IF *ROE* HAD TO GO . . . SO MUST *BRUEN*

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The Supreme Court has linked the concept of stare decisis to the protection of judicial legitimacy. In *Dobbs v. Jackson Women's Health Organization*, Justice Alito's majority opinion set forth five factors that called into question the legitimacy of *Roe v. Wade*, and found that they required an abandonment of the 49-year-old privacy right, for the sake of the rule of law. The next day, however, in *New York State Rifle & Pistol Association v. Bruen*, the same Court enhanced gun rights by articulating a new methodology for evaluating the validity of gun regulations, relying on a search for centuries-old historical analogues of present-day gun restrictions. We now have data by which to examine how *Bruen*'s new test has fared in the lower courts, through the lens of the *Dobbs* factors. Those factors examine the nature of the prior court's error, the quality of its reasoning, the workability of its rule, the degree to which the prior case has disrupted other areas of law, and the degree of reliance it has invited. We collected and analyzed lower federal court decisions in Second Amendment-related litigation from 2000 to 2023. It turns out that the test announced in *Bruen* has created a space for judicial discretion that has led to partisan polarization in its application. Considering all five of the *Dobbs* criteria in light of our empirical findings, we conclude that *Bruen* poses a threat to

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the stability, objectivity and determinacy necessary to the rule of law: If *Roe* had to go, so must *Bruen*.

INTRODUCTION

The nation was rocked in 2022 by the decision of the U.S. Supreme Court to overrule a nearly fifty-year-old precedent involving what the Court had originally recognized to be a fundamental right, the right to terminate a pregnancy.[1] While scattered critiques of *Roe v. Wade* had peppered the law reviews from the time the decision was issued in 1973,[2] the core personal liberty it recognized tenaciously survived as, time after time, predictions as to *Roe*'s demise were thwarted; even some justices selected for their pro-life commitment stepped up to preserve some version—even if diminished—of the right to reproductive autonomy.[3] But after the Trump trifecta of Supreme Court appointments culminating in 2020, *Roe* could dodge her destiny no more, as the *Dobbs* hatchet descended to seal her fate.

The Court, with Justice Alito at the helm, hinted that the result was overdetermined; that overruling *Roe* was not a judgment call, but a necessity. And it offered a defense of its decision to overrule this precedent, in terms designed to suggest generality: this was not just about *Roe*, but about precedent itself. The section on stare decisis calls out for treatment as an exposition of the law of stare decisis writ large. We take it as such.

Yet within twenty-four hours of the Court's issuance of its decision in *Dobbs*, the same Court[4] issued another decision—*New York State Rifle & Pistol Association v. Bruen*[5]—which, in its first two years, has succumbed to every one of the failings that the Court identified in *Roe* as meriting its overruling. Indeed, the *Bruen* decision has fared far worse, not only proving to be merely

1. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

2. Roe v. Wade, 410 U.S. 113 (1973).

3. Planned Parenthood v. Casey, 505 U.S. 833 (1992) (featuring the opinion of O'Connor, J., Souter, J., Kennedy, J.). *Casey* demoted the right to choose abortion from a fundamental right to a "liberty interest" but it still received protection as an individual right pre-viability through the undue burden test. *Id.* at 874. Starting with the Reagan administration, the Solicitor General's office began filing amicus briefs requesting the overruling of *Roe* in every case in which abortion was an issue. *Id.* at 844 (noting that the United States had requested the overruling of *Roe* five times before *Casey*).

4. Both the *Dobbs* and the *Bruen* judgments were the same 6–3 distribution of Justices, although in *Dobbs*, Roberts concurred only in the judgment.

5. 597 U.S. 1 (2022).

unworkable, but also instigating partisan polarization at the trial and appeals court levels, where we see that the discretion that the *Bruen* test affords judges enables them to cast votes consistent with their own partisan preferences.[6] Measured by the Court's own lights, its decision in *Bruen* is a failure.

Given that we start our Article by invoking *Roe* and *Dobbs*, a caveat is in order. This Article is not about the merits of the Court's decision to overrule *Roe* in *Dobbs*. Rather, we explore the reach of the Court's analysis in *Dobbs* regarding when the core principle of stare decisis should be abandoned because the rule of law is better served by over-ruling a prior case than by following it. We use *Dobbs*, through the five-part analysis it sets out, to tell us when that condition is met.

The *Dobbs* Court identified five factors that together supported the overruling of *Roe*, and, more generally, point to the overruling of any precedent. This set of inquiries, which we dub "the *Dobbs* Quintet," examines the following*:* the nature of the court's error in the prior case; the quality of the court's reasoning; the workability of the precedent; the distortive effect it has had on other doctrines; and reliance interests.[7] An application of each of these criteria to the short life of *Bruen* calls into question its entitlement to stare decisis.

In particular, we highlight evidence that *Bruen* has invited lower courts to inject their personal preferences into the application of the elusive history-and-tradition test that it sets forth. Of all the values that stare decisis seeks to protect, one of the most important is the value of objective and consistent application of the law, and yet this value is compromised by the indeterminate and subjective historical inquiry that *Bruen* demands.

The data presented here have little concern for whether the Court was or was not consistent in its own approaches to *Dobbs* and *Bruen*, respectively. Our focus, rather, is the effects on the rule of law of a constitutional test that imposes an indeterminate inquiry into history and tradition in place of the longstanding approach to constitutional adjudication that considers justifications for state restrictions on individual rights.[8] Taking

6. *See infra* Part II.C.
7. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268 (2022).
8. In *Dobbs*, for the majority, the strength of the state's interest in preserving life

Dobbs at its word, we find that *Bruen*'s test fails, a conclusion that we believe was later validated implicitly by the Court itself when it first faced the challenge of applying its own test in *United States v. Rahimi*.[9] As we discuss in our conclusion, *Rahimi* did nothing to ameliorate the problems created by *Bruen*. It placed them into stark relief.

We reach our conclusion about *Bruen* in four steps. Part I provides a review of *Bruen* to set the stage for the analysis that follows. Part II applies each of the five *Dobbs* factors to *Bruen*, using an approach that combines theory, doctrine, and data. In Part III we consider an additional sixth consideration for overruling precedent—its "real-world effects on the citizenry, not just its effects on the law and the legal system."[10] The *Dobbs* Court did not mention this factor, but it makes an appearance in landmark decisions that overruled precedent, including *Brown v. Board of Education*[11] and *West Virginia Board of Education v. Barnette*,[12] and was highlighted in Justice Kavanaugh's separate opinion in *Ramos v. Louisiana*.[13] We conclude, in Part IV, with a discussion of how the Court can replace the *Bruen* approach without eliminating a personal private right to keep and bear arms. The traditional means-ends scrutiny that has provided the touchstone for constitutional analysis for at least eight decades would more meaningfully protect the individual right at stake in light of contemporary state regulatory interests.

I. THE *BRUEN* DECISION

A journey through *Bruen* sets up our argument about its vulnerability to the *Dobbs* analysis. This case examined a New York law that required a person wishing to carry a handgun in public to obtain a concealed-carry license that involved a showing of a special need for self-defense, distinguishable from the general community. The law had been in effect since the early 1900s. The lower courts in the case sustained the proper-cause requirement,

played a large role. *See* 597 U.S. at 262. Yet in *Bruen*, the Court foreclosed any consideration of state interests in protecting safety and life, finding them "inconsistent" with the historical approach. *Bruen*, 597 U.S. at 23–24.

9. 144 S. Ct. 1889 (2024); *see infra* notes 169–174 and accompanying text.
10. Ramos v. Louisiana, 590 U.S. 83, 122 (2020) (Kavanaugh, J., concurring in part).
11. 347 U.S. 483, 494–95 (1954).
12. 319 U.S. 624, 630–42 (1943).
13. 590 U.S. at 122.

holding that it was "substantially related to the achievement of an important governmental interest."[14]

The Supreme Court rejected the analysis used by the lower courts and reversed. In place of the standard intermediate-or-strict[15] scrutiny that those courts had employed in an effort to apply the 2008 decision in *District of Columbia v. Heller*,[16] the Court announced a new way of dealing with gun rights.

No longer would it countenance a two-step framework for analyzing Second Amendment challenges. Purporting to follow *Heller* but rejecting the way that the lower courts had been interpreting it for fourteen years, the Court first established a presumption that the Second Amendment protects any conduct that is covered by "the Second Amendment's plain text."[17] The burden then shifts to the government, who "may not simply posit that the regulation promotes an important interest"[18]—the intermediate scrutiny that had been adopted by the courts of appeals. "Rather, the government must demonstrate that the regulation is "consistent with this Nation's historical tradition of firearm regulation."[19] If it fails, then a court may not conclude that

14. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 96 (2d Cir. N.Y. 2012), *abrogated by* New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). The 2nd Circuit in the *Bruen* case followed this precedent. New York State Rifle & Pistol Ass'n v. Beach, 818 Fed. App'x 99 (2d Cir. 2020).

15. For matters at the "core" of the Second Amendment right, the courts of appeals would use strict scrutiny, while for other matters, they would use intermediate scrutiny. Using *Heller*, some courts of appeals found that the "core" rights involved the possession of a handgun in the home for self-defense while others extended the core right to include public carry. *Compare Kachalsky*, 701 F.3d at 94 ("The state's ability to regulate firearms . . . is qualitatively different in public than in the home."), Gould v. Morgan, 907 F.3d 659, 672 (1st Cir. 2018) (stating that the right "is at its zenith inside the home" and "is plainly more circumscribed outside the home") *and* Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1126 (10th Cir. 2015) ("If Second Amendment rights apply outside the home, we believe they would be measured by the traditional test of intermediate scrutiny."), *with* Wrenn v. District of Columbia, 864 F.3d 650, 661 (D.C. Cir. 2017) (recognizing that the right of law-abiding citizens to carry a concealed firearm is a core component of the Second Amendment) *and* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) ("The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.").

16. 554 U.S. 570 (2008).

17. New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022). The "plain text" referred to in *Bruen* does not include the prefatory clause of the Second Amendment ("A well-regulated Militia, being necessary to the security of a free State. . . ."), which the *Heller* Court had previously interpreted to have no narrowing effect on the definition of the individual right. *Heller*, 554 U.S. at 596–600.

18. *Bruen*, 597 U.S. at 17.

19. *Id.*

the individual's conduct falls outside the Second Amendment's "'unqualified command.'"[20]

Bruen itself exemplifies many of the methodological problems that we discuss in this Article. Although the opinion has been the subject of much commentary,[21] few pieces look at what Justice Thomas himself modeled as a method for applying his newly-minted "consistent with this Nation's historical tradition" standard.[22] His rejection of one after another of the government's proffered statutory analogues—some as too old,[23] some as too new,[24] others as too different,[25] some as too specific,[26] or not specific enough,[27] others as not applied by courts as written,[28] still others as "outliers"[29]—presents a daunting task to anyone who wishes to derive interpretative principles from his example to carry forward into future cases.[30]

II. THE *DOBBS* QUINTET

We proceed by taking seriously the Roberts Court's most comprehensive statement on when exceptions should be made to the doctrine of stare decisis. *Dobbs* established that if a precedent suffers from five specified failings, then it should be jettisoned in the name of the rule of law.[31] Those failings, to reiterate, threaten

20. *Id.*

21. *See infra* Parts II.B.1 and II.B.2.

22. *Bruen*, 597 U.S. at 17.

23. *See id.* at 39–47.

24. *Id.* at 66 & n.28 (rejecting late nineteenth-century and twentieth-century evidence as irrelevant).

25. *Id.* at 47 (rebuffing a "dangerous and unusual" under colonial laws justification as not analogous to modern handguns in common use today).

26. *Id.* at 48–49 (finding the restriction of "pocket pistols" would not apply to firearms generally).

27. *Id.* at 56 (distinguishing surety requirements because they did not prohibit carrying arms, instead only requiring the posting of a bond).

28. *Id.* at 54 (featuring a Tennesee statute banning carrying "publicly or privately" that was subsequently read by state courts to permit some open carry).

29. *Id.* at 64–66 (finding that cases and laws from two states, Texas and West Virginia, are not enough to contradict the "overwhelming weight" of other available evidence regarding the right to keep and bear arms for defense in public).

30. *See* William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1488 (2024) ("Perhaps the length at which the Court discussed the details of these laws—going through each statute and court decision and explicitly parsing them, distinguishing them, and then counting them or setting them aside—obscured the Court's more fundamental inquiry. . . ."); Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023) (critiquing the *Bruen* method).

31. *See* 597 U.S. 215, 268 (2022).

the integrity of judicial review based on the nature of the Court's error in the prior case, the quality of the Court's reasoning, the workability of the rule established in the precedent, the distortive effect it has had on other doctrines, and reliance interests.

Applying these factors to *Roe v. Wade*,[32] the *Dobbs* Court believed that the case for overruling both *Roe* and its successor, *Planned Parenthood v. Casey*,[33] was compelling. We discuss each factor, as applied to the Court's decision in *Bruen*, and conclude that the case for reconsidering *Bruen*'s approach is equally compelling.

Before turning to the factors, a word is in order of what we do and do not mean by "reconsidering" *Bruen*. We do not mean that the personal, individual right to keep and bear arms explicitly established in *District of Columbia v. Heller*[34] must be eliminated. Our study does not implicate the methodology or conclusions adopted in *Heller*. Rather, our theoretical, doctrinal, and empirical analysis leads to the conclusion that *Bruen*'s history-and-tradition test to enforce Second Amendment rights should be discarded in favor of the approach that *Bruen* itself discarded: the more traditional and standard means-ends test commonly used to analyze constitutional rights.

A. "THE NATURE OF THE COURT'S ERROR"

> An erroneous interpretation of the Constitution is always important, but some are more damaging than others. —*Dobbs*[35]

This criterion for overruling precedent, the first on Justice Alito's list, could encompass all five factors with its focus on "damage." Indeed it may be important that, in identifying "the nature of the court's error" as a factor in overruling, Justice Alito broke new ground. While the other factors he identified are standard in the doctrine governing stare decisis, this one is unique to *Dobbs*.[36] Should we talk about damage to judicial impartiality?

