fetched,” and noting that “survey-based estimates of what appears to be a well-defined construct (use of a gun in self-defense during the last year or last 5 years) are hypersensitive to survey design, to the extent that estimates may differ by a factor of 25 or more. Another lesson for gun policy is that what some individuals consider to be a legitimate use of a gun in self-defense may be highly problematic in practice”).



makes it hard to know much concretely about the contemporary burdens on armed self-defense.<sup>108</sup> In future cases that do involve development of a record, those defending gun laws will presumably want to include evidence showing that they still allow “armed self-defense.” If, for example, a prohibition on one particular class of weapons leaves open a range of adequate alternatives, then the burden on “armed self-defense” is lessened and perhaps negligible.<sup>109</sup> The majority’s flexibility in accepting arguments about the supposedly high burden of the modern regulation, however, is in stark contrast to its willingness to minimize the burdens imposed by historical regulations, as discussed above.

## B. Modern evidence is necessary to evaluate modern gun law justifications under *Bruen*’s test.

In order to compare modern and historical justifications for gun regulation, it will be necessary to consider modern evidence underlying the former. The Committee is familiar with this body of evidence, including the disagreements underlying it, and I will not attempt anything like a recitation here—that is a matter for experts in evidence-based policy. My goal is simply to show how it fits into Second Amendment analysis.

In *Bruen*, Justice Breyer opened his dissenting opinion by exploring some of the evidence regarding gun violence and advocating a form of means-end scrutiny that would permit such evidence to be evaluated transparently by courts when considering Second Amendment challenges.<sup>110</sup> The majority, as noted above, refused to take this approach. But its analogical test still requires that such evidence be considered—if only in comparison to the justifications underlying historical laws. Although Justice Alito objected to the recitation of this contemporary evidence, he also provided some of his own: stories of people who either used guns in self-defense, or who thought that they might need to.<sup>111</sup> What is notable here is that, despite their sharp disagreement, both Justices were pointing to the kinds of contemporary evidence that will be relevant to evaluating the modern justifications of gun laws—as *Bruen*’s analogical approach requires.

What form will that evidence take? In many instances, it will be recognizably empirical: data about the ways in which various gun regulations do or do not save lives, for example. The empirical literature in that regard is rich and growing, and courts will not be able to avoid engaging with it. Indeed, the Justices in the *Bruen* majority were willing to make assessments of gun laws’ effectiveness—or ineffectiveness—in the course of striking down New York’s.<sup>112</sup>

From the perspective of constitutional doctrine, two important points should be made about the *form* of that evidence.<sup>113</sup> First, the Court does not always require an empirical showing to substantiate either the assertion of a government interest or the effectiveness of a challenged policy in effectuating it. In *Williams-Yulee v. Florida Bar*, for example, the Court rejected a First Amendment

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<sup>108</sup> *Bruen*, 142 S. Ct. at 2164 (Breyer, J., dissenting) (“[T]he Court decides this case on the basis of the pleadings, without the benefit of discovery or an evidentiary record. As a result, it may well rest its decision on a mistaken understanding of how New York’s law operates in practice.”).

<sup>109</sup> See *Friedman v. City of Highland Park*, 784 F.3d 406, 411 (7th Cir.) (2015) (pointing out that if Highland Park’s ordinance banning assault rifles left viable legal alternatives open to criminals, then it similarly left viable legal alternatives open to those seeking to carry in self-defense); Joseph Blocher & Darrel A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. ON LEG. 280 (2016).

<sup>110</sup> *Bruen*, 142 S. Ct. at 2163-68 (Breyer, J., dissenting).

<sup>111</sup> *Id.* at 2159 (Alito, J., concurring).

<sup>112</sup> See *id.* at 2157 (Alito, J., concurring) (discussing the failure of New York’s law to prevent the May 2022 shooting in Buffalo, N.Y.).

<sup>113</sup> These issues are discussed in more detail in Blocher & Siegel, *supra* note 6, from which the following analysis is drawn.

challenge to a Florida law prohibiting judicial candidates from soliciting campaign funds.<sup>114</sup> Chief Justice Roberts’ majority opinion upheld the law under strict scrutiny, finding that it not only helped prevent *quid pro quo* corruption, but advanced the “State’s compelling interest in preserving public confidence in the integrity of the judiciary.”<sup>115</sup> As the Chief Justice put it: “The concept of public confidence in judicial integrity does not easily reduce to precise definition, *nor does it lend itself to proof by documentary record*. But no one denies that it is genuine and compelling.”<sup>116</sup> If speech can be limited in the name of increasing public confidence in judicial integrity, why could guns not be limited in the name of increasing public confidence in other shared institutions and spaces?

