WHAT ORIGINALISM CAN TEACH HISTORIANS: HISTORY AS ANALOGY, MEANS-ENDS TESTS, AND THE PROBLEM OF HISTORY IN *BRUEN*

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I. INTRODUCTION: AMERICAN LAW'S BRUSH WITH ANTIFOUNDATIONAL HISTORY

There is a long tradition of professional historians' critiques of lawyers' truncated understandings and clumsy deployments of the past. The intellectual historian J.G.A. Pocock's *The Ancient Constitution and the Feudal Law*, with its depiction of a "common-law mind" obdurately committed to the continuity of law and unable to grasp the significance of situating law in historical context, might be taken as the origin point of a post–World War II tradition.[1] Historians' critiques have enjoyed a fresh lease of life since constitutional originalism began to assume prominence in the closing decades of the twentieth century. As legal scholars and judges have turned self-consciously to "history" to answer constitutional questions, professional historians' jibes have intensified. It has all become somewhat predictable. There is now something of an expectation that historians will tell legal scholars and judges the many ways in which they get things wrong: they do "law office" history; their use of historical evidence is selective and clunky; their interpretive techniques do violence to past understandings of language and law; they fail to appreciate the fullness of historical context.

In this Essay, I seek to reorient the conversation. Instead of assuming the familiar chastising stance of the professional historian, I argue that contemporary legal thinkers are far from insensitive to the

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1 J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY (1957).

pressures and challenges of situating law in history. Indeed, their strategies, rather than being blind to history, are often considered responses to it. This is true of *both* the competing constitutional strategies on display in *New York State Rifle & Pistol Ass'n v. Bruen*: originalism (in the majority opinion of Justice Thomas) and means-ends tests (in the dissenting opinion of Justice Breyer).[2] Although they emerged in different historical moments and typically serve different politics, both originalism and means-ends tests are tools fashioned as a consequence of law's brush with a particular kind of history: an antifoundational conception of history that rose to prominence in the late nineteenth century and that impressed upon legal thinkers a sense of the historicity, uncertainty, and limits of legal knowledge.

Once historians assimilate this point, and once they abandon their usual uncritical charge that lawyers fail to think historically, something more productive can occur. Historians might usefully use lawyers' tools—and especially lawyers' self-consciousness about their tools as tools—as a basis for reflecting upon their own relationship to their disciplinary tools. Professional history and law are very different enterprises. It is hardly surprising that they should resort to different kinds of tools to meet their distinct ends. In general, however, legal thinkers sensitive to the problem of situating law in history have been far more successful than historians in being self-conscious about their tools as tools, in recognizing the made-up nature of their tools, in debating the advantages and shortcomings of their tools, and in considering a plurality of tools. This is at least in part because the adversarial nature of legal disputes frequently sets different tools in competition with one another and compels an evaluation of tools. Professional historians can learn from this, if no more than to interrogate their hegemonic disciplinary faith that everything can be situated "in" history and that there is a preferred way of doing so.

Historians can learn from lawyers' deployment of their tools in yet another way. Using tools implies a sense of their fitness for use, knowing how to shape them, recognizing when to use which, sensing when to pick them up and lay them down. When used badly, tools can become hypertrophic, obliterate everything around them, blind us to their own limits, lead us astray. *Bruen* not only gives us an instance of two different tools (originalism and means-ends tests) at work, but also shows us what happens when tools such as originalism go rogue. Justice Thomas's originalist history-as-analogy test, with its blatantly manipulative use of history as analogy to go exactly where he wants no matter what, strains credibility profoundly. Not even Justice Thomas, I hazard, can be convinced by his deployment of originalism as method

2 142 S. Ct. 2111 (2022).

in this case. And while there is something salutary *even in this* to the extent that it denaturalizes originalism completely and robs it of its integrity as method, there is a different lesson for historians. What happens when history itself becomes hypertrophic, blotting out other ways of knowing? Should we as historians not be more alert to this problem than we typically are?

To begin an exploration of the foregoing, it is first important to set forth how I understand law's brush with antifoundational history in the late nineteenth century and its consequences for legal knowledge.[3]

In the third quarter of the nineteenth century, a profound revolution in ideas we might conveniently label "modernism" swept the Euro-American world. Modernism remade art and anthropology, engineering and economics, law and literature, mathematics and music, physics and poetry. Its various iterations were different based on discipline, the individuals involved, institutional setting, and national tradition. Nevertheless, it is possible to identify several features of the modernist dispensation. For our purposes, three matter.

First, modernist thinkers undermined all manner of received truths, moralities, logics, rationalities, and aesthetic norms in the name of history. Their use of history was explicitly antifoundational. By this, I mean that they deployed history to undermine foundations rather than to shore them up. Modernists insisted that a great deal that purported to lie "outside" history had in fact arisen in secular chronological time. This implied that the object subjected to historical contextualization was neither timeless nor as such entitled to respect. Instead, it had been created by—and was hence revisable by—human intellection. The use of history that undermined received truths also made it hard to arrive at stable new ones. Because they lived in a world marked by massive political, social, and economic transformation, dizzying technological change, and rapid scientific advance, modernist thinkers were convinced that the truths of today, including their own, would not be those of tomorrow. Their own truths were thus also "mere" products of history and, as such, endlessly revisable. One of the major developments that powered the modernist antifoundational historical orientation was, of course, the Darwinian dethroning of the biblical idea that God had created man. Darwin showed man to have earthly origins, arguing that the form man took was "only" the product of a slow unfolding in secular time.

Second, even as the modernist antifoundational use of history rendered received and new truths the "mere" product of history, unstable,

3 The arguments made in the remainder of this Part build upon (and are developed at much greater length in) KUNAL M. PARKER, THE TURN TO PROCESS: AMERICAN LEGAL, POLITICAL, AND ECONOMIC THOUGHT, 1870–1970 (2024).

and hence revisable, the late nineteenth-century revolution in psychology underscored repeatedly how difficult it was for human beings to get at truth in the first place. Psychologists pointed to the sharp limits of man's cognitive abilities. They showed that man in crucial areas of his life was irrational, unable to grasp fully the complexities of the modern world, driven by subconscious drives beyond his control, and subject to the manipulations of mobs and leaders.

