

Written Testimony of

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After *New York State Rifle & Pistol Association v. Bruen*”

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Chairman Durbin, Ranking Member Graham, and members of the Committee, thank you for inviting me to testify regarding the state of Second Amendment case law after the Supreme Court's landmark decision in *New York State Rifle and Pistol Association v. Bruen*,¹ and the implications for future gun safety legislation. My name is Eric Ruben, I am a professor at SMU Dedman School of Law, and I am testifying in my personal capacity.²

In *Bruen*, the Supreme Court held that the constitutionality of modern gun laws must be evaluated by direct analogy to history. The Court's novel historical-analogical approach was a drastic departure from the pre-*Bruen* doctrine applied by the lower federal courts, which had coalesced around a methodology that combined historical analysis with consideration of contemporary costs and benefits. As a result, *Bruen*, in one fell swoop, cast doubt on over a decade's worth of case law regarding the constitutionality of dozens of regulatory issues, in effect giving litigants a do-over under the new *Bruen* test.

More than 100 opinions have issued since *Bruen*,³ which demonstrate how lower courts have struggled to apply *Bruen* to various modern laws such as those regulating 3D-printed guns, large-capacity magazines, obliterated serial numbers, and gun possession by domestic abusers. Though *Bruen* purported to constrain judicial decisionmaking through historical analogy, the post-*Bruen* case law highlights the risk that, in fact, the opinion has enabled judicial subjectivity, obfuscation, and unpredictability.

I appreciate this committee's attention to this issue, and I submit this statement to aid your efforts. In Section I, I describe *Bruen*'s methodological approach. In Section II, I describe three broad challenges underlying the lower court struggles in post-*Bruen* cases: first, identifying principles of relevant similarity to compare past and present laws; second, conducting *Bruen*'s historical-analogical inquiry in a way that accommodates the drastic differences between past and present guns and gun violence; and, third, proceeding in a way that does not exacerbate the judiciary's institutional limitations.

I. *Bruen* Disrupted The Consensus Methodology For Second Amendment Cases In The Lower Courts And Replaced It With A Novel Historical-Analogical Inquiry

New York State Rifle and Pistol Association v. Bruen adopted a novel approach to constitutional historicism—one that does not simply identify the original public meaning of constitutional text and then apply standard doctrinal rules (as *Heller*'s progeny did), but purports to reason directly by analogy to the historical record.

In *Bruen*, the Court struck down a century-old New York law requiring that an individual demonstrate a heightened risk of being attacked in order to obtain a permit to carry a concealed handgun.⁴ That outcome had an immediate and significant impact on the roughly 80 million people

¹ 142 S. Ct. 2111 (2022).

² My testimony draws from Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. __ (forthcoming).

³ See Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. __ (forthcoming) (analyzing results from more than 100 lower federal court decisions in Second Amendment cases after *Bruen*).

⁴ *Bruen*, 142 S. Ct. at 2122.

living in states with laws like New York’s,⁵ as it required them to remove heightened self-defense need as a requisite for a concealed carry permit.⁶

But the broader and more lasting impact of *Bruen* will be the novel approach the Court adopted for evaluating Second Amendment challenges.⁷ Before *Bruen*, “the Courts of Appeals [had] coalesced around a ‘two-step’ framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.”⁸ In fact, that framework was adopted by every federal court of appeals to consider the question.⁹ Under this consensus approach, courts would “ask if the restricted activity is protected by the Second Amendment in the first place; and then, if necessary, [they would] ... apply the appropriate level of scrutiny.”¹⁰ The majority in *Bruen* rejected that approach. Instead, *Bruen* held that modern gun laws, including those addressing problems unknown to the founding generation, must be evaluated solely based on whether they are analogous to historical laws “when the Amendment’s plain text covers an individual’s conduct”:

In keeping with *Heller*, we hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”¹¹

This new test of historical tradition represented a sea change in doctrine, calling into question more than a thousand post-*Heller* cases that had been decided on grounds that were not exclusively historical

⁵ Adam Liptak, *Supreme Court Strikes Down New York Law Limiting Guns in Public*, N.Y. TIMES (Jun. 23, 2022), <https://www.nytimes.com/2022/06/23/us/supreme-court-ny-open-carry-gun-law.html>.

⁶ See *Bruen*, 142 S. Ct. at 2138 n.9 (noting that “nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regimes”); *id.* at 2162 (Kavanaugh, J., concurring) (underscoring that “shall-issue licensing regimes are constitutionally permissible”).

⁷ Along with Darrell A.H. Miller and Joseph Blocher of Duke Law School, I filed an amicus brief in support of neither side urging the Court to adopt the two-part framework embraced throughout the federal courts of appeal before *Bruen*. See Brief of Second Amendment Law Professors as Amici Curiae in Support of Neither Party, *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. __ (2022) (No. 20-843), 2022 WL 2251305.

⁸ *Bruen*, 142 S. Ct. at 2125.

⁹ *Id.* at 2174 (Breyer, J., dissenting) (“Every Court of Appeals to have addressed the question has agreed on a two-step framework for evaluating whether a firearm regulation is consistent with the Second Amendment.”).

¹⁰ *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 846 (2019).

¹¹ *Bruen*, 142 S. Ct. at 2126 (internal citation omitted); see also *id.* at 2129-30 (reiterating this test nearly verbatim). Though *Bruen* dismissed the consensus two-part approach applied in the lower courts as having “one step too many,” *id.* at 2117, it introduced a two-part test of its own—one that prescribes the historical-analogical inquiry only in a subset of Second Amendment disputes “when the Second Amendment’s plain text covers an individual’s conduct,” *id.* at 2130. Assuming that the word “when” is being used as a conditional—as seems to be the case—the reach of *Bruen*’s historical-analogical test might be limited only to those cases already covered by the “plain text” of the Amendment. That said, because doctrinal challenges in the lower courts are largely arising in connection with the second step of the *Bruen* test—the historical-analogical inquiry—that is the focus of my testimony.

and analogical.¹² And as the majority acknowledged, simply looking to tradition will not sufficiently decide cases since, as courts before *Bruen* had widely noted, history is often unclear.¹³ To fill the gap, *Bruen* emphasized repeatedly that its methodology requires litigants and judges to make analogies to historical regulations.¹⁴

The turn to analogy raises deep questions. The *Bruen* majority recognized that “because ‘[e]verything is similar in infinite ways to everything else,’ one needs ‘some metric enabling the analogizer to assess which similarities are important and which are not.’”¹⁵ What “metric,” then, should guide the historical-analogical process? The majority pointed to “at least two”:

While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: *how* and *why* the regulations burden a law-abiding citizen’s right to armed self-defense.¹⁶

Citing *Heller* and *McDonald v. Chicago* for the proposition that individual self-defense is the central component of the right to keep and bear arms, the Court further elaborated that “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry.”¹⁷ But just *how* “comparable” the modern and historical gun laws must be remained unclear in the opinion, except that “analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*.”¹⁸ *Bruen* further signaled that courts can consider other factors beyond the “how” and “why,” observing that the opinion “do[es] not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment.”¹⁹

Though the how-and-why metrics have generally been treated as *Bruen*’s central holding,²⁰ the Court elsewhere describes them as a “more nuanced” approach that applies only where a “modern

¹² One measure of this disruption was the fact that, within days of *Bruen*, nearly every Second Amendment case on WestLaw was marked with a red flag. Unfortunately, WestLaw does not—or would not, in response to queries—account for how many red flags were added or why, so this is simply an observation.