32. 410 U.S. 113 (1973).
33. 505 U.S. 833 (1992).
34. 554 U.S. 570 (2008).
35. 597 U.S. 215, 268 (2022).
36. *See* Payne v. Tennessee, 501 U.S. 808, 828–30 (1991) (discussing general principles of stare decisis without including the nature of the error). Most recently, in *Ramos v. Louisiana*, Justice Kavanaugh comprehensively laid out the considerations underlying the overruling of precedent and concluded that the factors identified in past cases included seven, none of which was the "nature" of the court's error. *See* 590 U.S. 83,

Damage to the integrity of the decision-making process of judges due to a demand for historical expertise that they do not have? Damage to the age-old judicial balancing of ordered liberty by removing the "order" from the equation? Or perhaps the damage to lives that may have already been caused by the proliferation of guns since the *Bruen* decision.[37]

All of these types of damage have ensued,[38] but for purposes of this stage of the stare decisis analysis, we look to the erroneousness of the decision itself, taking our cue from the way that *Dobbs* considered the kind of error(s) that the majority believed *Roe* made. Along these lines, two considerations moved to the fore: (1) the reasonableness of the prior decision and (2) the value of judicial self-restraint. However laden those inquiries may be with ideological motivations for overruling a decision that the majority admittedly reviles, we take the Court at its word that it is speaking broadly to the principle of stare decisis and the considerations that can legitimately support departure from it.

1. Reasonableness.

The *Dobbs* Court found *Roe* to be "far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed."[39] Yet when *Bruen* turned to developing a jurisprudential methodology for implementing the right identified in the Second Amendment, it rejected the two-step approach that had been unanimously developed in the courts of appeals and was consistent with the way that all other enumerated and unenumerated rights in the Constitution have been analyzed.

121 (2020) (Kavanaugh, J., concurring) (listing quality of reasoning, consistency with precedent, changed law, changed facts, workability, reliance interests, and age of precedent).

37. *See* Rosanna Smart, *Effects of Concealed-Carry Laws on Violent Crime*, RAND (July 16, 2023), https://www.rand.org/research/gun-policy/analysis/concealed-carry/violent-crime.html; *see generally* John J. Donohue et al., *Why Does Right-to-Carry Cause Violent Crime to Increase?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30190, 2022), https://ssrn.com/abstract=4147260.

38. On judicial impartiality, see *infra* Part II.C; on historical expertise, see *infra* Part II.B.2; on ordered liberty, see *infra* Part II.A.2; and on the relationship between gun restrictions and gun violence, see *infra* Part III.

39. 597 U.S. at 268. Justice Alito's claim, that the seven Justices who joined *Roe* itself and all the others who subsequently adhered to it for forty-nine years were indulging in unreasonable interpretation, is tendentious. We are suggesting that a similar critique is justified with regard to the *Bruen* Court's bald rejection of means-ends scrutiny.

That traditional two-step approach involves, first, a determination that the behavior at issue falls within the protection of the amendment, and second, an analysis of the state's interest according to how compelling it is and how necessary the challenged regulation is to achieve that interest. This is textbook constitutional means-ends analysis,[40] and it applies in some analogous form (meaning that the interests of the state are taken into account in determining the scope of the right) to nearly all constitutional rights, including the rights to freedom of speech,[41] freedom of the press,[42] free exercise of religion;[43] to be free from unreasonable searches and seizures;[44] to due process of law,[45] to

40. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.5, at 602 (7th ed. 2023) (explaining constitutional levels of scrutiny as "the test that is applied to determine if the law is constitutional").

41. *See, e.g.,* Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994) (declaring general rule that content-based restrictions on speech must meet strict scrutiny, while content-neutral restrictions must meet only intermediate scrutiny). The Court in *Bruen* pointed to only one First Amendment case to support its rejection of this universal analysis, and that case involved the materially different issue of whether a particular type of speech is protected at all by the First Amendment. *That* inquiry—step one of the two-step analysis—was reduced to a historical test in *United States v. Stevens*, 559 U.S. 460, 468–71 (2010), as *Bruen* claimed. 597 U.S. 1, 24–25 (2022). However, once speech is found to be within the class of speech protected by the First Amendment, step two has always been the means-ends scrutiny that *Bruen* rejects. *Id.* at 19. Thus the reliance on *Stevens* for the latter move is inapposite.

42. *See, e.g.,* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 583-85 (1983) ("Differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment *unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation*.") (emphasis added).

43. *See, e.g.,* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (rejecting a free-exercise challenge to denial of tax-exempt status because eliminating discrimination was a compelling government interest and no less restrictive means were available to achieve the government interest). In some free-exercise cases the Court has rejected the use of strict scrutiny but has done so in favor of a lower level of means-ends scrutiny, not a historical approach. See Employment Div. v. Smith, 494 U.S. 872, 888 (1990) (finding that neutral laws of general applicability require only rational-basis review). However, the Court clarified that non-neutral laws still require strict scrutiny. *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534–35 (1993) (applying strict scrutiny to law whose purpose was not neutral with respect to religion).

44. *See* Carpenter v. United States, 585 U.S. 296, 316–17, 319–20 (2018) (internal quotations omitted) (reiterating that "the ultimate measure of the constitutionality of a governmental search is 'reasonableness,'" which requires a showing of either probable cause or exigencies such as the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence—all state interests that are part of the constitutional analysis).

45. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (holding that when determining whether due process has been denied, courts must balance three factors, the third of which is the interest of the government).

be shielded from the uncompensated taking of property,[46] to a speedy trial;[47] to an impartial jury;[48] to be free of cruel and unusual punishment;[49] to equal protection of the laws,[50] as well as to the important unenumerated fundamental rights such as voting[51] and travel.[52] But, with no explanation except that that analysis "was one step too many," Justice Thomas's opinion for the Court rejected that longstanding conception of constitutional rights as a balance between order and liberty, and ruled out of bounds *any* consideration of the state's contemporary interests in restricting gun ownership.[53]

There is irony in noting that this unique exemption of a constitutional right from consideration of countervailing interests comes in the case of the one enumerated right that has the most obvious potential to inflict actual, concrete harm on the public—the right to use a gun.[54] Yet that is the single situation, said the Court, in which state police-power interests in health and safety may not be considered.

By eschewing the interests of elected legislatures in protecting their communities from the proliferation of lethal

46. *See* Kelo v. City of New London, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring) (stating that property may be confiscated only if it is "rationally related to a conceivable public purpose."); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394–35 (1926) (relying on the government's strong police power purpose in zoning regulations to deny takings claim); Nollan v. Calif. Coastal Comm'n, 483 U.S. 825, 838 (1987) (analyzing constitutionality of a condition on development of property by considering whether burden is roughly proportionate to government's justification for imposing it).

47. *See* Barker v. Wingo, 407 U.S. 514, 521–22, 530 (1972) (holding that a speedy trial claim under Sixth Amendment involves a balancing test that considers, among other factors, "the reason for the delay" which directly addresses the government interests).

48. *See* Duren v. Missouri, 439 U.S. 357, 368–69, 370 (1979) (finding that, in a fair-cross-section challenge, the state had failed to show "any significant state interest" to justify under-inclusion of women in jury pool).

49. *See* Furman v. Georgia, 408 U.S. 238, 279–80 (1972) (Brennan, J., concurring) (considering four principles in determining whether a punishment is cruel and unusual, the fourth being a punishment that "serves no penal purpose more effectively than a less severe punishment").

50. CHEMERINSKY, *supra* note 40, § 9.1.2, at 741 ("All equal protection cases pose the same basic question: Is the government's classification justified by a sufficient purpose?").

51. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190–91 (2008) (balancing the burden on the right to vote against the state's interest in preventing fraud in a challenge to photo identification requirement).

52. Saenz v. Roe, 526 U.S. 489, 502–03 (1999) (applying strict scrutiny to restriction on welfare benefits to new residents because travel is a fundamental right under Privileges and Immunities Clause of Fourteenth Amendment).

53. New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 19 (2022).

54. *See infra* Part III.

weapons, this grandiose deformation of the concept of ordered liberty succumbs to the flaw of which the *Dobbs* Court accused *Roe*: *Bruen* "wrongly removed an issue from the people and the democratic process."[55]

2. Democracy and judicial self-restraint.

The traditional constitutional scrutiny that the *Bruen* Court rejected was not an arbitrary artifact of constitutional doctrine. Courts have long wrestled with the legitimacy of judicial intervention into popular decision-making, and the means-ends test has given life to a critical balance between the will of the people and the so-called "counter-majoritarian difficulty" that arises when courts intervene on constitutional grounds.[56] Indeed, a theme in *Dobbs* is that the *Roe* Court got the balance wrong: it "usurp[ed] the people's authority" by making "choices that the people have never made and that they cannot disavow through corrective legislation."[57] Overturning *Roe* and *Casey*, Justice Alito proclaimed, "returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office."[58]

We take this as a call for judicial self-restraint, the idea that judges should be "*highly* reluctant to declare legislative . . . action unconstitutional," with the aim, in Judge Richard Posner's words, of "discourag[ing] judges from spinning completely out of control and becoming just another set of legislators"[59] and thus promoting a long-term goal of protecting the legitimacy of courts.

Dobbs purported to embrace the principle that "courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies,'"[60] and insisted that the judgments of legislatures on matters of health and welfare are entitled to a

55. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 269 (2022).

56. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (arguing for courts to protect their legitimacy by using judicial review sparingly).

57. *Dobbs,* 597 U.S. at 269 (quoting Thornburgh v. Am. Coll. of Obstetricians, 476 U. S. 747, 787 (1986) (White, J., dissenting)).

58. *Id.* at 289.

59. Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint,* 100 CALIF. L. REV. 519, 521 (2012).

60. *Dobbs*, 597 U.S. at 300 (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)).

"strong presumption of validity."[61] Such a law "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests . . . includ[ing] respect for and preservation of prenatal life at all stages of development"[62]—the constitutional standard most deferential to state law-making.

In short, under *Dobbs*, regulating or even proscribing abortion is a matter for each state and its citizens to decide, without interference from courts and judges: "We now . . . return that authority to the people and their elected representatives."[63]

The *Dobbs* Court, then, condemned *Roe* because it embraced the opposite view—*Roe* empowered courts to override the people's policy choices about their health and welfare, in the name of the Constitution. But when we think about the *Dobbs* decision that way, we must ask whether *Bruen* commits the same sin of overriding the people's policy choices about their health and welfare in the name of the Constitution.[64] Under *Roe* and *Casey*, governments were invited to offer contemporaneous justifications for their restrictions on abortion, and those justifications could theoretically succeed, particularly after the Court lowered the state's burden in *Casey*.[65] In *Casey*, the Court upheld nearly all of the abortion regulations at issue, based on the interests articulated by the states imposing those restrictions.[66] But under *Bruen*, states

61. *Id.*at 301.

62. *Id.*

63. *Id.* at 302.

64. Some would place weight, for stare decisis purposes, on a distinction between the privacy right recognized in *Roe* and the right recognized in *Bruen*, on the ground that the former is unenumerated while the latter has some textual support in the Constitution. Without engaging this debate on the merits, we note that the difference is less significant than it may appear. First, the text of the Ninth Amendment tends to undermine the disparagement of rights solely on the ground that they are unenumerated. At the same time, the Second Amendment text offered as a distinction has not always been understood to convey an individual right at all, and even when the Court took that step 217 years into the nation's history, it did so with a 5–4 split amongst the justices in *Heller*. So a claim that the two rights are *essentially* different is a thin reed on which to rest a wholesale argument about the role of the court in protecting the asserted right from encroachment by the state. Our approach is to treat them both as the rights that the Court recognized them to be, in *Roe/Casey* and in *Heller/Bruen*, equally entitled to the status that stare decisis affords.

65. *Casey* established that abortion restrictions would stand unless they imposed an "undue burden" on the woman's right to terminate her pregnancy. Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992).

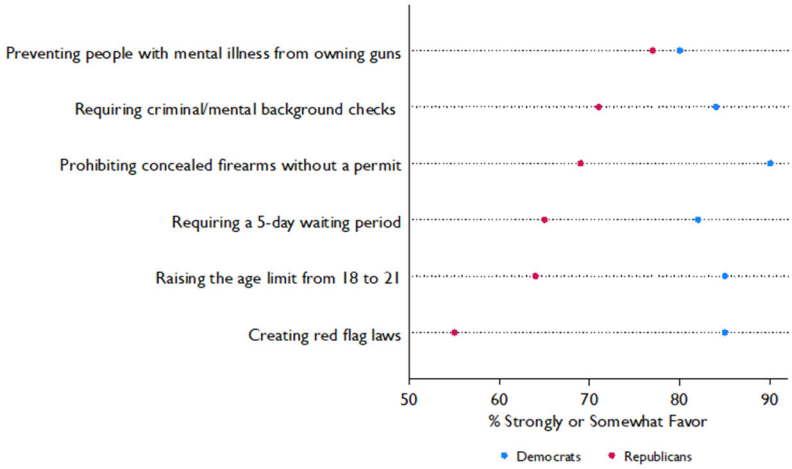
66. The only provision to constitute an "undue burden" was one requiring spousal consent because it imposed a "substantial obstacle" to the woman's choice to undergo an abortion, *id*. at 894–99, along with its implementing reporting requirement. *Id*. at 901.

have no opportunity to assert their health and safety interests in support of gun laws; the only way their law can survive is if some unspecified number of legislatures centuries ago had enacted what a judge deems to be analogous restrictions. The will of the people today has no voice.

This approach is the epitome of judicial activism; judges, not the states or the people, are the deciders of what a state's policy on gun ownership must be. As a result, *Bruen* not only opens the door to individual judge discretion—a claim we reinforce with data in Part II.C; it detracts from the courts' legitimacy by overriding public consensus, which supports *some* restrictions on guns, as Figure 1 shows.[67] Note that on each of the six regulations listed in Figure 1, a majority of both Democrats and Republicans agree on their desirability. Yet such laws will be invalidated under *Bruen*, unless a judge can identify a sufficient analogue from the eighteenth century.

67. Sources: All questions except concealed weapons are from the Economist/YouGovPoll, for guns. *Table 3F. Direction of Country on Issues—Guns (June 4–7, 2022)*, YOUGOV 21–22 (June 8, 2022), https://d3nkl3psvxxpe9.cloudfront.net/documents/20220604_econTabReport_revised.pdf. The concealed weapon question is from Finding #7 of a Pew Research survey conducted June 5 to 11, 2023. Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (July 24, 2024), https://www.pewresearch.org/short-reads/2024/07/24/key-facts-about-americans-and-guns. Note that Figure 1 shows proposals on which agreement exists. But for others deep divisions exist, as we suggest in the text, in the discussion of state regulation.