Third, as might be expected, the undermining of truth by antifoundational notions of history, combined with the psychologically driven undermining of man's ability to know truth, had a variety of consequences. If some thinkers turned their backs more or less resolutely on the modern, others celebrated a kind of decisionism that could intertwine with a level of comfort with—or even a celebration of—violence.[4] But there was yet another outcome, one more relevant to my purposes, that was perhaps more influential, especially in the United States. As modernist thinkers ceased to rely on received truths, and despaired of arriving at stable new ones, they increasingly reoriented knowledge *away* from truths, foundations, and moralities *towards* means, methods, processes, and techniques. If truth could not be arrived at, perhaps all one had were tools for getting at truths? In *The Promise of Pragmatism: Modernism and the Crisis of Knowledge and Authority*, the intellectual historian John Patrick Diggins underscored the point as follows: "Without access to the objectively real, the philosopher settles for the processes of knowing instead of the thing known."[5] Modernist knowledge thus increasingly centered around ways of getting at truths rather than around articulations of truths themselves.

All of the foregoing features of the modernist orientation can be seen at work in important currents of American law and legal thought beginning in the final quarter of the nineteenth century and extending into our own time. In the realm of constitutional law, means-ends tests—and subsequently constitutional originalism—are the direct outgrowth.

Between the American Revolution and the Civil War, despite a range of potent critiques, the common law dominated the American legal landscape. The U.S. Constitution was seen as deriving meaning from the common law and was interpreted in terms of it.[6] Relative to democratically elected legislatures, common-law judges were

4 *See, e.g.*, GOPAL BALAKRISHNAN, THE ENEMY: AN INTELLECTUAL PORTRAIT OF CARL SCHMITT (2000); T.J. JACKSON LEARS, NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880–1920 (1981).

5 JOHN PATRICK DIGGINS, THE PROMISE OF PRAGMATISM: MODERNISM AND THE CRISIS OF KNOWLEDGE AND AUTHORITY 48 (1994).

6 *See* KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM 67–218 (2011).

represented as Blackstonian "living oracles" possessed of special skills when it came to discovering and declaring the customs of the community, pronouncing the truth of the law, and maintaining legal continuity in the midst of change.[7]

Beginning in the 1870s, however, we see modernist antifoundational deployments of history begin to undermine law's pretentions to embody truth, logic, rationality, and morality. Oliver Wendell Holmes, Jr.'s *The Common Law*, a classic early modernist text, showed repeatedly how various legal doctrines, when traced back to their historical origins, were outright mistakes, unthinking transpositions from one context to another, or unwitting confusions of substance and procedure. History, for Holmes, served to tear down law, rather than to build it up.[8] Psychology also played its part. In the early twentieth century, prominent sitting judges were arguing that their methods of judging—vaunted for centuries as being superior to the methods of legislators—were neither qualitatively different from those of elected lawmakers nor entirely rational.[9]

The modernist undermining of law in the name of history and psychology found an increasingly receptive audience among Progressive Era critics of a politically conservative U.S. Supreme Court. In the late nineteenth and early twentieth centuries, the Court began to read into the Fourteenth Amendment of the U.S. Constitution common-law notions of contract and property in ways that shielded employers and property owners from redistributive legislation. Defined by the case of *Lochner v. New York*, this stance became synonymous with both judicial overreach and an arrogant willful blindness to the limits of legal knowledge.[10] Hundreds of democratically generated laws would be struck down by conservative federal judges between 1900 and the New Deal.[11] Early administrative agencies and commissions would find themselves tripped up and stymied by judicial second-guessing.

Given a mounting modernist sense of the historicity, uncertainty, and limits of legal knowledge, and an open recognition of the shortcomings of judicial decisionmaking, the call of critics of the *Lochner*

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7 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

8 *See* O.W. HOLMES, JR., THE COMMON LAW 259–69 (Boston, Little, Brown, & Co. 1881). I make this argument in PARKER, *supra* note 6, at 219–78.

9 *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113–15 (1921); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929).

10 In *Lochner v. New York*, the U.S. Supreme Court struck down as a violation of freedom of contract protected under the Due Process Clause of the Fourteenth Amendment a New York law establishing the maximum number of hours that could be worked in bakeries. 198 U.S. 45, 53 (1905), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

11 *See* MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING 37 (1984).

Court was for greater judicial and legal *deference.* Amounting to an open acknowledgment of the limits of traditional substantive legal knowledge, increased deference implied a ceding to democratically elected legislatures and a self-conscious backing away from second-guessing the agencies that democratically elected legislatures created. In its most general sense, this yielding of law to democracy was a modernist admission of the impossibility of arriving at an absolute idea of truth. Where men disagreed about truths, democracy was perhaps the only acceptable way forward.

The question of how deference was instantiated in American law in the twentieth century is an extremely complex story, following a twisting path from *Lochner v. New York* to the New Deal to the "rights revolution" of the post–World War II era, a path riddled with exceptions and qualifications and detours. My own understanding of this development sees it in important part as a typically modernist response to the crisis of foundations: a self-conscious turning *away* from truths, ends, and foundations *towards* means, methods, procedures, and processes.

Initially, this took the form of a kind of "proceduralization" of law. The emergence of administrative law as a new field of legal study fundamentally concerned with the procedures followed by administrative agencies is of course a case in point. But the transformation of constitutional law along related lines was equally marked: the focus was on process and procedure rather than substance. In *United States v. Carolene Products Co.*, even as the U.S. Supreme Court was signaling acceptance of the New Deal and a retreat from the economic substantive due process jurisprudence of *Lochner,* it announced a new orientation for constitutional law: the policing of breakdowns of democratic *processes.*[12] The new task of constitutional law would be the guaranteeing not of any transcendent truth, but of the robustness of the processes through which the people governed themselves.

In the postwar period, a great deal of the work of the Warren Court was directed at fixing broken *processes*: voting, administrative, criminal.[13] And if substantive due process cases like *Griswold v. Connecticut* and *Roe v. Wade* undoubtedly aroused conservative ire, no less so did cases in the voting rights, criminal law, or welfare law area that could straightforwardly be represented as correcting, or extending protections through, processes and procedures.[14] Nothing suggests more clearly how much law had embraced a sense of its own historicity,

12 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

13 *See* Bruce A. Ackerman, Law and the Modern Mind *by Jerome Frank*, DAEDALUS, Winter 1974, at 119, 124 (book review).