¹³ *See, e.g.*, *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012) (“History and tradition do not speak with one voice.”).

¹⁴ The opinion contained more than thirty references to versions of the word “analogy.”

¹⁵ *Bruen*, 142 S. Ct. at 2132 (internal citations omitted).

¹⁶ *Id.* at 2132-33 (emphasis added).

¹⁷ *Id.* (citing *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (quoting *Heller*, 554 U.S. at 599)) (quotation marks and emphasis omitted).

¹⁸ *Id.* at 2132 (emphasis in original); *id.* (“So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.”) (internal citations, quotation, and emphasis omitted).

¹⁹ *Id.* at 2132 (emphasis added). The Court also said that *Heller* and *McDonald* point to “at least two metrics”—those being the “how” and “why”—suggesting that other metrics are permitted. *Id.* at 2133 (emphasis added).

²⁰ *See, e.g.*, *Antonyuk v. Hochul*, ___ F.Supp.3d ___, 2022 WL 5239895, at *6 (N.D.N.Y. Oct. 6, 2022) (“To ‘enabl[e] [courts] to assess which similarities are important and which are not’ during this analogical inquiry, they must use at least ‘two metrics,’ which are ‘central’ considerations to that inquiry: ‘how and why the regulations burden a law-abiding citizen’s right to armed self-defense.’”) (quoting *Bruen*, 142 S. Ct. at 2132-33) (alterations in original).

regulation [was] unimaginable at the founding,” in which case one must look for “relevantly similar” analogies to the “distinctly modern firearm regulation.”²¹

An apparently more stringent—and thus presumably less “nuanced”—version of the historical-analogical test applies to modern laws addressing a “general societal problem” that has existed since the founding era.²² If the societal problem has persisted: (1) “the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment,”²³ (2) “if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional,”²⁴ and (3) “if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.”²⁵

This category of similar-problems-but-“materially different”—solutions places a great deal of weight on historical silence, problematically treating it as evidence for expansive gun rights. Failure to regulate—or, more accurately, absence of evidence of regulation—might have nothing to do with a belief that doing so would have been unconstitutional and reflect nothing about original public meaning. Maybe the founding generation did not think of a particular solution. Maybe the regulatory means did not exist. Maybe policymakers prioritized other pressing issues, like setting up a new government and addressing external and internal threats to its existence. It is simply unwarranted to assume that policymakers always regulated to the outer bounds of their constitutional authority. Moreover, which lens—modern or historical—should be used to determine if a phenomenon even *was* a “societal problem”? The framers did not seem to regard armed domestic violence as a problem worthy of legislation²⁶—a fact judges have cited in the course of striking down the modern law prohibiting gun possession by those subject to a domestic violence restraining order.²⁷ But that silence reflects their blinkered moral sensibility with regard to gendered violence,²⁸ not a determination about the right to keep and bear arms.

As fundamentally, the test introduces room for judicial discretion in deciding whether a historical problem has persisted and characterizing the means adopted for addressing it. In other words, what *is* a “general societal problem”?²⁹ What does it mean for a historical regulation to be “distinctly similar”?³⁰ What are “materially different means”?³¹ If, for example, one defines the “general societal problem” as “gun violence”—a broad level of generality—then it will be harder to justify modern regulations

²¹ *Bruen*, 142 S. Ct. at 2132.

²² Or, presumably, whatever historical era provides the relevant comparators—a matter that *Bruen* does not settle. *Id.* at 2162-63 (Barrett, J., concurring) (noting that the majority opinion does not resolve whether history after the framing era, including during Reconstruction, is relevant to the historical-analogical test the majority endorses).

²³ *Id.* at 2131 (majority opinion).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2121-29 (1996).

²⁷ See, e.g., *United States v. Rahimi*, ___ F.4th ___, 2023 WL 2317796 (5th Cir. 2023); *United States v. Perez-Gallan*, ___ F.Supp.3d ___, 2022 WL 16858516 (W.D. Tex. Nov. 10, 2022).

²⁸ See Siegel, *supra* note 26, at 2127 (describing historical protection of the “husband’s legal prerogative to inflict marital chastisement”).

²⁹ *Bruen*, 142 S. Ct. at 2131.

³⁰ *Id.*

³¹ *Id.*

that are not “distinctly similar” to predecessors. But one might also define the modern “general societal problem” as “mass shootings” or “school shootings”—a lower level of generality—and thereby avoid the need for a “distinctly similar” historical forebear to prove constitutionality.³² Both descriptions of the societal problem are accurate, just at different levels of generality, yet they lead to very different conclusions.

Bruen itself demonstrates how slippery and manipulable the persistent-societal-problem principle can be. The majority seems to equate the modern “societal concern” of handgun violence with a purportedly identical founding-era “societal concern.” Of *Heller*, the Court wrote:

One of the District’s regulations challenged in *Heller* ‘totally ban[ned] handgun possession in the home.’ The District in *Heller* addressed a perceived societal problem—firearm violence in densely populated communities—and it employed a regulation—a flat ban on the possession of handguns in the home—that the Founders themselves could have adopted to confront that problem.³³

The implication was that the historical omission was strong evidence of the modern law’s unconstitutionality. The Court characterized *Bruen* similarly: “New York’s proper-cause requirement concerns the same alleged societal problem addressed in *Heller*: ‘handgun violence,’ primarily in ‘urban area[s].’”³⁴ Both cases, according to the majority, called for “straightforward historical inquiry,”³⁵ but this conclusion is anything but—in fact, it reflects the risk of anachronism invited by a historical-analogical approach. Certainly, gun violence existed in the founding era. But why would “the Founders themselves” have “adopted” a handgun ban when less than 10 percent of the firearm stock consisted of handguns, and without evidence of widespread handgun use in crime?³⁶ There were, in some sense, “urban area[s]” and “densely populated communities,” but nothing even remotely comparable to today; New York City alone now contains more than twice the entire country’s 1790 population.³⁷ How can that comparison be “straightforward”?

A final wrinkle on understanding *Bruen* is that despite the seeming stringency of its historical-analogical test, *Bruen* repeatedly emphasizes—as *Heller* did—that it permits various forms of gun regulation. The majority notably does not fully reproduce (as the earlier decision in *McDonald v. City of Chicago* had done³⁸) the language from *Heller* regarding “presumptively lawful” gun restrictions, which had been central to post-*Heller* Second Amendment litigation:

[I]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in

³² See *infra* notes 116-118 and accompanying text (discussing the recentness of mass shootings and school shootings).

³³ *Bruen*, 142 S. Ct. at 2131.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See Eric Ruben, *The Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173, 204-207 (2021) (discussing firearms, crime, and self-defense at the founding).

³⁷ See *infra* notes 105-109 and accompanying text (discussing lack of urbanization at the founding).

³⁸ See *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.³⁹

Nonetheless, the *Bruen* majority does discuss some of those restrictions with approval.⁴⁰ Moreover, concurring opinions signed by three of the Justices who joined the six-Justice majority emphasized that *Heller*'s endorsement of various forms of regulation remains good law. Justice Alito wrote, "Nor have we disturbed anything that we said in *Heller* or *McDonald v. Chicago* about restrictions that may be imposed on the possession or carrying of guns."⁴¹ Justice Brett Kavanaugh, in a concurring opinion joined by Chief Justice John Roberts, underscored that, "as *Heller* and *McDonald* established and the Court today again explains, the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. Properly interpreted, the Second Amendment allows a 'variety' of gun regulations."⁴² Kavanaugh then went on to reproduce the "presumptively lawful" paragraphs from *Heller* and *McDonald*.⁴³ Separately, Kavanaugh highlighted, as the majority opinion also had, that the decision does not call into question "shall-issue" permitting, without acknowledging the lack of any obvious founding-era analogue for such policies.⁴⁴

These reassurances signal that the Supreme Court may be willing to uphold gun regulations outside the parameters of the Court's historical-analogical test—including those recognized as "presumptively lawful" in *Heller*. Though evidence exists that courts will continue to invoke *Heller*'s exceptions as carve-outs from Second Amendment coverage,⁴⁵ there also is evidence of gross departures from pre-*Bruen* case law that call into question how much continuity will be maintained between pre- and post-*Bruen* case outcomes. I discuss these in the next section.

