DARRELL A. H. MILLER AND
JOSEPH BLOCHER

MANUFACTURING OUTLIERS

Last term, the Supreme Court issued its first major Second Amendment decision in more than a decade, *New York State Rifle and Pistol Association, Inc. v. Bruen*.[1] The case concerned a challenge to New York's century-old "may-issue" regulation, which required applicants to show "proper cause" to receive a license to carry a concealed handgun in public. Petitioners described New York's may-issue law as an outlier compared to forty-three other states with more relaxed "shall-issue" or permitless carry laws. At oral argument, Paul Clement, representing the petitioners, framed the case as a simple request: "[W]e'd like what they're having."[2]

In a 6-3 majority opinion striking down New York's law, Justice Clarence Thomas embraced petitioners' characterization of the regulation as a contemporary outlier—and went further, casting it as a historical outlier as well. New York and supporting amici had amassed a

Darrell A. H. Miller is the Melvin G. Shimm Professor of Law at Duke University Law School. Joseph Blocher is the Lanty L. Smith '67 Professor of Law at Duke University Law School.

Authors' note: Thanks to Jake Charles, Eric Ruben, Larry Solum, and Andrew Willinger for comments, and to Noah Jacobs, Luisa Gomez, and Benjamin Rossi for their research assistance. Thanks also to the participants at the University of Colorado faculty workshop, the University of Chicago Law School public law workshop, the University of Illinois faculty workshop, and the University of Houston Law Center colloquium for their helpful questions and contributions.

[1] 142 S. Ct. 2111 (2022).

[2] Transcript of Oral Argument at 50, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2021) (No. 20-843) (comments of Paul Clement).

The Supreme Court Review, 2023.
 https://doi.org/10.1086/725159

substantial record of Anglo-American regulations from the medieval period to the early twentieth century to show New York's law was part of a deep and long tradition of public carry regulation. One by one, the majority characterized each of these historical regulations as outliers. Some were too new; some were too old. Some were outliers because they were passed by territorial governments; some were outliers because they were passed by Reconstruction governments. Some were outliers because they weren't adequately enforced; some because they weren't enforced criminally; some were outliers because they governed a population too small, or too regional. None of these regulations, according to the majority, were probative of a longstanding historical tradition of regulating public carry into which the New York law fit.

Bruen's description of New York's law as a contemporary and historical outlier raises fundamental questions about how the Justices define that term and the jurisprudential significance of that characterization. After all, there was nothing atypical about New York's licensing law even thirty years ago, when most states had may-issue permitting, or prohibited concealed carry altogether. Instead, the law became a minority position because of an aggressive and successful campaign to change state law and public norms regarding public carry, and to change the perception of American history pertaining to that practice.[3] Further, to suggest that New York's permitting law is an outlier compared to a longstanding tradition of public carry regulation depends entirely on what counts as constitutive of that tradition.

Of course, enforcing constitutional rights against outlier jurisdictions is not unusual. In contexts as varied as school segregation, contraception, the death penalty, and LGBTQ+ equality, the Justices have effectively nationalized a single standard as constitutional law when state laws and norms come to reflect a putative consensus, curbing jurisdictions that appear to break out in an atypical or retrogressive fashion.[4] Scholars across the ideological spectrum, including Justin Driver,[5]

---

[3] *See infra* notes 100–116 and accompanying text.

[4] Justin Driver, *Constitutional Outliers*, 81 U. Chi. L. Rev. 929 (2014).

[5] *Id.* Professor Driver's taxonomy of "constitutional outliers" is an illuminating contribution and does an excellent job of categorizing the kind of outlier regulations the Court tends to throttle. Our focus here is on the antecedent question of how a law becomes coded as an outlier in the first place, the inherent normativity and judicial discretion involved in that process, and the potential hazards that accompany the "outlier" framing as a reason for decision.

Keith Whittington,[6] Michael Klarman,[7] Cass Sunstein,[8] Brannon Denning, and Glenn Reynolds,[9] have all written on the tendency of the Court to use constitutional rights to prune outlier regulations.

The Court's invocation of outliers in *Bruen* warrants renewed attention to the topic for several reasons. First, *Bruen* highlights the current Court's inclination to cast its work in exclusively investigative, empirical terms—as a matter of finding something, rather than fashioning it. This maneuver masks assumptions that are essential to the decision and allows the Court to characterize its holding as the dispassionate evaluation of objective facts, uncontaminated by normative choice. Second, given the present majority's methodological tendencies, overt or covert conceptions of "outliers" are likely to appear in other constitutional domains. Many forms of originalism treat history as a matter of fact which judges can discover.[10] This historical-empiricism is frequently touted to distinguish originalist jurisprudence from other approaches that are purportedly more judge-empowering. As Justice Antonin Scalia put it, "[t]exts and traditions are facts to study, not convictions to demonstrate about."[11] "Outlier" arguments are exemplary of this framing, and of its weaknesses. *Bruen*

---

[6] Keith E. Whittington, Political Foundations of Judicial Supremacy 105 (2007).

[7] Michael J. Klarman, From Jim Crow to Civil Rights 453 (2004) ("More constitutional law than is commonly supposed reflects this tendency to constitutionalize consensus and suppress outliers.").

[8] Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 Harv. L. Rev. 246, 260–64 (2008).

[9] Brannon P. Denning & Glenn H. Reynolds, *Five Takes on* McDonald v. Chicago, 26 J.L. & Pol. 273, 284 (2011) (citing McDonald v. City of Chicago, 561 U.S. 742 (2010), as "another data point in favor of the theory that the Court is a lagging, rather than a leading indicator of popular preference, often constitutionalizing a national consensus and enforcing that consensus against outliers").

[10] Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 Harv. J.L. & Pub. Pol'y 5, 8 (2011) ("Proponents of originalism agree that historical facts at the time of a constitutional provision's adoption normally determine its meaning."); Mark A. Graber, *Original Expectations*, 52 Conn. L. Rev. 1573, 1579 (2021) ("Both original public meaning and original intentions/expectations purport to be facts about constitutional politics at the time the constitution was ratified."); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1 (2015). Will Baude and Steve Sachs maintain that the investigation is not into historical fact generally, but into that part of historical fact that counts as "original law" which judges then are bound to enforce as law in the present until the original law is lawfully changed. William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & Hist. Rev. 809, 809 (2019).

[11] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

reveals that such arguments are replete with discretion, whether in selecting the relevant jurisdictions, grouping social phenomena (including law), setting a temporal duration, or elevating or minimizing a set of historical data points. *Bruen* demonstrates the Court's tendency to curate a historical record and then to treat it as an objective basis for decision.

Part I of this Article analyzes *Bruen* with particular focus on how the majority describes contemporary or historical regulations as "outliers." The majority asserts that its test, which supposedly considers only text, history and tradition, is more "administrable" than the tiers-of-scrutiny test it replaced.[12] But *Bruen* both engages in and encourages forms of judicial intuitionism and discretion that, if left unguided, are likely to disrupt Second Amendment law significantly.

Sections II.A and B then identify and elaborate two principles—neither of them evident in *Bruen*—that might help bring more discipline to outlier arguments. The first is transparency: Unlike the *Bruen* majority, courts should be clear about their assumptions and how they shape the baselines against which purported outliers will be measured. The second is rigor: Although law is not statistics and may not lend itself to the same kinds of coding and robustness checks one sees in other disciplines,[13] characterizing something as an outlier, as *Bruen* does, makes an empirical claim that must be subject to some kind of verification.[14] We do not advance a trans-substantive legal rule by which one can identify outliers, but we are confident that *Bruen*'s approach is plainly inadequate, and that, at the very least, some general guiding principles are warranted if outlier analysis is to be anything beyond a rhetorical device. Section II.C briefly explains why an outlier analysis modeled on *Bruen* poses a threat to history and tradition as a modality of constitutional argument. In Part III we conclude by recognizing that our critique of *Bruen*'s

---

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

[13] *Cf.* Alexander M. Bickel, The Supreme Court and the Idea of Progress 97 (1978) ("Even when the law pretends to be a science, it is not, after all, mathematics."); Steven J. Burton, *Judge Posner's Jurisprudence of Skepticism*, 87 Mich. L. Rev. 710, 713 (1988) ("Law is not a science to be understood or criticized in scientific terms.").

[14] We agree that quantitative and qualitative analysis can both be empirical and subject to a set of best practices. *See* Lee Epstein & Andrew D. Martin, An Introduction to Empirical Legal Research (2014) (arguing that "data can be words, not numbers" that can "be organized into categories" from which to "identify patterns").

outlier argument is not confined to Second Amendment adjudication but is applicable to other areas of constitutional doctrine.

