

IS *BRUEN* CONSTITUTIONAL? ON THE METHODOLOGY THAT SAVED MOST GUN LICENSING

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Last Term, the U.S. Supreme Court decided a significant Second Amendment case after more than a decade of waiting. The Court’s majority coalition attempted to prevent judges from using deferential means-ends scrutiny and redirect their attention to enacted text, old examples, and analogies thereto. Yet the Court condemned outlier “may-issue” firearm licensing and, at the same time, preserved popular “shall-issue” licensing. That split result seems incompatible with some of the majority’s surface-level methodological commitments. Actually, to craft its holding, the majority deployed a wider range of considerations than text, history, and analogy, even apart from any extra-legal policy preferences that might have mattered. Such methodological inclusiveness is typical in modern constitutional adjudication, of course. But this case raises hard questions about which of the apparently legal considerations used to decide constitutional cases are themselves “constitutional” and which are not, along with how to understand the relationship between them. Perhaps “constitutional considerations” are so inclusive as to not be so special, or else “non-constitutional considerations” are no less supreme than their companions. Dilemmas appear either way, and for us all.

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INTRODUCTION

Here is a practical question that should have a satisfying answer: *Why aren't all firearm licensing laws unconstitutional?* Some critics do favor the nationwide abolition of firearm licensing, but today that position is not federal constitutional law. Not in court, anyway.

In fact, not a single Justice in *New York State Rifle & Pistol Ass'n v. Bruen*¹ questioned the now-popular “shall-issue” licensing regimes for concealed carry of firearms—as opposed to the few surviving “may-issue” licensing regimes that were declared unconstitutional by six Justices.² That cannot be because shall-issue licensing is free of significant burdens for ordinary law-abiding citizens. Justice Kavanaugh blocked that explanation. His crucial concurrence, joined by Chief Justice Roberts, made plain that shall-issue licensing regimes may impose meaningful demands on everyone who wants to carry a firearm in public, without any effort to target licensing burdens on especially risky persons. Although shall-issue regimes aren't supposed to require applicants to show a “special need” for self-defense, or grant officials “open-ended discretion,” Justice Kavanaugh told us that “shall-issue regimes may require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements.”³ Why is that acceptable?

Judges with a comprehensive and constraining method of constitutional decisionmaking would have a straightforward answer to that question. The *Bruen* Court did not offer one.

After all, the majority opinion disavowed “any means-end test such as strict or intermediate scrutiny,” as well as “any judge-empowering

¹ 142 S. Ct. 2111 (2022).

² There are different ways to specify “may-issue” and “shall-issue” licensing, but the basic difference is supposed to be that the former involves administrative discretion while the latter involves specific rules (that are relatively favorable to those seeking licenses). On the Justices' positions, compare *Bruen*, *id.* at 2138 n.9 (Thomas, J.) (majority opinion) (“[N]othing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' ‘shall-issue’ licensing regimes”), *id.* at 2162 (Kavanaugh, J., concurring) (“[T]he 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so.”), and *id.* at 2164, 2171–73 (Breyer, J., dissenting) (arguing for the constitutionality of New York's may-issue licensing regime, at least on the pleadings, and contesting efforts to distinguish shall-issue licensing), with *id.* at 2122, 2156 (Thomas, J.) (majority opinion) (condemning may-issue licensing), and *id.* at 2161 (Kavanaugh, J., concurring) (“New York's outlier ‘may-issue’ licensing regime for carrying handguns for self-defense violates the Second Amendment.”).

³ *Id.* at 2162 (Kavanaugh, J., concurring).

interest-balancing inquiry.”⁴ Apparently the majority thought those tests were too generous to regulators and too close to serious empirical inquiry and cost-benefit analysis.⁵ But at least those inquiries would’ve made the Court’s preference for shall-issue licensing easily intelligible to readers. The majority could have admitted that abolition of licensing would be least burdensome for rightful gun possessors, yet still have argued that abolition presents the greatest risks to safety in jurisdictions that prefer to license. The point seems debatable, but judges might conclude that even an undemanding licensing process with imperfect enforcement tends to yield a more responsible pool of firearm carriers, compared to no licensing at all.⁶ *Bruen*, however, disparaged such logic, which rather overtly assesses benefits and costs.

Instead the majority invoked *District of Columbia v. Heller*⁷ for the proposition that the character of the right to keep and bear arms as well as the validity of particular regulations depend on “text and history”⁸—or “the text, history, and tradition test,” in Justice Kavanaugh’s words.⁹ Those tests are supposed to make judges less deferential to regulators and less sensitive to policy preferences, by making them concentrate more on eighteenth- and nineteenth-century sources. The timeframe isn’t clearly marked, but the historical safe zone appears to reach from the 1700s to the Gilded Age.¹⁰ Moreover, the majority indicated that, for persons, weapons, and conduct within the plain text of the Second Amendment, the burden of persuasion on historical questions rests with the proponents of regulation.¹¹ Other parts of *Bruen* contradict any strict historical test, as I discuss below. And however much judicial deference *Bruen* will remove, substantial judicial discretion will remain.

⁴ See *id.* at 2129 (majority opinion) (internal quotation marks omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008)).

⁵ See *id.* at 2130–31 (expressing concerns about judicial empiricism, cost-benefit analysis, and deference); see also David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 739–40, 749–50 (2021) (suggesting forms of “policy” argument that are considered out of bounds for constitutional analysis).

⁶ Cf. Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1082 (2009) (“Based on available empirical data . . . we expect relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand.”), quoted in *Moore v. Madigan*, 702 F.3d 933, 938 (7th Cir. 2012).

⁷ 554 U.S. 570.

⁸ *Bruen*, 142 S. Ct. at 2128–29.

⁹ *Id.* at 2161 (Kavanaugh, J., concurring) (referring to a test “for evaluating whether a government regulation infringes on the Second Amendment”).

¹⁰ See *id.* at 2154 n.28 (suggesting that twentieth-century sources were irrelevant).

¹¹ See *id.* at 2130 n.6, 2149 n.25.

Still, an apparent theme in *Bruen* is the elevation of enacted text, pre-ratification history, and probably post-ratification tradition.

But those considerations generate as many complications as explanations for the majority coalition—Justices determined to send a nationwide message on constitutional methodology, yet not immediately rip up much existing regulation. Indeed, the split result on firearm licensing seems incompatible with some of the majority’s surface-level methodological commitments. To craft its holding, the majority deployed a wider range of considerations than text, history, and analogy, even apart from any extra-legal policy preferences that might have mattered.¹² Such methodological inclusiveness is typical in modern constitutional adjudication, of course. It appears in *Heller*, too.¹³ As much as any other case, however, *Bruen*’s tensions raise hard questions about which of the apparently legal considerations used to decide litigated constitutional cases are themselves “constitutional” and which are not, along with how to understand the relationship between them. Perhaps “constitutional considerations” are so inclusive as to not be so special, or else “non-constitutional considerations” are no less supreme than their companions. Dilemmas appear either way, and for us all.