II. The Lower Courts Have Struggled To Apply *Bruen* In A Consistent And Coherent Way

In the wake of *Bruen*, courts are faced not only with the concrete difficulty of resolving Second Amendment challenges, but also with making sense of a novel constitutional methodology. As with the post-*Heller* decade, lower courts will be the primary authors of doctrine to implement *Bruen*'s

³⁹ See *Heller*, 554 U.S. at 626-27 (citations omitted). In a footnote, *Heller* referred to these as "examples" of "presumptively lawful regulatory measures," further noting that the "list does not purport to be exhaustive." *Id.* at 627 n.26. The opinion then also blessed restrictions on "dangerous and unusual weapons" such as "M-16 rifles and the like." *Id.* at 627; see also Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1488 (2018) (noting, based on review of more than 1000 Second Amendment challenges between 2008 and 2016, that "a majority of the challenges in our study (60 percent) explicitly cited those paragraphs, though the ratio trended downward over time, perhaps reflecting the fact that *Heller* itself has now been baked into circuit precedent").

⁴⁰ *Bruen*, 142 S. Ct. at 2133-34 (discussing "sensitive places" restrictions).

⁴¹ *Id.* at 2157 (Alito, J., concurring) (internal citations omitted).

⁴² *Id.* at 2162 (Kavanaugh, J., concurring) (internal citations and quotation marks omitted).

⁴³ *Id.* (quoting *Heller*, 554 U.S. at 626-27 and n. 26, and *McDonald*, 561 U.S. at 786 (plurality opinion)).

⁴⁴ *Id.* at 2162 (stating that "shall-issue licensing regimes are constitutionally permissible"); *id.* at 2138 (majority opinion); see also Adam M. Samaha, *Is Bruen Constitutional? On the Methodology that Saved Most Gun Licensing*, 98 N.Y.U. L. REV. (forthcoming 2023) (analyzing inconsistencies between *Bruen*'s stated methodology and the preservation of shall-issue licensing regimes).

⁴⁵ See, e.g., *United States v. Hoover*, 2022 WL 10524008, at *13 (M.D. Fla. Oct. 18, 2022) ("[T]he Supreme Court's holding in *Bruen* did not overturn *D.C. v. Heller*, in which the Court recognized the importance of 'the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'") (citing *Heller*, 554 U.S. at 627); *United States v. Daniels*, 2022 WL 5027574, at *4 (W.D.N.C. Oct. 4, 2022) ("Nothing in the *Bruen* decision . . . casts doubt on 'the longstanding prohibitions on the possession of firearms by felons.'") (quoting *Heller*, 554 U.S. at 626-27).

directives.⁴⁶ But unlike after *Heller*, when courts borrowed rules and standards from other areas of constitutional law (and especially from First Amendment doctrine),⁴⁷ *Bruen*'s unique approach forecloses such borrowing.

Lower courts have struggled to reach coherent and consistent results after *Bruen*, diverging in terms of both outcomes and methodology.⁴⁸ For example, just nine months after *Bruen*, courts have pointed in different directions regarding the enforceability of:

- the federal law banning people under felony indictment from acquiring new guns,⁴⁹
- laws banning possession of firearms with obliterated serial numbers,⁵⁰
- large-capacity magazine restrictions,⁵¹
- disarmament of people subject to domestic violence restraining orders,⁵²
- restrictions on self-manufactured “ghost guns,”⁵³
- disarmament of unlawful users of controlled substances,⁵⁴ and
- restrictions on bringing guns into “sensitive places” such as places of worship, summer camps, urban mass transit, and Times Square.⁵⁵

Other cases have halted enforcement of laws on Second Amendment grounds, and it would not be surprising to see different outcomes in future cases based on different application of *Bruen*'s test:

- restrictions on bringing guns into “sensitive places” such as bars, zoos, libraries, and airports,⁵⁶
- prohibition on gun carrying by 18–20-year-olds,⁵⁷

⁴⁶ See Ruben & Blocher, *supra* note 39, at 1455 (noting that after *Heller*, the Supreme Court “[left] doctrinal development primarily to the lower courts,” which crafted rules and standards in over 1,000 challenges).

⁴⁷ See *United States v. Marzzarella*, 614 F.3d 85, 89 & n.4 (3d Cir. 2010).

⁴⁸ For a helpful analysis of such divergences, see Charles, *supra* note 3, at *39-*50.

⁴⁹ Compare *United States v. Kelly*, No. 22-CR-00037, 2022 WL 17336578 (M.D. Tenn. Nov. 16, 2022) (enforceable) with *United States v. Quiroz*, No. 22-CR-00104-DC, 2022 WL 4352482 (W.D. Tex. Sept. 19, 2022) (unenforceable).

⁵⁰ Compare *United States v. Reyna*, No. 21-CR-41, 2022 WL 17714376 (N.D. Ind. Dec. 15, 2022) (enforceable) with *United States v. Price*, No. 22-CR-00097, 2022 WL 6968457 (S.D.W. Va. Oct. 12, 2022) (unenforceable).

⁵¹ Compare *Oregon Firearms Fed'n v. Brown*, No. 22-CV-01815, 2022 WL 17454829, at *9 (D. Or. Dec. 6, 2022) (enforceable) with *Rocky Mountain Gun Owners v. Bd. of Cnty. Commissioners of Boulder Cnty.*, No. 122CV02113CNSMEH, 2022 WL 4098998 (D. Colo. Aug. 30, 2022) (unenforceable).

⁵² Compare *United States v. Kays*, No. CR-22-40-D, 2022 WL 3718519, at *5 (W.D. Okla. Aug. 29, 2022) (enforceable) with *United States v. Rahimi*, ___ F.4th ___, 2023 WL 2317796 (5th Cir. 2023) and *United States v. Perez-Gallan*, No. PE:22-CR-00427- DC, 2022 WL 16858516 (W.D. Tex. Nov. 10, 2022) (unenforceable).

⁵³ Compare *Def. Distributed v. Bonta*, No. CV 22-6200-GW-AGR, 2022 WL 15524977 (C.D. Cal. Oct. 21, 2022), *adopted*, No. CV 22-6200-GW-AGR, 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022) (enforceable), with *Rigby v. Jennings*, ___ F.Supp.3d ___, 2022 WL 4448220 (D. Del. Sept. 23, 2022) (unenforceable).

⁵⁴ Compare *United States v. Daniels*, ___ F.Supp.3d ___, 2022 WL 2654232, at *4 (S.D. Miss. July 8, 2022) (enforceable) with *United States v. Harrison*, ___ F.Supp.3d ___, 2023 WL 1771138 (W.D. Okla. Feb. 3, 2023) (unenforceable).

⁵⁵ See *infra* notes 71-79 and accompanying text (discussing divergent outcomes within the *Antonyuk* line of opinions).