14 Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

uncertainty, and limits than the framing of post–World War II constitutional review of legislation, especially when enumerated rights were involved. In this regard, the Court eschewed an endorsement of rights that could always trump all governmental regulation in favor of hierarchies of scrutiny (strict, intermediate, rational basis) where the judicial inquiry concerned itself with the fit between legislative means and ends. In this rendering, federal judges' special competence lay less in articulating ends than in evaluating how legislative means matched legislative ends. Postwar constitutional theorists such as John Hart Ely would understand and justify almost the entire *oeuvre* of the post–New Deal Supreme Court precisely in terms of the policing of democratic processes.[15]

As is well known, it is the liberal jurisprudence of the Warren and early Burger Courts that furnished the impetus for constitutional originalism in the early 1970s. At least on its own terms, however, the constitutional originalism "backlash" did not ground its conservatism in the vindication of deep tradition or in the enshrining of libertarianism. Instead, and crucially, its stance was that it was *deferential*, more deferential than the "activist" judges of the 1960s had been. A plunge into the past for the meaning of constitutional text was the solution, or so originalists maintained, to judicial overreach and encroachment. It was the best way of reining judges in and ensuring that they deferred appropriately to the understandings of those who wrote constitutional text. Every bit as much as the means-ends tests devised in preceding decades, then, constitutional originalism posed—and continues to pose—as a solution to the ever-present problem of the historicity, uncertainty, and limits of legal knowledge, a problem created as a consequence of law's brush with antifoundational history.

To state the obvious, just because I am characterizing both means-ends tests and constitutional originalism as consequences of law's brush with antifoundational history does *not* mean in the slightest that I equate them in terms of their political desirability. I have chosen not to mount a straightforward critique of constitutional originalism as a legal method in this Essay for the simple reason that effective and persuasive critiques of it abound.[16] I have chosen to do something different instead of repeating the familiar.

With this caveat in place, I can proceed. In the next section of this Essay, I read the majority and dissenting opinions in *Bruen* as different tools to respond to the problem of law's apprehension of its own

15 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

16 *See, e.g.*, ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2022).

historicity, uncertainty, and limits. In the conclusion, I discuss how professional historians might use *Bruen*'s display of judicial tools at work to reflect upon their own disciplinary practice.

II. *BRUEN*: "ADMINISTRABLE" HISTORY AS ANALOGY VERSUS MEANS-ENDS TESTS

Bruen is the U.S. Supreme Court's third major gun rights ruling in the last fifteen years. The first of these, *District of Columbia v. Heller,* struck down a District of Columbia regulation when it interpreted the Second Amendment to protect an individual's right to possess firearms in the home as a matter of self-defense, detaching that right from membership in a militia.[17] Two years later, in *McDonald v. City of Chicago,* the Court extended *Heller* to the states by "incorporating" it into the Fourteenth Amendment.[18] The dispute in *Bruen* was designed to test, before a Court more clearly sympathetic to gun rights than courts in decades, the constitutionality of state laws restricting public carry. The law at issue was New York's licensing regime for those who wished to carry firearms outside the home.[19]

Since *Heller* and *McDonald,* Justice Thomas states in his majority opinion in *Bruen,* appellate courts have employed a two-step process to decide Second Amendment claims: first, government may justify a restrictive law by "establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood"; second, courts 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."[20]

Following *Heller,* appellate courts have held that "the core Second Amendment right is limited to self-defense *in the home.*"[21] What appellate courts have done then is engage in familiar constitutional means-ends analysis. If the "core" Second Amendment right is burdened, courts have followed the familiar strict scrutiny analysis, insisting that government demonstrate that the law is "narrowly tailored to achieve a compelling governmental interest."[22] Where a "core" Second Amendment right is not implicated, courts have followed the equally familiar intermediate scrutiny analysis, requiring the government to

17 554 U.S. 570, 635 (2008).

18 561 U.S. 742, 750 (2010).

19 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

20 *Id.* at 2126 (alteration in original) (quoting Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019), *abrogated by Bruen,* 142 S. Ct. 2111).

21 *Id.* (quoting Gould v. Morgan, 907 F.3d 659, 671 (1st Cir. 2018), *abrogated by Bruen,* 142 S. Ct. 2111).

22 *Id.* (quoting Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017), *abrogated in part by Bruen,* 142 S. Ct. 2111).

show that the regulation is "substantially related to the achievement of an important governmental interest."[23]

As stated in the previous Part of this Essay, means-ends tests are decades-old tools developed to enact judicial deference to legislatures and hence to acknowledge the limits of legal knowledge. Even when the "core" of a constitutional right is implicated, that right might at least theoretically be abridged by showing a tight fit between means and compelling legislative ends. Such thinking has penetrated the thinking of legislatures. As Justice Thomas observes in *Bruen*, both the State of New York and the United States argue that "intermediate scrutiny is appropriate when text and history are unclear in attempting to delineate the scope of the right."[24]

Yet Justice Thomas's majority opinion, grounding itself in *Heller* and *McDonald*, argues that means-ends testing is inappropriate for deciding whether gun-rights legislation can survive constitutional scrutiny. Justice Thomas's reason for rejecting means-ends testing is the fear that it carries the risk of judicial overreach, that too much troublingly unjustifiable legal knowledge can impede the proper result. In short, he argues that means-ends testing is not deferential enough. He approvingly quotes *Heller* for "declin[ing] to engage in means-ends scrutiny because '[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.'"[25]

Justice Thomas is hardly wrong to argue that constitutional means-ends testing can be uncertain and unpredictable. Many have made the point. Yet it is Justice Thomas's solution to the problem of judicial overreach that constitutional means-ends testing entails that is noteworthy: history. As he puts it: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[26] Out with means-ends analyses,

23 *Id.* (quoting Kachalsky v. County. of Westchester, 701 F.3d 81, 96 (2d Cir. 2012), *abrogated in part by Bruen*, 142 S. Ct. 2111).

24 *Id.* at 2127.

