AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/ Guns

**New York State Rifle & Pistol Association v. Bruen, \_\_\_ U.S. \_\_\_** (2022)

*Members of the New York State Rifle & Pistol Association wished to obtain state license to carry a concealed pistol or revolver in public. New York law permitted the police to issue such licenses only if a person had a “proper cause” for wishing to carry a concealed weapon. Persons applying for licenses had to “demonstrate a special need for self-protection distinguishable from that of the general community.” The New York Rifle & Pistol Association filed a lawsuit against Kevin Bruen, the Superintendent of the New York State Police, claiming this requirement was unconstitutional under the Second Amendment as incorporated by the due process clause of the Fourteenth Amendment. The local district court dismissed the lawsuit and that decision was sustained by the Court of Appeals for the Second Circuit. The New York State Rifle & Pistol Association appealed to the Supreme Court of the United States.*

*The Supreme Court reversed the lower federal courts by a 6-3 vote. Justice Clarence Thomas’s majority opinion held that persons had a right to bear arms, even if they could not demonstrate special conditions in their case. Why does Thomas find a constitutional right to bear arms in public? Does Justice Stephen Breyer disagree with this analysis? Does such a right exist? The majority opinion distinguishes between “shall” requirements and “may” requirements. What is that distinction? Is that distinction sound? Chief Justice Roberts insists that “shall” rules are constitutional. Are all “shall” rules constitutional? Could a state forbid persons under twenty-one from obtaining a license (which is a “shall” rule)? Thomas claims that the proper test for a constitutional rule is whether history justifies restrictions. Breyer insists on a means-ends analysis. What arguments do they make for their preferred mode of analysis? Which mode of analysis is truer to judicial practice? Which mode of analysis do you prefer?*

JUSTICE THOMAS delivered the opinion of the Court.

In *District of Columbia*v. *Heller* (2008), and *McDonald* v. *Chicago* (2010), we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. In this case, petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for their self-defense. We too agree, and now hold, consistent with *Heller*and *McDonald*, that the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home. . . . Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State’s licensing regime violates the Constitution.

. . .

In*Heller* and *McDonald*, we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. In doing so, we held unconstitutional two laws that prohibited the possession and use of handguns in the home. . . . In keeping with *Heller*, we hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”

Since *Heller*and *McDonald*, the two-step test that Courts of Appeals have developed to assess Second Amendment claims proceeds as follows. At the first step, the government may justify its regulation by “establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood.” . . . At the second step, courts often analyze “how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on that right.”

Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment’s text, as informed by history. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.

In *Heller*, we began with a “textual analysis” focused on the “ ‘normal and ordinary’ ” meaning of the Second Amendment’s language.. That analysis suggested that the Amendment’s operative clause—“the right of the people to keep and bear Arms shall not be infringed”—“guarantee[s] the individual right to possess and carry weapons in case of confrontation” that does not depend on service in the militia.

. . . .

After holding that the Second Amendment protected an individual right to armed self-defense, we also relied on the historical understanding of the Amendment to demark the limits on the exercise of that right. We noted that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” . . . We assessed the lawfulness of that handgun ban by scrutinizing whether it comported with history and tradition. . . . [W]e did not engage in means-end scrutiny when resolving the constitutional question. Instead, we focused on the historically unprecedented nature of the District’s ban, observing that “[f]ew laws in the history of our Nation have come close to [that] severe restriction.” . . .

As the foregoing shows, *Heller*’s methodology centered on constitutional text and history. Whether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny.

. . . .

This Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment, to which *Heller*repeatedly compared the right to keep and bear arms.  In that context, “[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”  In some cases, that burden includes showing whether the expressive conduct falls outside of the category of protected speech. And to carry that burden, the government must generally point to *historical* evidence about the reach of the First Amendment’s protections.

. . . .

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.”  But reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than asking judges to “make difficult empirical judgments” about “the costs and benefits of firearms restrictions,” especially given their “lack [of] expertise” in the field.

If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of “intermediate scrutiny” often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here. The Second Amendment “is the very *product* of an interest balancing by the people” and it “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms” for self-defense.  It is this balance—struck by the traditions of the American people—that demands our unqualified deference.

The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment’s text and historical understanding. In some cases, that inquiry will be fairly straightforward. For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.

. . . .

New York’s proper-cause requirement concerns the same alleged societal problem addressed in *Heller*: “handgun violence,” primarily in “urban area[s].” *Ibid.* Following the course charted by *Heller*, we will consider whether “historical precedent” from before, during, and even after the founding evinces a comparable tradition of regulation.  And, as we explain below, we find no such tradition in the historical materials that respondents and their *amici* have brought to bear on that question. See Part III–B, *infra*.

While the historical analogies here and in *Heller*are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution—and a Second Amendment—“intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” *McCulloch* v. *Maryland* (1819) (emphasis deleted). Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated

We have already recognized in *Heller* at least one way in which the Second Amendment’s historically fixed meaning applies to new circumstances: Its reference to “arms” does not apply “only [to] those arms in existence in the 18th century.” 554 U. S., at 582. “Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Ibid.* (citations omitted). Thus, even though the Second Amendment’s definition of “arms” is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense.

Much like we use history to determine which modern “arms” are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are “relevantly similar.” . . .

While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller*and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen’s right to armed self-defense. . . . To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not “uphold every modern law that remotely resembles a historical analogue,” because doing so “risk[s] endorsing outliers that our ancestors would never have accepted.”  On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.

