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ARTICLE

THE AMBITIONS OF HISTORY AND TRADITION IN AND BEYOND THE SECOND AMENDMENT

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This Article examines the ambitions of history-and-tradition review in and beyond the Second Amendment. In Bruen and Rahimi, the Roberts Court rejected means-end review in favor of a historical-analogical approach, claiming to constrain the exercise of judicial discretion and thus to promote the democratic decisions of the founders. But our examination of these cases shows that the Court has created new opportunities for judges to advance their values in considerably less transparent ways. We identify contexts in which Second Amendment doctrine enables judicial discretion, key among them that it allows judges to reason about gun rights and regulation at disparate levels of generality, thus extending rights protection to modern guns while requiring gun laws to resemble ancient analogues. When applied in this asymmetric fashion, the historical approach deregulates in ways that are neither acknowledged nor justified. An eight-Justice majority objected to this strategy in

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Rahimi and voted to uphold a federal gun law. Yet numerous Justices wrote separately to limit Rahimi's reach—and, a year later, to suggest that the Court should take a case involving an assault weapons ban. As of this writing, the Court is considering two other Second Amendment cases that give the Justices an opportunity to further clarify Rahimi's method.

Our close reading of the history-and-tradition (HAT) cases shows that there is a persistent gap between what the Court says and does—between the judicial constraint the Roberts Court promises and the actual decisions it delivers. Understanding this dynamic in the Second Amendment cases helps us recognize it in the First Amendment and substantive due process cases as well.

We can better appreciate the Court's reasoning in extending HAT review if we excavate the arguments advanced in the decade between *Heller* and *Bruen* for substituting the HAT approach for means-ends review. This retrospective shows us that HAT approaches exhibit the very problems that Joel Alicea and others have imputed to means-ends review: HAT review is not grounded in original understanding and employs shifts in generality to provide judges discretion to enforce their value-based understandings. We can see this dynamic unfolding inside and outside the Second Amendment context.

HAT decisions pose distinctive threats to democracy. First, *Bruen* has implemented HAT through judicial review with a strong presumption of unconstitutionality, a counter-majoritarian practice lacking precedent at the Founding. Second, HAT review is not transparent, obscuring reasons for judicial decisions and thus obstructing democratic dialogue. Third, the HAT framework encourages judges to decide the constitutionality of public safety laws on grounds that ignore the public's most urgent reasons for enacting the laws.

This reading of the Court's Second Amendment cases indicates that the Court's push to adopt HAT approaches in First Amendment, Due Process, and other areas of constitutional law is likely to compound the problems it is supposed to solve, while insulating the Court's control of the Constitution from the public governed by it.

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INTRODUCTION

The Supreme Court's newly refashioned conservative majority¹ is transforming constitutional rights adjudication, replacing means-end analysis—including the tiers of scrutiny—with tests that ask whether modern legislation is consistent with the past. The dominant justification the Court has offered for changing frameworks is that scrutiny-based tests license judicial discretion or “policymaking,” whereas history-and-tradition (HAT) approaches impose judicial constraint and thus offer more neutral and democratic modes of interpreting the Constitution.²

¹ See Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court Is Now Much More Conservative than the Public*, 119 PROC. NAT'L ACAD. SCIS. U.S. AM. 1, 3 (2022) (“[Following the appointment of Justice Amy Coney Barrett,] the court is estimated to be significantly more conservative than the average American.”); Alanna Durkin Richer & Lindsay Whitehurst, *Trump Transformed the Supreme Court. Now the Justices Could Decide His Political and Legal Future*, ASSOCIATED PRESS (Dec. 21, 2023, at 09:33 ET), <https://apnews.com/article/donald-trump-14th-amendment-immunity-supreme-court-d3f001f66c5c3e85302b8772753ed769> [https://perma.cc/N9TG-LFM2] (“The three justices appointed by Trump—Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett—were . . . part of a GOP push to transform the ideological leanings of the bench [to the right].”).

² See *infra* Section III.A; see also *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248 (2022) (“On occasion, when the Court has ignored the ‘[a]ppropriate limits’ imposed by ‘respect for the teachings of history,’ it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York*, 198 U.S. 45 (1905).” (alteration in original) (citation omitted) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977))); *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.” (alteration in original) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 790-91 (2010))); *United States v. Rahimi*, 144 S. Ct. 1889, 1922 (2024) (Kavanaugh, J., concurring) (arguing that a “history-based methodology . . . imposes a neutral and democratically infused constraint on judicial decisionmaking”); Reva B. Siegel, *The Levels-of-Generality Game: “History and Tradition” in the Roberts Court*, 47 HARV. J.L. PUB. POL'Y 563, 579 (2025) [hereinafter Siegel, *The “Levels of Generality” Game*] (discussing the Court's argument in *Bruen* that relying on history as an interpretative approach would result in greater judicial constraint).

Differently put, proponents of HAT assert that any change in case outcomes produced by historical approaches reflects the Constitution and not judges' choices.

Through a close reading of the Court's Second Amendment cases, this Article shows to the contrary that the historical method provides judges new forms of discretion to engage in values-based decisionmaking that is less visible, and so less subject to democratic oversight, than means-ends review. We identify features of the case law suggesting that the conservative Justices are well aware of these properties of their method and are debating whether and how to cabin that discretion.³ This reading of the Second Amendment cases has direct practical relevance to the frontiers of litigation concerning, for example, the constitutionality of age restrictions and assault weapons bans⁴—an issue on which four Justices have declared an intention to grant certiorari in the next year or two⁵—as well as pending cases concerning possession of guns on private property⁶ and by habitual drug users.⁷

But our analysis of the Court's history-and-tradition decisions in the Second Amendment context is of equal importance for what it teaches about the Court's repeatedly-expressed ambition to replace means-end scrutiny with historical approaches in other areas of constitutional law. We show that the Court's interest in replacing means-ends scrutiny with historical approaches is a project of transforming law—not of constraining judges.⁸

³ See *infra* Part I.

⁴ See *infra* Part II.

⁵ See *infra* note 32 and accompanying text.

⁶ *Wolford v. Lopez*, 116 F.4th 959, 971 (9th Cir. 2024), *cert. granted in part*, No. 24-1046, 2025 WL 2808808 (U.S. Oct. 3, 2025) (mem.).

⁷ *United States v. Hemani*, No. 24-40137, 2025 WL 354982 (5th Cir. Jan. 31, 2025), *cert. granted*, No. 24-1234, 2025 WL 2949569 (U.S. Oct. 20, 2025).

⁸ See *infra* Part III; see, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (“[Liberties guaranteed by due process] must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (adopting a history-based approach to Establishment Clause challenges); *Dep’t of State v. Muñoz*, 144 S. Ct. 1812, 1827 (2024) (holding that a citizen does not have a substantive due process liberty interest in residing with her noncitizen spouse in the United States because the right is not a “‘deeply rooted’ tradition in this country” (quoting *Glucksberg*, 521 U.S. at 721))).

As we explore throughout the Article, see *infra* Section III.B, however, in other areas, the Justices have been moving toward historical tests only incrementally. For example, some of the conservative Justices employ history and tradition standards in the First Amendment context—but only some of the time. Compare *Vidal v. Elster*, 144 S. Ct. 1507, 1513, 1515-16 (2024) (Thomas, J., joined by Alito & Gorsuch, JJ.) (plurality opinion) (reasoning on history-and-tradition grounds that a content-based but viewpoint-neutral trademark restriction is permitted under the First Amendment), with *TikTok Inc. v. Garland*, 145 S. Ct. 57, 69 (2025) (per curiam) (upholding the TikTok ban unanimously under intermediate scrutiny).

In 2022, *New York State Rifle and Pistol Ass'n v. Bruen* explicitly rejected means-end analysis in favor of a historical-analogical approach.⁹ *Bruen* suggested this change in standards would produce constraint—instead, it delivered chaos.¹⁰ *Bruen*'s history-and-tradition standard has led to wildly divergent outcomes in lower courts, as judges struggle to apply its method and respond to some contradictory instructions given by the majority in *Bruen* itself.¹¹ In what follows we identify in *Bruen* and its successor, *United States v. Rahimi*,¹² features of HAT doctrine that enable and conceal the exercise of judicial discretion. We examine points of disagreement among the Justices in the conservative majority about how HAT should operate,¹³ and uncover indications that judicial proponents of constraint are building a body of doctrine that preserves judicial discretion in forms hidden from public view.

When the Fifth Circuit in *Rahimi* held that a federal law disarming persons subject to certain domestic violence restraining orders was inconsistent with American traditions and thus unconstitutional under *Bruen*¹⁴—an embarrassing result that threatened to undermine the legitimacy of *Bruen*'s method¹⁵—the Supreme Court intervened and reversed in an 8–1

⁹ 142 S. Ct. 2111, 2127–28 (2022) (adopting an approach to determining the lawfulness of firearm regulations that asks whether they “comported with history and tradition” instead of employing means-end scrutiny). We explain and explore *Bruen*'s analogical method in Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under Bruen*, 98 N.Y.U. L. REV. 1795, 1825–30 (2023) [hereinafter Blocher & Siegel, *Guided by History*].

¹⁰ See Jacob Gershman, *Why America's Gun Laws Are in Chaos*, WALL ST. J. (Aug. 1, 2023, at 05:30 ET), <https://www.wsj.com/articles/why-the-nations-gun-laws-are-in-chaos-587ded3f> [<https://perma.cc/3VXX-JTLM>] (“The result [of *Bruen*]: Hundreds of gun cases litigated in recent months have become a free-for-all, with lower courts conflicted or confounded about how and where to draw limits on gun rights.”).

¹¹ See, e.g., Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 111, 115–16 (2023) (explaining how *Bruen*'s rule that treats firearm conduct as permissible in the absence of historical legislation regulating it ignores a whole category of “historically lawful but regulable conduct”); Eric Ruben, Rosanna Smart & Ali Rowhani-Rahbar, Essay, *One Year Post-Bruen: An Empirical Assessment*, 110 VA. L. REV. ONLINE 20, 24–25 (2024) (describing discrepancies in the results of post-*Bruen* litigation influenced by judicial ideology or the type of law being challenged); see also Rebecca L. Brown, Lee Epstein & Mitu Gulati, *Guns, Judges, and Trump*, 74 DUKE L.J. ONLINE 81, 84 (2025) (“[In Second Amendment challenges post *Bruen*,] judicial discretion, as measured by partisanship, has not been constrained. It has increased.”); Rebecca L. Brown, Lee Epstein & Mitu Gulati, *The Constraining Effect of “History and Tradition”: A Test* 23–25 (Oct. 13, 2024) (unpublished manuscript) (on file with authors), <https://ssrn.com/abstract=4987850> (finding that *Bruen* increased votes favoring gun rights more amongst Republican-appointed judges, especially Trump-appointed judges, than Democrat-appointed judges).

¹² 144 S. Ct. 1889 (2024).

¹³ See *infra* Section I.C.

¹⁴ *United States v. Rahimi*, 61 F.4th 443, 459–61 (5th Cir. 2023) (“The Government fails to demonstrate that [the statute’s] restriction of the Second Amendment right fits within our Nation’s historical tradition of firearm regulation.”).

¹⁵ See *infra* notes 92–93.

decision authored by Chief Justice Roberts. The Second Amendment requires that modern gun laws be “consistent with *the principles that underpin* our regulatory tradition,”¹⁶ the Court emphasized; the Amendment does not require that modern gun laws precisely match their historical forebears. The Court’s Second Amendment cases, the majority stressed, “were not meant to suggest a law trapped in amber.”¹⁷ Just as weapons today differ from those at the founding, so may the laws that regulate them. “Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers.”¹⁸ The Court thus repudiated approaches—including the Fifth Circuit’s and the solo dissent by Justice Thomas, *Bruen*’s author¹⁹—that would extend constitutional protection to modern guns and rightsholders while only permitting the government to enact laws that had “historical twin[s]” at the Founding.²⁰

Yet *Rahimi*’s ultimate impact remains uncertain because members of the majority seemed unwilling to commit to its principles in future cases. Eight Justices joined the majority, but six also wrote or joined concurring opinions, with some conservative Justices seeming to endorse historical particularism rather than historical principles.²¹ The result is that, as several Justices acknowledged in *Rahimi*, there is a levels-of-generality problem at the heart of the Court’s debate over Second Amendment law and the continuing divergence in lower court outcomes. In her concurring opinion, Justice Barrett noted that “[c]ourts have struggled with th[e] use of history in the wake of *Bruen*. One difficulty is a level of generality problem,”²² and “reasonable minds sometimes disagree about how broad or narrow the controlling principle should be.”²³

The remarkably frank exchange among the Justices in *Rahimi* shows that *Bruen*’s historical approach requires choices about levels of generality that

¹⁶ *Rahimi*, 144 S. Ct. at 1898 (emphasis added).

¹⁷ *Id.* at 1897.

¹⁸ *Id.* at 1898.

¹⁹ *Id.* at 1930 (Thomas, J., dissenting).

²⁰ *Id.* at 1902-03.

²¹ See *infra* Section I.C (discussing the concurring opinions of Justices Gorsuch, Kavanaugh, Barrett, and Jackson).

²² *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring); see also *id.* at 1916 n.4 (Kavanaugh, J., concurring) (“[I]n applying those concepts [of tradition, liquidation, or historical gloss] in constitutional interpretation, some important questions can arise, such as: (i) the level of generality at which to define a historical practice”); *id.* at 1929 (Jackson, J., concurring) (“Consistent analyses and outcomes are likely to remain elusive because whether *Bruen*’s test is satisfied in a particular case seems to depend on the suitability of whatever historical sources the parties can manage to cobble together, as well as the level of generality at which a court evaluates those sources—neither of which we have as yet adequately clarified.”).

²³ *Id.* at 1926 (Barrett, J., concurring).

judges recognize as under-specified²⁴ and outcome-determinative.²⁵ They can be manipulated to stack the deck against modern gun laws.²⁶ Thus Judges can express elements of the Second Amendment right at a high level of generality (interpreting “Arms” as presumptively protecting all new guns) while analyzing gun regulations at a low level of generality (emphasizing differences between modern laws and historical analogues).²⁷ Nothing in originalism or constitutional theory requires this asymmetry, and indeed the Court’s own

²⁴ See, e.g., *Hanson v. District of Columbia*, 120 F.4th 223, 234 (D.C. Cir. 2024) (“[T]here is considerable uncertainty as to the degree of generality at which a court might properly find a relevantly similar historical analogue.”); *Bevis v. City of Naperville*, 85 F.4th 1175, 1210 (7th Cir. 2023) (Brennan, J., dissenting) (“In performing this analogical inquiry, it is critical to fly at the right level of generality. Fly too high, and we risk any historical firearms regulation becoming an analogue. . . . Fly too low, and we risk myopia—nitpicking differences because a historical regulation is not a dead ringer.” (internal quotation marks and citation omitted)); *United States v. Jenkins*, 697 F. Supp. 3d 380, 391 (E.D. Pa. 2023) (“*Bruen* offers no guidance regarding how to choose among these levels of generality (or the myriad other imaginable ones), and therefore contains no instruction regarding how to properly analogize to the historical record.”).

²⁵ See, e.g., *United States v. Coleman*, 698 F. Supp. 3d 851, 867 (E.D. Va. 2023) (“The historical analysis turns on the level of generality that applies to the regulated conduct.”); *Reese v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 647 F. Supp. 3d 508, 524 (W.D. La. 2022) (“The diverging conclusions reached by the opposing camps largely depends upon the level of generality employed.”); *Jenkins*, 697 F. Supp. 3d at 391 (“The real concern is that, absent metrics for comparison or instruction as to the proper level of generality at which to make those comparisons, the rules of the game in any Second Amendment case may become, with few guard rails, whatever the adjudicating court says they are.”).

²⁶ We’ve made this point previously, along with other Second Amendment scholars, by emphasizing the danger of asymmetric updating. See Brief of Second Amendment Scholars as Amici Curiae in Support of Petitioner at 6-7, *United States v. Rahimi*, 144 S. Ct. 1889 (2024) (No. 22-915) (“[C]ourts apply an expansive approach to identifying, for example, what counts as ‘arms’ within the protective ambit of the Second Amendment, while taking a parsimonious approach to identifying a tradition of regulation analogous to the challenged law. If left uncorrected, analytical mismatches of this kind can become a means of smuggling in the very ‘judge-empowering interest-balancing inquiry’ that *Bruen*’s historical approach was adopted to prevent.” (footnote omitted) (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2129 (2022))). *But see id.* at 7 n.3 (“To be sure, some cases make the opposite error by improperly narrowing the scope of the Second Amendment right while taking an overly expansive approach to identifying historical analogues for modern regulation.”).

The rights-favoring asymmetry seems to be increasingly common, however, and will be our focus here. See generally Blocher & Siegel, *Guided by History*, *supra* note 9, at 1800 (criticizing “selective and asymmetric updating” and arguing that “*Bruen* does not require gun regulation to match practices in the distant past, as judges and scholars often claim”); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 *YALE L.J.* 99 (2023); Charles, *supra* note 11, at 110-16; Siegel, *The “Levels of Generality” Game*, *supra* note 2.

²⁷ See Joseph Blocher & Reva Siegel, *Gun Rights and Domestic Violence in Rahimi—Whose Traditions Does the Second Amendment Protect?*, *BALKINIZATION* (Oct. 31, 2023) [hereinafter Blocher & Siegel, *Gun Rights and Domestic Violence in Rahimi*], <https://balkin.blogspot.com/2023/10/gun-rights-and-domestic-violence-in.html> [<https://perma.cc/B7WL-M7BF>] (showing how such an approach “interprets the Second Amendment to protect weapons like AR-15s that did not exist at the Founding, while insisting that government can only regulate the use of such weapons if it enacts laws that closely resemble legislation enacted in the ratification era”).

Second Amendment opinions (beginning with *District of Columbia v. Heller*²⁸) have repeatedly reaffirmed the government's historical authority to protect the public from the physical harm and terror that weapons can inflict—even as those threats take new forms over time.²⁹ And yet as this Article shows, ardent proponents of the historical method as an instrument of judicial constraint have advocated and wielded HAT, sometimes explicitly, as a tool for weapons deregulation.³⁰

Because these questions of doctrinal architecture and judicial role have been so explicitly debated in the Second Amendment context, *Bruen* and its aftermath reveal what we can expect when the Roberts Court replaces means-ends scrutiny with historical modes of review in other areas of law. The intense debates over HAT review in the Second Amendment context offer a window on the “ambitions” of the project: what the Justices seem to be interested in achieving through this form of review, rather than what they say they are using it for.

In Part I, we trace the development of HAT from *Heller* to *Rahimi*. We identify “two *Bruens*”—two different approaches to historical-analogical reasoning in the decision, reflecting tensions in the current conservative majority about how the Court will employ the historical method: to allow changes in weapons and weapons laws or to extend rights protection to new weapons while requiring weapons laws to resemble analogues of the distant past. *Rahimi* appears to reject the second of these approaches, mandating evaluation of rights and regulation at commensurate levels of generality, in this case by considering the “principles” undergirding a regulatory tradition rather than a search for historical regulatory twins. Yet the many concurring opinions in *Rahimi* create uncertainty about whether and under what circumstances a majority of Justices are committed to principles-based reasoning. Some of the conservative Justices seem to prefer the more granular historical approach, despite or because of the discretion it enables. Sustained debate about these questions shows that the conservative Justices have self-consciously structured doctrine to preserve judicial discretion, decisions that together allow the Justices to retain control over outcomes on a case-by-case basis.

As we demonstrate in Part II, the first post-*Rahimi* decisions in the United States Courts of Appeals—including cases involving age restrictions and

²⁸ 554 U.S. 570 (2008).

²⁹ See Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U. L. REV. 139, 175 (2021) [hereinafter Blocher & Siegel, *When Guns Threaten the Public Sphere*] (“*Heller* aligned itself with those aspects of Anglo-American common law that recognize the power of governments to regulate weapons so as to prevent terror and preserve the peace . . .”).

³⁰ We analyze the use of HAT as a deregulatory tool throughout the Article. For a discussion of judges and others explicitly advocating it for that purpose, see *infra* Part II.

assault weapons bans—respond to this tension among the Justices. Some judges are applying *Rahimi*'s principles-based approach, while others are proceeding as if the case had never been decided or else making undefended outcome-determinative judgments about levels of generality. We provide a close reading of the Fourth Circuit's en banc decision in *Bianchi v. Brown*, which upheld Maryland's ban on assault weapons.³¹ A divided Supreme Court later denied certiorari in that case, though four Justices indicated their desire to hear a case about assault weapons "in the next Term or two."³² Justices Thomas and Kavanaugh not only called for the Court to grant cert, but described the terrain on which they want the decision to be contested, seemingly signaling a desire to provide constitutional protection to new forms of weaponry while limiting new forms of regulation.

In Part III we examine the earliest proposals to replace means-ends review with history and tradition and compare the justifications for reform with the law that resulted. Our analysis of HAT cases in the Second Amendment and beyond shows that the HAT method exhibits the very problems its advocates imputed to means-ends review: The HAT cases are not originalist in method, and license discretion because they are riddled with levels-of-generality problems. And, we argue, there is more. HAT inflicts unique harms on democracy by providing judges resources and incentives to mask their value-based judgments. Values-based review continues, but now in forms that are far less transparent to democratic oversight and less responsive to the democratically expressed concerns of living Americans.

I. LEVELS OF GENERALITY IN HISTORICAL-ANALOGICAL REASONING—A CONSERVATIVE COURT DIVIDED

In this Part we offer a new reading of the Supreme Court's Second Amendment decisions. We show that cases from *Heller* to *Rahimi* in fact authorize contemporary firearms and contemporary firearms regulation, but in *Bruen* and *Rahimi* the Justices in the Court's new conservative majority signaled that judges could extend protection to modern weapons while restricting modern weapons laws.

³¹ *Bianchi v. Brown*, 111 F.4th 438, 446 (4th Cir. 2024) (en banc).

³² Justice Kavanaugh issued a "[s]tatement" saying, inter alia, that "this Court should and presumably will address the AR-15 issue soon, in the next Term or two." *Snope v. Brown*, 145 S. Ct. 1534, 1534-35 (2025) (mem.) (statement of Justice Kavanaugh respecting the denial of certiorari). As a circuit judge, Kavanaugh voted to strike down Washington D.C.'s assault weapons ban on historical grounds. See *Heller v. District of Columbia*, 670 F.3d 1244, 1269-96 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

Justices Alito and Gorsuch voted for certiorari. *Snope*, 145 S. Ct. at 1534. Justice Thomas dissented from denial of cert in an opinion that exemplifies many of the problems we discuss throughout the Article. See *infra* notes 335-339.

