LITIGATING ORIGINAL MEANING FROM *HELLER* TO *RAHIMI*: THE ROLE OF LAWYERING IN THE CONFUSED PATH OF SECOND AMENDMENT JURISPRUDENCE

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The Second Amendment is on a jurisprudential march. An individual right to "keep and bear arms" for purposes unrelated to militia or military service was not recognized until the Supreme Court's 2008 decision, applying what it took to be the original meaning of the "right to keep and bear arms" found in the Second Amendment, in District of Columbia v. Heller. *Subsequently, the Court, in* New York State Rifle & Pistol Ass'n v. Bruen, *invalidated a statute requiring a permit to carry concealable firearms on a showing of particularized need. Most recently, in* United States v. Rahimi, *the Court seemingly changed course, upholding a statute prohibiting the possession of firearms by those under domestic violence orders of protection.*

There is a great deal to criticize in the Court's treatment of the original meaning of the Second Amendment in the line of cases beginning with Heller *and culminating in* Rahimi. *That is the focus of Part I. Part I observes that by the time of* Bruen, *the Court had taken to ignoring the Second Amendment's preamble altogether; a position difficult to reconcile with the view taken of preambles in both the framing era and* Heller *itself. The Court had also managed to both acknowledge and then ignore the demonstrable ambiguity in*

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the meaning of the Second Amendment right to "bear arms." In Rahimi, *the Court ignored its prior account of the original meaning of the Second Amendment's text altogether. We are left with an incoherent originalism, which the Court elevates framing-era regulatory practice and its contemporary analogs over its own account of the original meaning of the Second Amendment's text, albeit without claiming any justification for doing so, or even admitting what it is doing.*

Part I is a relatively conventional example of the type of legal scholarship that dissects Supreme Court opinions. Part II takes a less familiar turn by focusing on the lawyering of those who defended the laws at issue in these cases. After undertaking to show that the Supreme Court's decisions should not be regarded as autonomous, but instead as reflecting to a considerable extent the arguments pressed on it, Part II demonstrates that the Court's errors mirror serious litigating errors by the attorneys defending the laws at issue in these cases. These flawed litigating strategies reflect, Part II shows, an incomplete grasp of the conceptual underpinnings of originalism as a method of constitutional interpretation. Lawyers defending statutes or other legal regimes without clear framing-era antecedents must develop a more sophisticated understanding of originalist constitutional interpretation. Part III offers a guide for avoiding the kind of errors reflected in the thus-far unavailing efforts to defend challenged firearms regulation from Second Amendment attack, in both Second Amendment litigation and other areas of constitutional law.

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INTRODUCTION

The Second Amendment is on a jurisprudential march—marching in search of the Amendment's meaning at the time it was originally framed. The route this march has taken contains important lessons for those seeking to defend any legal regime unknown when the Constitution was framed—whether involving firearms regulation or any other area in which the law has evolved since the framing era. Recent Second Amendment jurisprudence, however, offers a particularly good case study on the perils of litigating original meaning.

For decades, the Supreme Court's leading decision on the Second Amendment was *United States v. Miller*,[1] in which the Court held that a federal statute prohibiting the interstate transportation of short-barrel shotguns did not offend the Second Amendment, reasoning that a short-barrel shotgun has no "relationship to the preservation or efficiency of a well regulated militia."[2] Central to *Miller*, accordingly, was the interaction between the Second Amendment's preamble and its operative clause: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[3] Under *Miller*, the right to keep and bear arms

1. 307 U.S. 174 (1939).
2. *Id.* at 178.
3. U.S. CONST. amend. II.

was limited to those who did so in relation to service in an organized militia.[4]

The *Miller* regime came to an end with the 5-4 decision in *District of Columbia v. Heller*.[5] Assessing the constitutionality of an ordinance banning the possession of handguns and requiring that firearms, when stored, remain either unloaded and disassembled or locked,[6] the Court, in an opinion by Justice Scalia, began by stating an interpretive methodology rooted in the original meaning of constitutional text:

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.[7]

Accordingly, the Court undertook "the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification," adding, "[t]hat sort of inquiry is a critical tool of constitutional interpretation."[8] Few opinions in the history of the Court are so singularly focused on the original meaning of the Constitution's text; one commentator characterized *Heller* as "the most explicitly and self-consciously originalist opinion in the history of the Supreme Court."[9]

Turning to the original meaning of the Second Amendment, *Heller* concluded that the "right of the people" referred to an individual right,[10] and "[a]rms" included "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding,"[11] as long as they are "in common use," thereby excluding "dangerous and unusual weapons."[12] The right to "keep" arms, the

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4. For a discussion of the impact of *Miller* on Second Amendment jurisprudence, see Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 CUMB. L. REV. 961, 981–98 (1996).

5. 554 U.S. 570 (2008).

6. *Id.* at 574–75.

7. *Id.* at 576–77 (second alteration in original) (citations omitted) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

8. *Id.* at 605.

9. Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 246 (2008).

10. *Heller*, 554 U.S. at 579–81, 592.

11. *Id.* at 582.

12. *Id.* at 627.

Court wrote, meant the right to possess them,[13] and the right to "bear" arms meant the right to "carry[] for a particular purpose—confrontation."[14] The Court added that the Second Amendment's preamble would not have been understood in the framing era to "limit or expand the scope of the operative clause," but, instead, "announce[d] the purpose for which the right was codified: to prevent elimination of the militia."[15] As for *Miller*, the Court concluded that it should be understood as holding "only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[16] The Court then held that the Second Amendment was infringed by the District's prohibition on the possession of handguns as well as its requirement that firearms be locked or stored in an inoperable condition.[17]

The next shoe dropped when, in *McDonald v. City of Chicago*,[18] the Court, again dividing 5-4, held that the Second Amendment right to keep and bear arms was enforceable against the States, although the majority did not coalesce around a single rationale. Four of the five Justices in the majority concluded that the Second Amendment was applicable to the States by virtue of the Fourteenth Amendment's Due Process Clause, placing reliance not on the original meaning of the Second or Fourteenth Amendments, but instead on a line of precedent characterizing the Fourteenth Amendment's Due Process Clause as incorporating individual rights thought to be "fundamental."[19] Justice Thomas, in contrast, rejected the plurality's view that the Second Amendment "is enforceable against the States through a Clause that speaks only to 'process'"[20] and instead relied on his understanding of the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause.[21]

In *New York State Rifle & Pistol Ass'n v. Bruen*,[22] the Court considered a statute that required individuals to obtain a permit to carry

13. *Id.* at 582.
14. *Id.* at 584.
15. *Id.* at 578, 599.
16. *Id.* at 625.
17. *Id.* at 628–31.
18. 561 U.S. 742 (2010).
19. *Id.* at 767–87 (plurality opinion).
20. *Id.* at 806 (Thomas, J., concurring in part and concurring in the judgment).
21. *Id.* at 813–58.
22. 142 S. Ct. 2111 (2022).

concealable firearms in public, issued on a showing of "proper cause," a standard that had been interpreted, as applied to those seeking to carry handguns for purposes of self-defense, to require the applicant "demonstrate a special need for self-protection distinguishable from that of the general community."[23] Citing *Heller*, the Court, in an opinion by Justice Thomas, wrote that the original meaning "of 'bear' naturally encompasses public carry," and, accordingly, "[t]he Second Amendment's plain text thus presumptively guarantees . . . a right to 'bear' arms in public for self-defense."[24] The Court invalidated the New York statute, reasoning:

> American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor . . . have American governments required law-abiding, responsible citizens to "demonstrate a special need for self-protection distinguishable from that of the general community" in order to carry arms in public.[25]

Finally, and most recently, came *United States v. Rahimi*.[26] At issue was the constitutionality of a federal statute making it unlawful for persons subject to a domestic violence order of protection to possess firearms.[27] Chief Justice Roberts's opinion of the Court upheld the statute, but instead of discussing the original meaning of the Second Amendment, the opinion stated that "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."[28] After surveying this "regulatory tradition," the Court concluded: "When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."[29]

There is a great deal to criticize in the Court's treatment of the Second Amendment's original meaning in the line of cases from *Heller* to *Rahimi*. That is the focus of Part I below. Part I notes that by the time of *Bruen*, the Court had taken to ignoring the Second Amendment's preamble altogether; a position difficult to reconcile with the view taken of preambles in both the framing era and *Heller* itself. The Court

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23. *Id.* at 2123 (quoting *In re* Klenosky, 428 N.Y.S.2d 256, 257 (App. Div. 1980)).
24. *Id.* at 2134–35.
25. *Id.* at 2156. Justice Breyer dissented, joined by Justices Kagan and Sotomayor. *Id.* at 2163 (Breyer, J., dissenting).
26. 144 S. Ct. 1889 (2024).
27. *Id.* at 1894.
28. *Id.* at 1898.
29. *Id.* at 1901.

had also taken to ignoring the demonstrable ambiguity in the original meaning of the Second Amendment's operative clause—an ambiguity that both *Heller* and *Bruen* acknowledged, but then somehow disregarded. In *Rahimi*, the Court ignored the account of the original meaning of the Second Amendment's operative clause in *Heller* and *Bruen* altogether, and instead substituted an analysis based on "regulatory tradition." We are left with an incoherent originalism, in which the Court elevates framing-era regulatory practice and its contemporary analogs over its own account of the original meaning of the Second Amendment's text, albeit without claiming any justification for doing so, or even admitting what it is doing.

Part I is a conventional example of the type of legal scholarship that dissects Supreme Court opinions. Part II takes a less familiar turn by focusing on the lawyering in these cases. After undertaking to show that the Court's decisions should not be regarded as autonomous, but instead as reflecting to a considerable extent the arguments pressed on it, Part II demonstrates that the Court's errors can be explained by the litigating strategies employed by the attorneys defending the laws at issue in these cases. These flawed litigating strategies reflect, Part II shows, an incomplete grasp of the conceptual underpinnings of originalism. Indeed, originalism presents many traps for the unwary. Part III offers a guide for avoiding these traps for the unwary, in both Second Amendment litigation and other areas of constitutional law.

I. SECOND AMENDMENT ORIGINALISM FROM *HELLER* TO *RAHIMI*

Although the Supreme Court has purported to employ original meaning to decide all of the Second Amendment cases before it since *Heller*, in fact, its originalist methodology has varied wildly and inconsistently. By the time of *Rahimi*, the Court had taken to ignoring *Heller*'s account of the original meaning of the Second Amendment altogether.

A. The Relationship Between the Second Amendment's Preamble and its Operative Clause

Heller's treatment of the historical evidence of the original meaning has been subject to considerable criticism by commentators, regardless

whether they support or oppose the Court's conclusion in that case.[30] Consider, in particular, the Court's treatment of the relationship between the Second Amendment's preamble and its operative clause from *Heller* to *Rahimi*.

In *Heller*, the Court explained the relationship between a preamble and an operative clause this way: "Logic demands that there be a link between the stated purpose and the command," and, accordingly, "[t]hat requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause."[31] This approach to the interpretive significance of prefatory language has ample originalist support; framing-era sources similarly endorse reference to preambles to clarify an ambiguous text.[32]

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30. *See, e.g.*, Akhil Reed Amar, Heller, HLR, *and Holistic Legal Reasoning*, 122 HARV. L. REV. 145–46 (2008) (criticizing both the majority and dissenting opinions while supporting recognition of an individual right to keep and bear arms); Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 626–27 (2008) (criticizing the Court's analysis of original meaning); Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267 (2008) (same); David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295 (2009) (same); Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009) (same); William G. Merkel, The District of Columbia v. Heller *and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349 (2009) (same); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 200–01 (2008) (same); David C. Williams, *Death to Tyrants:* District of Columbia v. Heller *and the Uses of Guns*, 69 OHIO ST. L.J. 641, 642 (2008) (same).

31. District of Columbia v. Heller, 554 U.S. 570, 577 (2008).

32. *See, e.g.*, 1 WILLIAM J. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 59–60 (1765) ("[I]f words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus, the proeme, or preamble, is often called in to help the construction of an act of parliament."); I JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 459, at 443–44 (1833) ("The importance of examining the preamble, for the purpose of expounding the language of a statute, has been long felt, and universally conceded . . . . It is properly resorted to, where doubts or ambiguities arise upon the words of the enacting part . . . ."). For a contemporary acknowledgement of the clarifying function of preambles from a prominent firearms-rights advocate, see Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 807 (1998), stating "[T]he justification clause may *aid* construction of the operative clause but may not *trump* the meaning of the operative clause: To the extent the operative clause is ambiguous, the justification clause may inform our interpretation of it, but the justification clause can't take away what the operative clause provides." For an elaboration of the framing-era interpretive significance of a preamble from a historian critical of *Heller*, see Cornell, *supra* note 30, at 631–38.

In response to the argument that the phrase "bear arms" referred to carrying arms in connection with military service, the *Heller* Court wrote:

> The phrase . . . had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: "to serve as a soldier, do military service, fight" or "to wage war." But [the phrase] *unequivocally* bore that idiomatic meaning only when followed by the preposition "against," which was in turn followed by the target of the hostilities.[33]

Notably, this is not a claim that the phrase "bear arms," even when not followed by "against," unambiguously referred to the carrying of firearms even when unrelated to military service; it is only a claim that the phrase unambiguously referred to armed military service only when followed by the preposition "against." Indeed, *Heller* acknowledged that in the framing era, even when "bear arms" was unaccompanied by "against," "the phrase was often used in a military context."[34] It elaborated: "The common references to those 'fit to bear arms' in congressional discussions about the militia are matched by use of the same phrase in the few nonmilitary federal contexts where the concept would be relevant."[35] This, of course, is an admission, if a bit indirect, that the phrase "bear arms," even when unadorned by "against," was ambiguous, and could refer either to the physical act of carrying arms, or to carrying arms for the purpose of militia or military service—what *Heller* labels "an idiomatic meaning that was significantly different from its natural meaning."[36]

Indeed, the historical evidence supports the view that the phrase "bear arms," even when not followed by "against," is ambiguous; sometimes but not always used idiomatically to refer specifically to the use of arms in connection with military service. For example, one post-*Heller* review of the historical evidence identified ample indication that the phrase "bear arms" often had a military meaning in the framing era even when not followed by "against."[37] Others have addressed the

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33. *Heller*, 554 U.S. at 586 (citation omitted).
34. *Id.* at 587.
35. *Id.* (citation omitted).
36. *Id.* at 586.
37. *See* Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. EARLY REPUBLIC 585, 590 (2009) ("[*Heller*] argues that the phrase 'bear arms' only had an unequivocally military meaning 'when followed by the preposition "against,"' and that 'every example given by the petitioner's *amici* for the idiomatic

issue by examining databases containing founding-era documents, using a technique that has come to be known as "corpus linguistics," which analyzes the most prevalent usages of particular terms in a database.[38] These analyses, while differing in the details, have consistently found that the phrase "bear arms," even when used without the preposition "against," was most often used in the framing era to refer to carrying arms in connection with military service.[39]

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meaning of "bear arms" from the founding period either includes the preposition "against" or is not clearly idiomatic.' The evidence from these digital databases easily proves this assertion to be false, because 'bear arms' was used frequently in a military context without the proposition *against*."); *see also* Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840) ("The words 'bear arms,' too, have reference to their military use, and were not employed to mean wearing them about the person as part of the dress.").

38. *See, e.g.*, Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 HASTINGS CONST. L.Q. 509, 510 (2019).

39. *See id.* at 510 ("Founding-era sources almost always use *bear arms* in an unambiguously military sense. My examination of two corpora of seventeenth- and eighteenth-century English and American texts that only recently came online shows that the plain, ordinary, natural, and original meaning of *bear arms* in the eighteenth century was 'carrying weapons in war,' or in other forms of group offense, defense, or rebellion. Non-military uses of *bear arms* in reference to hunting or personal self-defense are not just rare, they are almost nonexistent."); Neal Goldfarb, *A (Mostly Corpus-Based) Linguistic Reexamination of* D.C. v. Heller *and the Second Amendment* 3 (Nov. 18, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3481474 ("Although *bear* was sometimes used to mean 'carry,' the two words weren't generally synonymous. The ways in which *bear* was used differed substantially from those for *carry*. While *carry* was often used to denote the physical carrying of tangible objects (e.g., *carry baggage*), *bear* was seldom used that way. In fact, *carry* had by the end of the 1600s replaced *bear* as the verb generally used to convey the meaning 'carry'"); James C. Phillips & Josh Blackman, *Corpus Linguistics and* Heller, 56 WAKE FOREST L. REV. 609, 679 (2021) ("Justice Scalia's conclusion about *bear arms against* was in error. The phrase *bear arms*, with *against*, is sufficient to make the phrase military. But the phrase *bear arms*, without *against*, can still invoke the military sense. In other words, *against* is a sufficient but not a necessary modifier to move a phrase into the military sense category."); Josh Jones, Note, *The "Weaponization" of Corpus Linguistics: Testing* Heller*'s Linguistic Claims*, 34 BYU J. PUB. L. 135, 165 (2020) ("Contrary to Justice Scalia's assertion that *bear arms* '*unequivocally* bore [its] idiomatic meaning only when followed by the preposition "against,"' only 36 hits, or 24.5% of all 147 specialized sense hits in the sample, used the preposition *against*. So, not only did this 'idiom' appear without the preposition *against*, but the specialized sense of *bear arms* was three times more likely to be recorded without it. While Justice Scalia's other claims and ultimate conclusion regarding the Second Amendment may still be correct (or at least subject to further research and debate), it is emphatically not true that the preposition *against* was necessary to convey the specialized sense of *bear arms* at the time of the Founding." (footnote omitted)); Kyra Babcock Woods, Note, *Corpus Linguistics and Gun Control: Why* Heller *Is Wrong*, 2019 BYU L. REV. 1401, 1420–21

In any event, even granting *Heller* all its claims about the phrase "bear arms," the opinion nevertheless acknowledges, if a bit backhandedly, ambiguity in the phrase. The Court never claimed that the meaning of "bear arms" is unambiguous; the Court wrote only that this phrase "*unequivocally*" referred to the carrying of arms in a military context "only when followed by the preposition 'against,' which was in turn followed by the target of the hostilities."[40] To be sure, the Court added:

> Giving "bear Arms" its idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war—an absurdity that no commentator has ever endorsed. Worse still, the phrase "keep and bear Arms" would be incoherent. The word "Arms" would have two different meanings at once: "weapons" (as the object of "keep") and (as the object of "bear") one-half of an idiom.[41]

Once again, this is not a claim that "bear arms" is unambiguous; it is only a claim that it would be absurd to read the operative clause as limited to a right to be a soldier or wage war. It does not follow, however, that the right to "bear arms" has only one meaning: unambiguous and unrelated to militia service.

Heller, accordingly, limited its interpretive conclusion to the proposition that the phrase "bear arms" did not unambiguously refer to the use of arms in connection with military service unless followed by the preposition "against."[42] Ambiguity in the phrase "bear arms," in turn, should warrant reference to the Second Amendment's preamble as a means of addressing that ambiguity. After all, *Heller* agrees that, in the framing era, it was appropriate to use "a prefatory clause to resolve an ambiguity in the operative clause."[43]

The Second Amendment's preamble contemplates a "well regulated Militia."[44] *Heller* concluded that the original meaning of the term "Militia" refers not to "the organized militia," but rather "all able-

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("[T]he Blackman and Phillips data overwhelmingly favors Justice Stevens's dissenting viewpoint. In their first set of corpus analysis, Blackman and Phillips were correct that the vast majority of the usage of *bear arms* is used in the militia context. Upon a second analysis, however, they were incorrect in stating that *bear arms* is used in a militia context less frequently when the preposition *against* is missing. The data presents strong evidence overall that the general public likely understood the right to *bear arms* as generally synonymous with militia service.").

40. *Heller*, 554 U.S. at 586.
41. *Id.* at 586–87 (citation omitted).
42. *Id.* at 586.
43. *Id.* at 577.
44. U.S. CONST. amend. II.

bodied men."[45] This framing-era "militia" was, the Court added, "the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty."[46] The Court added that the Second Amendment was enacted to protect a "'citizens' militia' as a safeguard against tyranny," which the Court characterized as "the people's militia that was the concern of the founding generation."[47] Accordingly, *Heller* effectively treats the militia and those who exercise the right to keep and bear arms as interchangeable, which reconciles the preamble's reference to the objective of maintaining a "well regulated Militia" with the operative clause's recognition of a "right of the people."[48] This use of the

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45. *Heller*, 554 U.S. at 596. Indeed, as the Court acknowledged, the first Militia Act defined the militia as "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years." *Id.* (quoting Act of May 8, 1792, ch. 33, 1 Stat. 271).

46. *Id.* at 627. The Court elaborated by noting that the "militia" was thought to exist prior to any effort by a government to organize it:

> Although we agree with petitioners' interpretive assumption that "militia" means the same thing in Article I and the Second Amendment, we believe that petitioners identify the wrong thing, namely, the organized militia. Unlike armies and navies, which Congress is given the power to create ("to raise . . . Armies"; "to provide . . . a Navy," the militia is assumed by Article I already to be *in existence*. Congress is given the power to "provide for calling forth the Militia," and the power not to create, but to "organiz[e]" it—and not to organize "a" militia, which is what one would expect if the militia were to be a federal creation, but to organize "the" militia, connoting a body already in existence. This is fully consistent with the ordinary definition of the militia as all able-bodied men. From that pool, Congress has plenary power to organize the units that will make up an effective fighting force. That is what Congress did in the first Militia Act, which specified that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia." To be sure, Congress need not conscript every able-bodied man into the militia, because nothing in Article I suggests that in exercising its power to organize, discipline, and arm the militia, Congress must focus upon the entire body. Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them.

Id. at 596 (alterations in original) (citations omitted).

