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## Time and Tradition in Second Amendment Law

Jacob D. Charles

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# TIME AND TRADITION IN SECOND AMENDMENT LAW

*Jacob D. Charles\**

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## INTRODUCTION

The Supreme Court’s Second Amendment is a chronological chameleon. For one purpose, its meaning is fixed in the firmament of the Founding era.<sup>1</sup> For another purpose, its language is anchored to the understanding of living Americans.<sup>2</sup> One clause gets projected backwards, traced to antecedents in the 17th century.<sup>3</sup> An adjacent clause gets projected forward, evolving alongside dynamic consumer preferences.<sup>4</sup> Still other words or phrases are

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1. See *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them[.]”).

2. See *id.* at 624–25 (announcing that weapons are protected when they are in common use by law-abiding citizens today); see also *id.* at 629 (dismissing arguments that the challenged law permitted sufficient alternative weapons because today “handguns are the most popular weapon chosen by Americans for self-defense in the home”).

3. See, e.g., *id.* at 592–93 (discussing English history to inform the meaning of the Second Amendment); see also *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136–37 (2022) (discussing the relevance of pre-1776 English history and its limitations).

4. See, e.g., *Heller*, 554 U.S. at 624–25 (suggesting that weapons are protected when they are in “common use” by law-abiding citizens); see also *Bruen*, 142 S. Ct. at 2142

cloaked in meaning from different temporal epochs — the Long 18th Century,<sup>5</sup> the Antebellum South,<sup>6</sup> the Reconstruction Era,<sup>7</sup> and even the Reagan Revolution.<sup>8</sup> This oscillation remains unexplained in the Justices’ opinions. Why so many incompatible timelines?

Only Χρόνος knows.<sup>9</sup>

Debates over timelines are common in constitutional law.<sup>10</sup> As Alison LaCroix says, “[q]uestions of time and temporality pervade American

(“[E]ven if these colonial laws prohibited the carrying of handguns because they were considered ‘dangerous and unusual weapons’ in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably *in common use today*.”) (emphasis added); see also Philip Casey Grove, *Common Use Under Fire: Kolbe v. Hogan and the Urgent Need for Clarity in the Mass-Shooting Era*, 59 ARIZ. L. REV. 773, 799 (2017) (discussing divergent court understandings and “the legitimate concerns surrounding the practical consequences of the common-use test”).

5. See *Heller*, 554 U.S. at 593 (describing the right to arms protected in the 1689 English Bill of Rights and arguing that it “had become fundamental for English subjects” by the time of the American Founding).

6. See *id.* at 611–14 (analyzing antebellum state cases as interpretive aids); see also Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121, 123–24 (2015) (criticizing the *Heller* myopic focus on the South, with its “distinctive culture of slavery and honor”). *Bruen* also relied on *Dred Scott* as a *positive* guide to the Constitution’s meaning. See *Bruen*, 142 S. Ct. at 2151 (“[E]ven Chief Justice Taney recognized (albeit unenthusiastically) in the case of blacks) that public carry was a component of the right to keep and bear arms — a right free blacks were often denied in antebellum America.”).

7. See *Heller*, 554 U.S. at 614–15 (discussing reports during Reconstruction about efforts to disarm formerly enslaved people).

8. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008).

9. Χρόνος, or Chronos, is the personification of time in Greek mythology. *Chronos*, GREEKMYTHOLOGY.COM, [https://www.greekmythology.com/Other\\_Gods/Primordial/Chronos/chronos.html](https://www.greekmythology.com/Other_Gods/Primordial/Chronos/chronos.html) [<https://perma.cc/K6VM-PJMP>] (last visited Oct. 6, 2023).

10. Many constitutional issues have engendered disputes about time or timing. These include broad-level questions about interpretation and understanding, such as debates over originalism, living constitutionalism, and pluralistic constitutional theories, which often dispute the proper temporal era in which to locate constitutional meaning. See, e.g., Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 15 (2015) (describing a core feature of originalist families of interpretation to be the fixation thesis, which holds that “[t]he object of constitutional interpretation is the communicative content of the constitutional text, and that content was fixed when each provision was framed and/or ratified”); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 11 (2020) (“In contrast to the general receptivity of non-originalism towards post-Founding historical practice, such practice is not a natural fit for originalism.”). See generally JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* (2020). They also include questions about the timing of constitutional amendments. See, e.g., Brannon P. Denning & John R. Vile, *Necromancing the Equal Rights Amendment*, 17 CONST. COMMENT. 593, 595–96 (2000) (discussing questions about the passage of time between votes to ratify the proposed Equal Rights Amendment and the 27th Amendment); Stewart Dalzell & Eric J. Beste, *Is the Twenty-*

constitutional theory.”<sup>11</sup> Indeed, in Michael McConnell’s view, “disagreements about time are at the heart of the most prominent arguments in constitutional theory.”<sup>12</sup> But, despite echoes elsewhere, those debates take on dramatic significance in the Second Amendment context. In *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court announced a new past-bound Second Amendment test. There, the Court said that no gun regulation can be upheld unless it has an analogue in the distant past — unless, that is, the government can “demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.”<sup>13</sup> History, tradition, and analogy alone now determine constitutionality.<sup>14</sup> That historical test masks the ways that the Supreme Court’s own pronouncements refer different questions to different time periods.

Who are “the people” entitled to exercise the right to keep and bear arms?<sup>15</sup> What weapons qualify as “arms” meriting constitutional protection?<sup>16</sup> What regulations “infringe[]” Second Amendment rights?<sup>17</sup> Nearly every answer to a central question about the right to keep and bear arms turns on what some group, at some time, thought or did.<sup>18</sup> Lower court judges have drawn attention to how the Court’s new guidance creates a

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*Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 503 (1994) (noting that many questions about the validity of the 27th Amendment “concern the question of whether a proposed amendment to the Constitution must be ratified in a timely manner after its transmission to the states”); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS 6–7* (1991) (developing a theory of higher law-making in constitutional moments that can effectively amend the Constitution outside Article V’s formal process).