I. Bruen

Gun rights advocates placed all their bets on *Bruen* and hit the jackpot. They wanted a declaration that the right to "bear arms" meant a right to carry guns in public. They got it. They wanted a declaration that New York's "may issue" discretionary licensing law was unconstitutional. They got it. And the big prize: they wanted a declaration that judges must abandon conventional tiers of scrutiny and analyze Second Amendment cases solely through text, history, and tradition. It appears they got that, too.

a. the decision

Bruen was a case nearly fifteen years in the making. In 2008, the Court decided *District of Columbia v. Heller*,[15] the first Supreme Court case to hold that the Second Amendment guarantees a right to keep and bear arms for personal purposes like self-defense in the home. It was shortly followed by *McDonald v. City of Chicago*,[16] which, by incorporating the Second Amendment through the Due Process Clause, vastly expanded the reach of the Second Amendment to cover every state and local jurisdiction in the nation. Although *Heller* and *McDonald* were undeniably watersheds in Second Amendment doctrine, they were Delphic in their guidance to lower courts.

Lower court judges scrambled to put together a doctrine that could implement this new right.[17] They quickly converged on a two-step framework.[18] At the first step, the lower courts used an approach—strongly influenced by history and *Heller*'s categorical distinctions[19]—to decide whether the Second Amendment covered the challenger's activity. If it did not, then that was the end of the inquiry. Felons caught

---

[15] 554 U.S. 570 (2008).

[16] 561 U.S. 742 (2010).

[17] *See* Richard H. Fallon, Jr., Implementing the Constitution (2001).

[18] *See* Joseph Blocher & Darrell A.H. Miller, The Positive Second Amendment: Rights, Regulation, and the Future of *Heller* 100–18 (2018) (describing structure and development of the framework).

[19] Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. Rev. 375, 405 (2009) (describing *Heller*'s categories).

with firearms,[20] or challenges to guns in "sensitive places" like commercial airliners,[21] usually failed at this step.

If the history was unclear, or the category underspecified, or the judge was cautious, courts would address step two, and apply a conventional means-end analysis calibrated by how close the regulation came to the "core" of the right. In doing so, courts would evaluate the stated government interest (typically described as public safety) and examine how closely the regulation fit with this stated goal compared to the expected burden on otherwise core Second Amendment conduct. Often, but not always, this analysis took the form of intermediate scrutiny. For example, the Third Circuit found firearms with obliterated serial numbers potentially within the coverage of the Second Amendment, because *Heller* did not categorically exclude them and because, unsurprisingly, there was no clear historical record of prohibiting ownership of unserialized firearms. Still, the prohibition survived, because preventing use of untraceable firearms in crime outweighs the minimal impact on a law-abiding person's ability to use other weapons—in particular firearms with serial numbers—for the core purpose of self-defense in the home.[22]

By the time the Court granted certiorari in *Bruen*, every federal circuit to directly address the issue had adopted this two-part framework.[23] But there were critics, including then-Judge Brett Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit. In *Heller v. District of Columbia* (*Heller II*), Dick Heller—the successful plaintiff in the 2008 Supreme Court case—challenged the District of Columbia's regulation of assault rifles and large capacity magazines as a violation of the Second Amendment.[24] The majority used the two-part framework and concluded that the District's regulation was constitutional. In dissent, then-Judge Kavanaugh read *Heller* as forbidding any type of means-end

---

[20] United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010) ("[F]elons are categorically different from the individuals who have a fundamental right to bear arms. . . .").

[21] *See* United States v. Davis, 304 F. App'x 473, 474 (9th Cir. 2008) (finding 49 U.S.C. § 46505 constitutional).

[22] United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010).

[23] Along with Eric Ruben of SMU Dedman School of Law, we filed an amicus brief in support of neither side urging the Court to adopt the two-part framework adopted throughout the federal courts of appeals, rather than this historical approach. *See* Brief of Second Amendment Law Professors as Amici Curiae in Support of Neither Party, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2021) (No. 20-843), 2021 WL 3144391.

[24] Heller v. Dist. of Columbia (*Heller II*), 670 F.3d 1244, 1271, 1282 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

scrutiny and argued instead that Second Amendment cases should be resolved solely by reference to "text, history, and tradition."[25] A few other federal judges echoed his skepticism of the second part of the two-part framework,[26] and this methodological issue became a centerpiece of the briefing in *Bruen*.

Bruen dealt with a challenge to New York's "may issue" permitting law. To obtain an unrestricted license to carry a handgun in New York, a person had to demonstrate "proper cause," meaning some kind of need different than the self-defense interests of the general population. Two plaintiffs from upstate New York, Brandon Koch and Robert Nash, challenged the regulation as a violation of the Second Amendment. They were joined in the action by the National Rifle Association's New York affiliate, the New York Rifle and Pistol Association, Inc. The tone of the Justices' questions at oral argument made it apparent that New York's regulation was going to fail; the only question was how broad the ruling would be, and on what grounds.[27] The options before the Court ranged from the factual and procedural—a remand for discovery about how licensing authorities were routinely using their discretion, for example—to the broad and disruptive—a complete revision of how Second Amendment cases should be decided.

The Court chose the latter course, overturning not only the Second Circuit's ruling, but also a decade and a half of Second Amendment doctrine. Justice Thomas began his opinion for the Court by casting New York's law as a departure from a national consensus: "In 43 States, the government issues licenses to carry based on objective criteria. But in six States, including New York, the government further conditions issuance of a license to carry on a citizen's showing of some additional special need."[28] The federal courts of appeals, with

---

[25] *Id.* at 1271 (Kavanaugh, J., dissenting); *see also* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 Yale L.J. 852 (2013) [hereinafter Miller, *Text, History, and Tradition*] (exploring, *inter alia*, the risks and rewards of a historical approach).

[26] *See, e.g.*, United States v. McGinnis, 956 F.3d 747, 761 (5th Cir. 2020) (Duncan, J., concurring) ("I write separately to reiterate the view that we should retire this [two-part] framework in favor of an approach focused on the Second Amendment's text and history."); Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 703 (6th Cir. 2016) (Batchelder, J., concurring in part).

[27] *See generally* Transcript of Oral Argument, *supra* note 2.

[28] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022).

the exception of the D.C. Circuit, had routinely upheld these "proper cause" laws using the conventional two-part framework.[29] But the majority of courts were wrong, according to the majority in *Bruen*.

"Despite the popularity of [the] two-step approach, it is one step too many,"[30] wrote Justice Thomas. The first part of the test is "broadly consistent with *Heller*" because it is rooted in "text, as informed by history."[31] But the second part of the two-part framework was foreclosed by *Heller*, which "did not invoke any means-end test such as strict or intermediate scrutiny."[32] Means-end scrutiny is balancing, and balancing, according to the Court, is judge-empowering.[33] The proper balance of gun rights and regulation was set "by the traditions of the American people,"[34] and any contemporary assessment of costs and benefits is impermissible policy-making by the Third Branch.[35]

Having rejected the circuits' consensus approach, the Court announced a new test: "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."[36] Under this new test, it isn't enough for the government to simply "posit that the regulation promotes an important interest";[37] it must "affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[38]

Of course, not every modern regulation has a historical duplicate. If it doesn't, a court is to examine whether the modern regulation is

---

[29] *See id.* at 2124 (citing Gould v. Morgan, 907 F.3d 659, 677 (1st Cir. 2018); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 101 (2d Cir. 2012); Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013); United States v. Masciandaro, 638 F.3d 458, 460 (4th Cir. 2011); Young v. Hawaii, 992 F.3d 765, 773 (9th Cir. 2021) (en banc)). *But see* Wrenn v. Dist. of Columbia, 864 F.3d 650, 668 (D.C. Cir. 2017).

[30] *Bruen*, 142 S. Ct. at 2127.

[31] *Id.*

[32] *Id.* at 2129.

[33] *Id.*

[34] *Id.* at 2131.

[35] *See id.*

[36] *Id.* at 2129–30.

[37] *Id.* at 2126.

[38] *Id.* at 2127.

"relevantly similar" to a historical one.[39] The Court declined to offer an "exhaustive survey" of what makes one regulation "relevantly similar" to another, but it did offer "two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense."[40] The "central" considerations in this analogical process will be "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified."[41] The court emphasized that there need not be a historical "twin" to the modern regulation, but that any analogue must be "well-established and representative."[42] Upholding any remotely comparable historical regulation "'risk[s] endorsing outliers that our ancestors would never have accepted.'"[43] This history-focused test, the Court reasoned, would rescue the Second Amendment from second-class status and restore it to equal dignity among the Bill of Rights.[44]

Having articulated the new test, the Court applied it, concluding that the plain text of "bear arms" in the Second Amendment, according to original public understanding, means to carry weapons for self-defense.[45] The Second Amendment thus presumptively covered the plaintiffs' conduct.