47. *Id.* at 600.

48. *Cf.* Amar, *supra* note 30, at 166 ("[T]he otherwise stilted syntax of the Amendment, with its reference to the 'militia' in the opening and the 'people' in the closing, makes the most sense and becomes the least stilted when we read these two key nouns, 'militia' and 'people,' as synonyms. Here is the key linkage between the Amendment's two parts. In eighteenth-century republican ideology, the (general)

preamble thereby satisfies the "requirement of logical connection," which, *Heller* acknowledged, "may cause a prefatory clause to resolve an ambiguity in an operative clause."[49]

The preamble, therefore, sheds light on the ambiguity in the meaning of "bear arms"—those who "keep and bear" arms do so not merely as individuals, but as part of a militia necessary to the security of a free state, even if unorganized and subject to regulation. Indeed, if only the organized militia was to be "well regulated," the term "Militia" in the preamble would violate *Heller*'s injunction against interpreting a single word to "have two different meanings at once."[50] Thus, the understanding that reconciles the preamble and the operative clause is that the right to keep and bear arms would be exercised by individuals subject to regulatory authority.

As for the phrase "well regulated," *Heller* stated that the original meaning of the phrase was "the imposition of proper discipline and training."[51] To similar effect, the first edition of Webster's dictionary, repeatedly relied on by *Heller* to provide evidence of the original meaning of the Second Amendment,[52] defined "regulated" as "[a]djusted by rule, method or forms; put in good order; subjected to rules or restrictions."[53] This definition, of course, is sufficiently broad to contemplate substantial regulatory authority.[54]

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militia *were* the people."). This broad conception of "militia" is consistent with that of even scholars who have advanced the view that the Second Amendment protects an individual right. *See, e.g.*, Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 214–18 (1983); Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. REV. 781, 807–22 (1997); Volokh, *supra* note 32, at 810–12. *But cf.* Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON U. C.R.L.J. 229, 240–41 (2008) (arguing that the "Militia" in the preamble and "the people" in the operative clause differ).

49. *Heller*, 554 U.S. at 577.

50. *Id.* at 587.

51. *Id.* at 597.

52. *Id.* at 581–82, 595.

53. 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 54 (1828). To similar effect, see 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS cdlxxvi (6th ed. 1785) (defining "regulate" as "[t]o adjust by rule or method" or "[t]o direct"). Johnson's dictionary was also repeatedly relied upon in *Heller* to provide evidence of the original meaning of the Second Amendment. 554 U.S. at 581–82, 584, 597.

54. *See, e.g.*, Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1318–19 (2009) ("The imposition of proper

Yet, *Heller* failed to follow the interpretive rule that it embraced—it made no effort to use the preamble to shed light on the ambiguity in the phrase "bear arms." To be sure, the Court used the preamble to explicate what it regarded as the rationale for codifying the right to keep and bear arms in the Second Amendment,[55] but it did not consider utilizing the preamble to address the ambiguity in the phrase

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discipline assumes someone with authority to impose discipline and presumes some consequence for drilling without adequate discipline. . . . [O]nce the people exercise their right to keep and bear arms as a people's militia and spill out into the street, then that right is textually constrained . . . ."); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 707 (2007) ("Training and discipline does not simply happen; laws must be adopted to ensure that the people are properly educated about guns and that the people understand the rules governing the use of guns. Discipline implies control, and the state disciplines individual gun users by teaching them the rules and by punishing them for failure to obey. . . . Some measure of regulatory authority, even though its precise contours are unclear, does seem to be called for by the text."). Moreover, in *Heller*, the Court wrote that the militia referred to in Article I is the same body referred to by the Second Amendment, 554 U.S. at 596, and Article I provides that Congress and the States may exercise substantial regulatory and disciplinary authority over the militia and its members. *See* U.S. CONST. art. I, § 8, cl. 16 ("The Congress shall have Power . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."); *cf.* Act of May 8, 1792, ch. 28, § 7, 1 Stat. 271, 273 ("[T]he rules of discipline, approved and established by Congress in their resolution of the twenty-ninth of March, one thousand seven hundred and seventy-nine, shall be the rules of discipline to be observed by the militia throughout the United States, except such deviations from the said rules as may be rendered necessary by the requisitions of this act, or by some other unavoidable circumstances."); Act of May 2, 1792, ch. 33, § 5, 1 Stat. 264, 264 ("[E]very officer, non-commissioned officer or private of the militia, who shall fail to obey the orders of the President of the United States . . . shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court martial; and such officer shall, moreover, be liable to be cashiered by sentence of a court martial: and such non-commissioned officers and privates shall be liable to be imprisoned by a like sentence, on failure of payment of the fines adjudged against them, for the space of one calendar month for every five dollars of such fine.").

55. *Heller*, 554 U.S. at 599 ("[T]he Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution.").

"bear arms" that the Court, at least implicitly, acknowledged.[56] The preamble, in turn, contemplates that those capable of exercising the right to keep and bear arms, and who, for that reason, constitute the "militia" that, whether organized or not, may be "well regulated."[57]

Notably, when it reached the constitutionality of the firearms regulations at issue in *Heller*, the Court did not rely on its account of the original meaning of the Second Amendment's text, presumably because the District permitted residents to possess long guns, and, to that extent, honored the right to "keep and bear arms."[58] Instead, the Court observed that "the inherent right of self-defense has been central to the Second Amendment right," that the District's "handgun ban amounts to a prohibition on an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose," and the ban "extends, moreover, to the home, where the need for defense of self, family, and property is most acute."[59] The Court wrote that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."[60] Because "the American people have considered the handgun to be the quintessential self-defense weapon," the Court concluded, "a complete prohibition of their use is invalid."[61] As for the trigger-lock requirement, because it required that "firearms in the home be rendered and kept inoperable at all times," this prohibition "makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional."[62]

This assessment of the burden that the District's ordinance imposed on armed self-defense, whatever its merit, has no apparent footing in what the Court had identified as the original meaning of the operative clause. As we have seen, the Court had concluded that the original meaning of the operative clause was to codify a right to possess and

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56. *Cf.* Saul Cornell, Heller*, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1110 (2009) ("Blackstone's rule is clear. If there are two plausible meanings, then one must turn to the preamble to decide which meaning of "bear arms" is correct in this particular context. Yet, Scalia did not consult the preamble to resolve this problem. His approach is simply inconsistent with the Blackstonian method. Scalia's originalist methodology violates one of the most well-established rules of construction from the Founding era.").

57. U.S. CONST. amend. II.

58. *Heller*, 554 U.S. at 628–29.

59. *Id.* at 628.

60. *Id.* at 629.

61. *Id.*

62. *Id.* at 630.

carry bearable firearms in common use.[63] Yet, the original meaning of the operative clause has little apparent relation to the Court's ultimate holding, which centers on the magnitude of the burden imposed by the District's ordinance on lawful armed defense.[64] A holding premised on the burden imposed by a challenged ordinance on lawful armed defense is hard to defend based on the original meaning of the Second Amendment's operative clause. Perhaps the Court's use of an undue-burden test reflects implicit acknowledgment of ambiguity in the operative clause; but, for whatever reason, *Heller*'s precise holding was not based on its account of the original meaning of the operative clause.

Had the Court straightforwardly acknowledged the ambiguity in the Second Amendment's operative clause, and then, consistent with framing-era interpretive practice, consulted the preamble to clarify its scope, it would then have appropriately considered whether, in light of the evidence canvassed by Justice Breyer in his dissenting opinion that concealable firearms are disproportionately likely to be used for unlawful purposes, a prohibition on the possession on concealable firearms while permitting the possession of long guns, would honor the right to keep and bear arms while also "well regulat[ing]" the militia, that is, those able to exercise the right to keep and bear arms.[65] But, because the Court elided that ambiguity, it was able to claim that Justice Breyer's approach was inconsistent with the original meaning of the Second Amendment.[66] Yet, the Court's own holding, stated in terms of the burden imposed by the ordinance on lawful armed defense, was no more rooted in original meaning.

Perhaps *Heller*'s failure to consider the effect of the Second Amendment's preamble on the scope of the right to "bear arms" was forgivable, or at least immaterial to the outcome in that case. In his lawsuit, Dick Heller sought only to possess a handgun within his own home.[67] Because this claim invoked only the right to "keep" a handgun

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63. *See supra* text accompanying notes 10–14.

64. *Heller*, 554 U.S. at 629–30.

65. For Justice Breyer's discussion of the evidence, see *Heller*, 554 U.S. at 693–719 (Breyer, J., dissenting).

66. *E.g.*, *id.* at 634 (majority opinion) ("The 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.").

67. *Id.* at 575–76 (noting that Heller's lawsuit sought "to enjoin the city from enforcing the bar on the registration of handguns, the licensing requirement insofar

within the home, no issue about the scope of the right to "bear" arms was at issue, and accordingly the ambiguity in that term arguably had no bearing on the outcome in that case.[68] Not so, however, in *Bruen*, where the right to "bear" or carry firearms in public was squarely at issue.

In *Bruen*, the Court ignored the preamble altogether. Discussing only the operative clause, the Court declared:

> [T]he right to "bear arms" refers to the right to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."[69]

The Court then concluded: "This definition of 'bear' naturally encompasses public carry."[70] Gone was any consideration of potential ambiguity in the phrase "bear arms" that might warrant resort to the preamble. Instead, the Court wrote: "The Second Amendment's plain text thus presumptively guarantees . . . a right to 'bear' arms in public for self-defense."[71] The Court added, however, that this "presumption" could be rebutted on a "show[ing] that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation."[72] This inquiry requires "determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation."[73]

The Court's refusal to grant the preamble interpretive significance has serious consequences for the scope of firearms regulation. As we have seen, the preamble contemplates a "well regulated Militia," and *Heller* acknowledges that the "militia" is the "people's militia," that is, the whole of the people able to exercise the right to keep and bear arms.[74] Yet, in *Bruen*, the preamble receives nary a mention. The Court, by stating that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that

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as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of 'functional firearms within the home.'").

68. *Id.* at 635.

69. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2134 (2022) (quoting *Heller*, 554 U.S. at 584).

70. *Id.* at 2134.

71. *Id.* at 2135.

72. *Id.*

73. *Id.* at 2132.

74. *See supra* text accompanying notes 44–49.

conduct,"[75] has erected a presumption against the very regulation expressly contemplated in the preamble.

Beyond *Bruen*'s erasure of the preamble, it is worth interrogating the rebuttable character of the Court's presumption. How could the Court believe that framing-era regulations and their contemporary analogues can somehow limit the scope of a constitutional right expressly and unambiguously set out in the Constitution's text? After all, in *Bruen* itself, the Court, after concluding that the original meaning of the right to "bear" arms "naturally encompasses public carry,"[76] added: "[T]o the extent later history contradicts what the text says, the text controls."[77] If the text secures a right to carry firearms in public, historical practice to the contrary should not, on the Court's own account, overcome the controlling character of the text itself.

To explain this apparent dilemma, the Court wrote:

> "a regular course of practice" can "liquidate & settle the meaning of" disputed or indeterminate "terms & phrases" in the Constitution. In other words, we 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."[78]

Notably, this reference to liquidation through a course of practice is offered as a means for construing an "ambiguous constitutional

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75. *Bruen*, 142 S. Ct. at 2126.

76. *Id.* at 2134.

77. *Id.* at 2137.

78. *Id.* at 2136–37 (citations omitted) (first quoting Chiafalo v. Washington, 140 S. Ct. 2316, 2326 (2020); then quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 WRITINGS OF JAMES MADISON 450 (G. Hunt ed. 1908); and then quoting NLRB v. Noel Canning, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment)). *Chiafalo* presented the question whether the Constitution forbids States from requiring presidential electors to vote for the presidential candidates they had pledged to support, and in that case, before turning to historical practice, the Court observed that the Constitution's text did not resolve the issue: "Whether by choice or accident, the Framers did not reduce their thoughts about electors' discretion to the printed page." *Chiafalo*, 140 S. Ct. at 2326. *Noel Canning* involved the meaning of the term "recess" in the Constitution's Appointments Clause, and in his separate opinion, Justice Scalia wrote: "[T]he Constitution's text and structure unambiguously refute the majority's freewheeling interpretation of 'the Recess.' . . . The historical practice of the political branches is, of course, irrelevant when the Constitution is clear." *Noel Canning*, 573 U.S. at 584 (Scalia, J., concurring in judgment).

provision."[79] Yet, as we have seen, the framing-era interpretive convention for preambles endorsed in *Heller* was to utilize a preamble to address an ambiguity in an operative clause.[80] Thus, according to *Bruen*, framing-era practice is relevant because the Second Amendment's operative clause is ambiguous. The Court, however, seemingly forgot that under framing-era interpretative practice, ambiguity in the operative clause warranted reference to the Second Amendment's preamble.

In short, *Bruen* managed to treat the operative clause of the Second Amendment as simultaneously unambiguous—when it defined the right to "bear arms"—and ambiguous—when it explained the historical evidence of regulatory authority over the carrying of arms in public as an example of the liquidation of "an ambiguous constitutional provision."[81]

Had the Court acknowledged the ambiguity of the phrase "bear arms" in *Bruen*, it could have properly turned to evidence of historical practice to liquidate its meaning, but, if truly committed to originalist methods of constitutional interpretation, it would have had to consider as well whether the framing-era use of preambles to address ambiguity meant that the right to bear arms was subject to the broad regulatory authority contemplated by the preamble. The Court, however, skipped this step, ignoring text in favor of post-enactment "liquidation" that the Court itself explained is properly employed only with respect to ambiguous terms.

Moreover, if the Court had acknowledged the ambiguity in the phrase "bear arms," and consulted the Second Amendment's

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79. *Bruen*, 142 S. Ct. at 2137. The Court cited a pair of law review articles to support this proposition, both of which endorse liquidation as a means of interpreting ambiguous constitutional provisions. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 14 (2019) ("Modern technical vocabulary distinguishes between two kinds of indeterminacy: ambiguity and vagueness. A term is ambiguous if 'it has more than one sense,' like the word 'cool,' which can mean either 'low temperature' or 'stylish.' A term is vague if it has one sense with borderline cases, like the word 'tall,' which leaves us with no precise number to differentiate those who are tall from those who are not. One might imagine liquidation extending only to one of these kinds of indeterminacy, but it seems that liquidation extended to *both* ambiguity and vagueness." (footnotes omitted)); Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 14 (2001) ("To the extent that a statutory or constitutional provision was ambiguous, a regular course of practice (including but not necessarily limited to court decisions) could settle its meaning for the future.").

80. *See supra* text accompanying notes 31–32.

81. *Bruen*, 142 S. Ct. at 2137.

preamble to determine the scope of the right to bear arms, it would have had occasion to consider the claim that one form of "well regulat[ing]" the militia—that is, those who exercise the right to keep and bear arms—would be to reduce the risk of violent confrontations on the streetscape by prohibiting the carrying of concealable firearms, at least in high-crime areas plagued by street gangs and the like, absent a permit issued on a showing of particularized need, enforced by targeted stop-and-frisk and other tactics directed at those who carry firearms without the requisite permits.[82] Perhaps there are powerful counter-arguments, but, under the approach taken by the Court in *Bruen*, which considers no more than the original meaning of the Second Amendment's text and framing-era regulatory practice, it had no occasion to consider this type of claim.

One wonders whether *Bruen*'s demonstrably erroneous and internally inconsistent claim that the Second Amendment's operative clause is unambiguous will eventually warrant its reconsideration. After all, many originalists take the view that because it is the original meaning of the Constitution that is interpretively binding, precedent inconsistent with original meaning should not be followed.[83] An example of that view is provided by *Bruen*'s author, Justice Thomas,

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82. For arguments along these lines, see, for example, Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1248–58 (2015); and Michael R. Ulrich, *Second Amendment Realism*, 43 CARDOZO L. REV. 1379, 1420–33 (2022).

83. *See, e.g.*, Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257, 269 (2005) ("Where a determinate original meaning can be ascertained and is inconsistent with previous judicial decisions, these precedents should be reversed and the original meaning adopted in their place."); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 8 (2017) ("[S]uppose that a prior judicial decision speaks squarely to the resolution of a dispute brought before a court. . . . That status as law creates a prima facie obligation on the part of the court to apply the decision. But as soon as the other side interposes the Constitution, the court is now faced with two competing sources of law. If the Constitution says, "A," and the prior judicial decision says, "B," the Constitution must prevail. If a statute, which the Constitution specifically declares to be "Law," cannot defeat the Constitution, it is hard to see how a judicial decision could have a more exalted legal status."); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) ("If one is an originalist—that is, if one believes that the Constitution should be understood and applied in accordance with the objective meaning the words and phrases would have had to an informed general public at the time of their adoption—then *stare decisis*, understood as a theory of adhering to prior judicial precedents that are contrary to the original public meaning, is completely irreconcilable with originalism." (footnote omitted)).

who has written: "'[O]ur judicial duty under Article III' . . . requires us to faithfully interpret the Constitution. . . . [W]hen our prior decisions clearly conflict with the text of the Constitution, we are required to 'privilege [the] text over our own precedents.'"[84] *Bruen* incorrectly treats the phrase "bear arms" as unambiguous—an error so palpable that the Court could not remain consistent on the point.

B. Historical Analogy in Bruen

As for *Bruen*'s treatment of the historical evidence of firearms regulation, its methodology is of note. The Court wrote that the historical evidence should be assessed to "determine[] whether a historical regulation is a proper analogue for a distinctly modern firearm regulation."[85] In undertaking this inquiry, "courts should not uphold every modern law that remotely resembles a historical analogue," though "analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*."[86] The Court added:

> 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. As we stated in *Heller* and repeated in *McDonald*, "individual self-defense is 'the *central component*' of the Second Amendment right." Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are "*central*" considerations when engaging in an analogical inquiry.[87]

These guidelines, of course, represent something less than mathematical precision.[88] It is even unclear whether the Court was able

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84. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2151 (2020) (Thomas, J., dissenting) (third alteration in original) (citations omitted).

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

86. *Id.* at 2133.

87. *Id.* at 2132–33 (citations omitted) (first quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010); and then quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008)).

88. Notably, even the scholarly article cited by the Court in defense of analogical reasoning, *id.* at 2132, acknowledges its imprecision:

> Because of its comparative lack of ambition, this form of reasoning has some important disadvantages. Compared with the search for reflective equilibrium,

to apply them with consistency. For example, the Court wrote that "nothing in our analysis should be interpreted to suggest the unconstitutionality of the [forty three] States' 'shall-issue' licensing regimes," which, the Court wrote, "are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'"[89] Similarly, Justice Kavanaugh, in his separate opinion, wrote that "the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense," noting that many states utilize "'shall-issue' [permitting] regimes" that "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."[90] None of the framing-era regulations canvassed by the Court, however, contained licensing regimes along these lines; rather, shall-issue permitting regimes emerged only in the latter part of the twentieth century.[91] It is entirely unclear whether, under the Court's methodology, the requirements

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> it is insufficiently theoretical; it does not account for its own low-level principles in sufficient depth or detail. Compared with economics and empirical social science, it is at best primitive on the important issue of likely social consequences. Law should be more attuned to facts, and on this score analogical thinking may be an obstacle to progress.

Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 790 (1993). For discussions of the welter of methodological issues that were unresolved by *Bruen*, see, for example, Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 137–74 (2023); and Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 95–122 (2023).

89. *Bruen*, 142 S. Ct. at 2138 n.9 (quoting *Heller*, 554 U.S. at 635).

90. *Id.* at 2161–62 (Kavanaugh, J., concurring).

91. *See, e.g.*, Michael P. O'Shea, *The Concrete Second Amendment: Traditionalist Interpretation and the Right to Keep and Bear Arms*, 26 TEX. REV. L. & POL. 103, 143 (2021) ("Beginning with Washington state's adoption of shall-issue carry in 1961, and gaining great momentum with Florida's switch to a similar system in 1987, shall-issue concealed carry became the legal regime of a majority of states in the 1990s and the supermajority position in the 2000s." (footnotes omitted)). When it comes to the regulations discussed by Justice Kavanaugh, it is worth noting, for example, that systematic collection and use of fingerprints as a means of identification did not begin until the early twentieth century. *See* SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATIONS 93–96 (2001) (documenting emergence and use of fingerprinting by Scotland Yard that soon spread internationally).

imposed by shall-issue permit laws, or the regulations described by Justice Kavanaugh, are properly analogous to framing-era regulation.[92]

At best, on this point, the Court suggested that shall-issue licensing laws that impose no undue burden on the ability of law-abiding persons to carry firearms in public are consistent with the Second Amendment.[93] Whatever the merit of this "undue burden" test as a policy matter, however, it has no evident footing in the Court's account of the original meaning of the Second Amendment, or in historical analogy.

This lack of precision in the Court's approach to original meaning and historical analogy is also reflected in the manner by which *Bruen* applied its guidelines for assessing historical evidence of firearms regulation to the New York statute at issue in that case.

The Court dismissed the relevance of framing-era statutes descended from the fourteenth-century Statute of Northampton thusly: "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."[94] At most, "[u]nder the common law, individuals could not carry deadly weapons in a manner likely to terrorize others."[95] The Court wrote that framing-era precedents enabling complainants to obtain orders requiring a named defendant to post a surety to carry weapons publicly when the complainant had reasonable cause to fear an attack were not proper analogues for the New York statute because they "*presumed* that individuals had a right to public carry that could be burdened only if

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92. *See, e.g.*, Nelson Lund, Bruen*'s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279, 291–92 (2022) ("[T]he Court does not provide so much as a shred of evidence that any kind of licensing requirements had ever been imposed on the general population before the 20th century. Furthermore, the first shall-issue statute was apparently not enacted until 1961, whereas may-issue statutes were enacted decades earlier. Under the Court's announced methodology, how in the world could only the later, rather than the earlier, of two very late 'traditions' reflect the original meaning of the Second Amendment? If there is any plausible answer to that question, it won't be found in the *Bruen* opinion." (footnotes omitted)).