. . . . Although we have no occasion to comprehensively define “sensitive places” in this case, we do think respondents err in their attempt to characterize New York’s proper-cause requirement as a “sensitive-place” law. In their view, “sensitive places” where the government may lawfully disarm law-abiding citizens include all “places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available.”. But expanding the category of “sensitive places” simply to all places of public congregation that are not isolated from law enforcement defines the category of “sensitive places” far too broadly. Respondents’ argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss in detail below. Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a “sensitive place” simply because it is crowded and protected generally by the New York City Police Department.

. . . .

Nothing in the Second Amendment’s text draws a home/public distinction with respect to the right to keep and bear arms. As we explained in *Heller*, the “textual elements” of the Second Amendment’s operative clause— “the right of the people to keep and bear Arms, shall not be infringed”—“guarantee the individual right to possess and carry weapons in case of confrontation.” . . . . This definition of “bear” naturally encompasses public carry. Most gun owners do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table. Although individuals often “keep” firearms in their home, at the ready for self-defense, most do not “bear” (*i.e.*,carry) them in the home beyond moments of actual confrontation. To confine the right to “bear” arms to the home would nullify half of the Second Amendment’s operative protections.

Moreover, confining the right to “bear” arms to the home would make little sense given that self-defense is “the *central component* of the [Second Amendment] right itself.”  After all, the Second Amendment guarantees an “individual right to possess and carry weapons in case of confrontation,”  and confrontation can surely take place outside the home.

. . . .

[W]hen it comes to interpreting the Constitution, not all history is created equal. “Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.”  The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years. It is one thing for courts to “reac[h] back to the 14th century” for English practices that “prevailed up to the ‘period immediately before and after the framing of the Constitution.’ ”  It is quite another to rely on an “ancient” practice that had become “obsolete in England at the time of the adoption of the Constitution” and never “was acted upon or accepted in the colonies.”

. . . .

Similarly, we must also guard against giving postenactment history more weight than it can rightly bear. . . . [W]e recognize that “where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.” But to the extent later history contradicts what the text says, the text controls. “ ‘[L]iquidating’ indeterminacies in written laws is far removed from expanding or altering them.”

. . .

A final word on historical method: Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second. Nonetheless, we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government. And we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791

. . . .

Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms. But apart from a handful of late-19th-century jurisdictions, the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.[9](https://1.next.westlaw.com/Document/Ic7b02ce9f2fa11eca841d44555f1c91a/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad74037000001819108d740307785e2%3Fppcid%3D167499c6111a406faed9d2243bf632a9%26Nav%3DCASE%26fragmentIdentifier%3DIc7b02ce9f2fa11eca841d44555f1c91a%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=d1e17072907babf38832fbdc1c176e3f&list=CASE&rank=1&sessionScopeId=25990436f0690cd2a5e33703f47920005ad28c073cb757a5df7009817b6fda26&ppcid=167499c6111a406faed9d2243bf632a9&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_BI5b16cd2de0eb11ec9f24ec7b211d8087_9) We conclude that respondents have failed to meet their burden to identify an American tradition justifying New York’s proper-cause requirement. Under *Heller*’s text-and-history standard,the proper-cause requirement is therefore unconstitutional.

. . . .

When handguns were introduced in England during the Tudor and early Stuart eras, they did prompt royal efforts at suppression. . . . But Henry VIII’s displeasure with handguns arose not primarily from concerns about their safety but rather their inefficacy. Henry VIII worried that handguns threatened Englishmen’s proficiency with the longbow—a weapon many believed was crucial to English military victories in the 1300s and 1400s, including the legendary English victories at Crécy and Agincourt. . . .

. . . .

When we look to the latter half of the 17th century, respondents’ case only weakens. As in *Heller*, we consider this history “[b]etween the [Stuart] Restoration [in 1660] and the Glorious Revolution [in 1688]” to be particularly instructive. During that time, the Stuart Kings Charles II and James II ramped up efforts to disarm their political opponents, an experience that “caused Englishmen . . . to be jealous of their arms. . . . Parliament responded by writing the “predecessor to our Second Amendment” into the 1689 English Bill of Rights, guaranteeing that “Protestants . . . may have Arms for their Defence suitable to their Conditions, and as allowed by Law.” . . .

. . . Serjeant William Hawkins, in his widely read 1716 treatise, confirmed that “no wearing of Arms is within the meaning of [the Statute of Northampton], unless it be accompanied with such Circumstances as are apt to terrify the People.” . . . Thus, whatever place handguns had in English society during the Tudor and Stuart reigns, by the time we reach the 18th century—and near the founding—they had gained a fairly secure footing in English culture.

At the very least, we cannot conclude from this historical record that, by the time of the founding, English law would have justified restricting the right to publicly bear arms suited for self-defense only to those who demonstrate some special need for self-protection.

. . .

In the colonial era, respondents point to only three restrictions on public carry. For starters, we doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation. . . . Far from banning the carrying of any class of firearms, they merely codified the existing common-law offense of bearing arms to terrorize the people, as had the Statute of Northampton itself. . . .