Figure 1. *Gun policies on which a majority of U.S. adults, Republicans and Democrats alike, agree. The figure shows the percentage of people who strongly or somewhat favor each policy. The question about red flag laws was: "Creating red flag laws that allow a court to temporarily remove guns from people that are believed to pose a danger to themself or others."*[68]



Nonetheless, there remains disagreement among the states over gun control. To take two examples, consider California, which has some of the strongest restrictions on guns in the country, and Wyoming, which has some of the weakest.[69] California generally requires licensed firearm dealers to conduct all gun sales or transfers subject to background checks and a waiting period;[70] Wyoming does not require background checks

68. The wording of the other questions, found in Tables 51A–L of the Economist/YouGov Poll, was as follows:

- Preventing persons with a history of mental illness from owning guns
- Requiring criminal and mental background checks for all those buying guns
- Preventing people from carrying a concealed gun in public
- Requiring people who purchase handguns to wait five days before they receive that gun
- Raising the age limit for owning a semi-automatic weapon from eighteen to twenty-one

Opinion on Gun Control Measures, YOUGOV 139–40, 147–52, 159–60 (June 8, 2022), https://d3nkl3psvxxpe9.cloudfront.net/documents/20220604_econTabReport_revised.pdf.

69. The Giffords Law Center, an organization favoring gun control, rated California first on its gun laws, and Wyoming last. *See Annual Gun Law Scorecard*, GIFFORDS L. CTR., https://giffords.org/lawcenter/resources/scorecard.

70. *See Background Check Procedures in California*, GIFFORDS L. CTR. (Dec. 31, 2023),

on firearm transfers and imposes no waiting period on sales or transfers.[71] California mostly prohibits people from openly carrying loaded guns;[72] Wyoming allows open carry without a license.[73] And with only limited exceptions California bans the possession of assault weapons;[74] Wyoming does not.[75]

States vary as much on their gun policies as they do on their abortion policies. Under *Bruen,* however, there is only one standard by which all laws must now be judged, creating a national rule based in the eighteenth century, not state-based variations based in the twenty-first century. To extrapolate from the observations of Melissa Murray and Katherine Shaw, if *Roe* is understood as having inappropriately interrupted ongoing state-level debates on the issue of abortion, then a similar critique could be levied against *Bruen*.[76]

This is the kind of failing that can undermine the legitimacy of the courts at a time when public confidence in the judicial branch and the Supreme Court, in particular, is in decline.[77]

B. THE QUALITY OF REASONING

> *Roe* was . . . more than just wrong. It stood on exceptionally weak grounds.
> —*Dobbs*[78]

Assessing the quality of a judicial opinion is a subjective enterprise—a fact that Justice Alito did not miss. In attacking *Roe*'s use of history, its viability line, and its makeover of "state

https://giffords.org/lawcenter/state-laws/background-check-procedures-in-california.

71. *See Background Check Procedures in Wyoming*, GIFFORDS L. CTR. (Apr. 15, 2024), https://giffords.org/lawcenter/state-laws/background-check-procedures-in-wyoming; *Waiting Period Laws in Wyoming*, GIFFORDS L. CTR. (Dec. 31, 2023), https://giffords.org/lawcenter/ state-laws/waiting-periods-in-wyoming.

72. *See Open Carry in California*, GIFFORDS L. CTR. (Dec. 31, 2023), https://giffords.org/ lawcenter/state-laws/open-carry-in-california.

73. *Open Carry in Wyoming*, GIFFORDS L. CTR. (Dec. 31, 2023), https://giffords.org/ lawcenter/state-laws/open-carry-in-wyoming.

74. *See Assault Weapons in California*, GIFFORDS L. CTR. (Dec. 31, 2023), https://giffords.org/lawcenter/state-laws/assault-weapons-in-california.

75. *See Assault Weapons in Wyoming*, GIFFORDS L. CTR. (Apr. 15, 2024), https://giffords.org/lawcenter/state-laws/assault-weapons-in-wyoming.

76. Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 729, 758 (2024). We substituted the word "Roe" for "Obergefell" and "abortion" for "marriage equality."

77. *See, e.g.,* Shawn Patterson, Jr., et al. *The Withering of Public Confidence in the Courts,* 108 JUDICATURE 22 (2024).

78. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 270 (2022).

regulatory authority,"[79] Justice Alito leaned heavily on expert judgment. As he put it, "academic commentators, including those who agreed with [*Roe*] as a matter of policy, were unsparing in their criticism."[80] Justice Alito also brought to bear a more objective indicator: whether the decision served as a model for other jurisdictions, particularly internationally.[81]

We follow Justice Alito's lead as we tackle the job of assessing the quality of reasoning used in *Bruen.* We begin with reactions to *Bruen* in the traditional law literature. Although we highlight examples in the narrative, as did Justice Alito in his opinion, we do not cherry-pick quotes. Instead, we rely on the results of a systematic survey of the law literature, which reveals unsparing criticism of *Bruen*.

We then turn from law school professors to professional historians. Our analysis shows that few supported the outcome in *Bruen*; and many have been critical of its approach. Lower court judges have echoed the sentiment, noting that they lack the training necessary to sift through the historical materials and reach credible conclusions.

Finally, we consider two more objective indicators of the quality of reasoning. The first, mentioned by Justice Alito, is whether the decision served as a model for other jurisdictions. The second is agreement among the justices over the reasoning and outcome in the precedent-setting case. This factor goes unmentioned in *Dobbs*, but, as we explain below, it has figured prominently in other decisions overruling precedent and has been found to be an important predictor of departures from precedent in empirical studies.

1. Reaction to *Bruen* among legal academics and judges.

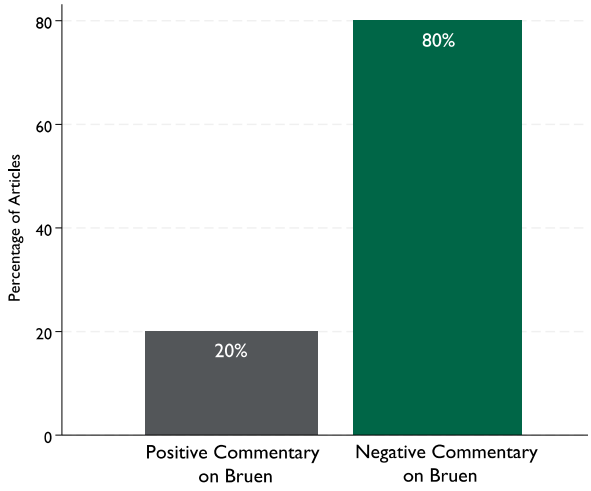
The *Dobbs* Court indicted *Roe* for having drawn "scathing scholarly criticism, even from supporters of broad access to abortion."[82] *Bruen*, too—now less than two years old—has already garnered intense criticism, even from supporters of gun rights.[83]

79. *Id.* at 250, 261, 263.
80. *Id.* at 278.
81. *Id.* at 277–78.
82. *Id.* at 270.
83. *See* Nelson Lund, Bruen*'s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279, 292 (Nov. 8, 2022), https://fedsoc.org/fedsoc-

Figure 2 depicts the results of a systematic analysis of legal commentary in the wake of *Bruen*. Specifically, we conducted a search in Lexis's law review file for the two years, between June 23, 2022 (the day the Court issued *Bruen*) through June 23, 2024, of the word "Bruen." After eliminating false positives and neutral descriptions of the decision, we were left with 133 articles that took a stand on the decision either in passing or in full.[84] We then characterized each article as negative or positive in its assessment of *Bruen*.

The weight of scholarly reaction condemns *Bruen.* Of the 133 articles, only 20% (twenty-six articles) could be deemed as positive, whether mildly or adamantly so. The remaining 80% (107 articles) range from mildly to scathingly critical.

Figure 2. *Commentary on Bruen in the 133 articles published in law reviews between June 2022 and June 2024. Each article was characterized as negative or positive.*



review/bruen-s-preliminary-preservation-of-the-second-amendment ("Even if the Supreme Court stops issuing ipse dixits that greenlight regulations a majority of the Justices don't care to call into question, all courts are going to face serious challenges in faithfully applying the Bruen test."); *see also* Brannon P. Denning & Glenn H. Reynolds, *Retconning* Heller*: Five Takes On* New York State Rifle & Pistol Association, Inc. v. Bruen, 65 WM. & MARY L. REV. 79 (2023).

84. Our analysis excludes notes and comments and included only articles written by academics (excluding, for example, heads of interest groups or attorneys without an academic affiliation).

How these numbers compare to commentary on *Roe*, we cannot say with empirical certainty. Justice Alito highlighted negative commentary on *Roe* without conducting a systematic analysis of scholarly reaction.[85] What we can say about the *Bruen* commentary is this: a healthy fraction of the articles that we coded as affirmative were focused on trying to apply *Bruen*'s approach to other types of regulation, such as AI,[86] intoxicant rules,[87] and product safety,[88] rather than defending the methodology itself.

The criticism of *Bruen*, in contrast, targets a spectrum of problems with its reasoning and effects: from the failure to honor federalism values,[89] to its treatment of race;[90] from its slipshod use

85. We are aware that some believe that *Dobbs* paid short shrift to the scholarly commentary following *Roe*. For example, Laurence Tribe recently objected to Justice Alito's quotation of him as a critic of *Roe*, because his 1973 article was "defending it as eminently right." Jess Bravin, *Harvard's Laurence Tribe Objects to Being Cited in Justice Alito's Opinion*, WALL ST. J. (June 25, 2022), https://www.wsj.com/livecoverage/supreme-court-decision-roe-v-wade-6-24-2022/card/harvard-s-laurence-tribe-dissents-at-being-cited-in-justice-alito-s-opinion-mPT1JxRcBx1hus04QWfV. Tribe asserted, "The fact that hundreds of people have come up with better ways of explaining the obvious conclusion that women own their own bodies cannot undermine the correctness of the original decision." *Id.* Because our goal here is to apply the *Dobbs* analysis rather than critique it, we focus instead on the post-*Bruen* commentary.

86. Mbilike M. Mwafulirwa, *The Automation Paradox*, 59 TULSA L. REV. 361, 368–72 (2024).

87. F. Lee Francis, *Armed and Under the Influence: The Second Amendment and the Intoxicant Rule After* Bruen, 107 MARQ. L. REV. 803 (2024).

88. Benjamin L. Cavataro, *Regulating Guns as Products*, 92 GEO. WASH. L. REV. 87, 152–53 (2024).

89. *See* Jenelle Carlin, *Correcting a Corrupt Court*, 22 SEATTLE J. SOC. JUST. 529, 545–46 (2024) ("One cannot help but wonder why the majority is comfortable strictly relying on the Constitution's language in allowing citizens to play geographical bingo when it comes to preserving their bodily autonomy, yet willingly disregards the Constitution's text in imposing sweeping nationwide protections for inanimate objects like guns."); *see also supra* Part II.A.2.

90. *E.g.,* Khiara M. Bridges, *The Supreme Court 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 33 (2022) (*Bruen* "failed to appreciate that a broad interpretation of the Second Amendment that permits the proliferation of guns in public spaces will be devastating to black communities. That is, the Court refused to recognize that allowing guns to go unregulated will inflict a racial injury on black people."); Daniel S. Harawa, *The Second Amendment's Racial Justice Complexities*, 108 MINN. L. REV. 3225, 3225 (2024) (*Bruen*'s test "disempowers Black people by tying the constitutionality of gun regulation to a time when Black people were not fully part of the polity."); Daniel S. Harawa, NYSRPA v. Bruen*: Weaponizing Race*, 20 OHIO ST. J. CRIM. L. 163, 165 (2022) ("[I]f a Black person *does* decide to carry a gun as freely as a white person, it will be at their peril. *Bruen* invokes racial justice without considering the full picture of America's racial *in*justice.").

of history[91] and its unleashing of result-oriented brute politics in the lower courts[92] to harms to public health.[93]

But a closer examination of the law commentary, both in our sample and beyond, shows much of it focused on the *ipse dixit*—found nowhere in the constitutional text, precedent or founding documents—placing a nearly insuperable burden on government to "find" an analogous restriction from the eighteenth century in support of any limit on gun ownership.[94] Scholars have bemoaned the paucity of reasoning underlying this approach, noting that it did not clearly limit itself to sources that shed light on original meaning, while still failing to provide any other method for achieving a meaningful understanding of the right that the Second Amendment confers. Constitutional theorist Adam Samaha put it this way: *Bruen*'s "claims to methodological simplicity and constraint . . . are highly implausible and seemingly incompatible with the results."[95]

One might challenge the foregoing on the ground that critiques of a pro-gun case from members of the legal academy,

91. Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797, 799 (2023) ("The historical tradition approach to constitutional law is far more complex than the Court suggests, . . . as the Court's own shoddy historical analysis in *Bruen* illustrates."); Amir H. Ali, *Forward: An Appeal to Books*, 121 MICH. L. REV. 871, 874 (2023) ("It is not surprising then that historians, who *are* expert in and have time to do history, have been underwhelmed by the Supreme Court's work. According to one historian who studies the early American history of gun regulation, *Bruen*'s analysis shows 'ignorance of basic legal historical method' and a 'shocking and amateurish use of history.'"); *see also infra* Part II.B.2.

92. Eric Ruben, Rosanna Smart & Ali Rowhani-Rahbar, *One Year Post*-Bruen, 110 VA. L. REV. ONLINE 20, 25 (2024) ("[O]ur findings suggest that *Bruen* has not meaningfully constrained judges—indeed, judicial ideology is predictive of outcomes after *Bruen* . . . ."); Jacob D. Charles, *Time and Tradition in Second Amendment Law*, 51 FORDHAM URB. L.J. 259, 276–77 (2023) ("Now, judges can survey the vast sweep of American history and set down at whichever waystation they want."); *see also infra* Part II.C.

93. Michael R. Ulrich, *Finding Balance in the Fight Against Gun Violence,* 51 J.L. MED. & ETHICS 7, 7 (2023) ("Amidst [the gun] crisis, the United States Supreme Court delivered a crushing blow to those seeking legal options to mitigate this growing threat to public health and safety."); Evan Vitiello et al., *Balancing the Roles of Clinicians and Police in Separating Firearms from People in a Dangerous Mental Health Crisis*, 51 J.L. MED. & ETHICS 93, 100 (2023) ("A public-health-focused, evidence-based approach to address America's gun violence epidemic is constrained by the U.S. Supreme Court's interpretation of the Second Amendment right to bear arms."); *see also infra* Part III.

94. *See* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1515 (2023) (criticizing *Bruen* for insufficient adherence to originalism, in particular for failure to justify use of post-ratification history and misapplying the practice of liquidation).

95. Adam M. Samaha, *Is* Bruen *Constitutional? On the Methodology that Saved Most Gun Licensing*, 98 N.Y.U. L. REV. 1928, 1949 (2023).

who tend to lean liberal and, perhaps, anti-gun, is a biased measure of the opinion's quality.[96] The point is fair and perhaps reason to discount somewhat our findings on this factor.