I

LICENSING PRESERVED, WITHOUT STRAIGHT ANSWERS

A. *Text, History, Analogy*

Suppose that we start with the text, so to speak. Any serious attention to enacted text customarily appears midstream in judicial opinions, obviously,¹⁴ and the *Bruen* majority opinion began its analysis

¹² This paper is not so much about a “law/politics” distinction per se, but rather an apparent “law/law” distinction—a potential and debatable distinction within the domain of law that might be related to non-legal reasoning. For research on ideology and Second Amendment litigation, see, for example, Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?*, 68 DUKE L.J. ONLINE 57 (2018) (comparing several fields of high-profile constitutional litigation in federal appellate courts); Adam M. Samaha & Roy Germano, *Judicial Ideology Emerges, at Last, in Second Amendment Cases*, 13 CHARLESTON L. REV. 315 (2018).

¹³ For the view that *Heller*’s majority opinion was multi-modal in its reasoning, see GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, *KEEPING FAITH WITH THE CONSTITUTION* 32–40 (Oxford University Press 2010). In a similar spirit, former federal judge Michael McConnell has written that “it is unlikely in theory—and impossible in practice—to employ only one methodology” in constitutional cases. Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1787 (2015).

¹⁴ See Adam M. Samaha, *Starting with the Text—On Sequencing Effects in Statutory Interpretation and Beyond*, 8 J. LEGAL ANALYSIS 439, 443–44 (2016).

with *Heller* and *McDonald v. City of Chicago*.¹⁵ But *Bruen* also indicated that part of the governing doctrine from here on out instructs judges to (1) consider whether the plain text of the Second Amendment covers the rights-claimants, their weapons, and their conduct, and, if so, (2) ask the defenders of the relevant regulation to demonstrate its consistency with historical tradition.¹⁶ Following precedent, therefore, we may turn next to plain text.

And there, we find nothing to understand the Court's privileging of shall-issue over may-issue licensing. Although the plain-text component of the doctrine surely allows for extensive analysis in some cases,¹⁷ in this instance the Court made short work of it. The parties were not arguing over whether a home-bound limit on carry rights appears in "the right of the people to keep and bear Arms," and the Court announced that "[n]othing in the Second Amendment's text draws a home/public distinction."¹⁸ Well, both may-issue and shall-issue licensing demands reach the public carry of handguns by otherwise ordinary law-abiding adult citizens. Whatever the proper scope of the right and of a plain-text reading, *Bruen* itself doesn't recommend a textual distinction between those types of licensing.

Anyway, most of the words in the majority opinion were devoted to sources that predate either the Second Amendment or the Fourteenth Amendment. Those sources attracted most of the expositional effort. The majority's selection and characterization of historical sources are open to criticism,¹⁹ but let's assume that those choices were fully justified. The problem remains that the majority's treatment of this history presented approximately zero reasons for distinguishing shall-issue from may-issue licensing of firearms.

¹⁵ 561 U.S. 742 (2010); see *Bruen*, 142 S. Ct. at 2122; see also *id.* at 2134 ("Having made the constitutional standard endorsed in *Heller* more explicit, we now apply that standard to New York's proper-cause requirement.").

¹⁶ See *Bruen*, 142 S. Ct. at 2126 ("[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation . . . the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."); *id.* at 2129–30 (similar). In what was apparently its "plain-text" analysis, the majority covered subjects that sometimes are debated extensively: (1) the *claimants' status*, here understood to be ordinary law-abiding adult citizens, (2) the *relevant weapons*, here understood to be in common use today for self-defense, and (3) the *claimants' conduct*, here described as carrying handguns in public for self-defense. See *id.* at 2134.

¹⁷ See *supra* note 16.

¹⁸ See *Bruen*, 142 S. Ct. at 2134.

¹⁹ See, e.g., Patrick J. Charles, *The Invention of the Right to 'Peaceable Carry' in Modern Second Amendment Scholarship*, 2021 U. ILL. L. REV. ONLINE 195, 195 (2021) (characterizing claims that the Second Amendment protects the peaceable carry of weapons in public as a 1970s invention).

Existing research indicates that firearm licensing per se did not materialize in the United States until the very late 1800s (in some cities) or the early 1900s (in some states).²⁰ It seems that what *Bruen* called may-issue regimes emerged toward the beginning of that timeline, not the end, if we attend to enacted texts. New York’s statute, as amended in 1913, is one example.²¹ According to several scholars, shall-issue regimes were not introduced until the 1960s and did not predominate in the states until the early 2000s.²² Yes, we could question the importance, clarity, and particular applications of this may-issue/shall-issue divide. But if we follow the Court’s lead, we hit another dead end. None of the above regulatory developments has a serious connection with pre-enactment history. And if older really were better in constitutional debate, shall-issue regimes would look worse than may-issue regimes. The Court delivered the opposite message: may issue bad, shall issue better.

Other potential grounds for favoring shall-issue over may-issue regimes do appear in the *Bruen* opinions, but these grounds are no less troublesome for this Court.

One idea is that we may analogize from some accepted range of historical sources. We don’t know exactly what that range is, but we aren’t restricted to replicas of old regulations. Some modern regulation is constitutional because it is “*analogous enough*” to one or more older examples.²³ This is the part where the majority opinion announces—nearly uselessly but quotably—that proper analogical use of history

²⁰ See Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting, 1328–1928*, 55 U.C. DAVIS L. REV. 2545, 2596, 2599–2600 (2022) (identifying city permit ordinances in the late 1800s and a 1906 licensing statute in Massachusetts); cf. Charles, *supra* note 19, at 213 (“[D]iscretionary licensing laws . . . spread rapidly in jurisdictions across the United States from the mid-to-late nineteenth century through the early twentieth century.”).

²¹ See Act of May 21, 1913, ch. 608, 1913 N.Y. Laws 1627, 1629 (including a “proper cause” requirement for certain concealed carry licenses for handguns); see also Act of June 2, 1927, No. 372, 1927 Mich. Pub. Acts 887, 889–90 (referring to “good reason to fear injury to his person or property” or “other proper reasons”); Act of Mar. 8, 1935, ch. 208, § 7, 1935 S.D. Sess. Laws 355, 356 (similar).