25 *Id.* at 2129 (second alteration in original) (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)). As Justice Thomas puts it when it comes to the related question of "interest balancing": "*Heller* and *McDonald* expressly rejected the application of any 'judge-empowering "interest balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."'" *Id.* (quoting *Heller*, 554 U.S. at 634).

26 *Id.* at 2129–30.

in with a demonstration of a current law's consistency with "the Nation's historical tradition."

For originalists like Justice Thomas in *Bruen*, the question then is really which technique is superior in light of the historical contingency, uncertainty, and limits of legal knowledge: means-ends tests or history. Justice Thomas makes his case for the latter in the following passage:

> 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 . . . 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.[27]

Justice Thomas's reference to history as "more administrable" than means-ends testing or cost-benefit analysis is noteworthy. I take him to mean that history can be subjected to rules and bounds, kept from becoming too messy or unruly or unwieldy, at least relative to what he considers more troublesome and open-ended means-ends testing. Surely somewhat shocking to the contemporary professional historian, the use of the term "administrable" to describe history reveals Justice Thomas's acute self-consciousness about history as a tool—one that can be managed and used to manage—that is to be judged relative to another tool (means-ends testing).

In thus conceiving of history, Justice Thomas is also quite clear that "administrable" history is not history as a professional historian might conceive it, let alone a term intended to refer to some vague and open-ended past. "Administrable" history is made up, entirely an artifact of law. Footnote six of Justice Thomas's opinion, in which he responds to Justice Breyer's dissent about the nonexpertise of judges when it comes to deciding historical questions, makes the point emphatically:

> The dissent claims that *Heller*'s text-and-history test will prove unworkable compared to means-end scrutiny in part because judges are relatively ill equipped to "resolv[e] difficult historical questions" or engage in "searching historical surveys." We are unpersuaded. The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies. That "legal inquiry is a refined subset" of a broader "historical inquiry," and it relies on "various evidentiary

27 *Id.* at 2130 (first and last alterations in original) (emphasis added) (citation omitted) (first quoting McDonald v. City of Chicago, 561 U.S. 742, 803–04 (2015) (Scalia, J., concurring); and then quoting *id.* at 790–91 (plurality opinion)).

> principles and default rules" to resolve uncertainties. For example, "[i]n our adversarial system of adjudication, we follow the principle of party presentation." Courts are thus entitled to decide a case based on the historical record compiled by the parties.[28]

"Administrable" history is a creature of "various evidentiary principles and default rules"; the historical record to be considered by the Court is not the archive, broadly considered, but "the historical record compiled by the parties."

Let us examine, then, what "administrable" history as a legal tool looks like in Justice Thomas's hands. It is here, I submit, that we see how "administrable" history as a tool can go astray.

According to Justice Thomas, as courts decide whether a particular regulation is consistent with "the Nation's historical tradition" of gun regulation, "administrable" history involves a search for analogies between past regulations and those in current disputes.[29] For those acquainted with the philosophy of history, something comparable might be the exemplary history—history as a collection of examples designed to instruct and apply to the reader—that was superseded by more modern conceptions of continuously changing historical time that followed the French Revolution.[30] For lawyers, the search for analogies might be comparable to a sifting through precedents. Indeed, the latter might be what Justice Thomas has in mind when he characterizes establishing analogies as "a commonplace task for any lawyer or judge."[31]

Obviously, deciding what is analogous to what involves selecting a criterion for determining whether things are similar or different. Since the core of the Second Amendment right (since *Heller*) is individual self-defense, the search for past analogies to modern regulations must ask "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified."[32] Along the way, Justice Thomas makes some perfunctory gestures towards "give" and flexibility in this announced quest for analogies: "analogical reasoning . . . is neither a regulatory straightjacket nor a regulatory blank check."[33] Courts will not

28 *Id.* at 2130 n.6 (alterations in original) (citations omitted) (first quoting *id.* at 2177, 2179 (Breyer, J., dissenting); then quoting William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 810–11 (2019); and then quoting United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020)).

29 *Id.* at 2130, 2132.

30 For a development of this point, see REINHART KOSELLECK, FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME (Keith Tribe trans., Columbia Univ. Press 2004) (1979).

31 *Bruen*, 142 S. Ct. at 2132.

32 *Id.* at 2133.

33 *Id.*

uphold every regulation that "remotely resembles" a historical analog,[34] he tells us, but also cannot demand that government produce evidence of a "historical twin."[35]

History as analogy in *Bruen* is a spectacular failure on its own terms and on its face: its way of admitting and rejecting historical analogs is full of obvious contradictions and crude shifts of goalposts, its interpretations are openly and brazenly tilted, its readings of the record are highly skewed, and its demands of the historical record are frequently absurd. I am no historian of gun regulation. One does not need to be to see *Bruen*'s shortcomings. Originalists receptive to criticism ought to find it embarrassing, if not troubling.

"[W]hen it comes to interpreting the Constitution," Justice Thomas tells us, "not all history is created equal."[36] While this statement appears in the context of telling the reader that regulations temporally more distant from the constitutional Founding moment will carry less weight than those closer to it, the statement can just as well be read as Justice Thomas's own arrogation of the right to decide what history does and does not count.

Take, for example, Justice Thomas's treatment of the 1328 Statute of Northampton.[37] The statute prevented individuals from carrying arms publicly and terrifying people and is thus a potential analogy for modern public-carry regulations.[38] According to Justice Thomas, however, the statute is too old and was passed before handguns even existed.[39] Because the evidence in the record suggests that the statute applied to armor and to launcegays (ten-to-twelve-foot lances), Justice Thomas identifies as a problem the fact that the statute's application was to arms that were too big.[40] Modern-day governments invoking the statute as an analogy need to come up with "evidence suggesting the Statute applied to the smaller medieval weapons that strike us as most analogous to modern handguns."[41] Why does size matter? We are not told. However, in Goldilocks fashion, regulations that target arms that are too big—or presumably too small?—are dismissed as valid analogies. Might not another, possibly better way of constructing the analogy have been the ability of the weapon to do harm? One does not need to be a medievalist to know that it might be difficult (or even impossible) to meet the judicial demand that the weapons targeted by

34 *Id.* (quoting Drummond v. Robinson Township, 9 F.4th 217, 226 (3d Cir. 2021)).
35 *Id.* (emphasis omitted).
36 *Id.* at 2136.
37 Statute of Northampton 1328, 2 Edw. 3 c. 3 (Eng.).
38 *Bruen*, 142 S. Ct. at 2139.
39 *Id.* at 2139–40.
40 *See id.* at 2140.
41 *Id.*

the regulation be of comparable size. Even if such weapons existed, especially as one goes further back in time, extant historical records simply cannot answer all questions.