11. See Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1331 (2010).

12. See Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1751 (2015); cf. Yuvraj Joshi, *Racial Time*, 90 U. CHI. L. REV. 1625, 1678 (2023) (exploring how the Supreme Court’s doctrine has often “played a significant role in enacting and universalizing dominant perspectives of time”).

13. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022); Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 71 (2023) (questioning the outsized role that *Bruen* places on historical legislation, and thus, on historical silence).

14. See *Bruen*, 142 S. Ct. at 2126.

15. See U.S. CONST. amend. II.

16. See *id.*

17. See *id.*

18. See McConnell, *supra* note 12, at 1750 (arguing that each of the various constitutional methodologies “resolves uncertainties in the meaning of constitutional principles by looking to how a particular institution or set of institutions . . . at a particular time period (the beginning, the present, or in-between) understands or has understood that constitutional principle”).

“logical inconsistency”<sup>19</sup> in the time that matters and fuels “anachronism”<sup>20</sup> in the Court’s doctrine. They have recognized, that is, that *time* takes on supreme importance, but that the relevant temporal frame is not uniform across the questions pervading Second Amendment law. Neither the Court nor commentators give any reason to refer some questions to the Founding generation and others to Gen X.

To take one example, consider how to ascertain whether a given weapon is entitled to Second Amendment protection. The Supreme Court in *Heller* said that “the sorts of weapons protected” are those weapons in “common use.”<sup>21</sup> Thereafter courts applied this “common use” test by asking whether people today commonly own and use the weapon at issue.<sup>22</sup> Justice Thomas has decried lower court rulings upholding restrictions on what he calls “modern sporting rifles” like AR-15 style rifles that “millions of Americans commonly own for lawful purposes.”<sup>23</sup> Other judges have curiously emphasized that Americans purchased more of these types of weapons in recent years than Ford F-150 trucks.<sup>24</sup> “Imagine,” said one judge, “every time one passes a new Ford pickup truck, it is a reminder that two new modern rifles have been purchased.”<sup>25</sup> The correct time frame in this view is unapologetically contemporary. What do *today’s* armed citizens choose?

Contrast that question with what regulations government can enact to address gun violence. Here, the Supreme Court has been equally emphatic — but in the opposite direction. The limits on the government’s authority

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19. See *Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 3:22-CV-410, 2023 WL 3355339, at \*12 n.15 (E.D. Va. May 10, 2023) (“There is, of course, a logical inconsistency in applying an Originalist understanding of ‘keep and bear arms’ and a modern understanding of ‘the people.’ But, fealty to the teachings of *Heller* and *Bruen* and the need to avoid the unacceptable reach of the Government’s position warrants the result reached here.”).

20. See Oral Argument at 1:02:04–1:02:16, *Bevis v. City of Naperville*, No. 23-1353 (7th Cir. June 29, 2023), [http://media.ca7.uscourts.gov/sound/2023/kra.23-1353.23-1353\\_06\\_29\\_2023.mp3](http://media.ca7.uscourts.gov/sound/2023/kra.23-1353.23-1353_06_29_2023.mp3) [<https://perma.cc/6VFL-U884>] (statement of Easterbrook, J.) (expressing frustration about “the anachronism built into the argument” as to what weapons are protected).

21. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (quoting *Miller v. United States*, 307 U.S. 174, 179 (1939)).

22. See *Teter v. Lopez*, 76 F.4th 938, 950 (9th Cir. 2023) (asking whether butterfly knives are in common use).

23. *Friedman v. City of Highland Park*, 577 U.S. 1039 (2015) (Thomas, J., dissenting from the denial of certiorari). Note the word *modern* in his characterization of the guns. *Id.*

24. See *Kolbe v. Hogan*, 849 F.3d 114, 153 (4th Cir. 2017) (en banc), *abrogated by* *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (Traxler, J., dissenting). It should be obvious, but Ford F-150s cost a lot more money than AR-15 style rifles, so it should not be surprising that more of the less expensive consumer good are purchased each year.

25. *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1022 (S.D. Cal. 2021), *vacated and remanded*, No. 21-55608, 2022 WL 3095986 (9th Cir. Aug. 1, 2022).

respecting firearms were set in stone in the 18th (or perhaps 19th) century.<sup>26</sup> The Second Amendment, said Justice Scalia, “is the very product of an interest balancing by the people” who placed it into the Constitution, and judges today cannot conduct that balance anew.<sup>27</sup> Likewise, today’s legislatures get no deference.<sup>28</sup> Only the ancient balance — the one “struck by the traditions of the American people” — compels the courts’ “unqualified deference.”<sup>29</sup> And evidence of any tradition that comes too late after 1791 is not a basis to uphold a modern law.<sup>30</sup> Comparing the common-use test to this method shows the inconsistencies in the treatment of time. Gun rights obtain evolving protection, but the state’s regulatory authority stagnates, stuck behind in the dusty session laws of historical state legislatures.

This brief Essay explores the inconsistency in the current doctrine. Part I charts the different questions that the Supreme Court has divided up among different temporal epochs. Some go back to the Founding era, while many others are punted to later generations — to either the amorphous post-ratification era (what McConnell calls “the in-between” time) or to the present.<sup>31</sup> Part II begins to think through how the Court could redirect or justify its practice, either by referring all questions to the same time period or explaining why the existing diversity makes sense. Whatever the pathway, the Court should justify its doctrinal treatment of time.

