

# THE TERRITORIES UNDER TEXT, HISTORY, AND TRADITION

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## ABSTRACT

*In two of its major decisions in the 2021–2022 Term, New York State Rifle & Pistol Ass’n v. Bruen and Dobbs v. Jackson Women’s Health Organization, the Court continued solidifying its originalist method of constitutional interpretation by looking increasingly to historical regulatory practice to construe how the Constitution protects individual rights. The Court is focused not only on the original public meaning of constitutional provisions, but also on historical practice. Historical laws and practices are now key to understanding how those who lived at the relevant time thought a constitutional provision might be applied and what regulatory approaches were consistent with that provision. Bruen and Dobbs both considered laws passed by governments in the Western territories prior to statehood in the nineteenth century, but with polar opposite results. One day the Court suggested that territorial laws and practices were exceptional improvisations irrelevant to the search for a national tradition; the very next day, the Court implied that territorial laws can be valuable tools for constitutional interpretation. This Article searches for a more satisfying and consistent theory of how to utilize territorial history in constitutional cases.*

*Part I critically analyzes the decision in Bruen and the Court’s determination that territorial public-carry bans could not serve as analogues to support New York’s modern gun-licensing law. Part II explains the history of continental territories, examines Dobbs and other decisions invoking territorial laws and practices, and identifies relevant principles from legal scholarship regarding the Court’s reliance on non-federal sources to interpret provisions of the U.S. Constitution. Part III argues that the Supreme Court’s use of territorial history in Bruen was inconsistent with its past practice, that territorial history is especially likely to reflect federal constitutional meaning because the territories were subject to the federal Bill of Rights long before those rights were*

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*incorporated against state governments, and that a text, history, and tradition methodology should accord territorial laws and practices a meaningful role.*

TABLE OF CONTENTS

I. *BRUEN* AND THE TERRITORIES ..... 9  
    A. *The Court Turns to Text, History, and Tradition* ..... 9  
    B. *Refuting Bruen’s Critique of Territorial History* ..... 12  
        1. *Duration and Improvisational Nature* ..... 13  
        2. *Lack of Judicial Scrutiny*..... 19  
        3. *Population Density and Counter-Majoritarianism*..... 21  
II. THE CONSTITUTION AND THE TERRITORIES..... 25  
    A. *A Brief History of the Continental Territories* ..... 25  
    B. *The Bill of Rights Applied to Continental Territories* ..... 28  
        1. *Historical Evidence*..... 28  
        2. *Legal Evidence* ..... 33  
    C. *The Court Has Invoked Territorial Laws and Practices in Other Contexts* ..... 37  
        1. *Substantive Due Process* ..... 38  
        2. *The Eighth Amendment and Other Consensus-Based Uses of Territorial Law*..... 40  
    D. *“Other Law” Scholarship as a Guide to the Territories*..... 43  
        1. *State Law*..... 44  
        2. *Foreign Law*..... 46  
        3. *Territorial Law*..... 48  
III. TERRITORIAL RELEVANCE AFTER *BRUEN* AND *DOBBS*..... 49  
    A. *Territorial History Is a Valuable Resource in Constitutional Cases*..... 50  
        1. *Originalism and American Exceptionalism* ..... 50  
        2. *Expanding the Scope of Historical Inquiry*..... 53  
        3. *Federalism*..... 56  
        4. *Institutional Capacity and Rigor of Analysis* ..... 57  
        5. *Summary of Territorial Laws* ..... 59  
    B. *Toward a Theory of Territorial Relevance*..... 60  
    C. *The Territories in Future Second Amendment and Constitutional Cases*..... 64  
CONCLUSION..... 67

INTRODUCTION

Frederick Jackson Turner wrote in 1893 that “at the end of a hundred years of life under the Constitution, the frontier has gone, and with its going

has closed the first period of American history.”<sup>1</sup> With the closing of the frontier, areas which had existed for long periods under territorial government became states.<sup>2</sup> As the Supreme Court increasingly looks to historical tradition to interpret the Constitution, it has—at times—curiously overlooked the importance of territorial acquisition and territorial governance in shaping the character and politics of the early United States during those first “hundred years of life under the Constitution.”<sup>3</sup>

The question of how to weigh historical practices from the continental U.S. territories is especially important following the Court’s back-to-back decisions in *New York State Rifle & Pistol Ass’n v. Bruen* and *Dobbs v. Jackson Women’s Health Organization*, and the shift to a version of originalism heavily informed by historical regulatory practice those decisions represent.<sup>4</sup> *Bruen* upended Second Amendment jurisprudence by

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1. FREDERICK JACKSON TURNER, THE SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY (1893), reprinted in THE FRONTIER IN AMERICAN HISTORY 1, 38 (1920).

2. In the twenty-three years between 1889 and 1912 alone, ten territories were elevated to statehood. See, e.g., Samuel Shipley, *List of U.S. States’ Dates of Admission to the Union*, ENCYC. BRITANNICA (Feb. 11, 2020), <https://www.britannica.com/topic/list-of-U-S-states-by-date-of-admission-to-the-Union-2130026> [<https://perma.cc/2ZTC-FD7L>].

3. Theodore Roosevelt said in 1903 that the Louisiana Purchase was “the event which more than any other, after the foundation of the Government and always excepting its preservation, determined the character of our national life—determined that we should be a great expanding Nation instead of relatively a small and stationary one.” Theodore Roosevelt, Remarks at the Dedication Ceremonies of the Louisiana Purchase Exposition in St. Louis, Missouri (Apr. 30, 1903), <https://www.presidency.ucsb.edu/documents/remarks-the-dedication-ceremonies-the-louisiana-purchase-exposition-st-louis-missouri> [<https://perma.cc/FVU8-L7JA>]; see also Peter J. Kastor, “What Are the Advantages of Acquisition?”: *Inventing Expansion in the Early American Republic*, 60 AM. Q. 1003, 1031 (2008) (arguing that, after the initial westward territorial expansion culminating in the Louisiana Purchase, “Americans would begin considering [further expansion] necessary”).

4. This Article does not directly evaluate *Bruen*’s originalist bona fides, but rather presumes that *Bruen* at least intends to present itself as an originalist endeavor—based primarily on repeated references to “original meaning” in the majority and concurring opinions—and this Article uses the term “originalism” as shorthand for interpretive methodologies that include *Bruen*’s historical-analogical test. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2137 (2022); *id.* at 2162–63 (Barrett, J., concurring). With that said, it remains an open question whether (and to what extent) *Bruen* and *Dobbs* are truly originalist opinions to begin with. Lawrence Solum and Randy Barnett argue that *Bruen*’s emphasis on historical practice and tradition “operates at the level of constitutional interpretation; it provides the content of the pre-existing legal right to bear arms that is a component of the original public meaning of the Second Amendment.” Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. L. REV. (forthcoming 2023) (manuscript at 25), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4338811](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4338811) [<https://perma.cc/K4DY-GYA4>]. However, Barnett and Solum also leave open the possibility that *Bruen*’s new test is a mode of constitutional construction rather than a method of uncovering original meaning. See *id.* (manuscript at 26). Others contend that *Bruen* “appears to present itself as part of a larger Originalist project” and contains originalist elements, but that parts of the legal test “privilege[] historical practices above any truly original interpretative object.” A.W. Geisel, *Bruen is Originalism* 20–23 (Jan. 23, 2023) (unpublished student essay), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4335950](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335950) [<https://perma.cc/WPL5-8TUR>]; see also Michael L. Smith, *Abandoning Original Meaning*, 86 ALB. L. REV. 43 (2023). To some, then, the Court’s interpretive choices in *Bruen* are focused on elevating traditional

holding that, instead of a scrutiny-based test, “the government must affirmatively prove that [a] firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.”<sup>5</sup> In other words, the constitutionality of most modern gun laws now turns on whether governments enacted similar restrictions close in time to either 1791, when the Bill of Rights was ratified, or 1868, when the Fourteenth Amendment that would ultimately incorporate the Second Amendment against state governments was ratified. New York pointed to several laws from continental *territories* that restricted the right to publicly carry firearms in ways similar to, or broader than, New York’s licensing law that required an applicant to demonstrate proper cause to carry a concealed firearm in public (commonly known as a “may-issue” law).<sup>6</sup> The Court proceeded to disregard all five territorial laws as “exceptional” outliers because territorial government was supposedly tolerant of “legislative improvisations” that did not accord “with the Nation’s earlier approach to firearm regulation.”<sup>7</sup>

The Court’s analysis of territorial history in *Bruen* is inconsistent with how it has approached the territories in other recent decisions.<sup>8</sup> Indeed, just one day after *Bruen*, *Dobbs* explicitly credited territorial abortion restrictions when examining whether a fundamental right to abortion was consistent with history and tradition around the time that the Fourteenth Amendment was ratified. *Dobbs* found highly relevant a “trend in the Territories that would become . . . States.”<sup>9</sup> In other fundamental rights cases, the Court has similarly accorded territorial history a status nearly

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laws and practices, rather than gleaning original public meaning. See, e.g., Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1124 (2020) (describing an interpretive method that “use[s] . . . tradition to constitute constitutional meaning”). Other scholars refer to “*Bruen*-style originalism” or situate *Bruen* within the originalist camp, even while expressing doubts about whether the Justices were actually “doing originalism.” See Albert W. Alschuler, *Twilight-Zone Originalism: The Supreme Court’s Peculiar Reasoning in New York State Pistol & Rifle Association v. Bruen*, 32 WM. & MARY BILL RTS. J. (forthcoming 2023) (manuscript at 49), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4330457](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4330457) [<https://perma.cc/5TW5-KVDG>]; see also Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. (forthcoming) (manuscript at 7), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4335545](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335545) [<https://perma.cc/A9FX-HFEA>] (referring to *Bruen* as “[s]tanding . . . at the border between originalist and traditionalist interpretation”). Similar points have been made about *Dobbs*, with Barnett and Solum arguing that *Dobbs* embraces “*Glucksberg*’s nonoriginalist approach to substantive due process” even if “its outcome might have been justified on originalist grounds.” Barnett & Solum, *supra* (manuscript at 17).

5. *Bruen*, 142 S. Ct. at 2127.

6. See Transcript of Oral Argument at 58–59, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

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

8. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2253 (2022); *Washington v. Glucksberg*, 521 U.S. 702, 714–15 (1997); *Baze v. Rees*, 553 U.S. 35, 41–42 (2008); *Deck v. Missouri*, 544 U.S. 622, 642–45 (2005).

9. *Dobbs*, 142 S. Ct. at 2253, 2296–300.

equal to state history, or suggested as much. For example, the Court has referenced historical territorial laws, practices, and judicial decisions when evaluating legal challenges to assisted suicide bans and criminal penalties under the Eighth Amendment.<sup>10</sup> Justices have even cited laws passed by *current* U.S. territories, such as Puerto Rico, and suggested that these laws are on similar footing to laws passed by states in terms of their relevance to constitutional interpretation—demonstrating that the territories are normally considered *within* the denominator whenever the Court conducts jurisdictional “counts” to evaluate the acceptance and impact of certain practices.<sup>11</sup>

*Bruen*’s perplexing approach to the territories, a notable departure from the Court’s practice outside of the Second Amendment, signals that the time has come both to fully evaluate the normative considerations implicated when territorial laws or practices are raised under a legal test focused on historical tradition and to identify a coherent framework for using territorial history. *Bruen* represents a broader embrace of historical tradition and, potentially, historical regulatory practice as a key to original constitutional meaning.<sup>12</sup> The Court has increasingly relied upon this methodology, including in other cases decided in the 2021–2022 Term.<sup>13</sup> It is likely that

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10. See *infra* Section II.C.

11. See, e.g., *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 40 n.4 (1961).

12. Specifically, some scholars have suggested that *Bruen* signals the rise of “expected applications,” in some form. See, e.g., John O. McGinnis, *Bruen’s Originalism, L. & LIBERTY* (July 21, 2022), <https://lawliberty.org/bruens-originalism/> [<https://perma.cc/7BCG-PH37>]; Michael C. Dorf, *The Injustice, Insincerity, and Destabilizing Impact of the SCOTUS Turn to History*, *VERDICT* (Oct. 26, 2022), <https://verdict.justia.com/2022/10/26/the-injustice-insincerity-and-destabilizing-impact-of-the-scotus-turn-to-history> [<https://perma.cc/2JQC-S686>]. A legal test based on expected applications would “ask[] how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense.” Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291, 296 (2007). Legal scholars have observed, however, that “original practices can be no more than important but fallible evidence of the original meaning of the Constitution,” in part because those practices might be based on incorrect factual premises which make their historical treatment inconsistent with the intent of the relevant provision. Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 *GEO. L.J.* 569, 615 (1998). Any strict use of expected applications, moreover, would call much settled precedent into doubt—for example, the original expected applications of the Fourteenth Amendment cannot support the Court’s decision in *Loving v. Virginia*, without recourse to broader themes and principles encompassed by the amendment’s language. See, e.g., Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 *BYU L. REV.* 1393, 1457–58.

13. For example, in *Kennedy v. Bremerton School District*, Justice Gorsuch’s majority opinion held that “[a]n analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some ‘exception’ within the ‘Court’s Establishment Clause jurisprudence.’” 142 S. Ct. 2407, 2428 (2022) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 575 (2014)). For scholars and commentators observing that the 2021–2022 Term marked either a greater commitment to originalist methodologies, or a shift to new modes of originalist interpretation, see Michael Waldman, *Originalism Run Amok at the Supreme Court*, *BRENNAN CTR. FOR JUST.* (June 28, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/originalism-run-amok-supreme-court>

*Bruen*'s brand of originalism may ultimately be extended to other provisions in the Bill of Rights, and lower courts are increasingly likely to consider and analyze historical regulatory practice when construing constitutional provisions to determine, in *Bruen*'s words, "whether modern . . . [laws] are consistent with . . . text and historical understanding."<sup>14</sup> This inquiry will often involve canvassing times in American history when the country had many continental territories on their way to statehood.<sup>15</sup>

Scholars have devoted substantial energy over the past two decades to analyzing the role of state<sup>16</sup> and foreign<sup>17</sup> practice in federal constitutional

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[<https://perma.cc/EX56-2M8V>]; Zack Smith & Alex Phipps, *5 Monumental Cases That Highlighted the Supreme Court's 2021-2022 Term*, HERITAGE FOUND. (July 8, 2022), <https://www.heritage.org/courts/commentary/5-monumental-cases-highlighted-the-supreme-courts-2021-2022-term> [<https://perma.cc/6GSL-BWFW>].

14. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022).

15. See, e.g., *id.* at 2154–55; *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2253 (2022). At any point in the nineteenth century, the country's ratio of incorporated territories to states was much higher than today (there are currently no *incorporated* U.S. territories—for a more detailed explanation of what constitutes an "incorporated" territory, see *infra* note 20 and Section II.B.2). As of 1805, for example, the United States was comprised of five territories and seventeen states. In 1868, when the Fourteenth Amendment was ratified, there were eleven territories and thirty-seven states. See *U.S. Territory and Statehood Status by Decade, 1790-1960*, U.S. CENSUS BUREAU (Feb. 21, 2013), <https://www.census.gov/dataviz/visualizations/048/> [<https://perma.cc/5KC5-9GM5>]; Martin Kelly, *States and Their Admission to the Union*, THOUGHTCO. (July 8, 2019), <https://www.thoughtco.com/states-admission-to-the-union-104903> [<https://perma.cc/MGA4-R8ZK>].

16. See, e.g., Note, *State Law as "Other Law": Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670, 1671 (2007) (surveying areas where "the Court has explicitly relied upon state legislation in reaching its decisions"); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1089 (2006) (criticizing the Court's reliance on state law as "more subjective than traditional doctrines"); Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 934–35 (2014) (summarizing and evaluating the Court's outlier-suppressing decisions, which often rely on "a snapshot of state practices"); Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 18 (2009) ("[S]tate counting [is used] as a mechanism of judicial self-limitation . . .").

17. This was a major issue of scholarly focus immediately following the 2002–2003 Supreme Court Term, which saw several high-profile decisions that relied, in part, on foreign sources and materials. See, e.g., Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONST. L. 91, 92 (2004); Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649, 662 (2004) [hereinafter Tushnet, *Interpreting Constitutions Comparatively*]; Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 71 (2004); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Osmar J. Benvenuto, Note, *Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent*, 74 FORDHAM L. REV. 2695, 2697 (2006). Since that time, prominent scholars have cited to the ongoing debate over the propriety of relying on foreign materials to interpret U.S. constitutional provisions. See, e.g., Frederick Schauer, *What Counts as Law?*, 52 VAL. U. L. REV. 1

interpretation. These scholars have vigorously debated the propriety of using such sources to decide claims brought under the Federal Constitution and its amendments.<sup>18</sup> Yet the Court's reliance on *territorial* laws and practices<sup>19</sup>—legislation and historical practice in the “continental” territories during the at-times-lengthy periods of transitional territorial government that directly preceded statehood—remains unexplored.

Should territorial practices be viewed in the same way as state practices, or should they be discounted and treated as more akin to *foreign* practices—only mildly persuasive, if relevant at all? This Article argues that, under an originalist methodology that considers historical regulatory practice, the Court's fundamental rights jurisprudence must account for territorial history.<sup>20</sup> After all, state governments were not subject to the Bill of Rights until the twentieth century due to the non-incorporation doctrine adopted in the *Slaughter-House Cases*; even when the Court began selectively incorporating provisions of the Bill of Rights against the states through the Due Process Clause it did so gradually, not incorporating the Second Amendment until *McDonald v. City of Chicago* was decided in 2010.<sup>21</sup> Territorial governments, on the other hand, were directly subject to the Bill of Rights from inception, and territorial laws were often challenged under other amendments in the Bill of Rights.<sup>22</sup> Thus, territorial laws and practices

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(2017); Johanna Kalb, *The Judicial Role in New Democracies: A Strategic Account of Comparative Citation*, 38 YALE J. INT'L L. 423 (2013).

18. Compare Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 57–58 (2004) (arguing that the Court's reliance on foreign law “fundamentally destabilizes the equilibrium of constitutional decision making”), with Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 9 (2006) (arguing that the use of foreign law and international materials is not undemocratic, and proposing “tentative principles for determining the appropriate relationship between international law and constitutional analysis”).

19. As a rough definition, “laws and practices” include “actions by executive officials and legislatures that have constitutional implications,” related judicial decisions, and broader social traditions. Cf. Barnett & Solum, *supra* note 4 (manuscript at 5–7).

20. This Article addresses how the *historical continental* (or “incorporated”) territories should fit into the Court's evolving brand of originalism that increasingly relies upon historical regulatory practice. A flurry of recent legal scholarship has addressed the related question of how originalism might impact territorial status and legislation for the current U.S. overseas (or “unincorporated,” per *The Insular Cases*) territories. See, e.g., *The U.S. Territories*, 130 HARV. L. REV. 1616, 1680 (2017) (articulating a modern theory of “territorial federalism” within the framework of the *Insular Cases*, identifying “the opportunity to repurpose the framework in order to protect indigenous culture from the imposition of federal scrutiny and oversight”); Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405 (2020) (critically evaluating an originalist interpretation of the Citizenship Clause, including its application to the territories); Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2458 (2022) (“[T]he *Insular Cases* gave rise to nothing less than a crisis of political legitimacy in the unincorporated territories, and . . . no amount of repurposing, no matter how well-intentioned—or even successful—can change that fact.”); see also *infra* Part II.B.2 and sources cited therein.

21. See *infra* note 132.

22. See *infra* Section II.B.



are especially likely to illustrate the originally understood scope of the actual language used in the Second Amendment, and potentially other amendments in the Bill of Rights, at a given point in history.

The Article proceeds in three parts. Part I summarizes *Bruen*'s treatment of the five territorial laws invoked by New York to support its may-issue licensing law and critically examines the Court's reasons for rejecting these laws as analogues. Part II traces the historical background of how the Bill of Rights has applied to the territories, examines how the Court has cited and used territorial practice in other areas, and situates the territories in the context of existing scholarship evaluating the Court's use of "other law" to interpret the Federal Constitution. Part III articulates normative principles suggesting that territorial laws are a valuable tool for federal constitutional interpretation—drawing on both the Court's past practice and "other law" scholarship—and argues in favor of considering territorial laws and practices in constitutional cases under a text, history, and tradition approach.

## I. *BRUEN* AND THE TERRITORIES

Section I.A will summarize the decision in *Bruen*, focusing on the Court's treatment of historical public-carry restrictions in continental territories. Section I.B will then critically evaluate the Court's purported reasons for choosing to largely disregard territorial history.