Regardless, even if respondents’ reading of these colonial statutes were correct, it would still do little to support restrictions on the public carry of handguns *today*. At most, respondents can show that colonial legislatures sometimes prohibited the carrying of “dangerous and unusual weapons”—a fact we already acknowledged in *Heller*. Drawing from this historical tradition, we explained therethat the Second Amendment protects only the carrying of weapons that are those “in common use at the time,” as opposed to those that “are highly unusual in society at large.” Whatever the likelihood that handguns were considered “dangerous and unusual” during the colonial period, they are indisputably in “common use” for self-defense today. They are, in fact, “the quintessential self-defense weapon.

The third statute invoked by respondents was enacted in East New Jersey in 1686. It prohibited the concealed carry of “pocket pistol[s]” or other “unusual or unlawful weapons,” and it further prohibited “planter[s]” from carrying all pistols unless in military service or, if “strangers,” when traveling through the Province. These restrictions do not meaningfully support respondents. The law restricted only concealed carry, not all public carry, and its restrictions applied only to certain “unusual or unlawful weapons,” including “pocket pistol[s].” . . . [A]although the “planter” restriction may have prohibited the public carry of pistols, it did not prohibit planters from carrying long guns for self-defense—including the popular musket and carbine. . . . .

. . . . A by-now-familiar thread runs through these three statutes: They prohibit bearing arms in a way that spreads “fear” or “terror” among the people. . . . Thus, all told, in the century leading up to the Second Amendment and in the first decade after its adoption, there is no historical basis for concluding that the pre-existing right enshrined in the Second Amendment permitted broad prohibitions on all forms of public carry. . . . [S]tate courts recognized that the common law did not punish the carrying of deadly weapons *per se*, but only the carrying of such weapons “for the purpose of an affray, and in such manner as to strike terror to the people.”  Therefore, those who sought to carry firearms publicly and peaceably in antebellum America were generally free to do so.

*Statutory Prohibitions*. In the early to mid-19th century, some States began enacting laws that proscribed the concealed carry of pistols and other small weapons. As we recognized in *Heller*, “the majority of the 19th-century courts to consider the question held that [these] prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.” . . . In fact, however, the history reveals a consensus that States could *not*ban public carry altogether. Respondents’ cited opinions agreed that concealed-carry prohibitions were constitutional only if they did not similarly prohibit *open* carry. . . .

. . . .

. . . . While New York presumes that individuals have *no* public carry right without a showing of heightened need, the surety statutes *presumed* that individuals had a right to public carry that could be burdened only if another could make out a specific showing of “reasonable cause to fear an injury, or breach of the peace.” As William Rawle explained in an influential treatise, an individual’s carrying of arms was “sufficient cause to require him to give surety of the peace” only when “attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them.”

. . . .

To summarize: The historical evidence from antebellum America does demonstrate that *the manner* of public carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying. Finally, States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly*.*

. . . .

. . . . Even before the Civil War commenced in 1861, this Court indirectly affirmed the importance of the right to keep and bear arms in public. Writing for the Court in *Dred Scott*v. *Sandford* (1857), Chief Justice Taney offered what he thought was a parade of horribles that would result from recognizing that free blacks were citizens of the United States. If blacks were citizens, Taney fretted, they would be entitled to the privileges and immunities of citizens, including the right “to keep and carry arms *wherever they went*.”  Thus, even Chief Justice Taney recognized (albeit unenthusiastically in the case of blacks) that public carry was a component of the right to keep and bear arms—a right free blacks were often denied in antebellum America.

. . . . On July 6, 1868, Congress extended the 1866 Freedmen’s Bureau Act, see 15 Stat. 83, and reaffirmed that freedmen were entitled to the “full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security . . . *including the constitutional right to keep and bear arms*.” . . . Of course, even during Reconstruction the right to keep and bear arms had limits. But those limits were consistent with a right of the public to peaceably carry handguns for self-defense. For instance, when General D. E. Sickles issued a decree in 1866 pre-empting South Carolina’s Black Codes—which prohibited firearm possession by blacks—he stated: “The constitutional rights of all loyal and well- disposed inhabitants to bear arms will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons. . . . And no disorderly person, vagrant, or disturber of the peace, shall be allowed to bear arms.” . . .

. . . .

Respondents and the United States, however, direct our attention primarily to two late-19th-century cases in Texas. In 1871, Texas law forbade anyone from “carrying on or about his person . . . any pistol . . . unless he has reasonable grounds for fearing an unlawful attack on his person.”. The Texas Supreme Court upheld that restriction in *English*v. *State* (1871). . . . We acknowledge that the Texas cases support New York’s proper-cause requirement, which one can analogize to Texas’ “reasonable grounds” standard. But the Texas statute, and the rationales set forth in *English* and *Duke*, are outliers. In fact, only one other State, West Virginia, adopted a similar public-carry statute before 1900.

. . . . Finally, respondents point to the slight uptick in gun regulation during the late-19th century—principally in the Western Territories. As we suggested in *Heller*, however,late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence. . . . These territorial restrictions fail to justify New York’s proper-cause requirement for several reasons. First, the bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry. For starters, “[t]he very transitional and temporary character of the American [territorial] system” often “permitted legislative improvisations which might not have been tolerated in a permanent setup.” . . . The exceptional nature of these western restrictions is all the more apparent when one considers the miniscule territorial populations who would have lived under them. . . . Put simply, these western restrictions were irrelevant to more than 99% of the American population. We have already explained that we will not stake our interpretation of the Second Amendment upon a law in effect in a single State, or a single city, “that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms” in public for self-defense. . . . .