²² See Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581, 596–97 (2022) (“When Florida enacted its shall-issue law [in 1987], sixteen states generally banned concealed carry, and the plurality—twenty-six—had discretionary may-issue regimes.”); Richard S. Grossman & Stephen A. Lee, *May Issue Versus Shall Issue: Explaining the Pattern of Concealed-Carry Handgun Laws, 1960–2001*, 26 CONTEMP. ECON. POL’Y 198, 200–01 (2008) (stating that may-issue laws “predominated in the early post-World War II period” and mapping the spread of shall-issue laws); Michael P. O’Shea, *The Concrete Second Amendment: Traditionalist Interpretation and the Right to Keep and Bear Arms*, 26 TEX. REV. L. & POL. 103, 143–45 (2021) (reporting that among state governments, a wave of adoptions of shall-issue concealed carry regimes began in 1987, a majority of states had such laws in the 1990s, and many states adopted constitutional concealed carry from 2015 to 2020).

²³ See *Bruen*, 142 S. Ct. at 2133 (emphasis added).

is “neither a regulatory straightjacket nor a regulatory blank check.”²⁴ Advocates and judges will have to work with the majority’s limited guidance here. They have no choice. But no serious student of the opinion should believe that it offers precise constraints by (1) calling for an apparently non-exhaustive inquiry into whether a given contemporary firearm regulation presents a “comparable burden on the right” that is “comparably justified,”²⁵ while leaving room for (2) a different approach to new technology and new social concerns that is somehow “more nuanced.”²⁶ The opinion offers little help, other than telling us that a schoolhouse probably is enough like a courthouse for the purpose of outlawing firearm possession, while Manhattan is not.²⁷ Much beyond that, *Bruen* is another “litigation magnet.”²⁸

Now, the analogical route to justifying shall-issue licensing is not necessarily obstructed by that test’s modest constraints. The test plainly, even painfully embeds case-by-case, matter-of-degree judgment calls. Theoretically, that flexibility leaves room for all kinds of nonobvious, wait-I-must-be-missing-something distinctions.

Here, however, the analogical route is obstructed by the inconvenient fact that the majority distinguished leading historical candidates for analogies to modern may-issue licensing, and in ways that don’t assist the preservation of shall-issue regimes. Take the restrictions on public carry of weapons that some people traced back to the Statute of Northampton.²⁹ The majority responded that those laws are too old to be relevant analogues,³⁰ too few to constitute a tradition,³¹ or targeted terrorizing behavior beyond merely carrying a firearm.³² Now take surety laws of the 1800s.³³ The majority contended in part that

²⁴ *Id.*

²⁵ *See id.* at 2118.

²⁶ *Id.* at 2132.

²⁷ *See id.* at 2133–34.

²⁸ *See* Cook, Ludwig & Samaha, *supra* note 6, at 1063 (discussing *Heller*); *see also* Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller, “*A Map Is Not the Territory*”: *The Theory and Future of Sensitive Places Doctrine*, 98 N.Y.U. L. REV. ONLINE 438 (2023) (“[T]he injunction to ‘use analogies’ to uphold ‘new and analogous’ place-based restrictions offers little guidance.”). Contrast the confident assertion that judges have “a clear legal standard now in hand.” *Rupp v. Bonta*, No. 19-56004, 2022 WL 2382319, at *1 (9th Cir. June 28, 2022) (Bumatay, J., dissenting) (disagreeing with the decision to remand the case in light of *Bruen*).

²⁹ *See* Cornell, *supra* note 20, at 2554–55 (reviewing the 1328 statute and stating that “[t]he mere act of traveling armed was the source of the terror that violated the peace”).

³⁰ *See Bruen*, 142 S. Ct. at 2139–40 (discussing English law in the Middle Ages).

³¹ *See id.* at 2142 (referring to certain colonial laws).

³² *See id.* at 2140–45 (characterizing English law in the 1700s, certain colonial laws, and certain state laws in the early United States).

³³ *See* Cornell, *supra* note 20, at 2580 (concluding that the “Massachusetts model” for surety laws “did not . . . sanction habitual public carry,” but rather allowed for armed travel based on “a specified and concrete threat”).

those laws depended on an individualized determination of a person's threat to the public before a bond could be required for public carry of firearms.³⁴ On this (disputed) rendering of nineteenth-century law, "a showing of special need [to carry a weapon] was required only *after* an individual was reasonably accused of intending to injure another or breach the peace."³⁵

If those are convincing grounds for dis-analogizing Northampton statutes and surety laws from may-issue licensing, it's difficult to understand why shall-issue licensing isn't equally different. Certainly, shall-issue licensing is supposed to be less discretionary because it's more rule-driven, insofar as it lacks a vague good-cause demand. But clarity isn't how the Court shunted Northampton statutes or surety laws. Furthermore, if shall-issue licensing is rule-like and simplistic, it's unlikely to include showings of applicant-specific risk of misconduct, let alone showings in advance of any demand that people seek a license.³⁶ As we know them, both may-issue and shall-issue firearm licensing apply broadly to a large class of potential arms bearers without such individualized indications. Nor can those forms of licensing be separated based on a special concern about so-called *ex ante* licensing over and above *ex post* punishment (which may have *ex ante* deterrent effects anyway). They are equally "ex ante" regimes, in the sense of making formal licensing demands on people who want to carry guns "before" they may do so lawfully and "before" the government is required to have relatively individualized evidence of risk. In those respects, both may-issue and shall-issue firearm licensing resemble classic prior restraints in the form of printing-press licensing.³⁷

B. *And More*

A different ground for saving shall-issue licensing lies far from history or analogy: a brand of *contemporary popularity*. Not unmediated popular opinion, but rather a headcount of state laws at the time of

³⁴ See *Bruen*, 142 S. Ct. at 2148 (asserting that 1800s surety laws were not bans on public carry and "typically targeted only those threatening to do harm").

³⁵ *Id.* at 2148–49.

³⁶ It is possible for a licensing regime to be both rule-like *and* complex, in the sense of a precise formula that includes lots of variables and data about each applicant. Adopting complex rule-like formulas is one way to "individualize" law. But that is not what shall-issue laws look like today.