We note, though, that even sympathetic authors have had to work arduously to fashion an understanding of *Bruen* that is consistent with originalism. Randy Barnett and Lawrence Solum sought to achieve that feat by articulating five possible ways to understand *Bruen*'s references to "historical tradition," and methodically, by supplying their own reasoning, defending the interpretation that is most consistent with a coherent understanding of originalism.[97] William Baude and Robert Leider have tried to redeem *Bruen*'s originalism by constructing what they argue the Court "was trying to say," although acknowledging that the reasoning was "under the hood."[98] Michael McConnell, a former appeals court judge appointed by President George W. Bush and now a conservative constitutional scholar at Stanford, was harsher.[99] He was quoted as saying that, while he was "fine" with the outcome in the case, "*Bruen* is not right under its own principles. It purports to be applying originalist and historicist interpretation, and it gets it wrong."[100]

Even originalist judges have pointed out holes in the theory underlying *Bruen.* Justice Barrett, who joined Justice Thomas's opinion in *Bruen*, wrote separately to clarify that the opinion does not resolve the foundational question whether the Second Amendment right as applied to the states should be assessed according to historical traditions existing in 1791, when the Second Amendment was ratified, or 1868, when the Fourteenth Amendment was ratified and is said (as of 2010) to have incorporated the Second.[101] These failings in supplying an

96. *See* Adam Bonica et al., *The Legal Academy's Ideological Uniformity*, 47 J. LEGAL STUD. 1 (2018).

97. Randy E. Barnett & Lawrence B. Solum, *Originalism after* Dobbs, Bruen, *and* Kennedy: *The Role of History and Tradition*, 118 NW. U. L. REV. 433, 466 (2023). Lund wrote one of the early articles "[e]stablishing that the Second Amendment protects an individual's right to keep and bear arms." *See* Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 108 (1987).

98. Baude & Leider, *supra* note 30, at 1470.

99. *Michael W. McConnell*, STAN. L. SCH., https://law.stanford.edu/michael-w-mcconnell; Jesse Wegman, *The Crisis in Teaching Constitutional Law*, N.Y. TIMES (Feb. 26, 2024), https://www.nytimes.com/2024/02/26/opinion/constitutional-law-crisis-supreme-court.html.

100. Wegman, *supra* note 99.

101. New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 82 (2022) (Barrett, J.,

intellectual anchor, even to those who embrace originalism, suggest, as the *Dobbs* Court said of *Roe*, that "this elaborate scheme was the Court's own brainchild."[102]

Other judges, too, have taken aim at *Bruen*'s fealty to original public meaning by pointing out that a "list of the laws that happened to exist in the founding era is, as a matter of basic logic, not the same thing as an exhaustive account of what laws would have been theoretically believed to be permissible by an individual sharing the original public understanding of the Constitution."[103] Thus, even if one subscribes to original understanding as the proper method for interpreting constitutional rights, the simplistic examination of positive law existing at the relevant time does not serve to accomplish what is needed under an originalist analysis, namely an indication of what the original public meaning of the right would have included. That fallacy is not addressed in *Bruen*. Nor did *Bruen* anticipate the inadequacy of the Second Amendment's cost-benefit analysis—"the Second Amendment is the very *product* of an interest balancing by the people"[104]—when applied to societal benefits that were simply not recognized in 1791 or 1868, such as the state interest in protecting against domestic violence—a societal interest that has no counterpart at a time when women were not part of the polity.[105]

2. Professional historians.

Bruen's author, Justice Thomas, was not oblivious to the potential pitfalls of judges undertaking historical analysis.

concurring).

102. Dobbs v. Jackson Women's Health Org., 597 U.S 215, 271 (2022).

103. United States v. Kelly, No. 3:22-CR-00037, 2022 U.S. Dist. LEXIS 215189, at *5 (M.D. Tenn. Nov. 16, 2022).

104. *Id.* (emphasis added).

105. This was the issue addressed in *United States v. Rahimi*, where the U.S. Court of Appeals for the Fifth Circuit concluded that the lack of meaningful analogue rendered the federal disarmament statute for subjects of domestic violence protective orders unconstitutional. 61 F.4th 443 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1889 (2024), *remanded to*, 117 F.4th 331 (5th Cir. 2024); *see* Jordan J. Al-Rawi, *The Case for Relaxing* Bruen*'s Historical Analogues Test: Rahimi, Domestic Violence Regulation, and Gun Ownership*, 39 BERKELEY J. GENDER, L. & JUST. 93, 101 (2024) ("[W]hen a defect in social values affects the cost-benefit analysis performed by colonial and post-enactment legislatures and courts, modern courts should be permitted to extend their analysis of the historical record to a later date when a cost-benefit analysis concerning the societal problem was performed in a meaningful way."). While domestic violence was not unknown as a social problem at the founding, it was not addressed in regulatory form until the 1990s. *Id.* at 100–02.

Quoting Justice Scalia's concurring opinion in *McDonald v. City of Chicago*,[106] he wrote: "To be sure, '[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.'"[107] But Thomas opined that judges could overcome these difficulties by relying on the historical record developed by the parties and, presumably, amici curiae—an approach that he took in *Bruen*.[108]

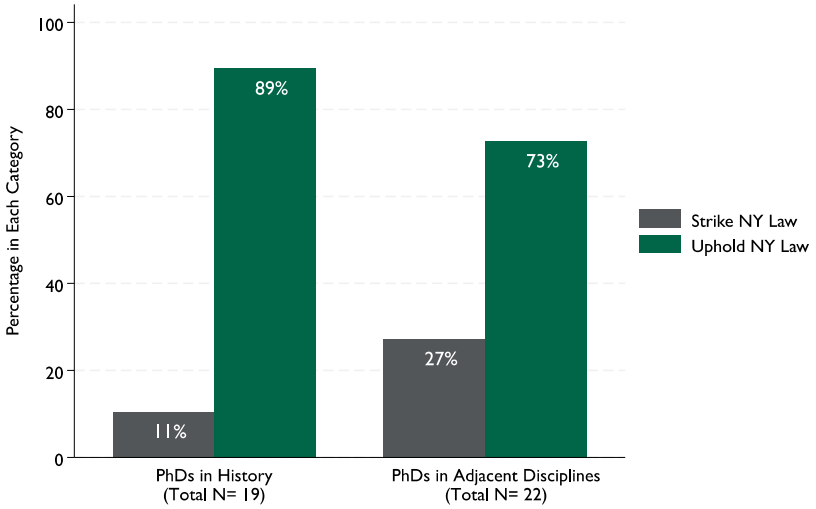
It turns out, though, that at least in *Bruen*, trained professionals in history and adjacent fields (those that also supply skills in linguistic and historical analysis) mostly argued in support of the New York law. This much Figure 3 makes clear. There we show the results of an examination of the *amici curiae* in *Bruen.* Only two of the nineteen participating PhDs in history—11%—supported invalidating New York's law; the remaining 89% (nineteen of twenty-two) filed in support of New York. Participation by PhDs in adjacent disciplines is almost as lopsided, with only six of the twenty-two (27%) filing for the pro-gun rights side.

106. 561 U. S. 742, 803–04 (2010).

107. *Bruen*, 597 U.S. at 25.

108. *Id.* at 27 ("[W]e will consider whether 'historical precedent' from before, during, and even after the founding evinces a comparable tradition of regulation. . . . [W]e find no such tradition in the historical materials that respondents and their *amici* have brought to bear on that question."); *see also id*. at 25 n.6 ("Courts are . . . entitled to decide a case based on the historical record compiled by the parties").

Figure 3. *Amici with PhDs in history and adjacent disciplines, by whether they filed for or against New York's gun law. "Adjacent disciplines" are Communications, Criminal Justice, Education, English, International Relations, Linguistics, Ministry, Philosophy, Political Science, and Sociology.*



Despite his assurances about relying on the historical record of the case, Justice Thomas cited some amicus briefs but rejected or ignored claims made in others by professionals in history and linguistics. For example, he asserted that a brief filed by Professors of History and Law, signed by eleven history PhDs working in departments at Stanford, Virginia, Chicago, and Brown, among others, "misunderstand[s]" colonial statutes.[109] Then there was a brief by experts in linguistics—three professors of linguistics and one historian, which cited systematic analysis to show that the "ordinary use of 'keep' and 'bear' arms at the founding confirms that any right to bear arms was highly regulated."[110] Thomas ignored it, despite the potential importance of linguistics to his historical formulation. In contrast, he was sufficiently impressed by an amicus filed on the other side on behalf of two law professors (one with a PhD in political science

109. *Bruen*, 597 U.S. at 47; Brief for Professors of History and Law as Amici Curiae Supporting Respondents, *Bruen*, 597 U.S. 1 (2022) (No. 20-843).

110. Brief for Corpus Linguistics Professors and Experts as Amici Curiae Supporting Respondents at 13–23, *Bruen*, 597 U.S. 1 (2022) (No. 20-843).

and the other, with a PhD in philosophy, who had been Thomas's law clerk[111]) to cite it approvingly for the proposition that "there is little evidence that authorities ever enforced surety laws."[112] That brief, we note, was condemned by a professional historian for "mischaracteriz[ing] the nature of these laws" by "misreading" them and "failing to use the standard techniques of legal history."[113]

This is the "cherry-picking" problem—the selective use of evidence to support one's claims or what some have deemed "law-office" history[114]—that so many experts in history and related fields have condemned in the Court's application of historical methods generally[115] and *Bruen*, in particular. Indeed, if the legal commentary is critical of *Bruen*, as Part II.B.1 suggests, then appraisals by trained historians are practically blistering. One referred to *Bruen* as "an ideological fantasy" whose "distortion of the historical record, misreading of evidence, and dismissal of facts . . . are genuinely breathtaking in scope."[116] Another noted scholar of early American history, with a PhD in American studies, complained that, as far as what counts as historical evidence, "[t]here is no method to it, nothing but inconsistency and caprice."[117] The Executive Director of the MacArthur Justice

111. Brief for Professors Robert Leider et al. as Amici Curiae Supporting Petitioners, *Bruen*, 597 U.S. 1 (2022) (No. 20-843); *Nelson Lund*, ANTONIN SCALIA L. SCH., https://www.law.gmu.edu/faculty/directory/fulltime/lund_nelson; *Robert Leider*, ANTONIN SCALIA L. SCH., https://www.law.gmu.edu/faculty/directory/fulltime/leider_robert.

112. *Bruen*, 597 U.S. at 58.

113. Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting*, *1328–1928*, 55 U.C. DAVIS L. REV. 2545, 2547 n.6 (2022).

114. A term coined by the historian Alfred H. Kelly, *Clio & the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.18 (1965) ("By 'law-office' history, I mean the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.").

115. An early critique is featured in Kelly's article. *Id.* A more recent assessment running along similar lines is Saul Cornell, *Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning*, 37 L. & HIST. REV. 821, 845 (2019) (Originalist theory "has made it easier, not more difficult, to cherry-pick evidence to support results-oriented outcomes and produce inaccurate accounts of the past. Until originalist scholars develop a genuinely historical approach to understanding the way the Constitution was read in the Founding Era, they will continue to distort the past, not illuminate it.").

116. Saul Cornell, *Cherry-Picked History and Ideology Driven Outcomes*: Bruen*'s Originalist Distortions*, SCOTUSBLOG (June 27, 2022), https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions.

117. Jill Lepore, *The Supreme Court's Selective Memory*, NEW YORKER (June 24, 2022), https://www.newyorker.com/news/daily-comment/the-supreme-courts-selective-memory-on-gun-rights.

Center, Amir Ali, summarized the observations of "actual experts in history" this way: "the Court's work fails basic standards for historical analysis and distorts historical facts toward a particular end. This occurs at a time when public confidence in the Supreme Court is at an all-time low, and concern for the spread of misinformation is high and rising."[118] Put simply, just as the justices "praised the objectivity of their fealty to history, they met widespread rebuke from historians."[119]

Professional historians are not alone in their dissatisfaction with *Bruen*'s history-tradition approach. Subtle and not-so-subtle whispers also slip from the many lower-court judges and magistrates on whom the brunt of implementing the decision has fallen. One bemoaned the fact that,

> To state the obvious—this Judicial Officer is not a trained historian. Historians sift through the vast historical record, applying pedagogical historical methodologies, in an effort to reconstruct, or to understand, the past. To further state the obvious, the work of a historian is unconstrained by such exigencies as the Speedy Trial Clock. Historians need not provide definitive answers because the historical materials exist in a dialectic, and may not support any one conclusion. The federal judiciary is not similarly situated. Definitive conclusions must be reached. This need to provide conclusions for Cases and Controversies, heightens the risk of biasing a federal court's historical inquiry towards a result-driven conclusion.[120]

Lower courts are increasingly finding themselves, while "operating in good faith, . . . struggling at every stage of the *Bruen* inquiry."[121] They have no guidance on such critical questions as how the government can demonstrate a sufficient "tradition" to justify a restriction: how and when a set of historical examples can be said to become a tradition, let alone the question Justice Barrett addressed about which historical period is the right one.[122] Even the foundational question of what *Bruen* means when it requires a "historical inquiry" has not been answered. "Must the

118. Ali, *supra* note 91, at 871; *see also* UCLA Luskin Center for History and Policy, *Why History Matters: Gun Violence*, THEN & NOW (Aug. 17, 2024), https://podcasts.apple.com/ us/podcast/then-now/id1506818557?i=1000652761059.

119. Ali, *supra* note 91, at 871.

120. United States v. Ryno, 675 F. Supp. 3d 993, 1003 (D. Alaska 2023).

121. United States v. Daniels, 77 F.4th 337, 358 (5th Cir. 2023) (Higginson, J., concurring), *rev'd*, 144 S. Ct. 2707 (2024) (mem.).

122. *See supra* note 102 and accompanying text.

Government provide expert testimony to prevail, or could a district court independently seek such evidence?"[123] One judge lamented that the *Bruen* inquiry "sends jurists on a quixotic journey through history."[124] Another emphasized the challenge of objectivity in seeking to find answers in the past: "It is not an easy task to make principled decisions about similarities and differences between modern regulations and laws passed hundreds of years ago, as required here. The historical record reveals no obviously correct answers."[125] Yet another disparagingly noted "the problems with *Bruen*'s game of historical Where's Waldo. . . ."[126] And still another eschewed "a PhD-level historical inquiry that necessarily will be inconclusive."[127] In short, "*Bruen*'s new legal test is ill-suited to the task."[128]

These reactions cast doubt on Thomas's rosy prediction that lower courts will have little difficulty applying the *Bruen* test with even a modicum of objectivity and professionalism.[129] As one observer put it, "we might wonder when Justice Thomas last visited an overworked and under-resourced trial court that has neither the time nor the expertise to play amateur constitutional historian."[130]

The same might be said of the Supreme Court. Professor Richard Fallon has contended that "the Justices who . . . are not trained as historians need to rely at least presumptively on [the parties]. But that [reliance] may prove more an embarrassment than an asset when the parties offer either cursory or inept briefing."[131] And "if unable to rely on the parties' briefing," Fallon continued,

123. *Daniels*, 77 F.4th at 359–60.