Similarly, in the voting rights context, the Court has suggested that restrictions can be upheld in the name of the government’s compelling interest in preserving citizens’ “right to vote in an election conducted with integrity and reliability.”<sup>117</sup> The Court has even been willing to uphold restrictions on voter registration on the grounds that “public confidence in the integrity of the electoral process has independent significance” above and beyond the prevention of fraud, because the regulation might “encourage[] citizen participation in the democratic process.”<sup>118</sup> If the hypothetical benefit of voter-fraud restrictions on registration is sufficient to sustain such legislation despite its burden on exercise of a fundamental right, then shouldn’t the same be true of gun regulations that might encourage, for example, student participation in education? Courts should not hold the government to higher empirical standards in Second Amendment cases than in other constitutional contexts.

Second, in assessing the justifications for modern gun laws, we should be attuned to non-physical harms as well.<sup>119</sup> There is already robust empirical evidence that gun-related harms go far beyond physical loss,<sup>120</sup> and that these harms—like the direct gun casualties of gun violence—disproportionately impact vulnerable communities.<sup>121</sup> Modern gun laws can be directed to the prevention of those harms, just as historical weapons laws were.

But not every gun law will, as the Chief Justice put it in *Williams-Yulee*, “lend itself to proof by documentary record.”<sup>122</sup> In various contexts, the threat of gun violence chills the exercise of other rights, depriving Americans of the security to speak, protest, learn, shop, pray, and vote. It will not always be possible to demonstrate that a particular gun law—a restriction on open carrying near

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<sup>114</sup> *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015).

<sup>115</sup> *Id.* at 457.

<sup>116</sup> *Id.* at 447 (emphasis added). *See also* *Burson v. Freeman*, 504 U.S. 191, 208–09 (1992) (“[T]his Court never has held a State to the burden of demonstrating empirically the objective effects on political stability that [are] produced by the voting regulation in question.”).

<sup>117</sup> *Burson*, 504 U.S. at 199.

<sup>118</sup> *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008).

<sup>119</sup> Joseph Blocher & Reva Siegel, *Guns Are a Threat to the Body Politic* ATLANTIC, (Mar. 8, 2021) <https://www.theatlantic.com/ideas/archive/2021/03/guns-are-threat-body-politic/618158/>.

<sup>120</sup> PHILIP J. COOK & JENS LUDWIG, *GUN VIOLENCE: THE REAL COSTS* (2000) (concluding that gun violence costs \$100 billion per year, including investments in prevention, avoidance, and harm reduction, both public and private); David Hemenway et al., *Firearms and Community Feelings of Safety*, 1 J. CRIM. L. & CRIMINOLOGY 86 (Fall 1995) (providing “suggestive evidence that possession of firearms imposes, at minimum, psychic costs on most other members of the community”); Cary Wu, *How Does Gun Violence Affect Americans’ Trust in Each Other?*, 91 SOCIAL SCIENCE RESEARCH 102449 (2020) (demonstrating that “that America’s gun violence affects not only just those killed, injured, or present during gunfire, but it can also sabotage the social and psychological well-being of all Americans”).

<sup>121</sup> Matthew Miller, Deborah Azrael & David Hemenway, *Community Firearms, Community Fear*, 11 EPIDEMIOLOGY 709 (2000) (Fifty percent of respondents said they would feel less safe if more people in their community owned guns, compared to fourteen percent who would feel more safe; women were 1.7 more likely to report feeling less safe, and minorities were 1.5 times more likely).

<sup>122</sup> 575 U.S. at 447 (emphasis added). *See also* *Burson*, 504 U.S. at 208–09 (“[T]his Court never has held a State to the burden of demonstrating empirically the objective effects on political stability that [are] produced by the voting regulation in question.”).

polling places, for example—measurably increases people’s confidence or security in exercising their rights. But that should not be fatal to gun laws any more than it would be to laws in other constitutional contexts.

### Conclusion: Highland Park after *Bruen*

Roughly two weeks after *Bruen* was decided, residents of Highland Park, Illinois, gathered for a July 4 parade. At 10:15 that morning, a gunman began firing on them with a semiautomatic rifle. Seven people were killed, dozens more physically injured, and countless more traumatized by the carnage, including a toddler orphaned by the murder of both parents.<sup>123</sup> Though its community will never be defined solely by the shooting, Highland Park now finds itself on the long list of American cities—Columbine, Newtown, Parkland, Buffalo, Uvalde—whose names immediately invoke mass carnage.