³⁷ See William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 248 (1982) ("The licenser was at the center of an administrative system used to prevent seditious libel, protect copyright interests, and preserve monopolies.").

judicial decision.³⁸ Justice Thomas's opinion mentioned current tallies a few times;³⁹ and they were more noticeable in Justice Kavanaugh's short concurrence, joined by Chief Justice Roberts.⁴⁰ Their count was that forty-three states had shall-issue licensing in 2022, while only six states and the District of Columbia retained may-issue licensing, making it seem as if the Court was merely knocking out a few contemporary holdouts from the mainstream position.⁴¹ Some Court-watchers have suggested that federal judicial review often functions to eliminate outlier policies,⁴² as the Court did with, say, state poll taxes in *Harper v. Virginia Board of Elections*.⁴³ Contemporary headcounts aren't especially strange in constitutional opinions.⁴⁴

Nonetheless, reliance on today's popularity creates two problems for this Court. First off, it has nothing to do with originalist history in any conventional sense.⁴⁵ These present-day headcounts couldn't be any more temporally distant from any enactment date of any relevant constitutional text. Awkwardly, the majority opinion referred to *twenty-first* century headcounts while refusing to address the *twentieth* century evidence; the latter, the majority wrote, "does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence."⁴⁶ Furthermore, the Court gave nothing in the way of originalist grounding for the contemporary state laws that it did tally. It is conceivable that those laws were supported by lawmakers' conclusions that the original meaning of the Fourteenth Amendment allows shall-issue and forbids may-issue licensing and that judges would want to give weight to those conclusions, but *Bruen* gave no such explanation for its surge into 2022.

³⁸ On popularity arguments and state-level headcounts, see Pozen & Samaha, *supra* note 5, at 760–63 (“[V]irtually any time a constitutional decisionmaker invokes a consensus-like argument, the argument turns out to be rooted not in popular opinion per se but rather in patterns of state legislation, state constitutional law, or lower-court rulings.”).

³⁹ See *Bruen*, 142 S. Ct. at 2122, 2123–24, 2138 n.9 (mentioning that forty-three states are shall-issue and six states are may-issue).

⁴⁰ See *id.* at 2161–62 (Kavanaugh, J., concurring).

⁴¹ See Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 933, 937 (2014) (defining “holdout” as a kind of outlier law or practice that has receded and now exists in no more than a few jurisdictions).

⁴² See *id.* at 931 & n.3 (collecting sources).

⁴³ 383 U.S. 663, 666 n.4 (1966) (“Only a handful of States today condition the franchise on the payment of a poll tax.”); see Driver, *supra* note 41, at 938.

⁴⁴ See Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L. REV. 365, 370–400 (2009) (collecting examples of “state nose-counting” in court opinions that involved civil liberties).

⁴⁵ Cf. Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 265 (2008) (“Originalists will be puzzled about the idea that a national consensus matters unless the original understanding suggests that it does.”).

⁴⁶ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2154 n.28 (2022).

Even if it had good reason to count state laws, doing so cannot salvage shall-issue licensing absent controversy. That depends on a framing choice, because the so-called *constitutional-carry* position—that is, the absence of a license requirement to carry a handgun in public for certain otherwise lawful carriers—has now been adopted in some form by twenty-five states.⁴⁷ Constitutional carry started trending after *Heller*, it seems,⁴⁸ but one might consider it a reversion to pre-1868 and pre-1791 laws.⁴⁹ Even if we restrict our attention to contemporary laws, we might observe that may-issue regimes were less popular than shall-issue regimes when *Bruen* was decided, but that shall-issue regimes (alone) were less popular than constitutional-carry regimes (with a shall-issue license option). The Justices in the majority did not tell us why this three-way comparison was less important than its two-way comparison of may-issue and shall-issue regimes.⁵⁰

Perhaps, then, post-enactment traditions can help explain the hedging on licensing. Such tradition arguments are themselves traditional in constitutional debate, and they reach beyond weak proxies for original meaning or liquidation by early decision.⁵¹ Although Justice Thomas's opinion avoided these arguments, Justice Kavanaugh's concurrence acknowledged them. He characterized *Heller's* test as embracing the trio of “text, history, and tradition.”⁵² Plus he repeated all of *Heller's* non-exhaustive list of presumptively constitutional regulations that are supposedly “longstanding”—not only those regarding dangerous and unusual weapons and sensitive places, but also restrictions based on felony conviction or mental illness, as well as conditions on commercial sales.⁵³ These references are important in their own right.

⁴⁷ See Amy Sherman, *More States Remove Permit Requirement to Carry a Concealed Gun*, POLITIFACT (Apr. 12, 2022), <https://www.politifact.com/article/2022/apr/12/more-states-remove-permit-requirement-carry-concea> [<https://perma.cc/MX6H-3XRT>].

⁴⁸ See Charles, *supra* note 22, at 597 (“[T]hese laws have been surging in popularity.”); Adam Weinstein, *Understanding “Constitutional Carry,” the Gun-Rights Movement Sweeping the Country*, THE TRACE (Feb. 28, 2017), <https://www.thetrace.org/2017/02/constitutional-carry-gun-rights-movement-explained> [<https://perma.cc/T4UX-9X6Y>] (“It wasn’t until Arizona passed a similar law [like Alaska’s and Vermont’s] in April 2010 that constitutional carry became the catchphrase, and many states rushed to adopt similar laws . . .”).

⁴⁹ Putting aside old state-level prohibitions on concealed carry combined with legalized open carry.

⁵⁰ Cf. *Bruen*, 142 S. Ct. at 2123 n.1 (noting the existence of constitutional-carry laws).

⁵¹ See, e.g., Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1773–82 (2015) (reviewing claims made from liquidation, historical gloss, and historical tradition); Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123 (2020) (collecting examples in judicial opinions).

⁵² *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (emphasis added).

⁵³ *Id.*

But defending shall-issue over may-issue licensing as a matter of tradition isn't easy, and the concurrence didn't try. Let's assume again that licensing for concealed carry dates back to the late 1800s, that may-issue licensing predominated early, and that shall-issue predominated after the 1990s.⁵⁴ Even if we conveniently ignore the recent rise of constitutional carry as well as any complications from modern trends in open-carry regulation,⁵⁵ we might well think that the may-issue tradition fizzled too long ago to be respected, while the shall-issue tradition began too recently to be significant. Apparently none of the Justices in the *Bruen* majority was swayed by a broadly stated post-enactment tradition of "licensing writ large." Otherwise, may-issue licensing would have had a good chance of survival as part of that broader practice. In the narrower frame of shall-issue licensing, moreover, a track record of twenty years might be too short for constitutional-level respect.

"Might," I write, because the strength of a tradition argument depends on a sizeable list of framing choices.⁵⁶ Among them and best known to scholars are, first, choices involving the level of generality. The options can be subdivided into degrees of abstraction and of breadth in classifying practices.⁵⁷ Second are choices of timeframe. Judges and others must decide whether to set a minimum duration for constitutional traditions, whether the practice must persist until the time of decision, and whether duration should affect weight in a larger mix of considerations.⁵⁸ Third, and related, are choices involving the level of commitment to a given practice. These include the degree to which the practice must have been widespread in terms of jurisdictions or of populations; the degree to which regulations must have been enforced;⁵⁹ and the severity of penalties for violations, in law or in practice.⁶⁰ Fourth are choices

⁵⁴ See *supra* notes 22, 48.