In *Heller*, the Court looked to history to guide recognition of new gun rights and new forms of gun regulation. For more than a decade after *Heller*, lower courts followed that approach, accommodating new weapons and new regulations through a two-part framework that combined historical inquiry and means-end scrutiny.³³

In *Bruen*, a Court with new membership rejected that framework, adopting a test that focused exclusively on history and tradition. But there appears to have been a significant (and generally unrecognized) disagreement between *Bruen*'s author, Justice Thomas, and some members of the *Bruen* majority about how its test should be applied. The result, we show, was two competing versions of *Bruen* within the decision itself. As the opinion initially explains its framework, historical-analogical inquiries must be pitched at a level of generality that recognizes both modern weapons and modern weapon regulations, as in the post-*Heller* regime. *Bruen*, for example, explained that its framework contemplates protecting firearms “not in existence at the time of the founding”³⁴ and also authorizes “regulations that were unimaginable at the founding.”³⁵ But in applying this test, Justice Thomas defined the right to keep and bear arms at a high level of generality and historical analogues for modern gun regulations at a low level of generality. This asymmetric approach extended the Second Amendment's coverage to technologically sophisticated weaponry of lethality unimaginable at the Founding, yet required regulations of such weapons to resemble laws at the time of the musket.

The decision in *Rahimi* offered a corrective to the kind of granular historical analysis performed in *Bruen*'s name, even as it forced into the open the division latent in *Bruen*. Chief Justice Roberts, writing for an eight-Justice majority, applied the first version of *Bruen*—expressly reaffirming that both gun regulations and gun rights evolve in history—while Justice Thomas, alone dissenting, applied the second version.³⁶ Several of the conservative Justices joined the majority and concurred, specifically noting the importance of the unsettled issues involving levels of generality. The result is continuing uncertainty about whether a majority of the conservative justices are committed to using historical principles broadly to guide and constrain development of both rights and regulation, or whether they prefer to retain

³³ See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2127 (2022) (describing the existing two-part framework and concluding that “[d]espite [its] popularity . . . it is one step too many”).

³⁴ *Id.* at 2132 (citing *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008)).

³⁵ *Id.*

³⁶ See generally *United States v. Rahimi*, 144 S. Ct. 1889, 1894-1903 (2024) (opinion of Roberts, C.J.); *id.* at 1930-47 (Thomas, J., dissenting).

discretion over their own discretion by employing history and tradition selectively—an issue to which we return in Part III.

A. *How Heller Sanctions Change*

Many have celebrated Justice Scalia's opinion in *District of Columbia v. Heller* as a paragon of originalism.³⁷ Justice Scalia styled the opinion in originalist terms as a search for “original meaning”³⁸ and “original understanding”³⁹ of the Second Amendment's text. At the outset of the opinion, Justice Scalia explained that the “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.”⁴⁰ This sounds in what is generally called “original public meaning” originalism—currently the dominant originalist method.⁴¹ Original public meaning originalism generally requires an interpreter to identify the meaning of a constitutional provision at the time of its adoption, considered in its full historical context.⁴²

³⁷ See, e.g., Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J. (June 27, 2008, at 00:01 ET), <https://www.wsj.com/articles/SB121452412614009067> [<https://perma.cc/NJR3-QRKU>] (calling *Heller* “the finest example of what is now called ‘original public meaning’ jurisprudence ever adopted by the Supreme Court”). But see Adam Liptak, *Justices’ Ruling on Gun Control Draws Comparison to Roe v. Wade*, N.Y. TIMES (Oct. 21, 2008), <https://www.nytimes.com/2008/10/21/world/americas/21iht-guns.1.17133910.html> [<https://perma.cc/A3V9-VXVH>] (reporting that Judges J. Harvie Wilkinson III and Richard Posner criticized *Heller* as like *Roe* in the sense of having “no basis in the Constitution”).

One of us has described *Heller* as an exemplar of originalism in the sense that *Heller* “enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism.” Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192-93 (2008).

³⁸ *Heller*, 554 U.S. at 614.

³⁹ *Id.* at 625.

⁴⁰ *Id.* at 576.

⁴¹ See Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1251 (2019) (“Most contemporary originalists aim to recover the public meaning of the constitutional text at the time each provision was framed and ratified; this has been the dominant form of originalism since the mid-1980s.”). The focus is on the meaning of the textual provision at issue to the ratifying public at the time of ratification. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 94-95 (rev. ed. 2014) (“[O]riginal [public] meaning’ originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”).

Since Justice Scalia wrote *Heller*, a contender to public-meaning originalism has emerged, called original-law originalism in which “law must trace a legal pedigree to the law of the Founding and its own rules of legal change.” William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1469 (2024).

⁴² Professor Richard Fallon surveyed recent accounts of original public meaning originalism, which focus on “what a reasonable person who knew the publicly available facts about the context of [a constitutional provision’s] drafting would have taken it to mean.” Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1425 (2021); see, e.g., ANTONIN

The world has dramatically changed since the late 1700s. How, then, does *Heller*'s method accommodate new rights claims, new regulations, and other changes in the legal landscape—especially given that technological and social transformations since the Founding⁴³ have greatly expanded the lethality of weapons and the classes of people entitled to possess them?

In *Heller*, Justice Scalia waved off the notion that his originalist opinion would freeze in place the types of weapons entitled to constitutional coverage: “Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment.”⁴⁴ To reject that argument—and thereby open the category of arms to new forms of weaponry—he first referred to decidedly *non*-originalist doctrine, and then appealed directly to modern public opinion. First, he argued by analogy that “[j]ust as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”⁴⁵ Justice Scalia then went on to recount the “many reasons that a citizen may prefer a handgun for home defense” (including that “it can be pointed at a burglar with one hand while the other hand dials the police”) and concluded, without evidence and seemingly contrary to fact, that “[w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”⁴⁶

SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012) (“In their full context, words mean what they conveyed to reasonable people at the time they were written”); Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar’s Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1440 (2014) (reviewing AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012)) (“[T]he true, original public meaning of the language employed . . . [is] the objective meaning the words would have had, in historical, linguistic, and political context, to a reasonable, informed speaker and reader of the English language at the time that they were adopted.”). Jonathan Giennapp, a critic of originalism, observes that meaning cannot be dissociated from context. See JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* 48 (2025) (“Whichever kind of original meaning we’re trying to recover, that meaning is a function of how original readers thought about the world. Complex constitutional provisions necessarily presuppose a thick network of conceptual understandings.”).

⁴³ For critical reflections on the supposed distinction between changes in facts and changes in values, see Jack M. Balkin, *Nino’s Paradox*, 173 U. PA. L. REV. 1871 (2025).

⁴⁴ *Heller*, 554 U.S. at 582.

⁴⁵ *Id.* (citations omitted).

⁴⁶ *Id.* at 629.

Justice Scalia cited no evidence for this “most popular weapon” proposition or the notion that “the American people have considered the handgun to be the quintessential self-defense weapon,” *id.*, and there are reasons to be dubious. Most self-defense actions involve no weapons of any kind, and other weapons are more commonly used than firearms. See, e.g., VIOLENCE POL’Y CTR., *FIREARM JUSTIFIABLE HOMICIDES AND NON-FATAL SELF-DEFENSE GUN USE: AN ANALYSIS OF FEDERAL BUREAU OF INVESTIGATION AND NATIONAL CRIME VICTIMIZATION SURVEY*

And yet many scholars and judges claim as a matter of doctrine that in the above quoted passages *Heller* resolved the question of arms coverage historically. As we discuss below, in *Bruen*, Justice Thomas repeatedly relied on what he characterized as *Heller*'s "historical" analysis, quoting passages from the decision to establish that modern weapons are protected by the Second Amendment.⁴⁷

Is it possible to reconcile the doctrine's claimed commitment to originalism with this explicit embrace of modern changes? Yes, if an interpreter approaches original public meaning originalism at a high level of generality, reading words shorn from particularizing context, for example by relying heavily on dictionaries, he can convert the supposedly historical inquiry of original public meaning originalism⁴⁸ into something resembling a present-focused textualism. A passage of this kind appears in *Heller*, where, in the course of arguing for an individual-rights interpretation of the Amendment, Justice Scalia claimed that "[t]he 18th-century meaning [of arms] is no different from the meaning today" citing dictionaries that defined arms as "[w]eapons of offence, or armour of defence" or as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another."⁴⁹ This generates a broad, high-level definition that readily encompasses new forms of weaponry, no matter how great their lethality.

But it would be absurd to extract, from the Court's use of dictionaries in the course of adopting the individual-rights interpretation, a coverage rule for Second Amendment cases that extends to *all* "[w]eapons of offence, or armour of defence," including things like chemical weapons whose mass-annihilative potential the Framers could not possibly have foreseen. And indeed Justice Scalia emphasized that the Second Amendment is "not a right to keep and carry any weapon whatsoever," pointing to the purportedly historical principle that "dangerous and unusual" weapons can be

DATA 6 (2023), <https://vpc.org/studies/justifiable23.pdf> [<https://perma.cc/RBA8-5MKD>] ("[L]ooking at the total number of self-protective behaviors undertaken by victims of attempted or completed property crime for the five-year period 2014 through 2018, in only 0.3 percent of these instances had the intended victim in resistance to a criminal threatened or attacked with a firearm.").

Nonetheless, judges have invoked it as a central "holding" of *Heller*, sufficient to rule out restrictions on high-capacity magazines. *Hanson v. District of Columbia*, 120 F.4th 223, 259-60 (D.C. Cir. 2024) (Walker, J., dissenting).

⁴⁷ See *infra* notes 63-64 and accompanying text. On changing weapons technology, see, for example, Brian DeLay, *The Myth of Continuity in American Gun Culture*, 113 CALIF. L. REV. 1, 35-46 (2025); Darrell A.H. Miller & Jennifer Tucker, *Common Use, Lineage, and Lethality*, 55 U.C. DAVIS. L. REV. 2495, 2506-11 (2022); see also *Bianchi v. Brown*, 111 F.4th 438, 464-72 (4th Cir. 2024) (en banc), which describes remarkable changes in weapons technology.

⁴⁸ See *supra* note 42 (reviewing scholarship on the importance of analyzing context in determining original public meaning).

⁴⁹ *Heller*, 554 U.S. at 581.

prohibited.⁵⁰ On this account, the ratifiers would have reasoned about the meaning of “Arms” in a historical context that supplied a limiting principle whose contours are not immediately legible to modern readers of the Constitution’s text. Further, we have a historical principle whose applications can change over time as new forms of weaponry are developed and the government’s regulatory authority changes accordingly.

And, in fact, even as *Heller* recognized a Second Amendment right that can grow and change over time, it also recognized that gun regulations can grow and change over time. The decision acknowledged the legitimacy of contemporary gun regulations, which it rooted in pre- and post-ratification history. In describing the government’s continuing prerogative to regulate firearms in the interests of public safety, *Heller* did not simply reason from Founding-era original public meaning; it ranged widely over the centuries, especially in Part III of the decision, which surveys many ways that “the right secured by the Second Amendment” can be regulated.⁵¹ As we observed in prior work, that portion of the opinion recognizes that government has authority to regulate weapons in the interests of preventing threats as well as physical injury, that the threats weapons pose to public life have evolved in history, and that government has the constitutional authority to respond to these threats by regulating weapons in the interests of public safety.⁵²

Indeed, in the course of approving a potentially wide range of gun regulations—those regarding felons, the mentally ill, dangerous and unusual weapons, and so on—the majority did not cite any historical sources, and many commentators (including those sympathetic to *Heller*’s basic holding) recognized that some parts of the opinion simply were not tethered to historical particulars.⁵³ *Heller* sanctioned symmetric change in the exercise of weapons rights and regulation, recognizing social, technological, and legal evolution bounded by high-level historical principles. If “the argument . . . that only those arms in existence in the 18th century are protected by the Second Amendment” is “bordering on the frivolous,”⁵⁴ then so, too, is the argument that the Second Amendment permits only those regulations in existence at that time.

⁵⁰ *Id.* at 581, 626-27.

⁵¹ *Id.* at 626; *see id.* (“Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”).

⁵² Blocher & Siegel, *When Guns Threaten the Public Sphere*, *supra* note 29, at 175.

⁵³ *See, e.g.*, Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1356-69 (2009) (arguing that the Justices in *Heller* opined on and seemingly approved a wide range of gun control regulations not before the Court and not subject to historical analysis).

⁵⁴ *Heller*, 554 U.S. at 582.

Heller did not reject the tiers of scrutiny and in fact reasoned within prevailing standards of means-ends review when Justice Scalia observed that D.C.’s handgun ban “would fail constitutional muster” “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.”⁵⁵ Consequently, the federal courts of appeals developed a two-step framework for evaluating modern gun restrictions.⁵⁶ Under this framework, judges first inquired whether the challenged law fell within the Second Amendment’s scope, and, if so, shifted the burden to the government to demonstrate that the law was sufficiently tailored to further an adequate government interest.⁵⁷ The first step often considered history for guidance in establishing the scope of the right. The second usually involved something like intermediate scrutiny, and—as in many areas of constitutional rights law—the government often prevailed.⁵⁸ Many gun rights advocates, scholars, and a growing number of judges decried this method as under-enforcing the Second Amendment and even treating gun rights as a “second-class right.”⁵⁹ Many argued for an alternative approach tied more tightly to historical analysis.

B. *The Two Bruens*

After Justices Gorsuch, Kavanaugh, and Barrett joined the Court in the wake of *Heller* and the era of the two-part framework,⁶⁰ Justice Thomas—who had complained for years that the two-step inquiry treated the Second

⁵⁵ *Id.* at 628-29.

⁵⁶ For a more expansive description of this two-part framework, see Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1451-52 (2018) (“Courts, advocates, and scholars generally agree that some version of the two-part test predominates throughout the lower courts.”).

⁵⁷ *Id.* at 1452-53.

⁵⁸ *See id.* at 1472 (finding that only nine percent of Second Amendment challenges succeeded between 2008 and 2016).

⁵⁹ Erin Ruben & Joseph Blocher, “*Second-Class*” *Rhetoric, Ideology, and Doctrinal Change*, 110 GEO. L.J. 613, 616 (2022) [hereinafter Ruben & Blocher, “*Second-Class*” *Rhetoric*]; *see also* Stephen P. Halbrook, *Text-and-History or Means-End Scrutiny in Second Amendment Cases? A Response to Professor Nelson Lund’s Critique of Bruen*, 24 FEDERALIST SOC’Y REV. 54, 55-56 (2023) (“We know from the post-*Heller* experience what to expect from a Second Amendment jurisprudence based on means-end scrutiny: naked value judgments imposed by federal judges who are hostile to the right to keep and bear arms. By contrast, *Bruen*’s text-and-history approach makes it far more difficult for judges to base their decisions in Second Amendment cases on their own policy preferences and moral judgments.”).

⁶⁰ In fact, Kavanaugh and Barrett each authored influential dissents rejecting the two-part framework and arguing for a turn to history and tradition. *See Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting) (preferring the use of “history and tradition . . . to identify the scope of the legislature’s power to take” away one’s Second Amendment rights); *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”).

Amendment as a “second-class right”⁶¹—assembled a majority in *Bruen* to repudiate means-end scrutiny and replace it with a standard focused on history and tradition alone.

Many have focused on the challenge in applying *Bruen*’s HAT test.⁶² We ask instead whether the new majority altered *Heller*’s recognition that both gun rights and regulation have evolved historically. Initially it appears that, like *Heller*, the test articulated in *Bruen* accommodated changed circumstances affecting gun rights claims and gun regulation alike, according them parallel treatment.

In determining the scope of gun rights protected, *Bruen* dispensed with an independent inquiry and reasoned doctrinally from the Court’s conclusions in *Heller*. Quoting *Heller*, Justice Thomas observed, “[w]e have already recognized in *Heller* at least one way in which the Second Amendment’s historically fixed meaning applies to new circumstances: Its reference to ‘arms’ does not apply ‘only [to] those arms in existence in the 18th century.’”⁶³ He continued, “[t]hus, even though the Second Amendment’s definition of ‘arms’ is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense.”⁶⁴ On this point, the *Bruen* Court is not doing independent originalist analysis, but instead following *Heller*’s reasoning about the modern arms the Second Amendment covers.⁶⁵

Justice Thomas continued in *Bruen*, initially introducing gun regulation as a parallel case and treating history as a guide rather than a limit for modern laws: “Much like we use history to determine which modern ‘arms’ are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the

61 *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari) (quoting *McDonald v. City of Chicago*’s use of the phrase “second-class right,” 561 U.S. 742, 780 (2010) (plurality opinion), to argue that the Second Amendment was being treated as a “constitutional orphan”); see also Ruben & Blocher, “*Second-Class*” Rhetoric, *supra* note 59, at 654 (“Justice Clarence Thomas and Judge Diarmuid O’Scannlain of the Ninth Circuit[] comprise . . . 47% (8/17) of the opinions invoking the strong versions of the [second-class right] claim.”).

62 See *supra* note 11 and sources cited therein.

63 *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2132 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008)).

64 *Id.* (citing *Caetano v. Massachusetts*, 577 U.S. 411, 411-12 (2016) (per curiam) (overturning opinion denying Second Amendment coverage to stun guns)). It is worth noting, too, that *Bruen* transmutes *Heller*’s “all instruments that constitute bearable arms” to all “instruments that facilitate self-defense.” *Heller*, 554 U.S. at 582; *Bruen*, 142 S. Ct. at 2132. Some judges have since relied on that language to conclude that high-capacity magazines—which are not weapons in and of themselves—are nonetheless “unquestionably ‘Arms’ under the Second Amendment” because they are “instruments that are necessary to the operation of most modern firearms for self-defense.” *Duncan v. Bonta*, 133 F.4th 852, 896 (9th Cir. 2025) (Bumatay, J., dissenting).

65 See *supra* notes 63–64 and accompanying text.

founding.”⁶⁶ It was at this point that the Court authorized analogical reasoning in order to ensure that new weapons regulations would be constitutional if consistent with tradition: “When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge.”⁶⁷ On this account, analogical inquiry would determine whether “modern regulations that were unimaginable at the founding” were “consistent” with American traditions of firearms regulation,⁶⁸ in terms of how and why the regulations burdened exercise of the right.⁶⁹

This is the critical joint in *Bruen*’s architecture where judicial discretion lives. How much variance between present-day gun regulation and its historical counterpart will a judge permit before deciding the modern regulation is no longer consistent with American tradition? That depends on how close a match the judge requires, which is a function of the level of generality at which she conducts the analysis. A higher level of generality in historical-analogical reasoning will permit change by treating more things (whether they be weapons or regulations) as relevantly similar, while a lower level of generality will limit change by distinguishing them. And if different levels of generality are applied to gun rights and gun regulations—high for rights and low for regulations, or vice versa—the result will be a kind of asymmetric updating that systematically favors only one kind of change, permitting coverage of modern weapons but not modern weapons laws—or the reverse.

It is on this very question that we can see instability within *Bruen*. Some passages of the opinion affirmed that the Constitution creates a form of self-government capable of addressing modern problems. *Bruen*’s invocation of *McCulloch v. Maryland*, for example, expressly directed judges that the Constitution authorizes new forms of regulation, which judges in turn would recognize, guided by history:

The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution—and a Second Amendment—”intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” *McCulloch v. Maryland*, 4 Wheat. 316, 415, 4 L.Ed. 579 (1819) (emphasis deleted). Although its meaning

⁶⁶ *Bruen*, 142 S. Ct. at 2132. The key ingredient here is *analogical* reasoning—indeed the Court uses versions of the word “analogy” nearly thirty times.

⁶⁷ *Id.*; see also *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) (quoting this passage).

⁶⁸ *Bruen*, 142 S. Ct. at 2130, 2132.

⁶⁹ *Id.* at 2132-33. For more on the “why” and “how” metrics, see Blocher & Siegel, *Guided by History*, *supra* note 9, at 1825-30.

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.⁷⁰

Elsewhere, *Bruen* approved dynamic interpretation of this kind in two ways. First, even as the majority employed historical analogues to strike down “may issue” licensing laws, the opinion went out of its way to bless the constitutionality of modern “shall issue” licensing laws, without any inquiry whatsoever into their historical provenance.⁷¹ Second, the opinion provided instructions about levels of generality and historical analogues, directing judges that a “more nuanced”—that is, more forgiving—historical approach may be required for modern laws addressing “unprecedented societal concerns or dramatic technological changes.”⁷² This invitation to calibrate the analogical analysis directs judges to use levels of generality to find historical analogues for modern laws, like those that prohibit loaded guns in airplane cabins, that would not have existed at the Founding.

In these and other ways, the first version of *Bruen* conducts the kind of history-and-tradition review that recognizes modern rights and regulation as consistent with tradition. This version of *Bruen* aligns with the portions of *Heller* that relied on post-Founding common law development and blessed modern gun regulations—those involving felons, the mentally ill, and so on—which did not exist (in their current form) at the Founding.⁷³ Notably, Justice Kavanaugh (joined by Chief Justice Roberts) reproduced this portion of *Heller* in his *Bruen* concurrence,⁷⁴ suggesting that at least two Justices in the six-Justice majority understand *Bruen* to be continuing in the same basic vein.⁷⁵

⁷⁰ *Bruen*, 142 S. Ct. at 2132.

⁷¹ *Id.* at 2138 n.9 (“[N]othing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regimes.”); *id.* at 2162 (Kavanaugh, J., concurring) (“[S]hall-issue licensing regimes are constitutionally permissible”); see also Adam M. Samaha, *Is Bruen Constitutional? On the Methodology that Saved Most Gun Licensing*, 98 N.Y.U. L. REV. 1928, 1931–32 (2023) (questioning whether and how this result can be squared with *Bruen*’s purportedly historical method).

⁷² *Bruen*, 142 S. Ct. at 2132.

⁷³ See *supra* notes 51–54 and accompanying text.

⁷⁴ The only notable omission was *Heller*’s line about the presumptive constitutionality of “prohibitions on carrying concealed weapons.” *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). Given that the claim in *Bruen* involved concealed carry, which *Heller* suggests can be entirely prohibited, perhaps including that line would have muddied the waters too much.

Indeed, while on the D.C. Circuit, Kavanaugh suggested that “governments appear to have more flexibility and power to impose gun regulations under a test based on text, history, and tradition than they would under strict scrutiny.” *Heller v. District of Columbia*, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). But see Andrew Willinger, *History and Tradition as Heightened Scrutiny*, 60 WAKE FOREST L. REV. 415, 421 (2025) (arguing that adoption of HAT has restricted government even more than heightened scrutiny did).