The burden then shifted to New York to show that its permitting law operated within a national tradition of regulation. New York and amici had amassed more than 700 years of Anglo-American regulation regarding public carry of firearms in an effort to show that New York's law was no historical anomaly. Indeed, the New York law itself

---

[39] *See id.* at 2132 (quoting Cass Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 773 (1993) (internal quotation marks omitted)).

[40] *Id.* at 2133.

[41] *Id.*

[42] *Id.*

[43] *Id.* (quoting Drummond v. Robinson, 9 F.4th 217, 226 (3d Cir. 2021)).

[44] *Id.* at 2130, 2156; *see* Joseph Blocher & Eric Ruben, *"Second-Class" Rhetoric, Ideology, and Doctrinal Change*, 110 Geo. L.J. 613 (2021).

[45] Though the parties did not really contest this conclusion, there is good reason to doubt it as a linguistic matter. Experts using eighteenth century documents and big-data techniques unavailable to the Court when it decided *Heller* have concluded that "bear arms" was overwhelmingly used at the time in a military or collective sense, not to connote the carrying of weapons for private purposes. *See* Dennis Baron, *Corpus Evidence Illuminates the Meaning of* Bear Arms, 46 Hastings Const. L.Q. 509, 510 (2019); Alison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, Panorama (Aug. 3, 2008), http://thepanorama.shear.org/2018/08/03/historical-semantics-and-the-meaning-of-the-second-amendment.

had been in place for more than a century, since at least 1911.[46] Nevertheless, the majority combed through all these regulations and explained away each one as an outlier with respect to a tradition of regulating public carry.

In doing so, the Court was bracingly candid: "not all history is created equal."[47] It chopped the historical evidence into five categories: medieval to early modern England, colonial and early American Republic, antebellum, Reconstruction, and late nineteenth to early twentieth century. Having broken the historical evidence into pieces, the Court rejected it case by case, statute by statute.

The Court began with medieval and early-Modern English law. Although the Second Amendment reflects a "pre-existing" right inherited from our English ancestors, regulations that "long predate []" the Second Amendment may not be indicative of a tradition "if linguistic or legal conventions changed in the intervening years."[48] Therefore, the copious regulation of public arms from the thirteenth century to early modern England failed to establish a relevant tradition: they were too old, they had fallen into desuetude,[49] they were limited to armor and medieval weapons,[50] they were the product of partisan or sectarian hostility[51] or domestic upheaval,[52] or they required a *mens rea* of carrying weapons "to the terror of the people."[53]

Colonial regulations contemporary to 1791—the date of the Second Amendment's ratification—did not fare any better. In the Court's estimation, New York had produced only three regulations on public carry, and two of them were identical.[54] These regulations only proscribed "dangerous and unusual" weapons, and twenty- first century handguns are no longer "dangerous and unusual."[55] The

---

[46] *Bruen*, 142 S. Ct. at 2122.

[47] *Id.* at 2136; *cf.* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1155 (9th Cir. 2014) ("All [Second Amendment precedents] are, in a broad sense, equally relevant, for every historical gloss on the phrase 'bear arms' furnishes a clue of that phrase's original or customary meaning. Still, some cases are more equal than others."), *rev'd on reh'g en banc*, 824 F.3d 919 (9th Cir. 2016).

[48] *Bruen*, 142 S. Ct. at 2136.

[49] *Id.* at 2140–41 & n.10.

[50] *Id.* at 2140.

[51] *Id.* at 2141.

[52] *Id.* at 2139.

[53] *Id.* at 2141.

[54] *Id.* at 2142.

[55] *Id.* at 2143.

historical regulations only touched on concealed carry, and only of weapons with three to four inch barrel lengths;[56] they didn't prohibit the carrying of long guns.[57] They also required a mens rea of "causing terror."[58]

Although New York had produced substantial evidence of common law and statutory regulation of public carry, this too was insufficient to form a tradition supporting New York's law. The Court found that the antebellum cases all required a showing of terror, and there was "no evidence indicating that these common-law limitations impaired the right of the general population to peaceable public carry."[59] Further, some regulations permitted open carry.[60] All were too new, as they were enacted seven decades after ratification of the Second Amendment.[61] Some were enacted by territorial jurisdictions that were not yet states.[62] The ten jurisdictions which passed surety statutes—statutes that required a bond to carry weapons in public—only addressed persons "threatening to do harm"[63] and required a citizen complaint (except for two antebellum laws in Virginia and West Virginia, which were, according to the Court, outliers[64]). Further, these surety laws were not clearly shown to be enforced, or were enforced pretextually, or were enforced with insufficient criminal sanction.[65] All of this made them "poor analogues to New York's proper-cause standard."[66]

Reconstruction regulations also failed to establish a tradition. A general order by a Union commander in the Carolinas to prevent the carrying of deadly weapons, except by those in active military service, was a wartime exigency subject to military jurisdiction, and therefore inapt.[67]

---

[56] *Id.*

[57] *Id.* at 2144.

[58] *Id.* at 2145.

[59] *Id.*

[60] *Id.* at 2142, 2144.

[61] *Id.* at 2147 n.22.

[62] *Id.* at 2147 n.22.

[63] *Id.* at 2148

[64] *Id.* at 2148 n.24.

[65] *Id.* at 2149.

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

[67] *Id.* at 2152 n.26. Notably, the Court found an order by this same Union general, allowing the carrying of weapons openly (not concealed) except among vagrants, the disorderly, or disturbers of the peace, as prima facie evidence of a right to bear arms for personal self-defense. *Id.* at 2152.

Some regulations were applied in a racially partial manner, and (presumably) suspect for that reason.[68] The Court "acknowledge[d]" that two late 1800s Texas cases and a West Virginia Supreme Court case all upheld statutes requiring "reasonable grounds" to carry weapons, which were analogous to "New York's proper-cause requirement," but these were dismissed as outliers because they were only a "single state statute and a pair of state-court decisions."[69]

Late nineteenth-century regulations, like prohibitions on firearms in towns, cities and villages, suffered from several defects. First, they were too remote from the Founding; second, "the vast majority" of the evidence "came from the Western Territories,"[70] even then, the regulations were too "localized," and governed "less than 1% of the American population" at the time.[71] Further, the regulations were not often litigated, obscuring their "perceived legality"; they excepted certain types of weapons, and those that were upheld conflicted with the decision one hundred years later in *Heller*.[72] These territorial restrictions were thus "passing regulatory efforts by not-yet-mature jurisdictions on the way to statehood, rather than part of an enduring American tradition of state regulation."[73] One state regulation potentially analogous to New York's was a 1881 Kansas statute obliging cities with more than 15,000 residents to regulate arms. But, according to the Court, that only covered Kansas City, Topeka, and Wichita, which "[a]ccounted for only 6.5% of Kansas's total population."[74]

In sum, according to the Court, the seven hundred years of history that New York and amici had produced could not demonstrate a long American tradition of regulating arms with a "proper cause" standard—at least not once the outliers were removed. Hence, the law violated the Second Amendment.

B. ANALYSIS AND OPEN QUESTIONS

Whatever one's view of New York's regulation, *Bruen*'s new methodology represents a problematic shift in Second Amendment doctrine,

---

[68] *Id.* at 2152 n.27.

[69] *Id.* at 2153.

[70] *Id.* at 2154.

[71] *Id.* at 2154–55.

[72] *Id.* at 2155.

[73] *Id.* at 2155.

[74] *Id.* at 2156.

and perhaps constitutional law more generally. Just how big of a problem remains unclear, as it is not apparent how broadly *Bruen* sweeps. Three Justices in the majority wrote or joined concurrences that appear to trim the ambition of Justice Thomas's opinion—either as to the topics it covers or the methods it employs or both.

Justice Samuel Alito suggested that the historical analysis only goes to the unconstitutionality of a permitting law like New York's: "That is all we decide."[75] According to Alito, the ruling says nothing about who may buy firearms, or what they must do to buy them; it doesn't decide anything about the kinds of arms that are constitutionally protected, "[n]or have we disturbed anything that we said in [*Heller* or *McDonald*] about restrictions that may be imposed on the possession or carrying of guns."[76]

Justice Brett Kavanaugh, joined by Chief Justice John Roberts, wrote a separate concurrence that also seemed to cool *Bruen*'s revolutionary fire. On his account, there are "limits" to the Court's opinion. The decision "does not prohibit States from imposing licensing requirements for carrying a handgun in self-defense" along the lines of the forty-three other states with "shall-issue" laws that use more objective metrics. Further, "[p]roperly interpreted, the Second Amendment allows a 'variety' of gun regulations."[77] To emphasize the point, Justice Kavanaugh reproduced assurances from *Heller* and *McDonald* that the Court was not scrapping all gun regulations. "Like most rights, the right secured by the Second Amendment is not unlimited," he reiterated:

> 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 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.][78]

---

[75] *Id.* at 2157 (Alito, J., concurring).