93. *Bruen*, 142 S. Ct. at 2138 n.9 ("Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right to public carry. . . . That said, because any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry." (quoting *Heller*, 554 U.S. at 635)).

94. *Id.* at 2143.

95. *Id.* at 2150.

another could make out a specific showing of 'reasonable cause to fear an injury, or breach of the peace.'"[96] Although a handful of jurisdictions prohibited the carrying of firearms absent reasonable cause to fear an unlawful attack, the Court wrote that these precedents were not sufficiently widespread to provide sufficient support for the New York statute; these regulations, the Court concluded, "are outliers."[97] How rare a regulation must be before it is branded an "outlier" remains unclear.[98]

The Court could not so easily dismiss statutes prohibiting the carrying of concealed weapons; a concealed weapon, because it cannot be seen, cannot "terrorize others" in the fashion that the Court thought justified the Statute of Northampton and its progeny, and prohibitions on concealed carry were not outliers. In both *Heller* and *Bruen*, the Court acknowledged that laws prohibiting the carrying of concealed firearms became common in the early nineteenth century following a surge in violent crime.[99] In the framing era, concealed-carry bans were generally upheld against constitutional challenges under the Second Amendment and its state-law analogues, as *Heller* and *Bruen* also acknowledged.[100] Moreover, in both cases, the Court treated judicial decisions and commentary on the Second Amendment and its state-law analogues, up to the Reconstruction Era, as illuminating the original meaning of the Second Amendment.[101] Thus, the framing-era

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96. *Id.* at 2148.

97. *Id.* at 2153. In dissent, Justice Breyer argued that such regulations were more widespread than acknowledged by the Court. *Id.* at 2186–89 (Breyer, J., dissenting). For a critical assessment of the Court's use of historical evidence in *Bruen*, see generally Patrick J. Charles, *The Fugazi Second Amendment:* Bruen*'s Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. ST. L. REV. 623 (2023).

98. For a helpful discussion of the imprecision that confounds an effort to identify a regulatory outlier, see generally Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49.

99. *E.g.*, SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 138–44 (2006); CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM 2–3, 139–41 (1999); ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 166–69 (2011); Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 IND. L.J. 1587, 1599–601 (2014).

100. *Bruen*, 142 S. Ct. at 2146; District of Columbia v. Heller, 554 U.S. 570, 612–14, 626 (2008).

101. *E.g.*, *Bruen*, 142 S. Ct. at 2136 ("[E]vidence of 'how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century' represent[s] a 'critical tool of constitutional interpretation.' (quoting *Heller*,

endorsement of prohibition on carrying concealed weapons seemingly offered solid historical support for New York's permitting requirement.

Nevertheless, in *Bruen*, the Court rejected the bans on concealed carry as analogical support for the New York statute, claiming that they reflected no more than "a consensus that States could *not* ban public carry altogether. . . . [C]oncealed-carry prohibitions were constitutional only if they did not similarly prohibit *open* carry."[102] Even putting aside the fact that some courts of the era upheld prohibitions on both concealed and open carry,[103] the Court identified only a single framing-era source—an opinion of the Georgia Supreme Court—that even hints at the view that in the framing era, legislatures could ban concealed or open carry, but not both, and the opinion articulates this rationale none too clearly.[104]

In fact, the judicial opinions of the era that address this issue—including the opinion cited in *Bruen*—articulated a quite different rationale for upholding prohibitions on carrying concealed weapons, reasoning that law-abiding persons carry their weapons openly, while those who carry concealed weapons are suspicious or potentially violent.[105] Even scholarly advocates of firearms-rights acknowledge that

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554 U.S. at 605)). The Court added that "[b]ecause post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'" *Id.* at 2137 (quoting *Heller*, 554 U.S. at 614).

102. *Id.* at 2146.

103. For framing-era decisions upholding complete bans on public carry, see, for example, Aymette v. State, 21 Tenn. (2 Hum.)154 (1840); State v. Buzzard, 4 Ark. 18 (1842).

104. In *Bruen*, the Court characterized *Nunn v. State* as "particularly instructive," and cited this passage: "[S]o far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void* . . . ." *Bruen*, 142 S. Ct. at 2147 (citing Nunn v. State, 1 Ga. 243, 251 (1846)). That passage, notably, contains little more than a naked conclusion, and nothing of the rationale that *Bruen* articulated.

105. *See, e.g.*, State v. Reid, 1 Ala. 612, 617 (1840) ("[A] law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the constitution."); *Nunn*, 1 Ga. at 249 (quoting the same passage in *Reid*); State v. Smith, 11 La. Ann. 633, 633 (1856) ("Th[e Second Amendment] was never intended to

this was the rationale most often advanced for the framing-era distinction between concealed and open carry.[106] Notably, on this view,

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prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke."); State v. Chandler, 5 La. Ann. 489, 490 (1850) ("This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."); *Aymette*, 21 Tenn. (2 Hum.) at 160 ("[T]he right to bear arms is not of that unqualified character . . . . [T]hey may be borne by an individual, merely to terrify the people or for purposes of private assassination. And, as the manner in which they are worn and circumstances under which they are carried indicate to every man the purpose of the wearer, the legislature may prohibit such manner of wearing as would never be resorted to by persons engaged in the common defence.").

106. *See, e.g.*, Leider, *supra* note 99, at 1604–05 ("The fact that contemporaneous sentiment within many quarters opposed all public carrying of weapons is important in trying to determine the purpose of concealed weapons laws at that time. Two rationales have been offered—both of which have some basis in the sentiments of the time. Under one view, the purpose of the concealed weapons ban was an attempt to stop individuals from carrying handguns and knives entirely. . . . The second theory was that *concealing* a weapon especially threatened public safety because one party could take the other by surprise."); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1523 (2009) [hereinafter Volokh, *Implementing the Right*] ("Carrying arms, the theory went, was 'one of the most essential privileges of freemen,' but 'open, manly, and chivalrous' people wore their guns openly, 'for all the honest world to feel.' Carrying a gun secretly was the mark of 'evil-disposed men who seek an advantage over their antagonists.' And requiring that people carry openly imposed no burden on self-defense, precisely because open carry was so common that it wasn't stigmatized." (footnotes omitted)); Jonathan Meltzer, Note, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1516 (2014) ("[E]arly nineteenth-century legislatures and courts were not merely indulging policy preferences by proscribing concealed, but not open, carry. Their understanding of the right to keep and bear arms did not include concealed carry, which simply could not, in their minds, be utilized for legitimate self-defense. It was a tool of the sneaky and the dishonorable, and its protection could not possibly be intended by their state constitutions."). Professors William Baude and Robert Leider, however, support the Court's characterization of the framing-era rationale for upholding prohibitions on the carrying of concealed weapons in *Bruen*, relying on a case decided in 1920 for the following proposition: "A law that prohibited concealed weapons 'does not operate as a prohibition on carrying concealed weapons, but as a regulation of the manner of carrying them.'" William Baude & Robert Leider, *The General Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1489 (2024) (quoting State v. Nieto, 130 N.E. 663, 664 (Ohio 1920)). Not only does *Nieto* likely come too late to

concealed carry is used as a proxy for undue risk; those engaging in the practice were thought less likely to be carrying firearms for purposes of lawful armed defense.[107]

This framing-era rationale for banning concealed carry while permitting open carry has little relevance to contemporary circumstances, in which the distinction between concealed and open carry is no longer much of a proxy for elevated risk, and when many may regard open carry as far more alarming than a discreetly concealed firearm.[108] Thus, by ignoring the sociological context in which framing-era firearms law distinguished by concealed and open carry, *Bruen* engaged in a distorted analogical analysis, mischaracterizing the historical rationale for concealed-carry bans.[109]

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shed light on the original meaning of the Second Amendment under the Court's methodology, *see Bruen*, 142 S. Ct. at 2154 (stating "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence"), but *Nieto* repeated the framing-era rationale for prohibiting concealed-carry because it was thought to pose an undue threat:

> One of the objects of the law is the avoidance of bad influences which the wearing of a concealed deadly weapon may exert upon the wearer himself, and which in that way, as well as by the weapon's obscured convenience for use, may tend to the insecurity of other persons.

Nieto, 130 N.E. at 665 (quoting Dunston v. State, 27 So. 333, 334 (Ala. 1900)).

107. There was perhaps another rationale for the distinction between concealed and open carry. Saul Cornell has argued that inasmuch as virtually all the nineteenth-century laws and judicial decisions drawing a distinction between concealed and open carry were in the antebellum South, its support for open carry may have been a product of the prevalence of slavery and the fear of slave rebellions. *See* Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1716–25 (2012).

108. *See, e.g.*, Volokh, *Implementing the Right*, *supra* note 106, at 1523 ("Today, open carrying is uncommon, and many law-abiding people naturally prefer to carry concealed (in the many states where it is legal). Concealed carrying is no longer probative of criminal intent. If anything, concealed carrying is probably more respectful to one's neighbors, many of whom are (sensibly or not) made uncomfortable by the visible presence of a deadly weapon. Nor is there any particular reason to think that concealed carrying increases lethal quarrels by suckering people into thinking that they can safely argue with a person who they think is unarmed. We should be aware now that strangers might well be armed, whether lawfully or not. And the very people who are most likely to turn an argument into a gunfight—for example, gang members—are probably especially unlikely to comply with an open-carry-or-no-carry mandate.").

109. *Cf.* Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1188 ("[O]riginalism depends on using history without historicism, the use of evidence from the past without paying attention to historical context. Understanding American constitutionalism requires an appreciation of changing contexts, something originalism has difficulty acknowledging.").

Strikingly, in *Bruen*, the Court acknowledged the importance of contextualizing historical evidence when engaging in analogical reasoning; confronted with evidence of colonial statutes that banned the carrying of handguns, the Court responded that the laws "do little to support restrictions on the public carry of handguns *today*," reasoning: "[E]ven if these colonial laws prohibited the carrying of handguns because they were considered 'dangerous and unusual weapons' in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today."[110] By the same token, the framing-era rationale for prohibiting concealed carry differently may well support contemporary regulation designed to prohibit the carrying of firearms under circumstances reflecting elevated risk.

Indeed, contemporary firearms present many regulatory challenges that differ from those of the framing era. Consider, for example, the increased lethality of firearms and their greater utility for facilitating violent crime. In the framing era, the most advanced bearable firearm was the flintlock smoothbore musket, which was difficult to load, could produce at most three shots per minute, and was inaccurate except at close range.[111] Today's firearms are far more efficient and lethal.[112] Accordingly, what was regarded as sufficient regulation in the framing era could well be regarded as insufficient today.[113]

As one eminent historian explained:

> [B]ecause eighteenth-century firearms were not nearly as threatening or lethal as those available today, we . . . cannot expect the discussants of the late 1780s to have cast their comments about keeping and bearing arms in the same terms that we would. Theirs

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110. *Bruen*, 142 S. Ct. at 2143.

111. *See* Michael S. Obermeier, Comment, *Scoping out the Limits of "Arms" Under the Second Amendment*, 60 U. KAN. L. REV. 681, 684–87 (2012).

112. For helpful discussions of the increasing lethality of firearms, see TOM DIAZ, MAKING A KILLING: THE BUSINESS OF GUNS IN AMERICA 98–105 (1999); and Darrell A.H. Miller & Jennifer Tucker, *Common Use, Lineage, and Lethality*, 55 U.C. DAVIS L. REV. 2495, 2506–09 (2022).

113. *Cf.* Albert W. Alschuler, *Twilight Zone Originalism: The Peculiar Reasoning and Unfortunate Consequences of* New York State Rifle & Pistol Association v. Bruen, 32 WM. & MARY BILL RTS. J. 1, 39–40 (2023) ("If the *Bruen* Court had acknowledged that the challenged New York statute regulated 'dramatically changed technology' and addressed different 'societal concerns' from those known to the Framers, it would have asked whether the statute imposed a comparable burden on the right of armed self-defense to those imposed by Founding-era restrictions and whether the burden was comparably justified.").

> was a rhetoric of public liberty, not public health; of the danger from standing armies, not that of casual strangers, embittered family members, violent youth gangs, freeway snipers, and careless weapons keepers. Guns were so difficult to fire in the eighteenth century that the very idea of being accidentally killed by one was itself hard to conceive. Indeed, anyone wanting either to murder his family or protect his home in the eighteenth century would have been better advised (and much more likely) to grab an axe or knife than to load, prime, and discharge a firearm.[114]

In the past, the Court has grasped the perils of relying on framing-era practice in light of the increased lethality of firearms. In *Tennessee v. Garner*,[115] the Court invalidated, under the Fourth Amendment's prohibition on unreasonable search and seizure, a statute codifying the framing-era rule that deadly force could be used to effect the arrest of any fleeing felon, reasoning that this rule "arose at a time when virtually all felonies were punishable by death," and was premised on "the relative dangerousness of felons," while today, the distinction between felonies and misdemeanors is "minor and often arbitrary."[116] The Court added:

> [T]he common-law rule developed at a time when weapons were rudimentary. Deadly force could be inflicted almost solely in a hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk. Handguns were not carried by police officers until the latter half of the last century. Only then did it become possible to use deadly force from a distance as a means of apprehension. As a practical matter, the use of deadly force under the standard articulation of the common-law rule has an altogether different meaning—and harsher consequences—now than in past centuries.[117]

Justice Scalia, the author of *Heller*, made a similar point when considering the permissibility of a stop-and-frisk under the Fourth Amendment absent probable cause to arrest, but when there is reasonable suspicion that criminal activity is underway and that the suspect may be dangerous.[118] He opined that although a frisk in such

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114. Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 110 (2000).

115. 471 U.S. 1 (1985).

116. *Id.* at 13–14.

117. *Id.* at 14–15 (citations omitted).

118. The rule permitting stop-and-frisk on reasonable suspicion that criminal activity is underway and that the suspect may be armed and dangerous was announced in *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

circumstances was likely regarded as unlawful in the framing era, it may have become constitutionally reasonable once "concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common—which might alter the judgment of what is 'reasonable' under the original standard."[119]

Indeed, if a State were to respond to *Bruen* by enacting a law prohibiting concealed carry while permitting open carry—the type of framing-era regulation that *Bruen* acknowledged was widely understood to be consistent with the Second Amendment in the framing era—firearms-rights advocates could well trumpet the virtues of context and attack the concealed carry prohibition by arguing that its framing-era rationale is not applicable to contemporary conditions.[120] That argument would not be without substance.

Indeed, the *Bruen* Court seemed to grasp the centrality of historical context:

> 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. . . . 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.[121]

Similarly, in its subsequent decision in *Rahimi*, the Court explained that just as "the reach of the Second Amendment is not limited only to those arms that were in existence at the founding," it follows that "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791."[122]

Had the Court in *Bruen* consulted the Second Amendment's preamble in light of the ambiguity in its operative clause, it might have concluded that those who exercise the right to "keep and bear arms," and who therefore constitute the "militia," whether organized or not, can be "well regulated," a standard broader than one limited to framing-era regulations and their contemporary equivalents. After all, *Heller* itself characterizes this standard as embracing "the imposition of proper discipline and training,"[123] and, as we have seen, the original

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119. Minnesota v. Dickerson, 508 U.S. 366, 382 (1993) (Scalia, J., concurring).

120. For arguments along these lines, see Volokh, *Implementing the Right*, *supra* note 106, at 1522–24; and Meltzer, *supra* note 106, at 1518–25.

121. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).

122. United States v. Rahimi, 144 S. Ct. 1889, 1897–98 (2024).

123. District of Columbia v. Heller, 554 U.S. 570, 597 (2008).

meaning of that phrase was likely capacious.[124] To be sure, the "well regulated" standard is no blank check; as Professor Nelson Lund has observed, "something can only be 'well regulated' when it is not overly regulated or inappropriately regulated."[125] That standard, however, is not limited to those regulations extant when the Second Amendment was originally framed; indeed, it is hard to imagine how a contemporary "militia" could be "well regulated" if only regulations suitable for framing-era firearms were permissible.

Indeed, according to *Bruen*, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry."[126] Once one acknowledges that the framing-era prohibitions on concealed carry were justified as an effort to identify individuals who posed elevated risk, and given that the distinction between concealed and open carry is, under contemporary conditions, likely no longer a good proxy for elevated risk, it may well be that New York's decision to grant carry permits when an applicant "demonstrate[s] a special need for self-protection distinguishable from that of the general community,"[127] represents about the best contemporary analogue available for the framing-era use of concealed carry as a proxy for unacceptable risk.[128]

Perhaps the discretionary character of the New York statute undermined its character as an analogue for framing-era regulation, but the Court made no claim that New York's "proper cause" standard was too vague or subjective to permit principled application; indeed, the individual applicants acknowledged that the standard had been

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124. *See supra* text accompanying notes 51–54.

125. Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 175 (1999) (emphasis omitted).

126. *Bruen*, 142 S. Ct. at 2133 (quoting *Heller*, 554 U. S. at 599).

127. *Id.* at 2123 (quoting *In re* Klenosky, 428 N.Y.S.2d 256, 257 (App. Div. 1980)).

128. *Cf.* Darrell A.H. Miller, *Second Amendment Equilibria*, 116 NW. U. L. REV. 239, 259–60 (2021) ("[I]n lieu of blanket prohibitions on concealable weapons, regulations also attempt to ensure the concealed weapons holder is trustworthy—in other words, someone who will keep the peace and will not cause harm to others. Restricting licensing to those who show good cause to carry a concealed weapon reflects an attempt to restore the status quo ante that arms should be carried only by those who need them upon reasonable fear of imminent attack.").

properly applied to them.[129] Moreover, New York's "proper cause" standard seems to involve at least as much discretion as Statute of Northampton, which prohibited public carry under circumstances likely to alarm others.[130] At a minimum, the Statute of Northampton and its progeny, which the Court subsequently described in *Rahimi* as "the going armed laws prohibit[ing] 'riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land,'"[131] were statutes in which a good deal of discretion was vested in those who enforced these laws to make judgments about whether a particular individual had violated these laws by "terrify[ing]" others. Accordingly, to the extent that framing-era regulation properly informs the meaning of the Second Amendment, discretion is not forbidden when it comes to regulating public carry.

The same is true of the surety laws, subsequently characterized in *Rahimi* as part of the regulatory tradition that informs the meaning of the Second Amendment, which "authorized magistrates to require individuals suspected of future misbehavior to post a bond" at proceedings in which "the accused could be compelled to post a bond for 'go[ing] armed.'"[132] Again, judgments about when an individual is sufficiently dangerous to require a surety involve a good deal of discretion. In short, the history of firearms regulation as recounted by the Court in both *Bruen* and *Rahimi* makes clear that discretion is not forbidden when it comes to regulating public carry.

If, under contemporary circumstances, concealed carry is no longer an adequate proxy for elevated risk, perhaps a regime that straightforwardly inquires into an individual's need for lawful armed defense is the best modern analogue to framing-era prohibitions on concealed carry directed to the same end. After all, if the questions "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are *'central'* considerations when engaging in an analogical inquiry,"[133] the burden on the right to carry for purposes of

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129. *See* Joint Appendix at 104, 106, *Bruen*, 142 S. Ct. 2111 (No. 20-843) (alleging in the complaint that each individual applicant "does not face any special or unique danger to his life").

130. *See supra* text accompanying notes 94–95.

131. United States v. Rahimi, 144 S. Ct. 1889, 1901 (2024) (alterations in original).

132. *Id.* at 1900 (alterations in original) (citing an early Massachusetts surety law, 1836 Mass. Laws ch. 134, § 16).

133. *Bruen*, 142 S. Ct. at 2133 (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008)).

lawful armed defense would likely be relatively low, and a regulation addressing the risks accompanying the carrying of concealable firearms reflects a justification comparable to that of the framing-era bans on concealed carry.

At a minimum, the question whether New York's effort to determine if an applicant had a "proper cause" to carry firearms for purposes of armed defense could be properly analogized, under contemporary conditions, to the framing-era prohibitions on concealed carry, premised on much the same rationale, was worth asking. The *Bruen* majority, however, ignored it.

C. Historical Analogy in Rahimi

In *Rahimi*, to uphold the federal statute at issue, which prohibited the possession of firearms by those subject to a domestic violence order of protection,[134] the Court relied on regulatory tradition, writing that when "a challenged regulation fits within that tradition, it is lawful under the Second Amendment."[135]

Citing *Bruen*'s endorsement of analogical reasoning, the Court wrote in *Rahimi* that the pertinent inquiry turns on "whether the new law is

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134. The statute at issue provided:

> It shall be unlawful for any person . . . who
> is subject to a court order that—
> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
> (C)
>> (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(8). The statute adds: "The term 'intimate partner' means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person." *Id.* § 921(32).

135. *Rahimi*, 144 S. Ct. at 1897.

'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'"[136] The Court then upheld the challenged statute against a facial attack, stating: "Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms."[137]

In support of this conclusion, the Court relied on two types of firearms regulations dating to the framing era. The first were surety laws, which "authorized magistrates to require individuals suspected of future misbehavior to post a bond," and, "[i]f the individual did post a bond and then broke the peace, the bond would be forfeit."[138] These laws, the Court added, "could be invoked to prevent all forms of violence, including spousal abuse."[139] The second were laws, descended from the Statute of Northampton, that prohibited "riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land," and which "punished these acts with 'forfeiture of the arms . . . and imprisonment.'"[140] The Court concluded that a "prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent," because it "applies to individuals found to threaten the physical safety of another," and, even then, "only once a court has found that the defendant 'represents a credible threat to the physical safety' of another," and "prohibits firearm possession so long as the defendant 'is' subject to a restraining order."[141]

Why these laws were viewed as sufficiently analogous to support disarmament of those under a domestic violence order of protection when the same laws were considered and rejected as analogical support for New York's licensing law in *Bruen* is less than perfectly clear.