⁷⁵ *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring).

But there is a second *Bruen* that reasons at high levels of generality to accommodate new gun rights while reasoning at low levels of generality to limit modern efforts at regulation. *Bruen*, like *Heller*, explained that the Second Amendment covers new forms of firearms.⁷⁶ This is because “even though the Second Amendment’s definition of ‘arms’ is fixed according to its historical understanding, that general definition covers *modern instruments that facilitate armed self-defense*.”⁷⁷ Whether *Bruen* was reasoning about arms as a matter of original public meaning or doctrine, it related historic and modern arms at an incredibly high level of generality—they are analogous because they both “facilitate armed self-defense.”⁷⁸ Reasoning at a similar level of generality, the majority might have determined whether New York’s licensing law was consistent with tradition by asking whether New York’s law was designed to, for example, “facilitate public safety.”⁷⁹ And yet *Bruen* struck down the New York licensing law at issue by reasoning at a low level of generality and emphasizing its differences from historical analogues, which the Court dismissed for a multitude of reasons: too old, too new, too limited in the people they governed, and so on.⁸⁰

Thus, two *Bruens* are apparent. One, following *Heller*, reasons from history as a guide as it extends Second Amendment coverage to new firearms *and* as it recognizes the government’s authority to regulate those new weapons in new ways. The second *Bruen* has a levels-of-generality problem. It, too, extends Second Amendment coverage to new firearms by characterizing the past and present at a high level of generality, while reasoning about the firearms laws at a low level of generality, allowing the government to regulate modern weapons only if modern laws closely resemble laws of the ratification era.

Tension between the two *Bruens* is at the heart of the continuing division in the lower courts, which we explore in Part II. For example, striking down

⁷⁶ *Id.* at 2132 (majority opinion).

⁷⁷ *Id.* (emphasis added).

⁷⁸ *Id.*

⁷⁹ Some courts wrestling with the levels of generality problem have read *Bruen* in exactly this way. See, e.g., *United States v. Benson*, 704 F. Supp. 3d 616, 624 n.9 (E.D. Pa. 2023) (“While the Government does not point to an eighteenth- or nineteenth-century law disarming people who brought guns onto school grounds, that is not the proper level of generality at which to conduct the historical analogical reasoning that *Bruen* demands. Instead, the proper question to ask under *Bruen* is whether disarming someone because he or she brought a gun onto school grounds would be based on the same judgment about that person as can be found in the historical record—*i.e.*, that his or her possession of guns would endanger the public safety.” (internal quotation marks and citations omitted)).

⁸⁰ See Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 58-60 (2022) (describing the historical analogues that the Court analyzed—and rejected—in *Bruen*).

California's prohibition on assault weapons and high-capacity magazines in *Miller v. Bonta*, Judge Benitez⁸¹ mused:

[A] semiautomatic pistol with a threaded barrel (i.e., an “assault weapon”) is is [sic] not much of a technological advancement over an 1868 navy revolver with a smooth barrel. And is a semiautomatic shotgun with a pistol grip and adjustable stock (i.e., an “assault weapon”) really a dramatic technological advancement over common multi-shot shotguns from the 1800s?⁸²

This broad approach to “Arms” reflects what historian Brian DeLay calls the “myth of continuity in American gun culture.”⁸³ Moreover, advocates of broad gun rights invoke these claims of continuity but surely would abandon them in the context of choosing weapons for self-defense; one suspects that Judge Benitez and those who celebrate his reasoning would quickly disclaim similarity if one were to suggest that modern assault weapons be traded in for 1868 navy revolvers.

Indeed, Judge Benitez's opinion illustrates how history and tradition can be used not to constrain judicial discretion, as its proponents claim, but to achieve specific substantive outcomes like the expansion of gun rights. Levels of generality are one powerful tool for doing so, as we have shown. In describing the Second Amendment right, Judge Benitez proceeded at “an extraordinarily high level of generality,”⁸⁴ as Judge Staton observed in a subsequent case involving the same California law. She noted that Judge Benitez had found modern assault weapons and nineteenth century lever-action rifles comparable because both “could be fired multiple times in succession very accurately and quickly,”⁸⁵ but that “such a high level of generality . . . would mean fully automatic machine guns are not a dramatic technological change over nineteenth century lever-action rifles.”⁸⁶

In stark contrast to the high level of generality he applied to the weapons themselves, Judge Benitez read the history of regulation at a very

⁸¹ “Saint” Judge Benitez is such a favorite of gun rights advocates that one can purchase prayer candles and t-shirts depicting him with a robe, halo, and assault weapon. Denise Guerra, Kasia Broussalian & David Toledo, *The Judge Who Likes to Overturn Gun Laws*, L.A. TIMES: THE TIMES PODCAST (Mar. 15, 2023), <https://www.latimes.com/podcasts/story/2023-03-15/the-times-podcast-judge-roger-benitez-assault-weapons> [<https://perma.cc/3U9M-XMUS>].

⁸² *Miller v. Bonta*, 699 F. Supp. 3d 956, 988 (S.D. Cal. 2023), *appeal held in abeyance*, No. 23-2979, 2024 WL 1929016 (9th Cir. Jan. 26, 2024).

⁸³ DeLay, *supra* note 47, at 77; *see id.* at 7 (“At its most general articulation, the myth maintains that Americans in the colonial and Founding eras wanted and used guns for the same basic reasons that Americans want and use guns today What has *really* changed, the myth's purveyors argue, is not the guns, the reasons Americans have them, what their owners do with them, or the resulting social consequences. What has really changed is the law.”).

⁸⁴ *Rupp v. Bonta*, 723 F. Supp. 3d 837, 880 (C.D. Cal. 2024).

⁸⁵ *Id.* (quoting *Miller*, 699 F. Supp. 3d at 988).

⁸⁶ *Id.*

low level. For example, the court opened its opinion by comparing assault weapons to “the Bowie Knife which was commonly carried by citizens and soldiers in the 1800s,”⁸⁷ but later rejected the relevance of historical laws regulating Bowie knives and other bladed weapons *because they were not laws regulating firearms*.⁸⁸

We do not find in *Heller*, nor in originalism, any authority supporting this second version of *Bruen*—the one that would update and continually expand the right to keep and bear arms by reasoning at high levels of generality while restraining the government’s regulatory authority by reasoning at low levels of generality.⁸⁹ The question under the Supreme Court’s Second Amendment precedents, from *Heller* through *Bruen* and *Rahimi*, is identifying the historical “balance” that the Amendment captures between an individual’s right to keep and bear arms for self-defense and a community’s right to defend itself through law.⁹⁰ That balance is disrupted if only one side is allowed to change and expand.

As we show in the following Section, eight Justices joined Chief Justice Roberts’s opinion in *Rahimi*, which rejected asymmetric updating and thus embraced the first version of *Bruen*—the one that admits both new weapons and new regulations. Yet it remains unclear whether the Court is *committed* to that form of historically guided constraint, or whether some of the conservative Justices prefer to retain discretion about when and how to rely on historical analysis.

⁸⁷ *Miller*, 699 F. Supp. 3d at 965.

⁸⁸ *Id.* at 994 (“But dirks, daggers, and bowie knives were not guns. . . . They were bladed instruments; they were not firearms. Knife laws may not be completely irrelevant, but they are pretty close.”). The court was quick to add that “[t]his is not to say that bowie knives are not ‘arms’ imbued with Second Amendment protection.” *Id.* at 995.

Even in cases involving modern knife restrictions, some judges have distinguished historical regulations on knives. In *Teter v. Lopez*, the Ninth Circuit considered a Second Amendment challenge to Hawaii’s ban on butterfly knives. 76 F.4th 938, 942 (9th Cir. 2023), *vacated as moot and remanded*, 125 F.4th 1301 (9th Cir. 2025) (en banc). Hawaii pointed to historical laws banning Bowie knives, Arkansas Toothpicks, sword-canes, and even an 1837 Georgia law restricting “any other kind of knives.” *Id.* at 951. But the *Teter* panel rejected these laws, because most restricted only concealed carrying, few regulated small knives, and none reached butterfly knives specifically. *Id.* at 953.

⁸⁹ *Cf.* *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.” (citations omitted)).

⁹⁰ See *supra* notes 51–54 and accompanying text (discussing the many forms of gun regulation *Heller* authorizes); *Heller*, 554 U.S. at 635 (calling the Second Amendment “the very product of an interest balancing by the people”).

C. Rahimi's Turn to Principles—and Uncertain Impact

The Fifth Circuit's decision in *United States v. Rahimi*⁹¹ followed the second version of Bruen and exemplified the asymmetric levels of generality approach we have described. The case was widely criticized both for its method and for the retrograde result⁹² that its use of the history-and-tradition method entrenched,⁹³ creating a potential legitimacy crisis for Bruen's approach.⁹⁴ The Fifth Circuit held that a law prohibiting gun possession by people subject to certain judicially imposed domestic violence restraining orders (DVROs) was inconsistent with historical tradition and thus unconstitutional under the Second Amendment.⁹⁵ In doing so, the Fifth Circuit framed the right to bear arms at a high level of generality, concluding that "Rahimi, while hardly a model citizen, is nonetheless among 'the people' entitled to the Second Amendment's guarantees, all other things equal."⁹⁶ At the same time, the court analyzed the government's prerogative to regulate at a low level of generality, calling the DVRO restriction an "outlier[]" that our ancestors would never have accepted⁹⁷ because it was not similar enough to historical analogues (e.g., sureties and prohibitions on affray) employed to

⁹¹ 61 F.4th 443 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1889 (2024).

⁹² See, e.g., *United States v. Rahimi: The Fifth Circuit's Dangerous and Extreme Decision*, EVERYTOWN FOR GUN SAFETY (Feb. 8, 2023), <https://www.everytown.org/united-states-v-rahimi-the-fifth-circuits-dangerous-and-extreme-decision> [<https://perma.cc/7P4H-7Y34>] (describing the decision as "extremely dangerous" and warning that it "would gut a fundamental public safety law and endanger the lives of domestic violence survivors nationwide"); Roxanna Asgarian, *Appeals Court Ruling Says Alleged Domestic Abusers Have a Constitutional Right to Keep Their Guns*, TEX. TRIB. (Feb. 9, 2023, at 05:00 CT), <https://www.texastribune.org/2023/02/09/guns-domestic-abuse-second-amendment> [<https://perma.cc/N5G9-JC73>] (arguing that despite the focus on historical analysis, "the risks to domestic violence victims could not be more immediate").

⁹³ For representative commentary, see, for example, Jennifer Mascia & Will Van Sant, *Bruen Takes Gun Law Back to a Time Before 'Domestic Violence'*, TRACE (Feb. 8, 2023), <https://www.thetrace.org/2023/02/restraining-order-gun-ban-constitutional> [<https://perma.cc/QA79-W3DQ>]; Paul Waldman, *Opinion, How the Supreme Court's Next Gun Case Could Deal a Blow to Originalism*, WASH. POST (Oct. 4, 2023), <https://www.washingtonpost.com/opinions/2023/10/04/rahimi-supreme-court-guns-domestic-violence> [<https://perma.cc/TQR9-NGFF>].

Criticism in the academy was more blunt. See, e.g., Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOU. L. REV. 799, 846 (2023) (observing that "a retrospective analysis that prioritizes the Founding, a time when women were not entitled to participate in the political process and when the state condoned domestic violence, is hardly conducive to upholding a restriction on firearm possession by those involved in domestic violence," making *Rahimi* "paradigmatic of the impact and import of the Court's jurisprudence of masculinity"). For our own criticism focused on the levels of generality question as it intersected with the matter of gender, see Blocher & Siegel, *Gun Rights and Domestic Violence in Rahimi*, *supra* note 27.

⁹⁴ *Rahimi*, 61 F.4th at 461.

⁹⁵ *Id.*

⁹⁶ *Id.* at 453.

⁹⁷ *Id.* at 461 (alteration in original) (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022)).

restrain those who threatened others with violence.⁹⁸ The court thus struck down the DVRO prohibition because it concluded that the government had not shown a tradition of intervening in gun-linked domestic violence⁹⁹—a problem that was, for reasons both social and technological, under-addressed at the Founding.¹⁰⁰ As we argued at the time in commentary¹⁰¹ and briefing,¹⁰² the Fifth Circuit’s decision allowed for change in the scope of gun rights, which it analyzed at high levels of generality, but not gun regulation, which it analyzed at low levels of generality.

When *Rahimi* reached the Court, the levels-of-generality question was a major focus of briefing.¹⁰³ Solicitor General Elizabeth Prelogar specifically noted at oral argument that “one of the fundamental problems with how courts are applying *Bruen* is the level of generality at which they’re parsing the historical evidence”¹⁰⁴ and the Justices repeatedly returned to the issue in their questions.¹⁰⁵

In an 8–1 decision, the Court overturned the Fifth Circuit.¹⁰⁶ In a key passage, Chief Justice Roberts’s majority opinion restated *Bruen*’s holding that modern gun laws be “consistent with this Nation’s historical tradition”¹⁰⁷ in terms that focused on the *principles* that guide the tradition: “As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with *the principles that underpin* our regulatory tradition.”¹⁰⁸ The *Rahimi* majority, joined by every Justice but Thomas, specifically rejected the low level of generality at which the Fifth Circuit had searched for historical analogues. “[L]ike the dissent, [the Fifth Circuit] read *Bruen* to require a ‘historical twin’ rather than a ‘historical analogue.’”¹⁰⁹ *Rahimi*’s embrace of a principles-based approach to identifying

⁹⁸ *Id.* at 460–61.

⁹⁹ *Id.*

¹⁰⁰ See Mascia & Van Sant, *supra* note 93 (offering social and technological reasons for why there may not be historical analogues for certain regulations); Murray, *supra* note 93, at 813–19 (tracing how the Roberts Court’s historical focus carries forward inequities from a time when women were excluded from the polity).

¹⁰¹ Blocher & Siegel, *Guided by History*, *supra* note 9, at 1825–26; Blocher & Siegel, *When Guns Threaten the Public Sphere*, *supra* note 29, at 175.

¹⁰² Brief of Second Amendment Scholars, *supra* note 26, at 6–7.

¹⁰³ See e.g., Brief of Global Action on Gun Violence et al. as Amici Curiae Supporting Petitioner at 5, *United States v. Rahimi*, 144 S. Ct. 1889 (2024) (No. 22–915); Brief of Public Health Researchers and Lawyers as Amici Curiae in Support of Petitioner at 10, *United States v. Rahimi*, 144 S. Ct. 1889 (2024) (No. 22–915); Brief of Second Amendment Scholars, *supra* note 26, at 12.

¹⁰⁴ Transcript of Oral Argument at 39, *United States v. Rahimi*, 144 S. Ct. 1889 (2024) (No. 22–915).

¹⁰⁵ *Id.* at 16–21, 39–42.

¹⁰⁶ *United States v. Rahimi*, 144 S. Ct. 1889, 1903 (2024).

¹⁰⁷ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

¹⁰⁸ *Rahimi*, 144 S. Ct. at 1898 (emphasis added).

¹⁰⁹ *Id.* at 1903 (quoting *Bruen*, 142 S. Ct. at 2111).

regulatory traditions in applying *Bruen* is a significant and welcome corrective to the rigid historicism practiced by the Fifth Circuit and by Justice Thomas in dissent.¹¹⁰

Applying the principles approach to the extraordinary facts before them, the Justices concluded that “[o]ur tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others.”¹¹¹ A judge had issued a specific individualized finding that Rahimi did indeed present such a threat,¹¹² so that relatively narrow principle was sufficient to reject his challenge. But the majority emphasized that “we do not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse,”¹¹³ leaving the door open for gun restrictions not tied to an individualized finding of dangerousness.

In discussing the role of principles in reasoning about tradition, the *Rahimi* majority specifically repudiated the Fifth Circuit’s reasoning about gun rights and regulation at asymmetrical levels of generality. The Court held that protecting contemporary firearms while requiring firearms laws to resemble ancient analogues was contrary to *Heller* and the Second Amendment:

As we explained in *Heller*, for example, the reach of the Second Amendment is not limited only to those arms that were in existence at the founding. . . . By that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers.¹¹⁴

Thus, the second major holding of *Rahimi*, which flows from the first, is that gun regulations, just like the guns they regulate, can change over time. The

¹¹⁰ See, e.g., Albert W. Alschuler, *United States v. Rahimi: Let’s Cheer the Supreme Court’s Result But Boo Its Ever-Stranger Standard*, JUSTIA VERDICT (July 2, 2024), <https://verdict.justia.com/2024/07/02/united-states-v-rahimi-lets-cheer-the-supreme-courts-result-but-boo-its-ever-stranger-standard> [<https://perma.cc/7D2B-3WC4>]; Marcia Coyle, *No Earthquake, but Did the Supreme Court Shift a Bit in Its Approach to Guns?*, NAT’L CONST. CTR. (June 24, 2024), <https://constitutioncenter.org/blog/no-earthquake-but-did-the-supreme-court-shift-a-bit-in-its-approach-to-guns> [<https://perma.cc/JX6X-BT7T>]; Douglas Letter, *Rahimi Paves Way for Courts to Stop Seeking Historical ‘Twins’*, BLOOMBERG L. (June 24, 2024, at 12:22 ET), <https://news.bloomberglaw.com/us-law-week/rahimi-paves-way-for-courts-to-stop-seeking-historical-twins> [<https://perma.cc/7DHP-ZAHZ>].

¹¹¹ *Rahimi*, 144 S. Ct. at 1902; see also *id.* at 1903 (“[W]e conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.”).

¹¹² *Id.* at 1895.

¹¹³ *Id.* at 1901.

¹¹⁴ *Id.* at 1897-98.

Court's Second Amendment cases, Chief Justice Roberts emphasized, "were not meant to suggest a law trapped in amber."¹¹⁵

Rejecting the Fifth Circuit's error of recognizing protected weapons at a high level of generality while restricting firearm regulation to historical analogues identified at a low level of generality, *Rahimi* suggests that courts can recognize changes in the scope of the right and its regulation at commensurate levels of generality. As Chief Justice Roberts himself put it at oral argument in *Heller*, "we are talking about lineal descendants of the arms but presumably there are lineal descendants of the restrictions as well."¹¹⁶ Writing for the majority in *Rahimi*, Chief Justice Roberts explained that under *Bruen*, the question is "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."¹¹⁷

Despite the majority's affirmation of principles-based reasoning, *Rahimi* has not clarified the confusions created by the "two *Bruens*." Many of the conservative Justices who joined the 8–1 majority also concurred on grounds suggesting uncertainty—and perhaps disagreement—with the principles-based approach. In their concurrences, Justices Gorsuch and Kavanaugh emphasized that *Bruen*'s historical method (read: reasoning at a low level of generality) constrains judicial discretion, echoing longstanding arguments of first-generation originalists.¹¹⁸ Even as he affirmed the modern DVRO prohibitor because it serves the same purposes as surety laws in the Founding era,¹¹⁹ Justice Gorsuch warned against judges reasoning at higher levels of generality and trying to extract "overarching 'policies,' 'purposes,' or 'values'" from past practices.¹²⁰ Justice Kavanaugh acknowledged that levels of generality are not fully determinate,¹²¹ but quoted Justice Scalia to the effect that "[h]istory establishes a 'criterion that is conceptually quite separate from

¹¹⁵ *Id.* at 1897.

¹¹⁶ Transcript of Oral Argument at 77, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290). Justice Barrett quoted this passage during her time as a circuit judge. See *Kanter v. Barr*, 919 F.3d 437, 465 (7th Cir. 2019) (Barrett, J., dissenting).

¹¹⁷ *Rahimi*, 144 S. Ct at 1898 (emphasis added).

¹¹⁸ See generally Siegel, *The Levels-of-Generality Game*, *supra* note 2, at 602-03 (showing how arguments about judicial constraint have long been asserted in the debate over levels of generality).

¹¹⁹ *Rahimi*, 144 S. Ct. at 1908 (Gorsuch, J., concurring) (observing that the domestic violence prohibitor "works in the same way and . . . for the same reasons" as the surety laws).

¹²⁰ *Id.* at 1908; see also *id.* at 1909 ("Come to this Court with arguments from text and history, and we are bound to reason through them as best we can. (As we have today.) Allow judges to reign unbounded by those materials, or permit them to extrapolate their own broad new principles from those sources, and no one can have any idea how they might rule. (Except the judges themselves.)").

¹²¹ See *id.* at 1916 n.4 (Kavanaugh, J., concurring) ("[I]n applying those concepts [of tradition, liquidation, or historical gloss] in constitutional interpretation, some important questions can arise, such as: (i) the level of generality at which to define a historical practice . . .").

the preferences of the judge himself,”¹²² and argued that “reliance on history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people.”¹²³ In doing so, he channeled the broader argument—which we discuss in Part III—that means-end analysis enables a kind of judicial policymaking that historical tests constrain.

And of course *Bruen*'s author, Justice Thomas, dissented from the application of its test in *Rahimi*. He did so by requiring those defending contemporary laws to identify historical antecedents that demonstrate “both a comparable burden and justification.”¹²⁴ This effectively excluded from consideration historical laws that imposed a different burden on gun rights (i.e., a different “how”) even if they served the same purpose (i.e., the same “why”) or vice versa. That move further limited the range of permissible historical analogues and has been imitated by other judges, as we show below.¹²⁵

Of those who wrote or joined *Bruen*, we know Justice Thomas disagrees with the *Rahimi* majority while Justice Gorsuch and Justice Kavanaugh have expressed misgivings about *Rahimi*'s method. Justice Alito did not write separately or join any of the concurrences in *Rahimi*, although he has been a reliable vote for gun rights. As we discuss in Section II.B, those same four Justices have expressed their desire to grant cert in a case in which the Fourth Circuit, sitting en banc, affirmed a state's authority to ban assault weapons—suggesting hostility to modern regulations but acceptance of modern weaponry.¹²⁶

That leaves Chief Justice Roberts and Justice Barrett. The Chief Justice wrote about the Court's decision in *Rahimi* in terms that extend beyond the facts of that case and in future cases should use “principles” to identify the legitimate “lineal descendants” of historical gun regulations, an approach that accords with the first version of *Bruen* we described above. Justice Barrett elsewhere has specifically recognized the judicial discretion involved in historical analysis, which suggests that she does not fully embrace the judicial constraint thesis that Justices Gorsuch and Kavanaugh elaborated in their *Rahimi* concurrences.¹²⁷ In *Rahimi*, she concluded that “reasonable minds sometimes disagree about how broad or narrow the controlling principle should be,” but that the majority “settle[d] on just the right level of

¹²² *Id.* at 1912 (quoting Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989)).