⁵⁵ See *Guns in Public: Open Carry*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/open-carry> [<https://perma.cc/3JNU-JWEV>] ("[M]ost states now place few or no restrictions on open carry of firearms in public.")

⁵⁶ Several of these choices are shared with arguments from pre-enactment history.

⁵⁷ See generally Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1087 (1990) ("Just as the choice of cognizable traditions involves value judgments, so does their description."); Adam M. Samaha, *Levels of Generality, Constitutional Comedy, and Legal Design*, 2013 U. ILL. L. REV. 1733, 1744–45 (2013) (dividing abstractness from breadth). There also can be debatable choices about which of several practices to evaluate, at approximately the same level of abstraction and breadth. Accord Tribe & Dorf, *supra*, at 1090 ("The absence of a single dimension of specificity is a pervasive problem.")

⁵⁸ Timeframe choices might be merged into level-of-commitment choices, discussed in text.

⁵⁹ A related issue is whether the relevant practice must have been formally lawful or peaceful.

⁶⁰ See, e.g., *Bruen*, 142 S. Ct. at 2149.

about the kind of commitment that counts toward a “venerable” tradition.⁶¹ These include the extent to which the practice must have been thoughtful instead of habitual; defended on constitutional grounds instead of tainted by reasons or emotions that are now considered invalid; and supported by a political community that was acceptably inclusive.⁶²

This list wasn’t compiled for the sake of being difficult, but to be careful and informative. All of these choices may be relevant to constitutional decisions, depending on whether and why one believes that tradition arguments are acceptable. For instance, if decision-makers value traditions because they value stability, they might demand a relatively widespread level of commitment to a practice that endured through the time of decision, but not worry about the kinds of commitments underlying the practice. In contrast, if decision-makers value traditions as reliable pools of collective wisdom, they might instead demand that the practice reflect thoughtful and constitutionally sound reasoning within an inclusive political community, and care less about the duration of the practice. Regardless, hard choices that are connected to deep normative disagreements are unavoidable.

Finally and subtly, the majority flagged additional arguments for preferring shall-issue to may-issue licensing in a footnote, and these arguments do not entail the superiority of the no-licensing alternative.⁶³ Strikingly, this below-the-line reasoning seems more pragmatic and functional than textual, historical, or analogical. Indeed, these arguments can be translated readily into means-ends scrutiny, and perhaps a casual version of cost-benefit analysis. Using labels from modern constitutional law, the Court displayed concern for certain types of regulatory burden, overbreadth, tailoring, and vagueness, but not necessarily prior restraint alone.

Thus the majority opinion indicated that shall-issue licensing is facially less burdensome for worthy applicants than may-issue licensing, insofar as the latter demands that applicants “show an atypical need

⁶¹ See, e.g., *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (addressing official immunities); *Moore v. East Cleveland*, 431 U.S. 494, 504 (1977) (plurality opinion) (addressing “family” households).

⁶² Concerns might involve, for example, political systems that minimized the power of affected populations defined by wealth, race, sex, gender, or tribal membership. A version of the “kind of commitment” concern appears in *Bruen*, where the majority opinion discusses targeting and failures to protect Black people in the 1800s. See *Bruen*, 142 S. Ct. at 2149, 2151–52, 2152 n.27. On whether the Court’s reliance on histories of racial injustice is problematically selective, see Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere From Weapons Threats Under Bruen*, 98 N.Y.U. L. REV. 1795 (2023).

⁶³ See *Bruen*, 142 S. Ct. at 2138 n.9. Justice Kavanaugh’s concurrence is consistent with these points.

for armed self-defense.”⁶⁴ That demand aims to screen out a fraction of what the Court’s majority calls law-abiding, responsible citizens from lawfully carrying firearms in public for self-defense, which the majority suggested was unconstitutional as to that fraction. That’s a type of overbreadth. In contrast, the majority indicated that shall-issue licensing seems targeted (we should be tempted to say closely tailored) to the valid goal (we should be tempted to say a legitimate, important, or compelling interest) of separating responsible from irresponsible applicants—in the majority’s words, shall-issue regimes seem “designed to ensure only that those bearing arms in the jurisdiction are, in fact, law-abiding, responsible citizens.”⁶⁵ Last, the majority adverted to the vagueness that shall-issue licensing can avoid, because those laws “appear to contain only narrow, objective, and definite” guidance for licensing officials.⁶⁶ To support its preference for tight rules over discretionary standards, the majority cited twentieth-century precedent on administrative discretion over speech, without articulating a concern about prior restraint per se.⁶⁷ Indeed, if the Court had thought that all prior restraints are invalid for firearms, it could not have distinguished shall-issue from may-issue licensing.

Perhaps the above mix of considerations establishes a persuasive basis for invalidating may-issue while allowing shall-issue licensing. We might grant that shall-issue licensing presents burdens for responsible people who are otherwise entitled to carry firearms and anticipate non-compliance by a significant percentage of firearm possessors, yet credit such licensing efforts with relatively clear demands that sensibly target potentially irresponsible persons for an intervention before they carry weapons in public. But again, that approach is estranged from the Court’s textual, historical, and analogical reasoning. In its summary of history, remember, the Court did not identify any pre-1868 or pre-1791 regulation of arms-carrying that required preclearance from government officials without individualized evidence of risk. And the historical examples that were discussed seem to have embedded a fair degree of vagueness and decision-maker discretion on their faces. Perhaps “terrorizing” the community had a shared and settled understanding by the 1800s, but then it’s hard to condemn broadly today’s may-issue regulations on account of facial vagueness. In any event, the *Bruen* opinions did not rely on text, history, or analogies therefrom to distinguish

⁶⁴ *Id.* The Court reserved judgment on shall-issue licensing systems that are “put toward abusive ends,” with extraordinary delays or high fees. *Id.*

⁶⁵ *Id.* (internal quotation marks omitted).

⁶⁶ *Id.* (internal quotation marks omitted) (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969)).

⁶⁷ *See id.*

shall-issue from may-issue licensing. And arguments about burdens, overbreadth, vagueness, and prior restraint needn't have any connection to contemporary popularity, either.