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136. *Id.* at 1898 (alterations in original) (quoting *Bruen*, 142 S. Ct. at 2133 n.7).
137. *Id.* at 1896.
138. *Id.* at 1900.
139. *Id.*
140. *Id.* at 1901 (alterations in original).
141. *Id.* at 1901–02. The Court therefore upheld the portion of the statute that prohibits "an individual from possessing a firearm if his restraining order includes a finding that he poses 'a credible threat to the physical safety' of a protected person," and found it unnecessary to consider the parallel provision barring possession of firearm by those under a restraining order that prohibits the use or threatened use of physical force. *Id.* at 1898–99 (quoting 18 U.S.C. § 922(g)(8)(C)(i)).

For example, surety laws only required the posting of a surety; unlike the statute at issue in *Rahimi*, they did not disarm anyone, as Justice Thomas pointed out in his dissenting opinion.[142] Indeed, in *Bruen*, the Court wrote that the surety laws "were not viewed as substantial restrictions on public carry," and added that there was "little evidence that authorities ever enforced surety laws."[143] In *Bruen*, in other words, surety laws were held not to be analogous to a contemporary law prohibiting individuals from carrying firearms when in public, absent particularized need, because they were rarely enforced and permitted persons to retain their firearms by posting a surety, but in *Rahimi*, the same laws were held analogous to a contemporary law that entirely disarmed those under a domestic violence order of protection.

As for the statutory descendants of the Statute of Northampton, the Court had written in *Bruen* that they "merely codified the existing common-law offense of bearing arms to terrorize the people, as had the Statute of Northampton itself."[144] These laws, therefore, had no application to domestic violence behind closed doors, a point Justice Thomas also made in his *Rahimi* dissent.[145] He added that like the surety laws, these laws disarmed no one, but instead "prohibited only carrying certain weapons ('dangerous and unusual') in a particular manner ('terrifying the good people of the land' without a need for self-defense) and in particular places (in public)."[146] Laws prohibiting the possession of firearms by persons under domestic violence restraining orders, in contrast, are of relatively recent origin, not appearing until the 1990s.[147] Thus, in *Bruen*, laws that criminalized

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142. *Id.* at 1939–40 (Thomas, J., dissenting).

143. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2149, 2150 (2022).

144. *Id.* at 2143.

145. *Rahimi*, 144 S. Ct. at 1942 (Thomas, J., dissenting).

146. *Id.*

147. *See* Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVAL. REV. 313, 316–20, 319 tlb.3 (2006) (documenting the emergence of domestic violence restraining order laws). Moreover,

> [u]ntil the legal reforms of the late 1970's, women could not obtain a restraining order against a violent husband unless they were willing to file for divorce at the same time. When protective orders were available, enforcement was weak, penalties for violations were minor, and use in emergencies was not possible.

JEFFREY FAGAN, NAT'L INSTIT. JUST., THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 8 (1996) (citation omitted), https://www.ncjrs.gov/pdffiles/crimdom.pdf

threatening others with firearms were held not to be analogous to a prophylactic ban on carrying firearms in public, absent particularized need, but in *Rahimi*, those same laws were held analogous to a new, prophylactic law that entirely disarmed those under a domestic violence order of protection, even if they have never threatened anyone with a firearm.

If there are analytically rigorous guidelines that govern the inquiry into what kind of framing-era regulatory precedent is considered sufficiently analogous to support contemporary regulation, they go unstated in *Rahimi*, which merely reiterates *Bruen*'s endorsement of analogical reasoning, while cautioning, "[e]ven when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an extent beyond what was done at the founding," yet adding that "when a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.'"[148] Again, we are left with something short of mathematical precision. Judgments about what kind of contemporary regulation is "relevantly similar" to framing era practice, what is "analogous enough," and what is regulation "to an extent beyond what was done at the founding," leave plenty of room for judicial subjectivity, perhaps influenced by underlying judicial policy preferences.[149]

Consider also the characterization of regulatory tradition in *Rahimi*. The Court upheld the ban on those under a domestic violence order of protection possessing firearm arms because, "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms."[150] Yet, one could characterize the regulatory tradition bearing on the carrying of concealable weapons at issue in *Bruen* as permitting bans on carrying firearms when there is an elevated risk

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[https://perma.cc/X9GG-L3FU]. For a helpful review of the gradual evolution of the law of domestic violence since the framing era, see generally Elizabeth Pleck, *Wife-Beating in Nineteenth-Century America*, *in* 2 HISTORY OF WOMEN IN THE UNITED STATES: HOUSEHOLD CONSTITUTION AND FAMILY RELATIONSHIPS 189 (Nancy F. Cott ed., 1992).

148. *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 142 S. Ct. at 2133).

149. In his separate opinion, Justice Kavanaugh criticized "balancing tests (heightened scrutiny and the like)" because they "require[] highly subjective judicial evaluations of how important a law is" and are "ill-defined." *Id.* at 1921–22 (Kavanaugh, J., concurring). Surely the same can be said for the Court's ill-defined parameters for determining when a contemporary regulation is a fair analogue for framing-era regulatory practice.

150. *Id.* at 1896 (majority opinion).

that they will be misused and thereby threaten physical harm to others, relying not only on the surety laws and the Statute of Northampton and its progeny, but also, as we have seen, on the framing-era suspicion of concealed carry as presenting an elevated threat to the public.[151] On that view, prohibiting the carrying of concealable firearms by those with no particularized need to use them for lawful purposes may well be "analogous enough to pass constitutional muster."[152]

D. The Substitution of Original Expected Applications for Original Meaning

In terms of its interpretive methodology, *Rahimi*'s failure to treat with the original meaning of the Second Amendment's operative clause is striking.

It is no easy task to square the Court's holding in *Rahimi* with the account of the original meaning of the Second Amendment's operative clause provided in *Heller* and *Bruen*. Both *Heller* and *Bruen* declare that the original meaning of the operative clause unambiguously confers an individual right to possess and carry all firearms in common civilian use.[153] *Bruen* pointedly added: "[T]o the extent later history contradicts what the text says, the text controls."[154] If the text confers on every individual a right to keep and possess firearms in common civilian use, however, we are left to wonder how the statute at issue in *Rahimi*, which disarms individuals entitled by a supposedly unambiguous text to possess and carry firearms, could survive. The opinion of the Court in *Rahimi* accomplishes that task by substituting regulatory tradition for *Heller* and *Bruen*'s account of the original meaning of the Second Amendment's text: "Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms."[155]

The profusion of separate opinions in *Rahimi* suggests that there is disquiet on the Court in terms of interpretive methodology. Despite joining the majority opinion, three members of the Court wrote separately in an apparent effort to explain what the opinion of the Court did not—why the emphasis on regulatory tradition rather than the original meaning of the operative clause?

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151. *See supra* text accompanying notes 99–101, 105–07, 132.
152. *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 142 S. Ct. at 2133).
153. *See supra* text accompanying notes 10–14, 69–70.
154. *Bruen*, 142 S. Ct. at 2137.
155. *Rahimi*, 144 S. Ct. at 1896.

Justice Gorsuch's concurring opinion, unlike the opinion of the Court, at least bothers to mention the Second Amendment's text, but then it simply repeats *Bruen*'s formulation: "[T]he Amendment's text 'guarantee[s] the individual right to possess and carry weapons in case of confrontation.' And where that 'text covers an individual's conduct,' a law regulating that conduct may be upheld only if it is 'consistent with this Nation's historical tradition of firearms regulation.'"[156] As we have seen in the discussion of *Bruen* above, however, *Bruen* explains that tradition can be used to interpret constitutional text only when it is vague or ambiguous, and if that is the case, originalism should require consideration of the Second Amendment's preamble.[157] Justice Gorsuch, accordingly, merely repeats *Bruen*'s feat of simultaneously treating the Second Amendment's operative clause as ambiguous and unambiguous.

In his separate opinion, Justice Kavanaugh tried a different tack. He wrote that "some provisions of the Constitution are broadly worded or vague," adding that the framers of the Constitution believed "the meaning of vague text would be 'liquidated and ascertained by a series of particular discussions and adjudications,'" and, accordingly, stated that "post-ratification history would be a proper and important tool to help constitutional interpreters determine the meaning of vague constitutional text."[158] Justice Kavanaugh did not, however, explain how the Court's explication of the original meaning of the Second Amendment's operative clause in *Heller* and *Bruen*, in which the Court declared that the Second Amendment's text unambiguously conferred an individual right to possess and carry firearms in common civilian use, left some type of vagueness that required resort to regulatory tradition to resolve textual indeterminacy.

Beyond that, as for Justice Kavanaugh's view that tradition can be consulted when constitutional text is "broadly worded or vague,"[159] consider both of these claims. It is entirely unclear why a "broadly worded" text must, for that reason, be read in light of regulatory tradition; if constitutional text unambiguously cuts a broad swath, surely it should be interpreted consistent with its unambiguous terms,

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156. *Id.* at 1907 (Gorsuch, J., concurring) (third alteration in original) (citations omitted) (first quoting District of Columbia v. Heller, 554 U.S. 570, 592 (2008); and then *Bruen*, 142 S. Ct. at 2130).

157. *See supra* text accompanying notes 31–32, 75–78.

158. *Rahimi*, 144 S. Ct. at 1911, 1917 (Kavanaugh, J., concurring) (citation omitted) (quoting THE FEDERALIST No. 37, at 228–29 (James Madison)).

159. *Id.* at 1911.

no matter how broad.[160] If, conversely, the operative clause is vague, then it is equally unclear why interpreters should not resort to the preamble to provide clarity; the preamble, at least, is part of the Constitution, unlike regulatory tradition.[161]

In her separate opinion, Justice Barrett endeavored to reconcile the Court's holding with the original meaning of the Second Amendment's text, writing: "Despite its unqualified text, the Second Amendment is not absolute. It codified a pre-existing right, and pre-existing limits on that right are part and parcel of it."[162] Yet, she provided no account of the original meaning of the Second Amendment's operative clause that somehow pulls in framing-era regulatory practice to limit the meaning of the operative clause as detailed in *Heller* and *Bruen*; nor did she identify any language in the text itself that somehow qualifies the "right to keep and bear arms" by reference to "preexisting limits." That, despite Justice Barrett's acknowledgment that "evidence of 'tradition' unmoored from original meaning is not binding law."[163] Indeed, just days earlier, in another case, Justice Barrett had written: "Relying exclusively on history and

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160. In any event, Justice Kavanaugh appears not to ascribe any independent significance to his view that the Second Amendment is "broadly worded," writing: "I will use the terms 'broadly worded' and 'vague' interchangeably in this opinion." *Id.* at 1911.

161. Although Justice Kavanaugh did not identify any terms in the Second Amendment's operative clause that he regarded as vague, he did invoke the First Amendment's protection for freedom of speech, writing: "With respect to the First Amendment, for example, this Court's 'jurisprudence . . . has rejected an absolutist interpretation.'" *Id.* (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 482 (2007)). The Court, however, has never offered an account of the original meaning of the First Amendment's Free Speech or Free Press Clauses remotely comparable to its account of the supposedly unambiguous original meaning of the Second Amendment explicated in *Heller* and *Bruen*. As it happens, the original meaning of the First Amendment's Free Speech and Free Press Clauses is notoriously elusive, with little apparent framing-era agreement about their meaning. For helpful discussions of the difficulties in ascertaining the original meaning of those clauses, see, for example, Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 295–318 (2017); Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 9–32 (2011). For consideration of the differences between the character of First and Second Amendment rights that warrant differing interpretative strategies, see Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 55–58 (2012); Rosenthal, *supra* note 82, at 1224–29; and Mark Tushnet, Heller *and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 423–28 (2009).

162. *Rahimi*, 144 S. Ct. at 1924 (Barrett, J., concurring).

163. *Id.* at 1925.

tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is *itself* a judge-made test."[164]

Beyond that, Justice Barrett, after acknowledging that reliance on framing-era regulatory practice risks improperly elevating the original expected application of constitutional text over its original meaning,[165] added that one cannot "assume[] that founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority."[166] On just that basis, however, one can question *Bruen*'s reliance on the absence of framing-era firearms licensing laws. Perhaps legislatures, aside from those characterized as "outliers" in *Bruen*, simply regarded licensing laws as unwarranted in the framing era, a judgment that might be crucially dependent on historical context; for example, as we have seen, framing-era firearms were not nearly as dangerous as their contemporary counterparts, and today, especially in dense, high-crime urban areas, firearms may pose special risks of violent confrontation—these changes in historical context could necessitate greater regulation of those who wish to carry concealable firearms than was regarded as warranted in the framing era.[167] One might add that a changed historical context has special force when it comes to *Rahimi* and the framing-era absence of laws directed at violence against women since,

164. Vidal v. Elster, 144 S. Ct. 1507, 1532 (2024) (Barrett, J., concurring in part).

165. *Rahimi*, 144 S. Ct. at 1925 n.* (Barrett, J., concurring) ("To my mind, this use of history walks a fine line between original meaning (which controls) and expectations about how the text would apply (which do not) . . . . Thus, while early applications of a constitutional rule can help illuminate its original scope, an interpreter must exercise care in considering them. In the Second Amendment context, particular gun regulations—even if from the ratification era—do not themselves have the status of constitutional law." (citations omitted)).

166. *Id.* at 1925; *accord, e.g.*, Alschuler, *supra* note 113, at 24 ("[T]he failure to regulate a practice provides almost *no* evidence that regulating this practice would be unconstitutional or that anyone thought it would be. Legislatures frequently fail to enact laws, not because they believe the Constitution forbids them, but simply because they haven't been persuaded that these laws are desirable."); Lund, *supra* note 92, at 293–94 ("There were very few restrictions on weapons in the founding period, but that might have been because legislatures saw no need for them. The absence of a regulation does not necessarily imply the absence of a power to adopt that regulation.").

167. *See supra* text accompanying notes 82, 111–19.

until the ratification of the Nineteenth Amendment, women had no right to vote and, accordingly, no direct influence on public policy.[168]

In short, after *Rahimi*, what was implicit in *Bruen* had become inescapable; the Court's embrace of framing-era regulatory practice had become completely detached from, and ultimately inconsistent with, *Heller*'s account of the original meaning of the Second Amendment's operative clause. An originalism of original meaning has somehow devolved into an originalism of framing-era practice (plus contemporary analogues). Yet, the justification for an originalism unanchored in the original meaning of text, supplemented by an undisciplined analogical inquiry, is unclear at best. Small wonder, then, that in addition to the three members of the majority in *Rahimi* that felt the need to explicate the Court's purportedly originalist methodology in the separate opinions discussed above, though failing to square the Court's reliance on "regulatory tradition" with *Heller*'s account of the original meaning of the Second Amendment's text, three other members of the majority in *Rahimi* seem prepared to repudiate the Court's purportedly originalist methodology.[169]

E. The Originalist Problem with Original Expected Applications

Even putting aside the vexing question of how the account of the Second Amendment's original meaning in *Heller* leaves some sort of vagueness or ambiguity to be fleshed out by regulatory tradition rather

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168. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136 (1994) ("[A]lthough [Black people] were granted the right to vote in 1870, women were denied even that right—which is itself 'preservative of basic civil and political rights'—until the adoption of the Nineteenth Amendment half a century later." (quoting Frontiero v. Richardson, 411 U.S. 677, 685 (1973) (plurality opinion))).

169. *Rahimi*, 144 S. Ct. at 1906 (Sotomayor, J., joined by Kagan, J., concurring) ("I remain troubled by *Bruen*'s myopic focus on history and tradition, which fails to give full consideration to the real and present stakes of the problems facing our society today. . . . Under the means-end scrutiny that this Court rejected in *Bruen* but 'regularly use[s] . . . in cases involving other constitutional provisions,' the constitutionality of § 922(g)(8) is even more readily apparent." (second omission in original) (citation omitted) (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2149, 2176 (2022) (Breyer, J., dissenting))); *id.* at 1926 (Jackson, J., concurring) ("I write separately because we now have two years' worth of post-*Bruen* cases under our belts, and the experiences of courts applying its history-and-tradition test should bear on our assessment of the workability of that legal standard . . . . Make no mistake: Today's effort to clear up 'misunderst[andings],' is a tacit admission that lower courts are struggling. In my view, the blame may lie with us, not with them." (alteration in original) (citation omitted) (quoting *id.* at 1897 (majority opinion))).

than the Second Amendment's preamble, despite the preamble's status as ratified constitutional text, there remains a serious originalist objection to the Court's focus on regulatory tradition in *Bruen* and *Rahimi*.

Before outlining this objection, it becomes important to define originalism and its conceptual underpinnings. Perhaps its leading theorist, Professor Solum, describes originalism as resting on

> two core ideas, fixation and constraint. The Fixation Thesis claims that the original meaning ("communicative content") of the constitutional text is fixed at the time each provision is framed and ratified. The Constraint Principle claims that constitutional actors (e.g., judges, officials, and citizens) ought to be constrained by the original meaning when they engage in constitutional practice (paradigmatically, deciding constitutional cases).[170]

Professor Solum's account nicely captures the essence of originalism: absent fixation and constraint, the legal meaning of the Constitution is capable of evolution. To be sure, originalists often disagree on the details of how fixation is ascertained. For example, some originalists argue that original meaning should be measured by the intentions of those who crafted constitutional text,[171] while others focus on the manner in which the framing-era public understood the text.[172] But, whatever their disagreements over the methodology for

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170. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–7 (2015) (footnotes omitted).

171. *See, e.g.*, Larry Alexander, *Originalism: The Why and the What*, 82 FORDHAM L. REV. 539, 540–41 (2013); *see also* Raoul Berger, *The Founders' Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033, 1055–76 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 236–84 (1988); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988); Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENT. 43 (1987); Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 CONST. COMMENT. 189, 194–99 (2010).

172. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 14–16 (2011); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144–51 (1990); Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 410–16 (2007); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 668–72 (2009); Aileen Kavanaugh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 271–79 (2002); Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 411–15 (2009); Lee J. Strang, *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 972–80 (2009).

determining fixation and constraint, originalists consistently endorse some version of fixation and constraint.[173]

Accordingly, originalism is a species of textualism. It is an effort to ascertain the original meaning of legal text, not merely an inquiry into historical practice. For example, Justice Scalia, whose extrajudicial writing reflects the most fulsome explication of originalism ever advanced by a Member of the Court, characterized originalism as a canon governing the interpretation of legal texts: "Words must be given the meaning they had when the text was adopted."[174] Then-Judge Amy Coney Barrett, before her elevation to the Supreme Court, characterized originalism in similar terms:

> [T]he authoritative law that the people created is the text that they ratified. That text is what satisfied the onerous process of ratification. That is what has supermajority buy-in. And if a constitutional provision became authoritative because the people consented to it, then we need to know what they consented to. And to discern that, we look at the meaning that the text had at the time it was drafted and ratified.[175]

Thus, it is the original meaning of the Constitution's text that is critical, not historical evidence of framing-era practice. Evidence of framing-era practice is relevant only to the extent that it sheds light on the original meaning of constitutional text. *Bruen*, as we have seen,

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173. *See, e.g.*, Amy Coney Barrett, *Originalism and* Stare Decisis, 92 NOTRE DAME L. REV. 1921, 1924 (2017) ("Originalism rests on two basic claims. First, the meaning of constitutional text is fixed at the time of its ratification. Second, the original meaning of the text controls because 'it and it alone is law.'" (footnotes omitted) (quoting Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994)); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004) ("Originalism regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present."). For an argument that originalism requires only a commitment to legal rules fixed in the past, even if not contained in a written text, see Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 157–59 (2017). Professor Solum has observed that "[a]lmost all originalist theories agree on fixation and constraint," and refers to Professor Sachs's view as "the only exception of which I am aware." Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1958 & n.5 (2021). For present purposes, the case for a non-textual originalism is immaterial when focusing on the original meaning of a legal text such as the Second Amendment.

174. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78 (2012).

175. Dean Reuter, Hon. Thomas Hardiman, Hon. Amy Coney Barrett, Michael C. Dorf, Saikrishna B. Prakash, & Richard H. Pildes, *Why, or Why Not, Be an Originalist?*, 69 CATH. U. L. REV. 683, 686 (2020) (remarks of Hon. Amy Coney Barrett).

makes this very point: "[T]o the extent later history contradicts what the text says, the text controls."[176]

In this, *Bruen* worked no innovation in originalist thought. Originalists have long rejected the view that framing-era practice can trump the original meaning of constitutional text. Take what is likely the best-known example—the question whether separate-but-equal racial segregation, famously upheld in *Plessy v. Ferguson*[177] and later repudiated in *Brown v. Board of Education*,[178] offends the original meaning of the Fourteenth Amendment. In terms of framing-era practice, there is little reason to condemn *Plessy*—segregation remained common, even outside of the South, during and after the ratification of the Fourteenth Amendment.[179] This is often taken to be a powerful attack on originalism, since, as Pamela Karlan has written, "because *Brown* has become the crown jewel of the *United States Reports*, every constitutional theory must claim *Brown* for itself."[180] Originalists, however, claim *Brown* as their own. Most argue that the framing-era practice with respect to segregation is an unreliable guide to original meaning because the framing generation's misconceptions about race

176. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2137 (2022).

177. 163 U.S. 537 (1896).

178. 347 U.S. 483 (1954).