[76] *Id.*

[77] *Id.* at 2162 (Kavanaugh, J., concurring).

[78] *Id.* (quoting and citing Dist. of Columbia v. Heller, 554 U.S. 570, 626–27 & n.26 (2008) (citations and quotation marks omitted); and McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion)).

Nor does the *Bruen* opinion, according to Kavanaugh, implicate prohibitions on weapons that are "not in common use at the time," a limitation supported by the prohibition on "carrying of dangerous and unusual weapons."[79] These precatory statements and assurances by three of the six Justices who formed the majority raise nettlesome questions as to what the case actually decides.

Then there's the uncertainty within the *Bruen* framework itself. Justice Thomas stated that so long as an individual's conduct falls within the "plain text" of the Second Amendment, it is presumptively protected and the burden shifts to the party defending the regulation to show that it is part of a longstanding American tradition. But that's almost certainly not right. A seventeen year old bringing a live hand grenade into a high school cafeteria fits within the plain text of "people" and "arms" and "bear."[80] It cannot be that such behavior raises a *prima facie* Second Amendment issue such that the school district must prove a longstanding tradition of keeping minor children from bringing explosives to school. Indeed, the majority itself suggests elsewhere that the first step is not just "plain text" but "text, as *informed by history*."[81] If that's the case, then it appears incumbent upon the challenger of a regulation to show more than that his conduct falls within the dictionary meaning of the Second Amendment's words; he must show how his conduct falls within a textually specified historical practice that was widely understood to be a matter of right. Only then would the burden shift to the defenders to establish a tradition of regulation.

Perhaps most perplexing, *Bruen* relied heavily on analogy but never specified criteria for determining when a present-day regulation is relevantly, as opposed to trivially, analogous to one in the past.[82] The majority assures us that its demand for analogues is neither a "regulatory straightjacket" nor a "blank check," but provides slender guidance on how to pilot between these two hazards. Instead, we get a set of abstractions: an analogue must be "well established and

---

[79] *Id.*

[80] *Heller*, 554 U.S. at 582, 584 (2008) ("bear" simply means "carry"; "keep arms" means simply "have weapons"). Again, this interpretation of "bear arms" as a matter of original public meaning is almost certainly wrong according to linguists and historians. *See supra* note 45.

[81] *Bruen*, 142 S. Ct. at 2118–19 (emphasis added).

[82] Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L.J. (forthcoming 2023) (on file with authors).

representative" instead of an "outlier."[83] For a "general societal problem that has persisted since the 18th century," the analogue must operate in "materially" similar ways and not have been "rejected on constitutional grounds" by some undetermined number of jurisdictions, or else it's a historical anomaly that cannot support the contemporary regulation.[84]

So how is a court supposed to analyze firearms on subways or airplanes? How should one describe the general societal problem in that context, and with what evidence? Is it gun violence generally? Is it terrorism? What does a "representative historical analogue" look like before the advent of railroads and airplanes? A boat? A buggy?[85] Are regulations forbidding the firing of guns from the decks of riverboats[86] "materially different" from regulations forbidding the possession of loaded guns in carry-on luggage? Or should the analogue be weapon regulation in areas of intense congestion, like fairs and markets? The Court says that judges are to look to "how and why" the analogous regulation burdens a right to armed self-defense, but that, as Justice Breyer notes in dissent, is exactly what means-end scrutiny is supposed to do.[87]

Working with analogues may be possible when there's a historical equivalent. But how courts will find, much less assess, "representative historical analogue[s]" to modern prohibitions on guns on subway cars and jet airplanes, or possession of untraceable firearms,[88] or possession by domestic abusers, remains distressingly indefinite.[89]

---

[83] *Id.* at 2133.

[84] *Id.* at 2131.

[85] *Cf.* United States v. Jones, 565 U.S. 400, 420 (2012) (Alito, J., concurring) (noting, in a case about whether the government's installation of a GPS device in a car constituted a Fourth Amendment search, "it is almost impossible to think of late–18th-century situations that are analogous to what took place in this case. (Is it possible to imagine 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?)").

[86] An Ordinance to Prevent Accidents from the Firing of Cannon or Other Guns on Boats, in Front of the City of Cincinnati § 1 (1828) ("[I]t shall not be lawful for any person or persons having charge or being on board of any boat upon the Ohio river, when passing by, stopping at, or leaving the city of Cincinnati, to cause any cannon, gun or other fire-arms, to be so fired as to discharge its contents towards the city. . . .").

[87] *Bruen*, 142 S. Ct. at 2179 (Breyer, J., dissenting).

[88] *See id.* at 2181 (Breyer, J., dissenting).

[89] Justice Breyer feared the Court had engineered a Second Amendment "one-way ratchet" where courts would examine prima facie claims at a very high level of generality (a "person," "keep[ing]" or "bear[ing]" an "arm"), but require any "representative historical analogue" the government supplies to be nearly identical to the modern regulation. *Id.* at 2180 (Breyer, J., dissenting). Initial post-*Bruen* cases show this fear is warranted, and that lower courts are not

II. Manufacturing Outliers

It will take decades for courts and scholars to work through *Bruen*'s problems. In the remainder of this Article, we focus on one—its recurrent reliance on the idea of an "outlier." As shown above, *Bruen* places substantial analytical weight on its characterization of laws as outliers. New York's permitting law is an outlier. Colonial regulations are outliers. Territorial laws are outliers. Reconstruction-era laws are outliers. In a broader context, the Court suggests the Second Amendment is itself being treated as an outlier among the guarantees in the Bill of Rights. *Bruen* uses the term outlier as a statement of fact and as a justification for action. But what does the Court mean by the term, and what considerations should guide its use?

A. TRANSPARENCY

A central defect of *Bruen* is the suggestion that its "outliers" were simply found. They weren't. They were created. *Bruen*'s outliers are the product of decisions both inside and outside the Court, motivated by express and assumed judgments about how to count, and what counts. But the Court does not explain, much less justify, how it is constructing its baseline or how evidence deviates meaningfully from that baseline. The result is an impressionistic and seemingly arbitrary set of conclusions that at best mask the values animating the analysis, and at worse appear to be post-hoc reasoning for a pre-determined outcome.

There are, in fact, varying accounts of why the Supreme Court might nationalize legal standards against outliers.[90] The Court might trim outliers because state laws are a rough proxy for political consensus.[91] The Court might trim outliers because it's attempting to ascertain

---

yet adopting equivalent levels of generality on both sides of the rights/regulation equation. *See* Andrew Willinger, Stickley v. Winchester, *State Analogues, and the Folly of Narrow Historical Focus*, Second Thoughts Blog (Oct. 7, 2022), https://firearmslaw.duke.edu/2022/10/stickley-v-winchester-state-analogues-and-the-folly-of-narrow-historical-focus.

For exploration of historical tests that would not fall into this trap, see Miller, *Text, History, and Tradition*, *supra* note 25 (arguing that if courts adopt analogues, the level of generality must be the same for both the rights and regulations); and Darrell A.H. Miller, *Second Amendment Equilibria*, 116 Nw. U. L. Rev. 239 (2021) [hereinafter Miller, *Second Amendment Equilibria*] (same).

[90] We offer three, although there may be other reasons why the Court trims outliers. *See* Driver, *supra* note 4, at 951–63.

[91] *Cf.* Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. Cal. L. Rev. 1447, 1478 (1995) ("As an

the original public understanding of a constitutional provision. Or the Court might trim outliers because it becomes satisfied from sub-constitutional consensus that nationalization will be net positive and will not generate catastrophic outcomes.[92]

Whatever the reason, identifying outliers requires choosing a reference set, and that choice is freighted with value judgments.[93] For example, using the States as the unit of measure for political consensus assumes the states are a superior proxy for the political preferences of their residents than other proxies. Discerning original public meaning from litigated cases assumes litigated cases are a reliable metric for public understanding. All these assumptions are unstated, and all do a lot of work in *Bruen*'s definition of outliers.

Take the Court's insistence that New York's "may issue" law was anomalous compared to that of forty-three other states. The first, unstated assumption is that states are the right reference set, even if some of these states are thinly populated or lack urban centers. If the Court had used population as the relevant denominator, then New York's law is not an outlier—good cause permitting covers fully a quarter of the American population, including some of the highest population densities in the country.[94] In fact, elsewhere in the opinion the Court *does* invoke population as a relevant metric, dismissing various gun laws in the territories as outliers because of "the miniscule territorial populations who would have lived under them."[95] It is not clear from the opinion why population is relevant in one context but not the other.