⁵⁶ See, e.g., *Antonyuk v. Hochul*, ___ F.Supp.3d ___, 2022 WL 16744700 (N.D.N.Y. Nov. 7, 2022) (hereinafter *Antonyuk III*).

⁵⁷ See, e.g., *Firearms Pol'y Coal., Inc. v. McCraw*, ___ F. Supp. 3d ___, 2022 WL 3656996 (N.D. Tex. Aug. 25, 2022).

- restrictions on bringing guns into private homes and businesses,⁵⁸ and
- various public carry application requirements.⁵⁹

Commentators have noted “turmoil” in the lower courts,⁶⁰ which is a fair characterization, but for the purposes of my testimony, I will focus on three noteworthy challenges facing lower courts. First and most fundamentally, the central legal issue after *Bruen* is not finding historical sources but drawing meaningful connections between them and present controversies. To do so, courts need to articulate principles of relevant similarity to make the historical-analogical exercise sensible. Yet lower courts are largely failing to do so. Second, courts must understand and accommodate the reality of change over time and thereby avoid anachronism. But lower court case law has exemplified such anachronism. Third, courts face challenges because of institutional limitations with regard to *Bruen*’s historical-analogical approach. Modern empirics and legislative deference may help ameliorate this challenge, but lower courts have deemed such tools off limits after *Bruen*—a conclusion not necessarily consistent with *Bruen*’s guidance.

A. Lower Courts Have Largely Failed To Identify Principles Of Relevant Similarity To Guide The Historical-Analogical Inquiry

Under *Bruen*, courts must at a minimum understand and articulate workable principles of relevant similarity. In the kind of historical-analogical test that *Bruen* has created, such principles are the basis for judicial decision, so to say that courts must articulate them is simply to say that they must give reasons for their decisions. And yet many cases have failed to satisfy this basic requirement. Instead, many lower courts are essentially looking only for exact matches in the historical record; in *Bruen*’s words, they are seeking a “historical *twin*.”⁶¹ In effect, it is the equivalent of ducking analogical reasoning entirely, and looking for discrete historical facts rather than principles of relevant similarity. I provide a few examples.

The first prominent post-*Bruen* case was *Antonyuk v. Nigrelli*, a challenge to a New York regulation barring guns from various places including behavioral health centers, playgrounds, nursery schools, and homeless shelters.⁶² In the span of ten weeks, the case resulted in a trilogy of opinions attempting *Bruen*’s test.⁶³ In the first, the court opined that all of New York’s sensitive places restrictions were unconstitutional because “the Supreme Court in *NYSRPA* effectively barred the expansion of sensitive locations beyond schools, government buildings, legislative assemblies, polling places and courthouses,” and the court could not find “historical analogs for restricting firearms at *all* of the” locations enumerated in the New York law.⁶⁴ Five weeks later, in a second opinion, the court walked

⁵⁸ See, e.g., *Antonyuk*, 2022 WL 16744700.

⁵⁹ *Id.*

⁶⁰ See, e.g., Alanna Durkin Richer and Lindsay Whitehurst, *Turmoil in Courts on Gun Laws in Wake of Justices’ Ruling*, AP NEWS (Feb. 18, 2023); Eric Segall, *The Supreme Court’s Radical Second Amendment Jurisprudence Is Sowing Chaos in the Lower Courts*, JURIST (Mar. 1, 2023).

⁶¹ *Bruen*, 142 S. Ct. at 2133 (emphasis in original).

⁶² See 2022 N.Y. Sess. Laws ch. 371, § 4 (codified at N.Y. Penal Law § 265.01-e[2]) (enacting the Concealed Carry Improvement Act); *Antonyuk v. Hochul*, __ F.Supp.3d __, 2022 WL 16744700, at *2 - *3 (N.D.N.Y. Nov. 7, 2022) (hereinafter *Antonyuk III*) (describing complaints).

⁶³ See *Antonyuk v. Bruen*, __ F.Supp.3d __, 2022 WL 3999791 (N.D.N.Y. Aug. 31, 2022) (hereinafter *Antonyuk I*); *Antonyuk v. Hochul*, __ F.Supp.3d __, 2022 WL 5239895 (N.D.N.Y. Oct. 6, 2022) (hereinafter *Antonyuk II*); *Antonyuk III*, 2022 WL 16744700. The three opinions had different procedural postures; my focus here is on the Second Amendment methodology that should not vary as between a ruling on a temporary restraining order and preliminary injunction.

⁶⁴ *Antonyuk I*, 2022 WL 3999791, at *34 (emphasis in original).

back both of these methodological interpretations of *Bruen*.⁶⁵ As for what counts as a sufficient analogue, however, the court stated simply that “generally, a historical statute cannot earn the title ‘analogue’ if it is clearly more distinguishable than it is similar to the thing to which it is compared.”⁶⁶ Instead of explaining what *makes* a law “distinguishable,” the court shifted to headcounting, concluding that at least three historical laws are needed to comprise an analogous “tradition.”⁶⁷ A month later, in its third opinion, the court acknowledged that sometimes it must “broaden its conception of what constitutes an ‘analogue’ and focus its attention on the justification for, and burden imposed by, it.”⁶⁸ But the Court did not explain how to “broaden” its conception of what constitutes an “analogue.”⁶⁹ Rather, the court added another layer atop the quantity of laws necessary for an analogous “tradition”: the laws must govern more than 15 percent of the population.⁷⁰

Predictably, the shifting methodologies created confusion. The court opined that bans on guns in places of worship were unconstitutional in *Antonyuk I*,⁷¹ constitutional in *Antonyuk II*,⁷² and unconstitutional again in *Antonyuk III*.⁷³ Bans on guns in children’s summer camps were unconstitutional in *Antonyuk I* and *II*,⁷⁴ but constitutional in *Antonyuk III*.⁷⁵ The same went for guns in Times Square – unconstitutional in the first two go-arounds,⁷⁶ and constitutional in the third.⁷⁷ In *Antonyuk I* and *II*, the court found the prohibition on guns in mass transit unconstitutional for lack of historical analogues.⁷⁸ In *Antonyuk III*, the court changed course, opining that a ban on guns on NYC buses would be constitutional “during the period before school.”⁷⁹ Within the opinions, a litigant could only speculate about why some place-based restrictions were constitutional and others were not. In *Antonyuk III*, for example, the court found it constitutional to restrict guns at playgrounds because of the presence of children, but unconstitutional to restrict them at zoos because, despite the presence of children, some adults are unaccompanied by them.⁸⁰ The court explained the discrepancies between opinions as a result of “better briefing by the State Defendants and its further consideration of the

⁶⁵ *Antonyuk II*, 2022 WL 5239895, at *14 (“[A]lthough the Supreme Court has not altogether barred the expansion of sensitive locations beyond schools, government buildings, legislative assemblies, polling places and courthouses, it has indicated skepticism of such an expansion based on the historical record.”); *id.* (“[A]lthough this Court has found that most of the CCIA’s list of ‘sensitive locations’ violate the Constitution, the Court does so not because the list (or a portion of the list) must rise or fall in its entirety.”).

⁶⁶ *Id.* at *8.

⁶⁷ *Id.* at *9. As the opinion put it, “two such historical analogues . . . can . . . appear as a mere trend,” not a “tradition,” and *Bruen* requires “traditions,” not “trends.” *Id.*

⁶⁸ *Antonyuk III*, 2022 WL 16744700, at *41.