The problems with Justice Thomas's reading of the Statute of Northampton continue. He makes a great deal of the 1686 acquittal of Sir John Knight, who was charged under the statute for walking down a street, and then entering a church, with a gun.[42] The fact that Knight was charged under the statute, in itself significant, counts for nothing for Justice Thomas. He chooses to focus instead on the decision in the case, which stated that the statute required a showing of evil intent to cause terror on the part of the bearer of the gun.[43] John Knight was eventually acquitted.[44] But was the demonstration of evil intent (in addition to the simple fact of carrying a firearm in public) an independent element to establish a crime under the statute? If it was, this would presumably weaken the statute further as an analogy for contemporary public-carry restrictions. Justice Breyer's dissent observes that *Sir John Knight's Case* only "arguably" supports such a reading.[45] Rather than a showing of evil intent being an independent element of the crime under the statute, contemporaneous treatises argued that terror was deemed the natural consequence of public gun carrying and hence that no additional showing of evil intent on the part of the carrier was required.[46] Justice Thomas's emphasis on the additional requirement of evil intent is, therefore, at the very least questionable. But even as Justice Thomas accepts in a footnote that "there are multiple plausible interpretations of *Sir John Knight's Case*," he insists that the Court "will favor the one that is more consistent with the Second Amendment's command."[47] Where an analog can be read in a few different ways, and in the absence of adequate evidence, why must it be read in a way that is *more* consistent with the Second Amendment's command? Is the point not to discern what the Second Amendment's command means with reference to the analog rather than the other way around? And at what point in the Court's command to search for analogies to establish "the Nation's historical tradition" were we told that the Court's reading of ambiguous analogies would be tilted to favor its reading of the Second Amendment?

As we march through the long history of Anglo-American public-carry regulations, troubling manipulations of analogs on one ground

42 *Id.* at 2140–41 (discussing Sir John Knight's Case (1686) 87 Eng. Rep. 75; 3 Mod. 117).

43 *Id.* at 2141.

44 *Sir John Knight's Case*, 87 Eng. Rep. at 76, 3 Mod. at 117.

45 *Bruen*, 142 S. Ct. at 2183 (Breyer, J., dissenting).

46 *See id.*

47 *Id.* at 2141 n.11 (majority opinion).

or another, accompanied by demands for evidence that might not exist, abound. Tudor and early Stuart proclamations against handguns and statutes from the period restricting possession are roundly dismissed as inapposite because "displeasure with handguns arose not primarily from concerns about their safety but rather their inefficacy."[48] Here, it is the stated justification for the analog regulation (inefficacy rather than safety)—rather than the existence of the regulation *tout court*—that becomes the criterion for excising it from "the Nation's historical tradition." At other times, respondents are faulted not for the evidence they show but for the evidence they do not show, again without any sense that such evidence might simply not be available. Thus: "Respondents do not offer any evidence showing that, in the early 18th century or after, the mere public carrying of a handgun would terrify people."[49] The absence of such evidence does not show, of course, that public carrying did not terrify people in keeping with the meaning of the Statute of Northampton any more than it shows that it did.

When it comes to the colonial era, Justice Thomas faults the respondents for pointing to "only three restrictions on public carry. . . . [W]e doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation."[50] But is the point for analogs to constitute a "tradition" in every period (must there be a seventeenth-century tradition, an eighteenth-century one, and a nineteenth-century one?) or only for a number of analogs across the centuries collectively to point to the existence of a tradition? And what is an appropriate number anyway?

Regardless, the colonial statutes are then limited *qua* analogs. Says the Court: "[I]t makes very little sense to read these statutes as banning the public carry of all firearms just a few years after Chief Justice Holt in *Sir John Knight's Case* indicated that the English common law did not do so."[51] But the Court itself admitted earlier that *Sir John Knight's Case* does not point unequivocally to a tradition favorable to limiting public carry and that there are many plausible interpretations of it.[52] Why must the one interpretation it favors be used to cut down the persuasive force of another possible analog?

Yet another twist of the criteria emerges. We have seen that medieval analogs are inapposite because there is not enough evidence that they targeted weapons of the same *size* as handguns. To the extent that colonial laws *did* prohibit the carrying of handguns (i.e., exactly

48 *Id.* at 2140.
49 *Id.* at 2142.
50 *Id.*
51 *Id.* at 2143.
52 *Id.* at 2141 n.11.

the same firearm that contemporary laws restrict and hence of the same size), they are dismissed as analogs because handguns in the eighteenth century were dangerous and unusual weapons and not commonly held weapons.[53] Where the size criterion is met, in other words, a common-use criterion is employed to weaken an analogy. Some statutes are dismissed because they only covered some arms and not all, or because they were too short-lived. Thus, a 1686 East New Jersey statute that prohibited concealed carry of "pocket pistol[s]" is dismissed as an analogy because it did not apply to all the pistols available in the late seventeenth century *and* because it only applied to concealed carry.[54] This analogy also cannot possess "meaningful weight" because it is only one statute and because it was short-lived.[55]

When it comes to nineteenth-century surety laws, the Court uses other manipulations of criteria to weaken analogies. To contest the idea that New York's surety laws posed a burden on public carry, the Court says, "That contention has little support in the historical record. Respondents cite no evidence showing the average size of surety postings."[56] So now the *size* of surety postings becomes a criterion of judgment. Furthermore, there is "little evidence that authorities ever enforced surety laws."[57] As before, the absence of evidence of enforcement is taken for lack of support, rather than equally plausible evidence of support.