. . . [B]ecause these territorial laws were rarely subject to judicial scrutiny, we do not know the basis of their perceived legality. . . . Absent any evidence explaining *why* these unprecedented prohibitions on *all* public carry were understood to comport with the Second Amendment, we fail to see how they inform “the origins and continuing significance of the Amendment.” Finally, these territorial restrictions deserve little weight because they were—consistent with the transitory nature of territorial government—short lived. Some were held unconstitutional shortly after passage. . . . Beyond these Territories, respondents identify one Western State—Kansas—that instructed cities with more than 15,000 inhabitants to pass ordinances prohibiting the public carry of firearms. By 1890, the only cities meeting the population threshold were Kansas City, Topeka, and Wichita. See Compendium of the Eleventh Census: Even if each of these three cities enacted prohibitions by 1890, their combined population (93,000) accounted for only 6.5% of Kansas’ total population.  Although other Kansas cities may also have restricted public carry unilaterally,[32](https://1.next.westlaw.com/Document/Ic7b02ce9f2fa11eca841d44555f1c91a/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad74037000001819108d740307785e2%3Fppcid%3D167499c6111a406faed9d2243bf632a9%26Nav%3DCASE%26fragmentIdentifier%3DIc7b02ce9f2fa11eca841d44555f1c91a%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=d1e17072907babf38832fbdc1c176e3f&list=CASE&rank=1&sessionScopeId=25990436f0690cd2a5e33703f47920005ad28c073cb757a5df7009817b6fda26&ppcid=167499c6111a406faed9d2243bf632a9&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_BI5b16cd2de0eb11ec9f24ec7b211d8087_32) the lone late-19th-century state law respondents identify does not prove that Kansas meaningfully restricted public carry, let alone demonstrate a broad tradition of States doing so.

. . . .

The constitutional right to bear arms in public for self-defense is not “a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.”  We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant’s right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.

New York’s proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

JUSTICE ALITO, concurring.

. . . .

Although *District of Columbia v. Heller* (2008) concerned the possession of a handgun in the home, the key point that we decided was that “the people,” not just members of the “militia,” have the right to use a firearm to defend themselves. And because many people face a serious risk of lethal violence when they venture outside their homes, the Second Amendment was understood at the time of adoption to apply under those circumstances. The Court’s exhaustive historical survey establishes that point very clearly, and today’s decision therefore holds that a State may not enforce a law, like New York’s Sullivan Law, that effectively prevents its law-abiding residents from carrying a gun for this purpose.

That is all we decide. Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller* or *McDonald*v.*Chicago* (2010), about restrictions that may be imposed on the possession or carrying of guns.

In light of what we have actually held, it is hard to see what legitimate purpose can possibly be served by most of the dissent’s lengthy introductory section. Why, for example, does the dissent think it is relevant to recount the mass shootings that have occurred in recent years?  Does the dissent think that laws like New York’s prevent or deter such atrocities? Will a person bent on carrying out a mass shooting be stopped if he knows that it is illegal to carry a handgun outside the home? . . . The dissent cites the large number of guns in private hands—nearly 400 million—but it does not explain what this statistic has to do with the question whether a person who already has the right to keep a gun in the home for self-defense is likely to be deterred from acquiring a gun by the knowledge that the gun cannot be carried outside the home. . . .

. . . .

Ordinary citizens frequently use firearms to protect themselves from criminal attack. According to survey data, defensive firearm use occurs up to 2.5 million times per year. A Centers for Disease Control and Prevention report commissioned by former President Barack Obama reviewed the literature surrounding firearms use and noted that “[s]tudies that directly assessed the effect of actual defensive uses of guns . . . have found consistently lower injury rates among gun-using crime victims compared with victims who used other self-protective strategies.” . . .

. . . .

This brings me to Part II–B of the dissent,  which chastises the Court for deciding this case without a trial and factual findings about just how hard it is for a law-abiding New Yorker to get a carry permit. The record before us, however, tells us everything we need on this score. At argument, New York’s solicitor general was asked about an ordinary person who works at night and must walk through dark and crime-infested streets to get home.

The solicitor general was asked whether such a person would be issued a carry permit if she pleaded: “[T]here have been a lot of muggings in this area, and I am scared to death.”  The solicitor general’s candid answer was “in general,” no. *Ibid.*To get a permit, the applicant would have to show more—for example, that she had been singled out for attack.  A law that dictates that answer violates the Second Amendment.

My final point concerns the dissent’s complaint that the Court relies too heavily on history and should instead approve the sort of “means-end” analysis employed in this case by the Second Circuit. . . . This mode of analysis places no firm limits on the ability of judges to sustain any law restricting the possession or use of a gun.

. . . .

*Heller* correctly recognized that the Second Amendment codifies the right of ordinary law-abiding Americans to protect themselves from lethal violence by possessing and, if necessary, using a gun. In 1791, when the Second Amendment was adopted, there were no police departments, and many families lived alone on isolated farms or on the frontiers. If these people were attacked, they were on their own. It is hard to imagine the furor that would have erupted if the Federal Government and the States had tried to take away the guns that these people needed for protection.

Today, unfortunately, many Americans have good reason to fear that they will be victimized if they are unable to protect themselves. And today, no less than in 1791, the Second Amendment guarantees their right to do so.

JUSTICE KAVANAUGH, with whom THE CHIEF JUSTICE joins, concurring.

*. . . .*

*First*, the Court’s decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense. In particular, the Court’s decision does not affect the existing licensing regimes—known as “shall-issue” regimes—that are employed in 43 States.