179. For a review of the evidence, see Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1885–93 (1995). To be sure, in terms of the original meaning of the Fourteenth Amendment, Michael McConnell has pointed to substantial support for efforts to end segregation in the Reconstruction-Era Congress subsequent to the ratification of the Fourteenth Amendment in 1868. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 947–48 (1995) (relying primarily on discussions in Congress between 1872 and 1875). Most important for present purposes, Professor McConnell acknowledged that framing-era practice does not support his view that the original meaning of the Fourteenth Amendment forbade racial segregation. *See* Michael W. McConnell, *The Originalist Justification for* Brown*: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1938–39 (1995) ("Klarman argues that given popular opinion and actual practice, the Fourteenth Amendment could not possibly have the meaning ascribed to it by the supporters of the 1875 Act—no matter what the words might say and no matter how those words may have related to the legal concepts of the day. On the facts, we have no disagreement: as I noted in the original article, school desegregation was deeply unpopular among white[] [people], in both North and South, and school segregation was very commonly practiced." (footnote omitted)).

180. Pamela S. Karlan, *What Can* Brown *Do for You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009).

made it largely unable to grasp the manner in which the constitutional command of equal protection applied to segregation.[181]

Brown does not stand alone in illustrating the perils of framing-era practice as the best evidence of original meaning. To use another familiar example, in the wake of the enactment of the Fourteenth Amendment and its Equal Protection and Privileges or Immunities Clauses,[182] women were nevertheless generally prohibited from practicing law, a practice that the framing-era Supreme Court—a group that presumably had passing familiarity with the original meaning of the then-new Fourteenth Amendment—upheld in *Bradwell v. Illinois*.[183] Professor Solum has offered an originalist critique of *Bradwell*, echoing the originalist defense of *Brown*, by writing that the Court ruled "on the basis of a false factual belief—that women lacked the intellectual capacity necessary for the practice of law. This kind of factual belief is not part of the communicative content of the Privileges or Immunities Clause."[184]

Accordingly, to the extent that the text does not incorporate framing-era practice, that practice is not interpretively binding. The point is reflected in the Constitution's very text. The Seventh Amendment is perhaps the classic example of a text with fixed meaning in terms of framing-era practice: "In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[185] Given that the text references framing-era common law, it should come as little surprise that the Seventh Amendment has been interpreted to require adherence to framing-era practice when it comes to the right to a jury

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181. For arguments along these lines, see, for example, BORK, *supra* note 172, at 81–83; LAWRENCE LESSIG, FIDELITY AND CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 338–61 (2019); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 42–44 (1994).

182. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

183. 83 U.S. (16 Wall.) 130 (1872).

184. Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1666.

185. U.S. CONST. amend. VII.

in civil cases, and to apply framing-era practice to contemporary analogs of common-law actions extant in the framing era.[186]

Most constitutional text, however, does not mirror the Seventh Amendment's reference to "preserv[ing]" an existing right, or the framing-era "rules of the common law." The Second Amendment, for example, does not employ this formulation. And, when the Constitution's text does not reference framing-era practice, there is no textual basis to regard it as interpretively binding.[187]

Indeed, most originalists draw a distinction between the original meaning of the constitutional text and its original expected application to particular fact patterns, and regard only the former as binding.[188]

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186. *See, e.g.*, Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708–09 (1999) ("[W]e have recognized that 'suits at common law' include 'not merely suits, which the *common* law recognized among its old and settled proceedings, but [also] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.' The Seventh Amendment thus applies not only to common-law causes of action but also to statutory causes of action 'analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'" (second alteration in original) (citations omitted) (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830))); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 348 (1998)); Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) ("'[T]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.' In keeping with our longstanding adherence to this 'historical test,' we ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was. If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." (citations omitted) (quoting Balt. & Carolina Line v. Redman, 295 U.S. 654, 657 (1935))).

187. Professors Randy Barnett and Lawrence Solum have defended *Bruen*'s use of historical analogy by reference to Seventh Amendment jurisprudence. *See* Randy E. Barnett & Lawrence Solum, *Originalism after* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 467 (2023) ("[T]he role of historical tradition in *Bruen* would be analogous to the role that the historical tradition of trial by jury plays in the context of the Preservation Clause of the Seventh Amendment . . . . The plausibility of this understanding of historical tradition in *Bruen* is grounded in the idea that the 'right to bear arms' that may not be 'infringed' is a preexisting legal right." (footnotes omitted)). They do not, however, account for the textual differences between the Second and Seventh Amendments.

188. *E.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295 (2007) ("Fidelity to the Constitution as law means fidelity to the words of the text,

As we have seen, however, *Rahimi* jettisoned any effort to apply the original meaning of the Second Amendment's operative clause as articulated in *Heller*, and instead announced that Second Amendment jurisprudence should turn on framing-era regulatory practice and its contemporary analogs. By *Rahimi*, it had become clear that the Court had taken to reading the Second Amendment as if it were the Seventh, despite their very different formulations. Justice Barrett seems to sense the problem; in her separate opinion, after acknowledging the distinction between "original meaning (which controls) and expectations about how the text would apply (which do not)," she added, "while early applications of a constitutional rule can help illuminate its original scope, an interpreter must exercise care in considering them."[189] One way to "exercise care," of course, is to be sensitive to changes in historical context, such as the increased lethality

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understood in terms of their original meaning, and to the principles that underlie the text. It follows from these premises that constitutional interpretation is not limited to those applications specifically intended or expected by the framers and adopters of the constitutional text."); Barnett, *supra* note 172, at 410 ("Balkin sharply criticizes the originalism of Justice Scalia, and others, who limit original meaning to the 'expected applications' of the more abstract provisions to the problems of the day . . . . [I]n my view, Balkin's critique is telling and correct. Unlike the process of determining original public meaning, in all but the rarest of cases, limiting the more abstract provisions of the Constitution to their 'expected application' is not a[] historical question. It calls instead for us to ask how the Framers would have expected the text to apply to concrete cases, which is a counterfactual rather than a factual inquiry." (footnotes omitted)); Calabresi & Fine, *supra* note 172, at 669 ("What judges must be faithful to is the enacted law, not the expectations of the parties who wrote the law. It is the text of the original Constitution of 1787 that was ratified by the State ratifying conventions, and it is the text of the Fourteenth Amendment that was ratified in 1868."); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1284 (1997) ("Mainstream originalists recognize that the Framers' analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong . . . . [T]hey believe that '[w]e are governed by what our lawmakers said—by the principles they laid down—not by any information we might have about how they themselves would have interpreted those principles or applied them in concrete cases.'" (footnote omitted) (quoting RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 10 (1996))); Reuter et al., *supra* note 175, at 705 ("[O]riginalists don't consider the expected applications to be binding.") (remarks of Hon. Amy Coney Barrett); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 935 (2009) ("The linguistic meaning of a text is one thing, and expectations about the application of that meaning to future cases are a different thing.").

189. United States v. Rahimi, 144 S. Ct. 1889, 1925 n.* (2024) (Barrett, J., concurring).

of firearms.[190] But, even more fundamental, absent some sort of vagueness or ambiguity in the Constitution's text, there is no justification to rely on regulatory tradition unanchored to the ratified text, especially in preference to the Second Amendment's ratified preamble.

In short, after *Rahimi*, we are left with an incoherent originalism, which elevates original expected applications and their contemporary analogues over the Court's own account of the original meaning of the Second Amendment's text, albeit without claiming any justification for doing so, or even admitting what it is doing.

II. THE IMPACT OF LAWYERING IN *HELLER* AND *BRUEN*

Thus far, this article has taken a conventional form as it dissects the opinions of the Supreme Court. At this point, however, we veer into a topic rarely considered in legal scholarship—the role that lawyers and their litigating strategies play in producing the opinions that commentators later critique.

Conventional legal scholarship, by focusing on judicial opinions and not the lawyering that precedes them, seems to rest on an implicit premise that judicial opinions spring into being, fully formed, from the minds of the Justices, with the lawyers playing no role other than to provide the Justices with an opportunity to write their opinions down. Yet, it may fairly be doubted whether judges go about with fully formed views about the legal issues that later come before them, unaffected by the arguments presented in the course of litigation. In *Bruen* itself, the Court observed that even originalist litigation is conducted in light of the arguments pressed by the parties, rather than as an abstract inquiry into original meaning.[191] Quite so; the defects in the opinions from *Heller* to *Bruen* canvassed above uncannily mirror defects in the lawyering of those who defended the laws at issue in those cases.

I advance this position with some trepidation; the lawyers spearheading the defense of the challenged laws in this line of cases have, with good reason, formidable reputations, as do many of the

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190. *See supra* text accompanying notes 111–19.

191. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130–31 n.6 (2022) ("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 . . . . For example, '[i]n our adversarial system of adjudication, we follow the principle of party presentation.'" (quoting United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020)).

lawyers representing the various amici who filed supporting briefs.[192] Criticism of lawyers of this stature surely bears a heavy burden of justification. That acknowledged, perhaps the first reaction of most to any criticism of the lawyering in these cases would be to contend that these lawyers faced unwinnable cases; no litigating strategy could have produced success before a hostile Court. Indeed, the view that Supreme Court decisions largely reflect the policy preferences of the Justices is widely embraced by political scientists.[193] It may therefore be wise to address this view at the outset.

A. The Impact of Lawyering on Supreme Court Decisions

One could doubt whether there is much legal argument can do to persuade the Court. Many political scientists embrace an attitudinal model of judicial behavior, in which judicial decisions are not based on legal argument, reasoned judgment, or precedent, but rather rest

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192. Walter Dellinger represented and argued the case for the District of Columbia in *Heller*. *See* District of Columbia v. Heller, 554 U.S. 570, 572 (2008); Brief of Petitioners at 59, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290); Reply Brief of Petitioners at 30, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290). He was an eminent academic, a high-ranking appointee in the United States Department of Justice, Acting Solicitor General, and later head of the appellate division at a major law firm. Walter Dellinger, WIKIPEDIA, https://en.wikipedia.org/wiki/Walter_Dellinger (Oct. 23, 2023). In *McDonald*, James Feldman who represented and argued the case for Chicago, *see* McDonald v. City of Chicago, 561 U.S. 742, 747 (2010); Brief for Respondents at 81, *McDonald* , 561 U.S. 742 (No. 08-1521), was a veteran of the Solicitor General's office, a fellow of the American Law Institute, has argued forty-nine cases before the United States Supreme Court, and has his own law firm specializing in Supreme Court litigation. James A. Feldman, THE AMERICAN LAW INSTITUTE, https://www.ali.org/members/member/441218/ (last visited Dec. 12, 2022). In *Bruen*, New York was represented, and the case was argued by its Solicitor General, Barbara Underwood. *See Bruen*, 142 S. Ct. at 2121; Brief for Respondents at 48, *Bruen*, 142 S. Ct. 2111 (No. 20-843). General Underwood was a professor at Yale Law School, a state and federal prosecutor, principal Deputy Solicitor General of the United States, later Acting Solicitor General, then Solicitor General of New York, and has argued twenty-two cases before the United States Supreme Court. Barbara Underwood, WIKIPEDIA, https://en.wikipedia.org/wiki/Barbara_Underwood (last updated Apr. 18, 2024). *Rahimi* was argued by the United States Solicitor General, Elizabeth Prelogar, who possesses considerable experience in appellate litigation at the highest level, both in private practice and government. Elizabeth Prelogar, WIKIPEDIA, https://en.wikipedia.org/wiki/Elizabeth_Prelogar.

193. *See, e.g.*, MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 1 (2011) ("Much of the [political science] discipline has long embraced the notion that judicial outcomes primarily reflect judicial policy preferences.").

on the Justices' ideological preferences.[194] The soundness of the attitudinal model is nevertheless hotly disputed, with its critics claiming that there is no reliable measure of the ideological preferences of the Justices and ample evidence that their votes change over time and are influenced by factors other than judicial ideology, such as precedent and institutional norms.[195]

A version of the attitudinal model so strong as to render anything beyond policy preferences irrelevant to adjudication is likely untenable. Few doubt that at least to some extent, the Constitution's text, precedent, and norms of legal reasoning constrain the ideological and political preferences of the Justices.[196] For example, when the Supreme Court announced its view that state legislative districting plans that produce districts with unequal populations violate the Fourteenth Amendment's Equal Protection Clause, it acknowledged that the same principle could not be used to condemn the Constitution's allocation of two senators to each State regardless of population because of the clarity of the pertinent constitutional text.[197]

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194. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 351 (2002) ("Only the attitudinal model's explanation [of the Supreme Court's decisions], though, is well supported by systematic empirical evidence. The fact that the attitudinal model has been successfully used to *predict* the Court's decisions further confirms its status as the best *explanation* of the Court's decisions."); John M. Scheb II, Terry Bowen & Gary Anderson, *Ideology, Role Orientations, and Behavior in the State Courts of Last Resort*, 19 AM. POL. Q. 324, 324 (1991) ("There is little doubt among students of the judicial process that ideology, in the sense of liberalism versus conservatism, is a significant predictor of judicial behavior.").

195. For useful summaries of the critiques of the attitudinal model, see Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1913–30 (2009); Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1748–55 (2003), reviewing SEGAL & SPAETH, *supra* note 194; and Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 15, 25–30 (Cornell W. Clayton & Howard Gillman eds., 1999).

196. *See, e.g.*, Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2474–75 (2014). *See generally* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013) ("If the extreme version of the attitudinal were correct, one might have expected the most liberal members of the Supreme Court . . . to have argued explicitly for a constitutional right to economic equality. Despite academic support for this idea, the Supreme Court never seriously considered finding such a right." (footnotes omitted)).

197. *See* Reynolds v. Sims, 377 U.S. 533, 571–76 (1964) (concluding that text and history did not support an effort to analogize the composition of the Congress with a

However strong the Court's attitudinal preference for one-person one-vote, it could not overcome constitutional text and structure.

Moreover, at least on occasion, the parties' arguments have had a demonstrable effect on previously announced positions of the Justices. For example, Justice Thomas, the author of *Bruen*, once joined an opinion doubting the soundness of a line of cases holding that the Fifth Amendment's Double Jeopardy Clause did not bar successive prosecutions for the same offense by the Federal Government and one or more States under the "separate sovereigns doctrine,"[198] though, in that case, the parties asserting a double jeopardy violation did not question the soundness of that doctrine.[199] In a subsequent case in which the matter was briefed and argued, Justice Thomas joined the opinion of the Court reaffirming the doctrine, writing: "[T]he historical record does not bear out my initial skepticism of the dual-sovereignty doctrine."[200]

Anecdotal evidence, however, is of limited value. One data point does not make much of a case against the attitudinal model.

It is difficult to test the impact of legal arguments on Members of the Supreme Court in a rigorous fashion. There is no practicable way to conduct blind, randomized tests to determine if Justices' votes vary based on the briefs and arguments placed before them. Nevertheless, there is some empirical evidence suggestive of the impact of lawyering on the Court. A number of studies, for example, document the impact of factors beyond ideology, such as legal doctrine and methodological preferences,[201] inclinations toward deference to coordinate branches

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state reapportionment plan allocating one state senator to each county regardless of population in light of the text and original understanding of the original Constitution).

198. *See* Puerto Rico v. Sanchez Valle, 579 U.S. 59, 78 (2016) (Ginsburg, J., joined by Thomas, J., concurring) ("The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct. Current 'separate sovereigns' doctrine hardly serves that objective." (citation omitted)).

199. *See* Brief of Respondents at 7–62, *Sanchez Valle*, 579 U.S. 59 (No. 15-108) (accepting current doctrine and arguing that Puerto Rico should not be treated as a separate sovereign).

200. Gamble v. United States, 139 S. Ct. 1960, 1980 (2019) (Thomas, J., concurring) (citation omitted).

201. *See* Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671, 1689–713 (2016) (statistical analysis demonstrating that considerations of ideology and a methodological preference for formalist or pragmatic adjudication better explains Supreme Court voting behavior than ideology alone).

of government,[202] as well as apparent changes in ideological preferences over time,[203] that explain votes of Justices.[204] Beyond that, the most thorough study of the effect of amicus briefs on the Justices found that nearly all Justices respond to efforts at persuasion made in amicus briefs, even when briefs reflect ideologies different from their own.[205] There is also evidence that positions taken by the Solicitor General influence Justices regardless of ideology.[206]

To be sure, there is evidence that the impact of the arguments of the parties and amici is reduced in cases likely to be ideologically charged or "salient,"[207] though none of the pertinent studies find that ideology is the sole determinant of the Supreme Court's decision making even in these "salient" cases.[208] There is also evidence suggesting that the

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202. *See* BAILEY & MALTZMAN, *supra* note 193, at 73–79, 108–20 (identifying legal doctrine and the views of President and Congress as influencing Justices' votes).

203. *See* EPSTEIN, LANDES & POSNER, *supra* note 196, at 116–23 (documenting ideological movement of Justices over time).

204. *See* Joshua B. Fischman, *Politics and Authority in the U.S. Supreme Court*, 104 CORNELL L. REV. 1513, 1530–46 (2019) (identifying cases involving the boundaries of institutional authority as reflecting divisions not explicable by liberal or conservative ideology); Fischman & Jacobi, *supra* note 201, at 1689–713 (2016) (statistical analysis demonstrating that considerations of ideology and a methodological preference for formalist or pragmatic adjudication better explains Supreme Court voting behavior than ideology alone).

205. *See* PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 131 (2008) ("Taken as a whole, these results again confirm the expectations of the legal persuasion model: 100% of justices are influenced by conservative amicus briefs, while liberal amicus briefs shape the decision-making proclivities of all justices except for three extreme conservatives constituting less than 5% of the observations in the data.").

206. *See, e.g.*, BAILEY & MALTZMAN, *supra* note 193, at 138–39 ("[E]ven after controlling for ideology and possible cherry-picking by solicitors general, we find that many justices move toward the position advocated by the solicitor general regardless of the ideological position of the solicitor general."); COLLINS, *supra* note 205, at 113 ("[N]ote the important role that amicus briefs filed by Solicitors General play in the Court. When the SG argues a liberal position, a justice is 13% more likely to cast a liberal vote; conversely, when the SG advocates for the conservative position, the likelihood of observing a justice cast a conservative vote increases by 13%.").

207. *See, e.g.*, Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000) (explaining the concept of salience and how it is measured).

208. *See, e.g.*, COLLINS, *supra* note 205, at 132 ("[T]he variance in the [J]ustices' decision making is decreased in salient cases, as compared to relatively routine disputes. This reveals that a justice's ideology plays a more prominent role in salient cases, reducing the probability of observing nonattitudinal behavior."); Isaac Unah & Ange-Marie Hancock, *U.S. Supreme Court Decision Making, Case Salience, and the*

Justices tend to interpret historical evidence consistent with their ideological preferences.[209] In cases with high salience, the empirical evidence nevertheless identifies factors other than that ideology driving Supreme Court decision-making.[210]

Moreover, the debate over the attitudinal model fails to consider the extent to which Justices who advocate originalism have an attitudinal preference for originalist methodology regardless of the outcomes that it generates. Its advocates argue that originalism constrains judicial power by confining constitutional adjudication to the legal meaning of text.[211] Originalism accordingly represents what Lawrence Solum, one

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Attitudinal Model, 28 LAW & POL'Y 295, 307 (2006) ("[T]he effect of ideology in the United States Supreme Court is regulated by the salience of the case presented for review. When a case is highly politically salient, the attitudinal model predicts an additional 17% increase in the probability that the Court would rule liberally, holding other variables constant. We believe the reason for this outcome is that case salience references the values of the justices more directly by raising their interest and attention in the case to a higher level.").

209. *See, e.g.*, FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 173–89 (2013) (finding that historical evidence of original meaning is usually utilized to justify decisions reached on other grounds); Matthew J. Festa, *Dueling Federalists: Supreme Court Decisions with Multiple Opinions Citing* The Federalist*, 1986-2007*, 31 SEATTLE U. L. REV. 75, 103 (2007) (reviewing Supreme Court opinions citing *The Federalist Papers* and concluding that "Justices who advocate divergent holdings or rationales in constitutional decisions are often willing to offer competing historical arguments using the same evidence"); Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113, 133 (2002) (examining Justices' votes in light of arguments made in merits briefs based on evidence of the original meaning of constitutional text and concluding: "Justices might speak about following an 'originalist' jurisprudence, but they only appear to do so when arguments about text and intent coincide with the ideological position that they prefer"); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 279–80 (2004) (analyzing Supreme Court decisions regarding federalism issues and concluding: "[O]ne of the principal justifications for originalism—that it will constrain the ability of judges to impose their own views in the course of decision making—might not be accurate as a descriptive matter. The study buttresses some of the most common criticisms of originalism—in particular, that originalism ultimately is indeterminate, and that (as a corollary) judges, facing a difficult (if not impossible) historical inquiry, might be tempted to slant the history to serve instrumentalist goals").

210. *See, e.g.*, RICHARD L. PACELLE, JR., BRETT W. CURRY & BRYAN W. MARSHALL, DECISION MAKING BY THE MODERN SUPREME COURT 106–09 (2011) (finding that even in highly salient constitutional and civil liberties cases strategic and legal factors influence Justices' votes).

211. *E.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 111–15 (2004); PERRY, *supra* note 181, at 31–38; KEITH E. WHITTINGTON,

of its leading academic proponents, describes as a "neoformalist" effort to reduce the importance of judges' ideological preferences.[212] For example, one recent study found that when Justices cite secondary sources canvassing historical evidence relating to the Constitutional Convention, the probability that they will vote in a manner inconsistent with their ideological preferences increases.[213] Thus, to the extent that arguments are framed in originalist terms, originalists' methodological preferences may trump other kinds of preferences, if only to prove the originalists' claim that originalism reduces the significance of the judge's own ideology.[214]

But, putting all this aside, what remains is the lawyer's fundamental duty to "zealously assert[] the client's position under the rules of the

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CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 50–61 (1999); Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL'Y 283, 288–91 (1996); Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1020–29 (1992); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989); Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 105–06 (1989); Lawrence B. Solum, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 42–44 (Robert W. Bennett & Lawrence B. Solum eds., 2011).