¹²³ *Id.*

¹²⁴ *Id.* at 1944 (Thomas, J., dissenting).

¹²⁵ See *infra* Part II.

¹²⁶ See *infra* Section II.B (discussing *Bianchi v. Brown*, 111 F.4th 438 (4th Cir. 2024) (en banc)).

¹²⁷ See *infra* notes 207, 271–273, 277 and accompanying text.

generality” by finding that “our Nation’s firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms.”¹²⁸ She also emphasized that judges should not be limited to searching for narrow original expected applications of historical principles—what the majority opinion called “historical twin[s]”¹²⁹—because they “do not themselves have the status of constitutional law.”¹³⁰

Judges seeking faithfully to implement the Court’s Second Amendment precedents might therefore read the Justices as having twice in the past two years debated the matter of constraint and levels of generality and twice refused to commit themselves to a clear framework. That persistent division is the echo of the two *Bruens* we discussed above, and as we show in the following Part, lower court judges continue to toggle between them.

II. LEVELS OF GENERALITY AFTER *RAHIMI*

In this Part, we use the first major appellate decisions after *Rahimi* to illustrate how judges are responding to the signals the conservative Justices provided and are taking radically different approaches to the levels of generality issue—approaches that track the two *Bruens* described above. The Second Amendment’s doctrinal coherence depends on which line of cases ultimately prevails. We focus in particular on how lower courts employ levels of generality to evaluate gun restrictions for classes of persons (e.g., minors, felons, and the mentally ill) and on classes of arms (e.g., assault weapons, high-capacity magazines).¹³¹

Examining how the lower federal courts are responding to the “two *Bruens*”—the contradictory modes of reasoning about HAT doctrine in *Bruen* and *Rahimi*—is especially timely because these cases bear on Second

¹²⁸ *Rahimi*, 144 S. Ct. at 1926 (Barrett, J., concurring). Notably, Justice Barrett followed this *supra* cite with a “see also” citation to her own opinion in *Kanter v. Barr*, 919 F.3d 437, 464–65 (7th Cir. 2019) (Barrett, J., dissenting) (“History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns.”). Whether the “dangerousness” principle from *Kanter* is equivalent to the majority’s focus on those presenting a credible risk of physical harm is a hard question. Indeed, the majority itself articulated its seemingly narrow principle in a few different ways. *See infra* note 176.

¹²⁹ *Rahimi*, 144 S. Ct. at 1903 (majority opinion).

¹³⁰ *Id.* at 1925 n.* (Barrett, J., concurring); *see id.* (arguing that in *Rahimi* the Court’s “use of history walks a fine line between original meaning (which controls) and expectations about how the text would apply (which do not)”); *id.* (“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.” (citation omitted)).

¹³¹ Levels of generality issues arise in other Second Amendment contexts, of course, and our analysis is relevant to those cases as well. *See, e.g., Antonyuk v. James*, 120 F.4th 941, 969 n.13 (2d Cir. 2024) (noting a levels-of-generality issue in a challenge to restrictions on guns in sensitive places).

Amendment questions that the Court has taken for decision.¹³² In doing so, we also highlight how levels-of-generality choices intersect with questions of coverage and burdens of proof in the two-part test that has emerged in many post-*Bruen* Second Amendment cases. The first part of this test asks whether the claim triggers Second Amendment analysis at all (i.e., whether the claim involves “people,” “arms,” or activities falling within the Amendment’s scope). If it does, the second part asks whether the restriction can be justified through *Bruen*’s analogical approach.¹³³ Crucially, the challenger bears the burden at the first step (otherwise all gun laws would be presumptively unconstitutional) and the government bears it at the second.¹³⁴

Judges skeptical of gun regulation have set doctrinal standards at different levels of generality to make it easy for claimants to establish constitutional coverage and nearly impossible for the government to meet its burden—doctrinal choices that advance gun rights but lack warrant in the Constitution or original understanding. For example, a court might answer the step one question at a very high level of generality by claiming to rely on the Amendment’s “plain text”—that “the People” includes all members of a political community, or that all bearable weapons are “Arms”—thus effectively eliminating any burden on a party to show that their claim falls within the Amendment’s scope. Typically, at the first step the challenging party is asked for little historical analysis, in stark contrast to the extensive historical record demanded of the government at step two.

At the second step, judges can dial down the level of generality—thus emphasizing any discrepancies between contemporary and historical laws—and then simply declare that the government has failed to carry its burden.¹³⁵ This approach generates regulatory silences (i.e., “there were no laws addressing the narrow and specific problem of X”) and imbues them with

¹³² See *supra* notes 6–7.

¹³³ See *Bianchi v. Brown*, 111 F.4th 438, 445–46 (4th Cir. 2024) (en banc) (outlining the two-part test). Although it is beyond the bounds of the present paper, this is how other constitutional rights work. See, e.g., Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1806 (2004) (describing how free speech claims can fail either as a matter of “coverage” or “protection”).

¹³⁴ *Bianchi*, 111 F.4th at 445–46; see also *Hanson v. District of Columbia*, 120 F.4th 223, 231–32 (D.C. Cir. 2024) (“*Bruen* established a two-step test . . . First, we consider whether ‘the Second Amendment’s plain text covers’ possession of [a high-capacity magazine]. If it does, then we must determine whether the magazine cap is ‘consistent with this Nation’s historical tradition of firearm regulation’ and therefore constitutional. The plaintiff bears the burden of proof at the first step, whereas the Government bears the burden of proof at the second step.” (citations omitted) (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022))).

¹³⁵ See, e.g., *United States v. Price*, 111 F.4th 392, 435 (4th Cir. 2024) (en banc) (Richardson, J., dissenting) (“[W]hatever the answer is to this question, the burden is not on me or Price to provide it. It is the Government’s burden, which it must carry by offering something more than mere conjecture.”).

great significance. And since the government bears the burden, it will effectively lose for reasons that may have nothing to do with whether a particular kind of gun regulation was thought to be permissible.¹³⁶ What emerges, then, is that analysis of the rights claim in step one is resolved at a high level of generality by appeals to “plain text” that discharge the burden on the challenger often without historical inquiry, while analysis of the regulatory interest is shunted to step two and analyzed at a low level of generality, in granular historical detail, and under a heavy burden of proof.

To illustrate these moves, we contrast post-*Rahimi* opinions that have adopted dramatically different approaches to the challenging party’s burdens at step one. As we will see, the Eighth Circuit analyzed step one at a high level of generality, relieving the challenging party of any obligation to make a historical showing, while imposing on the government the heavy burden of showing consistency with tradition at a low level of generality. The en banc Fourth Circuit took a very different approach, recognizing that both the right and regulation were historically rooted. But dissents in the Fourth Circuit used asymmetric levels of generality to expand gun rights while limiting regulatory authority. Appellate judges are thus discerning and responding to divisions within the Supreme Court and its case law.¹³⁷

As we will see, *Bruen* provides judges with the tools and authority to reach divergent decisions that reflect contemporary values they describe as rooted in the past. Judges following the first *Bruen* reason about rights and regulations at commensurate levels of generality, finding in the past the value of democratic self-governance exercised to provide for public safety and collective self-defense. Judges following the second *Bruen* reason at asymmetric levels of generality, finding in the past the authority to strike down weapons laws as obstructing the right of an individual to bear weapons in self-defense.

A. Updating “the People”—*Worth v. Jacobson*

The Eighth Circuit’s decision in *Worth v. Jacobson*¹³⁸ was the first major court of appeals decision issued after *Rahimi*.¹³⁹ And yet the court ignored the

¹³⁶ See *United States v. Rahimi*, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring) (noting, in the context of levels of generality, that “imposing a test that demands overly specific analogues has serious problems,” including that it “assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a ‘use it or lose it’ view of legislative authority. Such assumptions are flawed, and originalism does not require them.”).

¹³⁷ See *supra* note 11 (citing related empirical studies).

¹³⁸ 108 F.4th 677, 683 (8th Cir. 2024).

¹³⁹ Notably, *Worth* does not so much as mention *Rahimi*’s invocation of “principles,” which was central to the Supreme Court’s characterization of its test. See *supra* Section I.B. Indeed, *Worth*’s use of *Rahimi* was mostly limited to treating its approval of disarming those who pose a credible threat

Rahimi majority's turn to principles, effectively embracing the second version of *Bruen*, and thus the many level of generality problems we highlighted in the previous Part.

At issue in *Worth* was a Minnesota law forbidding people under the age of 21 from carrying handguns in public.¹⁴⁰ In the wake of *Bruen*, courts have divided on the constitutionality of such age-based restrictions.¹⁴¹ More than twenty states have adopted minimum age requirements regarding firearms in light of the striking evidence about the heightened risk that young people will misuse them: “[f]or example, while those between the ages of 18 and 20 compose less than 4 percent of the population, they account for more than 15 percent of those charged with murder or non-negligent manslaughter.”¹⁴² In *Worth*, Minnesota cited data (which the court did not question) to the effect that “the murder arrest rate for 18 to 20-year-olds is almost 33 percent higher than the murder arrest rate for the next most homicidal age group” and that they are “most likely of any age group to use firearms to commit homicides and other violent crimes.”¹⁴³

An understanding of this problem may have moved the legislature to add the age requirement to the licensing law, but *Bruen*'s historical-analogical test asks whether the law is consistent with historical tradition, not whether the law is effective in addressing the concerns of the modern polity. Accordingly, Minnesota defended its licensing law on the historical ground that “18 to 20-year-olds are not members of ‘the people’” protected by the Second Amendment “because at common law, individuals did not have rights until they turned 21 years old.”¹⁴⁴ In Blackstone's words, they were treated as

to others as a requirement under the Second Amendment, a matter to which we return below. See *infra* note 164 and accompanying text.

¹⁴⁰ *Worth*, 108 F.4th at 683.

¹⁴¹ Compare *Reese v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 127 F.4th 583, 586 (5th Cir. 2025) (striking down age-based restriction), *Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 127 (3d Cir.) (same), *vacated sub nom.*, *Paris v. Lara*, 145 S. Ct. 369 (2024), and *Fraser v. Bur. Alcohol, Tobacco, Firearms & Explosives*, 672 F. Supp. 3d 118, 123, 147 (E.D. Va. 2023) (same), *rev'd sub nom.*, *McCoy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 F.4th 568 (4th Cir. 2025), with *Nat'l Rifle Ass'n v. Bondi*, 133 F.4th 1108, 1111 (11th Cir. 2025) (en banc) (upholding restriction), *petition for cert. filed*, No. 24-1185 (U.S. May 16, 2025), and *Jones v. Bonta*, 705 F. Supp. 3d 1121, 1139 (S.D. Cal. 2023) (same).

¹⁴² Robert J. Spitzer, *Minors, Guns, History, and the Second Amendment*, ROCKEFELLER INST. (Apr. 24, 2024), <https://rockinst.org/blog/minors-guns-history-and-the-second-amendment> [<https://perma.cc/UW38-6HPY>]; see *id.* (“In 2019, according to FBI data, the age cohort that committed the largest number of homicides that year was 19-year-olds, followed by 18-year-olds.”); see also *Bondi*, 133 F.4th at 1150-53 (Rosenbaum, J., concurring) (collecting scientific research on this subject).

¹⁴³ *Worth*, 108 F.4th at 694 (internal quotation marks omitted).

¹⁴⁴ *Id.* at 689; see also *Reese*, 647 F. Supp. 3d at 523 (“In conformity with founding-era thinking, and in conformity with the views of various 19th-century legislators and courts, Congress restricted the ability of minors under 21 to purchase handguns because Congress found that they tend to be

“infant[s].”¹⁴⁵ Such historical evidence of age-of-majority restrictions might be taken either to show that minors are not among “the People” who can claim Second Amendment rights (a step one argument) or that they are among the People but can nonetheless be regulated so long as the modern law is relevantly similar to a historical forebear (a step two argument).

Worth, aligning with other courts extending Second Amendment protection to eighteen-to-twenty-year-olds,¹⁴⁶ characterized age-of-majority as an element of the *right* rather than the *regulation*, thereby effectively eliminating consideration of the legislature’s age-related public-safety concerns in the constitutional analysis. The Eighth Circuit asked whether 18- to 20-year-olds are among “the people” protected by the Second Amendment and answered at a very high level of generality by appeal to the “plain text” of the Amendment: “the Second Amendment’s plain text does not have an age limit.”¹⁴⁷ This echoed language from an earlier Fourth Circuit decision authored by Judge Richardson, whose dissenting opinion in *Bianchi* we discuss in more detail below:

[W]hile various parts of the Constitution include age requirements, the Second Amendment does not. The Founders set age requirements for Congress and the Presidency, but they did not limit any rights protected by the Bill of Rights to those of a certain age. *See* U.S. Const. art. I, § 2 (age 25 for the House); *id.* art. I, § 3 (age 30 for the Senate); *id.* art. II, § 1 (age 35 for the President); *cf. id.* amend. XXVI (setting voting age at 18). In other words, the Founders considered age and knew how to set age requirements but placed no such restrictions on rights, including those protected by the Second Amendment.¹⁴⁸

Although the burden is supposed to be on the challenger at *Bruen*’s first step, *Worth* read the Second Amendment’s text out of historical context and at a very high level of generality, relieving the challenger of any burden to

relatively immature and that denying them easy access to handguns would deter violent crime . . .”). *See generally* Kellen Heniford, *The Young and the Armed: History for Litigating Firearms Age Restrictions in a Post-Bruen World*, 101 IND. L.J. SUPP. 56 (2026) (arguing that, under *Bruen*, courts and litigants must confront the post-Civil War historical conditions that shaped early age-based weapons restrictions); Megan Walsh & Saul Cornell, *Age Restrictions and the Right to Keep and Bear Arms, 1791–1868*, 108 MINN. L. REV. 3049 (2024) (summarizing the legal rights of 18- to 20-year-olds at the Founding and suggesting that history, text, and tradition justify modern age-based firearm regulations).

¹⁴⁵ *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 451 (Oxford, Clarendon Press 1765) (“So that full age in male or female, is twenty one years . . . who till that time is an infant, and so styled in law.”).

¹⁴⁶ Walsh & Cornell, *supra* note 144, at 3060-61.

¹⁴⁷ *Worth*, 108 F.4th at 692.

¹⁴⁸ *Hirschfeld v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 5 F.4th 407, 421 (4th Cir.), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021).

demonstrate age-of-majority standards prevailing at the time of the Second Amendment's ratification.¹⁴⁹ In fact, the court flipped the burden and concluded that "Minnesota must overcome the 'strong presumption' that the right applies to 'all Americans.'"¹⁵⁰ As stated, this would mean that even if Minnesota amended its law to cover only those under the age of 10, the Second Amendment would be implicated and the state would then have to come forward with historical evidence to support it.¹⁵¹

In adopting this broad reading of the right, *Worth* effectively eliminated historical inquiry at step one. Indeed, the court explicitly updated the category of "the people" in the face of historical evidence, concluding that "[e]ven if the 18 to 20-year-olds were not members of the 'political community' at common law, they are today."¹⁵² Invoking equality principles on behalf of both minors and the Second Amendment itself, the court claimed that an alternative reading would "subjugate[] 'the constitutional right to bear arms in public for self-defense [to] . . . ' a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees."¹⁵³

What was the basis for this high level of generality? The "political community" language comes from *Heller*, which in the course of rejecting the militia-based reading of the Second Amendment said that the right to keep and bear arms extends to "all members of the political community, not an unspecified subset."¹⁵⁴ But this is only one of many things that *Heller* said

¹⁴⁹ *Worth*, 108 F.4th at 688-89. Notably, the *Worth* court was unconcerned that the plaintiffs "did not submit expert reports or facts about the Second Amendment's text." *Id.* at 688 n.4.

¹⁵⁰ *Id.* at 689 (emphasis added) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008)).

¹⁵¹ See, e.g., Jacob Charles, *K.G. v. Ellison*, No. 24-001 (D. Minn. Aug. 9, 2024) (parody), DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Aug. 30, 2024), <https://firearmslaw.duke.edu/2024/08/k-g-v-ellison-no-24-001-d-minn-aug-9-2024-parody> [<https://perma.cc/3JL5-XZCL>] (demonstrating, via a parody mock district court opinion, how the *Worth* court's approach could be used to vindicate a kindergartener's gun rights).

¹⁵² *Worth*, 108 F.4th at 691; see also *Nat'l Rifle Ass'n v. Bondi*, 133 F.4th 1108, 1185 (11th Cir. 2025) (Brasher, J., dissenting) ("[E]ighteen- to twenty-one-year-olds in Florida today are analogous to adults, not minors, at the time these statutes were enacted. Unlike minors, eighteen-to twenty-one-year-olds in Florida today must protect, shelter, and defend themselves."), *petition for cert. filed*, No. 24-1185 (U.S. May 16, 2025); *Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 672 F. Supp. 3d 118, 134 (E.D. Va. 2023) (holding that a ban on 18- to 20-year-olds purchasing guns infringed on Second Amendment rights, even if at the Founding 21-years-old was the age of majority because "[t]he approach manifest in *Heller* and *Bruen* supports a finding that today's understanding of 'the people' is appropriate when considering the reach of the Second Amendment"), *rev'd sub nom.*, *McCoy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 F.4th 568 (4th Cir. 2025).

¹⁵³ *Worth*, 108 F.4th at 691 (omission and second alteration in original) (quoting *Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 132 (3d Cir.), *vacated sub nom.*, *Paris v. Lara*, 145 S. Ct. 369 (2024)); see also *Bianchi v. Brown*, 111 F.4th 438, 483 (4th Cir. 2024) (en banc) (Richardson, J., dissenting) ("The Second Amendment is not a second-class right subject to the whimsical discretion of federal judges.").

¹⁵⁴ *Heller*, 554 U.S. at 580.

about who can claim Second Amendment rights. The opinion elsewhere equated “the people” with “law-abiding, responsible citizens”¹⁵⁵ and indicated that some rights-bearing members of the community like felons and the mentally ill can be disarmed entirely (and not merely denied the ability to carry a certain kind of gun in public).¹⁵⁶ Appearing to distinguish between original public meaning and original expected applications,¹⁵⁷ the *Worth* court judged irrelevant historical evidence that many people—Blacks, Native Americans, loyalists, and so on—were prohibited from possessing guns in 1791:

Arguments of this type, focusing on the original contents of a right instead of the original definition—i.e., that only those people considered to be in the political community in 1791 “are protected by the Second Amendment,” instead of those meeting the original definition of being within the political community—are “bordering on the frivolous.”¹⁵⁸

The court’s capacious and presentist treatment of “the People” at step one was in stark contrast to its treatment of historical regulations at step two, where the court considered gun regulations that *did* specifically reach minors. There, the court switched to a low level of generality and distinguished regulatory antecedents on a variety of grounds.¹⁵⁹ The difference between the court’s narrow parsing of the historical record in step two and its treatment of the right’s scope in step one—equating “the people” with “all members of the political community, not an unspecified subset”¹⁶⁰—is jarring. Indeed, it is the inverse of *Worth*’s own complaint that “[a]rguments . . . focusing on the original contents of a right instead of the original definition . . . are

¹⁵⁵ *Id.* at 635. *Bruen* added a different qualifier, referring to “ordinary, law-abiding citizens.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2156 (2022) (emphasis added).

¹⁵⁶ *Heller*, 554 U.S. at 626-27 & 627 n.26.

¹⁵⁷ *Cf.* *United States v. Rahimi*, 144 S. Ct. 1889, 1925 n.* (2024) (Barrett, J., concurring) (arguing that the Court’s “use of history walks a fine line between original meaning (which controls) and expectations about how the text would apply (which do not)”; *id.* (“[W]hile 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.” (citation omitted))).

¹⁵⁸ *Worth*, 108 F.4th at 690 (quoting *Heller*, 554 U.S. at 582).

¹⁵⁹ *Id.* at 697-98. The court drew many distinctions:

[S]everal prohibited only *concealed* carry. Others prohibited only the kinds of weapons that could be easily concealed, like bowie knives and pistols. . . . Many, including some already mentioned, criminalized the *sale* or *furnishing* of weapons to minors, meaning they could publicly bear arms subject to generally applicable concealed-carry rules. Several included exceptions for parental permission or self-defense. And others prohibited the sale of only easily concealable weapons.

Id. at 697 (citations omitted).

¹⁶⁰ *Id.* at 689 (quoting *Heller*, 554 U.S. at 580).

‘bordering on the frivolous.’”¹⁶¹ By focusing on the “original contents” of historical regulations,¹⁶² the panel committed the error it decried.

The court’s failure to derive *principles* from these historical examples runs contrary to the majority opinion in *Rahimi*.¹⁶³ Indeed, the Eighth Circuit did not even use the word “principles” in its opinion, though that concept is core to *Rahimi*. Instead, the court read *Rahimi* to stand only for the particular principle there at issue: “it would be a stretch to say that an 18-year-old ‘poses a clear threat of physical violence to another,’” or that they “‘pose [such] a credible threat to the physical safety of others’ that their ‘Second Amendment right may be burdened.’”¹⁶⁴ This effectively transformed what *Rahimi* had treated as a sufficient condition for disarmament (that a person pose a credible threat of physical safety) into a necessary one. *Worth* thus provides a particularly striking illustration of the continuing viability of the rigid version of *Bruen* evident in Justice Thomas’s *Rahimi* dissent.

B. Updating “Arms”—*Bianchi v. Brown*

A few weeks after the Eighth Circuit’s decision in *Worth*, the Fourth Circuit handed down en banc opinions in *Bianchi v. Brown*¹⁶⁵ and *United States v. Price*¹⁶⁶—the former upholding Maryland’s prohibition on assault weapons,

¹⁶¹ *Id.* at 690 (quoting *Heller*, 554 U.S. at 582).

¹⁶² *Id.*

¹⁶³ See *supra* Section I.C.

¹⁶⁴ *Worth*, 108 F.4th at 694 (alteration in original) (quoting *United States v. Rahimi*, 144 S. Ct. 1889, 1901-02 (2024)); see also *id.* at 695 (“While ‘our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others[,]’ Minnesota has failed to show that 18- to 20-year olds pose such a threat.” (alteration in original) (quoting *Rahimi*, 144 S. Ct. at 1902)). In his concurring opinion in *Rahimi*, Justice Kavanaugh could be read to describe the holding in similarly narrow terms:

In today’s case, the Court carefully builds on *Heller*, *McDonald*, and *Bruen*. The Court applies the historical test that those precedents have set forth—namely, “whether the new law is relevantly similar to laws that our tradition is understood to permit.” The Court examines “our historical tradition of firearm regulation,” and correctly holds that America’s “tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others.” The law before us “fits neatly within the tradition the surety and going armed laws represent.”