124. United States v. Sing-Ledezma, 706 F. Supp. 3d 650, 672 (W.D. Tex. 2023).

125. Baird v. Bonta, 706 F. Supp. 3d 1091, 1093 (E.D. Cal. 2023).

126. United States v. Love, 647 F. Supp. 3d 664, 670 (N.D. Ind. 2022).

127. Atkinson v. Garland, 70 F.4th 1018, 1025 (7th Cir. 2023) (Wood, J., dissenting).

128. United States v. Reilly, 2023 U.S. Dist. LEXIS 146106, at *3 (E.D. Okla. 2023); *see also* United States v. Bullock, 2022 U.S. Dist. LEXIS 203513, at *2 (S.D. Miss. 2022) ("The Court is not a trained historian. The Justices of the Supreme Court, distinguished as they may be, are not trained historians. We lack both the methodological and substantive knowledge that historians possess.").

129. *See also infra* Part II.C, using data to show that *Bruen*, to the extent that it has opened the door to individual judge discretion, has indeed proven unworkable.

130. Len Niehoff, *Unprecedented Precedent and Original Originalism*, 38 COMMC'N. LAW. 24, 29 (2023).

131. Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 272 (2023). For a stinging rebuke of the some of the briefs filed in *Bruen*, see Cornell, *supra* note 116.

> Justices committed to deciding every case based on original constitutional meanings would find themselves immersed in a flood of historical inquiries that even professional historians could not manage competently within the time allotted. In short, it is a virtual practical impossibility that the Supreme Court could conduct serious originalist inquiries in all of the cases on its docket.[132]

The consideration of these critiques has been aimed at assessing the quality of reasoning of the case, in order to apply the *Dobbs* criterion of how well-reasoned an opinion is as a factor for consideration in determining whether to overrule it. While assessment of quality of reasoning is necessarily dependent on a judgment call, there is widespread agreement among the reviews of *Bruen*—even by those seeking to defend it—that its reasoning is weak, in a way that is problematic for the legitimacy of the judiciary.

3. More objective indicators of weak reasoning.

These indicators of "weak reasoning" trace to scholars' and judges' subjective judgments about *Bruen*. Other measures are more objective in nature. One, mentioned by Alito, is the extent to which the precedent has served as a model for other jurisdictions. *Dobbs* put it like this, describing the viability line in *Roe v. Wade*:

> [I]t is telling that other countries almost uniformly eschew such a line. The Court thus asserted raw judicial power to impose, as a matter of constitutional law, a uniform . . . rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy.[133]

Substitute the word "guns" for "abortion," and you have a powerful statement of the state of gun regulation. Under *Bruen* the states lost their power to regulate guns based on contemporary conditions. This means that many existing laws—including regulations favored by a majority of Americans (see Figure 1)—may be called into question unless the government can find a historical analogue. Nothing even remotely like the United States's sweeping protection of gun ownership against government regulation is found anywhere else in the world.[134]

132. Fallon, *supra* note 131, at 273.

133. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 277–78 (2022).

134. Of the three countries that have constitutional protection for gun ownership

Yet another more objective approach to evaluate the strength of reasoning is the composition of the majority opinion: whether the precedent was unanimous or decided by a one-vote margin or a short-staffed court, as well as the number of concurrences.[135] The idea is that if the justices did not strongly support the reasoning in the precedent-setting decision, then their successors are "less likely to perceive the Court as credibly committed to the legal rule" it established.[136]

Justice Alito does not mention this indicator of the reasoning's quality. But his colleagues have considered it in decisions undermining precedent. To take a modern-day example, in his opinion invalidating race-based diversity programs in higher education, Chief Justice Roberts pointed to the "deeply splintered decision [in *Bakke*] that produced six different opinions."[137] Then, writing for the majority in *Loper Bright Enterprises. v. Raimondo*,[138] which overruled *Chevron U.S.A., Inc. v. Natural Resources Defense Council,*[139] the Chief noted that *Chevron* was decided "by a bare quorum of six Justices[.]"[140] Likewise, Roberts's predecessor, Chief Justice Rehnquist, observed that the two decisions the Court overruled in *Payne v. Tennessee* were "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions."[141]

Considering these statements, it is not surprising that empirical studies have found that such indicators of either weak reasoning or lack of agreement on a politically salient issue help account for the decision to depart from precedent. Depending on the study, for example, each concurring opinion increases the risk

(Guatemala, Mexico and the U.S.), only the United States's guarantee does not include a restrictive condition. Zachary Elkins, *Rewrite the Second Amendment*, N.Y. TIMES (Apr. 4, 2013), https://www.nytimes.com/2013/04/05/opinion/rewrite-the-second-amendment.html. There were once nine countries that had an explicit right to bear arms, but all but three have rescinded it. *Id.*

135. *See* Lee Epstein, William M. Landes & Adam Liptak, *The Decision to Depart (or Not) from Constitutional Precedent*, 90 N.Y.U. L. REV. 1115, 1134–36 (2015).

136. James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1096 (2001).

137. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 208 (2023).

138. 144 S. Ct. 2244 (2024).

139. 467 U.S. 837 (1984).

140. *Raimondo*, 144 S. Ct. at 2264.

141. 501 U.S. 808, 828–29 (1991). The two overruled decisions were *Booth v. Maryland,* 482 U.S. 496 (1987), and *South Carolina v. Gathers,* 490 U.S. 805 (1989).

of an overruling by over 20%.[142] A 5–4 split in the precedent-setting decision increases the risk by almost 54%, and so on.[143]

At first blush, *Bruen* does not fall into the "at-risk" category. All nine justices participated in the case; and it was decided by a 6–3 vote,[144] which could suggest some strength in its reasoning. But looking behind those votes on the judgment suggests that that number masks a material disagreement among the members of the majority as to the meaning of the opinion. *Bruen* prompted three concurring opinions joined by four justices.[145] This is way above average even for the Roberts Court,[146] a court that has hit record levels of concurring opinions and votes.[147]

Justice Kavanaugh's concurrence (joined by Chief Justice Roberts), in particular, turns back to *Heller* to emphasize limits on the majority's holding in *Bruen*. Justice Kavanaugh saw fit to quote from *Heller* its lengthy reminder that the right to bear arms is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . Nothing in our opinion should be taken to cast doubt on longstanding prohibitions. . . ."[148] Justice Kavanaugh included in his quote *Heller*'s footnote emphasizing that the list of these surviving prohibitions "does not purport to be exhaustive."[149] He went on to clarify that the right to bear arms also does not invalidate prohibitions of "dangerous and unusual weapons."[150]

142. Spriggs & Hansford, *supra* note 136, at 1105.

143. *Id.*; *see also* Christopher P. Banks, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 AKRON L. REV. 233, 241, 250 tbl.3 (1999) (finding that 36.4% of overruled cases "were decided by a bare majority (i.e., a 5–4 vote).").

144. New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 71 (2022). For purposes of comparison, *Roe* was 7–2 with 3 concurrences. Roe v. Wade, 410 U.S. 113 (1973) (containing wthe concurring opinions of Justices Burger, Stewart & Douglas).

145. See 597 U.S. at 71 (Alito, J., concurring); *id.* at 79 (Kavanaugh & Roberts, JJ., concurring); *id.* at 81 (Barrett, J., concurring).

146. During the Roberts years (2005–2024 terms), the average number of concurring opinions per case was under one (0.69) and the average number of concurring votes was one. Reported in Lee Epstein et al., *Provisional Data Report on the 2024 Term*, WASH. UNIV. 24 (July 1, 2024), https://epstein.wustl.edu/s/2024termdatareport.pdf (tables 5.3 and 5.4).

147. Adam Liptak, *In a Volatile Term, a Fractured Supreme Court Remade America,* N.Y. TIMES (July 2, 2024), https://www.nytimes.com/2024/07/02/us/politics/supreme-court-term-decisions.html.

148. *Bruen*, 597 U.S. at 81 (Kavanaugh, J., concurring) (internal quotations omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 636 (2008)).

149. *Id.* (internal quotations omitted) (quoting *Heller*, 554 U.S. at 627 n.26).

150. *Id.* (internal quotations omitted) (quoting *Heller*, 554 U.S. at 627).

Thus, two of the majority Justices are on record as adopting a view in conflict with two central features of the *Bruen* majority opinion: its sweeping scope and its disregard of state interests. In addition, Justice Alito insisted, in his concurrence, that the Court has not "disturbed anything that we said in *Heller* or *McDonald* . . . about restrictions that may be imposed on the possession or carrying of guns."[151] That means that on the central question of how absolute the right originally recognized in *Heller* will be going forward, at least three justices (plus the three in dissent) do not sign on to the largesse of the *Bruen* majority.

Whatever this may mean for interpreting *Bruen* in future cases, it shows that the reasoning is not solidly adhered to by a strong majority of justices, and thus is not entitled to any strong presumption against overruling. Indeed, lower court judges have pointed out this lack of uniformity within the majority as they tackle the daunting job of applying the rule of *Bruen*.[152]

C. WORKABILITY

> [T]he undue-burden standard was not "built to last."
> —*Dobbs*[153]

The *Dobbs* Court made "workability" a central feature of any decision to overrule precedent, defined as "whether the rule it imposes . . . can be understood and applied in a consistent and predictable manner."[154] As *Dobbs* elaborated, this consideration involves whether the application of the rule is "open to reasonable

151. *Id.* at 72 (Alito, J., concurring).

152. *E.g.*, United States v. Robinson, 2023 U.S. Dist. LEXIS 7440, at *2 (W.D. Mo. 2023) ("[A] [m]ajority of the Justices indicated *Bruen* does not invalidate *Heller*'s statements regarding the lawfulness of statutes prohibiting felons from possessing firearms. See (Kavanaugh, J., concurring, joined by Roberts, C.J.); . . . (Breyer, J., dissenting, joined by Sotomayor and Kagan, JJ.)."); United States v. Price, 111 F.4th 392, 418 (4th Cir. 2024) ("Though [in *Bruen*] they joined the majority, several Justices emphasized in separate writings that limits on the right to bear arms stem from historical tradition, not the amendment's broad text. . . . (Kavanaugh, J., concurring) (endorsing the use of history 'to determine exceptions to broadly worded constitutional rights'); . . . (Barrett, J., concurring) (asserting that the Court uses history to identify the 'original contours' of the right to bear arms)."); United States v. Hampton, 676 F. Supp. 3d 283, 300 (S.D.N.Y. 2023) ("[S]ix of the nine Justices authored or joined separate opinions which, among other things, noted that *Bruen* does not disrupt or abrogate *Heller* and *McDonald*'s endorsements of felon-in-possession laws.").

153. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 284 (2022) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 965 (1992) (Rehnquist, C.J., concurring in part and dissenting in part)).

154. *Id.* at 280–81.

debate,"[155] contains "vague terms,"[156] causes "confusion and disagreement"[157] among Supreme Court justices, "has generated a long list of Circuit conflicts,"[158] and has led lower courts to "criticize[] the assignment while reaching unpredictable results."[159] Failure of a legal standard to satisfy the workability criterion threatens the integrity of the rule of law because "[c]ontinued adherence to [that standard] would undermine, not advance, the evenhanded, predictable, and consistent development of legal principles."[160] The *Dobbs* Court concluded that *Casey's* "undue burden" test (replacing *Roe's* trimester framework) was "'plucked from nowhere,'" and had proved to be unworkable, thus vulnerable to overruling—indeed demanding it.[161]

Has *Bruen* fared better? Justice Thomas thought it would. He claimed that his approach in *Bruen*—"reliance on history to inform the meaning of constitutional text"—is "more legitimate, and more administrable" than the standard means-ends analysis that the lower courts deployed to implement *Heller.*[162] "[J]udge-empowering 'interest-balancing inquiry,'"[163] he asserted, asks judges to "make difficult empirical judgments about the costs and benefits of firearms restrictions especially given their lack of expertise."[164]

The data we collected on lower federal court decisions in Second Amendment-related litigation from 2000 to 2023, however, suggest the opposite.[165] In contradiction of Justice

155. *Id.* at 281.
156. *Id.* at 282.
157. *Id.* at 283.
158. *Id.* at 284.
159. *Id.* at 285.
160. *Id.* at 286 (internal quotations omitted) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).
161. *Id.* (quoting Planned Parenthood v. Casey, 505 U.S. 833, 965 (1992) (Rehnquist, C.J., concurring in part and dissenting in part)).
162. New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 25 (2022).
163. *Id.* at 22 (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).
164. *Id.* at 25 (internal quotations omitted) (quoting McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2010)).
165. To create the dataset we used Lexis and Westlaw to search on the term "Second Amendment." We looked at citations to four key cases: United States v. Miller, 307 U.S. 174 (1939), District of Columbia v. Heller, 554 U.S. 570 (2008), McDonald v. City of Chicago, 561 U.S. 742 (2010), and New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). We included in the dataset all gun-rights related decisions that Lexis categorized as "reported" (as of June 2024) in the federal district courts and courts of appeals, excluding *en banc* decisions in the courts of appeals and magistrate judges' decisions in the district courts.

Thomas's claims, the data show that the switch from *Heller*'s means-ends test to *Bruen*'s history-tradition methodology was less "administrable" in the sense that relative to the *Heller* years, *Bruen* is associated with an *increase*, not decrease, in individual judge discretion. Specifically, we found that personal factors, like gender and partisanship, significantly shaped judicial behavior in the post-*Bruen* era in ways they did not during the *Heller* years.[166]

Consider first, Figure 4, which shows votes in favor of gun rights in the federal circuit and district courts by the gender of the judge. Across all the decisions, male judges supported the claim in 22% of the cases versus 15% for the female judges[167]—no surprise considering surveys of U.S. adults showing that women favor gun regulation at significantly higher rates than do men.[168] It is also no surprise that votes in favor of gun rights increased for both male and female judges after *Heller* and again after *Bruen.* The Court's doctrinal changes were designed to induce these results—*Heller* by first recognizing an individual right to gun ownership, and *Bruen* by eliminating the use of means-ends scrutiny.