Where criteria for locating analogies cannot be blatantly manipulated midstream, as it were, the Court simply dismisses inconvenient analogs as "outliers."[58] Along with comparable restrictions in West Virginia, Texas's late nineteenth-century "reasonable grounds" limit on public carry, and judicial upholdings of such laws, are bundled out of "the Nation's historical tradition."[59] "[W]e will not give disproportionate weight to a single state statute and a pair of state-court decisions."[60] But in fact *no* weight is given them. Restrictions in the territories are dismissed because they are "a handful of temporary territorial laws" and because of "the miniscule territorial populations who would have lived under them."[61]

53 *Id.* at 2143.

54 *Id.* (alteration in original) (quoting An Act Against Wearing Swords, &c., ch. 9 (1686), *reprinted in* AARON LEAMING & JACOB SPICER, THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 290 (Somerville, N.J., Honeyman & Co. 1881) (n.d.)).

55 *Id.* at 2144.

56 *Id.* at 2149.

57 *Id.*

58 *Id.* at 2153.

59 *Id.*

60 *Id.*

61 *Id.* at 2154–55.

Even worse, nineteenth-century state courts "that upheld broader [public-carry] prohibitions without qualification generally operated under a fundamental misunderstanding of the right to bear arms, as expressed in *Heller*."[62] Thus, a 1905 Kansas Supreme Court decision upholding a complete ban on public carry is dismissed as "clearly erroneous."[63] But *Heller* was decided only in 2008 and *McDonald* in 2010, well over a century after state-court decisions upholding broad public-carry prohibitions were decided. The Second Amendment did not apply unequivocally to the states until 2010.[64] Furthermore, even if these late nineteenth- and early twentieth-century decisions were erroneous under a *Heller* and *McDonald* ruling extended a century backwards (which means they cannot count as legal precedent), do they not nevertheless point to a strong tradition of restrictions on public carry?

Several of Justice Thomas's identifications of historical instances of support for a robust right of public carry are also questionable on their face. According to Justice Thomas, the "predecessor to our Second Amendment" written into the 1689 English Bill of Rights granted gun-carrying rights only to Protestants "as allowed by Law" and granted them only vis-à-vis the monarch and not vis-à-vis Parliament.[65] This suggests that Catholics could be regulated by the monarch, and that *all* Britons could be regulated by Parliament. Similarly, by the eighteenth century, commentators were saying that "Persons of Quality" who carried guns publicly were "in no Danger of Offending against [the Statute of Northampton] by wearing common Weapons."[66] But what about those who were not "persons of quality"? Who counted as a "person of quality" in early eighteenth-century England? Were those not "of quality" far more numerous than "persons of quality"?

One can also plausibly take apart aspects of the Court's ruling that, in the nineteenth century, there was "a consensus that States could *not* ban public carry altogether."[67] This alleged "consensus" is based predominantly on a discussion of a few state supreme court cases.[68] Contrary evidence is minimized. Thus, according to Justice Thomas, Tennessee had a broad provision on public carry passed in 1821.[69] This provision seems not to have been limited by judicial

62 *Id.* at 2155.

63 *Id.* (discussing City of Salina v. Blaksley, 83 P. 619 (Kan. 1905)).

64 *See* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).

65 *Bruen*, 142 S. Ct. at 2141–42 (first quoting District of Columbia v. Heller, 554 U.S. 570, 593 (2007); and then quoting Bill of Rights 1688, 1 W. & M. Sess. 2 c. 2 (Eng. & Wales)).

66 *Id.* at 2142 (quoting 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 136 (London, J. Walthoe & J. Walthoe, Jun. 1716)).

67 *Id.* at 2146.

68 *Id.* at 2146–47.

69 *Id.* at 2147 (citing Act of Oct. 19, 1821, ch. 13, 1821 Tenn. Acts 15).

interpretation during its life. It was only a successor provision enacted in 1870 that was limited by the Tennessee Supreme Court in 1871.[70] But the fact that there *was* a prohibition on public carry in Tennessee for arguably forty years—a sizeable part of the nineteenth century—is never commented on, while the 1871 Tennessee Supreme Court decision limiting restrictions on public carry is given weight as the evidence of a "consensus."[71]

"Administrable" history by analogy in Justice Thomas's hands thus turns out to be a brazen exercise in the manipulation of the historical record, a twisting of analogies that works relentlessly towards its desired goal: restricting public-carry laws. As Justice Breyer puts it in his exhaustive and poignant dissent far better than I could:

> 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?[72]

What indeed?

Whatever "administrable" history by analogy might be, *Bruen*'s version of it is not a plausible investigation of "the Nation's historical tradition." In *Bruen*, "administrable" history as a legal tool born out of a sense of the historicity, contingency, and limits of legal knowledge—instead of keeping alive that sense of contingency—has gone rogue. It yields only a spurious and troubling historical fixity, the story of a univocal past that convinces nobody. In so doing, it reproduces the problem of judicial overreach it claimed to seek to minimize. Indeed, if one compares the two different responses to the problem of law's historicity, uncertainty, and limits caused by its brush with antifoundational history—history as analogy in Justice Thomas's opinion versus history combined with means-ends analysis in Justice Breyer's dissent—I find it hard to believe that anyone would conclude that the former does not entail more judicial overreach than the latter.

Let us make the point, then, by turning briefly to Justice Breyer's dissent.

70 Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871) (limiting Act of June 16, 1870, ch. 13, 1869–1870 Tenn. Acts. 2d Sess. 28).

71 *Bruen*, 142 S. Ct. at 2147.

72 *Id.* at 2190 (Breyer, J., dissenting).

Justice Breyer's approach hearkens back to an older legal-process tradition. Even if one disputes Justice Breyer's conclusion that there is a robust "tradition and history of [public-carry] regulation" (and I do not), one should at least accept his view that the past on this question is subject to multiple interpretations.[73] A dive into the history of public-carry restrictions, Justice Breyer insists, does not do away with uncertainty. And where that past is uncertain, he argues, judicial deference means ceding ground: "The question presented in this case concerns the extent to which the Second Amendment restricts different States (and the Federal Government) from working out solutions to these problems through democratic processes."[74] Precisely because the history is not clear enough to warrant striking down state laws, the Court should yield to those who are better equipped than it to decide upon public carry.