If at-large population is the wrong denominator, why should states be the right one? New York's law would have looked far more typical if the denominator had been large municipal governments.[96] If you

institution of national power, the Supreme Court might be expected to enforce national consensus politics against outlier or shirking states.").

[92] Roderick M. Hills, Jr., *Counting States*, 32 Harv. J.L. & Pub. Pol'y 17, 25 (2009) (state experimentation "provides information to national decision makers about how the 'maverick' norms will operate on the ground, allowing them to decide whether to nationalize the norms after they have proven themselves to be sound policies").

[93] *See* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 Harv. L. Rev. 148, 148 (2005) (setting a denominator "requires choices about which . . . jurisdictions are relevant").

[94] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2172–73 (2022) (Breyer, J., dissenting).

[95] *Id.* at 2154 (majority opinion).

[96] *See* Brief of Former Major City Police Chiefs as *Amici Curiae* in Support of Respondents, *Bruen*, 142 S. Ct. 2111 (No. 20-843) (brief filed by leaders of police departments of Boston,

combine the populations of Maine, Rhode Island, Montana, Delaware, South Dakota, North Dakota, Alaska, Vermont, and Wyoming it still doesn't equal the population of the City of New York. And even *that* approach might under-represent political preferences, considering that nearly all the forty-three states with "shall issue" or permitless carry also preempt local governments from enacting their own gun regulations.[97] That means that major urban centers like Houston and Phoenix may have their preferences unaccounted for when the unit of measure is legal regulation, because they're prohibited from registering their preferences as law. Further, some of this legislation (or absence of it) is the product of either a heavily gerrymandered state legislative map[98] or an equally skewed direct democracy mechanism.[99] The result is a data set that provides more voice to rural and less diverse populations compared to urban and multi-racial populations.

Finally, as Justice Breyer remarked in dissent, New York is only an outlier given a "snapshot" of the law in 2022.[100] Look back just forty years and the ratio is completely reversed: "shall issue" was limited to just five states[101] and permitless carry was the law of just

Buffalo, Chicago, Los Angeles, Milwaukee, Newark, New York City, Philadelphia, Seattle, and Washington, D.C.); Brief of City of Chicago and Eleven Other Cities as *Amicus Curiae* in Support of Respondents, *Bruen*, 142 S. Ct. 2111 (No. 20-843) (amici on behalf of Chicago, Baltimore, Cincinnati, Columbus, Dayton, Ohio, Los Angeles, Philadelphia, Portland, San Diego, San Francisco, Seattle, and St. Paul).

[97] Joseph Blocher, *Cities, Preemption, and the Statutory Second Amendment*, 89 U. Chi. L. Rev. 557 (2021).

[98] Paul A. Diller, *Toward Fairer Representation in State Legislatures*, 33 Stan. L. & Pol'y Rev. 135, 136 (2022) ("Gerrymandering and the uneven translation of votes into seats has entrenched political parties in control of the legislature in many states across election cycles despite often lacking a majority of statewide support.").

[99] Some states require the petitions for direct democracy initiatives to meet a geographic distributional requirement within the state, often giving rural communities a veto over direct democracy efforts supported by large urban centers. *See* Bernbeck v. Gale, 829 F.3d 643, 650 (8th Cir. 2016) (Kelly, J., dissenting) (plaintiff bringing Equal Protection claim on basis that "because Nebraska's counties vary widely in population … the signature-distribution requirement [to place an initiative on the ballot] gives disproportionate influence to voters in sparsely-populated counties"); *see also Initiative and Referendum Processes*, Nat'l Conf. of State Legislatures (Jan. 4, 2022), available at https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx ("To make it more difficult to place initiatives on the ballot and to ensure initiatives do not represent just the interests of heavily populated areas, some states have created a requirement that signatures be gathered from across the state.").

[100] *Bruen*, 142 S. Ct. at 2172 (Breyer, J., dissenting).

[101] In 1983, Indiana, Maine, New Hampshire, Rhode Island, and Washington all had shall issue licensing. Rhode Island's shall issue was limited to a reciprocity provision.

one.[102] New York went from being fairly representative to an outlier thanks to lobbying by gun-rights advocates, legislation by pro-gun state assemblies, and naked appeals to popular notions of the Constitution, history, and tradition.[103]

As Professor Jake Charles has documented, as recently as 1980 fully one-quarter of states outlawed concealed carry altogether, with most of the other states operating a "proper cause" or similar "may issue" licensing regime.[104] But "[t]his paradigm began to erode dramatically in the 1980s."[105] Florida kicked off a wave of state law changes when it adopted a "shall issue" law that retained certain requirements, but removed the "special need" or "proper cause" element.[106] By the time *Bruen* was decided, there was not a single jurisdiction in the United States that did not allow some form of concealed carry.[107]

A second wave of gun-rights legislation began to build shortly before the *Heller* decision in 2008, and soon overtook established institutions of gun-rights advocacy like the NRA. The permitless or "constitutional carry" movement was initiated in an Arizona diner around 2005,[108] and by 2020 had spread to sixteen states. With the repeal of permitting in Alabama and Florida in 2023, over half of the states are now permitless.

These legislative innovations often speak in a specific constitutional register, as the "constitutional carry" terminology attests. Washington's permitting law, for instance, has a preface that "[t]he applicant's constitutional right to bear arms shall not be denied, unless . . ."[109] The Governor of Georgia, signing a permitless carry act in 2022 announced, "The Constitution of the United States gives

---

[102] In 1983, Vermont was the only state with permitless carry.

[103] In this way, it was simply a specific iteration with public carry of a larger phenomenon of "originalism as popular constitutionalism" that Reva Siegel aptly identified in *Heller*. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 Harv. L. Rev. 191, 192 (2008).

[104] Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 Mich. L. Rev. 581, 596 (2022).

[105] *Id.*

[106] *Id.*

[107] Adam Weinstein, *Meet the Gun Rights Absolutists Bringing 'Constitutional Carry' to a State Near You*, Trace (Feb. 8, 2017), https://www.thetrace.org/2017/02/constitutional-carry-gun-rights-absolutists.

[108] *Id.*

[109] Wash. Rev. Code Ann. § 9.41.070 (West 2022).

us that right [to carry without a permit] – not the government."[110] For proponents of "constitutional carry" in particular, the idea that the only permit necessary to carry a firearm was signed in 1791 is not a slogan, it's a legal and historical reality. Although the historical record supporting a tradition of permitless concealed carry is thin to non-existent—*Heller* itself recognized as much[111]—that does not stop adherents from arguing that American tradition and constitutional law is on their side. The majority leader of the New Hampshire Senate, for example, explained his support this way: "We have historically allowed people to openly carry a pistol. I don't see why you have to get a second permit if you're a law-abiding citizen and legally entitled to own a gun."[112] A sponsor of a permitless carry bill in Utah said: "I have that right to protect myself, the Constitution says we have the right. Why are we putting a barrier for law-abiding citizens?"[113] The sponsor of the Ohio permitless carry bill made similar remarks: "Responsible gun owners should not be punished for lawfully practicing their constitutional rights."[114] The attitude can be summarized by one journalist who interviewed "constitutional carry" advocates: "The concept, rooted in constitutional originalism, assumes that the authors of the Second Amendment envisioned an unfettered right to wield a gun for personal defense."[115] To these adherents, "*any* limitation on an individual's right to carry guns, however small, is unjust. Full stop. As such, passing constitutional-carry legislation is seen by proponents as a restoration, not an expansion, of gun freedoms."[116]

---

[110] Press Release, Off. of the Governor, Gov. Kemp Signs Georgia Constitutional Carry Act into Law (Apr. 13, 2022), https://gov.georgia.gov/press-releases/2022-04-13/gov-kemp-signs-georgia-constitutional-carry-act-law.

[111] Dist. of Columbia v. Heller, 554 U.S. 570, 626 (2008) ("[T]he 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.").

[112] Katie Zezima, *More States Are Allowing People to Carry Concealed Handguns Without a Permit*, Wash. Post (Feb. 24, 2017, 9:15 AM), https://www.washingtonpost.com/news/post-nation/wp/2017/02/24/more-states-are-allowing-people-to-carry-concealed-handguns-without-a-permit.

[113] Ray Nothstine, *How Far Will North Carolina Fall Behind on Gun Rights?*, Carolina J. (Jan. 25, 2021), https://www.carolinajournal.com/opinion/how-far-will-north-carolina-fall-behind-on-gun-rights.

[114] Press Release, The Ohio Senate, Senate Concurs with Changes to Johnson Permitless Carry Bill (Mar. 2, 2022), https://ohiosenate.gov/senators/johnson/news/senate-concurs-with-changes-to-johnson-permitless-carry-bill.