### A. *The Court Turns to Text, History, and Tradition*

The Supreme Court's decision in *Bruen* articulated a new framework for deciding Second Amendment cases. The majority rejected the two-part test used across the Courts of Appeal, which combined an initial text-plus-history "scope" analysis with means-ends scrutiny.<sup>23</sup> In the majority's view, "[d]espite the popularity of this two-step approach, it is one step too many."<sup>24</sup> In its place, the Court set forth a historical-analogical test which "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."<sup>25</sup> In the Court's own words:

We reiterate that the standard for applying the Second Amendment is

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23. As Jacob Charles has described, "[t]his framework ask[ed] first whether the conduct falls within the scope of the right and then applie[d] a means-end test, like intermediate scrutiny, to see whether the conduct [was] protected." Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. 333, 338 (2021).

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

25. *Id.* at 2131.

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.<sup>26</sup>

The *Bruen* test is not new, but rather it can be traced to then-Judge Kavanaugh's dissent from a 2011 D.C. Circuit panel decision in a case challenging Washington, D.C.'s "assault weapons" ban. Dissenting from the panel's decision upholding the D.C. law, Justice Kavanaugh wrote that, "[i]n my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations *based on text, history, and tradition*, not by a balancing test such as strict or intermediate scrutiny."<sup>27</sup> Justice Kavanaugh's approach, in sum, dictated that a government "may still ban . . . firearms . . . which traditionally have been banned,"<sup>28</sup> but not guns that were unregulated historically—the constitutionality of a modern regulation, then, turns on its perceived consistency with the nation's historical tradition of firearms regulation.<sup>29</sup> Justice Kavanaugh's test was a major focus of the briefing and oral argument in *Bruen*, and a majority of Justices ultimately adopted it nearly wholesale.

The *Bruen* Court proceeded to apply the "text, history, and tradition" test to New York's may-issue licensing law, which had been interpreted to require a showing of some special, extraordinary need for self-defense, beyond mere fear of crime, to obtain a concealed-carry permit.<sup>30</sup> The majority spent nearly thirty pages considering various historical laws put forward by New York and its *amici* as potential analogues for the state's proper-cause requirement, stretching from medieval England to the twentieth century.<sup>31</sup> One by one, the Court determined that these laws were not analogous and did not evince a historical tradition of restricting public carry in the same way that New York had. Laws that *were* analogous to New York's modern-day regulatory system, notably an 1871 Texas prohibition on "carrying . . . any pistol . . . [without] reasonable grounds for fearing an

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26. *Id.* at 2129–30.

27. *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (emphasis added).

28. *Id.* at 1288.

29. *See id.* at 1293 ("Because the vast majority of states have not traditionally required and even now do not require registration of lawfully possessed guns, D.C.'s registration law . . . does not satisfy [a] history- and tradition-based test . . .").

30. *E.g.*, *Klenosky v. N.Y.C. Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980), *overruled in part by Bruen*, 142 S. Ct. 2111 (construing the "proper cause" requirement to mean that a permit applicant must "demonstrate a special need for self-protection distinguishable from that of the general community").

31. *Bruen*, 142 S. Ct. at 2138–56.

unlawful attack on his person,” were deemed “outliers.”<sup>32</sup> The Court found that these laws were not adopted by other states, covered only a small portion of the nation’s population, and thus did not constitute evidence of an enduring national tradition.<sup>33</sup>

Outside of state and municipal laws, the post-Civil War period saw a rise in public gun-carry regulation by Western territorial governments to address new societal concerns in those areas—territories which would ultimately become states, but at the time had not yet been elevated to that status.<sup>34</sup> New York pointed to several such territorial laws to support its position. The Court first noted that “late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence.”<sup>35</sup> With this principle in mind, the Court considered five territorial laws passed in the decades immediately following the Fourteenth Amendment, between 1869 and 1890.<sup>36</sup> The Arizona and New Mexico territories both passed laws that restricted the public carry of pistols in densely populated areas such as towns, cities, and villages, with exceptions for those with reasonable grounds for fearing an attack.<sup>37</sup> The Wyoming and Idaho Territories went even further, banning the public carry of *all* guns in those locations.<sup>38</sup> Finally, the Oklahoma Territory proscribed the public carrying of pistols entirely.<sup>39</sup>

The Court held that these territorial laws “fail[ed] to justify New York’s proper-cause requirement.”<sup>40</sup> First, the Court suggested the laws were “legislative improvisations” passed in a territorial system that allowed extraordinary and ad hoc governmental actions, and that they “conflict[ed] with the Nation’s earlier approach to firearm regulation.”<sup>41</sup> Second, the Court noted that, as of 1890, “Arizona, Idaho, New Mexico, Oklahoma, and Wyoming combined to account for only . . . about two-thirds of 1% of the

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32. *Id.* at 2153. As *Bruen* explains, West Virginia enacted a similar law in 1887 which was upheld by that state’s supreme court in 1891. *See id.*

33. *Id.* at 2153–56.

34. *See, e.g.,* David T. Courtwright, *The Cowboy Subculture*, in *GUNS IN AMERICA: A HISTORICAL READER* 86, 96 (Jan E. Dizard, Robert Muth & Stephen P. Andrews eds., 1999) (“The situation changed in the 1880s and 1890s. As the threat of Indians and outlaws receded and the regular police system gradually became more professional and efficient, it was harder to justify carrying personal weapons for self-defense.”).

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

36. As the Court noted, these laws (which restricted both concealed and open carry) followed on the heels of a number of *states*—especially in the South—enacting prohibitions on concealed carry only in the early-mid 1800s. *See id.* at 2152–53.

37. *See id.* at 2154 (citing 1889 Ariz. Terr. Sess. Laws no. 13, § 1, at 16; 1869 N.M. Laws ch. 32, §§ 1–2, at 72).

38. *See id.* (citing 1875 Wyo. Terr. Sess. Laws ch. 52, § 1; 1889 Idaho Terr. Gen. Laws §1, at 23).

39. *See id.* (citing 1890 Okla. Terr. Stats., Art. 47, §§ 1–2, 5, at 495).

40. *Id.*

41. *Id.*

[U.S.] population.”<sup>42</sup> Third, the Court observed that, “because these territorial laws were rarely subject to judicial scrutiny, we do not know the basis of their perceived legality.”<sup>43</sup> To support this point, the Court observed that a Kansas city’s municipal blanket public-carry ban was upheld in 1901 by a court that applied a militia-only interpretation of the Second Amendment, an interpretation now rejected by *Heller* and subsequent decisions.<sup>44</sup> Finally, the Court asserted that the laws in question “were—consistent with the transitory nature of territorial government—short lived,” noting that the Idaho law was held unconstitutional in 1902 and Wyoming’s law was revised upon the territory’s elevation to statehood in 1890.<sup>45</sup>

In a concluding paragraph holding New York’s may-issue law unconstitutional under the historical-analogical test, the majority referred to “a few late-19th century outlier jurisdictions” that represented, in the majority’s view, the only departure from a uniform historical tradition of allowing public carry without any showing of special need.<sup>46</sup> The Court’s analysis suggests that the “outlier jurisdictions” were primarily *states*, such as Texas and Kansas, that had restrictive public-carry laws in place at that time—either statewide laws, or laws governing certain urban areas. Territorial laws, by contrast, were entitled to even less weight. Not only did the Court almost entirely discount the five territorial laws mentioned above, it also observed—of an 1860 New Mexico law that criminalized the concealed and open public carry of pistols—that the law’s “value in discerning the original meaning of the Second Amendment is *insubstantial*.”<sup>47</sup> Even though some territorial laws were indisputably much broader than New York’s preferred regulatory approach, they did not factor directly into the analysis because they were enacted by territorial governments and thus could not “demonstrate a broad tradition of States” regulating in that manner.<sup>48</sup>

### *B. Refuting Bruen’s Critique of Territorial History*

*Bruen* levies several specific criticisms at the prospect of using territorial laws and historical practices in a text, history, and tradition analysis: that territorial laws were improvisational and short lived; that the laws were not subject to judicial scrutiny; and that the laws covered only a small

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42. *Id.*

43. *Id.* at 2155.

44. *Id.*

45. *Id.*

46. *Id.* at 2156.

47. *Id.* at 2147 n.22 (emphasis added).

48. *Id.* at 2156.

percentage of the nation’s population at the time. This Section will consider each criticism with a view toward ultimately determining whether the Court’s reasoning justifies disregarding territorial history altogether.

### 1. *Duration and Improvisational Nature*

The *Bruen* majority characterizes territorial laws as “legislative improvisations” that were “exceptional” and not illustrative of a general tradition. There is little debate that territorial governments and court systems (especially in the Western territories in the mid-nineteenth century) were *logistically* unique. For example, “[p]opulations and litigation increased faster than transportation improved,” in some instances denying large swathes of the territorial population access to an effective judicial system for some time.<sup>49</sup> And, due in part to the tremendous distance (not easily traversed) separating the territories from Washington, D.C., territorial “[o]fficers were accustomed to freedom from guidance, and sometimes resented what [little] guidance there was.”<sup>50</sup> It might be that the territories were places where laws were not uniformly applied or enforced, as compared to established states.

However, the majority’s focus on improvisation fails to consider two major points. First, contrary to the simple conclusion that territorial government sanctioned improvisation due to its form and geographic distance from the nation’s capital, it is actually unlikely that the territories countenanced legislative departures from a common American tradition precisely *because* they were territories, not states. The territorial period was intended to have a conforming influence that would prepare the territory to ascend to (and fit within) the community of existing states.<sup>51</sup> Thus, the history of territorial government in the United States is, in many ways, one of attempting to re-make each territory into the mold of an existing American state. Thomas Jefferson wrote in 1809 that “it is impossible not to look forward to distant times, when our rapid multiplication will expand itself beyond those limits, and cover the whole northern, if not the southern continent, with a people speaking the same language, *governed in similar*

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49. EARL S. POMEROY, *THE TERRITORIES AND THE UNITED STATES 1861–1890*, at 57 (1947). The majority opinion provides a single supporting citation for its assertion that territorial laws were improvisational and unique in a way that departed from general American historical tradition: Pomeroy’s 1947 study of territorial governance and administration. See *Bruen*, 142 S. Ct. at 2154.

50. POMEROY, *supra* note 49, at 24.

51. *E.g.*, Max M. Edling, *United States Expansion and Incorporation in the Long Nineteenth-Century*, 49 J. IMPERIAL & COMMONWEALTH HIST. 431, 440–41 (2021) (noting that, as the nation expanded westward in the nineteenth century, “[h]omogeneity of form was a central question . . . [and] [n]ew states had to comply with American social and political norms”).

*forms, and by similar laws.*<sup>52</sup> It is worth pausing to consider the import of those final two phrases. If Jefferson expected that inhabitants of newly acquired territory would be “governed in similar forms, and by similar laws,” then why would the territorial system, as *Bruen* suggests, “permit[] legislative improvisations which might not have been tolerated in a permanent setup”?<sup>53</sup> Rather, one would expect the territorial system to strongly encourage territories to conform to the norms and values that were part of the American tradition writ large. In this vein, certain territorial governments adopted wholesale portions of the legal code of preexisting states upon territorial formation, rather than drafting their own statutes from scratch.<sup>54</sup>

In the Land Ordinance of 1784, Jefferson recognized “a need for centralized control of new territories and that the ‘order of congress’ was entirely appropriate for guiding settlers towards statehood.”<sup>55</sup> The Northwest Ordinance, ultimately the basis for the young country’s first foray into territorial government, strove “to fix and establish [the fundamental principles of civil and religious liberty] as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory.”<sup>56</sup> Jefferson’s vision for territorial governance involved “a period of tutelage to assure that democracy had taken hold in the territory”—a period during which one would expect that territorial laws would be made to conform to existing-state laws and traditions, rather than deviate from a national tradition.<sup>57</sup> This “vision” contained, in many

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52. Letter from Thomas Jefferson to Governor Monroe (Nov. 24, 1801), in 4 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 420–21 (H.A. Washington ed., New York, H.W. Derby, 1861) (1853) (emphasis added).

53. *Bruen*, 142 S. Ct. at 2154 (quoting POMEROY, *supra* note 49, at 4).

54. See, e.g., Sandra B. Placzek, *Nebraska Prestatehood Legal Materials*, in 2 PRESTATEHOOD LEGAL MATERIALS: A FIFTY-STATE RESEARCH GUIDE, INCLUDING NEW YORK CITY AND THE DISTRICT OF COLUMBIA 661, 669 (Michael G. Chiorazzi & Marguerite Most eds., 2005) (noting that, in 1855, the newly formed Nebraska Territory’s legislature voted to adopt the criminal code of Iowa—which became a state in 1846—wholesale).

55. Casey Jack Musselman, *Congressional Sovereignty: Imperialism in a Republican Union* 49 (May 2014) (Master’s Thesis, James Madison University), <https://commons.lib.jmu.edu/cgi/viewcontent.cgi?article=1292&context=master201019> [<https://perma.cc/M5BW-HEM2>]; see also Report on Government for Western Territory (Mar. 1, 1784), in THOMAS JEFFERSON: WRITINGS 376 (Merrill D. Peterson ed., 1984) (explaining how an “order of Congress” might facilitate the development of territorial governments and their eventual elevation to statehood).

56. An Ordinance for the Government of the Territory of the United States North-West of the River Ohio § 13 (1787), <https://www.archives.gov/milestone-documents/northwest-ordinance> [<https://perma.cc/22QB-HWHF>].

57. See ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 7, 71 (1989) (“The Congressional supervisory role was a substantive one, in general trying to guide the territory *in accordance with the States’ experience.*” (emphasis added)); see also PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* xvi–xix (2019 ed.).

instances, elements of racism and paternalism.<sup>58</sup> For example, the Treaty of Guadalupe Hidalgo was “modified . . . to minimize the possibility of Mexican participation in U.S. politics” and to provide the federal government with greater discretion to determine when the ceded territories might be admitted to the Union.<sup>59</sup> But that approach merely illustrates the degree of control and oversight that the federal government retained to ensure that territories did *not* deviate from national norms in improvisational ways.<sup>60</sup>

The impact of territorial government, and its extension of default American norms and practices to areas previously beyond the American frontier, was felt in a unique way by Native American populations residing in those territories. Frequently, a major initial concern of Western territorial governments was limiting Native American access to firearms. For example, in 1853 the Oregon Territory enacted a facially discriminatory law that prohibited white citizens from giving or selling firearms to Native Americans.<sup>61</sup> In 1876—during the Great Sioux War—newspapers in Wyoming Territory reported on plans to prevent Native Americans from obtaining ammunition and advocated that Native Americans be prohibited by law from possessing arms.<sup>62</sup> This approach to gun regulation is not surprising given that, in many instances, the United States Army was actively at war with large segments of the Native American populations residing in those territories. Such an approach was also broadly consistent with earlier laws barring Native American gun possession enacted in the

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58. The *Dred Scott* majority declared that the Louisiana Territory, when acquired, contained no population fit to be associated together and admitted as a State; and it therefore was absolutely necessary to hold possession of it, as a Territory belonging to the United States, until it was settled and inhabited by a civilized community capable of self-government, and in a condition to be admitted on equal terms [to] . . . the Union.

*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 448 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (1868).

59. Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283, 295, 296–97 (2003).

60. This *conforming* aspect of territorial governance, moreover, is not unique to the United States. The constitutional documents of United Kingdom overseas territories have historically recognized that the central government has the authority “to disallow a law enacted by the legislature” of the territory. IAN HENDRY & SUSAN DICKSON, *BRITISH OVERSEAS TERRITORIES LAW* 79 (Hart Publ’g 2d ed., 2018) (2011). While seldom used in practice, this “power of disallowance is more in the nature of a disincentive to objectionable [territorial] legislation” that is thought to potentially implicate “questions of constitutionality or compatibility with international obligations.” *Id.* at 79–80.

61. Act of Jan. 16, 1854, § 1, 1854 Or. Laws 257 (prohibiting “Sale of Arms and Ammunition to Indians”).

62. *See, e.g., Plan for Subjecting the Indians*, CHEYENNE DAILY LEADER, Aug. 8, 1876; *Disarm the Indians*, CHEYENNE DAILY LEADER, July 11, 1876; *see also* George A. Mocsary & Debora A. Person, *A Brief History of Public Carry in Wyoming*, 21 WYO. L. REV. 341, 345 (2021).

eastern United States and midwestern territories.<sup>63</sup> Some territorial governments broadly restricted public carry in settlements or towns around the same time—the very laws at issue in *Bruen*. But these provisions likely did not have much impact on *unsettled* areas where Native Americans initially resided. Politicians gradually became more assertive in pushing for direct federal oversight, even in areas of the new territories theoretically reserved for tribal government.<sup>64</sup> The treaties which laid the groundwork for government in Indian Territory, which would later be incorporated into Oklahoma Territory pre-admission, contained judicial oversight mechanisms intended to “dislocate . . . the tribal governments before dispossessing them of all authority and, finally, dissolving them altogether.”<sup>65</sup> In sum, it is likely that territorial governments initially pushed to disarm Native Americans as a group and, ultimately, exerted a strong regulatory influence on Native American gun ownership through facially neutral laws even in areas that had been largely reserved for autonomous tribal government.<sup>66</sup>

Second, the *Bruen* majority overlooks the default rule that, consistent with the conforming objective of territorial governance, territorial laws were expected to carry over from the territorial period onto the state statute books as a matter of course.<sup>67</sup> *Bruen* emphasizes that the territorial laws in question there were “short-lived”—which one might expect, if these were in fact temporary legislative improvisations necessitated by the unusual territorial context. Per the *Bruen* majority, “consistent with the transitory nature of territorial government,” the laws sometimes “did not survive a Territory’s admission to the Union as a State.”<sup>68</sup> In other words, *Bruen* finds these laws to be mere “passing regulatory efforts by not-yet-mature jurisdictions on the way to statehood, rather than part of an enduring American tradition of state regulation.”<sup>69</sup> The opinion cites Wyoming’s territorial public-carry law, which banned public carry in all towns, cities, and villages in 1875. That

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63. See, e.g., Act of Feb. 8, 1798, § 5, 1798 Ky. Acts 113; Act of Mar. 30, 1802, § 9, 1807 Miss. Laws 588, 593.

64. See JEFFREY BURTON, INDIAN TERRITORY AND THE UNITED STATES, 1866–1906, at 25 (1995) (“[C]ongressmen wanted nothing less than territorial government in the Indian Territory, and started to push hard for it when the tribal governments showed no disposition to draw up plans of their own for a closer association with the Union . . .”).

65. *Id.* at 21.

66. Cf. Opinion, *Carrying Deadly Weapons*, SANTA FE NEW MEXICAN, Sept. 15, 1898, at 2 (arguing that police officers generally should not possess concealed firearms to accord with the law) (“The carrying of deadly weapons is altogether too prevalent among *all classes of citizens*, in direct violation of the territorial statutes. . . . The good name of the territory requires that the law governing the carrying of deadly weapons should be rigidly enforced.”) (emphasis added).

67. See *infra* notes 74–77 and accompanying text.

68. N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2155 (2022).

69. *Id.* at 2155.



law, the Court says, was revised in 1890, when Wyoming became a state, to ban only public carry with intent to injure.<sup>70</sup>

Of course, the decision to amend or replace a territorial law is substantively different from a court decision holding the law unconstitutional. Amending the law (even by removing it from the statute books entirely) merely suggests a recognition that the law is no longer *necessary* in its current form. There are numerous non-constitutional reasons that a law might be amended—for example, it could be that the new state was looking for a way to reduce expenditures and made the difficult decision to change the law to reduce enforcement burdens, or that statehood was accompanied by a gradual change in norms and social mores that rendered certain criminal prohibitions unnecessary.<sup>71</sup> In other words, it is perilous to infer from the mere fact of amendment that the law was modified because legislators thought it inconsistent with the Second Amendment.

As to the Arizona, New Mexico, and Oklahoma laws at issue in *Bruen*, a closer examination reveals that all three of these laws did in fact carry over to statehood (as did the Idaho law, although it was subsequently struck down in court). When each territory became a state, it did so pursuant to an Enabling Act: a federal statute authorizing the people of the territory to form a state government, convene a state constitutional convention, and apply for admission as a state. In each instance, the relevant enabling act—for example, the act authorizing admission of Arizona and New Mexico in 1910<sup>72</sup>—contained a provision titled “Territorial laws continued.” That section provided that “all laws of said Territory . . . shall be in force in said State until changed by the legislature of said State, except as modified or changed by this Act or by the constitution of the State.”<sup>73</sup> Oklahoma’s Enabling Act contained similar language stating “that the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State until changed by the legislature thereof.”<sup>74</sup> Contrary to the *Bruen* majority’s notion of passing regulatory efforts that rarely survived the transition to statehood, these examples show that survival was the norm rather than the exception. Territorial laws were presumed to become a permanent part of the state’s legal regime upon elevation to statehood, unless explicitly repudiated by the legislature or state constitutional

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70. *Id.* (citing WYO. REV. STAT. ch. 3, § 5051 (1899)).