Gun-rights related decisions are those that implicate the Second Amendment (the majority of cases in the dataset), as well decisions that are Second Amendment–adjacent, such as decisions on standing or ineffective counsel in the face of a Second Amendment claim. See Joseph Blocher & Noah Levine, *Constitutional Gun Litigation Beyond the Second Amendment*, 77 N.Y.U. ANN. SURV. AM. L. 175 (2022), for the kinds of gun-rights claims that derive from the Second Amendment.

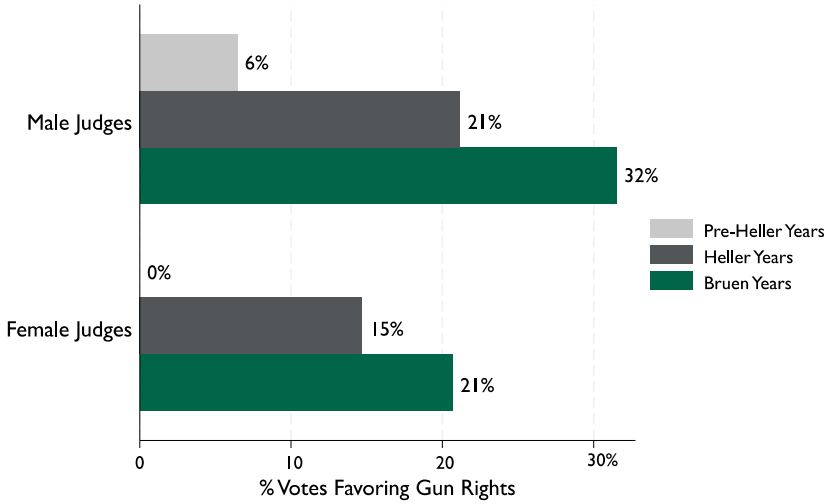
For each case, we noted whether the court held in favor of the gun-rights claim. We checked our data and coding against data collected by other scholars: Adam M. Samaha, Roy Germano, Eric Ruben, Joseph Blocher, Rosanna Smart, and Ali Rowhani-Rahbar. Virtually no differences emerged in the coding of case outcomes: pro- or anti- the gun claim. We also recorded the names of the participating judge(s) and whether they voted in favor of the claim. Finally, using the Federal Judicial Center's Biographical Directory, we added background information on each judge, including their date of birth, gender, and the identity and party of the appointing president.

166. On the partisanship results, see Rebecca Brown, Lee Epstein & Mitu Gulati, *Guns, Judges and Trump*, 74 DUKE L.J. ONLINE (forthcoming 2024) (manuscript at 13 fig.5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4873330.

167. This is a statistically significant difference, at $p \leq 0.05$.

168. *E.g.,* a 2023 Pew Research poll finds that 64% of women but only 51% of men favor stricter gun control laws. Schaeffer, *supra* note 67.

Figure 4. *Percentage of federal judges' votes favoring gun rights in reported Second Amendment–related decisions by doctrinal era and gender, 2000–2023.*



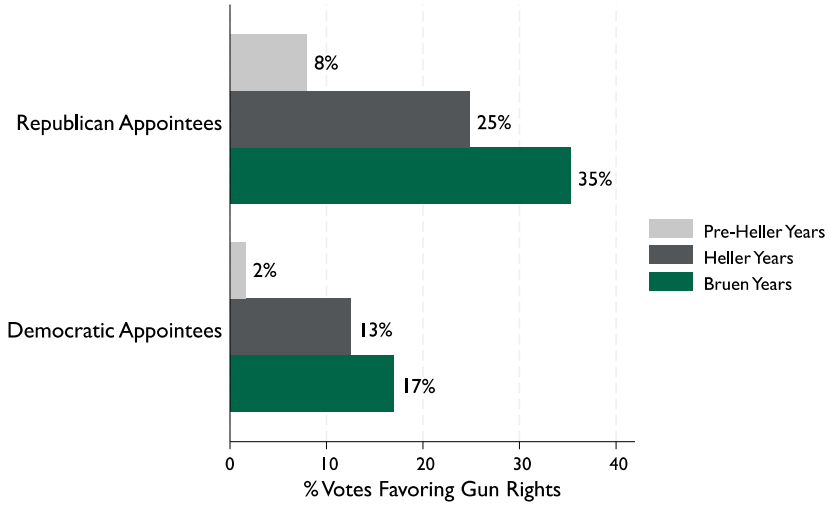
Then again, Figure 4 reveals some differences that might come as news to the *Bruen* Court. Start with the post-*Heller* (but before *Bruen*) years: *both* male and female judges were *significantly* more likely than pre-*Heller* to hold for the gun rights claim: for the men, from 6% to 21%; for the women, from 0% to 15%. Now look at the move from *Heller* to *Bruen.* Male judges increased their support for gun rights claims after *Bruen* by eleven percentage points, a statistically significant increase. Female judges, in contrast, showed no significant difference in their support for gun rights pre- and post-*Bruen*.

The suggestion here is that legally extraneous considerations were not cabined post-*Bruen*. Male judges, always more favorable toward gun rights, pushed *Bruen*'s history-and-tradition approach in their favored direction, while the female judges exercised their discretion against so doing.

Now consider the judges' partisanship, as measured by the party affiliation of their appointing president. At first glance, the story is much the same as it is for gender. In each doctrinal era, as Figure 5 shows, Republican judicial appointees voted more frequently in favor of gun rights than Democratic appointees. These results too reflect difference in the population. On average,

Americans who self-identify as Republicans are less likely to favor stricter gun laws than are Democrats.[169]

Figure 5. *Percentage of federal judges' votes favoring gun rights in reported Second Amendment–related decisions by doctrinal era and the party of the appointing president, 2000–2023.*



But the question of interest here is whether *Bruen* affected the partisans differently. The answer, as Figure 5 suggests, appears to be yes: Republican support for gun claims increased by ten percentage points post-*Bruen*, while the increase for Democratic judges was only four percentage points. This finding stands in contrast to the era begun by *Heller*, when judges of both parties moved *significantly* in the direction of pro-gun rights. In other work, we have shown that the comparison between the means-ends test widely used after *Heller* and the history-and-tradition test used in *Bruen* demonstrates an indeterminacy in the *Bruen* test that increases judicial discretion rather than diminishing it.[170] For example, our data show that male judges

169. *E.g.,* a 2023 Gallup poll shows that 88% of Democratic respondents, but only 26% of Republicans, favor stricter gun laws. Jeffrey M. Jones, *Majority in U.S. Continues to Favor Stricter Gun Laws*, GALLUP (Oct. 31, 2023), https://news.gallup.com/poll/513623/majority-continues-favor-stricter-gun-laws.aspx.

170. *See* Rebecca L. Brown, Lee Epstein & Mitu Gulati, *The Constraining Effect of "History and Tradition": A Test*, 713 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI., 200 (June 13, 2025).

(statistically more likely to favor gun rights than female) pushed *Bruen*'s history-and-tradition approach significantly more in the direction of gun rights than did the female judges, while the means-ends test post-*Heller* had had a more constraining effect on both male and female judges.[171]

Thus, *Bruen* appears to have created an environment in which those judges inclined to give a robust reading to the Second Amendment have had the latitude to do so and those inclined to be more reluctant to recognize gun rights have also had the freedom to follow their predispositions using the *Bruen* test.

Our data show that lower-court judges have been unable to give *Bruen* any kind of consistent application, and worse, have exploited the ambiguity and uncertainty created by the *Bruen* methodology to reach outcomes about when and whether a fundamental right exists based on personal considerations, including ideology.[172]

The chaos has not gone unnoticed. Concurring in *United States v. Rahimi*—decided two years after *Bruen*—Justice Jackson observed, "[t]he message that lower courts are sending now in Second Amendment cases could not be clearer. They say there is little method to *Bruen*'s madness."[173] Indeed, the judicial expressions of frustration with *Bruen*'s test have become so legion that Jackson was moved to devote a long footnote to listing a number of them.[174] Different judges have noted, for example, that Bruen "dismantles workable methods";[175] that courts, "operating in good faith, are struggling at every stage of the *Bruen* inquiry";[176] that there is no "clear guidance as to how analogous modern laws

171. *Id.*

172. *See* Brown, Epstein & Gulati, *supra* note 166 (manuscript at 17–23). There, we show that Trump-appointed judges, in particular, are driving the large differences between the parties. This may be explained by the fact that Trump was the first (and so far only) Republican president to appoint judges since the Supreme Court recognized an individual right to gun ownership in 2008, and thus those judges are likely to have been selected in part for their favorable views on gun rights. *Bruen* gave them the opportunity to act on those views. *See also* Randy E. Barnett & Nelson Lund, *Implementing* Bruen, LAW & LIBERTY (Feb. 6 2023), https://lawliberty.org/implementing-bruen ("The historical-practice standard established by [*Bruen*] is proving to be manipulable in the lower courts.").

173. 144 S.Ct. 1889, 1927 (2024) (Jackson, J., concurring).

174. *Id.* at 1927 n.1.

175. State v. Wilson, 543 P.3d 440, 453 (Haw. 2024).

176. United States v. Daniels, 77 F.4th 337, 358 (5th Cir. 2023) (Higginson, J., concurring).

must be to founding-era gun laws . . . caus[ing] disarray among the lower courts."[177]

Considering the growing commentary, supported by our data, it is difficult to escape the conclusion that the history-tradition test created in *Bruen* fares far worse than the overruled abortion decisions did on the "workability" scale.

D. "DISRUPTIVE EFFECT ON OTHER AREAS OF THE LAW"

> When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine has failed to deliver the principled and intelligible development of the law that stare decisis purports to secure.
> —*Dobbs*[178]

The *Dobbs* opinion suggested that a precedent's effect on other areas of law bears on whether it should be overruled. This is not a universally recognized consideration in the stare decisis literature, but its use by Justice Alito in defending the overruling of *Roe* is instructive.[179]

Justice Alito's opinion condemned *Roe* and *Casey* as having led to the distortion of many important but unrelated doctrines, including standing and res judicata principles as well as canons of statutory interpretation and First Amendment doctrines.[180] The suggestion is that, in an effort to protect the right to abortion, majorities of the Court had stretched to strike down statutes allegedly infringing that right, inflicting collateral damage on rules that would have counseled not doing so. Justice Alito's support

177. United States v. Bartucci, 658 F. Supp. 3d 794, 800 (E.D. Cal. 2023).

178. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 287 (2022) (internal quotations omitted) (quoting June Med. Servs. v. Russo, 591 U.S. 299, 346 (2020) (Roberts, C.J., concurring)).

179. Alito relied for this proposition on a concurring opinion by Justice Kavanaugh in another case, *Ramos v. Louisiana*, 590 U.S. 83, 115–16 (2020) (Kavanaugh, J., concurring in part). But he intoned only part of what Justice Kavanaugh wrote in that opinion. In addition to jurisprudential consequences of a challenged precedent, Justice Kavanaugh wrote that "[i]mportantly, the Court may also scrutinize the precedent's real-world effects on the citizenry, not just its effects on the law and the legal system." *Id.* at 122. The real-world effect of *Roe* and its overruling were explicitly disavowed by Justice Alito as he terminated a right that had been considered fundamental for fifty years. *Dobbs*, 597 U.S. at 288–89 (denying Court's role in adjudicating "impassioned and conflicting arguments about the effects of the abortion right on the lives of women."). *Infra* Part III takes up Kavanaugh's invitation to consider "real-world effect" when deciding whether to overrule precedent.

180. *Dobbs*, 597 U.S. at 286–87.

for this critique of *Roe* and *Casey* came entirely from dissenting opinions in which the dissenters accused the Court of overreaching[181]—a common accusation by dissenters in any type of split decision. But we take it at face value and consider whether the same distortions can be laid at the feet of *Bruen*.

Bruen is so new that the Supreme Court has applied it but once, and in that case retreated somewhat from *Bruen*,[182] and so has not had occasion to distort any other areas of law. Thus an investigation of an analogous trend will have to wait. But *Bruen* has so energized some judges eager to promote gun rights that we do already see extraordinary procedural moves to protect them.

Two cases before the U.S. Supreme Court involving statutory interpretation of gun regulations give a hint of this. The first began as *Garland v. VanDerStok*, in which a federal district court in Texas invalidated a federal regulation that would have imposed requirements on the sale of so-called "ghost guns."[183] These are firearms assembled easily with kits, available through the mail, and contain no serial numbers that law enforcement typically uses to trace guns used in crime.[184] The dispute centers on whether these gun kits fall within the statutory definition of "firearm" such that the federal government may regulate them.[185]

The case has already given rise to a slew of startling procedural moves that have kept the emergency docket hopping: a district judge's national injunction against enforcement of an

181. *Id.* at 286–87 nn.61–65.

182. The majority opinion in *Rahimi* purported to follow *Bruen*, but it is clear that the individual Justices' inflections of the *Bruen* test were different, as the Court found sufficient "common-sense" analogues to the federal law, while only Justice Thomas, who authored *Bruen*, would have rejected those analogues as he did in *Bruen*. Individual justices read the *Bruen* test through their own lenses. Justices Sotomayor and Kagan saw *Bruen* as requiring a "shared principle" with historical examples, United States v. Rahimi, 144 S. Ct. 1889, 1904 (2024) (Sotomayor & Kagan, JJ., concurring); Justice Gorsuch sought a "comparable burden," comparably justified, *id.* at 1907 (Gorsuch, J., concurring); Justice Kavanaugh sought laws that were "relevantly similar," *id.* at 1923 (Kavanaugh, J., concurring); Justice Barrett looked to history to "reveal a principle, not a mold," *id.* at 1925 (Barrett, J., concurring); Justice Jackson sought an outcome that comported with the "*principles* underlying the Second Amendment," *id.* at 1929 (Jackson, J., concurring). It happened that in this case, eight of the justices reached an overlapping conclusion under the specific facts regarding the disarming of a person found to be dangerous. But there is little, if anything, in *Rahimi* to reassure us that *Bruen* has become any more concrete or objective for future cases.

183. VanDerStok v. Garland, 86 F.4th 179 (5th Cir. 2023), *cert. granted*, 144 S. Ct. 1390 (2024).

184. *Id.* at 185.