### I. THE SECOND AMENDMENT IN TIME

Sundry questions about the Second Amendment’s scope haunt the Court’s existing decisions. Some of the answers seem time-bound, while others evolve through the passing decades. This Part traces two key timeframes and categorizes the questions that the Supreme Court refers to both: the Founding and the Post-Founding eras.

Section I.A focuses on questions that the Court has ostensibly bound to earlier generations, including questions about the meaning of what the Justices called the Second Amendment’s “operative clause” and the regulatory baselines that set the parameters for the constitutionality of future gun laws. Section I.B charts the surprising number of questions that were

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26. *See Heller*, 554 U.S. at 634–35 (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them[.]”).

27. *Id.* at 635 (emphasis omitted).

28. *See Bruen*, 142 S. Ct. at 2131 (2022).

29. *Id.*

30. *See id.* at 2137–38.

31. McConnell, *supra* note 12, at 1746 (“There are three dimensions to time: the beginning, the present, and the in-between (meaning the 226-plus years between the beginning and the present).”).

not set in stone at the Amendment's ratification but evolve through time, including questions about the purpose for the right to keep and bear arms, coverage for particular types of weapons, and more.

### A. Questions Referred to the Founders

In 2008, when the Supreme Court first construed the Second Amendment to protect an individual right unconnected to service in the militia, its decision sounded in originalist rhetoric.<sup>32</sup> It sought the original public meaning of the constitutional text by appealing to Founding-era sources and dictionaries.<sup>33</sup> Even in the primary dissent, Justice John Paul Stevens engaged the majority on the question of what the Second Amendment meant at the Founding.<sup>34</sup> Some commentators hailed *Heller* as “the finest example of what is now called ‘original public meaning’ jurisprudence ever adopted by the Supreme Court.”<sup>35</sup> Other scholars have questioned how truly originalist the decision actually was.<sup>36</sup> Indeed, the Court's decision in *Heller*, and its more recent pronouncements in *Bruen*, refer only *some* questions about the Second Amendment to the Founding generation. Consider the paucity of questions expressly bound to early America.

*Operative Clause.* The Supreme Court in *Heller* said it was interpreting the language of the Second Amendment with an eye toward what it meant to the people who ratified it in 1791.<sup>37</sup> The primary focus of the opinion was settling what was then the principal debate over the Second Amendment: did it protect an individual right to keep and carry weapons for personal reasons, like self-defense against crime, or only a militia-oriented right that was in

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32. See generally *Heller*, 554 U.S.

33. See *id.* at 576–605.

34. See Darrell A. H. Miller & Joseph Blocher, *Stevens, J., Dissenting: The Legacy of Heller*, 103 JUDICATURE 9, 11 (2019), <https://judicature.duke.edu/articles/stevens-j-dissenting-the-legacy-of-heller/> [<https://perma.cc/TKK5-MSKC>] (“What’s especially notable about Stevens’s dissent in *Heller* is its good faith. He was not an originalist, but he addressed originalists on their terms, using their tools.”).

35. Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., (June 27, 2008), <https://www.wsj.com/articles/SB121452412614009067> [<https://perma.cc/UE6M-Y39T>]; see also Mark Anthony Frassetto, *Judging History: How Judicial Discretion in Applying Originalist Methodology Affects the Outcome of Post-Heller Second Amendment Cases*, 29 WM. & MARY BILL RTS. J. 413, 414 (2020) (describing *Heller* as “the high point for the Supreme Court’s originalist jurisprudence”).

36. See Siegel, *supra* note 8, at 192 (describing how *Heller* deploys originalist rhetoric but uses a popular constitutional methodology); see also Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1345 (2009) (“Justice Scalia’s majority opinion makes a great show of being committed to the Constitution’s original meaning, but fails to carry through on that commitment.”).

37. See *Heller*, 554 U.S. at 605 (explaining the relevance of post-ratification evidence to the public understanding of the Constitution when it was ratified).

some way dependent on a person's connection to collective defense?<sup>38</sup> Dictionaries, commentators, and other historical sources formed the grist for the Court's interpretive work.<sup>39</sup> The answer to the perennial question, *Heller* said, was settled over 200 years ago in favor of a personal right devoid of militia baggage.<sup>40</sup> "The right to keep and bear arms," which the *Heller* majority dubbed the Second Amendment's "operative clause,"<sup>41</sup> meant that an individual has a right "to possess and carry weapons in case of confrontation."<sup>42</sup> Despite the massive changes in weaponry and in society, the Court said it could not and would not "pronounce the Second Amendment extinct."<sup>43</sup>

*Regulatory Baselines.* Across cases, the Court has also indicated that regulatory authority today depends in large part on choices made by long-dead Americans. In *Heller*, the Court made clear its understanding that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them."<sup>44</sup> In laying out its novel methodology, the Court in *Bruen* doubled down on this notion in rejecting regulatory innovation.<sup>45</sup>

No longer can lower courts decide Second Amendment challenges by asking conventional questions about narrow tailoring and compelling government interests.<sup>46</sup> Instead, what matters now is solely whether the government can prove that the challenged law "is consistent with this Nation's historical tradition of firearm regulation."<sup>47</sup> And, *Bruen* underscored, "not all history is created equal,"<sup>48</sup> because evidence from too long before or too long after the Second Amendment's ratification offers little insight into the proper scope of regulatory authority.<sup>49</sup> Thus, like

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38. See Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221, 222 (1999) (describing the dispute).

39. See *Heller*, 554 U.S. at 576–605.

40. See, e.g., *id.* at 585–86 ("These provisions demonstrate — again, in the most analogous linguistic context — that 'bear arms' was not limited to the carrying of arms in a militia.").

41. *Id.* at 577.

42. *Id.* at 592.

43. *Id.* at 636. Some scholars think the Second Amendment fell silent itself because of changes over time. See generally H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2003).

44. *Heller*, 554 U.S. at 634–35.