71. *See* Courtwright, *supra* note 34, at 96–97.

72. Act of June 20, 1910, Pub. L. No. 219, ch. 310, 36 Stat. 557, 567–68 (1910) (enabling the New Mexico and Arizona Territories to be elevated to statehood).

73. *Id.*

74. Act of June 16, 1906, Pub. L. No. 234, ch. 3335, 34 Stat. 267, 275 (1906) (enabling the inhabitants of Oklahoma Territory and Indian Territory to form a state government and be admitted to the Union as a single state).

convention. While *Bruen* is clear that the government bears the burden of making an initial showing of historical analogues,<sup>75</sup> the decision is entirely unclear on which party bears the burden of showing that a law was in effect for a sufficient period of time—an approach that places the burden on the plaintiff makes sense, especially considering the default approach of continuance.

Moreover, the idea that territorial laws only matter to the extent they survived for a certain number of years following statehood is generally inconsistent with the Court's past practice.<sup>76</sup> If the Court is suggesting that territorial laws only matter to the extent they remained in place after statehood, it would be odd to cite and discuss the territorial laws themselves—rather than the initial state statutes. It is also worth noting that the analysis in *Washington v. Glucksberg*, and several other cases described in Section II.C *infra*, consult *current* territorial practice.<sup>77</sup> The currently existing American territories (Puerto Rico, Guam, and so on) have not ascended to statehood and may never do so. Therefore, the Court's decision to invoke Puerto Rico's laws (for example) in various contexts undercuts the idea that the territories only matter to the extent their laws carry over into statehood. The Court's decision in *Romer v. Evans* is instructive on this point.<sup>78</sup> In *Romer*, the court struck down a Colorado state constitutional amendment banning all preferences and protections based on sexual orientation.<sup>79</sup> The dissenting opinion in *Romer* relied in part on *Davis v. Beason*, an 1890 case upholding an Idaho territorial law that flatly denied the franchise to polygamist men.<sup>80</sup> In response, the *Romer* majority stated that *Davis* was inconsistent with the Court's other holdings to the extent that it “held that persons advocating a certain practice may be denied the right to vote”—rather than pursuing the easier route of distinguishing the law because it was enacted by a territorial government.<sup>81</sup>

If territorial laws were indeed more directly indicative of American historical tradition, and for a longer period of time, than the Court suggested in *Bruen*, it is odd that the Court would simultaneously emphasize the importance of consulting historical tradition yet largely devalue *territorial* history. Territorial laws that were not aberrational and carried over to

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75. *Bruen*, 142 S. Ct. at 2135.

76. See *infra* Section II.C (describing instances where the Court has relied upon territorial laws and practices, without analyzing or requiring that those laws and practices continued for a certain period of time after statehood).

77. See *infra* Section II.C.2 and sources cited therein.

78. *Romer v. Evans*, 517 U.S. 620 (1996).

79. *Id.* at 635–36.

80. *Id.* at 651 (Scalia, J., dissenting).

81. *Id.* at 634 (majority opinion).

statehood as a default should, under *Bruen*'s stated methodology, have a much larger role.

## 2. *Lack of Judicial Scrutiny*

*Bruen* explains that the “territorial laws [offered by New York] were rarely subject to judicial scrutiny.”<sup>82</sup> Therefore, the majority says, there is no “evidence explaining *why* these unprecedented prohibitions on *all* public carry were understood to comport with the Second Amendment.”<sup>83</sup> It might be that territorial laws and practices have no *independent* historical value, but rather matter only to the extent that they were subject to some judicial evaluation of their constitutionality. Perhaps the fact that state laws in certain areas and time periods were not challenged in court warrants casting the net wider to also capture territories and the judgments of territorial courts. However, this idea fails to provide a satisfying explanation for the Court’s repeated inclusion of territories within both historical and modern headcounts in prior and subsequent cases. Territorial laws and practices have been invoked repeatedly without any indication that those laws were challenged and upheld in court.<sup>84</sup> And the *Dobbs* majority cites an appendix of territorial laws indicating a “trend in the Territories that would become the last 13 States . . . [of] criminaliz[ing] abortion at all stages of pregnancy.”<sup>85</sup> There is no discussion of whether these laws were challenged in court and upheld.

Rather than suggest that all five territorial laws offered in *Bruen* were unconstitutional when adopted, the lack of judicial scrutiny of territorial laws more plausibly indicates that these laws were viewed as *constitutional* at the time. This is especially true when one considers the weight of authority holding that the Bill of Rights applied directly to territorial governments, and cases striking down territorial laws under other amendments.<sup>86</sup> It would be odd to presume a legislative motive to violate protections in the Bill of Rights, rather than to presume that territorial legislators intended to comply with constitutional protections which they knew applied to their actions. The *Bruen* majority determined that the lack of evidence “explaining *why* these unprecedented prohibitions on *all* public carry were understood to comport with the Second Amendment” itself supported discounting the laws.<sup>87</sup> But the fact that these laws were enacted

82. N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2155 (2022).

83. *Id.*

84. See *infra* Section II.C.

85. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2253, 2296–300 (2022).

86. See *infra* Section II.B.

87. *Bruen*, 142 S. Ct. at 2155.

in the first place more plausibly indicates that they were considered constitutional at the time, especially given the settled application of the Bill of Rights to territorial enactments.

Moreover, limiting consideration of historical laws to only those upheld against a constitutional challenge is an odd way to look at history. Legislative silence on an issue cannot be equated with a judgment that a particular law addressing the issue was considered unconstitutional. When the Founding Era legislators ultimately chose *not* to address a certain question, “[a]s historians we cannot confirm or deny that the founders would have taken the position that we think follows from their other views if they had been compelled to address the question.”<sup>88</sup> In the context of *Bruen*, this means that many gun regulations that were considered constitutional at the time were likely not enacted for reasons unrelated to the Second Amendment.<sup>89</sup> The same principle applies to judicial decisions regarding a constitutional question: one should not presume from the *absence* of an adjudication of a law that, in the event of a legal challenge, a court would likely have invalidated the statute. Further, if a state supreme court struck down a historical gun law and some justices believed that the law was unconstitutional under a Second Amendment-analogue provision, while others found that the law was unconstitutional under a *separate* state constitutional provision, what value does that decision hold in modern Second Amendment cases dealing with similar laws? Perhaps most importantly, a law with a strong basis of perceived legality may never be challenged in court because, quite simply, people impacted by the law widely perceive it to be constitutional and expect that such a challenge would fail.

*Bruen* appears to give substantial weight to historical *judicial decisions* and elevates gun laws that were challenged in court and upheld as primary historical sources. Yet, if territorial governments were primarily concerned with other regulatory challenges and citizens recognized territorial public-carry restrictions as constitutional, then a *lack* of scrutiny may indicate established constitutionality and *Bruen* may have been incorrect to discount territorial laws that went unchallenged. If anything, this merely reveals a larger issue with the historical inquiry in *Bruen*: attributing meaning to silence in the historical record is often a highly fraught endeavor.

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88. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 671 (1987).

89. See Alschuler, *supra* note 4 (manuscript at 13) (“*Bruen* apparently missed the distinction between declining to act and lacking the power to do so.”); United States v. Kelly, No. 3:22-cr-00037, 2022 WL 17336578, at \*2 (M.D. Tenn. Nov. 16, 2022) (“[A] list of the laws that *happened to exist* in the founding era is, as a matter of basic logic, not the same thing as an exhaustive account of what laws would have been theoretically *believed to be permissible* by an individual sharing the original public understanding of the Constitution.”).

### 3. *Population Density and Counter-Majoritarianism*

The *Bruen* majority observed that, as of 1890, “[r]oughly 62 million people lived in the United States.”<sup>90</sup> By the Court’s count, “Arizona, Idaho, New Mexico, Oklahoma, and Wyoming combined to account for only 420,000 of those inhabitants—about two-thirds of 1% of the population.”<sup>91</sup> The territorial laws in question, then, applied to only a small percentage of the nation’s population at any given time and “were irrelevant to more than 99% of the American population.”<sup>92</sup> The majority’s point about population density is well-taken; the 1890 census numbers reflect that many Western territories were, at least for some time, sparsely populated compared to Eastern states. This passage of *Bruen* suggests some form of counter-majoritarian objection to considering territorial laws and practices: most of the American population at the time did not vote for such laws (or elect representatives who voted for such laws), and thus the Court should not rely upon them.

However, there are four reasons why the Court’s purported concern with majoritarianism in the context of territorial laws is not a convincing reason to devalue those laws. First, this argument largely overlooks the breakneck pace of population growth in the Western territories in the late nineteenth century. The Court in *Bruen* decides to evaluate historical population density as of a single, set date; this approach, however, risks missing broader trends. For example, the recorded population of the Oklahoma Territory increased from 61,834 in 1890 to 398,331 in 1900: an astonishing 544% increase in population in just ten years.<sup>93</sup> This rate of growth was not atypical in the rapidly expanding Western territories after the Civil War. In perhaps the best example of rapid territorial population growth, the recorded population of the Dakota Territory (North and South Dakota were combined until the 1890 census) increased from 14,181 in 1870 to 135,177 in 1880: an 853.2% increase in just ten years.<sup>94</sup> It is certainly true that the population of these territories at all times remained a small percentage of the nation’s total population; but using a single-year snapshot obscures the rapid pace at which many territories grew. Moreover, this approach tremendously diminishes the importance of the territorial system throughout the 1800s and into the early 1900s. The states that composed the original thirteen colonies constitute less than 9% of the total area of the current United States and

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

91. *Id.*

92. *Id.*

93. U.S. CENSUS BUREAU, 1900 CENSUS: STATES AND TERRITORIES 2 tbl.1.

94. *Id.*

contain less than 30% of the current U.S. population (8.93% and 29.33%, based on the most current data).<sup>95</sup> Every other part of the United States existed under territorial government (or federal military government, as in the case of California) for some time. As just one example, nearly all of the land comprising present-day South Dakota was acquired in 1803 through the Louisiana Purchase, but South Dakota did not become a state until 1889, almost ninety years later.<sup>96</sup>

The rapid territorial population growth in the mid-to-late 1800s was driven predominantly by men, often single men or married men who traveled initially without their wives and families.<sup>97</sup> While accurate data regarding frontier gun ownership is notoriously difficult to locate—and the subject itself is highly controversial<sup>98</sup>—one might reasonably believe that frontier men possessed guns at a higher rate than men living in crowded Eastern cities due to unique hazards on the frontier and the necessity of hunting game as a source of food.<sup>99</sup> Therefore, the territorial gun laws in question may well have impacted a disproportionately high number of

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95. U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, DISTRICT OF COLUMBIA, AND PUERTO RICO: APRIL 1, 2020 TO JULY 1, 2022 (2022), <https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html> [<https://perma.cc/F4SC-M2R3>]; U.S. CENSUS BUREAU, STATE AREA MEASUREMENTS AND INTERNAL POINT COORDINATES (Jan. 1, 2010), <https://www.census.gov/geographies/reference-files/2010/geo/state-area.html> [<https://perma.cc/KQS7-37SK>].

96. See Sarah Lanier Hollingsworth, *A Bibliographic Survey of Prestatehood Legal Resources for the State of South Dakota*, in 2 PRESTATEHOOD LEGAL MATERIALS: A FIFTY-STATE RESEARCH GUIDE, INCLUDING NEW YORK CITY AND THE DISTRICT OF COLUMBIA 1077 (Michael G. Chiorazzi & Marguerite Most eds., 2005).

97. See Mark E. Nackman, *Anglo-American Migrants to the West: Men of Broken Fortunes? The Case of Texas, 1821-46*, 5 W. HIST. Q. 441, 444 (1974) (referring to “[t]he high proportion of single men in frontier populations, and the disposition of such males to marry relatively late in life or not at all”); Myron P. Gutmann, Sara M. Pullum-Piñón, Kristine Witkowski, Glenn D. Deane & Emily Merchant, *Land Use and Family Formation in the Settlement of the US Great Plains*, 36 SOC. SCI. HIST. 279, 283 (2012) (“[I]n most cases the earliest settlers were single men who worked in ranching or a specialized industry, such as mining, trade, or manufacturing, and sex ratios were therefore quite high.”).

98. For example, Michael Bellesiles, in his now-discredited 2000 book *Arming America*, argued based on probate records that frontier gun ownership in the late 1700s was as low as 14% of households and less than gun ownership in settled regions. Yet Bellesiles could not substantiate this number, and subsequent review of the probate repositories he cited suggested that the real percentage was substantially higher. See, e.g., James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1786–87, 1819–35 (2002) (noting other scholarship suggesting that gun ownership was slightly higher in frontier than settled regions).

99. See generally ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 160–65* (2011) (noting that “[t]he Wild West was filled with guns” and that “[f]rontier towns handled guns the way a Boston restaurant today handles overcoats in winter”); Merrill J. Mattes & Esley J. Kirk, *From Ohio to California in 1849: The Gold Rush Journal of Elijah Bryan Farnham*, 46 IND. MAG. HIST. 297, 312 (1950) (referencing “a great many accidents [which] hapend by foolishly handling guns and pistoles [sic]” during the overland trek to California in 1849); *Carrying Weapons*, BLACK HILLS DAILY PIONEER, Feb. 6, 1879, at 4 (noting that “[o]n the frontier people seem to think it a necessity” to carry weapons).

*gunowners*, even though the total percentage of the U.S. population residing in the territories as of 1890 was quite small.

Second, the territorial laws at issue *were* laws passed in areas where American citizens lived, through a democratic process and by territorial legislatures elected by the populace. In a recent article, Gary Lawson and Guy Seidman convincingly argue from an originalist and textualist perspective that territorial inhabitants are part of the “people” of the United States encompassed by the Constitution, a document that creates institutions with a “scope of power . . . [that] extends over the *entire geographic and political range of the United States in its broadest sense*, including federally owned territory.”<sup>100</sup>

Third, the Court’s approach of focusing on population density only in this specific context is inconsistent with past decisions, and with other portions of *Bruen* itself. The Court does not generally consider population density when evaluating state and territorial history. For example, the *Dobbs* territorial appendix likely similarly contains abortion bans that applied to only a small percentage of the total U.S. population at any relevant time.<sup>101</sup> Yet the *Dobbs* majority nevertheless found it important that there was a noticeable trend in these territories to ban abortion, despite their presumably low population. As Justice Breyer’s dissent in *Bruen* observes, the six states plus the District of Columbia that employed may-issue licensing laws similar to New York’s law “comprise[d] about 84.4 million people and account[ed] for over a quarter of the country’s population.”<sup>102</sup> *Bruen* suggests that *current* state practice is relevant in some way to the legal analysis of Second Amendment claims, framing New York’s approach as a modern-day outlier.<sup>103</sup> If both modern and historical state practice matter, it

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100. Gary Lawson & Guy Seidman, *Are People in Federal Territories Part of “We the People of the United States”?*, 9 TEX. A&M L. REV. 655, 680 (2022).

101. The territorial abortion restrictions in the *Dobbs* appendix were enacted between 1850 and 1919. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2253, 2296–300 (2022). An exact quantitative comparison to *Bruen* is challenging because the territories gradually became states throughout that period, and thus it is unclear which census date to select. *Bruen* used the 1890 census that immediately preceded the admission of Idaho and Wyoming in 1890. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2154 (2022). For *Dobbs*, the corollary appears to be the 1880 census that preceded the 1889 admission of North Dakota, South Dakota, and Montana. As of 1880, eight territories had enacted abortion restrictions: Washington, Idaho, Montana, Arizona, Wyoming, Utah, North Dakota, and South Dakota (Colorado enacted such a law while it was a territory but was admitted as a state in 1876, and Hawaii had a similar restriction in place but did not become a U.S. territory until 1898). Including Colorado within the count (but not Hawaii), these territories had a total population of 681,581 in 1880, constituting approximately 1.3% of the total U.S. population. See U.S. CENSUS BUREAU, *supra* note 93, at 2 tbl.1. If the 1890 census is used, that percentage rises to around 3%. See *id.*

102. *Bruen*, 142 S. Ct. at 2172–73 (Breyer, J., dissenting).

103. *Id.* at 2123–24 (majority opinion) (“[T]he vast majority of States—43 by our count—are ‘shall issue’ jurisdictions . . . . [And] only six States and the District of Columbia have ‘may issue’ licensing laws . . . .”).

is not clear why population density is relevant only in the historical context and not as of the present day.

Fourth, a counter-majoritarian objection to considering territorial history requires some underlying assumption that the Court is, or should be, accounting for majoritarian preferences *at all* in its jurisprudence. As Alexander Bickel has explained, it is an “ineluctable reality” “that judicial review is a counter-majoritarian force in our system” of government.<sup>104</sup> That is because, by reviewing and invalidating certain enacted laws, the Court is necessarily “thwart[ing] the will of representatives of the actual people of the here and now.”<sup>105</sup> It is, of course, possible for a blatantly unconstitutional law to be highly popular. In such circumstances, the Court should ideally be skeptical and avoid eagerly embracing legislative interventions merely because they are widely supported or adopted in states representing the majority of the U.S. population. Consider, for example, the passage of the Alien and Sedition Acts shortly after the Founding, legislation which scholars have long argued was an unconstitutional infringement of the First Amendment freedom of speech when passed.<sup>106</sup> As scholars have observed, “[p]arty politics consumed constitutional interpretation during the Early Republic”<sup>107</sup>—potentially resulting in the passage of popular laws that contravened constitutional protections in the name of partisanship.<sup>108</sup> Moreover, “many sources that jurists legitimately rely upon in interpreting the Constitution are not created through democratic decisionmaking.”<sup>109</sup> Consulting territorial law or practice, then, is not much different from consulting state court decisions, state constitutions, or principles of the common law to interpret the Federal Constitution. In other words, even if territorial law and practice is considered less “majoritarian” than state law and practice, it forms part of the American tradition and is at

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104. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Yale Univ. Press, 1986) (1962).

105. *Id.* at 16–17.

106. *See, e.g.*, Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109, 110 (describing this as the “traditional view”). A modern example of this phenomenon is high public support for statutory bans on flag burning, despite established decisional law that such conduct is protected by the First Amendment. *See, e.g.*, Paul Taylor, *No Clamor for Amendment from Flag-Waving Public*, PEW RSCH. CTR. (June 28, 2006), <https://www.pewresearch.org/2006/06/28/no-clamor-for-amendment-from-flagwaving-public/> [<https://perma.cc/CF8D-9586>] (referencing support as high as 73% for a law criminalizing flag-burning).

107. Patrick J. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause: Resurrecting the Jurisprudence of Alexander Addison*, 58 CLEV. ST. L. REV. 529, 532–33 (2010).

108. *See, e.g.*, Ian Bartrum, *Of Aliens and Sedition*, PRAWFSBLAWG (Mar. 1, 2017, 4:11 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2017/03/of-aliens-and-sedition.html> [<https://perma.cc/MYQ9-L5JT>].

109. Cleveland, *supra* note 18, at 103.



least as likely to shed light on constitutional meaning as state-level sources that do not always reflect purely majoritarian preferences.

In the same way that reevaluating the *Bruen* majority's reliance on the duration and nature of territorial laws points to a more prominent role for territorial history, viewing territorial laws (which possibly covered a disproportionately high number of gunowners at the time) as a stronger expression of majoritarian will suggests they may be more central to American historical tradition than *Bruen* allows.

## II. THE CONSTITUTION AND THE TERRITORIES

*Bruen* is not the first Supreme Court decision to evaluate laws from U.S. territories, either historically or as of the present day. This Section seeks to situate the Court's past practice against the historical, legal, and cultural backdrop of the continental territories. Sections II.A and II.B trace the early history of U.S. territorial acquisition and show that the territories were always directly subject to the provisions in the Federal Constitution and its Bill of Rights. Section II.C describes how the Court has looked to territorial history in a wide variety of cases, ranging from substantive due process challenges under the Fourteenth Amendment, to death penalty cases under the Eighth Amendment, to administrative and securities law decisions.