Rahimi, 144 S. Ct. at 1923 (Kavanaugh, J., concurring) (citations omitted) (quoting *id.* at 1897-98, 1901-02 (majority opinion)).

Again, though, the majority opinion in *Rahimi* specifically disclaims the suggestion that individualized judicial findings of threat are required: “we do not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse.” *Id.* at 1901.

¹⁶⁵ 111 F.4th 438 (4th Cir. 2024) (en banc).

¹⁶⁶ 111 F.4th 392 (4th Cir. 2024) (en banc).

the latter upholding the federal statute prohibiting possession of firearms with a removed, obliterated, or altered serial number. Unlike *Worth*, these decisions imposed standards on parties bringing Second Amendment challenges to establish coverage at step one. We focus here on *Bianchi*, because four Justices explicitly indicated their interest in hearing it or another assault weapons case in the next two years. The debates about coverage and protection in that case are likely an important harbinger of the Second Amendment's future.

In *Bianchi*, a 10–5 majority opinion authored by Judge Wilkinson III rejected a challenge to Maryland's prohibition on assault weapons, finding at *Bruen*'s first step that such weapons fell outside the scope of the Second Amendment because "in essence, they are military-style weapons designed for sustained combat operations that are ill-suited and disproportionate to the need for self-defense."¹⁶⁷ The state also prevailed at *Bruen*'s step two because "the Maryland law fits comfortably within our nation's tradition of firearms regulation."¹⁶⁸

The *Bianchi* majority began step one with the doctrinal inquiry directed by *Bruen*, asking "whether the 'plain text' of the Second Amendment guarantees the individual right to possess the assault weapons covered by the Maryland statute."¹⁶⁹ Unlike the *Worth* majority, the court found that answering that question required reading the Amendment's text in historical context:

At first blush, it may appear that these assault weapons fit comfortably within the term "arms" as used in the Second Amendment.

We know, however, that text cannot be read in a vacuum. *See Biden v. Nebraska*, 600 U.S. 477, 511, 143 S. Ct. 2355, 216 L. Ed. 2d 1063 (2023) (Barrett, J., concurring) ("To strip a word from its context is to strip that word of its meaning").¹⁷⁰

The majority noted that "the text of the Second Amendment, like the text of other constitutional provisions, must be interpreted against its historical and legal backdrop" and quoted *Bruen*'s endorsement of "reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right."¹⁷¹

¹⁶⁷ *Bianchi*, 111 F.4th at 441.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 447.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 448, 461 (quoting *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022)); *see also* *United States v. Rahimi*, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring) (concluding that history "elucidates how contemporaries understood the text—for example, the meaning of the phrase 'bear Arms'" (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582–92 (2008))).

Surveying the historical restrictions, as well as *Heller's* references to “dangerous and unusual weapons” and “common use,” the *Bianchi* majority concluded that “[w]hat brings all the [historically prohibited] weapons beyond the scope of the Second Amendment together, and what separates them from the handgun, is their ability to inflict damage on a scale or in a manner disproportionate to the end of personal protection.”¹⁷²

By contrast, Judge Richardson’s dissent leaned heavily into step one analysis at a high level of generality and with less concern for history or context:

Relying on Founding-era dictionaries, *Heller* recognized an expansive definition of “Arms” that includes all “weapons of offence, or armour of defence” and “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.” And *Heller* clarified that the right is not limited to weapons that existed at the time of the Founding, nor to certain classes of weapons, but “extends, prima facie, to all instruments that constitute bearable arms, even those that were not found in existence at the time of the Founding.”¹⁷³

In support of reading “Arms” at a high level of generality and out of historical context, the *Bianchi* dissent cherry-picked bits of language from *Heller* as if they fairly represented the logic of the decision as a whole. Just as *Worth* emphasized *Heller's* broad language regarding “the People” without mentioning the categories of people excluded from bearing arms at the Founding, the *Bianchi* dissent invoked *Heller's* broad language about “Arms”¹⁷⁴ while scarcely mentioning that *Heller* recognized that the right to bear arms was long subject to regulation,¹⁷⁵ discussed prohibitions on “dangerous and unusual” and “dangerous or unusual” weapons,¹⁷⁶ and suggested that

¹⁷² *Bianchi*, 111 F.4th at 451.

¹⁷³ *Id.* at 500-01 (Richardson, J., dissenting) (citations omitted) (quoting *Heller*, 554 U.S. at 582).

¹⁷⁴ *See id.* (concluding that semiautomatic rifles are “Arms” covered by the Second Amendment’s plain text because semiautomatic firing “only enhances their ability to ‘cast at or strike another’ in ‘offence’ or ‘defence’” (quoting *Heller*, 554 U.S. at 581)).

¹⁷⁵ *See supra* notes 51–54 and accompanying text.

¹⁷⁶ The *Heller* Court used both formulations. *See Heller*, 554 U.S. at 627 (using “and”); *id.* at 623 (quoting “or” from the Government’s Brief); *see also* Nat’l Ass’n for Gun Rts. v. Lamont, 153 F.4th 213, 251 (2d Cir. 2025) (Nathan, J., concurring) (noting that the historical “sources to which *Heller* cites use a mix of “dangerous or unusual” and “dangerous and unusual”). Judges and scholars continue to debate whether the test is conjunctive. *See Hanson v. District of Columbia*, 120 F.4th 223, 239 n.7 (D.C. Cir. 2024) (explaining that “dangerous in the phrase ‘dangerous and unusual’ means ‘uncommonly dangerous.’”); *see also* Clayton E. Cramer, *The Legal History of “Dangerous or Unusual Weapons”* 8 (Oct. 17, 2015) (unpublished manuscript) (on file online on SSRN), <https://tinyurl.com/bdse6cnb> [<https://perma.cc/M86K-DSZD>] (describing hendiadys as “a literary construct of classical origin that combines two words using

“weapons that are most useful in military service—M-16 rifles and the like—may be banned.”¹⁷⁷

The *Bianchi* majority and dissent disagreed about the application of *Bruen*’s second step as well. Having decided that assault weapons fall outside the scope of the Second Amendment at *Bruen*’s first step, the majority nevertheless also conducted a step two historical-analogical analysis, concluding that Maryland’s law “is but another example of a state regulating excessively dangerous weapons once their incompatibility with a lawful and safe society becomes apparent, while nonetheless preserving avenues for armed self-defense.”¹⁷⁸ Taking this comparatively high-level approach, the majority explained, “compels consultation with the historical record, without at the same time using history as a set of minute instructions or a ‘straightjacket.’”¹⁷⁹ And that historical record showed “a storied tradition of legislatures perceiving threats posed by excessively dangerous weapons and regulating commensurately.”¹⁸⁰

The *Bianchi* dissent acknowledged seemingly strong historical comparators for Maryland’s regulation: “Appellees argue that there is a historical tradition of prohibiting the keeping or carrying of exceptionally dangerous weapons that are closely associated with criminal activity. And as a matter of historical fact, this does seem to have been the main problem these statutes addressed.”¹⁸¹ But it read these laws at a low level of generality. For example, it distinguished some laws on the basis that they regulated but did not prohibit particular classes of arms,¹⁸² or regulated only their location,¹⁸³

‘and’ to convey emphasis; it is not a way of saying both must be true for the phrase to be operative”); *cf.* *Caetano v. Massachusetts*, 577 U.S. 411, 417 (2016) (Alito, J., concurring) (proposing a conjunctive standard); Oliver Krawczyk & Gilbert Ambler, *Dangerous and Unusual: How Heller’s Ahistorical Assumption Violates the Founders’ Original Intent*, 129 DICK. L. REV. 801, 841 (2025) (“Interestingly, Blackstone’s Commentaries record ‘dangerous and unusual’ as ‘dangerous or unusual’—suggesting that the individual terms were interchangeable or simply emphatic.”).

¹⁷⁷ *Heller*, 554 U.S. at 627. Indeed, the Court found that it would be “startling” if the Second Amendment were interpreted in such a way that “the National Firearms Act’s restrictions on machineguns . . . might be unconstitutional.” *Id.* at 624. The *Bianchi* dissent’s approach to “bearable arms” would render that restriction presumptively unconstitutional, notwithstanding its recognition that “*Heller* indicates that laws like the National Firearms Act fit within the history and tradition of prohibiting dangerous and unusual weapons.” *Bianchi*, 111 F.4th at 534 (Richardson, J., dissenting).

¹⁷⁸ *Bianchi*, 111 F.4th at 441-42 (majority opinion).

¹⁷⁹ *Id.* at 462 (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133 (2022)); *see id.* (“This is what we think Justice Barrett meant when she recently wrote that “[h]istorical regulations reveal a principle, not a mold.” (quoting *United States v. Rahimi*, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring))).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 510 (Richardson, J., dissenting).

¹⁸² *Id.*

¹⁸³ *Id.* at 532 n.79.

or were motivated by a subset of public safety concerns,¹⁸⁴ all while minimizing “outlier[]” cases holding otherwise.¹⁸⁵

The dissent thus adopted levels that systematically favored the law’s challengers. Like many judges who support expansive gun rights, Judge Richardson invoked “in common use,” a phrase from *Heller*, wielding it as a free-standing doctrinal test¹⁸⁶ without fully accounting for the passage in which the phrase appears.¹⁸⁷ Judge Richardson also broadly defined “in common use,” suggesting the standard was satisfied if gun owners answered a survey identifying “self-defense” as a reason for owning an AR-15:¹⁸⁸

As stated, almost 62% of AR-15 owners point to self-defense of the home as their primary reason for owning their weapons. But that does not mean those owners have ever had to discharge their firearms for that purpose. On the contrary, keeping the arm is merely a contingency. Yet in possessing the arm, those citizens are “using” it as a form of insurance. The same can be said for those who possess firearms to be prepared in the event of hostile invasion or tyrannical government. In those circumstances, keeping the arm functions both as a backup plan and even as a deterrent.¹⁸⁹

This broad definition goes far beyond the most obvious forms of “use,” like brandishing or firing a weapon. There was no evidence in *Bianchi* that

¹⁸⁴ *Id.* at 532.

¹⁸⁵ *Id.* at 513-14 n.47. The dissent analyzed two “potential outliers”: *Nunn v. State*, 1 Ga. 243 (1846), and *State v. Huntly*, 25 N.C. 418 (1843) (per curiam). It concluded that *Nunn* is “inconsistent with the overwhelming authority to the contrary” and *Huntly* “conflicts with” other authorities and *Heller*, rendering them “outlier[s] of little value.” *Id.*

¹⁸⁶ See *id.* at 516-17 (“Appellees must show that the banned weapons are ‘not typically possessed by law-abiding citizens for lawful purposes.’ *Heller*, 554 U.S. at 625 . . . I start with common usage because it turns out to be dispositive.”).

¹⁸⁷ In the cited passage, the *Heller* Court reads the earlier decision in *United States v. Miller*, 307 U.S. 174 (1939), “to say *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,” not that all other weapons (i.e., those typically possessed by law-abiding citizens) are categorically immune from regulation. *Heller*, 554 U.S. at 624-25 (emphasis added).

¹⁸⁸ *Bianchi*, 111 F.4th at 518-19 (Richardson, J., dissenting). In support of this proposition, the dissent cited William English, 2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned 33 (May 13, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109494 [<https://dx.doi.org/10.2139/ssrn.4109494>]. That study suffers from methodological problems, as one of us shows in a co-authored peer review. See generally Deborah Azrael, Joseph Blocher, Philip J. Cook, David Hemenway & Matthew Miller, *A Critique of Findings on Gun Ownership, Use, and Imagined Use from the 2021 National Firearms Survey: Response to William English*, 78 SMU L. REV. 239 (2025) (“[English’s] paper should not be used as an authoritative source.”).

¹⁸⁹ *Bianchi*, 111 F.4th at 518 n.60 (Richardson, J., dissenting); see also *Hanson v. District of Columbia*, 120 F.4th 223, 270 n.180 (D.C. Cir. 2024) (Walker, J., dissenting) (citing the same figures); *Duncan v. Bonta*, 133 F.4th 852, 902 (9th Cir. 2025) (Bumatay, J., dissenting) (citing the same figures).

assault weapons are commonly brandished or fired in self-defense.¹⁹⁰ Instead, the dissent jumped to a higher level of generality that asymmetrically favors expansion of gun rights,¹⁹¹ effectively equating “common use” with possession or ownership,¹⁹² and drawing no distinction among types of weapons, as *Heller* had done. In doing so, it connected Second Amendment protection to purposes far beyond what *Heller* identified as the “core” and “central component” of the right—the interest in self-defense¹⁹³—pointing to “defense of the body politic and the prevention of tyranny.”¹⁹⁴

This high level of generality might be defensible if it were symmetrically applied to the regulatory side of the equation. If it is sufficient that gun owners feel more secure having guns even though they never actually use them (or that they serve as “insurance,” in Judge Richardson’s words), then it should be equally sufficient that Marylanders feel more secure regulating guns or relying on their laws as “insurance” against harm. But it seems unlikely that the dissent would accept such a regulatory principle, considering that it chided the majority for “waxing poetic about the dangers of gun violence and the blood of children”¹⁹⁵—actual concrete harms resulting from the active use of guns.

Even as it purported to apply *Bruen*’s historical method, the dissent emphasized that “we assess common usage based on usage patterns *today*, not those at the time of the Founding,”¹⁹⁶ and accused the majority of “demoniz[ing] the millions of Americans who lawfully keep these weapons to

¹⁹⁰ See *Bianchi*, 111 F.4th at 458 (majority opinion) (“[A]ppellants have failed to demonstrate that the weapon is suitable for self-defense. This is likely because such a showing would be difficult to make. Indeed, many of the weapon’s combat-functional features make it ill-suited for the vast majority of self-defense situations in which civilians find themselves.”).

¹⁹¹ It is hard to imagine that a person making this argument would accept this same definition if, say, the government were to argue that gun owners can “use” weapons for self-defense *only* by possessing them.

¹⁹² See, e.g., *Duncan v. Bonta*, 19 F.4th 1087, 1140 (9th Cir. 2023) (Bumatay, J., dissenting) (“[T]he Constitution protects the right of law-abiding citizens to keep and bear arms typically possessed for lawful purposes.”); *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Att’y Gen. N.J.*, 910 F.3d 106, 130 (3d Cir. 2018) (Bibas, J., dissenting) (“People commonly possess large magazines to defend themselves and their families in their homes. That is *exactly why* banning them burdens the core Second Amendment right. For any other right, that would be the end of our analysis.”); *Hanson*, 120 F. 4th at 270 n.180 (Walker, J., dissenting) (“What matters . . . is that millions of law-abiding Americans have chosen to arm themselves with plus-ten magazines to use for a lawful purpose.”).

¹⁹³ *District of Columbia v. Heller*, 554 U.S. 570, 599, 630 (2008); see also *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (“[I]n *Heller*, we held that individual self-defense is ‘the *central component*’ of the Second Amendment right.” (quoting *Heller*, 554 U.S. at 599)).

¹⁹⁴ *Bianchi*, 111 F.4th at 521 (Richardson, J., dissenting). We have shown in other work that self-defense interests are in play on all sides of the gun regulation debate—including that of the communities that seek to defend themselves from violence through gun regulation. See Blocher & Siegel, *When Guns Threaten the Public Sphere*, *supra* note 29.

¹⁹⁵ *Bianchi*, 111 F.4th at 532 (Richardson, J., dissenting).

¹⁹⁶ *Id.* at 517.

defend themselves and their communities”¹⁹⁷—apparently including the dissenters themselves¹⁹⁸: “Maybe, just maybe, these law-abiding citizens understand something that the majority doesn’t.”¹⁹⁹ The dissent never appeared to consider whether striking down popularly enacted legislation would “demonize[]” the Marylanders who adopted it.²⁰⁰ To the contrary, the dissent characterized “the citizens of Maryland” as the *challengers*, rather than having democratically adopted the law at issue.²⁰¹

The Supreme Court’s recent decision in *Snope*²⁰² to deny cert in *Bianchi* preserved its authority for now.²⁰³ But four Justices made known their interest in hearing an assault weapons case soon, suggesting that they very likely would have come to a different conclusion. As we discuss in more detail below,²⁰⁴ Justice Thomas’s dissent from the denial of cert appealed to democracy, but—like Judge Richardson’s dissent in *Bianchi*—raised at least two serious democracy problems of its own. The first is the asymmetric use of *Bruen*’s two-part test by invoking the “plain text” of the Amendment to eliminate virtually all evidentiary burdens on claimants while presenting the government with a nearly insurmountable historical burden at step two. The result is the broad and unjustifiable invalidation of gun safety laws. The second democracy problem is courts’ insistence that contemporary communities facing distinctly modern problems of gun violence are limited to the narrow solutions approved by “We the People” in the distant past.

We see, again and again, a gap between HAT’s promise to limit judicial discretion and the method’s performance in practice, where it so often functions to conceal the expression of judicial discretion. These problems, in turn, direct us back to the primary articulated reasons for adopting the historical test in the first place—that it would limit the kind of judicial

¹⁹⁷ *Id.* at 527.

¹⁹⁸ *See id.* at 521 n.63 (“Speaking from experience, many hog hunters deploy the exact weapons that Maryland bans, including the AR-15.”).

¹⁹⁹ *Id.* at 527 n.71. In *Price*, Judge Richardson similarly accused the majority of favoring the “speculations of federal judges” over the “customs of the American people.” *United States v. Price*, 111 F.4th 392, 435 (4th Cir. 2024) (Richardson, J., dissenting) (citing *Bianchi*, 111 F.4th at 522-23 (Richardson, J., dissenting)). It is unclear what “customs” were at issue in that case. The majority noted that “[h]ad there been evidence presented in this litigation that it is customary for law-abiding individuals to prefer firearms with obliterated serial numbers, we would, of course, factor such evidence into our analysis. But neither the second dissent nor *Price* have been able to offer any such evidence.” *Id.* at 407 n.10.

²⁰⁰ *Cf. Bianchi*, 111 F.4th at 452 (“The dissent announces a right to ‘communal self-defense’ and then proceeds directly to disregard the community’s judgment as expressed in the Maryland statute as to how communal self-defense can be most effectively safeguarded.”).

²⁰¹ *Id.* at 535 (Richardson, J., dissenting).

²⁰² *Snope v. Brown*, 145 S. Ct. 1534, 1534 (2025) (mem.).

²⁰³ *See supra* note 32 and accompanying text.

²⁰⁴ *See infra* notes 335–339 and accompanying text.

policymaking that purportedly prevailed under the tiers of scrutiny. Part III excavates those foundations.

III. HISTORY AND TRADITION'S AMBITIONS—AND HARM TO DEMOCRACY

In this final Part, we analyze the rationale then-Judge Kavanaugh and other critics originally provided for replacing means-ends review with historical review in Second Amendment cases, in light of the body of HAT doctrine the Justices have developed.²⁰⁵ We then examine what the Second Amendment example suggests about the goals of the Roberts Court in introducing historical review into other fields of constitutional law.²⁰⁶ Finally, we reflect on the gap between the law the Justices promised and the body of law they have fashioned. We show that the Justices who speak so much about judicial constraint have built a body of doctrine that enables judicial discretion and employs claims of fidelity to the nation's history and tradition to realign constitutional law with the values of the contemporary conservative legal movement.

The opinions in *Rahimi* show Justices consciously preserving discretion even as they embrace a method they say constrains discretion. Among the conservatives on the Court, only the Chief Justice and Justice Barrett seem to recognize that judges must reason from principle, while the other conservatives seek to legitimate judging by connection to claims of historical fact.²⁰⁷ Why? It may be that decades of attacking the Court have persuaded them that the discretion judges exercise is suspect, even illegitimate. After forging originalist theory as a critique of the Court, the Justices who identify as originalists are only now learning how to reconcile their theories of judicial review with the responsibilities of the judicial role.²⁰⁸ In an effort to displace responsibility for judgment onto the past, the Justices have produced a body of law that encourages them to hide judges' value-based reasoning from the public and to ignore the concerns of living Americans, especially those with

²⁰⁵ See *infra* Section III.A.

²⁰⁶ See *infra* Section III.B.

²⁰⁷ See Sherif Girgis, *Originalism's Age of Ironies*, 138 HARV. L. REV. F. 1, 11-19 (2024) (contrasting Justice Barrett with other conservative Justices); *supra* text accompanying notes 126-130 (discussing the opinions of Chief Justice Roberts and of Justice Barrett in *Rahimi*); see also *infra* notes 271-273 and accompanying text (discussing the opinion of Justice Barrett in *Vidal*).

²⁰⁸ Cf. Siegel, *The "Levels of Generality" Game*, *supra* note 2, at 604 ("The conservative legal movement is no longer outside the Court criticizing its work; the conservative legal movement is now inside the Court exercising public power. Claims about the objectivity and neutrality of historical interpretation on which the conservative legal movement mobilized against the Warren and Burger Courts will not persuade the Roberts Court's critics to defer to its judgment."); Girgis, *supra* note 207, at 20 ("Now that originalism has become a governing philosophy, it is developing under the *practical* pressures of implementation on an apex court.").

whom the Justices lack instinctive identification or empathy. The effort to mask judicial judgment in historical evidence produces a variety of democracy problems for HAT whose harms we explore in conclusion.

There is an alternative way to read the development of HAT doctrine. Newly appointed conservative judges may have been perfectly confident to exercise the prerogatives of their role, and to transform Second Amendment doctrine to vindicate a more expansive understanding of gun rights and a more restrictive view of the government's authority to regulate weapons in the interests of public safety. But judges and advocates appreciated that doing so openly would exact political costs, while changing doctrine to *limit* judicial discretion and *restore* the original understanding would prove more politically acceptable. As we show, the movement delivered on neither of these promises.

A. *The Campaign to Replace Means-End Analysis with History and Tradition—
A Short History*

We examine early attacks on mean-ends review, surveying the different grounds on which critics challenged its legitimacy. In the Second Amendment context, which in important respects began the broader campaign, some conservative commentators have pointed to a seemingly stray comment at oral argument in *Heller*.²⁰⁹ Responding to the suggestion that gun rights should receive strict scrutiny, Chief Justice Roberts remarked that the tiers of scrutiny do not appear in the Constitution but had “just kind of developed over the years as sort of baggage” that the First Amendment picked up.²¹⁰

This stray remark did not lead to an immediate repudiation of the tiers. In *Heller*, Justice Scalia reasoned within means-ends review when he observed that the handgun ban “would fail constitutional muster” “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.”²¹¹ The federal courts responded, overwhelmingly, by reading *Heller* to license a two-part framework that incorporated both historical analysis and a kind of sliding-scale scrutiny.²¹²

²⁰⁹ For sources quoting Chief Justice Roberts's line to support a historical-categorical approach to the Second Amendment, see, for example, Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL'Y 373, 399 n.154 (2016); Halbrook, *supra* note 59, at 61; Michael P. O'Shea, *The Concrete Second Amendment: Traditionalist Interpretation and the Right to Keep and Bear Arms*, 26 TEX. REV. L. & POL. 103, 123-24 (2021).