[115] Weinstein, *supra* note 107.

[116] *Id.*

The normativity of those arguments is evident—though unrecognized—in the Court's own treatment of the historical record.

Bruen says the historical laws supporting New York's regulation are outliers compared to the tradition of public carry regulation. But *Bruen creates* that tradition through a series of choices about the level of generality at which to identify a practice, the level of generality at which to identify a regulation, and the relevant denominator of practices, laws, groups and political units at which to define the tradition.[117]

Consider how *Bruen* dismisses the stringent regulations on public carry in the Western territories. Justice Thomas describes these regulations as outliers because they did not survive the transition into statehood.[118] That might be defensible if states were good proxies for consensus on the original understanding of the Second Amendment. But it is indefensible if the best measure of original understanding are those jurisdictions subject to the Second Amendment before the advent of incorporation. In those circumstances, the most probative reference set would be the territories, because they—*unlike* states—were subject to the Bill of Rights. In that sense, as Andrew Willinger notes, "the five territorial public-carry laws the Court declined to credit in *Bruen* may not be outliers at all, but in fact may hold crucial clues to the meaning of the *federal* Second Amendment in the 19th century."[119]

Similarly, the Court treats historical laws banning the carrying of concealable weapons as outliers when compared to four states that struck down similar regulations in the South.[120] But why are litigated cases the relevant metric for accurately assessing the legal tradition? Why wouldn't the relevant metric include all those jurisdictions where regulations went unchallenged (or unenacted) because the practice was socially frowned upon—and therefore rare[121]—or unchallenged

---

[117] *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2184, 2186–87 (Breyer, J., dissenting).

[118] *Id.* at 2155 (the territorial laws "appear more as passing regulatory efforts by not-yet-mature jurisdictions on the way to statehood, rather than part of an enduring American tradition of state regulation").

[119] Andrew Willinger, *Territorial Gun Regulation and the "Lost" History of the Federal Second Amendment*, Second Thoughts Blog (Aug. 8, 2022), https://firearmslaw.duke.edu/2022/08/territorial-gun-regulation-and-the-lost-history-of-the-federal-second-amendment; *see also* Andrew Willinger, *The Territories Under Text, History and Tradition*, 101 Wash. U. L. Rev. (forthcoming 2024) (on file with authors).

[120] *See Bruen*, 142 S. Ct. at 2146–47.

[121] The Court's citation of *State v. Huntly*, 25 N.C. 418 (1843), is important in this regard. *Huntley* does say that the state cannot criminalize *all* forms of public carry (which not even

because no one thought the Second Amendment had anything to say about the regulation?[122] In fact, the Court takes precisely this kind of approach when reiterating the constitutionality of restrictions on guns in "sensitive places" like polling places and courthouses, saying "we are also aware of no disputes regarding the lawfulness of such prohibitions. We therefore can assume it settled that these locations were 'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment."[123] If the relevant metric for tradition is not "what was litigated" but "what did people do and believe" then all kinds of historical sources, including newspaper articles, opinion pieces, letters and other materials should be evidence of the relevant "tradition,"[124] not just litigated cases available on Westlaw.

The difficulty here goes beyond the challenge of excavating historical sources, dealing with historical silences, and managing the disjunction between the craft of historians and that of judges. The Court has failed to acknowledge the inevitable role of "creativity and interpretive choice" that shapes its treatment of the historical record.[125] By dismissing so much of the historical evidence, and then regarding the remainder as a self-evident, pre-existing, and neutral baseline, the Court confuses an exercise in discretion for a process of discovery.

B. RIGOR

If *Bruen*'s first shortcoming is a lack of candor about its own role in manufacturing outliers, its second shortcoming is a lack of rigor in

New York's law did). But it also says that public carry is an unusual practice to be discouraged. *Id.* at 422 ("A gun is an 'unusual weapon,' wherewith to be armed and clad. No man amongst us carries it about with him, as one of his every day accoutrements—as a part of his dress—and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment.").

[122] *Bruen*, 142 S. Ct. at 2189 (Breyer, J., dissenting).

[123] *Id.* at 2133 (majority opinion).

[124] *See* Miller, *Second Amendment Equilibria*, *supra* note 89, at 247 (arguing that a more accurate measure of traditions could be adduced from "a wide range of sources, including folkways, state and local customs, law enforcement records, newspaper reports, private correspondence, and policy statements, as well as statutes, regulations, and state and federal court decisions").

[125] H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 660–61 (1987) ("My specific concern is to argue that the turn to history does not obviate the personal responsibility of the originalist interpreter for the positions he takes, because historical research itself, when undertaken responsibly, requires of the interpreter the constant exercise of judgment. Historical judgments, while by no means exercises in unconstrained or subjective creativity, necessarily involve elements of creativity and interpretative choice.").

defining them.[126] Calling something an outlier suggests the categorization is based on some kind of empiricism, something objective, falsifiable and roughly quantitative, based on a method that submits to a disciplinary standard. This is consistent with the general claim that originalism, in particular, can supply a kind of empirical determinacy with history and tradition that other methods of constitutional interpretation cannot.[127] An "I know it when I see it" standard for outliers is unsuitable to a claim that purports to an empirical statement of fact.

Where might one begin to articulate the minimum rigor for outlier analysis in constitutional law?[128] Given that the term itself seems borrowed from empirically-oriented disciplines—and is being used to similar ends—one might take some guidance from outside the law. The National Institute of Standards and Technologies defines outlier this way:

> An *outlier* is an observation that lies an abnormal distance from other values in a random sample from a population. In a sense, this definition leaves it up to the analyst (or a consensus process) to decide what will be considered abnormal. Before abnormal observations can be singled out, it is necessary to characterize normal observations.[129]

Three implications flow from this definition. First, there needs to be a sufficient sample to determine whether there's a distribution. A single point can't be an outlier. Second, the sample has to fall within an

---

[126] For more on the need for more empirical rigor in statements about the state of the law among lawyers, judges and legal academics, see William Baude, Adam S. Chilton & Anup Malani, *Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews*, 84 U. Chi. L. Rev. 37 (2017).

[127] We say "history" here, but most varieties of originalism purport to be constrained by some objective criteria, whether it is linguistics, methods, or intentions. *See supra* note 10 and sources cited therein. *But cf.* Calvin Massey, *Elites, Identity Politics, Guns, and the Manufacture of Legal Rights*, 73 Fordham L. Rev. 573, 581 (2004) (discussing the possibility that "text and tradition are simply rhetorical tropes" that enable judicial officers "to respond to the identity politics of the political right without overtly appearing to do so").

[128] Driver, *supra* note 4, at 930 n.2 (doing some of this definitional work); *see also* Baude, Chilton & Malani, *supra* note 126, at 37 (looking to "systematic reviews" in other disciplines with similar problems of transparency and falsifiability as guides to make doctrinal analysis more rigorous).

[129] Handbook of Statistical Methods, Nat'l Inst. of Standards & Tech., https://www.itl.nist.gov/div898/handbook/prc/section1/prc16.htm; *see also* Charles Yoe, Principles of Risk Analysis: Decision Making Under Uncertainty 489 (2019) ("An outlier is an observation that 'appears' to be inconsistent with other observations in the data set. It is usually left to the analysts to define what is unusual."); Osage Tribe of Indians of Okla. v. United States, 96 Fed. Cl. 390, 418 (2010) ("In its most general sense, an outlier is defined as '[a]n observation that appears to deviate markedly from the other members of the sample in which it occurs.'" (quoting B.S. Everitt, The Cambridge Dictionary of Statistics 274 (2d ed. 2002)).

identifiable grouping—there are no outliers when every point is an outlier. And, although researchers exercise some discretion in designating a data point as "abnormal" relative to the distribution, the discretion is not unbounded. There may be a "consensus process" to determine whether to recognize the data point as an outlier; there may be norms of the profession to justify whether something lies outside the distribution. Finally, outliers must be the result of observations. At the very least, an outlier designation can be challenged by other researchers based on a set of pre-existing criteria. Moreover, in any empirical project it's highly unorthodox—and usually forbidden—to cherry pick the data to fit a distribution you seek, rather than have the data determine the distribution.

Observations also have to be grouped according to some set of criteria or coding.[130] The norms of empirical disciplines vary, but the process tends to be designed to generate reliable data that minimizes bias or error,[131] is transparent and, if possible, is replicable.[132] Second, the more potential for bias to creep into the exercise, the more it needs to be distanced from the researcher.[133] In some empirical disciplines, for example, it's preferable to have blind coding—where the coders are given a set of parameters, but not given any information about the theory for which they are coding.[134] In other disciplines, the coding is done by two different individuals, with a third resolving disputes between the codes based on a set of ex-ante metrics.[135]

Describing the outlier analysis as a search for "tradition" does not eliminate the need for rigor.[136] Invocation of a "tradition" also presumes

---

[130] Epstein & Martin, *supra* note 14, at 10 ("Once researchers decide how and how much data to collect, they must code the data—that is, translate the information into a usable form for analysis.").