The Court’s decision addresses only the unusual discretionary licensing regimes, known as “may-issue” regimes, that are employed by 6 States including New York. As the Court explains, New York’s outlier may-issue regime is constitutionally problematic because it grants open-ended discretion to licensing officials and authorizes licenses only for those applicants who can show some special need apart from self-defense. . . . By contrast, 43 States employ objective shall-issue licensing regimes. Those shall-issue regimes may require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements. . . . Going forward, therefore, the 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so. Likewise, the 6 States including New York potentially affected by today’s decision may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements like those used by the 43 shall-issue States.

*Second*, as *Heller*and*McDonald*established and the Court today again explains, the Second Amendment “is neither a regulatory straightjacket nor a regulatory blank check.”  Properly interpreted, the Second Amendment allows a “variety” of gun regulations. . . .

JUSTICE BARRETT, concurring.

I join the Court’s opinion in full. I write separately to highlight two methodological points that the Court does not resolve. First, the Court does not conclusively determine the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution. . . . To name just a few unsettled questions: How long after ratification may subsequent practice illuminate original public meaning? What form must practice take to carry weight in constitutional analysis? . . .

Second and relatedly, the Court avoids another “ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868” or when the Bill of Rights was ratified in 1791.  Here, the lack of support for New York’s law in either period makes it unnecessary to choose between them. . . .

JUSTICE BREYER, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

In 2020, 45,222 Americans were killed by firearms. Since the start of this year (2022), there have been 277 reported mass shootings—an average of more than one per day. . . . Many States have tried to address some of the dangers of gun violence just described by passing laws that limit, in various ways, who may purchase, carry, or use firearms of different kinds. The Court today severely burdens States’ efforts to do so. It invokes the Second Amendment to strike down a New York law regulating the public carriage of concealed handguns. In my view, that decision rests upon several serious mistakes.

First, the Court decides this case on the basis of the pleadings, without the benefit of discovery or an evidentiary record. . . . Second, the Court wrongly limits its analysis to focus nearly exclusively on history.. . .. Third, the Court itself demonstrates the practical problems with its history-only approach. In applying that approach to New York’s law, the Court fails to correctly identify and analyze the relevant historical facts. . . .

In my view, when courts interpret the Second Amendment, it is constitutionally proper, indeed often necessary, for them to consider the serious dangers and consequences of gun violence that lead States to regulate firearms. . . .

The question before us concerns the extent to which the Second Amendment prevents democratically elected officials from enacting laws to address the serious problem of gun violence. And yet the Court today purports to answer that question without discussing the nature or severity of that problem.

In 2017, there were an estimated 393.3 million civilian-held firearms in the United States, or about 120 fire- arms per 100 people. That is more guns per capita than in any other country in the world. . . . Unsurprisingly, the United States also suffers a disproportionately high rate of firearm-related deaths and injuries. . . . Worse yet, gun violence appears to be on the rise. . . .

. . . .

[M]ass shootings are just one part of the problem. Easy access to firearms can also make many other aspects of American life more dangerous. Consider, for example, the effect of guns on road rage. In 2021, an average of 44 people each month were shot and either killed or wounded in road rage incidents, double the annual average between 2016 and 2019. . . .The same could be said of protests: A study of 30,000 protests between January 2020 and June 2021 found that armed protests were nearly six times more likely to become violent or destructive than unarmed protests. . . A study found that men who own handguns are three times as likely to commit suicide than men who do not and women who own handguns are seven times as likely to commit suicide than women who do not. . . . The presence of a gun in the hands of a civilian poses a risk to both officers and civilians. . . .

. . . There is, of course, another side to the story. I am not simply saying that “guns are bad.” Some Americans use guns for legitimate purposes, such as sport (*e.g.,* hunting or target shooting), certain types of employment (*e.g.,* as a private security guard), or self-defense. Cf. *ante,* at 4–6 (ALITO, J., concurring). Balancing these lawful uses against the dangers of firearms is primarily the responsibility of elected bodies, such as legislatures. It requires consideration of facts, statistics, expert opinions, predictive judgments, relevant values, and a host of other circumstances, which together make decisions about how, when, and where to regulate guns more appropriately legislative work. That consideration counsels modesty and restraint on the part of judges when they interpret and apply the Second Amendment.

Consider, for one thing, that different types of firearms may pose different risks and serve different purposes. . . . Or consider, for another thing, that the dangers and benefits posed by firearms may differ between urban and rural areas.

JUSTICE ALITO asks why I have begun my opinion by reviewing some of the dangers and challenges posed by gun violence and what relevance that has to today’s case.  All of the above considerations illustrate that the question of firearm regulation presents a complex problem—one that should be solved by legislatures rather than courts. . . . For a variety of reasons, States may also be willing to tolerate different degrees of risk and therefore choose to balance the competing benefits and dangers of firearms differently.

. . . .

. . . .

In describing New York’s law, the Court recites the above facts but adds its own gloss. It suggests that New York’s licensing regime gives licensing officers too much discretion and provides too “limited” judicial review of their decisions, that the proper cause standard is too “demanding,”  and that these features make New York an outlier compared to the “vast majority of States,”  But on what evidence does the Court base these characterizations? Recall that this case comes to us at the pleading stage. The parties have not had an opportunity to conduct discovery, and no evidentiary hearings have been held to develop the record. . . . Without an evidentiary record, there is no reason to assume that New York courts applying this standard fail to provide license applicants with meaningful review. . . . .