II

MULTIPLE CONSIDERATIONS, WITHOUT QUESTION

A. *Factors and Judgment*

We can understand *Bruen* as fleetingly advocating a relatively narrow methodology that could not accommodate its relatively restrained intervention. The majority wanted to stop may-issue licensing while holding harmless shall-issue licensing, which isn't a straightforward sum of plain text plus pre-enactment history. The Justices themselves invoked other considerations, including analogies, headcounts, and traditions. But none of that provides a handy rationale for preserving shall-issue licensing. So the Court's majority, quietly, added more. They alluded to ideas from modern doctrine without using the labels, including means-ends tailoring.⁶⁸ The kicker is that *Bruen* claimed that *Heller* was precedent (yet another consideration) for the proposition that text plus history (plus tradition) was already the test (which did not fully govern either decision).⁶⁹ Now *Bruen*, like *Heller*, will be a foundation for developing increasingly complex gun rights doctrine over time.⁷⁰

Granted, we don't know how long the Court will support shall-issue licensing, which was not directly at issue in *Bruen*, given the majority's preferred framing.⁷¹ Perhaps the Justices' apparent minimalism is about pacing and resource constraints, and perhaps they will get at shall-issue licensing later.⁷² Or the judicial line between may-issue and shall-issue licensing might persist. This could be because Court majorities retain a general if sometimes slight predisposition toward minimalism for the

⁶⁸ Permissible regulatory ends could be drawn from text and history, but that would not make the majority coalition's decisional method less than multi-factored.

⁶⁹ On *Heller* as multi-modal, see LIU, KARLAN & SCHROEDER, *supra* note 13, at 32–40.

⁷⁰ Compare the practical observation of Judge Newsom in *Club Madonna Inc. v. Miami Beach*, 42 F.4th 1231, 1261 (11th Cir. 2022) (Newsom, J., concurring) (noting that the narrow methodology suggested in part of *Bruen* is “not the way it seems to work” in free speech cases).

⁷¹ In lower federal courts and state courts, *Bruen*'s treatment of shall-issue licensing certainly will matter in any challenges thereto. Consider the impact of *Heller*'s list of presumptively permissible regulations, *see* *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 627 n.26 (2008), which has been cited in hundreds of cases.

⁷² That course might be encouraged if more states add constitutional-carry authorizations, or if states soften “shall-issue” regimes such that obtaining a license becomes more like a background check for firearm purchases. On the flipside, formerly may-issue jurisdictions and some others might adopt relatively demanding versions of “shall-issue” laws. Thanks to Barry Friedman and Darrell Miller for raising these points.

judiciary's federal constitutional footprint on society, or it could be for some other reasons on the merits of licensing. Whether temporary or enduring, however, we will have serious difficulties reconciling the Court's doctrine-level results, action-level considerations, and surface-level methodological commitments. This is true even if we assume that extra-legal commitments have no influence on results.

The Court's approach was not only multi-factored but heavy with open choices. The latter doesn't necessarily follow from the former: decision-makers sometimes add together lots of factors that are themselves clear-cut.⁷³ Here, however, we can perceive both the absence of a formula for integrating considerations and hazy edges to many of them. For example, we don't know what all is included in a plain-text reading; which timeframes, level of generality, degree, or kind of commitment to choose for history and tradition; the range of relevant similarities and what counts as "analogous enough"; what a "more nuanced" test would be for sufficiently novel developments; or the proper weights or priorities for headcounts, precedent, or other considerations. Not a hallmark of Justice Thomas's opinions, in this instance he empathetically acknowledged the difficulties of historical research,⁷⁴ as well as the necessity of external principles for choosing relevant similarities in analogical reasoning.⁷⁵ But of course acknowledging those problems is not the same as solving them in ways that minimize discretion.

Making broad choices about decisionmaking methods involves methodology, too, and *Bruen* likewise intimated an inclusive view on that point. In promoting text and history, the majority opinion resorted to deep and not uniquely legal considerations of legitimacy and expertise. Telling judges to use history to shape the meaning of a codified pre-existing right was assertedly "more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise' in the field."⁷⁶ If we want to fit this reasoning into orthodox constitutional argument, we can call it "structural" in its sweeping and breezy evaluation of institutional responsibilities and capacities.⁷⁷ If

⁷³ See generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 566, 586–89, 593–96 (1992) (distinguishing complexity from rules and standards); Adam M. Samaha, *Looking Over a Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554, 558 (2017) ("[T]he notion that discretion increases as sources increase is incorrect without more.").

⁷⁴ See *Bruen*, 142 S. Ct. at 2130–31.

⁷⁵ See *id.* at 2132.

⁷⁶ *Id.* at 2130 (citation omitted).

⁷⁷ Cf. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 23 (1969) (contending that structural reasoning requires the interpreter to "deal with policy and not with grammar"); Pozen & Samaha, *supra* note 5, at 749–50 (suggesting that the developing

instead we want to challenge the idea that the Court maintains any tight limit on positivist legal reasoning, we might say that its methodological justification is grounded in “political morality.”⁷⁸

We are left with many judgment calls that lack rigid formulas, and thoughtful observers may doubt that the Court has constrained its members or anyone else against the influence of non-legal preferences. Consider some of the many upcoming or potential controversies:

- As to the generally familiar, laws that authorize the seizure of firearms from persons who threaten themselves or others; that prohibit possession of firearms near schools, on public transportation, or in churches; or that prohibit semi-automatic assault weapons that are sold in large numbers but not owned by large populations.

- As to the less familiar, the prospect of laws requiring administrative preclearance of new firearm models, personalized-handgun technology, micro-stamping of ammunition, or liability insurance in some form for firearm owners.

- As to all-too-familiar, mass shootings of children and others at schools in recent decades, and any number of firearms laws that might be defended with reference to that arguably new social problem.

Assume that everyone attempts to follow *Bruen* in good faith. Should we think that resolving constitutional claims in these matters will depend more on research, or more on judgment?

B. *Constitutional and Non-Constitutional*

Given the multiple considerations and open choices that are detectable in *Bruen*, we should now wonder about the extent to which the Court was engaged in “constitutional” decisionmaking. Not because the majority was necessarily incorrect in its understanding of the Constitution. Maybe it was, maybe it wasn’t. And not because multi-factor inquiries or discretionary edges are necessarily indicators of non-constitutional activity. Maybe they are, maybe they aren’t. But because the broad range of apparently acceptable considerations for reaching the decision, alongside the majority’s uneven interest in limiting the range of considerations for reaching *constitutional* decisions, makes it natural to ask whether the Court was adding constitutional or non-constitutional considerations

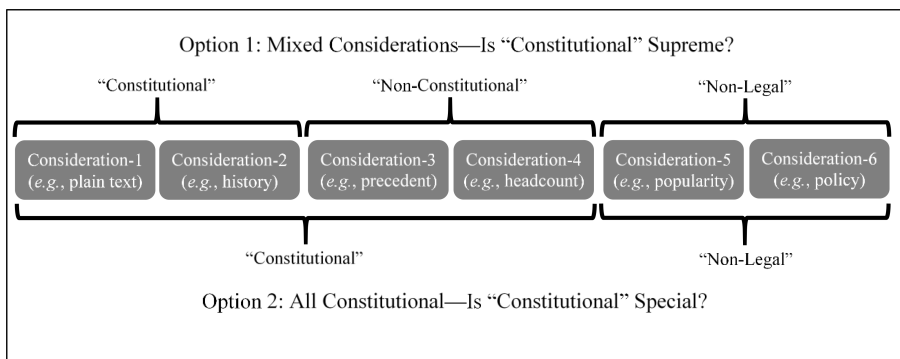
boundary of impermissible “policy” arguments tends to block professional consequentialist analysis).