[131] *Id.* at 87–94 (discussing methods of avoiding bias in selecting data).

[132] *Id.* at 59 ("[A]ll empirical studies should adhere to the *replicability standard*: anyone should be able to understand, evaluate, build on, or reproduce the research without any additional information from the author.").

[133] *Id.* at 95, 96, 106 (discussing general principles for coding both quantitative and qualitative data to ensure the coding is reliable and replicable).

[134] Kimberly A. Neuendorf, The Content Analysis Guidebook 158 (2d ed. 2017); Gene Williams, Applied Qualitative Research 184 (2019).

[135] Lucienne T.M. Blessing & Amaresh Chakrabarti, DRM, a Design Research Methodology 120 (2009).

[136] *See* Epstein & Martin, *supra* note 14, at 9 (discussing how part of empirical research is reducing abstract and conceptual concepts like "judicial independence" or "economic freedom" to the concrete, observable and testable).

some kind of empiricism. Sociologists define tradition as "[a] set of social practices which seek to celebrate and inculcate certain behavioural norms and values, implying continuity with a real or imagined past, and usually associated with widely accepted rituals or other forms of symbolic behaviour."[137] Although the data sets and coding may be different than more quantitative projects, identifying a "tradition" still requires designation of a relevant community and some set of phenomena, practices, or regulations sufficient in number and similarity to form a distribution, and some duration of time.[138] Practices that deviate meaningfully from this grouping are outliers.

This is an incomplete survey, and we do not think that courts must necessarily adopt the definitions and norms of these disciplines.[139] But the alternative for law cannot be the kind of erratic, impressionistic approach on display in *Bruen*. Empirical standards exist among these other disciplines and share common features, and law should expect empirical conclusions about outliers to rely on processes of comparable rigor.[140]

Indeed, law already aspires to this kind of rigor in many different ways, employing techniques that effectively treat claims about outliers as matters of empirical fact. The content of customary international law, for instance, has long been defined as "a general and consistent practice of states followed by them from a sense of legal obligation."[141] At least one component of this doctrine looks to a

---

[137] John Scott & Gordon Marshall, A Dictionary of Sociology (3d ed. 2009); *cf.* David Jary & Julia Jary, Collins Dictionary of Sociology (4th ed. 2006) (defining custom as "any established pattern(s) of behaviour within a community or society").

[138] Richard A. Epstein, *Rediscovering the Classical Liberal Constitution: A Reply to Professor Hovenkamp*, 101 Iowa L. Rev. 55, 57 (2015) ("[N]o tradition is defined as a single point in time. . . ."); *see also* Epstein & Martin, *supra* note 14, at 9.

[139] Although, to the extent that courts are instructed by the Supreme Court analyze constitutional matters historically, it may be that courts will of necessity have to rely on the norms and consensus of historians instead of their own historical intuitions. United States v. Bullock, No. 3:18-CR-165-CWR-FKB (S. D. Miss. Aug. 21, 2018) ("Not wanting to itself cherry-pick the history, the Court now asks the parties whether it should appoint a historian to serve as a consulting expert in this matter. (citing Fed. R. Evid. 706)), https://s3.documentcloud.org/documents/23255743/us-v-bullock-historian-order.pdf.

[140] Baude, Chilton & Malani, *supra* note 126, at 50 (noting that disciplinary differences "justify caution when translating elements of systematic reviews to doctrinal work, but do not necessarily justify ignoring entirely the lessons of the methodology"); *see also* Epstein & Martin, *supra* note 14, at 96 (articulating a set of "best practices" for coding, while recognizing that the difficulty or ease of coding may vary across data sets).

[141] Doe v. Exxon Mobil Corp., 391 F. Supp. 3d 76, 89 (D.D.C. 2019) (quoting Restatement (Third) of Foreign Relations Law § 102(2) (Am. L. Inst. 1987)).

generalizable practice among nations,[142] followed over some duration of time—a determination that is supposed to be an empirical exercise.[143] Tort law routinely pegs a duty of care for professional service providers—like physicians—to a standard of care common to comparable experts.[144] And there are theories of the "reasonable person" that depend on observed behavior of a representative sample of people, rather than on a normative fiction of what a person should do.[145] Outside the Second Amendment, in other areas of constitutional law, judgments rest on empirical assertions of what is "cruel and *unusual* punishment,"[146] or what offends "contemporary *community* standards."[147]

Although the sophistication of empirical analysis varies across these domains, we would expect that, to the extent any of them make factual assertions about the world, they would engage in a methodologically rigorous process that produces, within some set of professionally

---

[142] J. Patrick Kelly, *The Twilight of Customary International Law*, 40 Va. J. Int'l L. 449, 500 (2000) ("In order to determine customary norms, one needs to know what counts as state practice and how to interpret that evidence.").

[143] Michael D. Ramsey, *The Empirical Dilemma of International Law*, 41 San Diego L. Rev. 1243, 1247 (2004) (determining international customary law "is fundamentally a factual inquiry, seeking an objective answer about the state of the real world"); Tara Helfman, *The Dread Pirate* Who*? Challenges in Interpreting Treaties and Customary International Law in the United States*, 90 Tul. L. Rev. 805, 818 (2016) ("Chief Justice John Marshall described the process of ascertaining a rule of customary international law as an empirical enterprise that requires 'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law.'" (quoting United States v. Smith, 8 U.S. (5 Wheat.) 153, 160–61 (1820)); *see also* Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 Am. J. Int'l L. 1, 11 (2012).

[144] Mark A. Hall et al., *Measuring Medical Practice Patterns: Sources of Evidence from Health Services Research*, 37 Wake Forest L. Rev. 779, 779–80 (2002) ("From a scientific perspective, determining a custom-based professional standard of care is partially or entirely an empirical question about actual physician behavior.").

[145] Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. Rev. 323, 371 (2012) (specifying the empirical essentials for a positive theory of a reasonable person as (1) "observations of the society, and not from the views of the researcher"; (2) more data means more accuracy; (3) "researchers may not make ex ante distinctions among individuals in the society," and (4) "it must be possible, at least on some occasion, to find that someone has behaved unreasonably").

[146] Young, *supra* note 93, at 148 ("American states split thirty to twenty on the legitimacy of the juvenile death penalty. On the international plane, however, the United States stood alone in condoning the practice.").

[147] Daniel L. Chen & Susan Yeh, *Distinguishing Between Custom and Law: Empirical Examples of Endogeneity in Property and First Amendment Precedents*, 21 Wm. & Mary Bill Rts. J. 1081, 1104 (2013) (concluding that "judges are applying the *Miller* community standards test and relying on local sexual norms" to decide obscenity cases); *see also* Young, *supra* note 93, at 160 (noting that "in order to employ any community standard, one must first consider whether a coherent consensus can be identified within the proposed frame of reference").

agreed-upon parameters, an empirically falsifiable project. Like the more-transparently empirical disciplines discussed above, they begin with an identifiable grouping of sufficient size (nations, professionals, states) compare them according to the variable of interest (practice, standard of care, punishments), using standards not selected by the legal decisionmaker itself.

Bruen does none of this.[148] At least, it doesn't do so in any way that's obvious or conforms to the best practices common to empirical work. None of the quality control techniques one would expect of other disciplines appear to have been employed in *Bruen*. To the extent that customs, traditions, and baselines have been established at all, they seem to have been done through amicus briefing on appeal—not, for example, through dispassionate accumulation and characterization of the evidence, or for that matter even through adversarial testing of claims (whether historical or otherwise) at trial.

To the contrary, the Court makes confident generalizations based on phenomenon that might *themselves* be outliers. The two petitioners were denied licenses, but their Second Amendment challenge was decided on the pleadings, meaning that there is no record evidence to support the majority's conclusions that there is "limited" judicial review of license denials, that New York's law is too "demanding" and that this makes New York an outlier compared to the "vast majority of states."[149] It is entirely possible that the petitioners' experience was completely unrepresentative.

Further, the Court treats historical cases that are arguably outliers as indicative of broad historical trends. For example, the majority calls *Nunn v. State* "particularly instructive."[150] In that case, the Georgia Supreme Court applied the Second Amendment to state law at a time when Georgia had no similar provision in its state constitution, and just over a decade after the Court held that the Bill of Rights was not applicable to the states.[151] By nearly any measure,

---

[148] To be fair, the lack of rigor in specifying outliers is not unique to the Second Amendment. *See* Hills, *supra* note 92, at 21 (speaking of the Eighth Amendment prohibition on executing persons with mental incapacity: "It defies common sense to believe that the legal norms followed in 60% of the states representing roughly half the nation's population are somehow 'objective evidence' that the norms followed by the rest of the country (that is, in 40% of the states representing the other half of the nation's population) violate 'national standards.'").