. . . .

In support of its assertion that the law is “demanding,” the Court cites only to cases originating in New York City. But cases from New York City may not accurately represent how the proper cause standard is applied in other parts of the State, including in Rensselaer County where petitioners reside. To the contrary, *amici* tell us that New York’s licensing regime is purposefully flexible: It allows counties and cities to respond to the particular needs and challenges of each area. *Amici*suggest that some areas may interpret words such as “proper cause” or “special need” more or less strictly, depending upon each area’s unique circumstances. New York City, for example, reports that it “has applied the [proper cause] requirement relatively rigorously” because its densely populated urban areas pose a heightened risk of gun violence. In comparison, other (perhaps more rural) counties “have tailored the requirement to their own circumstances, often issuing concealed-carry licenses more freely than the City.” . . .

. . . .

. . . . In drawing a line between “may issue” and “shall issue” licensing regimes, the Court ignores the degree of variation within and across these categories. Not all “may issue” regimes are necessarily alike, nor are all “shall issue” regimes. Conversely, not all “may issue” regimes are as different from the “shall issue” regimes as the Court assumes. For instance, the Court recognizes in a footnote that three States (Connecticut, Delaware, and Rhode Island) have statutes with discretionary criteria, like so-called “may issue” regimes do.  But the Court nonetheless counts them among the 43 “shall issue” jurisdictions because, it says, these three States’ laws operate in practice more like “shall issue” regimes. . . . .

. . . .

The Court’s count captures only a snapshot in time. It forgets that “shall issue” licensing regimes are a relatively recent development. Until the 1980s, “may issue” regimes predominated. Moreover, even considering, as the Court does, only the present state of play, its tally provides an incomplete picture because it accounts for only the number of States with “may issue” regimes, not the number of people governed by those regimes. By the Court’s count, the seven “may issue” jurisdictions are New York, California, Hawaii, Maryland, Massachusetts, New Jersey, and the District of Columbia.  . . .The seven remaining “may issue” jurisdictions are among the most densely populated in the United States. [D]ensely populated urban areas face different kinds and degrees of dangers from gun violence than rural areas. It is thus easy to see why the seven “may issue” jurisdictions might choose to regulate firearm carriage more strictly than other States.

New York and its *amici* present substantial data justifying the State’s decision to retain a “may issue” licensing regime. The data show that stricter gun regulations are associated with lower rates of firearm-related death and injury. In particular, studies have shown that “may issue” licensing regimes, like New York’s, are associated with lower homicide rates and lower violent crime rates than “shall issue” licensing regimes. . . . JUSTICE ALITO points to competing empirical evidence that arrives at a different conclusion.  But these types of disagreements are exactly the sort that are better addressed by legislatures than courts. . . .

. . . .

The Court today replaces the Courts of Appeals’ consensus framework with its own history-only approach. That is unusual. We do not normally disrupt settled consensus among the Courts of Appeals, especially not when that consensus approach has been applied without issue for over a decade. . . .

. . . .

The opinion in *Heller* did focus primarily on “constitutional text and history but it did *not* “rejec[t] . . . means-end scrutiny,” as the Court claims. . . . After concluding that the Second Amendment protects an individual right to possess a firearm for self-defense, the *Heller* Court added that that right is “not unlimited.”  In answering that second question, it said: “Under *any of the standards of scrutiny that we have applied to enumerated constitutional rights*, banning from the home ‘the most preferred firearm in the nation to “keep” and use for protection of one’s home and family’ would fail constitutional muster.”  That language makes clear that the *Heller*Court understood some form of means-end scrutiny to apply. It did not need to specify whether that scrutiny should be intermediate or strict because, in its view, the District’s handgun ban was so “severe” that it would have failed either level of scrutiny.

. . . .

[T]the Court today is wrong when it says that its rejection of means-end scrutiny and near-exclusive focus on history “accords with how we protect other constitutional rights.”  As the Court points out, we do look to history in the First Amendment context to determine “whether the expressive conduct falls outside of the category of protected speech.”  But, if conduct falls within a category of protected speech, we then use means-end scrutiny to determine whether a challenged regulation unconstitutionally burdens that speech. . . . The upshot is that applying means-end scrutiny to laws that regulate the Second Amendment right to bear arms would not create a constitutional anomaly. Rather, it is the Court’s rejection of means-end scrutiny and adoption of a rigid history-only approach that is anomalous.

The Court’s near-exclusive reliance on history is not only unnecessary, it is deeply impractical. It imposes a task on the lower courts that judges cannot easily accomplish. Judges understand well how to weigh a law’s objectives (its “ends”) against the methods used to achieve those objectives (its “means”). Judges are far less accustomed to resolving difficult historical questions. Courts are, after all, staffed by lawyers, not historians. Legal experts typically have little experience answering contested historical questions or applying those answers to resolve contemporary problems.

The Court’s insistence that judges and lawyers rely nearly exclusively on history to interpret the Second Amendment thus raises a host of troubling questions. Consider, for example, the following. Do lower courts have the research resources necessary to conduct exhaustive historical analyses in every Second Amendment case? What historical regulations and decisions qualify as representative analogues to modern laws? How will judges determine which historians have the better view of close historical questions? Will the meaning of the Second Amendment change if or when new historical evidence becomes available? And, most importantly, will the Court’s approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?