⁷⁸ Adrian Vermeule, *The Bourbons of Jurisprudence*, IUS & IUSTITUM (Aug. 15, 2022), <https://iusetiustitium.com/the-bourbons-of-jurisprudence> [<https://perma.cc/E9HX-2AVQ>] (“In case after case and doctrinal area after area, originalist judges draw . . . [on] ambitious and contentious claims of political morality.”).

to reach its decision in *Bruen*.⁷⁹ If constitutional plus non-constitutional considerations were mixed, we should then ask about the relationship between them. If all considerations were constitutional in character, we should ask what if anything makes them different from other legal and non-legal considerations. Either way, the perception of constitutional decisions as special and superior might be shaken.⁸⁰

Taking a step back, there are two basic options for characterizing the range of considerations that the Court offered to support its decision to condemn may-issue licensing while holding harmless shall-issue licensing.⁸¹ Figure 1 charts these two options.

FIGURE 1. CATEGORIZING POTENTIAL CONSIDERATIONS IN CONSTITUTIONAL DECISIONS



Option 1: Mixed considerations. The first option is to accept that the Court relied on both constitutional and non-constitutional considerations. For instance, we might say that the majority opinion’s resort to enacted text and to history were part of constitutional argument and analysis properly defined, even if the Justices erred in their handling of those sources, but that the opinion’s invocations of other considerations such as judicial precedent, contemporary headcounts, and unnamed means-ends analysis, along with any broader commitment to judicial minimalism, fell into a non-constitutional even if legal category. One might characterize

⁷⁹ The Justices in the majority indicated that they were developing methods for deciding constitutional cases, not simply for interpreting text in the abstract. *See supra* notes 8–9 and accompanying text.

⁸⁰ *Cf. Pozen & Samaha, supra* note 5, at 790 (raising questions about the benefits and coherence of constitutional modalities, if radically expanded to include more of what people care about).

⁸¹ A “decision” of interest can be formulated in many ways, I acknowledge. My choice here identifies a decision that is recognizable as a proposition of constitutional law, and that is distinct from an adjudicatory judgment in the sense of dismissal, affirmance, reversal, and the like.

the former as efforts to conduct constitutional interpretation narrowly understood, and the latter as part of adjudication or decisionmaking in a broader sense.⁸² Regardless, the mixed-considerations option accepts that, with the expanse of legal reason, both constitutional and non-constitutional considerations mattered to the decision—like it or not.

Conceptually, this option allows constitutional analysis to be relatively tight—a special domain separate from the wider universe of normative analysis. It also permits a realistic picture of judicial opinions and the larger decision process, by including a potentially sweeping range of considerations within our map of what matters to final judgments. It must be true that non-constitutional yet legal considerations influence outcomes in what are fairly called constitutional cases. No civil plaintiff prevails without paying the filing fee or receiving *in forma pauperis* access, and countless constitutional claims fail because of forfeited arguments or certiorari denials. Those (legal) bases for judicial judgment certainly seem “non-constitutional.”⁸³ Even if we don’t think about every kind of judicial decision that clears a case from the docket, and instead try to concentrate only on the bases for formulating propositions of constitutional law, we might find conceptual value in the mixed-considerations option. We could treat some combination of precedent, headcounts, tailoring, minimalism, and other prudential considerations as non-constitutional yet legal and potentially crucial parts of decisionmaking in constitutional cases. And we could debate whether the resulting mix is legitimate and suitable for judges.

At the same time, the mixed-considerations option locates non-constitutional considerations on the same plane as—and sometimes above—constitutional considerations. At the level of case-specific judgments, it makes filing fees lexically superior to the best interpretation of the Constitution. At the level of propositions of constitutional law, the implications for judicial reasoning might be equally jarring. Return to *Bruen*. Under a narrow understanding of constitutional considerations that reaches only text and history, *all* of the intellectual action in preserving shall-issue licensing while condemning may-issue licensing

⁸² Compare Stanley Fish, *Intention Is All There Is*, 29 CARDOZO L. REV. 1109, 1109–16 (2008) (claiming that interpretation just is the search for authorial intent), and Gary S. Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1834 (1997) (claiming that interpretation is the search for original public meaning only), with Kent Greenawalt, *Constitutional and Statutory Interpretation*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 268, 268–70 (2002) (including within interpretation the resort to text, original meaning, underlying rationale, basic values, application to particular cases, and stare decisis).

⁸³ That is true even though, like an ordinary statute or a common-law claim, these bases for decision may be subject to constitutional attack at some point.

occurred on the *non*-constitutional side of the ledger. Text and history, even supplemented with analogies, seem badly inadequate to reach those conclusions.

Nor is that an isolated event. Every decision on a legal issue that is expressed through a judicial opinion involves crafting that decision's scope, and in doing so judges frequently resort to explanations that seem prudential or pragmatic in the sense of considering consequences for one doctrinal shape over another, or that involve generalizations about the appropriate judicial role.⁸⁴ Precedent is another featured source in contemporary constitutional opinions, even if less influential in high-profile disputes. However diminished the force of judicial minimalism or horizontal stare decisis, allowing those considerations into the mix at all puts pressure on the idea that constitutional analysis is not only tight and narrow, but fundamentally superior to other considerations.⁸⁵ The mixed-considerations option maintains some exclusivity for constitutional analysis by loosening its hold on higher law.

Option 2: Purely constitutional considerations. The second option is to understand all of the Court's considerations as constitutional in character. In no particular order, we could list plain-text readings, pre-enactment history, post-enactment tradition, analogical reasoning, judicial precedent, contemporary headcounts, means-ends scrutiny, and the meta-considerations of legitimacy and expertise—then accept that all of those and sometimes more are part of constitutional argument and analysis, properly understood. A variation on that approach is to merge some of the foregoing into a shorter list with expansive definitions. For instance, perhaps judicial precedent is an outgrowth of an originalist understanding of “the [j]udicial power.”⁸⁶ Or perhaps headcounts, means-ends scrutiny, and expertise are “prudential” arguments within constitutional law. Either way, the idea is to adopt an inclusive view of what counts as legitimate constitutional argument and analysis, within the institutional settings of judiciaries.