45. See *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

46. *Id.* at 2127, 2131.

47. *Id.* at 2126; see generally Charles, *supra* note 13 (questioning the outsized role that *Bruen* places on historical legislation, and thus, on historical silence).

48. *Bruen*, 142 S. Ct. at 2136.

49. See *id.* at 2126–37.



*Heller*'s treatment of the operative clause, *Bruen* also invoked an epochal moment of higher lawmaking — the ratification of the Second Amendment in 1791 — as the baseline for setting the boundaries around permissible regulation.

Even in these limited areas, however, there was slippage suggesting the landscape was not as settled as it seemed. Where did “self-defense” come from as a core and “central component” of the protection for bearing arms?<sup>50</sup> Despite what the Court said, that conclusion seemed to arise not from a close reading of the text or historical sources, but from a close connection to modern movement actors.<sup>51</sup> Thus, even the limited interpretive anchorage in the Founding era seems uncertain.

And *Bruen*'s fealty to the Founding generation's boundary setting sits uneasily with its emphasis on *tradition* as a permissible basis for validating legislation today. What role does “tradition” play, separate and apart from history, in *Bruen*'s new test? If, as the Court said, text trumps later inconsistent historical practice,<sup>52</sup> then why look to tradition at all instead of resting on the words' public meanings in 1791?<sup>53</sup>

Several scholars have recently tried to reconcile *Bruen*'s pronouncements.<sup>54</sup> Randy Barnett and Larry Solum, for example, argue that “the deployment of the historical tradition test in *Bruen* operates within an originalist framework and is not a rejection of originalism” because it is best understood as an interpretation of the Second Amendment's original scope.<sup>55</sup> Sherif Girgis, on the other hand, calls *Bruen* an example of “living

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50. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008); *see also id.* at 637 (Stevens, J., dissenting) (“[T]here is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.”).

51. *See generally* Siegel, *supra* note 8; *see also* Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 IND. L.J. 1587, 1592 (2014) (arguing that “*Heller* radically reshaped the Second Amendment right to fit the twenty-first-century popular understanding of the right,” but that such updating is consistent with how the right to bear arms has often been updated throughout history).

52. *See Bruen*, 142 S. Ct. at 2137 (“[T]o the extent later history contradicts what the text says, the text controls.”).

53. On some varieties of traditionalist interpretation — including in some ideas that seem apparent in *Bruen* itself — tradition gives meaning to the words. *See, e.g.*, Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES (forthcoming) (manuscript at 7), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4205351](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205351) [<https://perma.cc/TPR7-TLU4>] (arguing that, in traditionalist methodology, constitutional rights “are limited or constituted by enduring practices or their absence”).

54. *See, e.g.*, Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, NW. U. L. REV. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4338811](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4338811) [<https://perma.cc/6MNK-DBK8>] (exploring possible ways to understand *Bruen*'s test as either consistent with originalism or not).

55. *Id.* (manuscript at 36).

traditionalism,” a type of decision that relies on post-ratification practices that are not tied to the Constitution’s original meaning.<sup>56</sup> Marc DeGirolami has similarly argued that *Bruen*’s test is best understood as a form of traditionalism, not simply a form of liquidated originalism.<sup>57</sup> *Bruen*’s reference to the “unqualified deference” owed to the balance between rights and regulation “struck by the traditions of the American people” sounds less like authority is fixed at the Founding than that it can evolve post-1791.<sup>58</sup> The point, however, is that even *Bruen*’s attempt to root regulatory baselines in the distant past obscures how the past actually matters.

### B. Questions Referred to Later Generations

Perhaps surprising for an area of law that has often been viewed as one of the most expressly originalist,<sup>59</sup> many of the questions in Second Amendment doctrine are actually tied to times that post-date the amendment’s codification. *Heller* began this trend. It made weapon protection turn on modern consumer preferences,<sup>60</sup> relied on notions of the *purpose* for Second Amendment rights that are decidedly contemporary,<sup>61</sup> and carved out exceptions that appear crafted to keep the modern federal regulatory edifice intact,<sup>62</sup> among others. *Bruen* continued and amplified this modernization. This Section considers several of these questions in turn.

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56. See Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. (forthcoming 2023) (manuscript at 3), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4366019](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4366019) [<https://perma.cc/ZU6X-XSK2>].

57. See DeGirolami, *supra* note 53 (manuscript at 21–22).

58. See N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2131 (2022).

59. See, e.g., Cass R. Sunstein, *Second Amendment Minimalism: Heller As Griswold*, 122 HARV. L. REV. 246, 246 (2008) (“*Heller* is the most explicitly and self-consciously originalist opinion in the history of the Supreme Court.”).

60. See *District of Columbia v. Heller*, 554 U.S. 570, 624–25 (2008).

61. See Siegel, *supra* note 8, at 192 (“*Heller*’s originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism.”); see also Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1196 (2015) (arguing that none of *Heller*’s emphasis on the burden D.C.’s law placed on armed self-defense in the home “can be deduced from the Court’s explication of the original meaning of the Second Amendment’s text, which says not a word about self-defense or the importance of hearth and home”).

62. See Glenn H. Reynolds & Brannon P. Denning, *Heller’s Future in the Lower Courts*, 102 NW. U. L. REV. 406, 410–11 (2008) (noting the potentially small impact on federal law because “the majority preemptively (perhaps ‘peremptorily’ is a better word) signaled its view that a number of federal gun control laws would *not* be called into question by *Heller*”); see also Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1372 (2009) (“The *Heller* exceptions lack the historical grounding that would normally justify an exception to a significant constitutional right. Whatever the Court is doing here, it is not rigorously grounded in eighteenth-century sources.”).