. . . .

For example, the *Heller*majority relied heavily on its interpretation of the English Bill of Rights. . . . . Two years later, however, 21 English and early American historians (including experts at top universities) told us in *McDonald* v. *Chicago* that the *Heller* Court had gotten the history wrong. . . . The majority rejected Justice Stevens’ argument that the Second Amendment’s use of the words “bear Arms” drew on an idiomatic meaning that, at the time of the founding, commonly referred to military service. Linguistics experts now tell us that the majority was wrong to do so. . . .

. . . .

Failing to heed that warning, the Court today does just that. Its near-exclusive reliance on history will pose a number of practical problems. First, the difficulties attendant to extensive historical analysis will be especially acute in the lower courts. . . . Lower courts—especially district courts—typically have fewer research resources, less assistance from *amici* historians, and higher caseloads than we do. They are therefore ill equipped to conduct the type of searching historical surveys that the Court’s approach requires. . . . Second, the Court’s opinion today compounds these problems, for it gives the lower courts precious little guidance regarding how to resolve modern constitutional questions based almost solely on history. . . . What the Court offers instead is a laundry list of reasons to discount seemingly relevant historical evidence. The Court believes that some historical laws and decisions cannot justify upholding modern regulations because, it says, they were outliers. . . . Indeed, the Court offers many and varied reasons to reject potential representative analogues, but very few reasons to accept them. At best, the numerous justifications that the Court finds for rejecting historical evidence give judges ample tools to pick their friends out of history’s crowd. At worst, they create a one-way ratchet that will disqualify virtually any “representative historical analogue” and make it nearly impossible to sustain common-sense regulations necessary to our Nation’s safety and security.

Third, even under ideal conditions, historical evidence will often fail to provide clear answers to difficult questions. As an initial matter, many aspects of the history of firearms and their regulation are ambiguous, contradictory, or disputed. Fourth, I fear that history will be an especially inadequate tool when it comes to modern cases presenting modern problems. Consider the Court’s apparent preference for founding-era regulation. Our country confronted profoundly different problems during that time period than it does today. . . . In 1790, most of America’s relatively small population of just four million people lived on farms or in small towns. Even New York City, the largest American city then, as it is now, had a population of just 33,000 people.  Small founding-era towns are unlikely to have faced the same degrees and types of risks from gun violence as major metropolitan areas do today, so the types of regulations they adopted are unlikely to address modern needs.  This problem is all the more acute when it comes to “modern-day circumstances that [the Framers] could not have anticipated.”  How can we expect laws and cases that are over a century old to dictate the legality of regulations targeting “ghost guns” constructed with the aid of a three-dimensional printer? . . .

. . . . Even seemingly straightforward historical restrictions on firearm use may prove surprisingly difficult to apply to modern circumstances. The Court affirms *Heller*’s recognition that States may forbid public carriage in “sensitive places.” But what, in 21st-century New York City, may properly be considered a sensitive place? Presumably “legislative assemblies, polling places, and courthouses,” which the Court tells us were among the “relatively few” places “where weapons were altogether prohibited” in the 18th and 19th centuries. . On the other hand, the Court also tells us that “expanding the category of ‘sensitive places’ simply to all places of public congregation that are not isolated from law enforcement defines th[at] category . . . far too broadly.”  So where does that leave the many locations in a modern city with no obvious 18th- or 19th-century analogue? What about subways, nightclubs, movie theaters, and sports stadiums? The Court does not say.

. . . .

Indeed, the Court’s application of its history-only test in this case demonstrates the very pitfalls described above. The historical evidence reveals a 700-year Anglo-American tradition of regulating the public carriage of firearms in general, and concealed or concealable firearms in particular. The Court spends more than half of its opinion trying to discredit this tradition. But, in my view, the robust evidence of such a tradition cannot be so easily explained away. Laws regulating the public carriage of weapons existed in England as early as the 13th century and on this Continent since before the founding. Similar laws remained on the books through the ratifications of the Second and Fourteenth Amendments through to the present day. Many of those historical regulations imposed significantly stricter restrictions on public carriage than New York’s licensing requirements do today. Thus, even applying the Court’s history-only analysis, New York’s law must be upheld because “historical precedent from before, during, and . . . after the founding evinces a comparable tradition of regulation.”

. . . .

The relevant English history begins in the late-13th and early-14th centuries, when Edward I and Edward II issued a series of orders to local sheriffs that prohibited any person from “going armed.” . . . The Court seems to suggest that these early regulations are irrelevant because they were enacted during a time of “turmoil” when “malefactors . . . harried the country, committing assaults and murders.”  The Court also suggests that laws that were enacted before firearms arrived in England, like these early edicts and the subsequent Statute of Northampton, are irrelevant.  But why should that be? Pregun regulations prohibiting “going armed” in public illustrate an entrenched tradition of restricting public carriage of weapons. . . .

The Statute of Northampton was enacted in 1328. 2 Edw. 3, 258, c. 3. By its terms, the statute made it a criminal offense to carry arms without the King’s authorization. . . . The Court thinks that the Statute of Northampton “has little bearing on the Second Amendment,” in part because it was “enacted . . . more than 450 years before the ratification of the Constitution.”  The statute, however, remained in force for hundreds of years, well into the 18th century. . . . The Court also believes that, by the end of the 17th century, the Statute of Northampton was understood to contain an extratextual intent element: the intent to cause terror in others.  But other sources suggest that carrying arms in public was prohibited *because* it naturally tended to terrify the people. . . .