Section II.D explains how existing scholarship regarding the Court's consultation of state and foreign law to interpret the U.S. Constitution is relevant to the territorial issue. As described more fully below, the Court's consideration of territorial law and practice raises concerns that are similar to those levied when the court relies on "other law": "law that is 'foreign' in the sense that it does not emanate from the particular sovereign whose law is being interpreted."<sup>110</sup> The Court's past practice, and legal scholarship regarding "other law" consultation, suggest several important principles which counsel in favor of considering the territories in a history-focused analysis.

### A. A Brief History of the Continental Territories

This Section will briefly trace the history of U.S. acquisition of continental territories that would ultimately become states, and the constitutional and legal frameworks that applied to those territories prior to statehood. In 1787, at the same time that the Constitutional Convention was under way in Philadelphia, the Continental Congress drafted the Northwest

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110. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 179 (2006).

Ordinance and “set the pattern for territorial governance and statemaking that was ultimately applied to thirty-one of the fifty states.”<sup>111</sup> The Northwest Ordinance was necessary because certain states had ceded their claims over Western lands to the federal government—the culmination of a lengthy debate over how to handle those territories between states with claims to Western lands based on their colonial charters, and states without such claims.<sup>112</sup>

The federal government’s authority to acquire *new* territory, separate and apart from the initial cession of Western land by existing states, was initially a matter of heated debate. In an 1803 letter to John Breckinridge, Thomas Jefferson observed that “the constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our union.”<sup>113</sup> Jefferson, who believed in the importance of acquiring the territory from Spain to ensure American access to global markets through the Mississippi River,<sup>114</sup> initially pushed for a constitutional amendment that would specifically allow him to acquire the Louisiana Territory—and then followed through with the purchase without one despite his constitutional reservations.<sup>115</sup> The United States subsequently began to expand south and west, fueled by “Manifest Destiny” and “a belief in the inexorable nature of the growth of federal democracy across the Western Hemisphere.”<sup>116</sup> In short order, the United States annexed Texas, received a large cession of Southwestern land from Mexico following the Mexican-American War, and secured additional Western lands by treaty.<sup>117</sup>

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111. Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 930 (1995).

112. See generally Reginald Horsman, *The Northwest Ordinance and the Shaping of an Expanding Republic*, 73 WISC. MAG. HIST. 21 (1989); see also Duffey, *supra* note 111, at 934–35.

113. Letter from Thomas Jefferson, President of the U.S., to John Breckinridge, U.S. Sen. from Kentucky (Aug. 12, 1803), <https://founders.archives.gov/documents/Jefferson/01-41-02-0139> [<https://perma.cc/QWU8-YJNF>].

114. See Bernard W. Sheehan, *Jefferson’s “Empire for Liberty,”* 100 IND. MAG. HIST. 346, 352 (2004).

115. See 10 EVERETT SOMERVILLE BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803–1812*, at 25–35 (Herbert E. Bolton ed., 1920); see also *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 448–49 (1857) (“The form of government to be established [for the territories] necessarily rested in the discretion of Congress. . . . [And the form of that government] must always depend upon the existing condition of the Territory, as to the number and character of its inhabitants, and their situation in the Territory.”), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

116. ADAM BURNS, *AMERICAN IMPERIALISM: THE TERRITORIAL EXPANSION OF THE UNITED STATES, 1783–2013*, at 19 (2017).

117. *Id.* at 19–22.

Throughout this period of territorial acquisition, the legal and political structure of territorial government remained largely unchanged.<sup>118</sup> The Northwest Ordinance of 1787 provided that “[t]he said territory, and the States which may be formed therein, shall forever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation.”<sup>119</sup> The Ordinance created a political structure for the first federal territories: governors and judges would be appointed by the federal government initially and, once the territory reached “five thousand free male inhabitants of full age,” it would be permitted to elect its own legislative assembly.<sup>120</sup> The Ordinance also extended certain “fundamental principles of civil and religious liberty” to the territories.<sup>121</sup> The Northwest Ordinance provided the basis for future territorial government in the continental United States, although the form of territorial administration underwent several extensions of popular government in the early nineteenth century.<sup>122</sup> Federal administration of newly acquired territory generally followed the same process as that already in place for ceded Northwest territories and adhered to “[t]he doctrine that territories must pass through varying stages of progress before definite privileges [were] granted to them” and before ultimately attaining statehood.<sup>123</sup>

The Constitution itself does not prescribe specific rules or systems for territorial government. The Territories Clause in Article IV grants Congress the “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>124</sup> Although the grant of power to the federal government is exclusive and broad, “Congress has long allowed federal territories to govern themselves through local legislatures (subject to congressional oversight), both as a prelude to statehood and as a matter of democratic theory.”<sup>125</sup> And the territorial power within the continental United States is generally not all-encompassing, but rather “subject to check by some, though not all, of the same structural and prohibitory limitations that apply to federal power in

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118. See generally Duffey, *supra* note 111, at 949–50 (observing that the Northwest Ordinance “set a pattern that was followed in varying degrees by much subsequent territorial legislation . . . by establishing a governmental scheme dependent on maturation”).

119. An Ordinance for the Government of the Territory of the United States North-West of the River Ohio art. 4 (1787), <https://www.archives.gov/milestone-documents/northwest-ordinance> [<https://perma.cc/22QB-HWHF>].

120. *Id.* § 9.

121. *Id.* § 13.

122. POMEROY, *supra* note 49, at 1–5; Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 900–01 (1990).

123. BROWN, *supra* note 115, at 105.

124. U.S. CONST. art. IV, § 3, cl. 2.

125. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 393 (2002).

other contexts.”<sup>126</sup> Territories were generally organized pursuant to statute under the same general plan, with the agreements providing for creation of a territorial legislature and officially extending constitutional and federal rights and protections to territorial inhabitants.<sup>127</sup>

### *B. The Bill of Rights Applied to Continental Territories*

Although most provisions in the Bill of Rights today protect against infringement by state governments through the process of incorporation, historically that was not the case. Rather, from 1791 until the twentieth century and even beyond (as in the case of the Second Amendment), the Bill of Rights was construed as providing protections *only* against infringement by the federal government.<sup>128</sup> The Bill of Rights did, however, apply in continental territories, which were under the exclusive control of the federal government. This Section first assembles historical evidence that the Federal Constitution and the Bill of Rights were always intended to apply directly in continental territories and that the federal government wielded the Constitution and its central principles to curb territorial practices that deviated substantially from national consensus. Second, this Section traces the lengthy history of Supreme Court precedent applying provisions in the Bill of Rights to strike down inconsistent territorial enactments.

#### *1. Historical Evidence*

The Supreme Court held in 1833 that the protections in the Bill of Rights applied only against the federal government, and not against state or local governments.<sup>129</sup> On multiple occasions in the late nineteenth century, the specific era when the territorial laws at issue in *Bruen* were passed, the Court affirmed the then-fundamental principle that the Second Amendment “is a limitation only upon the power of Congress and the National government, and not upon that of the States.”<sup>130</sup> Given this limited scope and the lack of federal gun regulation outside of the militia context until the

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126. GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 4 (2004).

127. *See, e.g.*, Act of June 10, 1798, ch. 28, 1 Stat. 549 (1798) (memorializing “an amicable settlement of limits with the state of Georgia, and authorizing the establishment of a government in the Mississippi territory”).

128. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

129. *Id.* at 250–51.

130. *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *see also* *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

early 1900s,<sup>131</sup> the *Federal* Second Amendment did very little work from 1791 up until the Supreme Court’s decision in *McDonald v. City of Chicago*.<sup>132</sup> That should not come as a surprise, because the federal provision simply did not apply to the state governments who were mostly engaged in regulating the individual possession and use of firearms for much of early American history.

In 1833, the Supreme Court held in *Barron v. City of Baltimore* that the Bill of Rights did not apply to state or local government action.<sup>133</sup> The decision in *Barron* merely confirmed the overwhelming consensus at the time that the Bill of Rights had been passed to guard against a tyrannical *federal* government by carving out areas of exclusive state power where the federal government could not regulate. In other words, the Bill of Rights did not restrict state action and that construction was widely believed to be nonsensical. In state ratifying conventions, “no one ever suggested that the general language, simply because of its juxtaposition with other clauses worded differently, would limit state governments as well” and “[t]he proposed location of these clauses made it clear that, however worded, they applied only against the federal government.”<sup>134</sup> Therefore, “*Barron*’s

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131. While Congress legislated relatively frequently on the topic of when and how the state militias could be called forth by the federal government to address situations of exigent need, these laws did not regulate private gun possession and use in the way that federal law has since the 1930s. *See, e.g.*, Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 *YALE L.J.* 149 (2004).

132. 561 U.S. 742 (2010). The incorporation doctrine ultimately applied many protections in the Bill of Rights against state governments, albeit belatedly. The idea of using the Fourteenth Amendment to apply these protections against state government action was expressly suggested during Congressional debates over the Fourteenth Amendment. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1867) (in a speech introducing the proposed Fourteenth Amendment, Senator John Bingham declared: “The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today.”). The Court neutered this possibility shortly after the Fourteenth Amendment was ratified, embracing “the distinction between citizenship of the United States and citizenship of a State.” *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872). However, the Court then “gradually began to read certain guaranties of the Bill of Rights into the due process clause of the Fourteenth Amendment” in the early twentieth century. MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 197 (1986). For example, the Court held in 1925 that large portions of the First Amendment applied against state governments, *see Gitlow v. New York*, 268 U.S. 652 (1925), and in 1932 applied the Sixth Amendment right to counsel against the states in capital cases, *see Powell v. Alabama*, 287 U.S. 45 (1932). While ultimately rejecting wholesale incorporation of the full Bill of Rights, which some Justices supported, “the Supreme Court began to find more and more guaranties in the Bill of Rights fundamental and so protected under the due process clause of the Fourteenth Amendment.” CURTIS, *supra*, at 202. The Second Amendment was incorporated in 2010 in *McDonald*, and only a handful of provisions in the Bill of Rights—such as the Third Amendment—remain unincorporated against the states. *See* Kurt Lash, *Is the Third Amendment “Incorporatable?”*, PRAWFSBLAWG (Aug. 3, 2013, 12:42 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2013/08/is-the-third-amendment-incorporatable.html> [<https://perma.cc/T5D5-RD9B>].

133. 32 U.S. at 247–48.

134. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 142–43 (1998).

holding [] kept faith with both the letter and the spirit of the original Bill of Rights.”<sup>135</sup> Indeed, when one considers that the anti-Federalists who lobbied against the Constitution and in favor of a Bill of Rights wanted to reserve greater power to the states, the idea that the Bill of Rights was originally understood to *constrain* state action quickly becomes untenable. For example, in 1787, the anti-Federalist author Brutus railed against the corrupting influence of power that “will operate in the federal legislature to lessen and ultimately to subvert the state authority.”<sup>136</sup> Brutus further observed that “it ought to be left to the state governments to provide for the protection and defence of the citizen against the hand of private violence.”<sup>137</sup> Brutus and other anti-Federalists wanted to expand, not restrict, the regulatory power of state governments, and they proposed amendments that sought to constrain the federal government but not the states.<sup>138</sup>

As the United States expanded westward—through both treaty and war—the agreements memorializing acquisition of these new territories (later characterized by the *Insular Cases* as “incorporated” territories) stated that the Constitution, and the Bill of Rights, would apply directly during the period of territorial government. Both the Louisiana Purchase and the Mexican Cession—which together comprise over one-third of the area of the current United States, and a substantial portion of the specific territories at issue in *Bruen*—were acquired under treaties or agreements (similar to the Northwest Ordinance) that explicitly extended federal constitutional rights, privileges, and immunities to inhabitants of those territories.<sup>139</sup> For example, the agreement between the U.S. and France memorializing the Louisiana Purchase stated that inhabitants would be incorporated and admitted “according to the principles of the Federal [C]onstitution to the enjoyment of all these rights, advantages and immunities of citizens of the

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135. *Id.* at 144.

136. Brutus, No. 1 (Oct. 18, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 366, 368 (Herbert J. Storing ed., 1981).

137. Brutus, No. 7 (Jan. 3, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 136, at 400, 401.

138. See, e.g., The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents (Dec. 18, 1787) (“We dissent, secondly, because the powers vested in Congress by this constitution, must necessarily annihilate and absorb the legislative, executive, and judicial powers of the several States, and produce from their ruins one consolidated government, which from the nature of things will be an *iron handed despotism*, as nothing short of the supremacy of despotic sway could connect and govern these United States under one government.”), reprinted in PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 454, 465 (John Bach McMaster & Frederick D. Stone eds., 1888).

139. Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. RESV. L. REV. 147, 151–54 (2006).

United States.”<sup>140</sup> The Treaty of Guadalupe Hidalgo in 1848, under which Mexico ceded large portions of the Southwest to the United States, similarly provided that inhabitants of the territory “who . . . shall not preserve the character of citizens of the Mexican [R]epublic” would be extended, “all the rights of citizens of the United States, according to the principles of the [C]onstitution.”<sup>141</sup> A necessary foundation for the Court’s infamous decision in *Dred Scott* was that the federal government’s powers in the territories were “strictly defined, and limited by the Constitution, from which it derives its own existence.”<sup>142</sup>

The Constitution grants Congress the exclusive power “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>143</sup> As the Court held in 1828, “[t]he Constitution authorizes Congress to *provide* for the government of the territories. It has all the power over them, that Congress and the legislature of a state, have over a state.”<sup>144</sup> The President appointed territorial governors, Congress appropriated funds for territorial administration, and a variety of executive branch agencies supervised day-to-day government in the territories.<sup>145</sup> The territorial government then passed its own laws, so long as they were “not inconsistent with the Constitution or laws of the United States.”<sup>146</sup> This entire process occurred under federal oversight, and the federal government retained control and the ability to intervene in territorial affairs.<sup>147</sup> At all times, “Congress retained supreme power over the territories, however confused and ineffective its exercise of it.”<sup>148</sup> The explosive congressional debates surrounding the Thirteenth Amendment and federal interference with state power did not

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140. Treaty Between the United States of America and the French Republic on Land Purchase, Fr.-U.S., art. III, Apr. 30, 1803, 8 Stat. 200, 202 [hereinafter Louisiana Purchase].

141. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Mex.-U.S., art. IX, Feb. 2, 1848, 9 Stat. 922, 930 [hereinafter Treaty of Guadalupe Hidalgo].

142. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449 (1857), *superseded by Constitutional amendment*, U.S. CONST. amend. XIV. Because the Constitution and Bill of Rights restrained the federal government’s actions in the territories, the Court found that legislation barring slavery there unconstitutionally deprived territorial citizens of their property. *Id.* at 452.

143. U.S. CONST. art. IV, § 3, cl. 2.

144. *Am. Ins. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 534 (1828).

145. See POMEROY, *supra* note 49, at 4–5.

146. *356 Bales of Cotton*, 26 U.S. at 534.

147. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 154 (1879) (“As Congress may at any time assume control of the matter, there is but little danger to be anticipated from improvident territorial legislation in this particular.”).

148. POMEROY, *supra* note 49, at 4.

touch on the territories whatsoever—rather, it was always accepted that the amendment applied in the federal territories.<sup>149</sup>

Moreover, the federal government intervened in the territories directly to curb practices that it considered improper. As the Court observed in 1879, “there is but little danger to be anticipated from improvident territorial legislation,”<sup>150</sup> precisely because Congress could be expected to step in any time a territory might consider such action.<sup>151</sup> The federal Congress abrogated or otherwise nullified laws passed by territorial legislatures as early as 1792, due to concerns that these laws included criminal statutes of limitation outside of the national norm or permitted monopolistic commercial behavior.<sup>152</sup> In 1879 the Supreme Court officially sanctioned this practice, holding that “Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government [and] . . . do for the Territories what the people, under the Constitution of the United States, may do for the States.”<sup>153</sup>

Perhaps the most consistent and aggressive federal effort to rein in territorial behavior that it considered improper occurred in the late nineteenth century. The federal government passed three separate laws between 1862 and 1882 attempting to stamp out polygamy in the Utah Territory.<sup>154</sup> These laws included provisions criminalizing polygamy and permitting jurors to be struck in polygamy trials for failing to answer questions about their marital status.<sup>155</sup> The Supreme Court repeatedly sanctioned federal intervention in the Utah Territory to address polygamy; first in *Reynolds* and, later, in *Murphy v. Ramsey*.<sup>156</sup> *Murphy* includes lofty assertions about the self-evident right of Congress to legislate to secure single marriage: “the sure foundation of all that is stable and noble in our civilization.”<sup>157</sup> Anti-polygamists “rallied to the defense of monogamy as

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149. George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1374 (2008) (“The framers of the Amendment would not have thought of it as regulating only state action when they based its wording on an ordinance that applied as municipal law within federal territory.”); see also *Peonage Cases*, 123 F. 671, 675 (M.D. Ala. 1903) (noting that New Mexico territorial courts, “after the passage of the thirteenth amendment, h[eld] that it destroyed the right formerly existing under the territorial laws to hold to service”).

150. *Reynolds*, 98 U.S. at 154.

151. *Id.*

152. LEIBOWITZ, *supra* note 57, at 7.

153. *Nat’l Bank v. County of Yankton*, 101 U.S. 129, 133 (1879).

154. See generally Mary K. Campbell, *Mr. Peay’s Horses: The Federal Response to Mormon Polygamy, 1854 – 1887*, 13 YALE J.L. & FEMINISM 29, 38–45 (2001).

155. *Id.*

156. *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

157. *Id.*



the centerpiece of true religious liberty and constitutional rectitude.”<sup>158</sup> One of the centerpieces of the anti-polygamist movement was constitutional rhetoric, and opponents of polygamy posited that “[i]f [constitutional] liberty included the right to differ on moral questions of vital importance such as polygamy, then morality itself was subject to diverse interpretations in the name of ‘liberty.’”<sup>159</sup> Under federal influence, territorial governments in Utah and Idaho took drastic anti-polygamy measures well before those states were admitted into the union.<sup>160</sup> In other words, the Constitution did not “bend” in the territories but rather was at its apex—potentially prohibiting even practices *not* explicitly circumscribed in the document itself based solely on a “public morality paradigm.”<sup>161</sup>

## 2. Legal Evidence

Multiple Supreme Court decisions in the latter half of the nineteenth century confirmed that the Constitution, including the amendments in the Bill of Rights, applied directly in incorporated territories until statehood. A line of cases decided in the mid-1800s firmly settled the idea that, specifically, the Bill of Rights directly applied in those territories: “the overwhelming weight of judicial authority sustains the proposition that, except for the provision regulating the organization of the courts, the limitations in the Constitution extend to the continental territory ceded to the United States by France, Spain, and Mexico.”<sup>162</sup>

As early as 1851, the Court held that an Iowa territorial law prohibiting trial by jury in certain cases violated the Seventh Amendment.<sup>163</sup> The Court observed that the Northwest Ordinance of 1787 “secure[d] to its inhabitants the trial by jury,”<sup>164</sup> and that the jury right encompassed in the Seventh

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158. Sarah Barringer Gordon, *A War of Words: Revelation and Storytelling in the Campaign Against Mormon Polygamy*, 78 CHI.-KENT L. REV. 739, 751 (2003).

159. SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 40 (Thomas A. Green & Hendrik Hartog eds., 2002).

160. See, e.g., Merle W. Wells, *The Idaho Anti-Mormon Test Oath, 1884–1892*, 24 PAC. HIST. REV. 235, 235–39 (1955) (describing the 1884 test oath designed to exclude Mormons in Idaho territory from political participation).

161. Richard A. Vazquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 225, 232 (2001).

162. Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View.*, 13 HARV. L. REV. 155, 170 (1899).

163. *Webster v. Reid*, 52 U.S. (11 How.) 437, 460 (1851) (“The organic law of the Territory of Iowa, by express provision and by reference, extended the laws of the United States, including the Ordinance of 1787, over the Territory, so far as they are applicable.”). Notably, the Seventh Amendment has never been incorporated against the states through the Fourteenth Amendment. E.g., Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV. 467, 472 (2022).

164. *Reid*, 52 U.S. at 453.