*Weapon Protection.* In *Heller*, the Court announced that the Second Amendment presumptively protects bearable weapons as “arms.”<sup>63</sup> But it then significantly modified its own *prima facie* statement.<sup>64</sup> The right to keep and carry arms is limited to those that are in “common use” for lawful purposes.<sup>65</sup> The context makes clear what Justice Alito later underscored: the question is not what self-defense tools were popular among the yeoman farmer in the 18th century, or those weapons’ “lineal descendants,”<sup>66</sup> but what arms are “commonly possessed by law-abiding citizens for lawful purposes *today*.”<sup>67</sup> Only on such a contemporary reading could *Heller* have so breezily concluded that “the American people have considered the handgun to be the quintessential self-defense weapon.”<sup>68</sup> That was certainly not true at the Founding and for a long stretch after.<sup>69</sup>

Taking their cue from these statements, current court battles waged over weapon regulations are fought on modern terrain. Judges, parties, and experts duel over contemporary manufacturing<sup>70</sup> and sales data,<sup>71</sup> recent

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63. *Heller*, 554 U.S. at 581.

64. *See id.* at 582.

65. *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

66. Darrell A. H. Miller & Jennifer Tucker, *Common Use, Lineage, and Lethality*, 55 U.C. DAVIS L. REV. 2495, 2496 (2022).

67. *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring); *see also* Cody J. Jacobs, *End the Popularity Contest: A Proposal for Second Amendment “Type of Weapon” Analysis*, 83 TENN. L. REV. 231, 233 (2015) (“[T]est asks whether the weapon at issue is in common use at the time the case is decided.”).

68. *Heller*, 554 U.S. at 629.

69. *See* Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173, 207 (2021) (“Only a distinct minority of colonists owned pistols at the time of the founding — which, according to one historian, made up less than ten percent of the firearm stock.” (internal citation and emphasis omitted)); *see also* SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 114 (2006) (writing that, around the time of the Founding, a pistol “was a notoriously poor choice for personal self-defense” given its unreliability); Julie Turkewitz & Troy Griggs, *Handguns Are the New Home Security*, N.Y. TIMES (Oct. 14, 2016), <https://www.nytimes.com/interactive/2016/10/12/us/handguns-gun-ownership-survey.html> [<https://perma.cc/UF5P-57BJ>] (charting the recency of a primary interest in handguns among gun owners). *See generally* John Berrigan, Deborah Azrael & Matthew Miller, *The Number and Type of Private Firearms in the United States*, 704 THE ANNALS AM. ACAD. POL. & SOC. SCI. 70 (2022).

70. *See, e.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (*Heller II*) (relying on the number of AR-15s manufactured since 1986 as a sign of commonality).

71. *See* *Kolbe v. Hogan*, 849 F.3d 114, 153 (4th Cir. 2017) (en banc) (Traxler, J., dissenting) (discussing manufacturing numbers for AR-15s).

surveys about gun ownership,<sup>72</sup> and statistics about weapon use *today*.<sup>73</sup> Even then, the unanswered questions are plentiful. One court reviewing a large-capacity magazine (LCM) prohibition underscored this ambiguity — and how much of the focus is on *modern* facts and values:

Without clear guidance from binding authority, this Court is forced to determine which metric is most appropriate for evaluating “common use.” Is it sufficient, for instance, for a court to consider the absolute number of LCMs sold in the United States? Or should a court consider the percentage of LCMs relative to the overall civilian gun stock in the United States? Should a court consider not only the absolute number of LCMs, but the number of Americans that own those LCMs? And if this ratio suggests that a relatively small percentage of gun owners possess a disproportionate number of LCMs, does that mean that LCMs are not commonly owned?<sup>74</sup>

There is little room for resort to history when asking these kinds of questions about common use. To the extent historical analysis might play a role in an inquiry about weapon protection, it is most useful to underscore the wide transformation in weaponry and lethality from the Founding to the modern era.<sup>75</sup>

*Purpose.* As the prior Section suggested, the implicit theory in *Bruen* and *Heller* about the Second Amendment’s underlying purpose grounds the right in self-defense.<sup>76</sup> But that theme sounds quite modern as a justification for the right to arms.<sup>77</sup> An alternative theory — the anti-tyranny conception — would ground the right in the need for armed citizens to prevent or deter government tyranny.<sup>78</sup> The anti-tyranny theory seems to have more

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72. *See id.* (discussing sales numbers for AR-15s); *see also id.* at 151 (en banc) (Wilkinson, J., concurring) (“The dissent’s forays into the properties and usages of this or that firearm are the kind of empirical inquiries routinely reserved for legislative bodies which possess fact-finding capabilities far superior to the scantily supported views now regularly proffered from the bench.”).

73. *See* *Bevis v. City of Naperville*, No. 22 C 4775, 2023 WL 2077392, at \*15 (N.D. Ill. Feb. 17, 2023) (“[A]ssault weapons are used disproportionately in mass shootings, police killings, and gang activity”).

74. *Or. Firearms Fed’n v. Kotek Or. All. for Gun Safety*, No. 2:22-CV-01815-IM, 2023 WL 4541027, at \*27 (D. Or. July 14, 2023).

75. *See id.* at \*39; *see also* Miller & Tucker, *supra* note 66, at 2497–98 (discussing how the Theoretical Lethality Index can be used to compare lethality of weaponry across generations).

76. *See* Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63, 65 (2020).

77. *See* CORNELL, *supra* note 69, at 90–91 (describing how Founding era debates about the right to use a gun in self-defense were typically framed in terms of common-law self-defense doctrine not constitutional protection for arms-bearing).