212. *See* Solum, *supra* note 196, at 2494 ("Neoformalists in general and originalists in particular are committed to the normative principle that the communicative content of legal texts ought to constrain their legal effect; construction should be guided by interpretation.").

213. *See* Lorianne Updike Toler & Robert Capodilupo, *The Constraint of History*, 46 HARV. J.L. & PUB. POL'Y 457, 460–61 (2023) (In a study coding all references to the Constitutional Convention in the Supreme Court's opinions from 1937 to 2021, the authors found "citation to secondary sources bears a strong, positive relationship to the Justices voting against policy preferences. . . . This relationship maintained even when a Justice's ideology was held at a constant, indicating that history may better explain judicial behavior beyond what policy preference alone can predict.").

214. *See, e.g.*, Scalia, *supra* note 211, at 863–64:

> [T]he main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge; perhaps no conscientious judge ever succeeds entirely. Nonoriginalism, which under one or another formulation invokes "fundamental values" as the touchstone of constitutionality, plays precisely to this weakness. It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are "fundamental to our society." Thus, by the adoption of such a criterion judicial personalization of the law is enormously facilitated.

Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.

adversary system."[215] Given that duty, advocates facing an originalist Court have no effective choice but to make the most powerful originalist arguments they can. If the best originalist arguments are made and rejected, one might conclude that the attitudinal model is as powerful as its advocates claim, but the arguments advanced in defense of the challenged regulations in the line of cases from *Heller* to *Bruen*, viewed through the lens of originalism, have serious flaws. One cannot discount the possibility that those flaws drove the Court's decisions in those cases.

B. Assessing the Lawyering in Defense of the Challenged Firearms Regulations from Heller *to* Rahimi

The originalist defects in the Court's opinions from *Heller* to *Rahimi* canvassed in Part I above are uncannily reflected in litigating strategies advanced in defense of the laws challenged in those cases.

In *Heller*, Dick Heller, the party challenging the District's ordinance, unsurprisingly denied that there were any ambiguities in the operative Clause of the Second Amendment that warranted reference to the preamble.[216] Yet, the District made no effort to argue that the Second Amendment's operative clause was ambiguous, warranting consideration of the preamble. Instead, it argued for its own view of an unambiguous text—that the Second Amendment's "two clauses permit only a militia-related reading."[217] The District did not discuss the framing-era rules governing the use of preambles to address ambiguities, nor did it claim that the operative clause of the Second Amendment was ambiguous.[218] Rather, the District contended that the text was clear and supported its view that the Second Amendment protected only a right to keep and bear arms in connection with military service.[219]

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215. MODEL RULES OF PRO. CONDUCT: PREAMBLE & SCOPE (AM. BAR ASS'N 2002); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWS. § 16 (AM. LAW INST. 2000) ("[A] lawyer must, in matters within the scope of the representation: (1) proceed in a matter reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation.").

216. *See, e.g.*, Respondent's Brief at 8–9, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290) ("No doubts or ambiguities arise from the words 'the right of the people to keep and bear arms shall not be infringed.'" (quoting U.S. CONST. amend. II)).

217. Brief for Petitioners at 9, *Heller*, 554 U.S. 570 (No. 07-290).

218. *Id.* at 11–35.

219. *See, e.g.*, *id.* at 16 ("'[B]ear Arms' refers idiomatically to using weapons in a military context. This was the only sense in which the young Congress and its predecessors ever used the phrase.").

The impact of amicus briefs is also worth considering. On that score, there is abundant research indicating that of all amici curiae, the briefs of the Solicitor General, representing the United States, receive the greatest attention from the Court.[220] Thus, it is worth giving special attention to the position of the Solicitor General. In *Heller*, the Solicitor General, while opposing the District's view that the Second Amendment conferred no individual right unrelated to militia service, nevertheless supported the District's view that the judgment of the Court of Appeals in favor of *Heller* should not stand.[221] Still, the Solicitor General made no argument that the operative clause of the Second Amendment was ambiguous, or even an argument about the meaning of the term "bear" in that clause.[222] Nor did the other amici supporting the District make such an argument.[223] The brief of leading historians in support of the District, for example, made no argument premised on ambiguity, arguing instead that the Second Amendment simply was not understood to codify an individual right.[224]

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220. *See, e.g.*, RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS 111 (2012) ("When we compare winning OSG briefs with winning non-OSG briefs, the Court still borrows more from the OSG brief. The same dynamic holds when both briefs are on the losing end. . . . All this, we believe, points to considerable SG influence over Supreme Court opinions); Paul M. Collins, Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 LAW & SOC'Y REV. 917, 936 (2015) ("Compared with other amici, majority opinions adopt 135 percent more language from amicus briefs filed by the Solicitor General." (parenthetical omitted)); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 760 (2000) ("The Court referred to the Solicitor General as amicus in 402 cases during the fifty years of our study, which works out to just over 40% of the cases where the Solicitor General filed a brief. Significantly, the frequency of the Court's citation of the Solicitor General as amicus rises each decade, roughly doubling between the first decade of our study and the most recent decade." (footnote omitted)).

221. *See* Brief for the United States as Amicus Curiae at 27–28, *Heller*, 554 U.S. 570 (No. 07-290) ("[A] general prohibition on the possession of a type or class of firearms is subject to heightened judicial scrutiny. . . . Under that analysis, the D.C. ban may well fail constitutional scrutiny. The court of appeals appears to have applied instead a categorical rule, and the best course would be to remand for application of the proper standard of review in the first instance.").

222. *See id.* at 10–19.

223. *See, e.g.*, Brief of the American Bar Association as Amicus Curiae Supporting Petitioners, *Heller*, 554 U.S. 570 (No. 07-290); Brief for Former Department of Justice Officials as Amici Curiae Supporting Petitioners, *Heller*, 554 U.S. 570 (No. 07-290).

224. *See, e.g.*, Brief of Amici Curiae Jack N. Rakove et al. in Support of Petitioners at 2, *Heller*, 554 U.S. 570 (No. 07-290) ("[T]he private keeping of firearms was manifestly

Thus, in *Heller*, the position that the operative clause of the Second Amendment was ambiguous, and, for that reason, reference to the preamble was warranted, was not pressed on the Court. Small wonder, then, that this point received no attention in the Court's opinion.[225] Indeed, upon reading the briefs, *Heller*'s backhanded acknowledgment of the ambiguity of "bear arms," though disregarded by the court when considering the preamble, looks formulated to reply to the argument that the phrase "bear arms" unambiguously supported the District's reading of the Second Amendment.

In *Bruen*, things got worse. The petitioners argued that the original meaning of the Second Amendment's operative clause unambiguously granted them a right to carry firearms in public: "'[A]t the time of the founding, as now, to "bear" meant to "carry,"' which typically (though certainly not exclusively) involves conduct outside the home."[226] In its responsive brief, however, the New York Attorney General's office made no reference to the Second Amendment's preamble and no claim of ambiguity in the operative clause that would warrant reference to the preamble; instead, remarkably, in its argument concerning the Second Amendment's text, New York did not even mention the text, much less identify its original meaning.[227] Beyond that, the brief

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not the right that the framers of the Bill of Rights guaranteed in 1789. Though Anglo-American political tradition did indeed value the idea of an armed populace, it never treated private ownership of firearms as an individual right.").

225. Although the principal dissenting opinion in *Heller* briefly referenced the framing-era rule that preambles should be consulted when an operative clause is ambiguous, *see Heller*, 554 U.S. at 665 (Stevens, J., dissenting), that point was made late in the dissent and almost in passing; the dissent's principal argument was that the text was clear and, even if ambiguous, textual ambiguity did not warrant a departure from *Miller*. *See id.* at 651 ("When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia. . . . Even if the meaning of the text were genuinely susceptible to more than one interpretation, the burden would remain on those advocating a departure from the purpose identified in the preamble and from settled law to come forward with persuasive new arguments or evidence.").

226. Brief for Petitioners at 26, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843) (quoting *Heller*, 554 U.S. at 584)); *see also id.* at 28 ("[T]he plain text of the Second Amendment secures the right to carry arms outside the home. After all, it is 'extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen.'" (citations omitted) (quoting Peruta v. California, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting from denial of certiorari))).

227. *See generally* Brief for Respondents, *Bruen*, 142 S. Ct. 2111 (No. 20-843). There is a lack of any reference to the original meaning of the Second Amendment's text

conceded that the Second Amendment's text conferred an individual right to carry arms for purposes of armed defense,[228] a concession stressed by the petitioners in their reply brief,[229] and of which the Court subsequently took note in the ensuing opinion.[230] A desire to harmonize New York's litigating position with *Heller* cannot explain these choices. As we have seen, *Heller* carefully refrained from making any claim that the phrase "bear arms" in the Second Amendment was unambiguous and, beyond that, *Heller*'s discussion of the right to "bear arms" was likely dicta unnecessary to the decision.[231]

Instead of addressing the original meaning of the Second Amendment's text, New York relied on framing-era regulations and judicial opinions that had upheld or acknowledged the validity of laws regulating or prohibiting carrying weapons in public, arguing that when it comes to the right to carry arms in public, "[h]istory and tradition play a crucial role in defining the scope of that right."[232] New York then argued that there was sufficient historical precedent to support the challenged law, but relied on nothing in the Second

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under the heading: "The text of the Second Amendment does not enshrine an unqualified right to carry concealed firearms in virtually any public place." *Id.* at 19. Instead, without mentioning the text, the argument begins with the following paragraph: "*Heller* stressed that '[l]ike most rights,' the Second Amendment right is 'not unlimited.' It is not an entitlement to carry 'any weapon whatsoever in any manner whatsoever and for whatever purpose,' or 'for *any* sort of confrontation.' Rather, the Second Amendment 'codified a *preexisting* right,' and is limited by the historical understanding of the scope of the right." *Id.* at 19–20 (alteration in original) (citations omitted).

228. *See id.* at 19 ("[T]he Second Amendment right to 'keep and bear arms' entails the right to 'have weapons' and to 'carry[] arms for a particular purpose—confrontation.'"); *id.* at 20 ("The scope of the Second Amendment right to bear arms thus cannot be deduced from the proposition, not disputed here, that it entails an individual right to carry arms for self-defense beyond the home.").

229. *See* Reply Brief for Petitioners at 3, *Bruen*, 142 S. Ct. 2111 (No. 20-843) ("After insisting for the better part of a decade that its restrictive carry regime does not even *implicate* the Second Amendment, the state now 'do[es] not dispute' that 'the Second Amendment embodies a right to carry arms outside the home for self-defense.' The state tries to downplay that volte-face, but its view that the Second Amendment is limited to the curtilage was central both to its defense of its regime below and to the Second Circuit's reasoning that the Sullivan Law implicates neither the core of the Second Amendment nor strict scrutiny." (citation omitted)).

230. *Bruen*, 142 S. Ct. at 2134 ("We therefore turn to whether the plain text of the Second Amendment protects . . . carrying handguns publicly for self-defense. We have little difficulty concluding that it does. Respondents do not dispute this. See Brief for Respondents at 19.").

231. *See supra* text accompanying notes 33–41, 67–68.

232. Brief for Respondents at 20, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

Amendment's text, nor did it argue that the Second Amendment was ambiguous and its meaning could properly be "liquidated" through post-enactment practice. Instead, New York argued only that the Second Amendment should be read to prohibit only regulations that amount to "extreme outlier[s]."[233] No claim was made that anything in the original meaning of the Second Amendment itself supported this "extreme outlier" test, nor was there any discussion about the methodology to be used to establish whether a historical precedent could be regarded as fairly analogous to a contemporary regulation.

If the Court's ensuing opinion, as we have seen, failed to confront the ambiguity in the original meaning of the Second Amendment's text, and offered no coherent methodology for assessing historical evidence, it is perhaps no accident that New York's brief also failed to offer the Court a submission on these points.

Similarly, the United States, as amicus curiae supporting New York, made no argument about the ambiguity or even the meaning of the terms in the Second Amendment's operative clause, and instead only relied on what it regarded as the history and tradition of firearms regulation.[234]

Other amici supporting New York fared no better. The historians supporting New York, for example, were silent on the original meaning

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233. *See, e.g.*, *id.* at 21 ("Public-carry laws existed during all the historical periods that this Court identified as significant to understanding the 'pre-existing right' that the Second Amendment codified: from medieval England through the amendment's ratification, and on through its incorporation via the Fourteenth Amendment. Petitioners thus cannot show that New York's law is an 'extreme' outlier akin to the ban on home handgun possession invalidated in *Heller*." (citations omitted)).

234. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 5–15, *Bruen*, 142 S. Ct. 2111 (No. 20-843). Like New York, the United States was silent on the meaning of the terms of the operative clause, omitted reference to the preamble, and discussed only *Heller* in purporting to explicate the text:

> In *District of Columbia v. Heller*, this Court held that the Second Amendment protects an individual right to possess arms for lawful purposes, including self-defense. And in *McDonald v. City of Chicago*, the Court held that the Fourteenth Amendment makes that right binding on the States. That right is not, however, absolute. *Heller* and *McDonald* instruct that the scope of the right is determined by history and tradition. And from medieval times until today, the right recognized in those decisions has coexisted with a wide variety of reasonable regulations protecting public safety. Courts should therefore uphold such a regulation if it is validated by text, history, and tradition or if it satisfies a form of intermediate scrutiny, which is the modern equivalent of the standard traditionally applied to regulations of the right to bear arms.

Id. at 5–6 (citations omitted).

of the right "to keep and bear" arms; instead, like New York, they merely relied on historical examples of regulation, later dismissed by the Court as either not properly analogous to the New York statute or as representing regulatory outliers.[235] Another amicus brief canvassed the corpus linguistics literature, but rather than arguing that the Second Amendment was ambiguous, warranting reference to its preamble, it repeated the argument, rejected in *Heller*, that the Second Amendment protected only a right to keep and bear arms in relation to military service.[236] Other amici similarly ignored the text of the Second Amendment, and made nothing of either the preamble or the ambiguity in the phrase "bear arms," focusing instead on what they described as a tradition of firearms regulation that supported the New York statute, apparently regardless of its consistency with the original meaning of the text of the Second Amendment.[237] In light of this failure to controvert the petitioners' account of the original meaning of the Second Amendment text, it should come as no surprise that the Court took it as agreed that the text of the Second Amendment granted a right to carry arms in public.[238]

This failure to focus on the text reflects an insufficient grasp of the conceptual underpinnings of originalism which, as we have seen is ultimately rooted in textualism.[239] To be sure, originalism is

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235. *See* Brief for Amici Curiae Professors of History and Law in Support of Respondents at 3, *Bruen*, 142 S. Ct. 2111 (No. 20-843) ("The historical record plainly demonstrates that New York's 'good cause' law is not a historical aberration; on the contrary, it is reflective of a long Anglo-American tradition of broad restrictions on carrying dangerous weapons in public.").

236. *See* Brief for Corpus Linguistics Professors and Experts as Amici Curiae Supporting Respondents at 13, *Bruen*, 142 S. Ct. 2111 (No. 20-843) ("Consistent with its military origins, the phrase 'bear arms' has a collective connotation, typically referring to 'the act of soldiering and the use of weapons in war.'" (citation omitted)).

237. *See, e.g.*, Brief of Amicus Curiae Everytown For Gun Safety In Support of Respondents at 2, *Bruen*, 142 S. Ct. 2111 (No. 20-843) ("Public-carry laws like the one at issue here enjoy an almost singularly impressive historical lineage among firearms regulations."); Brief of Giffords Law Center To Prevent Gun Violence as Amicus Curiae in Support of Respondents at 2, *Bruen*, 142 S. Ct. 2111 (No. 20-843) ("New York's proper-cause requirement for an unrestricted public concealed-carry license is supported by centuries of state and local practice. We identify a distinct tradition further supporting New York's law: longstanding Anglo-American principles of self-defense.").

238. *Bruen*, 142 S. Ct. at 2134 ("We therefore turn to whether the plain text of the Second Amendment protects . . . carrying handguns publicly for self-defense. We have little difficulty concluding that it does. Respondents do not dispute this. See Brief for Respondents at 19.").

239. *See supra* text accompanying notes 170–79.

controversial; its critics have plenty to say about fixation and constraint.[240] But, whatever its merits, as the line of cases from *Heller* to *Rahimi* demonstrates, originalism is driving a great deal of contemporary constitutional adjudication; litigants cannot afford to ignore or repudiate it.

Thus, New York's failure to address the original linguistic meaning of the Second Amendment in *Bruen* represented a serious strategic error. This became evident at oral argument, when Justice Kavanaugh said: "[W]e don't start the analysis in a vacuum, but we start it with the text . . . [H]istorical practice can justify certain kinds of regulations, but the baseline is always the right established in the text."[241] As we have seen, in its subsequent decision, the Court wrote that the "definition of 'bear' naturally encompasses public carry," and, accordingly, "[t]he Second Amendment's plain text thus presumptively guarantees . . . a right to 'bear' arms in public for self-defense."[242] It added that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[243] Nothing in the briefs of New York, the United States, or nearly all of the amici supporting New York was responsive to these observations—precisely because those briefs offered no account of the original communicative content of the Second Amendment.[244] Had they argued that its operative clause was vague or ambiguous, and that its original meaning could be fleshed out by reference to the preamble, they would have had hope of offering an argument consistent with the text's original meaning for robust regulatory authority; the Second Amendment, after all, contemplates a "well regulated Militia," and the militia, according to *Heller*, includes everyone qualified to exercise the right to keep and bear arms.[245]

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240. For the views of one leading critic, see RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 48–102 (2018); and Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1453–76 (2021).

241. Transcript of Oral Argument at 52, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

242. *Bruen*, 142 S. Ct. at 2134–35.

243. *Id.* at 2126.

244. For example, the brief of the historians supporting New York similarly offered no account of the original meaning of the enacted text, instead confining itself to a discussion of historical practices relating to the regulation of those who carried firearms in public. *See* Brief Amici Curiae Professors of History and Law in Support of Respondents at 5–27, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

245. *See supra* text accompanying notes 44–48.

Nor, in *Bruen,* did New York, the Solicitor General, or other amici make any argument that the framing-era regime for firearms regulation provided an unreliable guide to contemporary regulation in light of changes in the lethality of firearms and the pertinent social context, or advance a methodology for determining when a framing-era regulation can be considered a proper analogue of the New York statute—a critical issue since New York, the Solicitor General, and other amici were able to identify few historical precedents closely resembling the licensing regime at issue.[246] As for any effort to provide a methodology for defending a challenged regulation when historical practice is inconclusive, New York and the United States offered only the use of "intermediate scrutiny," but identified no originalist support for that approach, instead supporting it by reference to recent doctrine in other areas.[247] That proved a dead end; the Court concluded that intermediate scrutiny was inconsistent with *Heller*'s approach to the Second Amendment.[248]

In *Rahimi*, the Solicitor General's brief, traveling down what had by then become the well-worn path of litigants defending challenged firearms laws in the Supreme Court, ignored the Second Amendment's text, relied extensively on dicta in *Heller* and *McDonald* suggesting that firearms laws may "disarm persons who are not law-abiding, responsible citizens[,]"[249] and cited framing-era laws

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246. *See* Brief for Respondents at 21–36, *Bruen*, 142 S. Ct. 2111 (No. 20-843) (identifying historical precedents for banning concealed carry in some circumstances but identifying no discretionary regimes of licensing); Brief Amici Curiae Professors of History and Law in Support of Respondents at 11–25, *Bruen*, 142 S. Ct. 2111 (No. 20-843) (same); Brief for the United States as Amicus Curiae Supporting Respondents at 16–22, *Bruen*, 142 S. Ct. 2111 (No. 20-843) (identifying no discretionary licensing regimes).

247. *See* Brief for Respondents at 37–42, *Bruen*, 142 S. Ct. 2111 (No. 20-843); Brief for the United States as Amicus Curiae Supporting Respondents at 5–14, *Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843); *accord Bruen*, 142 S. Ct. at 2127 ("Both respondents and the United States largely agree . . . that intermediate scrutiny is appropriate when text and history are unclear in attempting to delineate the scope of the right.")

248. *Bruen*, 142 S. Ct. at 2129 ("[W]hen *Heller* expressly rejected that dissent's 'interest-balancing inquiry,' it necessarily rejected intermediate scrutiny." (citation omitted)).

249. Brief for the United States at 6, United States v. Rahimi, 144 S. Ct. 1889 (2024) (No. 22-915). The entirety of the principal brief's discussion of the text is to mention it, acknowledge that it grants an individual right, and then move along: "The Second Amendment provides: 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.' The

disarming loyalists, minors, intoxicated persons, vagrants, and twentieth-century laws disarming the mentally ill.[250] Supporting amici, for the most part, followed the lead, and while the emphasis of their briefs varied, they consistently ignored the Second Amendment's text, making no effort to reconcile the challenged statute with the text.[251] Notably, the Court rejected the bulk of this submission; in particular, the Solicitor General's reliance on the dicta in *Heller* and *Rahimi* concerning "law-abiding, responsible citizens," writing:

> [W]e reject the Government's contention that Rahimi may be disarmed simply because he is not "responsible." "Responsible" is a vague term. It is unclear what such a rule would entail. Nor does such a line derive from our case law. In *Heller* and *Bruen*, we used the term "responsible" to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right. But those decisions did not define the term and said nothing about the status of citizens who were not "responsible."[252]

To be sure, one can scour the many amicus briefs filed in these cases and find isolated references to the Second Amendment's ambiguity and its preamble.[253] Yet, arguments along these lines went unnoticed by the Court in from *Heller* to *Rahimi*. This should come as little surprise in light of the available empirical evidence concerning the manner in which Justices consider amicus briefs.