Amendment thus applied fully in the territory.<sup>165</sup> In an 1853 case, the Court rejected a claim to recover duties paid on foreign goods imported to California during the brief period when it was held by the United States as territory before being elevated to statehood.<sup>166</sup> The Court observed that any territory “not within the jurisdiction of any particular State . . . is within the power and jurisdiction of the United States,” that the federal government was limited in this jurisdiction only by the Constitution and federal law, and that the government’s choice to leave a duty system in place in the territory legitimized the collection of duties and imposts during the intervening territorial period.<sup>167</sup>

Following the Civil War, the Court was frequently called upon to decide challenges to territorial laws alleging violations of the Bill of Rights. In 1878, the Court assumed that the Sixth Amendment applied in the Utah Territory and further opined that “Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation.”<sup>168</sup> In another Utah case about twenty years later, the Court again affirmed the application of the Seventh Amendment right to trial by jury in the territories, this time to strike down the attempt to impose a non-unanimous jury verdict as “destroy[ing a] substantial and essential feature” of the territorial citizens’ constitutional rights.<sup>169</sup> In an 1890 decision, the Court observed, “[d]oubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution *and its amendments*.”<sup>170</sup> In *Bauman v. Ross*, the Court held that the Fifth Amendment applied to the District of Columbia.<sup>171</sup> Even Earl Pomeroy, the Court’s preferred source for information about the nature of territorial government in the West, notes that “[r]esistance to outside authority was practical, not doctrinal. There were few arguments on a constitutional basis for general territorial autonomy after 1861.”<sup>172</sup>

Overall, it was largely established from the Founding until well into the twentieth century that the Bill of Rights applied in the territories but did *not*

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165. *Id.*; see also *Springville v. Thomas*, 166 U.S. 707, 708–09 (1897) (same holding as to the jury-unanimity requirement).

166. *Cross v. Harrison*, 57 U.S. (16 How.) 164 (1854).

167. *Id.* at 192, 194–95, 201–02.

168. *Reynolds v. United States*, 98 U.S. 145, 162 (1879).

169. *Am. Publ’g Co. v. Fisher*, 166 U.S. 464, 468 (1897).

170. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 44 (1890) (emphasis added).

171. *Bauman v. Ross*, 167 U.S. 548 (1897).

172. POMEROY, *supra* note 49, at 100.

apply against state government action.<sup>173</sup> As to the Second Amendment specifically, it was not until 2010 that the provision was actually incorporated against state governments.<sup>174</sup> Although some early state court decisions held or assumed that the Federal Second Amendment bound state governments, even following *Barron*,<sup>175</sup> that approach was an “outlier” theory and not consistent with *Barron*. This area of state decisional law is murky at best and, if anything, merely suggests that it was at least several decades before *Barron* took hold at the state level. For example, the Tennessee Supreme Court considered the Second Amendment (and Tennessee’s state-analogue provision) in two separate mid-nineteenth-century cases—*Aymette* and *Andrews*—but only cited *Barron* and the anti-incorporation principle<sup>176</sup> in the latter 1871 *Andrews* decision.<sup>177</sup> It bears noting that even the Supreme Court’s adherence to its own precedent in the early-to-mid 1800s was spotty at best, with one commentator noting that “the best explanation for [the Marshall Court’s] failure to rely on precedent is probably the lack of a reliable digest system during the early part of the nineteenth century.”<sup>178</sup> Some state courts may have initially been unaware of *Barron* and, later, simply assumed that state-analogue provisions should be construed identically to the Federal Second Amendment because this interpretation did not require them to disturb pre-*Barron* decisions.<sup>179</sup>

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173. Indeed, even those who argue from an originalist perspective in favor of incorporation start their inquiry during Reconstruction, and not in the Founding Era. *E.g.*, Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441 (2022); *see also* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1212 (1992) (observing that those who “belie[ved] that *Barron* was wrongly decided . . . found themselves in a distinct minority among antebellum lawyers”).

174. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

175. *See, e.g.*, *State v. Buzzard*, 4 Ark. 18, 27–28 (1842) (evaluating a challenge to a state concealed carry ban under the Federal Second Amendment, even though the judge was “not aware that this right has ever become the subject of any adjudication in the Federal courts”); *Nunn v. State*, 1 Ga. 243, 250 (1846) (“The language of the *second* amendment is broad enough to embrace both Federal and State governments—nor is there anything in its terms which restricts its meaning.”); *State v. Chandler*, 5 La. Ann. 489, 490 (1850); *see also* *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891) (noting that the applicability of the Second Amendment to the states was “a question upon which authorities differ”), *abrogated by* *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

176. *See* *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833), *superseded by constitutional amendment*, U.S. Const. amend. XIV (holding that the amendments in the Bill of Rights “demanded security against the apprehended encroachments of the general government—not against those of the local governments” and thus did not limit state action).

177. *See* *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 172–74 (1871).

178. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 668 (1999).

179. *See* Amar, *supra* note 173, at 1204–05 (noting that, in the three decades following *Barron*, some “lawyers, having simply never heard of *Barron* and its progeny, casually assumed . . . that the general language of various provisions made application to states obvious,” and that “several capable

The *Insular Cases* added a new layer of complexity regarding how the Constitution applied in unincorporated, non-continental territories with majority non-white populations which the United States did not intend to elevate to states. The *Insular Cases* include about twenty Supreme Court decisions handed down in the first two decades of the twentieth century that “addressed the legal status of the new overseas territories”—in particular, those territories the United States acquired after the Spanish-American War.<sup>180</sup> For example, *Downes v. Bidwell* involved a challenge to a duty imposed on produce shipped to Puerto Rico under the Constitution’s requirement of uniform taxes and duties.<sup>181</sup> The Court first confirmed “that past treaties of acquisition had provided for the incorporation of the inhabitants of territories into the United States,” such that the Constitution and Bill of Rights applied directly.<sup>182</sup> Then, however, the Court held that “unincorporated” overseas territories such as Puerto Rico were “not a part of the United States” in the same way and therefore did not automatically enjoy the same constitutional protections as *incorporated* territories.<sup>183</sup>

The larger background question surrounding the *Insular Cases* “was whether the American legal system was to [sic] going to foster or fetter imperialism”<sup>184</sup>—by holding that the Constitution did not apply fully in these new territories, the Court permitted the federal government to govern them in a manner akin to how other imperial powers governed overseas dominions.<sup>185</sup> There is a rich scholarly literature surrounding the unincorporated territories and the *Insular Cases*, including the continuing vitality of the non-incorporation doctrine and whether the *Insular Cases* can be squared with an originalist theory of constitutional interpretation.<sup>186</sup> This

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lawyers in the Thirty-ninth Congress . . . seemed unaware of *Barron* until the case was brought to their attention by name by John Bingham”).

180. KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 80 (2009).

181. *Downes v. Bidwell*, 182 U.S. 244, 248–49 (1901).

182. JAMES EDWARD KERR, THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM 85 (Rudolph J. Gerber ed., 1982).

183. *Downes*, 182 U.S. at 287. Other unincorporated U.S. territories at the time, whose status would be governed, at least initially, by the holding in *Downes* and subsequent cases, included Cuba, the Philippines, Guam, and Hawaii. See BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE 3–5 (2006).

184. RAUSTIALA, *supra* note 180, at 81.

185. See *id.* at 86 (“The doctrine of incorporation facilitated the imperial ambitions of turn of the century America while retaining a veneer of commitment to constitutional self-government.”); see also *Downes*, 182 U.S. at 286 (“A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire.”).

186. See, e.g., Ponsa-Kraus, *supra* note 20, at 2539; *The U.S. Territories*, *supra* note 20, at 1680; Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 374 (2005); Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 32 YALE L. & POL’Y REV. 57, 70 (2013); Rose Cuison Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127 (2018).

Article addresses the related, but distinct, question of how the incorporated, continental territories fit into a theory of constitutional interpretation which increasingly looks to historical regulatory practice. And as to those continental, incorporated territories, there can be little doubt that the Bill of Rights applied directly.

*C. The Court Has Invoked Territorial Laws and Practices in Other Contexts*

The Supreme Court often “count[s] states’ laws in a variety of doctrinal contexts to determine the legislative consensus among the States”<sup>187</sup> and, potentially, to suppress “outlier” legislative approaches—for example, to determine whether a particular form of criminal punishment violates Eighth Amendment “standards of decency,” or whether a particular right is deeply rooted in our nation’s historical tradition for purposes of substantive due process jurisprudence.<sup>188</sup> In other words, the Court “treats states as sovereigns capable of elaborating constitutional norms like reasonableness or standards of decency, and weighs or even defers to what it perceives as their judgments regarding the federal constitutional questions at hand.”<sup>189</sup>

This practice of referencing state law occurs in two major ways. First, the Court’s substantive due process decisions frequently consult historical tradition to determine whether a certain right is longstanding or sufficiently rooted in the nation’s common-law tradition, and thus protected against state infringement by the Fourteenth Amendment’s Due Process Clause. To do so, the Court has often included *historical* territorial laws and implied that such territorial laws are on equal footing with state legislation when it comes to demonstrating a tradition which might indicate (or refute) that a right is fundamental. This method of invoking the territories is a direct cousin of the mode of analysis in *Bruen* itself. Second, the Court occasionally cites territorial laws and practices—either historical or modern—alongside state laws as evidence of national consensus. For example, the Court might use the prevailing practice among states and territories to inform the meaning of vague constitutional protections (as in the Eighth Amendment context, when determining if a certain criminal punishment violates the Constitution), or to clarify the likely intended meaning of a specific procedural word or phrase that appears in both the Federal Constitution and in state or territorial governing documents. Outside of substantive due process cases, the question is normally whether the

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187. Hills, *supra* note 16, at 17.

188. *See id.*

189. *State Law as ‘Other Law,’ supra* note 16, at 1673.

territories are used in the denominator of any jurisdictional count that also includes states. Here again, the Court notably has not suggested that territorial laws shed *less* light on these questions than state laws—although the Court may rely on territorial law only when it does not find a state law or practice directly on point. This second category of cases includes some that conduct jurisdictional headcounts as of the present to determine a modern national consensus.<sup>190</sup>

### 1. *Substantive Due Process*

*Bruen*'s historical analysis is, on closer examination, quite similar to the Court's method for determining the existence of new fundamental rights in its evolving substantive due process jurisprudence. John McGinnis observes that Justice Thomas's majority opinion in *Bruen* places great emphasis on "laws passed around the time of the Second Amendment's enactment that were considered to be consistent with it or with similarly worded provisions in state constitutions."<sup>191</sup> In *Dobbs*, the Court similarly asked whether a right to abortion was "rooted in our Nation's history and tradition."<sup>192</sup> And *Dobbs* appears to endorse the approach to substantive due process rights first introduced in *Washington v. Glucksberg*—where the Court emphasized that relying upon "concrete examples involving fundamental rights found to be deeply rooted in our legal tradition . . . tends to rein in the subjective elements that are necessarily present in due process judicial review."<sup>193</sup> This mode of legal analysis sounds quite similar to *Bruen* and its rejection of tiers of scrutiny in favor of a history-only approach—which suggests that the approach to evaluating territorial practices should also be similar.

The Court has relied upon territorial laws and practices in several substantive due process cases over the past three decades, and some of the very Justices who champion *Bruen*'s methodology have consulted territorial practices as part of the American tradition. One need look no further than the Court's decision in *Dobbs*, issued the day after *Bruen*, for an example of how the Court consults territorial laws and practices. The *Dobbs* majority

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190. While these headcounts are conducted as of the present day rather than a specific point in history, including territorial laws suggests that the Court inherently *approves* of using these laws and does not have any categorical objection to consulting territorial sources.

191. McGinnis, *supra* note 12.

192. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2224 (2022).

193. *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). *But see* Reva B. Siegel, *Memory Games: Dobbs's Originalism As Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1182 & n.213 (2023) (arguing that even *Glucksberg* did not fully embrace the "history-and-traditions standard" that the *Dobbs* Court found it was obliged to apply, and that "*Glucksberg* itself defines liberties protected by the Due Process Clause far more expansively" than *Dobbs*).

used territorial abortion bans as evidence that the right to abortion was, in the Court’s view, not deeply rooted in our nation’s historical tradition.<sup>194</sup> The logical reading of *Dobbs* is that territorial practices *are* part of the nation’s historical tradition. The Court’s invocation of “territories that would become . . . States” may provide a clue as to one potential justification for this use of territorial history, which appears generally consistent with the reasoning in *Bruen*.<sup>195</sup> Perhaps the theory is that territorial laws only matter to the extent that they actually survived the transition to statehood; and *Bruen* itself notes that Wyoming’s territorial gun law “did not survive [that] Territory’s admission to the Union as a State.”<sup>196</sup> But, regardless of the theoretical underpinnings, the Court in *Dobbs* transparently credits territorial legislation within its historical analysis. Chief Justice Rehnquist’s concurrence in the Court’s earlier decision in *Planned Parenthood v. Casey* similarly noted that, “in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion.”<sup>197</sup>

The Court’s historical methodology in *Dobbs*—examining history from 1868 to determine whether a right was “deeply rooted” when the Fourteenth Amendment was ratified—originates with the Court’s 1997 decision in *Washington v. Glucksberg*. *Glucksberg* upheld a Washington prohibition on assisted suicide, finding that “the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”<sup>198</sup> Territorial regulatory practice played a central role in the Court’s lengthy historical analysis in *Glucksberg*. The opinion began by noting that “Washington’s first Territorial Legislature outlawed ‘assisting another in the commission of self-murder.’”<sup>199</sup> The Court then surveyed the “Nation’s history, legal traditions, and practices,” citing a prior dissent from Judge Beezer of the Ninth Circuit which noted that “forty-four states, the District of Columbia and two territories prohibit or condemn assisted suicide.”<sup>200</sup> The Court went on to observe that—although the first statute specifically banning assisted suicide was passed by the state of New York—“many of the new States and Territories followed New York’s example.”<sup>201</sup>

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194. *Dobbs*, 142 S. Ct. at 2253, 2296–300.

195. *Id.* at 2253.

196. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2155 (2022). The possibility that the Court only credits territorial laws that survive into statehood is addressed in greater detail in Section I.B.1 *supra*.

197. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 952 (1992) (Rehnquist, J., concurring in judgment in part and dissenting in part) (emphasis added), *overruled by Dobbs*, 142 S. Ct. 2228 (2022).

198. *Glucksberg*, 521 U.S. at 711.

199. *Id.* at 706–07.

200. *Id.* at 710 & n.8 (emphasis added).

201. *Id.* at 715 (emphasis added).

In fact, a model penal code provision addressing assisted suicide was first “adopted in the Dakota Territory in 1877” before later spreading to states.<sup>202</sup>

While *Dobbs* and *Glucksberg*, unlike *Bruen*, deal with unenumerated rights, they similarly look to a period in our nation’s history and survey state regulatory practice in order to determine what rights the Constitution does and does not protect. If anything, one might expect that including territorial history is even more important in the context of enumerated rights. For one, *Bruen*’s historical analysis covers a much longer period of time which, as described herein, included a great deal of territorial acquisition and governance. But, at the very least, the Court’s approach in these cases should be consistent—if territorial government was truly as unique, improvisational, and short-lived as the *Bruen* majority suggests, there is not much reason to believe that the territories’ approach to abortion tells us anything about its consistency with American tradition at the time.

## 2. *The Eighth Amendment and Other Consensus-Based Uses of Territorial Law*

Outside of substantive due process, the Court has invoked territorial laws in a variety of contexts to show a consensus or accepted interpretation of a constitutional provision. These uses stray farther than substantive due process cases from the specific way territorial laws were invoked in *Bruen*. The Court here is often concerned with a narrow question of historical practice, rather than a broad inquiry into the nature of American historical tradition where a party bears the burden of pointing to historical analogues for a modern law. However, these cases strongly suggest that the Court has no major qualitative objection to territorial consultation.

Eighth Amendment cases are often litigated against a historical backdrop. In upholding the death penalty writ large against an Eighth Amendment challenge in *Gregg v. Georgia*, the Court noted “that history and precedent strongly support” its constitutionality, that “the existence of capital punishment was accepted by the Framers,” and that “the penalty continued to be used into the 20th century by most American States.”<sup>203</sup> In *Baze v. Rees*, the Court relied in part on a law review article “counting 48 States and Territories that employed hanging as a method of execution” by the mid-1800s.<sup>204</sup> Holding that state choices among methods of execution are entitled to deference, the *Baze* majority also cited an 1879 decision,

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202. *Id.*

203. *Gregg v. Georgia*, 428 U.S. 153, 176–77 (1976).

204. *Baze v. Rees*, 553 U.S. 35, 41–42 (2008) (citing Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 364 (1997)).



*Wilkerson v. Utah*, which it characterized as “uphold[ing] a sentence to death by firing squad imposed by a territorial court, rejecting the argument that such a sentence constituted cruel and unusual punishment.”<sup>205</sup> Besides illustrating the direct application of the Bill of Rights to territorial action, the Court’s reliance on *Wilkerson* appears to equate territorial and state action: the primary support for the Court’s contention that it “has never invalidated a State’s chosen procedure for carrying out a sentence of death” is, in fact, a case upholding a *territory*’s chosen method of execution.<sup>206</sup>

Other examples of consulting historical territorial laws in federal constitutional cases include *NLRB v. Noel Canning*, where the Court cited a Florida territorial militia organization law as support for the existence of a broad interpretation of the word “happen” in the Recess Appointments Clause.<sup>207</sup> The statute in question, passed three years prior to Florida becoming a state, referenced a mandatory lieutenant colonel election “in the battalion in which such vacancy *may happen*.”<sup>208</sup> Additionally, in a 1994 decision evaluating private causes of action under the Securities Exchange Act, the Court observed that, “at the time Congress passed the 1934 Act, the blue sky laws of 11 States *and the Territory of Hawaii* provided a private right of action against those who aided a fraudulent or illegal sale of securities.”<sup>209</sup> In the Court’s view, the fact that those states *and that territory* explicitly provided for a private right of action, while Congress did not, suggested that the Act did not contemplate such a right.

In *Deck v. Missouri*, the Court held that visibly shackling a criminal defendant during trial violates due process “*unless* that use is ‘justified by an essential state interest’ . . . specific to the defendant.”<sup>210</sup> The *Deck* dissent is notable for its focus on territorial judicial decisions and was authored by Justice Thomas, who wrote the *Bruen* majority opinion. As he did in *Bruen*, Justice Thomas focused heavily on history and tradition.<sup>211</sup> The dissent relied on a New Mexico territorial court decision from 1882 deferring to “the trial court’s decision to put the defendant in shackles,” and also cited

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205. *Id.* at 48 (citing *Wilkerson v. Utah*, 99 U.S. 130 (1879)). *Wilkerson* in fact may not have squarely addressed the issue of whether the punishment was “cruel and unusual” but, in any event, was clear that a territory’s “prescribed” method of execution was generally entitled to judicial deference. *Wilkerson*, 99 U.S. at 136–37.

206. *See id.*

207. 573 U.S. 513, 539 (2014) (construing U.S. CONST. art. I, § 5, cl. 4).

208. *Id.* at 539 (quoting Act of Mar. 5, 1842, § 13, 1842 Fla. Laws 25, 29 (organizing and regulating the militia of the Territory of Florida)).

209. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184–85 (1994) (emphasis added).

210. 544 U.S. 622, 624 (2005) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568–69 (1986)).

211. *Id.* at 636 (Thomas, J., dissenting) (“Tradition—either at English common law or among the States—does not support this conclusion.”).

an Arizona territorial decision permitting a defendant to be shackled.<sup>212</sup> For Thomas, these decisions were evidence of a division *among states* about how much deference to accord trial courts in making a shackling determination.<sup>213</sup> Territorial practice was instrumental, to Justice Thomas, in concluding that “there was no consensus that supports elevating the rule against shackling to a federal constitutional command.”<sup>214</sup>

Stepping outside of the historical context, the Court has also cited modern laws from the current, unincorporated territories in a variety of constitutional cases—without distinguishing these laws from state laws. For example, a 1961 decision rejecting a challenge to the California state bar’s moral character requirement observed that “[a]ll of the 50 States, *as well as Puerto Rico and the District of Columbia*, prescribe qualifications of moral character as preconditions for admission to the practice of law.”<sup>215</sup> In *New York v. O’Neill*,<sup>216</sup> the fact that “[t]oday forty-two States *and Puerto Rico* may facilitate criminal proceedings, otherwise impeded by the unavailability of material witnesses, by utilizing the machinery of this reciprocal legislation to obtain such witnesses” militated in favor of the constitutionality of a Florida criminal procedure comity statute.<sup>217</sup> These decisions did not invoke territorial laws in a historical context, but rather as of the time the case was decided. They demonstrate, however, that the Court’s approach to jurisdiction-counting *includes* the territories in the denominator, as a general rule. There is no convincing reason why the Court should include territories within these counts only in the historical or modern context. If the objection, as *Bruen* suggests, relates to the nature and form of territorial government itself, then the territories should be either all in or all out.