⁶⁹ *Id.*

⁷⁰ *Id.* at *67 (“The Court need not go back and recalculate the numbers so that they both come from the same census: it is confident that, under reasoning . . . in *NYSRPA*, the resulting percentage of less than 15 would not suffice to be representative of the Nation.”).

⁷¹ *Antonyuk I*, 2022 WL 3999791, at *34.

⁷² *Antonyuk II*, 2022 WL 5239895, at *16. The court required New York to make “an exception for those persons who have been tasked with the duty to keep the peace at the place of worship or religious observation.” *Id.*

⁷³ *Antonyuk III*, 2022 WL 16744700, at *60-*63.

⁷⁴ *Antonyuk I*, 2022 WL 3999791, at *34; *Antonyuk II*, 2022 WL 5239895, at *17.

⁷⁵ *Antonyuk III*, 2022 WL 16744700, at *22 n.35.

⁷⁶ *Antonyuk I*, 2022 WL 3999791, at *34; *Antonyuk II*, 2022 WL 5239895, at *20.

⁷⁷ *Antonyuk III*, 2022 WL 16744700, at *37 and n.66.

⁷⁸ *Antonyuk I*, 2022 WL 3999791, at *34; *Antonyuk II*, 2022 WL 5239895, at *17.

⁷⁹ *Antonyuk III*, 2022 WL 16744700, at *71 n.114.

⁸⁰ *Id.* at *67.

historical laws obtained in light of the standard set forth in *NYSRPA*.⁸¹ But the meandering methodologies and correspondingly divergent constitutional outcomes are more clearly an indication of *Bruen*'s failure to set forth a clear standard and the *Antonyuk* court's failure to identify sensible, workable principles of relevant similarity.

The *Antonyuk* opinions are not isolated examples. In *United States v. Perez-Gallan*,⁸² a federal judge struck down a law prohibiting gun possession by people subject to a domestic violence restraining order.⁸³ The law was passed in 1994 to address the relationship—well-documented now, but apparently unappreciated at the founding—between guns and domestic violence.⁸⁴ The court concluded that, after *Bruen*, “[n]o longer can lower courts account for public policy interests, historical analysis being the only tool.”⁸⁵ And it found that “straightforward historical analysis ... reveals a historical tradition likely unthinkable today” because “until the mid-1970s, government intervention—much less removing an individual’s firearms—because of domestic violence practically did not exist.”⁸⁶ The court agreed with then-judge Amy Coney Barrett’s observation that “founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety.”⁸⁷ But the court refused to see that legal tradition as analogous to modern restrictions on domestic abusers, declining to take what it called a “leap of faith” in concluding that the “colonies considered domestic abusers a ‘threat to public safety.’”⁸⁸ Thus, the historical failure to treat domestic violence *specifically* as a threat to public safety in the late 1700s made it unconstitutional *today* to disarm domestic abusers deemed a present threat to others’ safety.⁸⁹

In *Firearms Policy Coalition v. McCran*, a district judge struck down a Texas law prohibiting 18–20-year-olds from carrying a handgun in public.⁹⁰ The court emphasized that the earliest age restriction identified by the government dated to 1856, too late in the court’s view.⁹¹ Nowhere did the court consider whether restrictions on *other* categories of people could reflect a principle of relevant similarity that could be applied to age-based restrictions. The court also did not consider whether youth gun violence was a historical problem warranting a historical solution—in other words, whether the historical omission of age restrictions has a benign explanation unrelated to the scope or protection of the right to keep and bear arms.

⁸¹ *Id.* at *41.

⁸² *United States v. Perez-Gallan*, ___ F.Supp.3d ___, 2022 WL 16858516 (W.D. Tex. Nov. 10, 2022).

⁸³ 18 U.S.C. § 922(g)(8).

⁸⁴ See Pub.L. 103-322, § 110401(c) (1994); SAFE HOMES FOR WOMEN ACT, H.R. 4092 § 1624 (finding that “domestic violence is the leading cause of injury to women in the United States between the ages of 15 and 44” and “firearms are used by the abuser in 7 percent of domestic violence incidents”); see also Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014*, 66 MORBIDITY & MORTALITY WKLY. REP. 741, 741 (July 2017) (observing that most women who are murdered in the United States are killed by an intimate partner and more than half of those murders involve a firearm); Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 313 (2006) (concluding that roughly 60 percent of intimate-partner homicides are committed with a firearm).

⁸⁵ *Perez-Gallan*, 2022 WL 16858516, at *1.

⁸⁶ *Id.* at *5.

⁸⁷ *Id.* at *11 (quoting *Kanter v. Barr*, 919 F.3d 437, 455 (7th Cir. 2019) (Barrett, J., dissenting)).

⁸⁸ *Id.* at *11.

⁸⁹ *Cf.* *United States v. Quiroz*, ___ F.Supp.3d ___, 2022 WL 4342482, at *10 (W.D. Tex. Sept. 19, 2022) (refusing to extend the “historical tradition of excluding specific groups from the rights and powers reserved to ‘the people’” to those under felony indictment, observing that “little evidence” from the late 1700s “supports excluding those under indictment in any context”).

⁹⁰ *Firearms Pol’y Coal., Inc. v. McCran*, ___ F. Supp. 3d ___, 2022 WL 3656996, at *1 (N.D. Tex. Aug. 25, 2022).

⁹¹ *Id.* at *11 (“The earliest law cited is from 1856.”).

Similarly, in *Koons v. Reynolds*, a challenge to New Jersey’s post-*Bruen* law regulating public carry, a district judge struck down a ban on gun possession in bars, emphasizing the government’s failure to present exact historical replicas of the modern law.⁹² The government pointed to historical prohibitions on possessing guns while intoxicated,⁹³ but the judge dismissed that precedent as having “no relevance here as the restriction at issue clearly does not address possession of firearms by intoxicated persons.”⁹⁴ The court relegated the question of *why* the historical intoxication laws were passed to a footnote—“presumably because guns and alcohol do not mix”—opining that it is “unlikely” any such rationale would be sufficient.⁹⁵

Analysis of *Bruen*’s injunction that modern gun laws must be “consistent with this Nation’s historical tradition”⁹⁶ has generally focused on identifying the relevant “historical tradition.” But as a matter of law development it is even more important that courts elaborate what it means to be “consistent” with that tradition. That is the basic function of principles of relevant similarity in a historical-analogical mode, and it is precisely what is missing from many early post-*Bruen* opinions.

B. Lower Courts Have Failed To Account For Drastic Differences Between Past And Present

Perhaps the most concrete and jarring complication of the historical-analogical approach is the degree to which it requires judges to compare modern and historical gun laws, given the extraordinary technological and social changes since the founding. What meaningful historical comparator could there be for the modern prohibition on guns in airplane cabins⁹⁷ or restrictions on automatic weapons?⁹⁸ Perhaps more fundamentally, what about modern laws that reflect broader social change, like the prohibition on gun possession by those who have committed misdemeanor crimes of domestic violence or are subject to a domestic violence restraining order?⁹⁹

Many post-*Bruen* cases fall prey to anachronism. In *Antonyuk II*, for example, the court found “an insufficient number of historical analogues exists requiring a list of social media accounts for the past three years” to receive a gun permit, noting that New York had “adduced no historical analogues requiring persons to disclose the pseudonyms they have used while publishing political pamphlets or newspaper articles.”¹⁰⁰ The most prominent appellate decision after *Bruen* is *United States v. Rahimi*, in which the Fifth Circuit Court of Appeals struck down a law prohibiting gun possession by people subject to a domestic violence restraining order.¹⁰¹ As noted above, the law was passed in 1994 to address the relationship—well-documented now, but unappreciated at the founding—between guns and domestic violence.¹⁰² The court concluded that the “ban on possession of firearms is an ‘outlier[]

⁹² *Koons v. Reynolds*, ___F.Supp.3d___, 2023 WL 128882, at *13 (D.N.J. Jan. 9, 2023) (quoting 2022 N.J. Laws c. 131 § 7(a)).