[149] N.Y. State Pistol & Rifle Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2123 (2022).

[150] *Id.* at 2147 (citing Nunn v. State, 1 Ga. 243 (1846)).

[151] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

Nunn's understanding of the Second Amendment was an outlier in antebellum America. And yet the majority reads it to "indicate[] that it was considered beyond the constitutional pale in antebellum America to altogether prohibit public carry."[152] If a single state case can stand for the scope of a constitutional right "in antebellum America" then how can the Court dismiss, for example, Texas's Reconstruction-era regulations as outliers? Or, for that matter, why should *Nunn* count so much more than the "handful" of jurisdictions with laws that, even under the Court's own telling, supported New York?[153]

Consider, too, Justice Alito's assertion that the two-part doctrinal framework adopted throughout the federal courts of appeal "places no firm limits on the ability of judges to sustain any law restricting the possession or use of a gun. Two examples illustrate the point."[154] Considering that more than 1,000 Second Amendment challenges were resolved in the eight years after *Heller*—and probably more than 1,500 by the time *Bruen* was decided—one might expect more than two examples to sustain such a broad generalization, much less justify the doctrinal chaos *Bruen* threatens to unleash.

c. manufacturing outliers and the integrity of historical reasoning

The risk of non-transparent and improvised outlier analysis is not simply that it may result in unjustifiable or erratic case outcomes. It threatens the integrity of history as a modality of constitutional interpretation.[155] A chief selling point of originalism has always been that history is an objective and falsifiable metric that can constrain judicial decision-making. But you need not buy all the judicial-constraint optimism of Ed Meese-era originalism to believe that statements of historical fact pronounced by the Court and statement of historical fact rendered by professional historians need share the same epistemic universe. A Court that repeatedly elevates one set of historical premises and denigrates the other, and then suffocates contrary historical evidence as "irrelevant" based solely upon its prior

---

[152] *Bruen*, 142 S. Ct. at 2147.

[153] *Id.* at 2138.

[154] *Id.* at 2160 (Alito, J., concurring).

[155] Philip Bobbitt, Constitutional Fate: Theory of the Constitution (1982).

decrees about history, risks an ever-increasing separation of law-office history from actual history.[156]

For example, in *Heller*, the Court was faced with a record containing many historical examples of strict and even prohibitionist gun regulation. Some courts applying *Heller* treated these historical laws as tainted, since some of them were based on the traditional view—rejected in *Heller*—that the right to keep and bear arms extended only to the organized militia.[157] *Bruen* engages in this same foreshortened historical investigation as well, discounting nineteenth century historical evidence when it is inconsistent with what *Heller* said over a century later.[158]

Every time the Court cuts off one of these lines of tradition as incompatible with its own historical construction, it shifts the baseline and the center of gravity for judicial history drifts further from the corpus of actual history.[159] Iterative pronouncements based on manufactured outliers are likely to continue in this context and in others, as the Court treats its holdings as precedential not only as to matters of law, but also matters of historical fact.[160]

This ratcheting effect may lead constitutional law further and further from *both* a historical baseline and contemporary best practices. As described above, "may issue" is an outlier as a result of a careful program of legislation and cultivation of constitutional memory.[161] But once you lop off "may issue," then "shall issue" becomes exposed. Employing the very same mechanisms that led to *Bruen* could lead another court to describe "shall issue" as the outlier and argue that permitless carry is what's required by the history and tradition of the

---

[156] Reva B. Siegel, *The Politics of Constitutional Memory*, 20 Geo. J.L. & Pub. Pol'y 19, 24 (2022) ("[C]onstitutional memory plays a special role in legitimating the exercise of authority when constitutional memory systematically diverges from constitutional history.").

[157] *See* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1155 (9th Cir. 2014), *rev'd on reh'g en banc*, 824 F.3d 919 (9th Cir. 2016).

[158] *Bruen*, 142 S. Ct. at 2155.

[159] *See* Stephen M. Griffin, *Optimistic Originalism and the Reconstruction Amendments*, 95 Tul. L. Rev. 281, 321 (2021) ("Public meaning originalism appears to produce outlier views from a historical perspective, views that can be understood as projections of an alternate reality had things been different.").

[160] On the topic of facts in constitutional adjudication, see Joseph Blocher & Brandon Garrett, *Originalism and Historical Fact-Finding*, 112 Geo. L.J. (forthcoming 2023) (on file with authors).

[161] On the difference between constitutional history and constitutional memory, see Siegel, *supra* note 156, at 24. For more on traditionalism's ratchet problem, see Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. Rev. (forthcoming 2023) (on file with authors).

Second Amendment. Nor is that kind of ratcheting confined to the issue of public carry. We can see the appeal of this tool to gun rights supporters who want to target other regulations—whether those are prohibitions on large capacity magazines and "M-16 rifles and the like,"[162] age restrictions on who may possess firearms; extreme risk protection orders; training requirements to carry; and so forth. All you have to do is pull the legislative levers with receptive legislatures, support the position with a particular form of constitutional memory, present the target jurisdiction as a contemporary and historical outlier, and what had—to invert Jack Balkin's framework—formerly been "on the wall" is rendered "off the wall."[163] The result may be an American firearm policy that ironically becomes less and less the work of legislatures and representative branches of government and more and more the exclusive task of judicial officers using crude adjudicative tools and an invented historical tradition.[164]

Conclusion

We come to neither praise nor bury judgments that trim outliers; there is an appropriate role for this form of analysis in constitutional law. At one time, suppressing outliers was seen as part of the Warren Court's project to "modernize" the law for twentieth century.[165] Most recently, on the left, the push for marriage equality adopted many of the same dynamics as the campaign against "may issue" in *Bruen*.[166]

---

[162] Dist. of Columbia v. Heller, 554 U.S. 570, 627 (2008).

[163] Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, Atlantic (June 4, 2012), www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040.

[164] Genevieve Lakier, *The Invention of Low-Value Speech*, 128 Harv. L. Rev. 2166, 2168 (2015) ("The term 'invented tradition' refers to novel social practices that are justified on the basis of an alleged, but ultimately fictitious, continuity with the past." (citing Eric Hobsbawm, *Introduction: Inventing Traditions*, *in* The Invention of Tradition 1, 1 (Eric Hobsbawm & Terence Ranger eds., 1992))).

[165] For an articulation and critique of this approach, see David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. Chi. L. Rev. 859, 862 (2009).

[166] *See* Neil S. Siegel, *Federalism as a Way Station:* Windsor *as Exemplar of Doctrine in Motion*, 6 J. Legal Analysis 87, 133–34 (2014); Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 Vand. L. Rev. 1183, 1197 (2017) (discussing the process whereby Court decisions affect "judicial precedent, legislation trends, and public opinion" which are then invoked for further change).

Nor do we think that *Bruen* is the only example of problematic outlier analysis. *Bruen* provides a useful illustration because of its salience, its insistence on historical objectivity, and its aggressive certitude. But the same lack of transparency and rigor so clearly on display in *Bruen* can found in decisions addressing other constitutional matters.[167]

Our more limited point is to caution that outlier analysis—to the extent it seeks to become relevant to, or even dispositive of[168] matters of constitutional law—is going to have to mature beyond the "open ended, rough-and-tumble"[169] fashion in which it's currently employed and become something far less opaque and far more exacting.

---

[167] *Cf.* Kennedy v. Louisiana, 554 U.S. 407, 448 (2008) (Alito, J., dissenting) ("In assessing current norms, the Court relies primarily on the fact that only 6 of the 50 States now have statutes that permit the death penalty for this offense. But this statistic is a highly unreliable indicator of the views of state lawmakers and their constituents."); *see also* Hills, *supra* note 92, at 21 (criticizing the Court's reasoning in an Eighth Amendment case).

[168] The dispositive nature of outliers is what's contestable. Shoddy empirics can show a theory false; but excellent empirics can't always prove a theory. Lopping off historical outliers can narrow the range of uncertainty or disagreement in much the same way that constitutional text can form a focal point, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 911 (1996); but resolution of the residual disagreement will have to be supplied by other kinds of commitments, whether Thayerian deference or other forms of judicial minimalism, Ely's representational reinforcement, Dworkinian moral readings of the Constitution, or some other theory.

[169] *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 360 n.2 (2009) (Roberts, C.J.) (internal quotation marks and citations omitted).