Overall, these decisions suggest that the Court ordinarily views territorial laws and practices as roughly on par with state history and does not substantively differentiate between territorial and state practice in terms of their relevance to construing federal constitutional provisions. There is no discussion, for example, of the idea that territorial government was unique, unusual, or transitory. The Court also does not refer to population density, nor does it attempt to quantify the percentage of the nation’s population that lived under certain territorial laws. Moreover, it would be odd to credit territorial laws only when, as in cases such as *Dobbs* and *Glucksberg*, the

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212. *Id.* at 643, 645 (first citing *Territory v. Kelly*, 2 N.M. 292, 304–06 (1882); and then citing *Parker v. Territory*, 52 P. 361, 363 (Ariz. 1898)).

213. *Id.* at 645.

214. *Id.*

215. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 40 n.4 (1961) (emphasis added).

216. 359 U.S. 1 (1959).

217. *Id.* at 9 (emphasis added).

laws passed in the territories were similar to laws passed in many states at the time. If territorial laws were truly improvisational and completely *sui generis*, they should matter very little in *all* constitutional cases; if territorial laws *are* relevant, they at least should be considered, whether they confirm or depart from state practice.

As shown by the above discussion, in the past the Court has frequently observed that a certain number of states and territories employed a certain regulatory approach at a specific time, assessed the legal significance of that consensus, and moved on. In these previous references to territorial law, the Court does not discuss qualitative differences between laws passed in states and territories, as it does in *Bruen*, nor does it conduct any in-depth analysis of population density, judicial scrutiny, or longevity of territorial (versus state) laws. The Court's past practice, therefore, suggests a much more fulsome role for territorial laws and practices. Yet these cases also fail to provide any normative foundation explaining why territorial laws should be considered when the Court searches for a historical consensus or tradition. This Article will proceed to evaluate scholarly discussion of the benefits and drawbacks of consulting other non-federal sources to interpret constitutional provisions, with an eye toward determining whether the normative considerations there also bear on the territorial question.

#### *D. "Other Law" Scholarship as a Guide to the Territories*

The Supreme Court's use of state, foreign, and other non-federal sources when interpreting provisions of the United States Constitution has been a popular topic for legal scholars in recent years.<sup>218</sup> A handful of scholars have addressed the Court's use of *state* law, *Bruen*'s primary historical focus. Legal academics have also analyzed the Court's choice to consider (or not consider, as the case may be) other non-federal sources of authority such as local and municipal regulatory practice and state-court decisions under state constitutional provisions. Much scholarship has focused on the controversial trend of considering foreign (non-U.S.) law and practice in constitutional cases. This Section will summarize the current scholarship in these areas, evaluate potential justifications for the Court's use of "other" law or regulatory practice generally, and situate the Court's potential consideration of historical laws from continental United States territories against this broader scholarly landscape.

It is possible to place territorial laws and practices on a continuum of other similar sources of interpretive guidance. First, federal practice occurs

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218. See generally *supra* notes 16–18.

directly under the relevant constitutional limitation. Second, state practice was historically not subject to the Federal Constitution, at least until the Bill of Rights was incorporated against the states in the twentieth century, but may have been subject to similar state constitutional restrictions. Finally, foreign practice is never subject to the limitations of the U.S. Constitution. Territorial practice likely falls somewhere between federal and state practice—not always explicitly endorsed by Congress itself, but approved by territorial legislatures acting under direct federal oversight.<sup>219</sup>

In *Bruen*, the Court appears concerned with the territories primarily because they may not be “part of an enduring American tradition of state regulation,” and may not “inform ‘the origins and continuing significance of the [Second] Amendment.’”<sup>220</sup> Similarly, the underlying scholarly concern with using state and foreign law to interpret the Federal Constitution is typically based on where the material comes from, how it was enacted or promulgated, and the possibility that it might not accurately reflect prevailing attitudes relevant to U.S. constitutional interpretation.<sup>221</sup> By examining the normative case for and against considering state and foreign practice in federal constitutional cases, this Article draws out additional principles relevant to the question of whether and how to include the territories within originalist methods of constitutional interpretation.

### 1. State Law

The Constitution is a federal document and, when courts interpret the Federal Constitution, the laws of non-federal jurisdictions such as states and foreign countries are legal sources which emanate from “other” sovereigns. In contrast to intense scholarly focus on the Court’s use of foreign law, “its

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219. In this way, territories are similar in nature to Native American tribes and it is hardly surprising that their ambiguous legal status has created doctrinal confusion when laws and practices from the territories are invoked. See generally Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 438 (2005) (“[T]he Constitution supports viewing tribes as both domestic and sovereign . . . .”); *United States v. Lara*, 541 U.S. 193, 214–15 (2004) (Thomas, J., concurring in the judgment) (observing the inherent tension within the idea that “Congress . . . can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity” while “Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members”).

220. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2155 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008)).

221. See, e.g., Alford, *supra* note 18, at 63 (“One does not analyze contemporary human rights treaties or the current practice of nations to understand our Constitution’s text, structure, or history.”); Young, *supra* note 17, at 149 (arguing against “creating consensus by including foreign jurisdictions”). The Court almost always invokes state and foreign law in a modern, rather than a historical, context; yet, normative considerations about why the *source* of law is relevant are likely to be relatively constant, whether the inquiry is modern or historical. *Bruen*’s objection is primarily qualitative: territorial laws are substantively distinct because of where they come from. See *Bruen*, 142 S. Ct. at 2154–55. The same overarching concern drives scholarly criticism of state and foreign-law use.

use of state law has been tolerated with scarcely a blink.”<sup>222</sup> The Court consults state law in a variety of different contexts, including “Fourteenth Amendment fundamental rights cases, Fourth Amendment search-and-seizure cases, Sixth Amendment jury cases, and Eighth Amendment capital punishment cases.”<sup>223</sup>

In each instance, the Court “seems to treat state legislation as a source of ‘knowledge relevant to the solution of trying questions.’”<sup>224</sup> Sometimes, the Court uses state laws as evidence of substantive constitutional meaning—for example, as a way to determine whether something is or is not a fundamental right, as in *Glucksberg* and *Dobbs*. This analysis can also come out the other way. In *Lawrence v. Texas*, for example, the Court found that recent state legislative practice (as well as foreign law and practice) indicated a trend against criminalizing homosexual conduct and the emerging recognition of a liberty interest in pursuing consensual homosexual relationships.<sup>225</sup> Similarly, in the Sixth Amendment context, the Court has relied upon state laws to imbue an indeterminate constitutional guarantee with substantive meaning—the specific jury right in criminal trials is not described in detail in the Constitution, so the Court construes it by reference to state law and practice.<sup>226</sup>

The Court has also used state practice in a comparative way: evidence that many states have adopted a certain practice or passed a certain kind of statute might be used to indicate that an “outlier” approach is constitutionally deficient. The Court’s outlier-suppressing opinions often rely heavily on state practice.<sup>227</sup> State laws that are anachronistic holdouts from a bygone era, upstarts representing an innovative but not widely accepted approach, or throwbacks to legislation that has largely disappeared from the scene, are often stuck down by reference to *other states’* laws.<sup>228</sup>

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222. *State Law as ‘Other Law,’ supra* note 16, at 1671. The same might apply to the Court’s consultation of local and municipal laws and practices in constitutional cases. *See generally* Brandon L. Garrett, *Local Evidence in Constitutional Interpretation*, 104 CORNELL L. REV. 855 (2019).

223. *State Law as ‘Other Law,’ supra* note 16, at 1672. As explained in Section ILC *supra*, the most closely analogous use of *territorial* history to this reliance on state history occurs in substantive due process cases where the Court is performing a heavily historical analysis (often consulting both state and territorial history as of 1868). Cases that consult non-federal laws in a *modern* context, by contrast, are useful primarily because they would likely indicate any fundamental, qualitative objection to consulting the territories on the whole (historically, or as of the present day).

224. *Id.* at 1673 (quoting Ruth Bader Ginsburg, Assoc. Just., U.S. Sup. Ct., “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, Address Before the Constitutional Court of South Africa (Feb. 7, 2006), [https://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp\\_02-07b-06](https://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp_02-07b-06) [<https://perma.cc/HL7U-FKVS>]).

225. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

226. *Ring v. Arizona*, 536 U.S. 584, 607–08, 608 n.6 (2002); *Burch v. Louisiana*, 441 U.S. 130, 138 (1979).

227. *See Driver, supra* note 16, at 935.

228. *See id.* at 933–34.

In the Eighth Amendment context, “[w]hen national consensus disfavors a punishment, the Court has generally invalidated the punishment.”<sup>229</sup> For example, in *Roper v. Simmons*, the Court gave great weight to a “national consensus against the death penalty for juveniles” and invalidated outlier laws permitting that practice.<sup>230</sup> As previously observed, such use of state law is relevant to this Article primarily because of the presence of modern overseas territories which might be included in these headcounts.

## 2. Foreign Law

The Supreme Court’s use of foreign law—which, for purposes of this Article, refers to laws passed by foreign nations, decisions by foreign judicial bodies, and statements by international organizations<sup>231</sup>—spiked around the turn of the century, driving a veritable mountain of scholarship extolling or critiquing certain elements of this jurisprudence.<sup>232</sup> Even mainstream media outlets noted this change, with *The New York Times* observing in 2003 the Court’s “new attentiveness to legal developments in the rest of the world and to the [C]ourt’s role in keeping the United States in step with them.”<sup>233</sup> Substantial scholarship followed on the heels of two high-profile Supreme Court decisions in the 2002–2003 Term, *Atkins v. Virginia*<sup>234</sup> and *Lawrence v. Texas*, both of which relied on foreign-law sources. The Court’s recent shift to originalist methods of interpretation, however, has likely significantly tempered its willingness to consult foreign sources.<sup>235</sup>

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229. *State Law as ‘Other Law,’ supra* note 16, at 1679.

230. *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005); *see also id.* at 604–05 (O’Connor, J., dissenting) (observing the lack of “a genuine national consensus against the juvenile death penalty,” but asserting that, in general, “the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus”).

231. This Article will not address situations where the Court consults international or foreign law because the “Constitution expressly refers to international law or a concept of international law,” such as cases implicating the constitutional directive to punish “offenses against the law of nations” or those that involve the federal treaty power. Cleveland, *supra* note 18, at 12. The use of international law in this context is both relatively uncontroversial and less relevant to the question of how “other” law is used to interpret fundamental-rights provisions of the U.S. Constitution. Relatedly, scholars have debated in recent years to what extent an originalist interpretation of the Constitution incorporates international law as a supreme source of domestic law for resolving certain disputes. *See generally* John Harrison, *The Constitution and the Law of Nations*, 106 GEO. L.J. 1659 (2018).

232. *See, e.g., supra* notes 17–18.

233. Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES (July 1, 2003), <https://www.nytimes.com/2003/07/01/us/supreme-court-overview-momentous-term-justices-remake-law-court.html> [<https://perma.cc/4XDV-WQ4Q>].

234. 536 U.S. 304 (2002).

235. *See, e.g.,* Michael P. Waxman, *The Sotomayor Hearings: Supreme Court Citations to International and Foreign Law*, MARQ. UNIV. L. SCH. FAC. BLOG (July 15, 2009), <https://law>

In the past, the Court has occasionally used foreign law, or practices of a certain set of countries, “as a background principle to identify the territorial scope of the Constitution, the sovereign powers of the national government, or to delineate structural relationships within the federal system.”<sup>236</sup> Perhaps the most well-known debate over this use of foreign law occurred in *Printz v. United States*.<sup>237</sup> *Printz* considered whether the federal Brady Act’s requirement for state officers to execute background checks on certain gun purchasers violated constitutional separation of powers and the anti-commandeering principle. Justice Breyer’s dissenting opinion would have consulted European practice because “their experience may . . . cast an empirical light on the consequences of different solutions to a common legal problem—in this case[,] the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity.”<sup>238</sup>

Especially in recent decades, the Court has relied on foreign law in another, related context: to “interpret the U.S. Constitution’s . . . individual rights protections.”<sup>239</sup> The Justices have used foreign laws and practices to identify emerging norms and have, in certain cases, used these norms as an ancillary source to construe substantive domestic constitutional protections (sometimes by reasoning that the U.S. Constitution protects, at a minimum, rights “accepted as an integral part of human freedom in many other countries” absent any uniquely American governmental interest in restricting those rights).<sup>240</sup> This use of foreign law is substantive, because the Court “reaches out at the first stage—to seek foreign and international guidance in defining the content of the domestic constitutional rule.”<sup>241</sup> For example, in *Lawrence*, the majority opinion relied on a decision by the European Court of Human Rights striking down a law criminalizing homosexual conduct, and noted that “[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.”<sup>242</sup> Similarly, in *Atkins*, the majority noted in a footnote that, “within the world community, the imposition of the death penalty for crimes committed by mentally retarded

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.marquette.edu/facultyblog/2009/07/6122/ [https://perma.cc/42Q6-SJW4] (“The [originalists’] fear is that these references will be used as tools to pervert the essence of the ‘originalist’ philosophy of constitutional purity.”).

236. Cleveland, *supra* note 18, at 12.

237. 521 U.S. 898 (1997).

238. *Id.* at 977 (Breyer, J., dissenting).

239. Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 71 (2004).

240. *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003).

241. Larsen, *supra* note 17, at 1291.

242. *Lawrence*, 539 U.S. at 576.

offenders is overwhelmingly disapproved,” which supported the view that the Eighth Amendment prohibition on cruel and unusual punishment prevents states from executing the mentally ill.<sup>243</sup>

While the Court’s use of foreign law has garnered more attention in recent years, it is not new. Steven Calabresi and Stephanie Zimdahl have catalogued “Supreme Court cases between the Founding and 1840 that rely on foreign law,” including British and Roman law, to interpret constitutional provisions and federal statutes.<sup>244</sup> Indeed, the Court’s 1878 decision in *Reynolds*—which held that religious beliefs could not be invoked as a defense to a criminal polygamy prosecution in the Utah Territory—noted that “[p]olygamy has always been odious among the northern and western nations of Europe” and, therefore, the U.S. Constitution’s protection of the individual freedom of religion did not encompass any right to engage in polygamous marital relationships as part of a set of religious beliefs.<sup>245</sup>

### 3. Territorial Law

Laws and practices from the continental territories fall somewhere along a continuum of possible historical sources which includes state and foreign law. As described in Section II.B *supra*, many continental territories were acquired from foreign powers—whether by purchase, war, or some combination thereof. One might view the territories as some form of “in-between” creature in the process of being transformed from a foreign nation into a full-fledged U.S. state. Under this view, territorial laws and practices may retain certain foreign aspects unknown to the American experience and, therefore, judges might treat this history carefully rather than assume that the period of territorial governance necessarily sheds light on a truly *American* understanding of constitutional provisions.

On the other hand, there are reasons to believe that territories might, in fact, be much closer to the “state” end of the spectrum (or even to *federal* legislation) and, thus, that territorial history deserves more fulsome consideration.<sup>246</sup> As described in Section II.A *supra*, the territories were

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243. *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002).

244. Calabresi & Zimdahl, *supra* note 17, at 756–57, 763–92.

245. *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

246. *See infra* Section III.A.1. For comparative purposes, this Article considers the Court’s consultation of modern—as well as historical—state law. That is because a large part of *Bruen*’s objection to considering *historical* territorial laws appears to be qualitative: the territories were fundamentally distinct in their governmental structure and population, so those laws and practices should not be persuasive. If that is the nature of the objection, then it appears to be mostly untethered from history; and the Court’s modern consultation of state and foreign law should suggest factors that are relevant to evaluating the doctrinal maneuver. With that said, the Court has not suggested (and this



placed under federal control with a view toward shaping them into the mold of existing states. Therefore, territorial laws were “federal” in nature, and it is reasonable to believe that the territories are at least as likely to reflect conventional constitutional understanding as full-fledged states. Because the U.S. federal system at times permits *states* (but not territories) to experiment with novel legislative approaches, territorial practices may be more likely to align with a common, national tradition or consensus. And the Supreme Court’s general practice, where territorial history is presented by the parties, has been to consider that history as roughly on par with state history by crediting “trends” in territories on their way to presumptive statehood.

### III. TERRITORIAL RELEVANCE AFTER *BRUEN* AND *DOBBS*

*Bruen* listed various reasons to be skeptical that territorial laws and practices have anything useful to tell modern-day interpreters about federal constitutional provisions. As described in Section I.A *supra*, the Court identified the improvisational nature of territorial laws, their short duration, their lack of judicial scrutiny, and the fact that they applied to only a small percentage of the total population. Therefore, the *Bruen* majority held, territorial gun regulations were by definition not part of an enduring national tradition.<sup>247</sup> But *Bruen*’s analysis did not consider any potential positive aspects of consulting territorial history, as a general matter. The Court’s past practice and scholarly assessments of “other law” usage, however, are more nuanced in considering broader normative principles potentially implicated by using non-obvious sources of interpretive guidance (such as territorial history) to interpret the Federal Constitution.

Section III.A identifies four major themes from past Court decisions and “other law” scholarship and considers how those themes apply to the use of historical territorial practices to interpret the Federal Constitution. Section III.B argues in favor of a legal test that considers territorial evidence as a relevant factor when determining American historical tradition. Section III.C concludes by using the Second Amendment as a case study for how territorial laws and historical practices might be used in future constitutional cases generally—especially in light of the potential expanded role of

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Article does not suggest) that *modern* territorial laws or practices should necessarily have a major role in constitutional cases. The takeaways here are mostly limited to defining the correct role for the territories in originalist judicial methodology where the materials consulted will necessarily be historical—close in time to either 1791 or 1868.

247. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2153–56 (2022).

historical regulatory practice in originalist methods of constitutional interpretation.

*A. Territorial History Is a Valuable Resource in Constitutional Cases*

Four major normative themes emerge from examining scholarly assessments of state and foreign law consultation—all four of which suggest that territorial practices hold important clues to federal constitutional interpretation. This Section will summarize each theme and explain why it suggests that territorial practice is important.

*1. Originalism and American Exceptionalism*

One major criticism of the Supreme Court's use of foreign law has been that it deviates from the original understanding of what the framers of the *U.S. Constitution* intended, and what their words meant to the American people at the time.<sup>248</sup> Dissenting from the Court's decision in *Thompson v. Oklahoma*, Justice Scalia observed that “[w]e must never forget that it is a Constitution for the United States of America that we are expounding.”<sup>249</sup> To Justice Scalia, “the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”<sup>250</sup> Justice Scalia's dissent in *Lawrence* similarly argued that constitutional rights do not “spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct.”<sup>251</sup> Michael Dorf has written that Justice Scalia's objection to consulting foreign sources stemmed primarily from his commitment to originalism and, therefore, his belief that “[c]ontemporary decisions by a European or other foreign court obviously have no bearing on what Americans thought the U.S. Constitution meant in 1789, when it was ratified.”<sup>252</sup> Thus, under Dorf's analysis, “Justice Scalia[']s . . . main problem with citing modern foreign law to interpret the U.S. Constitution is not so much that the law is foreign, but that it is modern.”<sup>253</sup>

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248. See Mark Tushnet, *When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1278–79 (2006).

249. *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (emphasis added).

250. *Id.*

251. *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

252. Michael C. Dorf, *The Use of Foreign Law in American Constitutional Interpretation: A Revealing Colloquy Between Justices Scalia and Breyer*, FINDLAW (Jan. 19, 2005), <https://supreme.findlaw.com/legal-commentary/the-use-of-foreign-law-in-american-constitutional-interpretation.html> [<https://perma.cc/P8WB-MEY9>].

253. *Id.*

Territorial laws, however, fare especially well under an originalist critique because they are perhaps more likely than even state laws to illustrate the originally understood scope of federal constitutional provisions. That is because, as described in Section II.B *supra*, territories were directly subject to the Bill of Rights for hundreds of years before those provisions were gradually interpreted to apply against state governments. John McGinnis and Michael Rappaport define “original public meaning” as a theory of constitutional interpretation which “posits that the Constitution should be interpreted based not on the intent of its authors or enactors but on the original public meaning of the language.”<sup>254</sup> They derive this definition, in part, from the work of Randy Barnett, who points to “the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”<sup>255</sup> The last portion of Barnett’s definition is crucial for the purposes of this Article—according to this definition, originalists seek the public meaning of *the words used in the constitutional provision at the time of its enactment*. The public-meaning originalist is therefore primarily concerned with sources that shed light on the meaning of *the exact words* used in the constitutional provision, not “similar” or “analogous” language.<sup>256</sup>

In the Second Amendment context, then, the public meaning originalist should be far more pleased with territorial history than state history. Territories operated directly under the Second Amendment in the eighteenth and nineteenth centuries; states did not. Territorial gun laws could be challenged in court as violating the Second Amendment to the Federal Constitution during that time; state gun laws could not. The originalist objections to using *foreign* law—that foreign materials do not reflect American public understanding of the specific provision as of ratification—actually apply more forcefully to consulting historical state regulatory practice (as opposed to territorial practice). Laws passed in states are not necessarily likely to reflect original understanding of the words written in the Constitution because most were passed either under *different* arms-keeping and bearing protections in state constitutions, or, in some states,

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254. John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1376 (2019).

255. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92 (2004).

256. The idea that originalism is focused on the understanding of the actual words used in a provision is neither novel nor particularly controversial. *See, e.g.*, Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 272 (2017) (focusing on the “communicative content of a text”); Lee J. Strang, *Originalism and Legitimacy*, 11 KAN. J.L. & PUB. POL’Y, 657, 657 (2001) (“The legitimacy of originalism originates from the idea that the Constitution means what those who gave the Constitution authority understood the Constitution to mean (or *what the language meant* at the time of ratification).”) (emphasis added).

under no such provision at all.<sup>257</sup> Territorial laws, by contrast, *were* subject to the language of the Second Amendment (“the words used in the constitutional provision at the time of its enactment”)<sup>258</sup> when passed, and are thus uniquely likely to hold clues to the original public meaning of that language.

Moreover, the natural choice to elevate historical practice in areas that were directly subject to the exact constitutional provision at issue has force, even if one views post-ratification history as potentially “liquidating” constitutional indeterminacy (rather than as a direct clue to original public meaning). To explain its examination of historical practice in the 1800s—well after the Second Amendment was ratified in 1791—the *Bruen* majority writes that “a regular course of practice [after ratification] can liquidate & settle the meaning of disputed or indeterminate terms & phrases in the Constitution.”<sup>259</sup> The idea of “liquidating,” or determining through practice, the meaning of indeterminate constitutional language dates back to James Madison himself.<sup>260</sup> Madison believed language could be liquidated only through “a series of particular discussions and adjudications” about whether certain actions were (or were not) within the scope of that specific language.<sup>261</sup> Therefore, Madisonian liquidation appears to apply with special force to territorial laws, where there is reason to believe that legislators would have specifically considered the issue of federal constitutionality during the legislative process.

There is also little reason to be concerned that relying upon territorial sources will somehow deviate from the uniqueness of the American historical experience. Despite *Bruen*’s reference to “legislative improvisations,” incorporated territories were (and are) part of the United States. Although they were, in some instances, acquired from other European colonial powers, their *American* history began at the time they were acquired as territories and was not somehow “put on hold” until statehood. The residents of incorporated territories were American citizens, and territorial laws “are by definition part of ‘national experience’ in a way that foreign laws are not” and, indeed, are highly likely to reflect American

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257. See generally Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 192 (2006).

258. BARNETT, *supra* note 255, at 92.

259. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (internal quotation marks omitted) (quoting *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (recounting terms from the founding documents)); see also William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 7 (2019).

260. See Baude, *supra* note 259, at 8, 18.

261. THE FEDERALIST No. 37 (James Madison); see also Baude, *supra* note 259, at 17 (“And it was not enough for Madison that the practice be one of sheer political will; it must also be one of constitutional interpretation.”).

values.<sup>262</sup> “[T]he common constitutional ground between states and the nation does not mean that state law is always relevant to federal constitutional adjudication,”<sup>263</sup> but it does suggest more strongly that *territorial* laws are relevant. The territorial period, moreover, was intended to have a conforming influence to bring territories into alignment with broader American legal and cultural mores.<sup>264</sup> Thus, the concern about relying on laws that are “not part of the American constitutional tradition” does not counsel against using laws passed by territorial governments.<sup>265</sup>

*Bruen*, of course, cautions that post-ratification evidence has little value when it “conflict[s] with the Nation’s earlier approach to firearm regulation.”<sup>266</sup> But there simply is little “earlier” history of legislating under the very language of the Federal Second Amendment to conflict with, before the Western territories began regulating guns in the nineteenth century. Assuming a definition of originalism which is focused on uncovering the original meaning of *the words used in the constitutional provision*, territorial history may very well *be* that earlier tradition: the first instance of a jurisdiction regulating the individual possession and use of firearms while directly subject to the Federal Second Amendment.

## 2. *Expanding the Scope of Historical Inquiry*

*Printz* illustrates the possibility that foreign (or state) governments may have thoughtfully considered how to deal with challenges or disputes that are new and unexplored in the federal context and “cast an empirical light on the consequences of different solutions to a common legal problem.”<sup>267</sup> When other jurisdictions, especially those with similar democratic forms of government, have reached reasoned decisions about the same or similar broad legal questions, we may be able to learn from their experiences and apply their reasoning to reach just outcomes. In this way, “[c]omparative constitutional study offers the possibility of sharpened insight into aspects of one’s own system or provisions, of how and why they work together in a distinctive way.”<sup>268</sup>

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262. *Cf. State Law as ‘Other Law,’ supra* note 16, at 1686.

263. *Id.* (emphasis omitted).

264. *See supra* Parts I.B.1, II.B.1 (tracing the origins of American territorial governance and arguing that the territorial period was intended to encourage adoption of existing state norms and practices; describing the federal government’s past efforts to root out territorial practices contrary to prevailing national values).

265. Cleveland, *supra* note 18, at 9.

266. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2154 (2022).

267. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

268. Jackson, *supra* note 17, at 92.

Consulting “other law” in such situations might better enable American courts to deal with thorny constitutional questions, determine which approaches are workable in practice, and borrow best practices from other countries—“enhanc[ing] our ability to interpret our own Constitution.”<sup>269</sup> Indeed, “[i]t seems positively anti-intellectual and hubristic to say that we can learn nothing from foreign jurisdictions.”<sup>270</sup> Similarly, U.S. courts “can learn from experience elsewhere by looking at that experience in rather general terms, and then by seeing how those terms might help us think about the constitutional problems we confront.”<sup>271</sup> Even when a foreign jurisdiction has not explicitly considered the exact legal question at issue, courts may uncover new arguments or perspectives which bear on that question by consulting other law and practice.

Considering territorial laws within originalist methods of constitutional interpretation will similarly allow the Court to draw on historical experience in jurisdictions that dealt with unique problems related to firearms. By virtue of their status on the frontier of a young, expanding nation, the territories may have confronted regulatory challenges that Eastern states did not. For example, these governments were tasked with ensuring public safety with limited resources over large geographic areas, responding to hazards that did not exist on the same scale in the East (including extreme weather events and conflict with Native Americans), and navigating breakneck urban growth, in certain instances.<sup>272</sup> Just because territorial governments confronted *new* challenges does not necessarily mean that their solutions were improvisational. Rather, it is more likely that the territories drew on the existing American regulatory tradition and applied that tradition to new situations.<sup>273</sup>

Including territorial laws in the analysis therefore has the potential to enrich constitutional decision-making by increasing the universe of relevant data points and providing a more fulsome picture of the country’s tradition of regulation, as of a certain date. Just as the *Printz* dissent would have looked to European jurisdictions for guidance on how to approach a novel constitutional question, including territorial laws and practices within originalist analysis would permit courts to consider “different solutions to a

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269. Tushnet, *Interpreting Constitutions Comparatively*, *supra* note 17, at 662.

270. Young, *supra* note 17, at 151.

271. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225, 1308 (1999).

272. *See, e.g.*, Courtwright, *supra* note 34, at 96–97.

273. *See, e.g.*, *Carrying Weapons*, *supra* note 99, at 4 (arguing, approximately eighteen years after the Dakota Territory was established, that territorial inhabitants were “now a peaceful, industrious, law-abiding people” and that the practice of carrying concealed weapons should be completely banned because “[s]elf defence is a mere pretext”).

common legal problem.”<sup>274</sup> Scholars have recently made similar arguments in favor of expanding the scope of the inquiry into original public meaning to capture parts of the historical “public” typically excluded or devalued.<sup>275</sup> Under this view, “[i]f the Constitution is supposed to belong to everyone, as the truism runs, then we should have a constitutional history that at least attempts to meet that aspiration—that reflects the pluralist, messy, complicated nation that the United States always was.”<sup>276</sup> Moreover, territorial history can be used without the pitfalls that detractors point to when courts consult *foreign* law—territories were *American* jurisdictions and their governments were analogous in structure and organization to state governments.<sup>277</sup>

Perhaps for this reason, the Court has often cited territorial laws in addition to state laws to support the idea that practices were well-established as a matter of national tradition—the territories enrich and supplement the analysis.<sup>278</sup> One can also view the territories as an initial “experiment” in incorporation: the Constitution and its amendments applied there directly, as they do today in the states, and thus provide a glimpse into how those provisions worked in practice in an age of much more limited federal government. Until the 1900s, the Second Amendment largely only applied to restrict these territorial laws because the federal government was not engaged in the type of gun regulation that is relevant to modern Second Amendment challenges (such as licensing, locational restrictions, bans on specific types of weapons, and so on).<sup>279</sup> Therefore, territorial laws and practices not only provide the supplementary guidance referenced in *Printz*, but also are squarely within American historical tradition and, perhaps, especially likely to demonstrate *constitutional* meaning through regulatory practice.

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274. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

275. See, e.g., Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243, 307, 308–10 (2023) (“Though no Native peoples wrote the Constitution, the drafters’ keen awareness of Native audiences might be relevant for explorations of original intent.”); Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 437 (2018) (“[O]riginalism stands to benefit as an interpretive methodology significantly by including more diverse voices in the present and from the past.”); James W. Fox, Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 737 (2016) (“Counterpublic Originalism allows us to see better the range of meanings available at the time . . . and to think more richly about what meanings are available to us today.”).

276. Ablavsky & Allread, *supra* note 275, at 316.

277. See *supra* Section II.A.

278. See *supra* Section II.C.

279. See, e.g., Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637, 646 & n.39 (2021) (noting that the 1934 National Firearms Act was “the federal government’s first substantial entry into the field of firearms regulation,” preceded only by a 1927 law restricting shipment of firearms by the U.S. Postal Service).

### 3. *Federalism*

Some scholars have asserted that the “use of state legislation to evince an evolving national consensus is entirely at odds with the federalist ambition of states having freedom to experiment and diversify.”<sup>280</sup> In other words, any approach that tries to glean lessons from how the majority of states acted at a point in time misses the mark, because our federalist system contemplates that states must have the flexibility to depart from national norms to try new legislative approaches. This is, as Justice Brandeis famously wrote, “one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>281</sup> Federalism “permits different states to arrive at different solutions,” and curtailing that ability by suppressing purported outliers may be of questionable value.<sup>282</sup> The same objection might be raised historically—if the Court consults only a snapshot of state practice and determines that a minority approach is an outlier, or otherwise not indicative of an enduring, national tradition, it might be overlooking the fact that this minority approach later proved popular and spread to other states. By determining the content of a “tradition” as of a certain date, the Court might, in effect, be burying evidence of the very type of legislative experimentation that our federal system is designed to encourage.

Federalism concerns, however, are largely absent for the territories. The territories existed (and exist) under exclusive federal control.<sup>283</sup> In stark contrast to states, and possibly localities, the territories were not meant to serve as “laboratories” of innovation; rather, part of the goal of the territorial system was to remake territories in the uniform American mold.<sup>284</sup> While there were certainly exceptions, as with the Dakota Territory’s pioneering adoption of the Field Penal Code provision regarding assisted suicide,<sup>285</sup> in general territories that attempted to deviate from the national consensus

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280. Jacobi, *supra* note 16, at 1106.

281. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

282. Driver, *supra* note 16, at 961.

283. *Am. Ins. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542–43 (1828).

284. *See supra* Section I.B.1.

285. Even the Field Penal Code episode can be viewed more as evidence that a national consensus or tradition might take root before being officially memorialized. In other words, the Dakota Territory may simply have been a pioneer in *enacting* by statute a code that reflected existing views and would later spread to other states. *See* Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler’s Predecessors*, 78 COLUM. L. REV. 1098, 1133–38 (1978) (observing that the Field Penal Code was based on New York’s pre-existing criminal statutes and motivated primarily by the organizational concerns “of the professional lawyer, not radical reform of the law or broad social reform generally”; describing how the Field Penal Code gradually spread to other Western states after its adoption by the Dakota Territory in 1877).



were aggressively curtailed.<sup>286</sup> Therefore, courts should be far less concerned that including territorial laws in historical surveys will stifle local innovation—rather, this historical evidence is likely the best evidence we have of a uniform national tradition that *omits* transitional “improvisations.”

#### 4. *Institutional Capacity and Rigor of Analysis*

Some argue that the Court tends to use “other law” in a haphazard and non-rigorous manner. For example, the Court may not actually be uncovering any kind of durable consensus when it counts states, because it uses a bare-majority standard to determine “consensus,” fails to properly “aggregat[e] the preferences of the nation when the population is divided into unequal units with varying levels of disagreement within those units,” and fails to consider that public opinion on certain contentious issues relevant to constitutional standards may be cyclical.<sup>287</sup> The Court might also fail to properly account for the fact that state *inaction* may be either intentional (because the state believes there is a right that cannot be regulated in a certain way), or unintentional in that it is not based on any constitutional consideration at all.<sup>288</sup> Finally, the Court’s consideration of state law may gloss over differences in how laws are passed at the state (versus federal) level, differences which may make it easier to pass state laws, even if they would not similarly be endorsed by majorities across the nation.<sup>289</sup> In the foreign law context, some scholars have argued that the Court is often engaged in “‘comparativism lite,’ haphazardly drawing on the wisdom of the present,” when it attempts to consult foreign sources.<sup>290</sup> If the Court conducts only cursory analysis of foreign legal systems, it may miss subtle trends and draw sweeping conclusions where the reality is far more complicated.<sup>291</sup> The lack of empirical rigor and expertise employed in sifting through “other law” sources might ultimately lead the Court to use such materials in a selective manner.

The concern that the Court is doing shoddy empirical analysis remains acute in the territorial context, and one might legitimately object to the inclusion of territorial laws on the grounds that it would unnecessarily complicate the analysis. A primary critique of *Bruen* is that the decision cherry-picks the historical record to reach its desired result. As scholars

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286. See, e.g., *supra* Part II.B.1 (describing federal efforts to regulate polygamy in the Utah Territory).

287. Jacobi, *supra* note 16, at 1114, 1119–22.

288. See *id.* at 1128–31; cf. Hills, *supra* note 16, *passim*.

289. See Jacobi, *supra* note 16, at 1130–31.

290. See Alford, *supra* note 18, at 67.

291. Cf. *id.* at 66–67.

have observed, in many instances “the majority either dismisses contrary evidence as unrepresentative or simply ignores evidence it finds inconvenient.”<sup>292</sup> Adding territorial laws to the mix potentially increases the risk that courts will elevate the wrong sources and reach the wrong result. Sporadic mentions of territorial history in the Court’s Eighth Amendment and substantive due process decisions suggest that, perhaps, the Court may only rely on territorial laws when convenient—such as when those laws lend additional support to a historical tradition that the Court believes exists and is consistent with the ultimate holding in the case. When territorial approaches may have deviated from practice in the majority of then-existing states, the Court may simply decline to mention those laws or downplay them. Choosing to consult territorial law in addition to state law might increase the universe from which the Court can cherry-pick. Indeed, scholars have already strongly criticized the Court’s analysis of historical state practice in *Dobbs* as overlooking state judicial decisions that limited abortion bans to only the period of the pregnancy after quickening, and misinterpreting state statutes that barred only certain types of procedures as general abortion bans, among other errors.<sup>293</sup> It is not difficult to imagine that the Court might make similar errors when attempting to evaluate historical territorial legislation.

One might also reasonably be concerned that the Court is less than capable of accurately differentiating between laws that were “improvisations” and those that were not. As Justice Breyer observes, “[j]udges are . . . [not] accustomed to resolving difficult historical questions,” and expanding the universe of possible historical sources might indeed “permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history.”<sup>294</sup> Concerns about legal historicism are amplified the further back in history one reaches. As Saul Cornell argues, “using nineteenth-century texts as a means of understanding earlier ones . . . ignores the profound changes that transformed American constitutionalism in the period between the Founding era and the middle of

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292. Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen’s Originalist Distortions*, SCOTUSBLOG (June 27, 2022, 5:05 PM), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/> [https://perma.cc/N6Z9-ETRX]; see also Jake Charles, Bruen, *Analogies, and the Quest for Goldilocks History*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (June 28, 2022), <https://firearmslaw.duke.edu/2022/06/bruen-analogies-and-the-quest-for-goldilocks-history/> [https://perma.cc/UD2B-LQBL].

293. See, e.g., Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1128–45 (2023).

294. N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2177 (2022) (Breyer, J., dissenting).

the nineteenth century.”<sup>295</sup> In this vein, consider the Court’s near-exclusive reliance on Earl Pomeroy’s 1947 book to draw conclusions about the nature of territorial governance over half a century earlier, and the potential lack of reliable historical materials from the territories (as opposed to states).<sup>296</sup>

However, above all else, this critique suggests that the Court should either credit all territorial laws or none at all—rather than attempting to decide which laws were enacted in an improvisational manner or the exact population governed by territorial laws at any given point in time. The concerns with shoddy methodology and historical cherry-picking apply with largely the same force to the Court’s historical consultation of state law. Determining which state laws to credit, and which to potentially discount as outliers, is a fraught exercise and many have raised legitimate concerns about the ability of courts to conduct such historical analysis in a reasoned fashion that produces clear or consistent results.<sup>297</sup> There are simply few, if any, new problems introduced by bringing territorial laws into the mix that were not already lurking within the originalist project of evaluating historical *state* laws and practices.

##### 5. *Summary of Territorial Laws*

Consulting law from the territories accords particularly well with originalist methods of constitutional interpretation, which seek to glean clues about the original meaning of the exact words used in the Constitution. Territorial laws were subject to the same Second Amendment that modern state laws are subject to, and thus are especially likely to hold clues to how that text was viewed and understood during earlier periods in American history. The use of territorial law and practice also likely serves to enrich judicial decision-making by increasing the number of historical data points from which a court draws—which is, perhaps, why the territories have appeared with some frequency in prior Supreme Court decisions in a variety of contexts. Considering territorial laws and practices might also mitigate criticism of the Court’s historical analysis generally, by making it clear that the Court is willing to substantively evaluate all potentially relevant historical material.

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295. Saul Cornell, Heller, *New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095, 1111 (2009).

296. See *Bruen*, 142 S. Ct. at 2154 (quoting POMEROY, *supra* note 49, at 4).

297. See Jacobi, *supra* note 16, at 1148 (observing, in the state context, that the Court’s “evidentiary bumbblings are so counter to accepted social science methods of factual determination that its examination of state legislation is at best pointless”); Darrell A. H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49 (2023) (discussing the problem of faux empiricism with respect to *Bruen* specifically).

It is also notable that few of the specific scholarly criticisms levied against the use of foreign and state law suggest reasons to be skeptical about territorial history.<sup>298</sup> For example, consulting territorial laws should not undermine majoritarianism to any real extent, because the territorial laws in question were passed by legislatures elected by American citizens. One might, indeed, be *more* receptive to relying upon territorial laws than state laws due to issues of federalism: while states are generally accorded some leeway to vary their regulatory approaches from the national consensus, and thus state regulatory practice may depart in some instances from any “national” tradition or majority, territories for the most part had no such leeway and existed under the heavy hand of federal conformity.<sup>299</sup> To be sure, some reasons for skepticism remain. *Bruen*’s concern about the “improvisational” nature of territorial lawmaking warrants some consideration, at least as it relates to the logistical challenges confronted by territorial governments. The duration that some territorial laws were in effect and the population subject to such laws may also give pause; although, as discussed in Section I.B *supra*, those concerns are overblown in several ways. Territorial improvisation was, in fact, substantially limited, and territorial laws carried over into statehood by default.<sup>300</sup>

Perhaps the largest obstacle to incorporating territorial laws into originalist interpretation is that, to the extent the Court purports to conduct anything resembling an empirical or objective analysis of historical sources, including the territories makes an already complex task more burdensome. The parties must unearth historical territorial sources, and courts must be especially careful in dealing with a historical record that is likely to be less preserved and more difficult to comb through than the record of historical state practice. But, overall, the normative inquiry into consulting territorial laws and practices reveals many reasons for optimism with few major warning signs.