⁹³ *Id.* at *14 (citing Kansas and Missouri laws).

⁹⁴ *Id.* at *14.

⁹⁵ *Id.* at *14 n.15.

⁹⁶ *Id.* at 2126 (internal citation omitted); *see also id.* at 2129-30 (reiterating this test nearly verbatim).

⁹⁷ *See, e.g.*, 14 C.F.R. § 135.119 (“No person may, while on board an aircraft being operated by a certificate holder, carry on or about that person a deadly or dangerous weapon, either concealed or unconcealed.”).

⁹⁸ *See, e.g.*, 18 U.S.C. § 922(o) (banning the possession or transfer of machineguns not possessed before May 19, 1986).

⁹⁹ *See, e.g.*, 18 U.S.C. § 922(g)(8) and (9).

¹⁰⁰ *Antonyuk II*, 2022 WL 5239895, at *12.

¹⁰¹ *United States v. Rahimi*, ___F.4th___, 2023 WL 2317796 (5th Cir. 2023); *see also United States v. Perez-Gallan*, ___F.Supp.3d___, 2022 WL 16858516 (W.D. Tex. Nov. 10, 2022) (same); 18 U.S.C. § 922(g)(8).

¹⁰² *See supra* note 84 and accompanying text.

that our ancestors would never have accepted.”¹⁰³ But that is largely due to the fact that the framing era did not view women as political or legal equals to men, and did not view domestic violence as a problem worthy of addressing through legislation. Even if they had appreciated the problem of domestic violence, there still might not have been a need to regulate guns in the domestic violence context because research suggests that they were rarely used for domestic violence—a reflection of the unadvanced state of firearm technology at the time. As historian Randolph Roth has noted, “Family and household homicides—most of which were caused by abuse or simple assaults that got out of control—were committed almost exclusively with weapons that were close at hand,” which were not loaded guns but rather “whips, sticks, hoes, shovels, axes, knives, feet, or fists.”¹⁰⁴ What’s more, women did not have the ability to vote for leaders who would safeguard their interests until the Nineteenth Amendment was ratified in 1920.

The challenges of anachronism facing courts after *Bruen* fit into at least three categories. First, the historical record underlying the historical-analogical method is replete with silences (no historical evidence one way or the other); second, it contains violations (historical laws that would be unconstitutional by modern lights); and, third, it is full of variations (different approaches taken in different places).

First, historical practice will obviously not always speak directly to a contemporary problem, especially those involving technological and social change. No amount of painstaking archival work will turn up historical predecessors except at a higher level of generality. The narrowness of the analogical approach on display in many post-*Bruen* cases suggests that the historical-analogical method is especially prone to over-reading historical silences.

For example, urban areas simply did not exist in 1791 as we understand them today. In 1790, just before the Second Amendment was ratified, 33,000 people lived in New York City, the country’s largest city and home of the First Congress.¹⁰⁵ The population of the *entire country* was under 4 million.¹⁰⁶ Today, more than twice that many people live in New York City alone.¹⁰⁷ The densification of American cities during the late 1800s is well documented,¹⁰⁸ as is the relationship between urbanization and crime.¹⁰⁹

Likewise, firearm technology has transformed. Americans in 1791 generally owned muzzle-loading flintlocks, “liable to misfire” and incapable of firing multiple shots.¹¹⁰ Fewer than ten percent of

¹⁰³ *Rahimi*, 2023 WL 2317796, at *12.

¹⁰⁴ Randolph Roth, *Why Guns Are and Are Not the Problem: The Relationship Between Guns and Homicide in American History*, in *A RIGHT TO BEAR ARMS? THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT* 276 (Jennifer Tucker, Barton C. Hacker & Margaret Vining eds., 2019).

¹⁰⁵ UNITED STATES CENSUS BUREAU, 1790 FAST FACTS, https://www.census.gov/history/www/through_the_decades/fast_facts/1790_fast_facts.html (noting a 1790 population of 33,131 in New York City).

¹⁰⁶ See U.S. BUREAU OF THE CENSUS, *A CENTURY OF POPULATION GROWTH: FROM THE FIRST CENSUS OF THE UNITED STATES TO THE TWELFTH, 1790-1900* 80 (1969).

¹⁰⁷ *Id.* (noting a 1790 resident population of 3,929,214 people in the United States); UNITED STATES CENSUS BUREAU, QUICKFACTS, <https://www.census.gov/quickfacts/newyorkcitynewyork> (noting a July 2021 population of 8,467,513 in New York City).

¹⁰⁸ See, e.g., Eric Jaffe, *Watch 210 Years of Manhattan Densification in 2 Minutes*, BLOOMBERG NEWS (June 3, 2015), <https://www.bloomberg.com/news/articles/2015-06-03/this-2-minute-animation-captures-210-years-of-manhattan-density-history>.

¹⁰⁹ LOUISE I. SHELLEY, *CRIME AND MODERNIZATION: THE IMPACT OF INDUSTRIALIZATION AND URBANIZATION ON CRIME* (1981) (reviewing literature and data regarding crime patterns).

¹¹⁰ Roth, *supra* note 104, at 275.

firearms were pistols.¹¹¹ Crime was committed using weapons far less lethal than modern firearms—according to some research, often without firearms at all.¹¹² Well into the 1800s, even after pistols became more common, some commentators still considered knives to be more dangerous.¹¹³

Today, in contrast to at the founding, criminal gun violence is largely an urban problem and is perpetuated most often by handguns far more deadly than a colonial-era musket. According to one analysis, “[h]alf of America’s gun homicides in 2015 were clustered in just 127 cities and towns, . . . even though they contain less than a quarter of the nation’s population.”¹¹⁴ Another analysis found that “in Maryland from 2016–2020, someone living in Baltimore City was 30 times more likely to die by firearm than someone living 40 miles away in Montgomery County.”¹¹⁵

Other gun violence problems, meanwhile, like mass shootings where an attacker kills multiple people and school shootings, are also of recent vintage. In one recent case, a court relied on “evidence that there is no known occurrence of a mass shooting resulting in double-digit fatalities from the Nation’s founding in 1776 until 1948, with the first known mass shooting resulting in ten or more deaths occurring in 1949.”¹¹⁶ At the founding, nothing similar occurred nor *could have* occurred, and framing-era policymakers unsurprisingly had no reason to pass public-safety measures to address acts of random mass violence. Similarly, researchers have tracked a significant increase in school shootings in recent years,¹¹⁷ from 11 a decade ago to 93 during the last full school year.¹¹⁸ At the founding, there was no similar problem of gun violence at schools, and, accordingly, no efforts to address it.

In other cases, historical silence might reflect not an absence of law and practice, but the simple fact that historians have yet to uncover it, let alone on a briefing schedule. As one court recently noted in the context of a Second Amendment challenge to California’s restrictions on homemade guns:

In order to even be able to assess whether or not [plaintiff] could demonstrate a “likelihood” of prevailing on the merits . . . there is no possibility this Court would

¹¹¹ Kevin M. Sweeney & Saul Cornell, *All Guns Are Not Created Equal*, THE CHRON. OF HIGHER EDUC. (Jan. 28, 2013), https://www.chronicle.com/article/all-guns-are-not-created-equal/?bc_nonce=y14ezgqk1fr1nyysqdip&cid=reg_wall_signup (observing that only “[a] distinct minority of colonists” owned pistols at the time of the founding).