²¹⁰ Transcript of Oral Argument at 44, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

²¹¹ *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008).

²¹² See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (outlining “the two-step test that Courts of Appeals have developed to assess Second Amendment claims” in the wake of *Heller* and *McDonald*).

Chief Justice Roberts's remark questioning the constitutional legitimacy of the tiers did not go unnoticed, however, and was soon invoked in what would become a widely cited opinion by then-judge Brett Kavanaugh. In a case now known as *Heller II*, Kavanaugh dissented from a D.C. Circuit opinion upholding the District's gun licensing requirement and prohibition on assault weapons.²¹³ He gave what was then the most prominent critique of means-end scrutiny in the Second Amendment context and the most thorough articulation of a HAT alternative. Quoting Roberts's comment from *Heller*'s oral argument,²¹⁴ Judge Kavanaugh rooted his case in an account of the judicial role: that anything other than historical analysis would allow judges to "re-calibrate the scope of the Second Amendment right" based on judicial assessment of the government's interest in regulation.²¹⁵ Instead, "courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."²¹⁶

Judge Kavanaugh pointed to a virtue of this historical approach: It could be advocated on grounds of judicial role, as leading to "more determinate" and "much less subjective" judging, "[i]nstead" of merits-based criteria, such as the amount of protection for gun rights the standard would provide.²¹⁷ In his view,

[T]he major difference between applying the *Heller* history- and tradition-based approach and applying one of the forms of scrutiny is not necessarily the number of gun regulations that will pass muster. Instead, it is that the *Heller* test will be more determinate and "much less subjective" because "it 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."²¹⁸

Kavanaugh's approach proved to be quite influential—endorsed by many other conservative appellate judges²¹⁹ even before *Bruen* adopted it. In this

²¹³ *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

²¹⁴ *Id.* at 1273-74 n.5 (pointing to the comment as evidence that "[t]he Court's failure to employ strict or intermediate scrutiny appears to have been quite intentional and well-considered").

²¹⁵ *Id.* at 1271.

²¹⁶ *Id.*

²¹⁷ *Id.* at 1274 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 804 (2010) (Scalia, J., concurring)).

²¹⁸ *Id.* (emphasis added) (quoting *McDonald*, 561 U.S. at 804 (Scalia, J., concurring)).

²¹⁹ For sources citing Kavanaugh's reasoning to support a historical-categorical approach to the Second Amendment, see, for example, *Ass'n of New Jersey Rifle & Pistol Clubs Inc. v. Att'y Gen. N.J.*, 974 F.3d 237, 257 (3d Cir. 2020) (Matey, J., dissenting), *judgment vacated sub nom.* *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Bruck*, 142 S. Ct. 2894 (2022); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 702-07 (6th Cir. 2016) (Batchelder, J., concurring in most of the judgment); *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting).

same period, Justices Alito and Thomas, along with other predominately conservative judges, were beginning to voice concerns that the prevailing doctrinal framework treated the Second Amendment as a “second-class right.”²²⁰ These two lines of critique worked together. Even as then-Judge Kavanaugh’s dissent emphasized considerations of judicial role rather than case outcomes, it was quickly embraced and advocated as a tool for further gun deregulation²²¹—a campaign that successfully culminated in *Bruen*.²²²

The *Heller II* dissent presented itself as compelled by the Court’s decisions in *Heller* and *McDonald*.²²³ But Justice Kavanaugh had produced outcome-independent reasons for rejecting tiers in favor of HAT that could be applied far beyond the Second Amendment. Speaking at Notre Dame in 2017, he attacked the tiers of scrutiny and other doctrines as “vague and amorphous tests [that] can at times be antithetical to impartial judging and to the vision

²²⁰ Ruben & Blocher, “*Second-Class*” Rhetoric, *supra* note 59, at 651 (noting increase in claims of second-class treatment by courts after 2015); *id.* at 653-54 (“From the first judicial invocations of the second-class rhetoric to the last, the authors of opinions in the dataset, and the judges signing onto them, were overwhelmingly appointed by Republican Presidents.”); *id.* at 615 (“[N]owhere is second-class rhetoric more prominent, nor more poised to reshape constitutional doctrine, than in the context of the Second Amendment which Alito said is, ‘[o]f course, the ultimate second-tier constitutional right in the minds of some.’” (quoting THE FEDERALIST SOCIETY, *Address by Justice Samuel Alito [2020 National Lawyers Convention]*, at 26:59-27:03 (YouTube Nov. 25, 2020), <https://youtube.com/watch?v=VMnukCVIZWQ> [<https://perma.cc/JX7H-TZ8D>])).

²²¹ See, e.g., Brief of United States Senator Ted Cruz and 24 Other U.S. Senators as Amici Curiae Supporting Petitioners at 11, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2021) (No. 20-843) (“What matters is that the Framers’ balancing was incorporated into the Constitution and may only be reweighed by amending the Constitution—not by legislative resistance or judicial fiat.” (emphasis removed)); Brief of the National Shooting Sports Foundation Inc. as Amicus Curiae in Support of the Petitioners at 5, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2021) (No. 20-843) (“The right to carry arms in public is as fundamental today as it was when the Second Amendment was ratified, and it should not be relegated to second-class constitutional citizenship with an ‘intermediate scrutiny’ standard of review.”).

²²² See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2129 & n.5, 2134, 2137 (2022) (citing and quoting then-Judge Kavanaugh’s dissent in *Heller II*). Dissenting in an abortion case in 2016, Justice Thomas opened his own attack on the tiers. See *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 638 (Thomas, J., dissenting) (“The undue-burden standard is just one variant of the Court’s tiers-of-scrutiny approach to constitutional adjudication. And the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right—be it ‘rational basis,’ intermediate, strict, or something else—is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat.”). Justice Thomas focused even more explicitly than then-Judge Kavanaugh on the tiers as an instrument judges employed to privilege some rights over others: “Unless the Court abides by one set of rules to adjudicate constitutional rights, it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear.” *Id.* at 643.

²²³ *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting) (asserting that “*Heller* and *McDonald* leave little doubt that” HAT is required). We observe that in *Heller*, Justice Scalia expressly invoked means-ends review. See *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008) (“Under any of the standards of scrutiny that we have applied to enumerated constitutional rights [the handgun ban] would fail constitutional muster.”).

of the judge as umpire.”²²⁴ His objection was articulated in terms of determinacy: “If nothing else, I want to underscore that the compelling interest/important interest/strict scrutiny/intermediate scrutiny formulations are rather indeterminate. . . . Those formulations are sometimes empty of real, determinate, objective meaning.”²²⁵

In this period, Kavanaugh was in dialogue (sometimes explicitly in print²²⁶ and sometimes even literally²²⁷) with conservative scholars and commentators pushing for abandonment of the tiers—and often using the Second Amendment as the thin end of the wedge.²²⁸ Two years after the Notre Dame address, Professor Joel Alicea (who had been Kavanaugh’s “superstar” student at Harvard²²⁹) and John D. Ohlendorf (who would later serve as co-counsel for the challenger in *Worth*²³⁰) wrote “Against the Tiers of Constitutional Scrutiny,” articulating a similar attack on the tiers and declaring that “[t]he Roberts Court would have few accomplishments of greater significance than the repudiation of the tiers of scrutiny and the reassertion of a method of constitutional analysis based on the text, history, and tradition of the Constitution.”²³¹ Alicea and Ohlendorf—who were addressing their arguments specifically to the Court’s then-pending Second Amendment decision in *Bruen*’s predecessor case, *New York State Rifle & Pistol Ass’n v. City of New York*²³²—argued that the framework had no basis in original meaning and mired review in “indeterminacy and manipulability”: “the Supreme Court has *never explained* how the level of generality of the

²²⁴ Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1919 (2017).

²²⁵ *Id.* at 1914–15.

²²⁶ See *United States v. Rahimi*, 144 S. Ct. 1889, 1916 n.4 (2024) (Kavanaugh, J., concurring) (referring to “[r]espected scholars [who] are continuing to undertake careful analysis” in the course of describing and defending originalist approaches to interpretation).

²²⁷ Brett M. Kavanaugh & J. Joel Alicea, *The Center for the Constitution and the Catholic Intellectual Tradition Presents: A Conversation with Justice Brett Kavanaugh*, 74 CATH. U. L. REV. 1, 10 (2025) [hereinafter *A Conversation with Justice Brett Kavanaugh*].

²²⁸ See Jonathan Scruggs, *From Guns to Websites: Clarifying Tiers of Scrutiny for Free-Speech Cases*, FEDERALIST SOC’Y BLOG (July 14, 2022), <https://fedsoc.org/commentary/fedsoc-blog/from-guns-to-websites-clarifying-tiers-of-scrutiny-for-free-speech-cases> [<https://perma.cc/53RH-LA76>] (“The Constitution doesn’t mention anything about tiers or balancing. [They are] atextual, ahistorical, and very discretionary.”).

²²⁹ *A Conversation with Justice Brett Kavanaugh*, *supra* note 227, at 3 (“Joel was a superstar student. I could see future stardom, and he has lived up to all that I anticipated, and then some, and exceeded it.”).

²³⁰ Brief in Response to Petition for Writ of Certiorari, *Jacobson v. Worth* at 24, 145 S. Ct. 1924 (2025) (mem.) (No. 24-782).

²³¹ Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, NAT’L AFFS. (2019), <https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny> [<https://perma.cc/K855-QQ3F>].

²³² 140 S. Ct. 1525 (2020). The case was declared moot when New York changed the challenged law. *Id.* at 1526.

government's interest is to be determined" despite the fact that "in many cases, to decide the level of generality is to decide the case."²³³ Alicea channeled these themes into an amicus brief in *Bruen*—a brief that Kavanaugh cited at oral argument as being "very helpful."²³⁴

Justice Kavanaugh would go on to write a remarkable concurring opinion in *Rahimi*—essentially a long defense of HAT and a direction to judges and litigants about how to use it.²³⁵ In doing so, he invoked the Alicea and Ohlendorf article, quoting their claim that "tiers of scrutiny have no basis in the text or original meaning of the Constitution"²³⁶ and that scrutiny tests amount to balancing and therefore judicial policymaking.²³⁷ Balancing, he said, "requires highly subjective judicial evaluations of how important a law is—at least unless the balancing test itself incorporates history, in which case judges might as well just continue to rely on history directly"²³⁸—thus ruling out approaches like the post-*Heller* framework that combined history and scrutiny. In the absence of precedent, he argued, the only alternative to policymaking is historical analysis.²³⁹ This is an account of judicial role—one that purports to protect democracy from the third branch. In Justice

²³³ Alicea & Ohlendorf, *supra* note 231.

²³⁴ Transcript of Oral Argument at 53, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) (referencing Brief for J. Joel Alicea as Amicus Curiae).

²³⁵ See *United States v. Rahimi*, 144 S. Ct. 1889, 1910 (2024) (Kavanaugh, J., concurring) ("I add this concurring opinion to review the proper roles of text, history, and precedent in constitutional interpretation.").

²³⁶ *Id.* at 1921 (quoting Alicea & Ohlendorf, *supra* note 231, at 73).

Notably, though, originalism does sometimes incorporate balancing, contrary to the claim that historical and means-end analysis are incompatible. For example, in their originalist account of *Bruen* as reflecting the "general law," William Baude and Robert Leider argue that the Second Amendment should be governed by "a two-part test" that would ask "whether the conduct fell within the scope of the right" and then, if so, "whether the legislature had reasonably regulated the right using its police power," which would involve "some form of interest balancing." Baude & Leider, *supra* note 41, at 1488-89, 1491. Others have identified First Amendment doctrine as an area in which fidelity to history will necessarily entail some kind of public welfare analysis or direct interest-balancing. See, e.g., Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL'Y 569, 573-74, 588 (2017) (arguing that many Founders believed "judges should, when possible, construe statutes to comport with the public interest"); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 255-56 (2017) (identifying the "promotion of the public good" as an element of speech and press freedoms recognized at the Founding and noting that "the First Amendment left unresolved whether certain restrictions of expression promoted the public good"); Girgis, *supra* note 207, at 12 (recognizing Justice Barrett's observation in *Vidal* that a rule which relies "exclusively on history and tradition" and "render[s] tradition dispositive is *itself*" not binding law but just another "judge-made test" (quoting *Vidal v. Elster*, 144 S. Ct. 1507, 1532 (2024) (Barrett, J., concurring in part))).

²³⁷ *Rahimi*, 144 S. Ct. at 1921 (Kavanaugh, J., concurring).

²³⁸ *Id.*

²³⁹ See *id.* at 1912 ("[A]bsent precedent, there are really only two potential answers to the question of how to determine exceptions to broadly worded constitutional rights: history or policy. . . . The policy approach rests on the philosophical or policy dispositions of the individual judge. History, not policy, is the proper guide.").

Kavanaugh's words, "[h]istory is far less subjective than policy. And reliance on history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people."²⁴⁰

When Alicea hosted Justice Kavanaugh for the inaugural event of the Center for the Constitution and the Catholic Intellectual Tradition at The Catholic University of America,²⁴¹ they discussed the Justice's opinion in *Rahimi*, Alicea's article (which the Justice called "outstanding"²⁴²), and the desirability of rule- and history-based jurisprudence. In Justice Kavanaugh's words,

Now, if you don't rely on that, you're at sea and I don't know how you rely on anything other than just your policy inclinations—which might be dressed up as a balancing test or tiers of scrutiny But that's just policy a little bit dressed up, as I see it.²⁴³

In his remarks at Catholic and his concurrence in *Rahimi*, Kavanaugh invited scholars²⁴⁴ and litigants to join the HAT project—a signal that was quickly picked up by conservative lawyers briefing First Amendment and Equal Protection cases before the Court.²⁴⁵ In the following Section, we show how the doctrinal transformation appears to be unfolding in these and other fields.

B. *HAT in First Amendment and Substantive Due Process*

The Second Amendment cases illustrate a law reform project that is unfolding across several areas of law, including the First Amendment and substantive due process. In all of these areas, the turn to HAT has enabled

²⁴⁰ *Id.*

²⁴¹ *A Conversation with Justice Brett Kavanaugh*, *supra* note 227.

²⁴² *Id.* at 10.

²⁴³ *Id.*

²⁴⁴ *See Rahimi*, 144 S. Ct. at 1916 n.4 (Kavanaugh, J., concurring).

²⁴⁵ *See, e.g.*, Brief for Concerned Women for America and Samaritan's Purse as Amici Curiae in Support of State Respondents at 26-27, *United States v. Skrmetti*, 145 S. Ct. 1816 (2025) (No. 23-477) (defending a ban on gender-affirming care against equal protection challenge and arguing that "[i]ntermediate scrutiny, like the other 'tiers of scrutiny,' ha[s] no basis in the text or original meaning of the Constitution" (quoting *Rahimi*, 144 S. Ct. at 1921 (Kavanaugh, J., concurring))); Brief for America's Future, Eagle Forum, et al. as Amici Curiae in Support of Respondents at 8, *United States v. Skrmetti*, 145 S. Ct. 1816 (2025) (No. 23-477) (arguing that the Court should "do away with its 'tiers of scrutiny' analysis, and require that that from now onward all federal courts analyze Equal Protection claims strictly on the basis of the Fourteenth Amendment's history and tradition," and observing that "[t]his Court has done precisely that in the Second Amendment context"); Brief of Alliance Defending Freedom as Amicus Curiae in Support of Respondents at 3-4, *Free Speech Coal. v. Paxton*, 144 S. Ct. 1473 (2024) (No. 23-1122) (invoking Justice Kavanaugh's *Rahimi* concurrence to argue that history rather than means-end scrutiny should be used to evaluate a First Amendment challenge to a law regulating digital pornography).

the Justices to naturalize a political imaginary—sometimes by expanding rights (as with guns and some aspects of free speech) and sometimes by contracting them (as with substantive due process and other aspects of free speech). In the Second Amendment context, HAT purports to cover the whole body of doctrine, whereas in these other areas of law its reach thus far is incremental. In *Dobbs*, for example, dissenters accused the majority of employing a new method of interpreting the liberty guarantee that threatened a variety of substantive due process rights.²⁴⁶ Justice Alito insisted, however, that the Court’s decision in *Dobbs* did not threaten the right to contraception or protections for same-sex sex or same-sex marriage—none of which were originally recognized by the Court through decisions applying HAT at the same low levels of generality that *Dobbs* does.²⁴⁷ For this reason it is presently unclear what areas of substantive due process law are governed by *Dobbs*’s method, or what standard governs in contested areas.²⁴⁸

This step-by-step shift in standards of review is particularly evident in free speech cases, where the Court has been recasting unprotected categories of speech as being rooted in historical categoricism. This has meant reinventing some of its own precedent, such as 1942’s *Chaplinsky v. New Hampshire*, in which the Court held that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”²⁴⁹ The *Chaplinsky* Court explained that “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”²⁵⁰ *Chaplinsky* and its progeny have long been understood and implemented as being based on a conclusion about the low value of such speech²⁵¹—what Justice Kavanaugh would probably describe as “balancing.”²⁵²

But seventy years later, in *United States v. Stevens*, the Court announced that it would not use “a simple balancing test” weighing “relative social costs

²⁴⁶ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2318-19, 2332 & n.8 (Breyer, J., dissenting).

²⁴⁷ *See id.* at 2280 (insisting that its opinion did not “call[] into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*”).

²⁴⁸ *See, e.g.*, Reva B. Siegel & Mary Ziegler, *Abortion’s New Criminalization—A History-and-Tradition Right to Healthcare Access After Dobbs*, 111 VA. L. REV. 413, 415 (2025) (“*Dobbs*’s account of why states can criminalize ‘elective abortions’ in turn suggests that bans that break with past practice in criminalizing urgently needed health care may be unconstitutional under federal and state law.”).

²⁴⁹ 315 U.S. 568, 571-72 (1942).

²⁵⁰ *Id.* at 572.

²⁵¹ *See* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2170-71, 2173 (2015) (tracing the Court’s modern differentiation between high and low value speech back to *Chaplinsky*).

²⁵² *See A Conversation with Justice Brett Kavanaugh*, *supra* note 227, at 10.

and benefits,” instead insisting on a “long-settled tradition” regulating the speech at issue.²⁵³ Echoing his “baggage” comment at *Heller*’s oral argument a few years prior, Chief Justice Roberts’s opinion in *Stevens* acknowledged that the Court had “often *described* historically unprotected categories of speech as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”²⁵⁴ And yet, he concluded, “such descriptions are just that—descriptive,” and the only proscribable speech is that which is “historically unprotected.”²⁵⁵ (Demonstrating the intertwining lines of doctrinal critique, Justice Kavanaugh’s *Rahimi* concurrence later quoted *Stevens* for the proposition that “[f]rom 1791 to the present, ‘the First Amendment has permitted restrictions upon the content of speech in a few limited areas’—including obscenity, defamation, fraud, and incitement,”²⁵⁶ and extended it to guns: “So too with respect to the Second Amendment.”²⁵⁷)

The historical approach seems poised to reshape areas of First Amendment law, though the divisions in the conservative majority we excavated in *Bruen* and *Rahimi* seem evident in the free speech context as well. Employing the same arguments about historical particularity and judicial constraint, Justice Thomas has taken aim at one of the central pillars of First Amendment law, arguing that the actual malice standard of *New York Times v. Sullivan*²⁵⁸ should be rejected because it “bears ‘no relation to the text, history, or structure of the Constitution’” and represents “policy-driven decisions masquerading as constitutional law.”²⁵⁹ Relying on the levels-of-generality games we have described above, this critique minimizes *Sullivan*’s discussion of Founding-era protections for criticism of the government and “the great controversy over the Sedition Act of 1798,”²⁶⁰ instead focusing on a smaller set of libel claims that were permitted at the time.²⁶¹ But so far, only

²⁵³ 559 U.S. 460, 469-70 (2010).

²⁵⁴ *Id.* at 470 (internal quotation marks omitted); see also Transcript of Oral Argument at 44, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

²⁵⁵ *Stevens*, 559 U.S. at 471-72.

²⁵⁶ United States v. Rahimi, 144 S. Ct. 1889, 1911-12 (2024) (Kavanaugh, J., concurring) (quoting *Stevens*, 559 U.S. at 468).

²⁵⁷ *Rahimi*, 144 S. Ct. at 1912 (Kavanaugh, J., concurring).

²⁵⁸ 376 U.S. 254 (1964).

²⁵⁹ *Berisha v. Lawson*, 141 S. Ct. 2424, 2424-25 (2021) (Thomas, J., dissenting from denial of certiorari) (quoting *Tah v. Glob. Witness Publ’g, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting in part)); *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari).

²⁶⁰ 376 U.S. at 273.

²⁶¹ As Clay Calvert and Mary-Rose Papandrea reason,

Justice Thomas’s narrow focus on libel laws specifically, rather than on the history and tradition of protecting speech critical of the government more generally, might explain why he does not address the jury’s acquittal of printer John Peter Zenger in the 1730s

Justice Gorsuch has signaled interest in such a dramatic transformation,²⁶² and other Justices have expressed some reservations about this granular approach to historical analysis.

The most notable case in that regard is *Vidal v. Elster*,²⁶³ decided just days before *Rahimi*, in which the Court rejected a First Amendment challenge to the Lanham Act's name clause, which prohibits the registration of a trademark that "[c]onsists of or comprises a name . . . identifying a particular living individual except by his written consent."²⁶⁴ The Court was unanimous as to the result, but deeply divided as to whether and how that result could be justified solely by reference to history—precisely the issue that was still simmering in *Rahimi*.²⁶⁵ Justice Thomas announced the opinion of the Court, basing it on his conclusion that the “names clause has deep roots in our legal tradition” and that “[w]e see no reason to disturb this longstanding tradition, which supports the restriction of the use of another’s name in a trademark.”²⁶⁶ But only Justices Alito and Gorsuch joined this part of the opinion.²⁶⁷

Perhaps reflecting their view that HAT can sometimes give way to precedent,²⁶⁸ Justice Kavanaugh (joined by the Chief Justice) entered a concurrence suggesting that “a viewpoint-neutral, content-based trademark restriction might well be constitutional even absent such historical pedigree.”²⁶⁹ Justice Sotomayor, joined by Justices Kagan and Jackson, would also have decided the case based on existing doctrine rather than historical analysis, and pointedly criticized Justice Thomas’s approach for inviting the same kind of “confusion” as *Bruen*.²⁷⁰

in his opinions in either *McKee* or *Berisha*, even though Justice Thomas cited that case extensively in his *McIntyre* concurrence.

Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After Bruen*, 18 DUKE J. CONST. L. & PUB. POL'Y 59, 98-99 (2023).

²⁶² See *Berisha*, 141 S. Ct. at 2430 (2021) (Gorsuch, J., dissenting) (“I cannot help but think the Court would profit from returning its attention, whether in this case or another, to a field so vital to the ‘safe deposit’ of our liberties.”).

²⁶³ 144 S. Ct. 1507 (2024); see *id.* at 1524 (2024) (Barrett, J., concurring in part) (“In my view, the Court’s laser-like focus on the history of this single restriction misses the forest for the trees.”).

²⁶⁴ *Id.* at 1513 (quoting 15 U.S.C. § 1052(c)).

²⁶⁵ Recognizing the connection between the cases, Justice Sotomayor’s concurring opinion in *Vidal* cited the amicus brief we filed in *Rahimi*—which was still pending at that point—to emphasize the “confusion” engendered by historical tests like *Bruen*’s. *Id.* at 1534 (Sotomayor, J., concurring); see also *supra* note 26 (discussing amicus brief).

²⁶⁶ *Vidal*, 144 S. Ct. at 1519, 1523.

²⁶⁷ *Id.* at 1512.

²⁶⁸ See *infra* notes 282–283 and accompanying text.

²⁶⁹ *Vidal*, 144 S. Ct. at 1524 (Kavanaugh, J., concurring).

²⁷⁰ *Id.* at 1534 (Sotomayor, J., concurring) (“One need only read a handful of lower court decisions applying *Bruen* to appreciate the confusion this Court has caused.”).

The opinion that drew the most attention was Justice Barrett's concurrence.²⁷¹ She criticized the Court's reading of history, saying that it had failed to "establish a historical analogue for the names clause" and—more deeply—that it "never explains why hunting for historical forebears on a restriction-by-restriction basis is the right way to analyze the constitutional question."²⁷² Pointedly rejecting the notion that the historical approach erases judicial discretion, she concluded: "Relying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is *itself* a judge-made test."²⁷³

HAT has thus far reached its apex in Second Amendment cases because the Court is relatively unencumbered by precedent in that area. Both Roberts and Kavanaugh have argued that the Second Amendment could avoid scrutiny analysis because, in essence, it was a *tabula rasa*—Roberts called it "starting fresh";²⁷⁴ Kavanaugh said that "[t]o be clear, I am not suggesting that the Court overrule cases where the Court has applied those heightened-scrutiny tests."²⁷⁵ And yet the Court seems to be open to doing precisely that, even when—as in *Stevens*—it is proceeding by recasting rather than overruling its precedents.²⁷⁶

We observe that the Justices have developed no law to govern the question whether to eliminate means-ends review by extending HAT incrementally from one area of First Amendment (or Due Process) law to another. It seems to be an underarticulated branch of *stare decisis*, driven by discretionary, outcome-determinative, and often unexpressed decisions that the Justices appear to make with little to guide or constrain them. Justice Barrett's concurring opinion in *Vidal* is a prominent exception, wrestling with the question whether and how history and tradition guides First Amendment

²⁷¹ See, e.g., Girgis, *supra* note 207, at 14-15; Matt Ford, *Amy Coney Barrett Breaks with Supreme Court Originalists*, NEW REPUBLIC (June 19, 2024), <https://newrepublic.com/article/182870/amy-coney-barrett-breaks-supreme-court-originalists> [<https://perma.cc/XE9U-FQLL>] ("Justice Amy Coney Barrett did something interesting last week in an otherwise uninteresting case While this might seem like a minor difference in practical terms, it is a significant one in legal theory."); Josh Gerstein, *Amy Coney Barrett May Be Poised to Split Conservatives on the Supreme Court*, POLITICO (June 19, 2024, at 07:00 ET), <https://www.politico.com/news/2024/06/19/amy-coney-barrett-supreme-court-conservatives-rift-00164047> [<https://perma.cc/9EYK-QEPK>] (discussing how Justice Barrett has diverged methodologically from other originalists on the court).

²⁷² *Vidal*, 144 S. Ct. at 1525 (Barrett, J., concurring).

²⁷³ *Id.* at 1532.

²⁷⁴ Transcript of Oral Argument at 44, *District of Columbia v. Heller*, 554 U.S. 570 (No. 07-290) (question of Roberts, C.J.).

²⁷⁵ *United States v. Rahimi*, 144 S. Ct. 1889, 1921 (2024) (Kavanaugh, J., concurring).

²⁷⁶ For an argument that *Bruen* does this to *Heller*, see Brannon P. Denning & Glenn H. Reynolds, *Retconning Heller: Five Takes on New York State Rifle & Pistol Association, Inc. v. Bruen*, 65 WM. & MARY L. REV. 79, 80 (2023).

law.²⁷⁷ In *Dobbs*, the Justices claimed that under *Washington v. Glucksberg* the abortion right was outside the nation's history and tradition, never acknowledging that *Glucksberg* said exactly the opposite, or explaining what had led the Court to shift levels of generality in applying the *Glucksberg* history-and-tradition standard.²⁷⁸

Throughout the 2024 Term, the Court has received many invitations to avoid or deconstruct the tiers,²⁷⁹ and seems to be struggling internally with whether and how HAT can be used to resolve cases involving distinctly contemporary controversies. In a rushed per curiam opinion in *TikTok Inc. v. Garland*, the Court ignored the HAT question and upheld a ban on the popular social media service by applying intermediate scrutiny,²⁸⁰ with only Justice Gorsuch fretting that litigation over the tiers can “do more to obscure than to clarify the ultimate constitutional questions.”²⁸¹ In *Free Speech Coalition v. Paxton*, a First Amendment case involving state restrictions on access to pornography, versions of the word “tradition” were invoked 19 times,²⁸² but the Court (in an opinion by Justice Thomas) ultimately upheld the law on the basis of intermediate scrutiny.²⁸³ As *Dobbs*, *Vidal*, and *Rahimi* vividly illustrate, the Justices are still debating where and how they will replace means-end scrutiny with historical review, and exercising unfettered discretion with respect to that judgment as well.

C. *History and Tradition Betrays its Own Standards and Violates Democratic Values*

As we show, critics of means-ends review objected that means-ends review was not rooted in originalism and had levels of generality problems; they advocated HAT to constrain judicial discretion.²⁸⁴ But as we briefly discuss here, the HAT cases inside and outside the Second Amendment do not

²⁷⁷ See generally *Vidal*, 144 S. Ct. at 1524–32 (Barrett, J., concurring).

²⁷⁸ For discussion of how the Court shifted levels of generality in interpreting *Glucksberg*'s history-and-tradition standard in *Dobbs*, see Reva B. Siegel, Foreword, *Democratizing Constitutional Memory*, 123 MICH. L. REV. 1011, 1017–18 (2025) [hereinafter Siegel, *Democratizing Constitutional Memory*], and Siegel & Ziegler, *supra* note 248, at 462, which notes that “[t]he text of the *Glucksberg* decision features the abortion right among the liberties the Constitution protects, repeatedly citing *Roe* and *Casey*—indeed, citing *Casey* over twenty times.”

²⁷⁹ See *supra* note 245 and sources cited therein.

²⁸⁰ See *TikTok Inc. v. Garland*, 145 S. Ct. 57, 69 (2025) (per curiam) (“On this understanding, we cannot accept petitioners’ call for strict scrutiny. No more than intermediate scrutiny is in order.”).

²⁸¹ *Id.* at 74 (Gorsuch, J., concurring).

²⁸² Transcript of Oral Argument, *Free Speech Coalition v. Paxton*, 145 S. Ct. 2291 (2025) (No. 23–1122).

²⁸³ *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291 (2025).

²⁸⁴ See *supra* notes 237–243 and accompanying text.

consistently adhere to any originalist method (or any method at all). As we have shown, the HAT cases shift levels of generality within and across cases. They create new forms of doctrine that enable free-wheeling exercises of judicial discretion, allowing judges to vindicate conservative constitutional values—what conservatives elsewhere term “judicial policy-making”—disguised as deference to the past.²⁸⁵

Putting all this together, we can see that HAT review does not cure the asserted defects of means-ends review. To the contrary, *HAT review enables judges to vindicate conservative constitutional values disguised as deference to the past*. And the strategy employed to present the vindication of judicial values as deference to the past itself inflicts unique harms to democracy. In directing judges to assemble evidence of a tradition to which they will defer, HAT review directs judges away from the reasons that living Americans have advocated legislation or asserted rights. And HAT review provides judges resources to mask their reasons for declaring laws or rights unconstitutional. In this way, we argue, the HAT framework makes judicial review less responsive to citizen concerns and less transparent to citizen observers, making it harder for advocates and journalists to communicate to interested publics what is at stake in the decisions.

In sum, the body of Second Amendment law that critics of means-ends review have built does not establish any persuasive grounds for replacing means-ends review with HAT methods other than judicial preference for changing the outcome of the cases at issue. If that is the basis for change, some more democratically transparent form of review is warranted. In what follows, we briefly develop each of these three points and conclude.

1. HAT Is Not Originalist

As we have shown above, a standard argument against the tiers of scrutiny and in favor of HAT has been that the tiers are inconsistent with originalism. But the HAT cases do not adhere to originalist methods in any systematic way.

We begin with the Second Amendment, surely the strongest case for originalism in method, and with *Heller* in particular—not because *Heller* is a HAT case, but rather because *Bruen* and subsequent cases build upon it. As we have shown, Justice Scalia’s opinion in *Heller* broke from original public meaning originalism both in determining the scope of the right to bear arms

²⁸⁵ See *infra* notes 296–312 and accompanying text (contrasting narrow treatment of unenumerated substantive due process rights with expansive treatment of unenumerated right to armed self-defense).

and in determining its regulation.²⁸⁶ In explaining the right's extension to modern weaponry Justice Scalia cited Supreme Court case law *under other constitutional amendments*, not the understanding of the ratifying generation in relevant historical context.²⁸⁷ In *Bruen*, Justice Thomas then quoted these passages of *Heller*, characterizing Justice Scalia as having undertaken a “historical” inquiry into the scope of the right that relieved Justice Thomas of the need to perform any originalist analysis of his own.²⁸⁸ Justice Thomas then created a historical analogical test for determining a firearm regulation's consistency with tradition that is plainly not originalist; it is a *doctrinal* test, or what originalists might call constitutional construction.²⁸⁹

Originalists in fact divide about whether *Bruen's* HAT method is truly originalist.²⁹⁰ Some of their disagreement can be chalked up to intramural methodological debates about whether and how it is appropriate for originalists to consider tradition,²⁹¹ whether *Bruen's* method requires analogical reasoning or a search for the general law,²⁹² and the proper interpretation of the historical

²⁸⁶ See *supra* Section I.A.

²⁸⁷ See *supra* note 45 and accompanying text.

²⁸⁸ See *supra* notes 63–64 and accompanying text; accord Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 463 (2023) (“Our point is that *Bruen* assumes that *Heller* articulates the original public meaning of the Second Amendment and then argues that this articulation encompasses the carrying of a gun in public.”).

²⁸⁹ See Barnett & Solum, *supra* note 288, at 448 (“A direct appeal to history or tradition could also provide a method for constitutional construction in cases of underdeterminacy. For example, in *Bruen*, Justice Clarence Thomas's opinion for the majority used a historical analogue test to determine the validity of contemporary gun control regulations.”).

²⁹⁰ See, e.g., *id.* (“Justice Thomas's majority opinion in *Bruen* employs thoroughly originalist reasoning in its effort to identify the meaning of the ‘right to . . . bear arms.’”); Denning & Reynolds, *supra* note 276, at 107 (“Given the number of questions about the analogical process left open in *Bruen*, we think you might (if somewhat uncharitably) say that the three phases of Second Amendment analysis post-*Bruen* are: (1) Consult text, history, and tradition; (2) ?; (3) Decision.”); Nelson Lund, *The Proper Role of History and Tradition in Second Amendment Jurisprudence*, 30 FLA. J.L. & PUB. POL'Y 171, 174 (2020) (arguing that text, history, and tradition are unlikely to provide clear guidance in most Second Amendment cases, and that judges should instead engage in means-end analysis informed by historically and textually specified purposes).

When Justices Scalia and Thomas reason about the Second Amendment covering modern weapons, they appear to reason from doctrine rather than from originalist method. See *supra* notes 44–46 and 77–78 and accompanying text.

²⁹¹ See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2162 (2022) (Barrett, J., concurring) (“[T]he Court does not conclusively determine the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution.”); Girgis, *supra* note 236, at 2 (“Originalism faces a different and deeper challenge in rights cases, where the originalist Justices themselves are divided about traditionalism.”).

²⁹² Contrast Baude & Leider, *supra* note 42 (arguing that *Bruen* mandates a search for the general law rather than analogies), with Nelson Lund, *Second Amendment Originalism, “General Law,” and Rahimi's Two-Fold Failure*, 78 SMU L. REV. 459 (2025) (criticizing the general law reading of *Bruen*).

sources cited in those cases.²⁹³ Some originalists have discussed the originalist pedigree of *Bruen*'s analogical method charitably,²⁹⁴ while others have rather harshly rejected its method as indeterminate.²⁹⁵ But there is obviously a problem if originalist method provides so little clarity that originalists themselves cannot agree about these matters.

If we look beyond the Second Amendment, the problem is even more pronounced. *Dobbs*'s history-and-tradition analysis is not originalist in any straightforward methodological sense. Because *Dobbs* was based on the Fourteenth Amendment's Due Process liberty guarantee rather than Privileges or Immunities Clause, as originalist critics of substantive due process including Justice Thomas urged, many originalists characterized the decision as living constitutionalism.²⁹⁶ Professor Stephen Sachs wrote an originalist defense of *Dobbs* that is expressly framed as a response to "critics" who "almost as soon as *Dobbs* was handed down" "began to describe it as an originalist betrayal" because "the Court hadn't been originalist enough."²⁹⁷ Sachs responded to this problem by explaining that *Dobbs* was an "originalism-compliant opinion" whose reading of *Washington v. Glucksberg*²⁹⁸ was in fact enforcing a general-law interpretation of the Fourteenth Amendment's Privileges or Immunities Clause, with understandings that pre-dated the Civil War.²⁹⁹ By contrast, Joel Alicea suggested that *Dobbs* was

²⁹³ We note that prominent originalist defenses of *Bruen*'s method explicitly disclaim any assessment of whether its account of history is accurate. See, e.g., J. Joel Alicea, *Bruen Was Right*, 174 U. PA. L. REV. 13, 19 (2025) ("My focus is on constitutional theory and methodology, not on the accuracy of *Bruen*'s historical claims."); Barnett & Solum, *supra* note 288, at 463 ("[W]e will not recapitulate Justice Scalia's analysis in *Heller* or take a position on the validity of his conclusions."); *id.* ("Whether or not [*Bruen*'s] conclusions are correct in light of all the evidence bearing on the public meaning of the Second Amendment, this portion of the opinion clearly relies on originalist methodology.").

²⁹⁴ See Barnett & Solum, *supra* note 288, at 448 (casting *Bruen*'s use of history and tradition as "a [m]ethod of [c]onstitutional [c]onstruction" (emphasis removed)); see also *id.* at 469-71 (suggesting that the test might concern the content of the right and not an implementing rule).

²⁹⁵ See Denning & Reynolds, *supra* note 276, at 107; Lund, *supra* note 276.

²⁹⁶ See Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEXAS L. REV. 1127, 1171 & nn. 164-167 (2023) (quoting sources); cf. Barnett & Solum, *supra* note 288, at 457-61 (characterizing *Dobbs*'s "analysis of the historical tradition of regulating abortion rights" as "nonoriginalist"). For Justice Thomas, see *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2300-04 (2022) (Thomas, J., concurring).

²⁹⁷ Stephen E. Sachs, *Dobbs and the Originalists*, 47 HARV. J.L. & PUB. POL'Y 539, 540 (2024); *id.* at 540-41.

²⁹⁸ 521 U.S. 702, 720-21 (1997) (articulating the due process framework for unenumerated rights as those "deeply rooted in this Nation's history and tradition").

²⁹⁹ See Sachs, *supra* note 297, at 541 (arguing *Dobbs* was an opinion that "a faithful originalist should write, reaching the right originalist result for what were essentially the right originalist reasons"). But see Siegel & Ziegler, *supra* note 248, at 471-87 (rebutting that reading of *Glucksberg* and *Dobbs*, and raising questions about selective reading of Privileges or Immunities Clause).

moved by what Randy Barnett has called originalism's "gravitational force,"³⁰⁰ resulting in a case that was the product of (at least) two *different* forms of originalist theory and we have no evidence that the Justices employed *either*.

Given that proponents pitch HAT as a clear originalist alternative to the tiers of scrutiny, its reception by originalist scholars should be cause for concern.

Our review of originalist scholars responding to HAT doctrine under the Second and Fourteenth Amendments shows that the cases have *not* been decided in accordance with any identifiable originalist method that could be applied across contexts.

2. HAT Fails to Constrain Judicial Discretion

Another prominent argument in favor of HAT has been that it will constrain discretion by directing judges to consider historical particulars rather than pursuing their own values. Experience shows otherwise.³⁰¹ Judges retain immense discretion about which historical sources to credit and how. Judges can also select levels of generality that are themselves outcome determinative.³⁰² In effect, judges not only can look around a crowded cocktail party to pick out their friends;³⁰³ they can decide who gets invited to the party in the first place.

The argument for turning to history and tradition at low levels of generality to constrain judicial decisionmaking has been especially prominent in substantive due process cases. Famously, in *Michael H. v. Gerald D.*,³⁰⁴ Justice Scalia claimed (in a footnote joined only by Chief Justice Rehnquist) that to avoid "arbitrary decisionmaking" it was necessary "to adopt the most specific tradition as the point of reference."³⁰⁵ Justice Alito followed Justice

300 Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 421 (2013); Siegel, *The Levels-of-Generality Game*, *supra* note 2, at 576-78 (discussing Alicea's argument in this regard at a recent Federalist Society convening).

301 See *supra* note 11 and sources cited therein (empirically demonstrating increased inconsistency and partisan divergence post-*Bruen*); see also FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 189 (2013) ("[R]eliance on originalist sources is not . . . particularly constraining, so justices exercise their ideological preferences in cases using originalism as much as in other decisions.").

302 See *supra* Part I.

303 See *Vidal v. Elster*, 144 S. Ct. 1507, 1534 (2024) (Sotomayor, J., concurring) ("[T]he indeterminacy of the Court's history-and-tradition inquiry, which one might aptly describe as the equivalent of entering a crowded cocktail party and looking over everyone's heads to find your friends." (citing *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment))).

304 491 U.S. 110 (1989).

305 *Id.* at 127 n.6 (Scalia, J., joined by Rehnquist, C. J.) (plurality opinion). He argued that "[b]ecause such general traditions provide such imprecise guidance, they permit judges to dictate, rather than discern, the society's views. The need, if arbitrary decision making is to be avoided, to adopt the most specific tradition as the point of reference . . . is well enough exemplified . . . in the

Scalia's reasoning in *Dobbs v. Jackson Women's Health Organization*, decided the day after *Bruen*: "[A]ttempts to justify abortion through appeals to a broader right to autonomy and to define one's concept of existence prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like."³⁰⁶

As one of us has noted elsewhere, "[t]his passage in *Dobbs* says the quiet part out loud: *Don't like the result? Dial down the level of generality!*"³⁰⁷ That is exactly what *Dobbs* does to flip *Washington v. Glucksberg*³⁰⁸ from an opinion that recognizes the abortion right into one that requires its overruling.³⁰⁹ Soon thereafter Chief Judge Sutton of the Sixth Circuit employed *Dobbs*'s reasoning about *Glucksberg* and levels of generality to uphold a ban on gender-affirming care in the *Skrmetti* case, remarking that "[l]evel of generality is everything in constitutional law, which is why the Court requires 'a 'careful description' of the asserted fundamental liberty interest."³¹⁰ As Professor Randy Barnett explains, the granular history-and-tradition approach of *Glucksberg* "is the approach of those judicial conservatives who, like Chief Justice Rehnquist and Justice Scalia, want to see no further extension of substantive due process to other [unenumerated] rights."³¹¹

Whatever might be said of an across-the-board commitment to low levels of generality in rights cases, it is exactly the opposite of what we see in the Second Amendment context, which again bodes poorly for the prospects of a judge-constraining approach to HAT. *Bruen*, after all, involved a claim involving the concealed carrying of handguns in public. Had the Court considered the claim at a low level of specificity it would have run headlong into *Heller*'s own admonition that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."³¹² Instead,

present case." *Id.*; see also Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) (criticizing Justice Scalia's claims to objectivity in *Michael H.* and noting that "[t]he selection of a level of generality necessarily involves value choices").

³⁰⁶ 142 S. Ct. 2228, 2258 (2022) (citation and internal quotation marks omitted).

³⁰⁷ Siegel, *The Levels-of-Generality Game*, *supra* note 2, at 596.

³⁰⁸ 521 U.S. 702 (1997).

³⁰⁹ For a discussion on *Glucksberg* and levels of generality see Siegel, *Democratizing Constitutional Memory*, *supra* note 278, at 1017-19, which highlights how "[t]he *Dobbs* Court defined the liberties the Fourteenth Amendment protected at a much lower level of generality than [*Glucksberg*]."

³¹⁰ *L.W. v. Skrmetti*, 83 F.4th 460, 475 (6th Cir. 2023) (quoting *Glucksberg*, 521 U.S. at 721), *aff'd*, *United States v. Skrmetti*, 145 S. Ct. 1816 (2025); see also Siegel, *The Levels-of-Generality Game*, *supra* note 2, at 596 (observing how Chief Judge Sutton self-consciously deployed *Dobbs*'s generality move in *Skrmetti*).

³¹¹ Randy Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1493 (2008).