But Highland Park was already well known in Second Amendment circles, because of a prominent constitutional challenge to its prohibition on the possession of assault weapons and large capacity magazines.<sup>124</sup> In an opinion by Judge Frank Easterbrook—a conservative stalwart who Justice Scalia said he’d choose as a successor<sup>125</sup>—the U.S. Court of Appeals for the Seventh Circuit upheld Highland Park’s regulation. Judge Easterbrook’s opinion discussed history, even invoking some of the same principles of analogical reasoning as *Bruen*,<sup>126</sup> finding that the ultimate question should be “whether a regulation bans weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia, *and* whether law-abiding citizens retain adequate means of self-defense.”<sup>127</sup> The opinion noted the enormous differences between the “Arms” of 1791 and modern assault weapons and large-capacity magazines.<sup>128</sup> And, just as *Bruen* mandates consideration of “burdens” on “armed self-defense,” the opinion concluded that “the ordinance leaves residents of Highland Park ample means to exercise the ‘inherent right of self-defense’ that the Second Amendment protects.”<sup>129</sup> Under the post-*Heller* framework, then, communities like Highland Park had the authority to try to defend themselves with law, and not only with guns.

When the Supreme Court declined to review Judge Easterbrook’s opinion, Justice Thomas dissented, decrying Highland Park’s prohibition on “modern sporting rifles (*e.g.*, AR-style semiautomatic rifles), which many Americans own for lawful purposes like self-defense, hunting, and target shooting.”<sup>130</sup> The phraseology itself is notable, since characterizing AR-style weapons as *modern*

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<sup>123</sup> *These are the Victims of the Fourth of July Parade Shooting in Highland Park*, CHI. TRIB. (July 9, 2022) <https://www.chicagotribune.com/news/ct-highland-park-victims-20220705-tgcgdx5bqbfzrakhzf6jian634-list.html>.

<sup>124</sup> *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015).

<sup>125</sup> John Kruzal, *Scalia Wanted Judge Opposed by NRA to Replace Him on Supreme Court*, ABC NEWS (Feb. 18, 2016); <https://abcnews.go.com/Politics/scalia-wanted-judge-opposed-nra-replace-supreme-court/story?id=37010230>.

<sup>126</sup> *Compare Friedman*, 784 F.3d at 410 (“It is enough to say, . . . that at least some categorical limits on the kinds of weapons that can be possessed are proper, and that they *need not mirror restrictions that were on the books in 1791.*”) (emphasis added), *with Bruen*, 142 S. Ct. at 2133 (“[A]nalogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*.”).

<sup>127</sup> *Friedman*, 784 F.3d at 410 (internal citations omitted, emphasis added).

<sup>128</sup> *Id.* (“The features prohibited by Highland Park’s ordinance were not common in 1791. Most guns available then could not fire more than one shot without being reloaded; revolvers with rotating cylinders weren’t widely available until the early 19th century. Semi-automatic guns and large-capacity magazines are more recent developments. Barrel shrouds, which make guns easier to operate even if they overheat, also are new; slow-loading guns available in 1791 did not overheat. And muzzle brakes, which prevent a gun’s barrel from rising in recoil, are an early 20th century innovation.”).

<sup>129</sup> *Id.* at 411.

<sup>130</sup> *Friedman v. Highland Park*, 577 U.S. 1039, 1039, *cert. denied*, (Thomas, J., dissenting) (2015).

*sporting* rifles would seem to make them twice-removed from *Bruen*'s emphasis on the *historical* right to armed *self-defense*.

But that is the kind of characterization problem that the new test invites. Even as the *Bruen* majority confidently extends Second Amendment coverage to “modern instruments that facilitate armed self-defense,”<sup>131</sup> it is unwilling simply to recognize the symmetric principle that the Second Amendment permits modern gun laws that facilitate public safety. Instead, those restrictions are subject to the “how” and “why” analogical test described in detail above. A prohibition like Highland Park’s should still fare well under such a test, given that—to borrow then-Judge Barrett’s words from a different Second Amendment context—“history is consistent with common sense.”<sup>132</sup> And just as “it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns,”<sup>133</sup> it also demonstrates that they have the power to ban what *Heller* called “dangerous and unusual weapons.”<sup>134</sup>

How any individual judge would weigh the evidence in such a challenge after *Bruen* is very hard to know. And that is precisely the point: The Supreme Court’s decision has introduced significant unpredictability into Second Amendment law going forward. Some judges will find the historical analogies clear. Others will distinguish them. The whole enterprise is likely to be driven largely by judges’ own unexamined and perhaps inarticulable intuitions about relevant similarity.

One thing, however, remains quite clear: Legislatures can and must continue to promote public safety, including through consideration of contemporary empirical evidence. Constitutional law must and will continue to reconcile “history and common sense.”

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<sup>131</sup> *Bruen*, 142 S. Ct. at 2132.

<sup>132</sup> *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting).

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

<sup>134</sup> *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (slip op., at 3) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008), in support of the proposition that the historical tradition supports bans on dangerous and unusual weapons).