78. *See generally* JOSEPH BLOCHER & DARRELL A. H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* (2018).

historical basis than the self-defense theory,<sup>79</sup> but *Heller* closed the door on it. The Court said “weapons that are most useful in military service — M-16 rifles and the like — may be banned.”<sup>80</sup> The “quintessential self-defense weapon,” however, secures ultimate constitutional protection.<sup>81</sup>

The choice of theory is not a purely academic exercise. It could have downstream effects on how courts resolve certain claims, such as bans on automatic weapons, semi-automatic rifles designated assault weapons, and large-capacity magazines. Glenn Reynolds, for example, writes that if the Court had adopted the anti-tyranny rationale, “then questions involving the treatment of tasers, pepper spray, and the like might be avoided: such weapons have limited military utility, and their presence among the populace probably does little to deter tyranny.”<sup>82</sup> But the Court did not. Reva Siegel has shown how the self-defense rationale that *Heller* vindicated arose from a shift in emphasis among gun-rights proponents in the 1980s and 1990s, as it became increasingly difficult for the mainstream movement to stay affiliated with domestic extremists committing violence under the banner of the anti-tyranny conception.<sup>83</sup> As one commentator concluded, “*Heller*’s discussion of the centrality of self-defense and the defense of the home, and the extent to which a challenged regulation impinges on the interest in such defense, has no apparent footing in the original meaning of the Second Amendment’s operative clause.”<sup>84</sup>

*Exclusions.* In *Heller*, the Court set aside a number of regulations as untouched by its ruling:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>85</sup>

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79. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 651 (1989) (“[T]he strongest version of the republican argument would hold it to be a ‘privilege and immunity of United States citizenship’ — of membership in a liberty-enhancing political order — to keep arms that could be taken up against tyranny wherever found, including, obviously, state government.”).

80. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

81. *Id.* at 629.

82. Glenn Harlan Reynolds, *Second Amendment Penumbra: Some Preliminary Observations*, 85 S. CALIF. L. REV. 247, 254–55 (2012).

83. See Siegel, *supra* note 8.

84. Rosenthal, *supra* note 61, at 1196–97 (internal citation omitted).

85. *Heller*, 554 U.S. at 626–27.

Brannon Denning and Glenn Reynolds called this “*Heller’s* safe harbor.”<sup>86</sup> Lower courts employed these often,<sup>87</sup> but these exclusions were not grounded in historical sources. Rather, a sort of pragmatism better explains why they appeared in the decision.<sup>88</sup> After all, to take one example, no Founding-era laws prohibited felons or people with select mental health histories from possessing guns.<sup>89</sup> Those laws are a product of the early 20th century. *Heller’s* carve-out for these laws is more *ipse dixit* than reasoned historical conclusion.<sup>90</sup> They are grounded in an implicit contemporary weighing of costs and benefits, not in a fixed original public meaning analysis.<sup>91</sup>

*People Protection.* Based in part on the mixed messages *Heller* sent about who can exercise the right to keep and bear arms, courts have yet to work out an adequate theory of when government can constitutionally disarm someone. Some have searched for theoretical rationales in the historical record — dangerousness, virtue, or law-abidingness.<sup>92</sup> Others have looked not to history but to contemporary understandings of who belongs to the American community.<sup>93</sup> And, of course, the groups included in the political community have changed dramatically over the last 250 years.<sup>94</sup> Courts and commentators alike disagree about the right time period in which to look.<sup>95</sup>

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86. Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water (Mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1248 (2009).

87. 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, 1488 (2018) (finding that the majority of courts analyzing Second Amendment challenges in the years following *Heller* cited this paragraph).

88. Larson, *supra* note 62, at 1379.

89. See, e.g., C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 697 (2009) (“[A] lifetime ban on any felon possessing any firearm is not ‘longstanding’ in America.”).

90. *Heller*, 554 U.S. at 722 (Breyer, J., dissenting); Larson, *supra* note 62, at 1372.

91. Indeed, some judges post-*Bruen* have rejected *Heller’s* statement that the felon prohibition is permissible because it is longstanding. *United States v. Jackson*, No. 22-2870, 2023 WL 5605618, at \*4 (8th Cir. Aug. 30, 2023) (Stras, J., dissenting from the denial of rehearing en banc) (“There is nothing about felon-dispossession laws that is longstanding, unless six decades is long enough to establish a ‘historical tradition’ of the type contemplated by *Bruen*. Spoiler alert: it is not.”).

92. Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws That Dispossess Prohibited Persons*, 83 L. & CONTEMP. PROBS., 53, 53, 55 (2020) (discussing various approaches).

93. *Id.*

94. See, e.g., Pratheepan Gulasekaram, “*The People*” of the Second Amendment: *Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1533 (2010) (“The uncertainty regarding the precise contours of ‘the people’ in the Constitution reflects the indeterminacy of the phrase at the Constitution’s creation.”).

95. Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, 33 (2023) (describing the problem of meshing historical gun laws grounded in bigotry with a requirement of historical inquiry).

Consider the Eastern District of Virginia’s discussion in a recent challenge to the federal law barring those under 21 from purchasing handguns from federally licensed firearms dealers.<sup>96</sup> That court first had to determine whether 18-to-20-year old individuals fell within the class of “the people” that the Second Amendment covers.<sup>97</sup> Relying on precedent that aligned that inquiry with the notion of the political community, it said that “[t]he first task in determining who is a member of the ‘political community’ is to determine at which point in time to base the analysis — in 1791 (the date the Second Amendment was adopted) or 2023.”<sup>98</sup> The court recognized that many aspects of *Heller* and *Bruen* required resorting to history and definitions fixed in the Founding era.<sup>99</sup> Yet that court concluded that despite the chronological inconsistency with other parts of Second Amendment doctrine, “*Heller* and *Bruen* support adopting a modern understanding of the definition of ‘the people.’”<sup>100</sup>

*Traditional Regulation.* Traditionalism is fundamentally dynamic, not fixed.<sup>101</sup> In traditionalist interpretation, constitutional meaning is not settled at the point in time when the text is ratified, but can change and evolve as practices do.<sup>102</sup> Thus, if not quite the opposite, this method is at least in significant tension with the “dead, dead, dead” Constitution of originalism that Justice Scalia lauded.<sup>103</sup> The form of originalism to which conservative justices have claimed adherence locks in meaning at the time of ratification.<sup>104</sup> That is, in fact, what theorists have described as one of the bedrock principles of all families of originalism: the Fixation Thesis.<sup>105</sup>

96. *See generally* *Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 3:22-CV-410, 2023 WL 3355339 (E.D. Va. May 10, 2023).