¹¹² See *supra* note 104 and accompanying text.

¹¹³ *Cockrum v. State*, 24 Tex. 394, 402 (1859) (“The gun or pistol may miss its aim, and when discharged, its dangerous character is lost, or diminished at least. . . . The bowie-knife differs from these in its device and design; it is the instrument of almost certain death.”).

¹¹⁴ Aliza Aufrichtig, Lois Beckett, Jan Diehm & Jamiles Lartey, *Want to Fix Gun Violence in America? Go Local*, GUARDIAN (2017), <https://www.theguardian.com/us-news/ng-interactive/2017/jan/09/special-report-fixing-gun-violence-in-america>.

¹¹⁵ THE JOHN HOPKINS CENTER FOR GUN VIOLENCE SOLUTIONS, A YEAR IN REVIEW: 2020 GUN DEATHS IN THE US 27 (April 28, 2022), <https://publichealth.jhu.edu/sites/default/files/2022-05/2020-gun-deaths-in-the-us-4-28-2022-b.pdf> (citing county-level data from the U.S. Centers for Disease Control and Prevention).

¹¹⁶ *Oregon Firearms Fed’n, Inc. v. Brown*, No. 2:22-CV-01815-IM, 2022 WL 17454829, at *13 (D. Or. Dec. 6, 2022).

¹¹⁷ See *generally* K-12 SCHOOL SHOOTING DATABASE, <https://k12ssdb.org/> (last checked Oct. 5, 2022) (collecting data for shootings at U.S. schools).

¹¹⁸ See Lauren Camera, *School Shootings Hit Highest Level on Record, Federal Data Shows*, U.S. NEWS & WORLD REPORT (June 28, 2022), <https://www.usnews.com/news/national-news/articles/2022-06-28/school-shootings-hit-highest-level-on-record-federal-data-shows>.

expect Defendants to be able to present the type of historical analysis conducted in *Bruen* on 31 days’ notice (or even 54 days’ notice).¹¹⁹

Had the court required such an analysis and treated it as final, the result almost certainly would have been to build constitutional law on a fundamentally incomplete foundation.

Indeed, historians have emphasized the tension between litigation and their professional norms in this regard. Historian Zachary Schrag, an expert both on methods of historical research¹²⁰ and on mass transit in particular,¹²¹ was retained by the District of Columbia to defend the constitutionality of its rule against firearms on mass transit like the DC Metro.¹²² Even with that professional expertise—indeed, because of it—Schrag entered an expert declaration effectively declining the job: “The District has asked whether I or a team of historians could adequately research the ‘Nation’s historical tradition’ of firearm regulation on mass transit within 60 days. The answer is ‘no’”¹²³

Bruen minimizes this problem by invoking the rule of party presentation and saying that “[c]ourts are thus entitled to decide a case based on the historical record compiled by the parties.”¹²⁴ But that simply compounds the problem when the doctrinal test directs courts to a historical record that could not possibly be complete. The issue here is not a failure of the parties, but of a test that purports to respect history without accounting for the realities of historical research.

A second problem related to regulatory silences is that the known historical record from which lawyers and judges must analogize is full of practices and laws that would be impermissible today. The Alien and Sedition Acts, to take one obvious example, were passed within a decade of the First Amendment’s ratification, but originalists dismiss them as a guide for understanding the meaning of the freedom of speech.¹²⁵ Similarly, it would be impossible to even begin to canvass the ways in which law marginalized and oppressed the majority of people living in the United States, and by doing so limited the voices of those who might have shaped it. As a Justice of the Ohio Supreme Court recently noted in a post-*Bruen* gun case: “[T]he glaring flaw in *any* analysis of the United States’ historical tradition of firearm regulation in relation to Ohio’s gun laws is that no such analysis could account for what the United States’ historical tradition of firearm regulation *would have been* if women and nonwhite people had been able to vote for the representatives who determined these regulations.”¹²⁶ Nor is there an obvious way to correct this omission: “[E]ven if a court tries to take the views of women and

¹¹⁹ Def. Distributed v. Bonta, No. CV 22-6200-GW-AGRX, 2022 WL 15524977, at *5 n.9 (C.D. Cal. Oct. 21, 2022), adopted, No. CV 22-6200-GW-AGRX, 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022).

¹²⁰ ZACHARY M. SCHRAG, THE PRINCETON GUIDE TO HISTORICAL RESEARCH (2021).

¹²¹ ZACHARY M. SCHRAG, THE GREAT SOCIETY SUBWAY: A HISTORY OF THE WASHINGTON METRO (2006).

¹²² See Declaration of Zachary Schrag, Angelo v. District of Columbia, 22-cv-1878 (D.D.C. Sept. 16, 2022).

¹²³ *Id.* ¶ 6.

¹²⁴ See, e.g., *Bruen*, 142 S. Ct. at 2130 n.6. This is itself a bit ironic, given that *Bruen* was decided on the pleadings and therefore did not have the benefit of the development of historical facts at trial notwithstanding disagreements and uncertainty regarding the historical record.

¹²⁵ Cf. Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1931 (2017) (“It is of no more consequence at this point whether the Alien and Sedition Acts of 1798 were in accord with the original understanding of the First Amendment than it is whether *Marbury v. Madison* was decided correctly.”) (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 1380-39 (Amy Gutmann ed., 1997)).

¹²⁶ State v. Philpotts, 2022-Ohio-3155, ¶ 8, 194 N.E.3d 371, 373 (Ohio 2022) (Brunner, J., dissenting) (emphasis in original).

nonwhite people into account, are there sufficient materials on their views available to enable reliable conclusions to be made?”¹²⁷

A third problem is that of variation. As Akhil Amar has noted, “our common Constitution looks slightly different from state to state and across the various regions of this great land.”¹²⁸ The same, of course, was true historically, especially with regard to gun regulations, which varied significantly both regionally¹²⁹ and locally¹³⁰ because of differing needs and values. What result if eight original states did not pass a given law, but five did? What if the count is nine and four? What if some of those states changed positions on the issue in the 19th Century? What if some of those states changed again after the Civil War? What if some state courts upheld the restriction but others struck it down? What if variations existed within a state? And what if state weapon traditions were shaped by divergent state constitutional protection for the right to keep and bear arms?¹³¹ A narrow focus might lead to doctrine being constructed on the basis of unrepresentative traditions—using only antebellum cases from Southern states as comparators, for example.¹³²

The complications of historical silences, violations, and variations invite a fundamental question for judges implementing *Bruen*’s approach: What should courts do about the acute risk of anachronism? After all, as *Bruen* recognized, “the Founders created a Constitution—and a Second Amendment—‘intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.’”¹³³

The most obvious doctrinal solution is to adjust the level of generality at which a court conducts the inquiry. How broadly or narrowly a judge defines a principle of relevant similarity (or, for that matter, applies it) can increase or decrease the risk of anachronism, but at the same time can be outcome-determinative, meaning that it is not the historical record that will determine the result but the level of generality at which the judge decides to approach it.¹³⁴ Understanding this dynamic will be crucial for principled application of *Bruen*’s test.