³¹² *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

Justice Thomas turned to a higher level of generality, describing the case as one about the right to “armed self-defense”³¹³—a broad right that does not fall within *Heller*’s own definition of the Second Amendment’s verbs “keep” and “bear” as meaning “to have” and “to carry.”³¹⁴

Describing the right at such a high level of generality in *Bruen* allowed Justice Thomas to insulate it from regulation, even as in other constitutional contexts he has adopted narrow definitions and denied constitutional coverage entirely. For example, Justice Thomas has narrowly defined the speech rights of young people;³¹⁵ will he take the same approach in *Worth*³¹⁶ or another case involving young people’s gun rights? Judge Reeves has remarked upon this contrast, observing how the Roberts Court has defined Second Amendment rights at a “high level of generality,” in contrast to “disfavored rights”—such as the rights of criminal defendants or the right to vote—where “courts must instead ‘frame the constitutional question with specificity and granularity.’”³¹⁷ “In breathing new life into the Second Amendment,” Judge Reeves has observed, “the Court has unintentionally revealed how it has suffocated other fundamental Constitutional rights.”³¹⁸

Indeed, the levels-of-generality games on display in Second Amendment cases after *Bruen* and *Rahimi* belie the suggestion that the historical-analogical method constrains. Rather than directly and openly discussing “policy” considerations in HAT cases, judges and Justices can simply select—sometimes without reasoned discussion—levels of generality (i.e., principles of relevant similarity) that are outcome-determinative and hide a substantial amount of (perhaps unconscious) judicial discretion. It is not surprising that the newest generation of originalist scholars seems to have substantially

³¹³ See, e.g., *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2128, 2132, 2133, 2135, 2138 n.9 (2022).

³¹⁴ Joseph Blocher, *Safe Storage and Self-Defense from Heller to Bruen*, 102 N.C. L. REV. 1353, 1371 (2024) (“To pull a trigger or brandish a weapon is not to ‘keep’ or ‘bear’ under the Court’s own definitions of those terms as ‘to have’ and ‘to carry.’ . . . [T]hat does not mean that the act of armed self-defense is not itself a right, only that it is not a right derived from the Second Amendment—which extends only as far as possession of the implement.”).

³¹⁵ See, e.g., *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2059 (2021) (Thomas, J., dissenting) (finding that “[a] more searching review reveals that schools historically could discipline students in circumstances like those presented here” and that “the majority entirely ignores the relevant history”); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 835, 839 (2011) (Thomas, J., dissenting) (“‘The freedom of speech,’ as originally understood, does not include a right to speak to minors without going through the minors’ parents or guardians.”); *Morse v. Frederick*, 551 U.S. 393, 419 (2007) (Thomas, J., concurring) (“In light of the history of American public education, it cannot seriously be suggested that the First Amendment ‘freedom of speech’ encompasses a student’s right to speak in public schools.”).

³¹⁶ *Worth v. Jacobson*, 108 F.4th 677 (8th Cir. 2024).

³¹⁷ *United States v. Bullock*, 679 F. Supp. 3d 501, 537-39 (S.D. Miss. 2023) (quoting *Morrow v. Meachum*, 917 F.3d 870, 874-75 (5th Cir. 2019)).

³¹⁸ *Id.* at 538.

abandoned the claim that the originalist method has distinctive power to constrain judges, even if the judges themselves have not.³¹⁹ The judges' persistent assertion that historical methods constrain, all the evidence to the contrary notwithstanding, leads back the democracy-based critique of means-end scrutiny with which we began—and our third and final point here.

D. *HAT's Democracy Problems*

As noted above, advocates of HAT have often argued that their method solves a purported problem of democratic decisionmaking under the tiers of scrutiny—namely, that the tiers license judges to make decisions that should rest with “the People.”³²⁰ As *Bruen* put it, quoting *Heller*, “the Second Amendment is the ‘product of an interest balancing *by the people*,’ not the evolving product of federal judges. Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances.”³²¹ But if judges’ appeals to historical facts in interpreting the Constitution fail to impose judicial constraint and instead disguise the expression of judicial values, the method’s justification as a defense of democracy collapses on itself.³²² Worse, it hides that fact, thereby both constraining democracy and keeping it in the dark.

HAT restricts democracy in several important ways. In the Second Amendment context, HAT doctrine is deregulatory, leading to the invalidation of a large number of firearms laws in whole or in part.³²³ With no particular warrant in text or history, judges have fashioned an asymmetric doctrinal framework that imposes virtually no evidentiary burden on those who challenge gun laws while imposing what are often insurmountable historical burdens on the government seeking to defend them. A framework that makes it so easy to secure judicial review and so hard to survive it is inevitably hostile to legislation. Proponents have not provided originalist or other historical support for this form of judicial review, which seems to be at odds with the practices and understandings of the Founding—an era when we have reason to believe that enumerated rights were understood as

³¹⁹ See Siegel, *The Levels of Generality Game*, *supra* note 2, at 580-84 (observing that recent generations of originalists have abandoned the judicial-constraint justification of originalism).

³²⁰ See, e.g., *supra* notes 237–243 (recounting Justice Kavanaugh’s argument that HAT protects democracy from judicial activism).

³²¹ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133 n.7 (2022) (citation omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

³²² See Bernadette Meyler, *Fiction at the Court*, 138 HARV. L. REV. F. 22, 23-24 (2024) (“[S]ome Justices have claimed to avoid making ‘policy’ by looking to history for constraints on regulation in constitutional areas like the Second Amendment. In doing so, they both deny their role in constructing normative narratives and overly constrain the discretion of the political branches.”).

³²³ See *supra* note 11 and sources cited therein.

declaratory rights whose meaning could be clarified through ordinary politics rather than judicial review.³²⁴

HAT has a second and very different democracy problem: HAT obscures the exercise of judicial judgment, rendering the method far less transparent than means-ends review. Judicial discretion is inevitable under HAT or any other method of judicial decision making.³²⁵ But the HAT approach alone denies the exercise of judicial discretion and imputes all value choices to the founders.³²⁶ The judge structures the inquiry and obscures his role by lawyerly framing devices. The public is asked to defer to judges' expertise in reading arcane historical sources. This effectively insulates HAT from public and even scholarly scrutiny—including the kind of scrutiny to which means-end review has been subjected for decades by its critics, who nevertheless seem not appreciate transparency in judging as a democratic virtue.³²⁷ Judges applying means-ends scrutiny must say out loud what judges applying HAT can mute: that cases involve competing interests and that the job of doctrine is to resolve them rather than deny their existence.³²⁸ Whether HAT constrains judicial discretion more than means-ends scrutiny is a matter of

³²⁴ See Jud Campbell, *Determining Rights*, 138 HARV. L. REV. 921, 937 (2025) (observing that in the eighteenth century, enumeration of rights could be declaratory, but that determining the content of underdeterminate rights “was up to the people themselves,” often determined through ordinary politics, and cautioning that a modern “text and history” approach rests on incorrect historical assumptions and distorts an image of the original Bill of Rights). Campbell further observes, “[i]n my view, it is reasonable to assume, as a default rule, that provisions in the Bill of Rights were declaratory.” *Id.* at 976; see also Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 L. & CONTEMP. PROBS., 31, 35–36 (2020) (observing that gun rights were originally understood as natural rights that could be regulated for significant public ends).

³²⁵ See generally Sherif Girgis, *Unfinished Liberties, Inevitable Balancing*, 125 COLUM. L. REV. 531 (2025) (showing that balancing in general liberties cases is inevitable and that history and tradition approaches do not constrain policy judgments); Nelson Lund, *Bruen's Preliminary Preservation of the Second Amendment*, FEDERALIST SOC'Y BLOG (Nov. 8, 2022), <https://fedsoc.org/fedsoc-review/bruen-s-preliminary-preservation-of-the-second-amendment> [<https://perma.cc/4NH6-AHJW>] (“Heller and Bruen both insist that the balance struck by the American people when they adopted the Second Amendment is the only balance to which courts should defer. That’s right, but it will sometimes, perhaps often, be impossible as a practical matter to determine where that balance was struck without performing means-end scrutiny.” (citation omitted))).

³²⁶ See, e.g., *supra* note 321 and accompanying text.

³²⁷ See Siegel, *supra* note 2, at 612 (“With transparency, an aroused public can mobilize to challenge the Court, precisely as the conservative legal movement has . . .”). Perhaps the lesson critics have learned from their own experience in attacking means-ends review is the importance of hiding discretionary judgments from public view.

³²⁸ See *id.* (“Precisely as judges writing history-and-tradition decisions treat normative questions as questions of historical fact, they fail to explain how they have coordinated the competing values on which their decisions rest. Dispensing with reason-giving—by forswearing value-based judgments at the very same time that the Court is burying its value-based judgments in a story about deference to the past—offends the rule of law and democracy itself.”).

debate;³²⁹ our point here is that HAT *hides* discretion much more than scrutiny analysis does.

Yet a third democracy problem is that HAT shifts all questions about a law's constitutionality into the distant past, far away from the considerations that led to the law's enactment, thereby "forc[ing] further underground arguments about the unprecedented ways in which gun violence affects American communities."³³⁰ In Second Amendment cases, this leads judges to ignore—or even decry discussion of³³¹—the reasons a community has attempted to protect itself from gun violence while (as noted above) hiding the court's reasons for invalidating the law from democratic oversight.³³²

These democracy problems were on full display in Justice Thomas's dissent from denial of certiorari in *Bianchi v. Brown* (renamed *Snope v. Brown*). Justice Thomas argued that the Court should have taken the case, suggesting as grounds for reversal that the "plain text" meaning of Arms "covers all '[w]eapons of offence, or armour of defence.'"³³³ He argued that

³²⁹ See *supra* notes 118–125 and accompanying text (discussing opinions by Justices Thomas, Kavanaugh, and Gorsuch in *Rahimi*); Siegel, *supra* note 2, at 580–84.

³³⁰ Karen M. Tani, Foreword, *Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 61 (2024); see also Meyler, *supra* note 322, at 31 ("[T]he Court's claim of discovering the scope of permissible legislation within history is a kind of fiction that conceals its own construction. The effect of the new approach is to increase the power of the Court while making that increase seem consistent with a minimalist judicial role.").

³³¹ See, e.g., *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2157 (2022) (Alito, J., concurring) (chiding that, "[i]n light of what we have actually held, it is hard to see what legitimate purpose can possibly be served by most of the dissent's lengthy introductory section," which describes the use of guns in mass shootings and other homicides, suicides, and domestic violence); *Bianchi v. Brown*, 111 F.4th 438, 532 (4th Cir. 2024) (Richardson, J., dissenting) (accusing the en banc majority of "waxing poetic about the dangers of gun violence and the blood of children"); *Duncan v. Bonta*, 19 F.4th 1087, 1166 (9th Cir. 2021) (VanDyke, J., dissenting) (complaining about majority's inclusion of a "very personal anecdote about losing our beloved colleague to a mass shooting").

³³² As Judge Wilkinson III put it in the closing paragraph of his opinion in *Bianchi*:

The founding generation's understanding that the Second Amendment codified a right that is less than absolute is all the more important today, when modern armaments are increasingly used for crimes so mean and vile that it is difficult even to read about them. Imagine, then, *living* through these recent tragedies. Imagine the sense of loss that afflicts not only the moment, but the lifetimes of those families and friends affected. And then imagine that you mobilize and lobby your representatives to pass preventative legislation, only to be told by a court that your Constitution renders you powerless to save others from your family's fate. The Second Amendment, as elucidated by *Heller* and *Bruen*, does not require courts to turn their backs to democratic cries—to pile hopelessness on top of grief.

Bianchi, 111 F.4th at 472–73.

³³³ *Snope v. Brown*, 145 S. Ct. 1534, 1535 (2025) (mem.) (Thomas, J., dissenting from denial of certiorari). Though we cannot explore it in depth here, the purported reliance on the Second Amendment's "plain text" smuggles in a wide range of atextual principles, such as defining the right itself as one to "armed self-defense" (a phrase that appears nowhere in the Amendment) and concluding that the challenger's "burden is met if the law at issue 'regulates' Americans' 'arms-bearing

“the scope of the right to keep and bear arms cannot turn on judicial speculation about the American people’s self-defense needs” and suggested even nuclear warheads might satisfy the “plain text” test³³⁴—that is, if Americans chose to own nuclear weapons in self-defense, the Second Amendment would prohibit the government from banning their acquisition.

In short, at step one, Justice Thomas defined the scope of the right at a high level of generality that relieved challengers of any historical showing and virtually any evidentiary burden, while then restricting the government’s regulatory authority at step two. As to the latter, he presented a standard of quite recent provenance: “[a] weapon may not be banned . . . unless it is both dangerous and unusual.”³³⁵ The standard Thomas adopted here renders danger irrelevant if it can be shown that a class of arms is not unusual but instead in “common use”; a standard that the Court has never endorsed or elaborated empirically or normatively.³³⁶ Justice Thomas and Justice Kavanaugh emphasized presentist claims about “tens of millions of law-abiding AR-15 owners throughout the country,”³³⁷ suggesting that this renders them immune to prohibition. That approach equates gun owners with “the American people,” and depicts the government as interfering with them—rather than acting as the elected representatives of the people of Maryland: “Our Constitution allows the American people—not the government—to decide which weapons are useful for self-defense.”³³⁸ In short, “[l]ooking to the standards set ‘by American society’ rather than our judicial colleagues, I cannot see how AR-15s fall outside the Second Amendment’s protection.”³³⁹

conduct.” *Id.* at 1538 (quoting *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024)) (emphasis added). Whether defensible or not, these principles are not a matter of “plain text.” *See also* Pratheepan Gulasekaram, *The Second Amendment’s “People” Problem*, 76 VAND. L. REV. 1437, 1465-69 (2023) (noting that *Bruen* goes beyond the plain text of the amendment in defining “the people” who’s right to keep and bear arms it protects).

³³⁴ *Snope*, 145 S. Ct. at 1538.

³³⁵ *Id.* at 1537 (quoting *Caetano v. Massachusetts*, 577 U.S. 411, 417 (2016) (Alito, J., concurring in judgment)).

³³⁶ A full analysis of the “common use” and “dangerous and unusual” tests is far beyond our scope here, but at the very least it must be said that it cannot be derived from *Heller*, since common law sources alternate between “dangerous and unusual” and “dangerous or unusual” formulations, and *Heller* cites both. *Compare* *District of Columbia v. Heller*, 554 U.S. 570, 623 (2008) (using “dangerous or unusual weapons”), *with id.* at 627 (using “dangerous and unusual weapons”). *See also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms: An Analytical Framework and Research Agenda*, 56 UCLA L. REV. 1443, 1481-83 (2009) (noting *Heller*’s lack of clarity and proposing a test that would exclude unusually dangerous weapons).

³³⁷ *Snope*, 145 S. Ct. at 1538 (Thomas, J., dissenting from denial of certiorari); *see also id.* at 1534 (Kavanaugh, J., statement respecting the denial of certiorari) (“Given that millions of Americans own AR-15s and that a significant majority of the States allow possession of those rifles, petitioners have a strong argument that AR-15s are in ‘common use’ by law-abiding citizens and therefore are protected by the Second Amendment under *Heller*.”).

³³⁸ *Id.* at 1537.

³³⁹ *Id.* at 1538.

Justice Thomas's opinion in *Snope* may well be a harbinger of what is to come when the Supreme Court addresses the constitutional status of assault weapons, as it seems likely to do in the very near future. Whether such a case brings more clarity and coherence to Second Amendment doctrine depends largely on which of the two *Bruens* we have described here prevails. The asymmetric updating of rights via appeals to "plain text" while freezing regulatory authority via narrow historical analysis represents exactly the problem that *Bruen* purported to solve: judicial discretion. And it does so in ways that are far less transparent than the scrutiny tests it replaces.

Writing in this same volume, Professor Joel Alicea defends *Bruen* as "right,"³⁴⁰ offering new language in which to defend the asymmetric approach to enforcing *Bruen* that *Rahimi* rightly rejected. Alicea characterizes *Bruen* as almost purely textual in its first step and historical only at the second step.³⁴¹ Alicea then contends that the methodological differences of *Bruen*'s two steps require different levels of generality. According to Alicea, *Bruen*'s first step defines the scope of the right through the text's "original semantic meaning."³⁴² He argues that "[b]ecause the original semantic meaning is very general[,] . . . the relevant facts about the person, object, or conduct will likewise be framed at a high level of generality."³⁴³ "[W]e would need a more granular understanding of the person, object, or conduct at issue in the case to determine whether the rights-claimant can prevail at Step Two [T]he level of generality will differ at the two steps."³⁴⁴

There are a number of reasons why this attempt to justify disparate levels of generality fails, but here we limit ourselves to one. Neither *Heller* nor *Bruen* uses "original semantic meaning," and both decisions describe right and regulation in terms of text *and* history, with *Bruen* repeatedly emphasizing this formulation, of a "test rooted in the Second Amendment's text, *as informed by history*."³⁴⁵

We are not persuaded that Alicea's account offers a more faithful reading of *Bruen* than one rooted in the language of *Bruen* itself. We are especially

³⁴⁰ Alicea, *supra* note 293.

³⁴¹ See *id.* at 31 ("Whereas Step One is a textual analysis, Step Two is *historical* in nature.")

³⁴² See *id.* at 23-25, 27-30, 29 n.121, 37, 54 n.306, 82. Introducing the framework, Alicea repeatedly describes step one as a "textual analysis," which looks to "minimal historical context." See, e.g., *id.* at 22-23, 25, 31.

³⁴³ *Id.* at 29.

³⁴⁴ *Id.* at 30.

³⁴⁵ N.Y. State Rifle & Pistol Ass'n v. *Bruen*, 142 S. Ct. 2111, 2127 (2022) (emphasis added) ("Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, *as informed by history*"); see also *id.* (describing *Heller*'s decision as made "on the basis of both text and history"); *id.* at 2129 ("Whether it came to defining the character of the right . . . , suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history.")

concerned about an approach that (1) employs “original semantic meaning” to supplant the language of “text and history” in *Bruen*,³⁴⁶ and (2) suggests that “original semantic meaning” justifies asymmetric levels of generality at steps one and two, interpreting *Bruen* contrary to the majority’s reasoning in *Rahimi*.³⁴⁷ In addition to questions concerning the authority of the Court and its academic commentators, we focus on a separate critical consideration: endorsing asymmetric levels of generality at steps one and two would compound the democracy harms we have identified above.

While Alicea claims his method promotes democracy, there are at least two major problems with that claim. Alicea claims that *Bruen*’s method is more democratic than judicially enforced means-end scrutiny because it is faithful to the founders’ balance.³⁴⁸ But Alicea is in no position to make this claim; even as he argues that “*Bruen* Was Right,” Alicea explains that his argument is theoretical and that he has not engaged with “the accuracy of *Bruen*’s historical claims.”³⁴⁹ Just as importantly, Alicea offers no theoretical account of how the asymmetric framework he proposes for enforcing the Second Amendment could preserve the “balance struck by the founding generation.”³⁵⁰ Over time, the framework he proposes—one that defines the right in broad terms focused on the text but ties regulations to historical particulars the government must identify³⁵¹—will expand protection for gun rights and restrict laws that regulate guns.

This returns us to the problem of the two *Bruens* we described in Part I.³⁵² Whatever “balance” the Framers struck cannot be maintained if judges sanction change on one side of that balance on different terms than on the other. In short, the asymmetric framework for enforcing *Bruen* that Alicea proposes does not take its democratic warrant from the Framers or any other source that we can identify. Advocating this asymmetric framework as fidelity to the Framers is, as we have shown, antidemocratic by several measures. *Heller* does not require this, nor does *Bruen* or *Rahimi*.

³⁴⁶ See *id.*

³⁴⁷ See *supra* text accompanying notes 114–117.

³⁴⁸ See Alicea, *supra* note 293, at 18 (arguing that *Bruen* “requires a comparison between the ‘balance struck by the founding generation’ and the balance struck by modern firearms regulations,” which is more “justifiable” than “requiring judges to determine whether *they* think the balance struck by modern legislatures is the right one” (footnote omitted) (quoting *Bruen*, 142 S. Ct. at 2133 n.7)).

³⁴⁹ *Id.* at 19.

³⁵⁰ *Id.* at 18.

³⁵¹ Alicea characterizes step one as a textual inquiry with a highly circumscribed role for history. See *id.* at 23 (describing “a two-step approach in which the first step focuses on the original semantic meaning of the text (informed by a minimal contextual inquiry . . .) and the second step focuses on broader historical context”). At step one, minimal historical context is relevant as “necessary to disambiguate among potential original semantic meanings of the text. But the history is relevant *only* insofar as it reveals the original linguistic meaning of the ‘plain text.’” *Id.* (footnote omitted).

³⁵² See *supra* Section I.B.

CONCLUSION

The Roberts Court has embarked on a project of replacing means-ends scrutiny with HAT review, for the asserted reason of constraining judicial discretion. Empirical studies suggest that this new mode of review has *increased*, rather than constrained, judicial discretion. There is more variance in outcomes based on the party of the appointing president (i.e., partisanship),³⁵³ and judges widely report difficulty in conducting the historical inquiry *Bruen* mandates.³⁵⁴ Without undertaking comparative measurements of this kind, we have identified numerous sources of discretion in HAT review—the cases organize constitutional inquiry in doctrinal forms that are not grounded in original meaning or method and afford judges the discretion to decide Second Amendment challenges at disparate levels of generality within and across cases.

The Court has employed the HAT framework to expand protection for gun rights and for other values favored by the conservative legal movement, all the while insisting that tying the Constitution's interpretation to Founding understandings and to history and tradition will constrain judges from acting on their values. We show that history and tradition case law lacks originalist warrant and harms democracy. It obstructs public understanding of the Justices' reasons for invalidating gun regulations and channels debate about firearm laws' constitutionality onto ancient analogues and away from the reasons that living Americans mobilize to enact gun safety laws today.

353 See Brown et al., *supra* note 11.

354 See, e.g., Andrew Adams & Peter Hancock, *In Closely Watched Case, Federal Appeals Court Weighs Constitutionality of Illinois' Assault Weapons Ban*, WTTW (June 29, 2023, at 16:50 ET), <https://news.wttw.com/2023/06/29/closely-watched-case-federal-appeals-court-weighs-constitutionality-illinois-assault> [<https://perma.cc/H38G-TC4Q>] (noting that during oral argument, Judge Easterbrook “called relying on a weapons’ historical availability or popularity an ‘anachronism,’ saying that a weapon being banned or not banned creates a ‘self-fulfilling prophecy’ for common use”); Gershman, *supra* note 10 (“‘There’s all this picking and choosing of historical evidence. ‘This is too early. This is too late. Too small, too big.’” Judge Gerard Lynch of the Second U.S. Circuit Court of Appeals said during a recent argument about a new law in New York that prohibits guns in sensitive places like parks, museums and bars.”).