97. *Id.* at \*9.

98. *Id.* at \*12.

99. *Id.*

100. *Id.* at \*11.

101. *See* Girgis, *supra* note 56 (manuscript at 63–64); Barnett & Solum, *supra* note 54 (manuscript at 19–23).

102. *See* Girgis, *supra* note 56 (manuscript at 64) (arguing that decisions based on traditionalist reasoning should be subject to lower *stare decisis* weight so that they can change as practices change); McConnell, *supra* note 12, at 1771 (“Longstanding practice is the idea that when democratically accountable institutions, state as well as federal, act for many years on the basis of a particular understanding of constitutional principle, that interpretation becomes authoritative.”).

103. Jonathan Easley, *Scalia: Constitution is ‘Dead, Dead, Dead’*, THE HILL (Jan. 29, 2013), <https://thehill.com/blogs/blog-briefing-room/news/140572-scalia-constitution-is-dead-dead-dead/> [<https://perma.cc/Z99D-Q9MT>]; *see* Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. UNIV. L. REV. 1653, 1674 (2020) (“No original meaning theory gives primacy to ancient and enduring practices as constituents of meaning, so that none is synonymous with traditionalism on that point at least.”).

104. *See* McConnell, *supra* note 12, at 1755.

105. Solum, *supra* note 10, at 42; *see also supra* note 10 and accompanying text.

Traditionalism, on the other hand, is not tied to original meanings but to evolving ones.<sup>106</sup> *Bruen* sometimes speaks in both registers, seeming to suggest a fixed meaning at some points and at others to allow later traditions to validate practices as constitutional.<sup>107</sup> Regulations that are part of our tradition, it says, are permissible.<sup>108</sup> Thus, something more than fixed original public meaning must be determining the scope of regulatory authority today. But, as I have explored at length in another work, the boundaries of that focus on tradition are ill-defined in the decision.<sup>109</sup>

Who can own guns, what guns they can own, what they can use them for — the Supreme Court has answered all of these questions through a modern or evolving lens. Its decisions about the Second Amendment have failed to settle on a single time period for discerning the meaning and application of the right to bear arms. The next Part questions whether this is a problem.

## II. TEMPORAL STASIS OR A DYNAMIC DOCTRINE?

Lower courts reading *Heller* and *Bruen* have often seemed bewildered.<sup>110</sup> And the Supreme Court itself has acknowledged the sometimes-scattered approach to historical timetables, as when it expressly declined to decide whether 1791 or 1868 is the relevant benchmark to use for searching for historical analogues to modern regulations.<sup>111</sup> But mostly, the Court has left questions about varying times and traditions unmentioned, let alone justified.

It is easy enough to criticize this inconsistency, but what should the Court, or lower courts, do? Some of the problems with creating a well-justified doctrinal infrastructure to deal with time are common to other constitutional rights contexts.<sup>112</sup> But some are unique to the Second Amendment. It is the only amendment that protects a right to a *thing*, to chattel.<sup>113</sup> The nature of

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106. DeGirolami, *supra* note 53 (manuscript at 19) (noting that in contrast to originalist theories that focus on fixed historical time points, for traditionalism, “[e]nduring practices (often appearing in comparatively diffuse and far-flung contexts, sometimes away from the centers of elite legal and political power) give the traditionalist interpreter presumptive confidence that such practices are ingredients of the text’s meaning and of the law of the Constitution”).

107. Girgis, *supra* note 56 (manuscript at 32).

108. *Id.* at 36.

109. *See generally* Charles, *supra* note 13.

110. *See* Charles, *supra* note 13, at 122.

111. *See* N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2138 (2022) (acknowledging but declining to settle the debate).

112. *See* Jacob D. Charles, *Constructing A Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. 333, 334–35 (2021) (describing the difficulties and design choices for developing constitutional infrastructure).

113. *See* Adam B. Sopko, *Second Amendment Background Principles and Heller’s Sensitive Places*, 29 WM. & MARY BILL RTS. J. 161, 188 (2020) (“[*Heller*’s] curious elevation



that thing changes over time, as nearly all material artifacts do. So it would make no sense, for example, to say that only those weapons that existed at the time of ratification are protected. In fact, *Heller* described such an argument as borderline frivolous.<sup>114</sup> On top of that, *Bruen*'s history-and-tradition test is also novel and unlike the method used for other constitutional rights.<sup>115</sup> Those factors make answering novel methodological questions in this context different.

This Essay cannot do more than gesture in the direction of possible approaches. I focus here on two that could resolve certain of the problems with the current haphazard method. One approach would be to minimize the historical back and forth by focusing on the underlying rationale or theory for protecting the right to arms. Another would be to embrace the inherent dynamism and explain why the proper time periods differ.