> Balancing these lawful uses [of firearms] 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.[75]

In such situations of uncertainty, what courts can do best, after ceding ground to legislatures and nonlawyers, is to engage, precisely, in the means-ends analysis repudiated in *Bruen*: "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 history and engage in what the Court calls means-ends scrutiny."[76] In significant part, this is where modern judges' expertise lies. "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."[77]

Means-ends tests and constitutional originalism both purport to be different kinds of tools for enacting deference and dealing with the historicity, uncertainty, and limits of law in the aftermath of law's brush with antifoundational history. In *Bruen*, one of these tools—

73 *Id.*

74 *Id.* at 2168.

75 *Id.* at 2167.

76 *Id.* at 2190.

77 *Id.* at 2177.

"administrable" history—reproduces the very problems it is supposedly intended to avoid.

III. ORIGINALISM AND PROFESSIONAL HISTORY

To most professional historians today, the originalism on display in *Bruen* will seem egregiously bad. I do not disagree. But instead of using *Bruen* to reconfirm what historians are already sure of—that they "get things right" relative to lawyers—I want to explore how *Bruen* might spark reflection among historians.

Like law, professional history has had its brush with antifoundational history. Historical thinking in the eighteenth and nineteenth centuries was explicitly foundational. To take just a few examples, Scottish Enlightenment, Whig, Hegelian, Comtean, Marxist, Spencerian, and other histories of the period all advanced accounts in which historical time was possessed of meaning and direction. In *Meaning in History*, the philosopher Karl Löwith argued that such foundational histories were all versions of one kind or another of Christian eschatology, in which time moved towards a particular end.[78]

In the twentieth century, the very same antifoundational historical sensibility that undermined ideas of law as an embodiment of truth, morality, logic, and rationality—and that sent legal thinkers scrambling for methods such as means-ends tests and originalism—undermined foundational historical narratives. The influential historical thinkers of the nineteenth century were convinced that history led *somewhere*; they said so with a measure of confidence unimaginable to us. In a twentieth century marked by war, totalitarianism, and mass death, foundational histories promising greater freedom, prosperity, and mastery of the natural world seemed to many to be empty or, worse yet, profoundly dangerous. Historical time, while it remained important in undermining truths that purported to lie outside it, ceased to bear any clear meaning.

To be sure, this is a considerable simplification. Nevertheless, it is surely noteworthy that, for the most part, Anglo-American philosophy of history in the post–World War II period turned its back on substantive philosophies of history and began to focus instead on epistemology. The question that leading twentieth-century Anglo-American philosophers of history would ask was not whether historical time had meaning or direction, but rather what kind of knowledge historical knowledge was in the first place and whether history as a way of

78 KARL LÖWITH, MEANING IN HISTORY: THE THEOLOGICAL IMPLICATIONS OF THE PHILOSOPHY OF HISTORY (1949).

knowing was possible and on what terms.[79] Within the historical profession, Marxist, Hegelian, and Whiggish histories did not disappear. Indeed, in the guise of the new social history of the 1960s, Marxism of a certain stripe became powerful. Notably, however, the new social history of the post–World War II period largely shed the stadial Marxist philosophy of history in favor of a Marxist analytics of power and culture.[80] Today, even as many professional historians are committed to furthering the rights and claims of subordinated groups, I suspect that most would not explicitly subscribe to a *substantive* philosophy of history.

Contemporary professional historians often state their commitment to an idea of difference over time. This is not the progression of time as possessed of meaning, however, but of time as a simple marker and unwitting engine of difference. Thus, for historians, something "in" 1800 is assumed to be necessarily different from something "in" 1900 simply *because* these are different chronological moments, even as the passage of time from 1800 to 1900 is understood necessarily to produce difference, not a difference that is evidence of direction and meaning, but difference *tout court*.

Related to this is the contemporary professional historian's idea of historical context. Today, historical contexts do not exist and succeed one another in ways that underscore the meaning of historical time (as, for example, a Marxist would see the transition from feudalism to bourgeois capitalism). Instead, historical contexts purportedly bring objects together—either in one temporal moment or across time—to give them meaning. The conceit is that the joining of different objects together gives those objects meaning, rather than meaning dictating how different objects are joined together.

Not surprisingly, then, the contexts of contemporary history are (or are supposed to be) infinitely accommodating: nothing must ever be cast out of them. For example, if we take "Jacksonian America" as a temporal frame, the professional historian will not eject from it outright anything in the United States in the 1820s and 1830s. An idea in the 1820s and 1830s that is dramatically out of step with the mainstream will not *only for that reason* be cut out of "Jacksonian America" in the way in which Justice Thomas excises "outliers" from "the Nation's historical tradition." Professional historians will not hesitate to characterize certain currents of thought in "Jacksonian America" as mainstream or dominant or influential, but ideas out of step with the

79 *See, e.g.*, ARTHUR C. DANTO, ANALYTICAL PHILOSOPHY OF HISTORY (1965). To be sure, there were influential exceptions in the aftermath of 1989. *See* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

80 *See, e.g.*, E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS (1963).

mainstream are more likely to compel them to think about the period as more complex than previously imagined, rather than to be jettisoned from the period. Complexity in contemporary historical knowledge is, I would argue, professional historians' way of (and aesthetic for) acknowledging and recognizing the difficulty of getting at truth. Everything is true in history today, because nothing existing can be deemed not true.

But there are problems with this way of thinking about history. And it is here, I think, that originalism can be of some service.

What if professional historians began to think of history, to borrow from Justice Thomas, as an "administrable" tool? Most would undoubtedly balk at the description. To think of history as a manageable or administrable tool that works towards certain (but not all) ends does violence to how professional historians view and describe their own practice. Many professional historians naturalize their methods and, as a result, imagine not only that "everything" can be explained through history but that history is a superior way of explaining everything.