185. *Id.*

entire federal regulation, even including its unchallenged provisions;[186] an appellate court's stay of the part enjoining unchallenged portions;[187] a Supreme Court stay of the district court's judgment pending appeal;[188] a grant by the district court of a new partial injunction against applying the regulation to certain persons,[189] later narrowed by the court of appeals to parties to the case;[190] a decision by the U.S. Supreme Court vacating the injunction in its entirety[191]—all before consideration of the merits. It is evident that a zeal for striking down gun regulations is inspiring unconventional procedures, to say the least. That case was ultimately decided by the Court in favor of the government, and gave rise to five separate opinions filed along with the majority opinion.[192]

In the other case, *Cargill v. Garland*, decided by the Court at the end of the 2023 Term, a dissenting Court of Appeals judge had accused the majority of abusing the rule of lenity when it applied that rule to dictate that a "bump stock" cannot be included in the statutory definition of machine gun, in conflict with every other circuit court that had considered the statutory question.[193] Thus, according to the dissent (which is the indicator used in *Dobbs* for this type of phenomenon), the "new lenity regime" was used "to legalize an instrument of mass murder. . . . giving machinegun owners immunity from prosecution that is not shared by other offenders under the federal code."[194] This is just the kind of casualty of legal doctrines in the effort to protect gun rights that concerned Justice Alito in the Court's erstwhile efforts to protect abortion rights.[195] The Supreme Court has since affirmed the decision regarding bump stocks, and this time the dissent insists that the Court's zeal to strike down a gun restriction led it to cast aside the ordinary meaning of the statute.[196] This, too, is the kind

186. VanDerStok v. Garland, 625 F. Supp. 3d 570, 586–87 (N.D. Tex. 2022).

187. *See VanDerStok*, 86 F.4th at 186–87, 196–97, and procedural history described therein.

188. *See* Garland v. Vanderstok, 144 S. Ct. 44 (2023) (mem.).

189. *See* VanDerStok v. BlackHawk Mfg. Grp., Inc., 692 F. Supp. 3d 616, 646 (N.D. Tex. 2023).

190. *See VanDerStok*, 86 F.4th at 196–97.

191. *See* Garland v. Blackhawk Mfg. Grp., Inc., 144 S. Ct. 338 (2023) (mem.).

192. *See* Bondi v. VanDerStok, 604 U.S. ___ (2025).

193. Cargill v. Garland, 57 F.4th 447, 480–83 (5th Cir. 2023) (Higginson, J., dissenting).

194. *Id.* at 483.

195. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 286–87 (2022).

196. *See* Garland v. Cargill, 144 S. Ct. 1613, 1627–28 (2024) (Sotomayor, J., dissenting).

of move that Justice Alito identified as problematic with the right to abortion.

It will take time to ascertain whether the Supreme Court will engage in distortion of other doctrines in support of the right to bear arms. But even now, it is possible to detect other kinds of spillover effects emerging in the lower courts. Litigants are making arguments, sometimes successful, that the right recognized in *Bruen*—and, more significantly, the methodology used to get there—affects the way that other constitutional provisions are understood and applied. In one case, for example, a carjacking defendant sought to use *Bruen* to call into question the constitutionality of the federal carjacking statute under Congress's commerce power.[197] He argued that the lack of historical analogue for the federal prohibition's manner of incorporating a firearm into the offense created tension with the *Bruen* framework, even for Commerce Clause analysis.[198]

Another inchoate trend has *Bruen* affecting Fourth Amendment jurisprudence. Courts have begun to narrow the grounds on which police can justify a *Terry* stop or probable cause to arrest. In a recent district court decision in Illinois, the court held that, in light of *Bruen*, "the mere presence of a concealed weapon, without more, cannot support a reasonable suspicion that the suspect is illegally carrying that gun."[199] Similarly, a district court in New York has held that, because of *Bruen*, an officer did not have probable cause for an arrest of a person wielding a gun in public.[200] While the limited stop and frisk first authorized by *Terry* was justified primarily by concerns about safety of officers,[201] *Bruen* changes the analysis to focus only on the *legality* of the suspect's gun possession, whether or not dangerous under the circumstances.[202]

Criminal defendants are currently invoking *Bruen* to support a claim of ineffective assistance of counsel under the Sixth

197. United States v. Flores, 2023 U.S. Dist. LEXIS 103138 (S.D. Tex. 2023).

198. *Id.* The effort was not successful before the district court, on the ground that circuit precedent had upheld this statute. *Id.* at *2.

199. United States v. Jones, 708 F. Supp. 3d 1365, 1375 (N.D. Ill. 2023).

200. United States v. Homer, 715 F. Supp. 3d 413, 416–17, 419 (E.D. N.Y. 2024).

201. Terry v. Ohio, 392 U.S. 1, 24 (1968) ("[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest.").

202. *See, e.g.*, *Homer*, 715 F. Supp. 3d at 417–20.

Amendment;[203] a claim of "legal innocence" sufficient to justify withdrawal of a guilty plea;[204] and a reduction in sentence.[205] Even a civil plaintiff has sought to leverage *Bruen* to undergird a "chilling" or "retaliation" claim—analogous to those recognized under the First Amendment—against a city that allegedly named him as a person of interest in a shooting, for carrying around an AR-15 style assault weapon, which he claimed it was his Second Amendment right to do.[206] Consequently, there is fertile ground for *Bruen* to spread its tendrils into an array of other constitutional and non-constitutional landscapes, depending on how receptive the courts are to these arguments. This, on its own, is not a powerful indicator of vulnerability to overruling. But the way that the courts, and especially the Supreme Court, respond to these various arguments in the future will indicate whether the case starts to undermine the "principled and intelligible development of the law that stare decisis purports to secure," in Justice Alito's words.[207]

E. "ABSENCE OF CONCRETE RELIANCE"

> [T]his Court is ill-equipped to assess generalized assertions about the national psyche.
> —*Dobbs*[208]

The final factor identified in *Dobbs* for justifying the overruling of a precedent is consideration of reliance interests. Justice Kavanaugh had explained, in a prior case, that this consideration "focuses on the legitimate expectations of those who have reasonably relied on the precedent. In conducting that

203. *See* Calton v. United States, 2023 U.S. Dist. LEXIS 157036, at *1–2 (N.D. Ohio 2023) (holding that defendant charged with felon-in-possession-of-firearm, seeking habeas relief on the ground that counsel's failure to advise him about *Bruen* constituted ineffective assistance, was procedurally barred).

204. *See* United States v. Malone, 2023 U.S. Dist. LEXIS 162836, at *3–6 (E.D. Va. 2023) (rejecting argument that defendant charged with felon-in-possession-of-firearm was raising a claim of "innocence" based on *Bruen*'s alleged invalidation of the statute, in support of his motion to withdraw his guilty plea).

205. United States v. Norman, 2023 U.S. Dist. LEXIS 172285, at *4–5 (N.D. Ohio 2023) (rejecting, on the merits, defendant's *Bruen*-based motion to reduce his sentence for a felon-in-possession charge, but acknowledging split in the circuits).

206. Segler v. City of Detroit, 2023 U.S. Dist. LEXIS 162436, at *16–17 (E.D. Mich. 2023) (finding qualified immunity in the city's actions).

207. *Dobbs*, 597 U.S. at 287 (internal quotations omitted) (quoting June Med. Servs. v. Russo, 591 U.S. 299, 375–76 (2020) (Thomas, J., dissenting)).

208. *Id.* at 288 (internal quotations omitted) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 957 (1992) (Rehnquist, C.J., concurring in part and dissenting in part)).

inquiry, the Court may examine a variety of reliance interests and the age of the precedent, among other factors."[209] Justice Alito concluded in *Dobbs* that society's reliance on the forty-nine-year-old right to terminate a pregnancy was not strong, finding that overruling *Roe* and *Casey* would not "upend substantial reliance interests" like "those that develop in cases involving property and contract rights."[210]

Famously, the prior case of *Planned Parenthood v. Casey* had dwelt extensively on the very question of reliance as it affects the right to abortion specifically. There, the Court found the necessary reliance in the "ability of women to participate equally in the economic and social life of the Nation [which] has been facilitated by their ability to control their reproductive lives."[211] *Dobbs* took issue with this analysis and rejected that form of reliance as dependent on "an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society."[212] Thus, reliance on an established individual right did not outweigh the other indicators supporting the elimination of that right, in the Court's view.

The reliance interests involved in the case of *Bruen* are different. First, overruling *Bruen* (but not *Heller*) would not remove the right altogether as did the overruling of *Roe* in *Dobbs*. Rather, it would return the law to the post-*Heller* world in which a right existed and gun regulations were assessed under the two-step means-ends scrutiny that had prevailed prior to *Bruen*. Thus, any showing of reliance on *Bruen* to support its survival would require a demonstration of reliance interests representing the *difference* between the gun rights after *Heller* and gun rights after *Bruen*. This is a daunting concept even to imagine, let alone to prove. Criminal defendants are increasingly taking scattershot aim at all laws involving guns, and they are winning some and losing some. But there is no indication that any person has a

209. Ramos v. Louisiana, 590 U.S. 83, 122 (2020) (Kavanaugh, J., concurring in part).

210. *Dobbs*, 597 U.S. at 287–88 (internal quotations omitted) (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991).

211. Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992).

212. *Dobbs*, 597 U.S. at 288. The Court did not note that research can be found, for example, in Gretchen Sisson et al., Adoption Decision Making Among Women Seeking Abortion, 27 WOMEN'S HEALTH ISSUES, 136, 139 (2017). *See Dobbs*, 597 U.S. at 397 n.17 (Breyer, Sotomayor, and Kagan, JJ., dissenting); *see also* DIANA GREENE FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION (2020).

personal reliance interest specifically in the chaotic *Bruen* regime, which still raises more questions than it answers.

Moreover, the age of a case is relevant to the assessment of societal reliance on it. Justice Scalia expounded this idea in a 2009 decision,[213] overruling *Michigan* v. *Jackson*, a 1986 decision:[214]

> Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned. The first two cut in favor of abandoning *Jackson:* The opinion is only two decades old, and eliminating it would not upset expectations. Any criminal defendant learned enough to order his affairs based on the rule announced in *Jackson* would also be perfectly capable of interacting with the police on his own.[215]

If overruling a two-decades-old decision is insufficient to "upset expectations," claims of reliance on the two-year-old regime under *Bruen* are likely elusive.

Interests of the state, on the other hand, in having their legitimate safety concerns taken into account to some degree in the constitutional analysis, may amount to a reliance interest in the prior approach to Second Amendment claims, which assessed their interests under means-ends scrutiny. Recall that *Bruen* outright jettisoned all consideration of contemporary state interests in safety.[216] To the extent that reliance interests play any role in the consideration of *Bruen's* status, therefore, those of individual rights-holders are weak, short-term and speculative, while the interest of states in participating in the gun policy arena are strong, longstanding and concrete. We return to this theme in the next Part. For now suffice it to quote one scholar:

> Gun ownership is as old as the country. But so are laws restricting guns and other dangerous weapons, which have adapted to changes in threats to public safety. If this history teaches anything, it is that the state has no less an abiding interest in preserving public safety today by restricting the tools that magnify violence than it did in prior centuries.[217]

213. Montejo v. Louisiana, 556 U.S. 778 (2009).

214. 475 U.S. 625 (1986).

215. *Montejo*, 556 U.S. at 792–93.

216. *See supra* Part. I.A.1.

217. Robert J. Spitzer, *Understanding Gun History after* Bruen*: Moving Forward by Looking Back*, 51 FORDHAM URB. L.J. 57, 104 (2023).

If reliance interests are taken seriously, then, there is reason to rethink the central tenet of *Bruen*, that consideration of the state interests is "one step too many."[218] The Court's zeal to mold gun rights into a "super-right"[219] that overrides all possible state interests in health and safety has prompted many criticisms about reasoning, legal legitimacy, federalism and judicial supremacy. It has thus undermined the widespread efforts that have been made since *Heller* to reconcile Second Amendment rights with gun safety laws.[220] *Bruen* has taken those conciliation efforts backwards with one step too many.

III. "REAL-WORLD EFFECTS ON THE CITIZENRY"

We have ticked off the five factors on Justice Alito's list for overruling a precedent. But there is an additional consideration not explicitly contemplated in *Dobbs*: what Justice Kavanaugh, in a concurring opinion in *Ramos v. Louisiana*, termed "the precedent's real-world effects on the citizenry, not just its effects on the law and the legal system."[221] As Justice Kavanaugh framed it, this is *not* a consideration of his own devising. Real-world effects figured prominently in several landmark decisions overruling precedent, including *Brown v. Board of Education*.[222] In *Brown*, the Court invoked social science evidence to show that *Plessy v. Ferguson*'s[223] "separate but equal" doctrine "generates a feeling of inferiority" among pre-college students "as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[224]

218. New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 19 (2022).

219. *See* Bridges, *supra* note 90, at 70 (arguing that *Bruen* has made the Second Amendment the "most protected of rights in the Constitution.").

220. *See* Johns Hopkins, *The Public Health Approach to Prevent Gun Violence*, JOHNS HOPKINS: BLOOMBERG SCH. PUB. HEALTH, https://publichealth.jhu.edu/center-for-gun-violence-solutions/research-reports/the-public-health-approach-to-prevent-gun-violence; *see also* Off. U.S. Surgeon Gen., *Advisory on Firearm Violence: A Public Health Crisis in America*, U.S. DEP'T HEALTH & HUM. SERVS. 6, 21 (2024), https://www.hhs.gov/sites/default/files/firearm-violence-advisory.pdf (concluding that "the rate of firearm-related deaths in our nation has been rising and reached a near three-decade high in 2021," with gun access a significant contributing factor).

221. 590 U.S. 83, 122 (2020) (Kavanaugh, J., concurring in part).

222. 347 U.S. 483 (1954).

223. 163 U.S. 537 (1896).

224. *Brown,* 347 U.S. at 494. Consider too W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943), overruling Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), which had upheld a regulation requiring children in public schools to salute the American flag. In *Barnette*, the Court took lessons from historical episodes to show the disastrous real-world

Following Justice Scalia's lead in *Heller*,[225] such real-world effects went (mostly) unmentioned by Justice Thomas in *Bruen*.[226] But two real-world consequences of *Bruen* come to mind. The first centers on the Supreme Court's legitimacy. There seems to be little doubt now that when the justices consistently rule against the desires of the public, the people's trust in the Court takes a dive.[227] Without public support, the Court risks its legitimacy. And without legitimacy, the rule of law is at risk.

This is perhaps one reason Justice Alito refrained from listing real-world consequences from his list of overruling considerations: At least since Gallup started asking the question in 1989, a majority of Americans have never supported overruling *Roe*. As Gallup summarized the data, since 1989 through 2021, "between 52% and 66% of U.S. adults have wanted to maintain the landmark abortion decision."[228] Immediately after *Dobbs*, 58% of Americans disapproved of *Roe*'s overturning.[229] By 2023, the percentage rose to sixty-one.[230] *Brown,* by the way, elicited the

consequences of attempts to promote national unity by suppressing dissent. 319 U.S. at 636–37.

225. Heller v. District of Columbia, 554 U.S. 570, 636 (2008) ("We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem. . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table.").