Amendment guarantees an individual right to possess and carry arms for self-defense. But as this Court has repeatedly emphasized, 'the right secured by the Second Amendment is not unlimited.'" *Id.* at 10 (citations omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

250. *See id.* at 7 ("[D]uring the Revolutionary War, the Continental Congress recommended, and many States adopted, laws disarming loyalists. States in the 19th century disarmed minors, intoxicated persons, and vagrants. And Congress in the 20th century disarmed felons and persons with mental illnesses."). *Id.* at 21–22. The specific examples of framing-era regulation discussed by the brief, however, were limited to disarmament of those thought loyal to England during and after the Revolution, rebels, confiscation of firearms of those who had used them to commit an offense, surety statutes, minors, the mentally ill, vagrants, and intoxicated persons. *Id.* at 22–26.

251. *E.g.*, Brief for the City of New York and Fourteen Other Cities and Counties as Amici Curiae in Support of Petitioners at 11–15, *Rahimi*, 144 S. Ct. (1889) (No. 22-915); Brief of Second Amendment Law Scholars as Amici Curiae in Support of Petitioner at 9–17, *Rahimi*, 144 S. Ct. 1889 (No. 22-915); Brief for Amici Curiae Professors of Law and History in Support of Petitioner at 4–18, *Rahimi*, 144 S. Ct. 1889 (No. 22-915); Brief of Gun Violence and Domestic Violence Prevention Groups as Amici Curiae in Support of Petitioner at 6–15, *Rahimi*, 144 S. Ct. 1889 (No. 22-915).

252. *Rahimi*, 144 S. Ct. at 1903 (citations omitted).

253. For a textual argument along these lines, see Brief of the National League of Cities et al. at 12–14, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

Although it is difficult to obtain direct evidence about the manner in which Justices utilize amicus briefs, according to Members of the Court and their clerks who have addressed the issue publicly, amicus briefs are routinely screened by law clerks, and only briefs identified as unusually valuable are read by the Justices.[254] Moreover, amici other than the United States ordinarily do not participate in oral argument and therefore have no opportunity to address the questions posed by Members of the Court.[255]

In light of this, it should not be a surprise that the available empirical studies find that the Court is more likely to rely on the parties' briefs than those of the amici.[256] Moreover, when there are large numbers of amicus briefs, there is particular reason to believe they have less impact since the empirical evidence suggests the Court's ability to absorb large

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254. *See* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 102–03 (2008) ("[J]udges rarely read all the amicus briefs. They will surely read one filed by the United States, probably one filed by the ACLU in a civil-rights case or by the AFL-CIO in a labor-law case, and probably one filed by a lawyer in whose integrity and ability they have special confidence (yet another reason to develop a reputation for these qualities). The rest will very likely be screened by law clerks, with only a few (if any) making it to the judge's desk."); Kelly J. Lynch, *Best Friends? Supreme Court Clerks on Effective Amicus Curiae Briefs*, 20 J. LAW & POL. 33, 45 (2004) ("Screening amicus briefs is a task that requires finding the 'diamonds in the rough' rather than simply weeding out the bad ones. Given this process, it is reasonable from an efficiency standpoint that a [J]ustice would utilize his clerks to help identify the best amicus briefs. Clerk comments suggest that, while most [J]ustices will not read the majority of amicus briefs, many will read the exceptional, superior amicus brief."); Linda Sandstrom Simard, *An Empirical Study of Amici Curiae Participation in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 688 (2008) (quoting Justice Ruth Bader Ginsburg indicating that "her clerks often divide the amicus briefs into three piles: those that should be skipped entirely, those that should be skimmed, and those that should be read in full." (footnote omitted)).

255. *See* Darcy Covert & Annie J. Wang, *The Loudest Voice at the Supreme Court: The Solicitor General's Dominance of Amicus Oral Argument*, 74 VAND. L. REV. 681, 695–705 (2021) (demonstrating that the Solicitor General is far more likely to be permitted to present oral argument as an amicus curiae than any other litigant).

256. *See, e.g.*, Adam Feldman, *Opinion Construction in the Roberts Court*, 39 LAW & POL'Y 192, 206 (2017) ("[O]n the whole, parties' merits filings play a greater role in defining the Court's opinion language than either amicus briefs or lower-court opinions but that case-specific factors can shift the relative utility of these resources. . . . [T]he Court tends to share more language with amicus briefs in salient cases, more language with parties' or amicus briefs when they are filed by the solicitor general, and more language with lower-court opinions in less salient and more complex cases.").

numbers of amicus briefs is limited.[257] Beyond that, amicus briefs containing information not repeated in other briefs filed in the case are less likely to influence the content of the ultimate opinion of the Court.[258] Apparently, "outlier" amicus briefs are likely to be ignored.

Thus far, we have paid less attention to the *McDonald* decision, since four of the five Justices in the majority in that case decided the case by applying nonoriginalist precedent governing the incorporation of individual rights into the Fourteenth Amendment's Due Process

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257. *See, e.g.*, COLLINS, *supra* note 205, at 131–32 ("[A]s the number of amicus briefs filed in a case increases, so too does the variability in the justices' decision making. This indicates that by presenting information that might not otherwise be available to the justices, organized interests expand the scope of the conflict causing the justices' choices to become more variant than in cases with no (or less) amicus participation. As such, these results suggest that theories of information overload developed in a number of disciplines are applicable to the Supreme Court justices; as the information available to the justices increases, it becomes more difficult for the justices to determine the correct application of the law; thus increasing the uncertainty and variability in their decision making."); Paul M. Collins Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POL. RES. Q. 55, 63 (2007) ("[O]nce a case has been thoroughly briefed by organized interests, the addition of concomitant briefs attenuates the overall influence of the briefs."); Morgan L.W. Hazleton, Rachael K. Hinkle & James F. Spriggs II, *The Influence of Unique Information in Briefs on Supreme Court Opinion Content*, 40 JUST. SYST. J. 126, 142 (2019) ("[A]ll amicus briefs in a case are less likely to be influential when the average number of words and citations across briefs increase."); Kearney & Merrill, *supra* note 220, at 824 (conducting an empirical study on the effect of amicus briefs and finding that in cases with large numbers of amicus briefs "each side's attempt to file amicus briefs with additional arguments and information would to some extent cancel out the other side's effort to come up with new arguments and information. Clearly, there are inherent limits to how many new ideas and background studies can be submitted to the Court"). According to the Supreme Court's electronic docket, in *Bruen*, there were forty-seven amicus briefs filed in support of the petitioners, thirty-seven amicus briefs filed in support of New York, and two amicus briefs that were filed in support of neither party. *See generally* Docket, *Bruen*, 142 S. Ct. 2111 (No. 20-843), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-843.html [https://perma.cc/Q82L-2TL2].

258. *See, e.g.*, Collins, Corley & Hamner, *supra* note 220, at 936 ("[T]he justices adopt more language from amicus briefs that repeat information contained in the opinions of the lower courts that initially handled the litigation, litigant briefs, and other amicus briefs. . . . It seems that, rather than ignore repetitious arguments, the justices are likely to view repeated arguments as valid and integrate those arguments into their opinions, and are especially likely to do so if the amici repeat arguments made in litigant briefs and lower court opinions."); Hazleton, et al., *supra* note 257, at 140 ("[B]riefs with a greater amount of unique information are less similar to the majority opinion. This effect emerges most emphatically for amicus briefs, where all four measures of novel information are statistically significant.").

Clause.[259] Only Justice Thomas relied on original meaning, not of the Due Process Clause, but the Fourteenth Amendment's Privileges or Immunities Clause.[260] Yet, the lawyering in that case offers a useful contrast. In its brief, the City of Chicago argued that even if nonoriginalist precedent on the point were ignored, the original meaning of the Privileges or Immunities Clause was ambiguous.[261] That was apparently enough to carry the day, at least in the debate over the Fourteenth Amendment's original meaning. Nevertheless, when it came to the status of the Second Amendment and whether it created the kind of fundamental right that is incorporated into the concept of due process, Chicago made no argument that the Second Amendment was ambiguous.[262]

It is surely remarkable that the lawyers defending the firearms regulations from *Heller* to *Rahimi* failed to argue that the Second Amendment's operative clause was ambiguous at least as a "back-up" argument following their primary submission.[263] Perhaps the lawyers feared that even an implicit acknowledgment of ambiguity in the operative clause would be used against them by a hostile Court. Yet, in *Heller*, exclusively relying on a claim that the text was unambiguous and in the District's favor amounted to a high-stakes and losing wager. New York's decision in *Bruen* to ignore the Second Amendment's text altogether, and point only to evidence of framing-era practice, even though it differed in significant respects from the New York statute, looks even more ill-advised. The most likely explanation for what seems in hindsight to be baffling strategic decisions by highly competent lawyers inheres in the pervasive phenomenon of confirmation bias.

A large body of psychological research confirms the prevalence of motivated reasoning and confirmation bias, the process of interpreting

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259. McDonald v. City of Chicago, 561 U.S. 742, 767–87 (2010) (plurality opinion).

260. *Id.* at 806 (Thomas, J., concurring in part and concurring in the judgment).

261. *See* Brief for Respondents at 58, *McDonald*, 561 U.S. 742 (No. 08-1521) ("Because 'privileges' and 'immunities' had more than one meaning, it cannot be concluded that the public would have understood those words to invoke petitioners' collection of all broadly defined natural and fundamental rights, and the Bill of Rights too.").

262. *See id.* at 31–37.

263. *Cf.* Megan E. Boyd & Adam Lamparello, *Legal Writing for the "Real World": A Practical Guide to Success*, 46 J. MARSHALL L. REV. 487, 511 (2013) ("[I]n preparing your 'Legal Analysis,' keep in mind that you may frequently have more than one 'strong' argument to support your position. Follow your strongest argument or arguments with your second strongest argument and so forth.").

evidence selectively to confirm preexisting beliefs.[264] There is no reason to believe that originalist constitutional interpretation is immune to the dangers of confirmation bias; as then-Justice Thomas Lee and Professor James Phillips have observed: "[T]he use of linguistic intuition—as confirmed by a handful of sample sentences from founding-era documents—may be the product of motivated reasoning and cherry-picking and is not transparent or falsifiable."[265] Indeed, complaints about cherry-picked "'law-office' history" have long been a staple of scholarly analyses of the efforts of lawyers and judges to analyze historical evidence.[266]

There is little reason to believe that lawyers preparing litigating strategies are immune to confirmation bias. In *Heller*, for example, the District's lawyers, as we have seen, never argued that the Second Amendment's operative clause was ambiguous, though more than a few neutral observers concluded that there was plenty of historical evidence on both sides of that case.[267] Similarly, in *Bruen*, New York's

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264. *See, e.g.*, DANIEL KAHNEMANN, THINKING, FAST AND SLOW 81 (2011) ("Contrary to the rules of philosophers of science, who advise testing hypotheses by trying to refute them, people (and scientists, quite often) seek data that are likely to be compatible with the beliefs they currently hold."); Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 495 (1990) ("Although the mechanisms underlying motivated reasoning are not yet fully understood, it is now clear that directional goals do affect reasoning. People are more likely to arrive at those conclusions that they want to arrive at."); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 177 (1998) ("A great deal of empirical evidence supports the idea that the confirmation bias is extensive and strong and that it appears in many guises. The evidence also supports the view that once one has taken a position on an issue, one's primary purpose becomes that of defending or justifying that position.").

265. Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 320 (2019).

266. *See, e.g.*, Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13 ("By 'law-office' history, I mean the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.").

267. *See, e.g.*, J. Harvie Wilkinson III, *Of Guns, Abortion, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 271 (2009) ("What is a neutral observer left with? Each of the points on which the two sides take issue ends inconclusively. It is hard to look at all this evidence and come away thinking that one side is clearly right on the law. After a careful analysis, Mark Tushnet has concluded that 'the arguments about the Second Amendment's meaning are in reasonably close balance,' and that given this indeterminacy, people's positions on the Second Amendment's meaning will have more to do with their ideas about policy than with legal principle." (footnotes omitted) (quoting Mark V. Tushnet, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS xvi, 116–17 (2007))).

lawyers made no argument based on ambiguity in the operative clause, and instead relied on framing-era regulations that the Court found inadequate as historical analogues for the challenged statute. In light of the outcomes in these cases, it seems fair to conclude that the lawyers overestimated the force of the historical evidence they presented or underestimated their own confirmation biases. Lawyers litigating original meaning must be on guard against the risk that their presentation of the historical evidence will strike skeptics as cherry-picked law-office history.

It should be plain, at least with the benefit of hindsight, that the litigating strategies offered in defense of the laws challenged in the line of cases from *Heller* to *Rahimi* display serious shortcomings from an originalist perspective. It remains to consider how those shortcomings can be addressed.

III. LITIGATING ORIGINALISM

Those who seek to defend statutes, regulations, or other legal regimes that do not embody prevailing framing-era practices face some serious originalist obstacles. In a Court increasingly insistent upon utilizing originalist methodology, even appeals to nonoriginalist precedent, where it exists, are likely to fall short.[268]

One thing that is striking about the efforts to defend the laws at issue in the line of cases from *Heller* to *Rahimi* is how little effort was made to advance the most compelling rationale for their enactment. For those who support firearms regulation, surely the most powerful reason to do so is that these laws represent good-faith efforts by politically accountable institutions to attack violent crime.[269] As we have seen, there are eminently plausible arguments that efforts to reduce the prevalence of firearms on the streetscape can reduce violent crime.[270] Yet, in the briefs of the parties seeking to defend the challenged laws in these cases, that point emerges as an afterthought.

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268. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2254 (2022) (overruling *Roe v. Wade* and its progeny, reasoning "[n]ot only are respondents and their *amici* unable to show that a constitutional right to abortion was established when the Fourteenth Amendment was adopted, but they have found no support for the existence of an abortion right that predates the latter part of the 20th century").

269. *Cf.* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2164–68 (2022) (Breyer, J., dissenting) (stating that there are many valid public safety reasons for supporting the gun control measure in question and that the legislature is the best governing body to address this issue).

270. *See supra* text accompanying note 82.

The briefs begin with and focus the bulk of their argument on claims that there are historical precedents for these regulations dating to the framing era.[271] Presumably, the lawyers feared that if they focused on the contemporary concerns over public safety and firearms crime that actually motivate legislators to enact these laws, their submissions would be dismissed as policy rather than legal argument.[272] But, surely the best legal strategy cannot involve downplaying, if not ignoring altogether, the most compelling argument in support of a challenged law. Those defending legal regimes that come under originalist attack must therefore identify a strategy that reconciles originalism with policy arguments that provide the central rationale for a challenged enactment.

Lawyers are likely to have fair notice when an adverse party intends to attack statutes, other forms of regulation, or even precedent itself on originalist grounds; *Bruen* itself explains that Courts should address claims about the original meaning of the Constitution only when and in the manner that they are presented by the parties.[273] In such cases, there are a number of guidelines for litigating strategies that can chart a course past the originalist traps for the unwary, and enable litigants to convert what might otherwise seem like policy arguments into claims readily reconciled with originalism. The first guideline, however, may constitute the most important trap for the unwary.

A. Distrust Your Assessment of the Historical Evidence

As we have seen, a large body of psychological research confirms the prevalence of motivated reasoning and confirmation bias, and that

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271. *E.g.*, Brief for Respondents at 19–36, *Bruen*, 142 S. Ct. 2111 (No. 20-843) (relying on asserted historical evidence providing support in terms of history and tradition for New York's statute); Brief of Petitioners at 11–35, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290) (relying on historical evidence to support the claim that the Second Amendment only protects militia-related activities).

272. *Cf. Heller*, 554 U.S. at 636 ("We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table.").

273. *Bruen*, 142 S. Ct. at 2130 n.6 ("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 . . . . For example, '[i]n our adversarial system of adjudication, we follow the principle of party presentation.'" (quoting United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) (citation omitted))).

phenomenon is all too likely to skew the assessment of a lawyer assessing historical evidence.[274]

Advocates of corpus linguistics claim that it can reduce the risk of motivated reasoning.[275] Even when using this methodology, however, there remains a danger that in assessing the data, both lawyers and judges will fall victim to confirmation bias and convince themselves that it supports their preferred view.[276] Moreover, corpus linguistics offers no metric for assessing contemporary statutes and other legal regimes to determine whether they are fair analogues for framing-era laws in light of changes in historical and technological context.[277]

Accordingly, lawyers should hesitate to credit an assessment of historical evidence that supports their preferred outcome. When the historical evidence is in conflict, arguing that it resolves the case in your favor is often a heavy lift; even more so when some Justices'

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274. *See supra* text accompanying notes 264–66.

275. *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 297 (2021) ("There will always be a risk of motivated reasoning or confirmation bias. The introduction of an evidence-based tool like corpus linguistic analysis can help reduce this risk.").

276. *See, e.g.*, Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L. REV. 156, 202 (2012) ("The corpus methodology, however, cannot fully escape confirmation bias. The judicial interpreter must still read through the concordance lines and her biases may shape how she perceives the words in the data presented to her."); *cf.* Evan C. Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 SETON HALL L. REV. 401, 419 (2019) ("There are a number of distinct points during the interpretive process at which a user of corpus techniques must make a subjective decision that influences the interpretive outcome. First, at the beginning of the interpretive process, a user of corpus linguistics techniques must choose a particular corpus to search . . . . Second, the user must choose search parameters. If a statute makes it a crime to 'carry a firearm,' for example, the corpus user must decide whether to search for the word 'carry,' the phrase 'carry a firearm,' or some other term . . . . Third, a corpus search will often return results that the user believes are not germane to the statutory inquiry. The user of corpus linguistics techniques must make a subjective decision about which search results to evaluate and which results to exclude from evaluation." (footnotes omitted)). To be sure, some advocates of corpus linguistics argue that methodological rigor can reduce the risk of motivated reasoning. *See, e.g.*, James C. Phillips and Jesse Egbert, *Advancing Law and Corpus Linguistics: Importing Principles and Practices from Survey and Content Analysis Methodologies to Improve Corpus Design and Analysis*, 2017 B.Y.U. L. REV. 1589, 1613–18 (2017) (advocating procedures such as using multiple independent coders not involved in writing the brief or article).

277. *Cf., e.g.*, Zoldan, *supra* note 276, at 430–44 (explaining that general corpus text is not a suitable method for assessing contemporary statutes because general corpus and statutes have different intended audiences and different linguistic characteristics that cannot yet be accounted for).

preferred outcome differs from that of the advocate. Especially in "salient" cases in which ideology is likely to play a larger role, confirmation bias is likely to lead those not otherwise persuaded to discount the significance of historical evidence inconsistent with their ideological priors.

B. Litigate for Vagueness or Ambiguity

This second rule is a corollary of the first. Just as it is difficult to establish that constitutional text is clear and resolves the case in your favor, it is far easier to demonstrate that text is vague or ambiguous.

As we have seen, originalism is rooted in fixation and constraint.[278] Accordingly, originalist litigation requires an advocate to identify precisely what original meaning was fixed: does the text freeze framing-era practice in place, as with the Seventh Amendment, or is the text crafted at a higher level of generality?

When the text is framed at a higher level of generality, in turn, it becomes possible to argue that original meaning was fixed in this fashion because the framing generation fixed an original meaning at a higher level of generality, capable of being adapted to circumstances that the framing generation could not have foreseen.[279] It is not an article of originalist faith that originalism always supplies determinate answers to constitutional debates; as Justice Barrett has said:

> Originalism doesn't purport to give an answer to every question, nor does it hold itself out as making all constitutional questions easy. . . . [O]riginalism doesn't answer every question, and it sometimes operates at a high level of generality—but those are features of the constitutional text.[280]

And when the historical evidence of original meaning is in conflict, or otherwise unsatisfactory or inconclusive, it becomes possible to argue that it supplies an inadequate basis for identifying a fixed and determinant original meaning.[281]

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278. *See supra* text accompanying notes 170–79.

279. For a helpful discussion of the importance of the level-of-generality at which original meaning is fixed, see Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 532–49 (2017).

280. Reuter et al., *supra* note 175, at 705–06 (remarks of Hon. Amy Coney Barrett).

281. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring) ("In *Employment Div., Dep't of Human Resources of Ore. v. Smith*, this Court held that a neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise.

Thus, when one seeks to defend regulations or other legal regimes with limited support in framing-era practice, it becomes important to identify whether original meaning fixes framing-era practice in place or is stated at a higher level of generality—in terms, for example, of a rule or standard rather than framing-era practice.[282]

As we have seen, the communicative content of constitutional text generally does not track the Seventh Amendment's formulation.[283] In the context of the Second Amendment, for example, the evidence is in conflict about whether the phrase "bear arms" had a military meaning or denoted the physical act of carrying arms, and reference to the preamble could have enabled lawyers defending the regulations challenged from *Heller* to *Rahimi* to argue that the regulatory authority

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Petitioners, their *amici*, scholars, and Justices of this Court have made serious arguments that *Smith* ought to be overruled. While history looms large in this debate, I find the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances.").

282. *Cf.* Reuter et al., *supra* note 175, at 687–88 (remarks of Hon. Amy Coney Barrett) ("[W]hen the Constitution does speak, it does so through a mix of rules and standards. That has given the Constitution the flexibility to last. It speaks not only in specifics but also in generalities. And fidelity to the Constitution means respecting the level of generality at which the text is written, not to transform standards into rules or vice versa."). For present purposes, Kathleen Sullivan's definition of "rules" and "standards" is helpful:

> *(a) Rules.* - A legal directive is "rule"-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. A rule captures the background principle or policy in a form that from then on operates independently. A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness. But the rule's force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.
>
> *(b) Standards.* - A legal directive is "standard"-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule—the more facts one may take into account, the more likely that some of them will be different the next time.

Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992) (footnotes omitted).

283. *See supra* text accompanying notes 185–87.

fixed by the preamble was that the militia, whether organized or unorganized, could be "well regulated."[284] That phrase, of course, is not stated in terms of framing-era practice, nor did *Heller* define its original meaning in those terms.[285] It leaves ample room to craft regulations adapted to contemporary needs. Even *Bruen* acknowledged: "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."[286]

Moreover, it is generally an easier lift to demonstrate that constitutional text is vague or ambiguous than to establish its clarity; the latter may require, especially in a hostile Court, that the historical evidence be virtually perfectly aligned in one's favor. Ambiguity or vagueness, in contrast, is far easier to establish.[287] Indeed, corpus linguistics may be well-suited for that task, since it will frequently demonstrate contrasting uses of a given term; it showed just that when it comes to the Second Amendment.[288]

Ambiguity or vagueness, in turn, facilitates moving the debate from the state of the law in the framing era onto nonoriginalist ground, even under prevailing originalist theories, thereby enabling lawyers to cast what might otherwise be regarded by originalists as a policy argument rather than one readily reconciled with originalist interpretive theory. Originalists typically acknowledge that when constitutional text is vague or ambiguous, resort must be had to what they label nonoriginalist "construction."[289]

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284. *See* U.S. CONST. amend. II.

285. *See supra* text accompanying notes 51–54.

286. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).

287. For present purposes, Professor Solum's definition of vague or ambiguous text is helpful: "*Vagueness*: A term or phrase is vague if and only if it admits of borderline (or uncertain) cases"; and "*Ambiguity*: A term or phrase is ambiguous in the strict or philosophical sense when it has more than one sense or meaning." Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGIS. ISSUES 409, 415 (2009).

288. *See supra* text accompanying notes 38–39.

289. *E.g.*, BALKIN, *supra* note 172, at 14, 31–32; BARNETT, *supra* note 211, at 118–30; WHITTINGTON , *supra* note 211, at 5–14; Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 34–36 (2018); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1128–32 (2017); Robert J. Delahunty & John Yoo, *Saving Originalism*, 113 MICH. L. REV. 1081, 1098–99 (2015) (reviewing Akhil Reed Amar, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012)); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 467–72 (2013); GRÉGOIRE C.

To be sure, there is debate among originalists over the extent to which construction is required, with some originalists arguing that textual vagueness or ambiguity can be resolved by reference to framing-era methods for interpreting vague or ambiguous text.[290] Yet, even the original-method's view for addressing ambiguity offered something in aid of the defense of the firearms regulations challenged in the line of cases from *Heller* to *Rahimi*; as we have seen, the framing-era method for addressing ambiguity in an operative clause involved consulting its preamble.[291]

The extent to which originalism can reduce indeterminacy in constitutional text is ultimately an empirical one; there is at present little scholarship that sheds light on the question whether original meaning offers a basis for resolving the bulk of the interpretative debates about the meaning of the Constitution that require judicial resolution. Beyond that, one might question whether originalist Justices are willing to acknowledge that original meaning is indeterminate or otherwise incapable of resolving the issue before the Court. The single empirical study to examine the question, canvassing Fourth Amendment cases during the tenure of Justice Scalia, found that in the vast majority of cases, even Justices professing adherence to originalism concluded that it provided no basis to resolve the question before the Court, and for that reason based their votes on nonoriginalist grounds.[292] At a minimum, the limited empirical

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N. WEBBER, *Originalism's Constitution*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 147, 173–76 (Grant Huscroft & Bradley W. Miller eds., 2011).

290. *See, e.g.*, JOHN O. MCGINNIS & MICHAEL D. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 116–53 (2013) (advocating "originalist methods" used in the framing era to resolve vagueness or ambiguity); John O. McGinnis & Michael D. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 935–58 (2021) (describing originalist interpretative methods that reduce the need for construction of constitutional text); Stephen A. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 874–83 (2015) (advocating interpretive methodology used in the framing era to resolve vagueness or ambiguity).

291. *See supra* text accompanying notes 31–32.

292. *See* Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 HASTINGS L.J. 75, 80 (2018) ("Originalism played a small role in Fourth Amendment jurisprudence: less than 14% of the opinions of the Court during Justice Scalia's service were originalist. A Justice's methodological commitments made little apparent difference; despite Justice Scalia's professed commitment to originalism, he voted on originalist grounds in only 18.63% of cases addressing disputed questions of Fourth Amendment law. The Court's other

evidence suggests that it is premature to conclude that originalist Justices are unwilling to acknowledge when vagueness or ambiguity requires resort to nonoriginalist construction. Moreover, endeavoring to demonstrate that original meaning was fixed at a higher level of generality than simply freezing framing-era practice in place will facilitate the constitutional defense of regulations or other legal regimes with limited support in framing-era practice.[293] Perhaps most important, arguments claiming that constitutional text freezes framing-era practice in place may have limited appeal in light of the problem of changed context, to which we next turn.

C. Contextualize Historical Evidence

As we have seen, framing-era practice, as with the framing-era rule permitting the use of deadly force against fleeing felons, is often dependent on historical context.[294] A framing-era rule may well lose its rationale when divorced from its historical context, just as the framing-era rationale for distinguishing between concealed and open carry has little contemporary application.[295]

When it comes to firearms regulation, the framing era bears scant resemblance to the present, and not only because, as we have seen, the lethality of firearms has increased.[296] To use another example, in the framing era, there was no equivalent to contemporary police; instead, there were only constables, sheriffs, and the night watch, whose duties primarily involved executing judicial orders and responding to

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professed originalist, Justice Clarence Thomas, voted on originalist grounds in only 15.71% of cases. Voting patterns were not markedly different for Justices with different methodological commitments . . . . [T]hese results . . . reflect neither a lack of commitment to originalism nor the influence of nonoriginalist precedent, but instead the difficulties in applying original meaning in contemporary constitutional adjudication.").

293. *Cf.* Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 498 (2016) ("[I]t is all the better to distinguish the act of discerning original meaning from the act of fleshing out thin original meanings to resolve constitutional questions. It is thus useful to adopt the new originalist nomenclature signaling this distinction. It is useful, in other words, to distinguish between discerning original meaning, which new originalists label 'interpretation,' and supplementing thin original meanings where necessary to resolve constitutional questions, which new originalists label 'construction.'").

294. *See supra* text accompanying notes 115–19.

295. *See supra* text accompanying notes 105–09.

296. *See supra* text accompanying notes 111–19.

breaches of the peace.[297] As George Thomas put it, what framing-era officials "did *not* do was investigate crime."[298] Instead, as Wesley Oliver observed: "For most crimes, [victims] alone conducted the investigation, identified suspects, and determined whether their suspicions were adequate to initiate a criminal prosecution."[299] This framing-era regime, however, proved unable to provide adequate protection against crime and disorder; in the nineteenth century, in response to increasing crime and social instability, cities began to establish police forces.[300] The emergence of urban police subsequent to the framing era surely has some bearing on whether framing-era firearms regulations—and the framing-era justification for permitting public-carry—are properly analogized to contemporary regulations, especially given the risk that police on patrol may not be able to readily determine whether an individual is carrying a firearm for a proper purpose, leading to a risk of violent confrontation between patrol officer and citizen little known in the framing era.[301]

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297. *E.g.*, LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 28–29, 68 (1993); Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions of and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 419–32 (2002); Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure: 1850-1940*, 62 RUTGERS L. REV. 447, 450–56 (2010); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830–32 (1994); George C. Thomas III, *Stumbling Toward History: The Framers' Search and Seizure World*, 43 TEX. TECH. L. REV. 199, 200–01, 225–28 (2010).

298. Thomas, *supra* note 297, at 201.

299. Wesley MacNeil Oliver, *The Modern History of Probable Cause*, 78 TENN. L. REV. 377, 382 (2011).

300. *E.g.*, FRIEDMAN, *supra* note 297, at 68–71; DAVID R. JOHNSON, POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE, 1800-1887 12–40 (1979); THOMAS A. REPETTO, THE BLUE PARADE 2–23 (1978); JAMES F. RICHARDSON, URBAN POLICE IN THE UNITED STATES 6–15, 19–32 (1974); SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 49–51 (1st ed. 1980); Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L. REV. 1085, 1098–1101 (2012); Steiker, *supra* note 297, at 832–34. For a helpful discussion of the extent to which nineteenth-century police acquired new investigative powers, see Oliver, *supra* note 297, at 461–68.

301. *See, e.g.*, FRANKLIN E. ZIMRING, WHEN POLICE KILL 56–57 (2017) (stating 56% of individuals killed by police were armed with firearms); Wesley G. Jennings, Meghan E. Hollis & Allison J. Fernandez, *Deadly Force and Deadly Outcome: Examining the Officer, Suspect, and Situational Characteristics of Officer-Involved Shootings*, 41 DEVIANT BEHAV. 969, 972 & tbl.1 (2019) (showing suspects were armed in 81.8% of police shootings); Charles E. Menifield, Geiguen Shin & Logan Strother, *Do White Law Enforcement Officers Target Minority Suspects?*, 79 PUB. ADMIN. REV. 56, 60–61 & fig. 2 (2019) (65.3% of

Accordingly, rather than attempting to jam the square peg of legal regimes developed long after the framing into the round hole of their arguable framing-era antecedents, lawyers can more persuasively argue that framing-era firearms regulation, in which both law enforcement and firearms bore scant resemblance to their contemporary successors, holds few if any true analogues for contemporary regulation.[302] Indeed, as we have seen, the Court has, at least on occasion, recognized that changes in firearms and law enforcement since the framing era justify departures from framing-era practice.[303]

The point is not limited to firearms law. Consider *Kyllo v. United States*.[304] In that case, the Court held that the warrantless use of a thermal imaging device to locate the sources of heat in a home was an unreasonable search within the meaning of the Fourth Amendment, in an opinion delivered by no less an originalist than Justice Scalia, who wrote: "It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."[305] He elaborated:

> [T]here is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists,* and that is acknowledged to be *reasonable.* To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. . . . This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.[306]

The willingness of originalists to contextualize is not limited to instances of technological change. In *Vernonia School District 47J v. Acton*,[307] considering a program of random drug testing of high-school athletes challenged as unreasonable under the Fourth Amendment, Justice Scalia's opinion of the Court, joined by Justice Thomas, acknowledged the framing-era rule that schools act *in loco parentis* and

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suspects killed by police were armed with a handgun); *Tracking Fatal Police Shootings*, WASH. POST, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (tracking individuals fatally shot by police since January 1, 2015, and reporting that, as of August 8, 2024, 83% had a weapon).

302. *Cf.* Miller, *supra* note 128, at 240–73 (advocating "equilibrium adjustment" in which the framing-era rights allocated individuals, the military, and law enforcement are adjusted or reset in light of societal and technological change).

303. *See supra* text accompanying notes 115–19.

304. 533 U.S. 27 (2001).

305. *Id.* at 31, 33–34.

306. *Id.* at 34 (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).

307. 515 U.S. 646 (1995).

are permitted to exercise wide-ranging parental powers over students.[308] He then reasoned that the emergence of compulsory school attendance laws, as well as the contemporary youth drug problem, called for a reasonableness test "judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[309] That is very much the type of nonoriginalist interest-balancing rejected in *Heller* and *Bruen*, but embraced by even committed originalists in *Acton* when faced with an argument based on an altered historical context.

Of course, the most famous example in which the Court came to doubt the import of framing-era practice in can be found in *Brown*, when the Court wrote:

> [W]e cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[310]

As we have seen, originalists defend *Brown* by acknowledging that framing-era practice is not dispositive.[311]

By contextualizing framing-era practice in light of the very different kinds of regulatory challenges of that era, those defending contemporary regulations are not limited to identifying framing-era analogues when endeavoring to address regulatory challenges far different from those of the framing era.[312] For example, as we have seen, one could argue that given the prevalence of urban street gangs and their dependence on firearms to facilitate unlawful activity—problems far different than those of the framing-era—there may be good reason to reduce the prevalence of firearms on the streetscape, at least in high-crime areas, thereby reducing the risk of violent confrontations; this objective can be accomplished when carry permits are limited to those who can demonstrate particularized need, enabling police to deter unlawful public-carry through properly

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308. *Id.* at 654–55.

309. *Id.* at 652–53 (quoting Skinner v. Ry. Lab. Exec. Ass'n, 489 U.S. 602, 619 (1989)).

310. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 492–93 (1954).

311. *See supra* text accompanying note 181.

312. For one effort to develop a general theory for undertaking to "translate" framing-era understandings in light of changes in historical context, see LESSIG, *supra* note 181, at 349–69.

targeted stop-and-frisk and other investigative tactics directed at those who carry firearms unlawfully.[313] There may be powerful counter-arguments, and regimes along these lines may not be warranted (or politically feasible) in many jurisdictions, but surely evaluating the costs and benefits of contemporary urban firearms regulations are best viewed through a modern and not a framing-era prism.

In dissent, in *Bruen*, Justice Breyer observed that the Court's opinion appeared indifferent to the regulatory challenges posed by contemporary firearms violence.[314] Absent a footing for evaluating the contemporary costs and benefits of a challenged regulation in the original meaning of the Second Amendment, however, arguments about the need for firearms regulation in contemporary circumstances will remain invisible to an originalist Court.

D. Root Standards of Review in Constitutional Text

As we have seen, in *Bruen*, aside from identifying framing-era regulations that the Court found as unconvincing analogues for New York's statute, New York and the Solicitor General argued for reviewing the challenged statute under "intermediate scrutiny."[315] For a Court wishing to root constitutional interpretation in original meaning, however, this approach predictably had little appeal. The concept of intermediate scrutiny is a modern invention, without footing in original meaning.[316] Tiers of scrutiny are typically developed in an effort to identify readily-administrable rules for deciding cases governed by constitutional text framed at a high level of generality.[317]

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313. *See supra* text accompanying note 82.

314. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2164–68 (2022) (Breyer, J., dissenting).

315. *See supra* text accompanying note 247.

316. The phrase "intermediate scrutiny" was first used by a Member of the Court in a separate opinion in a case involving commercial speech in 1980. *See* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 573 (1980) (Blackmun, J., concurring in the judgment) ("I agree with the Court that this level of intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech.").

317. *See, e.g.*, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9–13 (2004) (distinguishing between operative propositions, which reflect the meaning of the Constitution's text, and decision rules, which are judicially administrable rules developed by courts for applying vague or ambiguous operative propositions); Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. POL'Y 475, 483–87 (2016) (tracing the development of tiers of scrutiny as a response to the need to provide greater guidance to the lower courts).

The perils of resting on nonoriginalist tiers of scrutiny are reflected in Chief Justice Roberts's remarks during oral argument in *Heller*. In response to the Solicitor General's suggestion that the Court adopt a test for assessing the constitutionality of firearms regulation like those utilized in other areas of constitutional law, he observed:

> Well, these various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, including you can't take the gun to the marketplace and all that, and determine how these—how this restriction and the scope of this right looks in relation to those?[318]

Similarly, in *Rahimi*, Justice Kavanaugh wrote that "balancing tests (heightened scrutiny and the like) are a relatively modern judicial innovation . . . . The[se] 'tiers of scrutiny have no basis in the text or original meaning of the Constitution.'"[319]

If one offers no originalist grounding for a proposed standard of review, one should be unsurprised when an originalist Court's response is to reject the proposed standard, and instead employ the type of analogical reasoning described by Chief Justice Roberts, and later embraced in *Heller* and *Bruen*. Advocacy of means-ends scrutiny unanchored in constitutional text encounters the additional obstacle of enmeshing an originalist Court in empirical disputes that bear little apparent relationship to original meaning.[320]

To be sure, originalist judges are not unalterably opposed to means-ends scrutiny; only four days after *Bruen* was decided, the same majority, in sustaining free-speech and free-exercise First Amendment claims of a high-school football coach utilizing "[a]n analysis focused

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318. Transcript of Oral Argument at 44, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

319. United States v. Rahimi, 144 S. Ct. 1889, 1921 (2024) (Kavanaugh, J., concurring).

320. *Cf.* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022) ("[R]eliance 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." (second alteration in original) (quoting McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2010) (plurality opinion))).

on original meaning and history,"[321] the Court nevertheless concluded that once a litigant established that his conduct is presumptively protected, "a government entity normally must satisfy at least 'strict scrutiny,' showing that its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end."[322] Presumably, this is an instance in which nonoriginalist construction is warranted to ensure that originalism does not produce anomalous results. Even so, when means-ends scrutiny is not anchored in original meaning, arguments for its use before an originalist Court are likely to encounter choppy waters.

In *Bruen* and *Rahimi*, an argument for some form of means-ends scrutiny could have been anchored in constitutional text. As we have seen, the preamble's reference to a "well regulated Militia" offered textual support, anchored in original meaning, for some form of means-ends scrutiny.[323] Given the originalist distaste for difficult empirical judgments, however, the inquiry could be framed in terms of assessing whether a challenged regulation imposes an undue burden on Second Amendment rights.[324] Indeed, even *Bruen* is hospitable to this type of inquiry; it suggests such an approach when it asks "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry."[325] Moreover, as we have seen, the precise holding in *Heller*, as well as *Bruen*'s apparent endorsement of nondiscretionary licensing laws, seem to rest on something like an undue-burden test.[326]

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321. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022).

322. *Id.* at 2426.

323. *See supra* text accompanying note 125.

324. *Cf.* Crawford v. Marion Cnty Elections Bd., 553 U.S. 181, 209 (2008) ("The universally applicable requirements of Indiana's voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not 'even represent a significant increase over the usual burdens of voting.' And the State's interests are sufficient to sustain that minimal burden." (citations omitted)); Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (holding that the constitutional right to travel is infringed only "by statutes, rules, or regulations which *unreasonably* burden or restrict this movement." (emphasis added)).

325. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022) (citing McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008))).

326. *See supra* text accompanying notes 58–64, 93.

For other texts stated at even higher levels of generality, such as the Fourteenth Amendment's guarantees of "due process" and "equal protection," textual vagueness or ambiguity can offer even greater support for a judicially administrable construction of these terms that accommodates some form of means-ends scrutiny.[327]

E. Challenge Originalists to Honor Their Methodological Commitments

Advocates of the attitudinal model will doubtless be skeptical that originalism is anything more than a smokescreen for preexisting ideological commitments. Before this hypothesis is accepted, however, it is worth considering whether the attitudinal model can be harnessed by advocates wishing to challenge Justices to prove that their jurisprudence cannot be reduced to their own ideological preference.

Whatever its deficiencies, originalist litigation is not entirely a creature of the Justices' ideological preferences. For example, one can readily demonstrate that the phrase "bear arms" was ambiguous in the framing era.[328] Even when unaccompanied by the preposition "against," it frequently denoted the use of weapons in connection with military service, as *Heller* actually, if backhandedly, acknowledged.[329] When there is demonstrable evidence of uncertainty when it comes to original meaning, lawyers can challenge originalist judges not to use ideological preference as a means of resolving uncertainty.

As we have seen, originalists claim that their methodology reduces the likelihood that judicial decisions will be the product of judicial ideology.[330] Indeed, originalist judges frequently argue that a principal virtue of originalism is that it reduces the likelihood that judicial ideological or political preferences will influence adjudication.[331] This

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327. U.S. CONST. amend. XIV.

328. *See supra* text accompanying notes 31–39.

329. *See supra* text accompanying notes 40–43.

330. *See supra* text accompanying notes 211–14.

331. *See, e.g.*, United States v. Rahimi, 144 S. Ct. 1889, 1922 (2024) (Kavanaugh, J., concurring) ("[T]he historical approach is superior to judicial policymaking. The historical approach 'depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.'"); Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61, 82 (2017) (reviewing RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016)) ("The measure of a court, then, is its fidelity to the original public meaning, which serves as a constraint upon judicial decisionmaking. A faithful judge resists the temptation to conflate the meaning of the

is itself an ideological commitment, and the attitudinal model suggests originalist judges have a stake in vindicating it.

Accordingly, advocates would be well advised to leverage the concern originalist judges may well harbor that their methodology will often be viewed as a smokescreen for ideology, and challenge judges to reach results that may be inconsistent with other ideological or policy preferences. If originalist judges have a stake in proving their preferred methodology impervious to judicial policy preference, advocates should challenge them to do so. Originalism represents a type of ideological commitment that the attitudinal model suggests can be used in an effort to encourage judges to prove that something other than policy preference drives judicial decision-making. Conversely, lawyers who refuse to take originalism seriously, and endeavor to understand originalist judges as they understand themselves, surely have little hope of success in an originalist Court.

CONCLUSION

Originalism, especially in the view of its advocates, is a deeply theorized approach to constitutional interpretation. Those who litigate in any court dominated by originalists—or obligated to adhere to originalist precedent—must frame their arguments in a manner consistent with originalist theory. Originalist theory, in turn, requires more than cherry-picking a handful of historical precedents that seem roughly analogous to a contemporary regulation under constitutional attack.

Perhaps the attitudinal model is so powerful that even litigating strategies solidly rooted in originalist theory cannot prevail when they seek outcomes inconsistent with the policy or political preferences of the current majority of the Supreme Court. Nevertheless, unless lawyers develop litigating strategies rooted in originalist theory when litigating before an originalist Court, we may never know whether it is the lawyering or the attitudinal model that explains the Court's outcomes. We ought to find out.

Constitution with the judge's own political preference; judges who give into that temptation exceed the limits of their power by holding a statute unconstitutional when it is not." (footnote omitted)).