But if historians were sufficiently impressed with the made-up nature of their tools, something lawyers openly acknowledge, historians might reflect harder about their tools as tools and confront the limits of those tools. To begin with, historians might simply be more forthright about the enterprise of professional history today. I use a recent example to make my point. To themselves and to others, historians often intone pieties about placing objects in historical context and eschewing "presentism." When urged to avoid presentism themselves, however, historians have balked. Witness, for example, the firestorm recently created when the President of the American Historical Association (AHA) James H. Sweet criticized the 1619 Project for its presentism, accusing it, inter alia, of sanitizing Africans' own role in the slave trade.[81] Lambasted for his observation that the 1619 Project and related efforts were presentist and therefore not history, on August 19, 2022, Sweet professed contrition:

> I sincerely regret the way I have alienated some of my Black colleagues and friends. I am deeply sorry. In my clumsy efforts to draw attention to methodological flaws in teleological presentism, I left the impression that questions posed from absence, grief, memory,

81 *See* James H. Sweet, *Is History History? Identity Politics and Teleologies of the Present*, AM. HIST. ASS'N: PERSPS. ON HIST. (Aug. 19, 2022), https://www.historians.org/research-and-publications/perspectives-on-history/september-2022/is-history-history-identity-politics-and-teleologies-of-the-present [https://perma.cc/M8P2-5UU9]. For a summary of the reaction to Sweet's essay, see Jennifer Schuessler, *Grappling with Past, Present and Future*, N.Y. TIMES, Jan. 9, 2023, at C1.

> and resilience somehow matter less than those posed from positions of power.[82]

My point is not that Sweet or his critics are right or wrong, but rather that greater self-consciousness about history as an "administrable" method or tool might be salutary. How does a commitment to understanding objects in terms of contexts determined "only" by chronological time, on the one hand, intersect with commitments to appropriate the past that are born out of trauma, grief, pain, memory, resilience, or a demand for justice, on the other? As the recent AHA controversy around presentism illustrates, such intersections and cohabitations *already* exist within professional history but without being aired adequately; greater clarity about the discipline's tools and their limits could help.

This gets me to a related point. Precisely because they are self-conscious about their tools as tools, legal thinkers are, generally speaking, quite comfortable with having *several* tools in their arsenal. Like lawyers more generally, constitutional lawyers routinely rely on language, history, constitutional structure, precedent, practice, and other tools to reach their ends. Means-ends tests, on the one hand, and originalist delves into the past, on the other, can often coexist in the same opinion. Originalists are no exception here: their sense of the "administrability" of history as a tool—rather than some wholehearted embrace of history to answer any and every question—proves the point. As originalists' critics never fail to point out, no originalist follows through with originalism in a thorough-going way.[83] To do so would bring about results—for example, a reversal of racial desegregation decisions—that are politically and morally unpalatable.[84]

The recent controversy in professional history over the limits of presentism suggests that historians can learn a great deal from lawyers in this regard. Historians' calls to avoid presentism have run headlong into the argument that grief, pain, trauma, and memory are legitimate ways of knowing and claiming the past. I would suggest that many realms of human endeavor—to name just a few, art, psychology, religion, law—offer ways of understanding and appropriating the past that cannot and should not be subsumed by professional history. This is not to say that there are not entirely valid historical approaches to these realms of endeavor, only to suggest that these are not the *only* approaches. Historians would do well to acknowledge that many other constructions of the past—and many other accounts of time—possess validity. To be sure, I am not asking historians to become artists or

82 Sweet, *supra* note 81.

83 *See, e.g.*, CHEMERINSKY, *supra* note 16.

84 *See, e.g.*, *id.* at 32.

psychologists or lawyers, only to temper a "history imperialism" that one encounters all too frequently.

Finally, and following from the above, law can also instruct historians in a graphic way about what happens when tools become hypertrophic and subvert the very ends they are supposed to serve. My reading of the *Bruen* case argues that Justice Thomas's deployment of originalism—a constitutional theory intended to enact judicial deference—is a betrayal of what originalism (at least taken at face value) was intended to do. Justice Thomas's willful manipulation of evidence to get to where he wants, his turning his back on evidence that does not suit him, might be described as a corruption of method. It is also an instance of a method that cannot recognize its own limits. While it might be too extravagant and exaggerated to compare historians' totalizing approach to the world to Justice Thomas's deployment of originalism, the latter serves as a cautionary tale for historians who argue that history can explain "everything."

As should be clear from the foregoing, I am not a fan of history's disciplinary will to power. I have read *Bruen* (and originalism more generally) to extract from it lessons for professional history. But I will end by asserting that I am not a fan of law's will to power either.

Recently, legal scholars, exasperated no doubt by being chastised repeatedly by professional historians, have sought to defend the boundaries of originalism as practiced by lawyers from the depredations of marauding historians. In a passage quoted by Justice Thomas in *Bruen* to defend his use of "administrable" history as a lawyerly device, William Baude and Stephen Sachs write,

> To be sure, applying the law of the past requires knowledge of the past, and lawyers must often defer to historical expertise on the relevant questions. But we should also recognize that the legal inquiry is a refined subset of the historical inquiry. It looks to legal doctrines and instruments specifically, rather than to intellectual movements more generally. It interprets these instruments in artificial ways, properly ignoring certain facts about their historical authors and audience. And when there is uncertainty, it also applies various evidentiary principles and default rules that can give us confidence about today's law, even when yesterday's history remains obscure.[85]

As should be clear, I agree entirely with Baude and Sachs that the law will go about its reading of history "in artificial ways." I have been arguing that history should learn from law and discover its own "artificial ways."

85 Baude & Sachs, *supra* note 28, at 810–11, *quoted in* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 n.6 (2022).

But calling something "artificial" cannot and should not serve to shield it from critique, either internally (by lawyers) or externally (by the world outside law). Indeed, the "artificial" should be open to critique precisely *because* it is "artificial." And if the history of law reveals anything, it is that the "artificial ways" of the law have always been remade by things outside law. *Bruen* affects all Americans. Whether and how much the decision will contribute to increased deaths from gun violence remains open (and will in any event be difficult to determine), but the *Bruen* majority and concurring opinions' refusal to make the contemporary reality of gun violence part of their thinking as they explore "the Nation's historical tradition" is noteworthy. It reveals the U.S. Supreme Court's profound disconnection from the lives and concerns of the many Americans who are victims of gun violence in one way or another. Only Justice Breyer, in dissent, seems to think that the country's epidemic of gun violence should matter in shaping judicial deference to legislatures. This suggests to me that *Bruen* and decisions like it can and should be vigorously attacked. *All* who want to criticize *Bruen*—including historians—should do so from their own vantage points. Lawyers will not end up giving up their "artificial ways" of doing things. But this does not mean they have nothing to learn from nonlawyers and will not change their practices based on what they learn. The struggle over law will not be waged by lawyers alone.