. . . .

The American Colonies continued the English tradition of regulating public carriage on this side of the Atlantic. In 1686, the colony of East New Jersey passed a law providing that “no person or persons . . . shall presume privately to wear any pocket pistol, skeines, stilladers, daggers or dirks, or other unusual or unlawful weapons within this Province.” . . . It is true, as the Court points out, that these laws were only enacted in three colonies.  But that does not mean that they may be dismissed as outliers. They were successors to several centuries of comparable laws in England, and predecessors to numerous similar (in some cases, materially identical) laws enacted by the States after the founding. And while it may be true that these laws applied only to “dangerous and unusual weapons,” that category almost certainly included guns. . . .

The tradition of regulations restricting public carriage of firearms, inherited from England and adopted by the Colonies, continued into the founding era. Virginia, for example, enacted a law in 1786 that, like the Statute of Northampton, prohibited any person from “go[ing] nor rid[ing] armed by night nor by day, in fairs or markets, or in other places, in terror of the Country. . . . The Court discounts these laws primarily because they were modeled on the Statute of Northampton, which it believes prohibited only public carriage with the intent to terrify.  I have previously explained why I believe that preventing public terror was one *reason*that the Statute of Northampton prohibited public carriage, but not an *element*of the crime. . . .

. . . .

Beginning in the 19th century, States began to innovate on the Statute of Northampton in at least two ways. First, many States and Territories passed bans on concealed carriage or on any carriage, concealed or otherwise, of certain concealable weapons. . . . . Several of these decisions . . . emphasized States’ leeway to regulate firearms carriage as necessary “to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence.” . . . The second 19th-century innovation, adopted in a number of States, was surety laws. Massachusetts’ surety law, which served as a model for laws adopted by many other States, provided that any person who went “armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon,” and who lacked “reasonable cause to fear an assualt [*sic*],” could be made to pay a surety upon the “complaint of any person having reasonable cause to fear an injury, or breach of the peace.” . . . . The Court believes that the absence of recorded cases involving surety laws means that they were rarely enforced. Of course, this may just as well show that these laws were normally followed. . . .

After the Civil War, public carriage of firearms remained subject to extensive regulation. Of course, during this period, Congress provided (and commentators recognized) that firearm regulations could not be designed or enforced in a discriminatory manner But that by-now uncontroversial proposition says little about the validity of nondiscriminatory restrictions on public carriage, like New York’s.

What is more relevant for our purposes is the fact that, in the postbellum period, States continued to enact generally applicable restrictions on public carriage, many of which were even more restrictive than their predecessors. . . . When they were challenged, these laws were generally upheld. The Court’s principal answer to these broad prohibitions on public carriage is to discount gun control laws passed in the American West.  It notes that laws enacted in the Western Territories were “rarely subject to judicial scrutiny.”  But, of course, that may well mean that “[w]e . . . can assume it settled that these” regulations were “consistent with the Second Amendment.” . . .

The Court disregards “20th-century historical evidence.” *Ante,* at 58, n. 28. But it is worth noting that the law the Court strikes down today is well over 100 years old, having been enacted in 1911 and amended to substantially its present form in 1913. That alone gives it a longer historical pedigree than at least three of the four types of firearms regulations that *Heller* identified as “presumptively lawful. . . Like JUSTICE KAVANAUGH, I understand the Court’s opinion today to cast no doubt on that aspect of *Heller*’s holding.  But unlike JUSTICE KAVANAUGH, I find the disconnect between *Heller*’s treatment of laws prohibiting, for example, firearms possession by felons or the mentally ill, and the Court’s treatment of New York’s licensing regime, hard to square. . . . .

. . .

In each instance, the Court finds a reason to discount the historical evidence’s persuasive force. Some of the laws New York has identified are too old. But others are too recent. Still others did not last long enough. Some applied to too few people. Some were enacted for the wrong reasons. Some may have been based on a constitutional rationale that is now impossible to identify. Some arose in historically unique circumstances. And some are not sufficiently analogous to the licensing regime at issue here. But if the examples discussed above, taken together, do not show a tradition and history of regulation that supports the validity of New York’s law, what could? Sadly, I do not know the answer to that question. What is worse, the Court appears to have no answer either.

. . . .

. . . . To the extent that any uncertainty remains between the Court’s view of the history and mine, that uncertainty counsels against relying on history alone. In my view, it is appropriate in such circumstances to look beyond the history and engage in what the Court calls means-end scrutiny. Courts must be permitted to consider the State’s interest in preventing gun violence, the effectiveness of the contested law in achieving that interest, the degree to which the law burdens the Second Amendment right, and, if appropriate, any less restrictive alternatives.

. . . .

New York’s Legislature considered the empirical evidence about gun violence and adopted a reasonable licensing law to regulate the concealed carriage of handguns in order to keep the people of New York safe. The Court today strikes down that law based only on the pleadings. It gives the State no opportunity to present evidence justifying its reasons for adopting the law or showing how the law actually operates in practice, and it does not so much as acknowledge these important considerations. Because I cannot agree with the Court’s decision to strike New York’s law down without allowing for discovery or the development of any evidentiary record, without considering the State’s compelling interest in preventing gun violence and protecting the safety of its citizens, and without considering the potentially deadly consequences of its decision, I respectfully dissent.