226. The exception is a footnote Thomas dropped in response to the dissent, which identified studies showing the real-world effects of "shall-issue" licensing laws on violent crime. Thomas criticized the dissent for detailing this evidence rather than providing a "governing legal framework." New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17, n.3 (2022).

227. *See, e.g.,* Christopher D. Johnston et al., *Ideology, the Affordable Care Act Ruling, and Supreme Court Legitimacy*, 78 PUB. OP. Q. 963, 970 (2014) (finding that "the ACA decision seemed to influence opinions of Supreme Court legitimacy" for some respondents); Joshua Boston & Christopher N. Krewson, *Public Approval of the Supreme Court and Its Implications for Legitimacy*, 77 POL. RSCH. Q. 835, 846 (2024) ("[P]erceptions of legitimacy react to the Court's salient decisions and vacancies."). Even doubters of this proposition have changed their tune, especially in the wake of *Dobbs*. *See, e.g.*, James L. Gibson, *Losing Legitimacy: The Challenges of the* Dobbs *Ruling to Conventional Legitimacy Theory*, 68 AM. J. POL. SCI. 1041, 1041 (2024) (an analysis undermining a key finding of his previous work, that "displeasure with a Supreme Court ruling typically has negligible consequences for institutional support").

228. Lydia Saad, *Americans Still Oppose Overruling* Roe v. Wade, GALLUP (June 9, 2021), https://news.gallup.com/poll/350804/americans-opposed-overturning-roe-wade.aspx.

229. Mark Murray, *Poll: 61% of Voters Disapprove of Supreme Court Decision Overturning* Roe, NBC NEWS (June 22, 2023), https://www.nbcnews.com/meet-the-press/first-read/poll-61-voters-disapprove-supreme-court-decision-overturning-roe-rcna90415.

230. *Id.* Gallup asked a question about overruling *Roe* in May 2022 (before the Court's

opposite response. Although backlash to the decision in the South is undeniable, immediately after *Brown* Gallup found that 55% of Americans approved of the decision, and 40% disapproved. The approval percentage continued to rise, such that by *Brown*'s fortieth anniversary, the approval percentage was at eighty-seven.[231]

We do not know how *Brown* affected public trust in the Supreme Court—no reliable opinion polls existed back then. But with regard to *Dobbs*, overruling *Roe* was so unpopular that respected scholars have demonstrated that *Dobbs* itself likely "eroded the public's trust and confidence in the U.S. Supreme Court."[232]

What of *Bruen*? We identified only one credible public opinion poll specifically asking about the case, but it was fielded before the Court issued its decision.[233]

What we can say so far is that public opinion supports regulations on guns that go well beyond what might be permitted under the restrictive analysis of *Bruen*. For example, as Figure 1 above shows, 64% percent of Republicans and 85% of Democrats favor raising the age limit for owning a semi-automatic weapon from eighteen to twenty-one—that amounts to 72% of all respondents. But it is questionable whether *Bruen* would allow such a restriction. In 2023, a federal district court struck down a law prohibiting eighteen-to-twenty-year-olds from purchasing handguns from federally licensed dealers.[234] Citing *Bruen*, the

decision) in which 63% of respondents thought it was a "bad thing" to overrule *Roe* and allow states to establish their own abortion policies. Megan Brenan, *Steady 58% of Americans Do Not Want* Roe v. Wade *Overturned*, GALLUP (June 2, 2022), https://news.gallup.com/poll/393275/steady-americans-not-roe-wade-overturned.aspx.

231. Joseph Carroll, *Race and Education 50 Years After* Brown v. Board of Education, GALLUP, (May 14, 2004), https://news.gallup.com/poll/11686/race-education-years-after-brown-board-education.aspx.

232. Patterson et al., *supra* note 77, at 25; *see also* Gibson, *supra* note 227, at 1041–42.

233. Stephen Jessee et al., *What Do the American People Think About the 2021-2022 Supreme Court Cases?*, PROJECTS HARV. (June 6, 2022), https://projects.iq.harvard.edu/files/scotus-poll/files/scotuspoll-summary2022.pdf. Another poll, conducted by Marquette Law School, has been seriously questioned if not discredited. *See* Andrew Willinger, Bruen*, Public Opinion, and Survey Design*, DUKE CTR. FOR FIREARMS L. (Dec. 8, 2022), https://firearmslaw.duke.edu/2022/12/bruen-public-opinion-and-survey-design (finding that the poll's question asked whether Respondents favored or opposed the Second Amendment protection of the right to carry a gun outside the home in some circumstances, which was not litigated in *Bruen*).

234. Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 672 F. Supp. 3d 118 (E.D. Va. 2023).

court wrote that the government failed because it was unable to present "any evidence of age-based restrictions on the purchase or sale of firearms from the colonial era, Founding, or early Republic."[235]

Whether and how the Supreme Court will decide that issue is a mystery, in light of the indeterminacy of the *Bruen* standard. But the larger issue is this: No matter how the question is asked, Americans want stricter gun laws.[236] And so the potential implications of the Court's repeated invalidation of such laws under *Bruen* could be as devastating to its legitimacy as *Dobbs* was.

The second potential real-world consequence of *Bruen* is more obvious but harder to pin down: its effect on gun violence. Justice Breyer devoted a substantial portion of his dissent reciting statistics and studies on gun crime;[237] and Justice Alito spent a substantial portion of his concurrence presenting evidence to the contrary.[238] To Justice Breyer, guns have led to violent crime; to Justice Alito, guns have allowed Americans to protect and defend themselves. In Breyer's world, guns make the United States more dangerous; in Alito's version, guns make the United States a safer place.

We are not going to resolve this debate here. But we note that the most definitive study to date, produced by a non-partisan organization in 2024, shows that some restrictions on guns, including waiting periods and background checks, reduce homicides and suicides, while some permissive policies, such as stand-your-ground laws, lead to upticks.[239] Most relevant here, the

235. *Id.* at 143. Another district court judge followed suit a few months later, also invalidating the federal law on *Bruen* grounds. Brown v. BATFE, 704 F. Supp. 3d 687, 703–06 (N.D. W.Va. 2023).

236. To provide a few examples:

- A 2023 Gallup poll asked whether "you feel that the laws covering the sale of firearms should be made more strict, less strict or kept as they are now?" and 56% said more strict. *Guns*, GALLUP, https://news.gallup.com/poll/1645/guns.aspx.
- A 2023 Pew survey asked whether "it is too easy to legally obtain a gun in this country" and 61% said it was too easy. Schaeffer, *supra* note 67.
- A 2023 CNN poll found that 64% of respondents favored stricter gun control laws. Ariel Edwards-Levy, *CNN Poll: Most Americans Want Stricter Gun Control, but They're Divided on Whether Guns Make Public Places Safer*, CNN (May 26, 2023), https://www.cnn.com/2023/05/26/politics/cnn-poll-gun-laws/index.html.

237. *See* New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 83–90 (2022) (Breyer, J., dissenting).

238. *Id.* at 72–76 (Alito, J., concurring).

239. Rosanna Smart et al., *The Science of Gun Policy*, RAND (July 16, 2024),

study concludes that "shall-issue" concealed-carry laws—such as those insisted upon by *Bruen*—"increase total homicides, firearm homicides, and other violent crime."[240]

Perhaps future studies will contest this and other findings about the effectiveness of regulations on gun violence. But the larger point is that under the *Heller* means-ends approach, governments were invited to present real-world contemporary studies to support their restrictions; challengers could do the same to undermine the restrictions. This kind of evidence is standard fare in disputes over laws burdening other liberties and should be considered when deciding whether a precedent needs to be overruled. Without taking account of contemporary societal conditions, the continued "application of the Court's understanding of the history and tradition of gun control in this country [could have] disastrous consequences."[241]

IV. WHAT SHOULD THE COURT DO?

This article has used theory, doctrine, and data about the impact of *Bruen* to voice a reminder about the important values that underlie the rule of stare decisis—a principle designed to maintain consistency, discourage personal bias, and uphold the legitimacy of the judiciary. The Court invoked those values in supporting its decision to overrule *Roe v. Wade*. But the same institutional considerations, if taken seriously, lead to a similar outcome with regard to *Bruen*. Unlike the overruling of *Roe*, however, this analysis does not lead to an outright elimination of the constitutional right at stake. It merely calls out for a more coherent framework for applying the right recognized in *Heller*.

Specifically, the *Dobbs* Quintet of considerations condemns the history-tradition test that *Bruen* introduced for the enforcement of Second Amendment rights—the quixotic search for analogues from prior centuries and the disregard of contemporary state regulatory interests. The history-and-tradition approach fails the *Dobbs* test because it is damaging to the democratic process, it is poorly reasoned, unworkable, with collateral harm to other areas of law, and enjoys minimal, if any,

https://www.rand.org/pubs/research_reports/RRA243-9.html.

240. *Id.*

241. Jack M. Beermann, *The Immorality of Originalism*, 72 CATH. U. L. REV. 445, 464 (2023).

reliance by rights holders. We argue that the worst failing of the *Bruen* test is that it lacks the intelligibility and workability that allow lower courts to apply it in an evenhanded and predictable way. Instead, its opacity invites partisan application, which is the last effect that the Supreme Court of the United States should seek to cause, especially with regard to a fundamental right. It is a threat to the rule of law.

Therefore, the Court should overrule *Bruen* and begin to construct a coherent analysis for gun rights that adheres more faithfully to the traditional analysis afforded all important constitutional rights, entailing the use of means-ends scrutiny along the lines of what the courts of appeals adopted after *Heller*. Courts of appeals should continue to resist the historical test because its demands are deeply inconsistent with the obligations of judges to decide cases impartially and objectively. History and tradition regarding the use and regulation of firearms in this country can have a place in the analysis, but not at the expense of all consideration of current societal needs. That is what the balance referred to as ordered liberty seeks to achieve: it is "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[242] That balance has "regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."[243] The Court must supply standards for the lower courts to apply without inviting bias, and it can certainly do so in ways that do not shatter the core tradition of constitutional scrutiny.

The most important element of a revised *Bruen* test would be an opportunity for courts to consider evidence of contemporary state interests in the law that they passed. The absence of contemporary public interest in the analysis of gun rights dooms *Bruen* to be "trapped in amber," a result the justices claim to reject.[244] In addition, there should be investigation into the effects of gun laws, in an effort to engender—beyond the gut level—analysis of narrow tailoring and effectiveness of laws, which should be part of the scrutiny. This is an issue on which empirical studies would go a long way toward limiting the free-wheeling claims that have characterized much gun litigation on both sides.

242. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).
243. *Id.*
244. *See* United States v. Rahimi, 144 S. Ct. 1889, 1897 (2024).

We close by looking at where the Court has left us. In its first post-*Bruen* case to interpret the Second Amendment, *United States v. Rahimi*, the Court upheld a federal law disarming those who have been the subject of a domestic violence restraining order.[245] A majority of eight justices found common ground in upholding the statute, with only Justice Thomas (the author of *Bruen*) dissenting. *Rahimi* side-stepped the most extreme reading of *Bruen* but did nothing to quell the vast discretion that *Bruen* bestowed upon judges eager to inject the law with their partisan views on gun rights.

The *Rahimi* decision did two significant things. First, it missed an opportunity to refine and improve *Bruen* by disavowing the "historical analogue" approach, instead cobbling together a splintered majority of justices whose idiosyncratic readings of *Bruen* happened to bring them to the same outcome in the one case. They did nothing to assist the lower courts.

A close look at each of the separate opinions in *Rahimi* reveals a wide divergence of views about the nature of the right at issue and what *Bruen* demands of a state to justify restricting gun rights in the name of public safety. Justices Sotomayor and Kagan, both of whom dissented in *Bruen*,[246] wrote separately in *Rahimi* to emphasize their view that "[r]ather than asking whether a present-day gun regulation has a precise historical analogue, courts applying *Bruen* should 'consider whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition.'"[247] This appears to run *counter* to the heart of the *Bruen* test. Justice Gorsuch, who concurred in upholding the statute, and Justice Thomas, who alone dissented,[248] both purported to apply the *Bruen* test robustly, with opposite results. Gorsuch acknowledged that "reasonable minds can disagree whether [the statute] is analogous to past practices originally understood to fall outside the Second Amendment's scope."[249] Justice Kavanaugh wrote a paean to the importance of history to interpretation and concluded that the regulation at issue was consistent with tradition, but did not apply the historical test as

245. *Id.* at 1889.

246. New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 84 (2022).

247. *Rahimi*, 144 S. Ct. at 1904 (Sotomayor & Kagan, JJ., concurring) (quoting *Bruen*, 597 U.S. at 30).

248. *Id.* at 1930 (Thomas, J., dissenting).

249. *Id.* at 1909 (Gorsuch, J., concurring).

Bruen articulated it.[250] Justice Barrett's concurrence pointed out many flaws with *Bruen's* test, but found that this case could be resolved without addressing them.[251] And Justice Jackson bemoaned the problems of workability in the *Bruen* test, alarmed that "the Rule of Law suffers."[252] So, with *Rahimi*, the justices have simply left the *Bruen* test to steep in its own indeterminacy, with no consensus on how to salvage the history-and-tradition test.

The second important effect of *Rahimi* is perhaps even more significant. True to a pattern we have identified across other areas of law,[253] the Court continued to burnish its own dominance over national policy in the United States by insisting on a "test" for gun regulation that, at the end of the day, only the Supreme Court can apply definitively, and has been shown here to incite partisan application. Thus, the Court has ensured that it alone can always have the last word on which laws do and which don't pass muster. The Court has guaranteed that it labors under no real constraint in making this final determination;[254] the Imperial Supreme Court[255] lives on.

250. *Id*. at 1923 (Kavanaugh, J., concurring).

251. *Id*. at 1925–26 (Barrett, J., concurring).

252. *Id*. at 1929 (Jackson, J., concurring).

253. *See* Rebecca L. Brown & Lee Epstein, *Is the US Supreme Court a Reliable Backstop for an Overreaching US President? Maybe, but Is an Overreaching (Partisan) Court Worse?*, 53 PRESIDENTIAL STUD. Q. 234, 247–50 (2023) (showing the Roberts Court's increasing tendency to preserve itself as the final decider in cases involving executive power).

254. To borrow from Jeff Powell, the Court might as well be determining the constitutionality of laws according to "the length of the Chancellor's foot." H. Jefferson Powell, *"Cardozo's Foot": The Chancellor's Conscience and Constructive Trusts*, 56 LAW & CONTEMP. PROBS. 7 (1993).

255. *See* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 98–113 (2022) (showing a trend of Supreme Court taking power from all other entities to itself).