### *B. Toward a Theory of Territorial Relevance*

There is no accepted framework for how the Court should treat territorial laws in a history-focused analysis, even though this question is almost certain to take on outsized importance in the coming years. *Bruen* itself illustrates that territorial history is unavoidable when the historical period of 1791 to 1899 becomes a primary focus and guide to original

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298. Cf. Alford, *supra* note 18, at 58 (“Using *global* opinions as a means of constitutional interpretation dramatically undermines sovereignty . . . .”) (emphasis added).

299. See *supra* Section II.B and sources cited therein.

300. E.g., *supra* notes 72–75 and accompanying text; cf. LEIBOWITZ, *supra* note 57, at 7.

constitutional meaning.<sup>301</sup> The Court’s recent decisions, including *Bruen* and *Dobbs*, place great weight on historical *state* practice—suggesting that some determination of a state consensus close in time to the Founding, or to the ratification date of the relevant constitutional provision, is outcome-determinative (or at least highly persuasive) for determining the originally understood scope of that provision. As described in recent coverage of those decisions, the Court’s decisions suggest in some sense that the “fundamental rights of Americans . . . rise or fall depending on a head count of state practice in 1868,” or some earlier date.<sup>302</sup>

When courts are required to consult historical state practice in cases that seek to determine the scope of constitutional rights and protections, the inquiry will almost certainly cover periods in history when the United States had many continental territories.<sup>303</sup> As of 1805, for example, the United States was comprised of 17 states and 5 territories.<sup>304</sup> In 1868, when the Fourteenth Amendment was ratified, there were 37 states and 11 territories.<sup>305</sup> If the Court continues to emphasize state practice in future cases as a way of gleaning the original public meaning of indeterminate constitutional provisions, practice in the territories might easily tip the scales one way or another if it is considered.

Until *Bruen*, the Court was normally willing to credit historical territorial laws and practices when put forward by the parties, and to place such evidence on essentially the same level as state history—although the Court did so sporadically and without any consistent theory of relevance. For example, the decision in *Glucksberg* cited territorial laws and did not distinguish between historical practice in states and territories.<sup>306</sup> *Dobbs*, decided just one day after *Bruen*, cited to an appendix of territorial abortion restrictions from the late 1800s and never suggested that those restrictions were entitled to less weight than state prohibitions from the same time

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301. Although *Bruen* appears to preclude consideration of twentieth-century laws entirely, 142 S. Ct. at 2154 n.28, incorporated territories existed up to 1959, when Alaska and Hawaii were admitted as states. See Kelly, *supra* note 15.

302. David H. Gans, *This Court Has Revealed Conservative Originalism to Be a Hollow Shell*, ATLANTIC (July 20, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/roe-overturned-alito-dobbs-originalism/670561/> [<https://perma.cc/HX4X-VVR8>].

303. As Brandon Garrett observes, such an inquiry “might demand quite a bit of consensus, perhaps over a long period of time, to obtain that status.” Garrett, *supra* note 222, at 863 (referencing the finding of a “fundamental” right).

304. See *supra* note 15 and sources cited therein. That the ratio of states to territories was approximately the same in 1805 as in 1868 illustrates that, even if the Court eventually clarifies that only laws passed close in time to 1791 can establish a historical tradition of regulation, territorial laws can and should still play a major role in the analysis.

305. See *id.*

306. *Washington v. Glucksberg*, 521 U.S. 702, 710–11, 710 n.8, 715 (1997).

period, merely because they came from territories.<sup>307</sup> To the contrary, *Dobbs*'s reference to a "trend" in the territories suggests that the appearance of similar laws in multiple territories pre-statehood can confirm the existence of a broader national tradition.<sup>308</sup> In other contexts, the Court has similarly relied upon past and current territorial laws, and accorded them the same weight as state laws or included them within the denominator for jurisdictional surveys.<sup>309</sup>

*Bruen* stands largely alone as a departure from this practice of according equal weight to territorial and state legislation. In *Bruen*, the Court discounted territorial laws almost entirely on the basis that they were passed in territories rather than states, distinguishing the territorial form of government as of a different kind.<sup>310</sup> Federal courts applying *Bruen* have, accordingly, largely disregarded territorial evidence. For example, the decision in *Hardaway v. Nigrelli* striking down New York's ban on guns in places of worship found that *Bruen* "gave little weight to territorial enactments that, like the territories themselves, were 'short lived.'"<sup>311</sup> In an opinion granting in part a motion for preliminary injunction of New York's post-*Bruen* regulation, a district judge observed that "less weight is generally given to laws from Western Territories because of, in part, the smaller 'territorial populations who would have lived under them.'"<sup>312</sup> The *Antonyuk* opinion, indeed, observed that, "to the extent . . . laws come from territories near the last decade of the 19th century[,] . . . the Court discounts their weight, because of their diminished ability to shed light on the public understanding of the Second Amendment."<sup>313</sup> District Judge Roger Benitez, who is presiding over a case challenging California's large-capacity magazine ban—among other Second Amendment cases—similarly noted during a recent court conference that evidence of laws and practices "in the territories in the Reconstruction period . . . doesn't help me. It's not an analog."<sup>314</sup>

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307. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2296–300 (2022).

308. *Id.* at 2253, 2260.

309. *See supra* Section II.C.

310. *See supra* Section I.A.

311. *Hardaway v. Nigrelli*, 22-CV-771 (JLS), 2022 WL 16646220, at \*16 (W.D.N.Y. Nov. 3, 2022), *appeal docketed*, No. 22-2933 (2d Cir. Nov. 15, 2022).

312. *Antonyuk v. Hochul*, 1:22-CV-0986 (GTS/CFH), 2022 WL 16744700, at \*7 (N.D.N.Y. Nov. 7, 2022) (quoting *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2154–56 (2022)), *appeal docketed*, No. 22-2908 (2d Cir. Nov. 9, 2022).

313. *Id.* at \*61, \*75.

314. Reporter's Transcript of Proceedings at 37, *Duncan v. Bonta*, No. 3:17-cv-01017-BEN-JLB (S.D. Cal. Dec. 12, 2022), [https://michellawyers.com/wp-content/uploads/2022/12/2230680\\_2022-12-20-Transcript-of-SC-on-12-12-22.pdf](https://michellawyers.com/wp-content/uploads/2022/12/2230680_2022-12-20-Transcript-of-SC-on-12-12-22.pdf) [<https://perma.cc/C6TB-CTEV>].

Which approach is correct? Should territorial evidence be substantially discounted or disregarded entirely as unrepresentative and unusual, as the Court suggested in *Bruen*? Or should territorial evidence be considered alongside state evidence, on relatively equal terms, in federal constitutional cases employing originalist methods of interpretation? This Article argues that an interpretive methodology actually focused on uncovering the original public meaning of the language used in the constitutional provision at issue, and honestly in search of an enduring national tradition, must account for territorial laws and practices.<sup>315</sup>

As this Article has shown, *Bruen* identified a set of reasons for discounting territorial history that are only mildly, if at all, persuasive. More importantly, *Bruen* failed to consider ways in which territorial history might be uniquely well-suited to the interpretive task at hand. Territorial practices should serve as evidence of the original meaning and scope of the constitutional provision at issue: the words used in the constitutional provision at the time of its enactment. For example, in *Bruen*, the Court should have credited 1800s territorial laws as persuasive evidence of the scope of the Second Amendment right at that time and, potentially, as an emerging trend which later spread to the states.<sup>316</sup> This makes sense, because those laws were passed in territories under direct federal control where the protections in the Bill of Rights applied. Territorial legislators who passed the laws knew they were legislating under the Bill of Rights and that the laws could be challenged for violating its provisions. The Court should assume those legislators acted accordingly and include the territorial laws they enacted within any account of American historical tradition.

Territorial laws and practices are also some of the *earliest* evidence we have of a national tradition of regulating firearms pursuant to the Second Amendment—and they are much more likely to reflect a uniform national approach, rather than a departure from such an approach. These laws do not pre-date the amendment’s ratification, to be sure, but *Bruen*’s elevation of historical practices suggests that the time of enactment is not particularly high on the Court’s list of priorities (so long as it is relatively close to 1791). If the Court believed that *only* post-ratification practice could illuminate the originally understood scope of the Second Amendment, there would have

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315. Specific doctrinal rules which might guide this inquiry further are a subject ripe for future scholarly inquiry. For example, one possibility is that the courts might initially consult any possible territorial analogues at the “plain text” step, to determine the originally understood textual scope of the amendment. State history, on the other hand, might be reserved for a second step that is focused on tradition, more broadly defined.

316. See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 117–20 (2013) (describing the rising trend of public-carry regulations on the Western frontier during the late nineteenth century).

been no reason to spend a dozen pages analyzing post-1791 historical developments, legislation, and case law.<sup>317</sup>

### C. *The Territories in Future Second Amendment and Constitutional Cases*

In Second Amendment cases specifically, an approach that considers territorial laws will likely place much greater emphasis on the question of whether 1791 or 1868 is the correct reference point for Second Amendment challenges to state laws. *Bruen* referenced scholarly debate<sup>318</sup> on this issue but declined to decide the question, finding that the outcome in that case would have been the same regardless of whether 1791 or 1868 was used.<sup>319</sup> Due in no small part to the large number of state gun regulations enacted in the early-mid 1800s, however, the issue of whether Second Amendment challenges to state regulations through the Fourteenth Amendment should be decided by reference to 1791 or 1868 was certain to re-surface, and federal appellate courts applying *Bruen* have already gone in different directions.<sup>320</sup>

The Court itself has, in prior cases outside of the Second Amendment, consistently suggested “that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted

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317. *Bruen*, 142 S. Ct. at 2144–56.

318. Kurt Lash, for example, argues that those who ratified the Fourteenth Amendment imbued the provisions in the Bill of Rights with new meaning by “respeaking” those protections into existence against the states. *See* Lash, *supra* note 173. Akhil Reed Amar similarly argues that the Fourteenth Amendment transformed the meaning of certain provisions of the original Bill of Rights—for example, Amar notes that

the very same words “the right . . . to keep and bear arms” take on a different coloration and nuance when they are relabeled “privileges or immunities of citizens” rather than “the right of the people,” and when they are severed from their association with a well-regulated militia. To recast the textual point as a historical one, the core applications and central meanings of the right to keep and bear arms and other key rights were very different in 1866 than in 1789.

AMAR, *supra* note 134, at 223. To both Lash and Amar, judging the constitutionality of modern *state* gun laws by reference to historical tradition would surely require looking to historical regulations passed around 1868. Others, however, argue that the meaning of provisions in the original Bill of Rights was fixed as of 1791. *See, e.g.*, Mark W. Smith, “Not All History Is Created Equal”: In the Post-*Bruen* World, the Critical Period for Historical Analogues Is When the Second Amendment Was Ratified in 1791, and Not 1868 (Nov. 4, 2022) (unpublished manuscript) (on file with author). Scholars like Smith, who highlight the Court’s own statements that provisions in the Bill of Rights “are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment,” *Malloy v. Hogan*, 378 U.S. 1, 10 (1964), contend that consulting mid-1800s history is improper.

319. *Bruen*, 142 S. Ct. at 2138.

320. *Compare* *Range v. Attorney General*, 53 F.4th 262, 270–71, 274 n.17 (3d Cir. 2022) (focusing on “regulations at the Founding” and Founding-era historical sources), *vacated pending reh’g en banc*, 56 F.4th 992 (3d Cir. 2023), *with* *Nat’l Rifle Ass’n v. Bondi*, 61 F.4th 1317, 1323 (11th Cir. 2023) (holding that “the right’s contours turn on the understanding that prevailed at the time of the later ratification—that is, when the Fourteenth Amendment was ratified”).



against the federal government.”<sup>321</sup> Of course, it is possible that *Bruen*’s unique historical-analogical test and focus on historical regulations might warrant a different approach to the date question than the Court has generally endorsed in other areas of constitutional law. The Eleventh Circuit’s recent decision in *NRA v. Bondi* is especially notable in this regard. In *Bondi*, the panel observed that, “[b]ecause the understanding of the right to keep and bear arms in 1866 generally differed from the understanding of that right in 1789, *Bruen* is likely an exception in its ability to assume away the differences.”<sup>322</sup> While noting the Court’s exhortation that the *substance* of the right versus the federal government and state governments must be the same, *Bondi* held that “the right’s contours turn on the understanding that prevailed at the time of the later ratification—that is, when the Fourteenth Amendment was ratified.”<sup>323</sup> To the *Bondi* panel, it “ma[de] no sense to suggest that the States would have bound themselves to an understanding of the Bill of Rights—including that of the Second Amendment—that they did not share when they ratified the Fourteenth Amendment.”<sup>324</sup> The *Bondi* opinion also relied on at least one territorial law in reaching its decision that Florida’s ban on the purchase of firearms by those under the age of 21 was consistent with historical tradition.<sup>325</sup>

If the approach in *Bondi* is embraced by other courts, it will both necessitate Supreme Court guidance on the date question and bring territorial history into sharper focus.<sup>326</sup> *Bruen* itself relied heavily on the date that the five territorial laws at issue were enacted to discount them<sup>327</sup>—with that rationale eliminated, the Court’s other reasons for rejecting territorial history may be too slender a reed to bear the force of the ultimate conclusion to disregard territorial statutes. Under the approach advocated here, which would credit territorial regulations on equal footing, the outcome in many cases will likely turn on the date question. If the scope of the incorporated right is determined as of 1868, as the Eleventh Circuit suggested in *Bondi*,

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321. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020); *see also Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964) (“The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a ‘watered-down, subjective version of the individual guarantees of the Bill of Rights.’” (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960))).

322. *Bondi*, 61 4th at 1323.

323. *Id.*

324. *Id.*

325. *See id.* at 1333 (app.) (citing a Wyoming territorial statute from 1890 banning the sale or provision of certain weapons to those under age 21).

326. The United States had over twice as many continental territories in 1868 as it did in the first decade of the nineteenth century. *See supra* note 15.

327. *See N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2154 (2022) (“[L]ate-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence.”).

then New York in *Bruen* would have shown a robust national tradition of strictly regulating public carry as of that date. As the Court held in *Glucksberg* and *Dobbs*, territorial laws can be directly relevant to the expected application of a constitutional provision (and the appearance of five separate territorial laws within a short period of time likely makes the case even stronger). If, on the other hand, 1791 is the correct point and laws far in time from 1791 are discounted according to the time gap, then the outcome in *Bruen* may very well remain unchanged under this Article's preferred approach.

Including territorial laws within the scope of the nation's historical tradition will also place more focus on the specific number of historical analogues that are required for the government to meet *Bruen*'s standard for a tradition of similar regulation.<sup>328</sup> *Bruen* is conspicuously silent on this issue, alternatively explaining that “analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*,” but then holding that an analogous Texas public-carry regulation was an outlier because it was contradicted by other evidence.<sup>329</sup> Courts to decide cases since *Bruen* have been all over the map—variously suggesting that half of the states in existence at the relevant time must have had analogous regulations in place,<sup>330</sup> that three historical analogues are sufficient,<sup>331</sup> or that the population of the states with analogous restrictions is relevant to the inquiry.<sup>332</sup> With territories squarely included, courts would be able to spend more time addressing these crucial questions, rather than wrestling with the threshold matter of whether certain historical evidence must be rejected nearly sight unseen.

The point is not that the result of *Bruen*—or any future Second Amendment case—would necessarily turn on a law passed in a single Western territory with a small population. However, embracing an approach to historical tradition that includes the territories obviates the need to rely on questionable socio-demographic rationales to reason away territorial laws. For example, lower courts would not need to reflexively assume that these laws were legislative “improvisations” unrepresentative of a uniform

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328. One unfortunate consequence of *Bruen*'s approach to territorial regulation is that attorneys combing the historical record for analogous laws—already a time-consuming task that often must be performed on a tight turnaround—are now much more likely to restrict their search to only *state* laws. As a result, courts will be presented with a history of regulation that purports to be complete, but in fact omits the very jurisdictions that were actually subject to the Second Amendment at the time.

329. *Bruen*, 142 S. Ct. at 2133, 2153.

330. See, e.g., *Firearms Pol'y Coal., Inc. v. McCraw*, 623 F. Supp. 3d 740, 756 (N.D. Tex. 2022).

331. See, e.g., *Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH), 2022 WL 5239895, at \*9 (N.D.N.Y. Oct. 6, 2022).

332. *Antonyuk*, 2022 WL 16744700, at \*7 n.5 (opinion granting in part preliminary injunction) (refining legal test for finding historical analogues).

tradition when they were, in fact, passed in jurisdictions directly subject to the Federal Second Amendment. Rather, courts could honestly credit territorial laws as some evidence of the scope of the federal constitutional provision, while also giving state practice its due.

There is no convincing reason, moreover, why the approach described herein should necessarily be limited to the Second Amendment. First, the Court has traditionally relied upon territorial laws and practices in other areas of constitutional law, including substantive due process cases and Eighth Amendment challenges to state laws. This Article, then, merely provides a stronger normative foundation for the Court's existing approach in those areas—an approach that frequently credits developments in the territories as relevant to a national tradition (albeit without any comprehensive analysis of *why* territorial laws should be considered).

Second, scholars have suggested that *Bruen*'s focus on text, history, and tradition to determine the scope of constitutional provisions and adjudicate modern-day constitutional challenges is the first indication of a broader trend.<sup>333</sup> If the Court believes that close examination of historical regulatory practice is the most faithful and constraining method of constitutional adjudication in the Second Amendment sphere, it seems that this reasoning should apply with equal force to other provisions in the Bill of Rights (including the First Amendment) and, potentially, to challenges brought under other constitutional provisions. *Bruen* seems to signal a broader project of remaking originalism to carve out a more prominent role for historical practices and regulations. If that prediction comes to fruition, it is all the more important for the Court to adopt a coherent theory of territorial relevance now.

## CONCLUSION

*Bruen* marks a revolution in Second Amendment jurisprudence which may soon impact other provisions in the Bill of Rights and the Constitution. As the Supreme Court looks increasingly to the American historical regulatory tradition to judge the constitutionality of modern laws, it is certain to once again confront the thorny problem of territorial practice and

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333. See, e.g., Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After Bruen*, 18 DUKE J. CONST. L. & PUB. POL'Y (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4277611](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4277611) [<https://perma.cc/BDG5-SNCR>] (addressing the potential impact of a broader adoption of text, history, and tradition on First Amendment cases, including in the defamation context); Michael L. Smith & Alexander S. Hiland, *Using Bruen to Overturn New York Times v. Sullivan*, 50 PEPP. L. REV. 80, 97 (2023) (arguing that *Bruen* may provide a template for overruling *Sullivan* and “earlier case law on defamation in light of [a] failure to consider historic meaning”).

the outsized role of territorial government throughout much of our nation's early history, compared to today. Contrary to the approach in *Bruen*, the Court should resist the temptation to reflexively relegate the territories to the trash bin of history. Closer examination reveals that territorial legislative approaches were, as a general rule, neither improvisational nor short-lived.

As this Article has shown, including territorial laws within a text, history, and tradition analysis accords with the Court's preferred method of constitutional interpretation. Because territories were subject to the Bill of Rights long before states, territorial practice is some of the very best and earliest evidence in existence regarding regulatory practice under the federal constitutional provisions that underlie today's major Court decisions. Territorial consultation should be especially attractive to originalists because the same constitutional language at issue today applied directly to territorial legislation. Including territorial history within the legal framework also has strong potential to enrich constitutional adjudication by capturing jurisdictions that applied uniform national traditions to new and unanticipated regulatory challenges.

This may all seem like a relatively minor point in the ongoing debates over originalism. Yet the question of which historical sources may be considered is, in fact, critical to the future legitimacy of a history-focused test such as the one adopted in *Bruen*. The territories could very well determine the outcome in future cases, if considered. Moreover, if the Court weighs *all* historical evidence on equal footing, the Court is less subject to criticism that it is simply cherry-picking history or doing history in a way that suits its own ends. As it stands, *Bruen*'s apparent rejection of all territorial laws renders the Court especially vulnerable to detractors who believe the Justices are accepting without investigation the historical sources they prefer, while distinguishing away those sources which do not support their chosen outcome. Excluding certain historical laws from the universe of inquiry entirely damages any sense of neutrality and undermines the majority's assertion that its test is more constraining of judicial discretion than means-ends scrutiny. It is neither constraining nor administrable for the Justices to decide, in their own subjective view, that laws from the territories were improvisational and thus not part of an "enduring" tradition. While there are many reasons to be skeptical about *Bruen*'s extensive reliance on history, embracing a legal framework that considers territorial history on equal footing would resolve one major anomaly and ensure that decisions applying a text, history, and tradition methodology reflect the full fabric of America's regulatory tradition.