This purely constitutional option can resolve part of the tension between the proposition that constitutional reasoning is somehow

⁸⁴ Judicial minimalism might be inconsistent with judicial originalism, regardless of whether minimalism is deployed to temporarily slow or permanently constrict judicial intervention. See Suzanna Sherry, *An Originalist Understanding of Minimalism*, 88 Nw. U. L. REV. 175, 176, 179–80 (1993) (stating that “[a]n examination of the historical record suggests that a true originalist must almost certainly be a non-minimalist”).

⁸⁵ Conceivably there is a defensible line between courts doing “too little” as opposed to “too much” with otherwise valid constitutional claims. In this space, I merely suggest that the possibility is not subject to simple justifications.

⁸⁶ U.S. CONST. art. III; cf. Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 578–82, 585 (2001) (exploring bases for constitutional stare decisis in text, history, and structure, as well as from acceptance).

superior and the perception that many factors matter to judges when they resolve constitutional questions. Each source that is included within the range of accepted constitutional considerations is one less source that we must struggle to demote. Moreover, this option is not a bad fit for the many judicial opinions that cover many considerations without clearly marking any hierarchy, and without tagging sources such as precedent or headcounts as “not constitutional yet decisive.” We don’t yet have a reliable and comprehensive empirical measure of the types of considerations that show up in judicial opinions in constitutional cases, let alone the potentially influential considerations that don’t show up there. As well, opinion-writing trends might be shifting toward fewer identifiable considerations in federal constitutional cases, although I’m not aware of an empirical study of the matter. Still, the purely constitutional option presents the hope of reflecting official judicial practice without generating repeated conflict with the supposed superiority of constitutional argument over other legal argument, if not non-legal argument.

The downside, if it is one, would be that constitutional argument and analysis become less special—and possibly harder to sustain over other forms of reasoning, many of them more accessible to more people. Instead of some limited range of techniques for working with enacted text and an exhaustible pool of historical sources, for instance, we would have to accommodate as constitutional every other consideration that we have noted. That stops short of all reputable forms of normative argument, but the list is potentially long. While gathering so much within constitutional argument makes it easier to understand a decision like *Bruen*, the inclusiveness makes it harder to distinguish constitutional judicial review from what happens when the rest of us reach non-constitutional and even non-legal conclusions. As constitutional argument more closely resembles other normative argument, it might become more intelligible and less alienating for many people. But it also becomes less special, and therefore less sustainable as the top tier of law and beyond. And if this loss of analytical uniqueness makes it less apparent that judges are the legitimate experts in constitutional analysis, then the purely constitutional option would likewise make any supreme form of judicial review more difficult to preserve.

Challenges. The resulting challenges are more than labeling difficulties. Something significant is supposed to follow from recognizing a consideration, a source, an argument, or an analytic move as constitutional in character. At minimum, the category indicates a role within supreme law and therefore a status that is elevated over all other forms of law, whatever the significance to national identity or fundamental values. Of course many kinds of non-legal normative evaluation are

fundamental to most people, but federal constitutional reasoning enjoys exceptional stature within law. Certainly, judges act as if the boundaries of “the constitutional” are sufficiently important to invoke and contest, as they attempt to explain themselves to parties, attorneys, political leaders, interested groups, and the general public. Invoking constitutional law is associated with power and, understandably, judges want to provide special explanations that help support that power. Although an inclusive list of considerations and decision types seems necessary to resolve disputes at the case level and to shape judicial pronouncements on the content of constitutional law, that inclusiveness exerts pressure on the understanding of constitutional reasoning as both restricted and superior.

Which suggests hard questions for everyone. For those comfortable with a wide range of considerations within constitutional cases, we can ask why that practice deserves any elevated respect over other kinds of decisionmaking—legal or non-legal. For those dedicated to developing constitutional argument into a narrow range of non-discretionary considerations, we can ask whether that approach can ever be more than modestly influential in actual cases that people care about. Perhaps, over time, judges and the larger systems that select and support them can tighten the range of non-constitutional and constitutional considerations that matter in adjudicating cases and shaping constitutional law. But we have reason for doubt. It took several personnel changes and more than ten years from *Heller* for the Supreme Court to produce *Bruen*, and a careful examination shows little or no movement toward tighter methodological limits within that period. After all that, the majority still referenced considerations like precedent and headcounts.

These questions are not exactly novel or isolated, and my brief discussion here is hardly definitive. For generations, judges and scholars have dealt with efforts to distinguish cores from penumbras,⁸⁷ fit from justification,⁸⁸ rights from remedies,⁸⁹ interpretation from adjudication,⁹⁰ interpretation from construction,⁹¹ and lexically superior from lexically inferior considerations in constitutional cases.⁹² Each of those efforts

⁸⁷ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–08 (1958).

⁸⁸ See RONALD DWORKIN, *JUSTICE IN ROBES* 122–23 (2006); RONALD DWORKIN, *LAW’S EMPIRE* 65–68, 228, 380 (1986).

⁸⁹ See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857 (1999) (“Rights occupy an exalted sphere of principle, while remedies are consigned to the banalistic sphere of policy, pragmatism, and politics.”).

⁹⁰ See *supra* note 82.

⁹¹ See Pozen & Samaha, *supra* note 5, at 778; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 473 (2013).

⁹² See Pozen & Samaha, *supra* note 5, at 777–78.

implicates questions of feasibility and desirability in partitioning, purifying, and prioritizing legal decisions while accounting for an often large range of forces that matter to real-world judgments. What seems unfinished is a thorough understanding of the full collection of “constitutional” and “non-constitutional” considerations and activities, along with their actual and proper relationships within the resolution of real cases. That understanding might lead to far less ambitious goals for constitutional reasoning, from both those who prefer inclusiveness and those who prefer exclusivity in the considerations that count.

CONCLUSION

Quotable phrases and word counts can make decisions like *Bruen* seem methodologically narrow. No doubt the Justices in the majority hoped for a methodological shift in Second Amendment adjudication. Whatever the initial reaction to the case, however, we should know that the Court became methodologically inclusive to deliver its hedged holding, even apart from any non-legal forces that might have mattered. The case is still important: It will foment relitigation of lost gun rights claims, it will threaten some policy innovation, and it was part of a larger legal upheaval during the Court’s last Term. But the *Bruen* majority’s partial restraint on licensing might at least outlast its claims to methodological simplicity and constraint, which are highly implausible and seemingly incompatible with the results. This problem of meshing constitutional method and results within a coherent and respect-worthy constitutional system is a challenge not only for this Court, though. The complications of developing a special form of constitutional decisionmaking that matters, that lasts, and that deserves to last are ongoing challenges for us all.