Although it may be impossible to articulate a single, overarching principle governing levels of generality in legal reasoning,¹³⁵ *Bruen*’s particular approach to historical analogy raises the importance of operating at a high level of generality. If questions are pitched too narrowly, courts will run directly into the problems of anachronism discussed above, like searching for historical examples of regulations of guns in subways. So, too, will they fail to account for historical silences, variations, and violations, potentially building federal constitutional doctrine on a set of unrepresentative or even

¹²⁷ *Id.*

¹²⁸ AKHIL REED AMAR, *THE LAW OF THE LAND* xii (2015); see also Joseph Blocher, *Disuniformity of Federal Constitutional Rights*, 2020 U. ILL. L. REV. 1479, 1485-91 (2020) (describing ways that federal constitutional law is not uniform from place to place).

¹²⁹ Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121 (2015).

¹³⁰ Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013).

¹³¹ See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193-204 (2006) (listing state constitutional rights to keep and bear arms by state and year).

¹³² See Ruben & Cornell, *supra* note 129.

¹³³ *Bruen*, 142 S. Ct. at 2132 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819)).

¹³⁴ See generally Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485 (2017) (providing examples of originalist attempts at constitutional interpretation and demonstrating how selecting a level of generality plays a pervasive, undertheorized role).

¹³⁵ Scholars have investigated the issue of levels of generality for decades. See, e.g., Michael C. Dorf & Laurence H. Tribe, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

reprehensible traditions. Operating at a high level of generality—looking for broad principles of similarity, rather than near-identical historical laws—might help minimize these problems.

C. Courts Have Institutional Limitations In Conducting The Historical-Analogical Inquiry, And Legislative Deference And Empirics Remain Solutions

A final challenge facing courts after *Bruen* is accounting for institutional limitations. An approach focused on historical analogy transforms the way litigation looks, stretching resources more than conventional constitutional argumentation. Judges have acknowledged that “[w]e will inevitably miss some” historical precedents because “[t]he briefs filed [are] able to address only so many before running up against word limits.”¹³⁶ If historical analogy is the sole determinant of constitutionality, running out of space to document historical precedents can be the difference between winning or losing a case. This is especially true when courts rely on party presentation of historical analogues,¹³⁷ and consider the *quantity* of analogues to be probative.¹³⁸ In *Antonyuk*, New York requested an additional 70 pages to respond to a motion for a preliminary injunction.¹³⁹ Even still, the court found historical laws not included in the briefing.¹⁴⁰ New York State might have the resources to conduct such extensive—but still incomplete—motion practice; most municipalities defending local gun laws certainly will not. At the same time, the burden on judges tasked with parsing a voluminous historical record and rendering it relatable to modern times will be significant and difficult—judges have even considered hiring historians to assist in the exercise.¹⁴¹

Courts faced with tasks they are ill-suited to do often consider whether it is appropriate to defer to co-equal branches of government. Yet *Bruen* critiqued lower court caselaw as being too deferential to legislatures and too responsive to modern day realities.¹⁴² As a result, some courts have read *Bruen* as prohibiting consideration of empirics or deference to the legislature.¹⁴³ But both empirics and deference remain relevant after *Bruen*, and they could mitigate the institutional challenges presented by the historical-analogical approach.

¹³⁶ *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1156 n.6 (9th Cir. 2014), *on reh’g en banc*, 824 F.3d 919 (9th Cir. 2016).

¹³⁷ *See, e.g., Bruen*, 142 S. Ct. at 2130 n.6 (“Courts are thus entitled to decide a case based on the historical record compiled by the parties.”).

¹³⁸ *See, e.g., Firearms Policy Coalition v. McCraw*, ___ F.Supp.3d ___, 2022 WL 3656996, at *11 (N.D. Tex. Aug. 25, 2022) (“The [h]istorical record before the Court establishes (at most) that between 1856 and 1892, approximately twenty jurisdictions (of the then 45 states) enacted laws that restricted the ability of those under 21 to ‘purchase or use firearms.’”); *Antonyuk II*, 2022 WL 5239895, at *9 (“[T]he Court generally has looked to instances where there have been three or more such historical analogues.”).

¹³⁹ Consent Letter Motion, *Antonyuk v. Hochul*, No. 1:22-CV-986 (N.D.N.Y.) (GTS/CFH) (Oct. 12, 2022); Text Order, *Antonyuk v. Hochul*, No. 1:22-CV-986 (N.D.N.Y.) (GTS/CFH) (Oct. 12, 2022) (granting motion for additional pages). In *Miller v. Bonta*, a case concerning California’s ban on assault weapons, the district judge asked the parties to compile a spreadsheet of relevant weapons policies from the time of the Second Amendment’s enactment until 20 years after the Fourteenth Amendment’s enactment. California’s list was 56 pages long and contained 191 laws, statutes, or regulations. *See Defendants’ Survey of Relevant Statutes (Pre-Founding – 1888)*, *Miller v. Bonta*, No. 3:19-cv-01537-BEN-JLB (Jan. 11, 2023).

¹⁴⁰ *See Antonyuk III*, 2022 WL 16744700, at *41 & n.72 (describing the court’s research process).

¹⁴¹ *See, e.g., Baird v. Bonta*, No. 2:19-CV-00617-KJM-AC, 2022 WL 17542432, at *9 (E.D. Cal. Dec. 8, 2022); *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022).

¹⁴² *Bruen*, 142 S. Ct. at 2131.

¹⁴³ *See, e.g., Perez-Gallan*, 2022 WL 16858516, at *1 (concluding that after *Bruen*, “[n]o longer can lower courts account for public policy interests, historical analysis being the only tool”).

Despite *Bruen*'s suggestion that its approach is purely historical, the plain text of its test requires contemporary evidence to play a doctrinal role. Quite simply, there is no way to compare the “why” and “how” of modern and historical gun laws without evidence. History alone cannot show the “burden” that modern gun laws place on “armed self-defense,” nor why such laws are “justified.” Doing so requires modern empirics to demonstrate, for example, how often particular weapons are used for self-defense or in crimes or what harms a particular law prevents.

The continuing relevance of empirics invites a question about how much deference judges should give to legislative determinations. To the extent historical legislatures had broad autonomy to regulate on a given public safety issue, modern legislatures arguably should, too. For example, in her dissenting opinion in *Kanter v. Barr*, then-Judge Barrett concluded that “[i]n 1791—and for well more than a century afterward—legislatures disqualified categories of people from the right to bear arms only when *they judged* that doing so was necessary to protect the public safety.”¹⁴⁴ In this telling, it was the legislature that was “judg[ing]” the threat to public safety presented by a category of people.

Under *Bruen*, deference afforded to historical legislatures arguably should carry forward to today. If the principle of relevant similarity at issue in categorical prohibition cases, for example, is that the legislature can bar those “they judge[]” to be dangerous from gun possession,¹⁴⁵ and their historical determinations were overinclusive, modern-day legislatures arguably should be granted similar leeway, subject, of course, to other constitutional limitations (like, for example, the Equal Protection Clause).

The Supreme Court’s embrace of a novel historical-analogical test in *Bruen* has opened the door to tremendous challenges, reflected in divergent methodologies and outcomes in the lower courts. The ones identified in this testimony – how to articulate principles of relevant similarity to compare historical and modern laws, how to account for the immense differences between past and present, and how to remain within the courts’ institutional competence – are not exhaustive. Ultimately, how courts address these challenges will determine whether the Court’s new approach to Second Amendment cases succeeds or fails at providing a stable, coherent, and predictable jurisprudence.

¹⁴⁴ *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (emphasis added); *see also id.* at 458 (“In sum, founding-era legislatures categorically disarmed groups whom *they judged* to be a threat to the public safety.”) (emphasis added).

¹⁴⁵ *Id.* at 458.