### A. A Fixed-Time Doctrine

One way to tie a more consistent temporal theme through the different doctrinal questions would be to focus even more particularly on the purpose of the Second Amendment right as a means of rationalizing the rest of the doctrine. If self-defense truly is the core, then questions about weapon protection, people protection, and a whole host more can be answered by reference to that value directly, instead of mediated through questions asked and answered at different temporal epochs. It would be inconsistent, for instance, to look to common use *today* to understand weapon protection, but turn to historical understandings of “the people” to flesh out people protection. Of course, at the level of “self-defense,” the notion is too capacious to answer concrete questions.<sup>116</sup> Perhaps the narrower *historical doctrine* of self-defense can discipline claims because that doctrine focuses on essential factors like imminence, necessity, and proportionality.<sup>117</sup>

For example, consider a recent Ninth Circuit case about butterfly knives.<sup>118</sup> If self-defense undergirds the right to keep and bear arms, then a central question in cases about weapon restrictions should be the effectiveness of the weapon for self-defense and the existence of adequate

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of a particular chattel worked to propertize the Second Amendment by ‘thingifying’ the right to keep and bear arms.”).

114. See *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

115. See Charles, *supra* note 13, at 88 (discussing the use of means-end scrutiny in other areas of constitutional law).

116. See JOSEPH BLOCHER & DARRELL A. H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* 152–54 (2018).

117. See Ruben, *supra* note 76, at 152–54 (detailing the limits).

118. See *generally* *Teter v. Lopez*, 76 F.4th 938 (9th Cir. 2023).

substitutes.<sup>119</sup> That might lessen the importance of questions tied to modern statistics about the number of butterfly knives in Hawaii and the proportion of their criminal misuse.<sup>120</sup> Instead, courts could ask about the scope of the privilege of using deadly weapons in self-defense at the Founding and the other options the law leaves open, and inquire into whether the restrictions under review impermissibly curtail that self-defense interest. Similar questions could be asked about prohibitions on weapon possession for certain classes of people or in certain locations.<sup>121</sup>

So too could the time period be uniform if anti-tyranny is the governing rationale. Courts could ask questions about the ability of private individuals to mount an effective resistance to government tyranny and seek to preserve the balance created at the Founding.<sup>122</sup> The Court is not likely to change course and vindicate this view, but the point is that even if it did, it could still set a more uniform timeline by focusing on the nature and purpose of the right.

### B. Dynamic Second Amendment Rights

Embracing dynamism, on the other hand, would require courts to come up with *reasons* for treating different questions at different time periods. Why, for example, ask about common-use today when deciding what weapons are protected? Why refer to the modern understanding of “the people” instead of the one that governed when the Second Amendment was ratified? Why, despite those modern questions, still require analogous historical regulations in order to uphold contemporary laws? There might be perfectly cogent answers to these questions. Perhaps questions about weapon protection should be referred to modern generations because

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119. Jacobs, *supra* note 67, at 283 (arguing for such a test in the Second Amendment context); see also Sherif Girgis, *Fragility, Not Superiority? Assessing the Fairness of Special Religious Protections*, 171 U. PA. L. REV. 147, 171 (2022) (arguing that a central theme in protection for civil liberties is the “adequate alternatives principle” that applies heightened scrutiny to neutral laws that do not offer adequate alternatives, where adequacy means that “an alternative means of exercising the liberty must let you pursue the interest served by that liberty (i) to about the same degree, and (ii) at not much greater cost, than you could have through the options the law has closed off”).

120. See *Teter*, 76 F.4th at 950.

121. See Pratheepan Gulasekaram, *The Second Amendment’s ‘People’ Problem*, 76 VAND. L. REV. 1437, 1439 (2023) (“Presumably most persons — regardless of immigration status — might need the home and personal protection venerated by the Supreme Court in *District of Columbia v. Heller* and recently reaffirmed in *New York State Rifle & Pistol Ass’n v. Bruen*.” (internal citations omitted)).

122. See Darrell A. H. Miller, *Second Amendment Equilibria*, 116 NW. U. L. REV. 239, 244 (2021) (discussing how an “[e]quilibrium-adjustment theory” could help Second Amendment doctrine by considering how social and technology change over the years upset the initial distribution — and equilibrium — set at the Founding “between government power to possess, use, and control the implements of violence and private power to do the same”).

something about the original meaning of the Second Amendment commends an “evolving-standards-of-utility” type test.<sup>123</sup> Perhaps rights expand with time, but regulatory authority does not because that best serves the prophylactic purpose of constitutional protection for guns.<sup>124</sup> But if there are good reasons, they have not yet been forthcoming.

### CONCLUSION

In nascent Second Amendment doctrine, timing is everything. When past laws were enacted depends on whether modern ones are constitutional.<sup>125</sup> Like these questions of state authority, some issues in the doctrine are entirely backward-looking. But many questions are not answered with a fixed reference point in the past. The answers to some questions evolve as practices do, like those about which weapons garner Second Amendment protection.<sup>126</sup> Yet there seems to be no explanation for whether this existing temporal diversity is good — or justified.

This Essay has canvassed possible ways to explain, justify, or redirect doctrinal references to time. But one other answer suggests itself: perhaps the unexplained time variation is just a way for judges to toggle the time periods to reach their desired outcomes in each case. That explanation does account for some otherwise strange divergences — like the focus on modern consumer choices for weapon protection and simultaneous strict limitation to the past for assessing new regulations. The flexibility of temporal toggling allows judges to expand the right while keeping regulations at bay.<sup>127</sup> Justice Scalia was fond of invoking the adage that appeals to some kinds of evidence simply allow judges to look out over a crowd and pick their friends.<sup>128</sup> Historical evidence seems no different, and the Court’s inconsistent time periods magnifies these concerns. Now, judges can survey the vast sweep

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123. Jake Charles, *Heller and the Vagaries of History*, DUKE CTR. FIREARMS L. BLOG (Sept. 16, 2019), <https://firearmslaw.duke.edu/2019/09/heller-and-the-vagaries-of-history/> [<https://perma.cc/M5GZ-AFZT>].

124. *See, e.g.*, David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) (“[P]rophylactic” rules are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law.”).

125. *See supra* Section I.A.

126. *See supra* Section I.B.

127. *Cf.* N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2180 (2022) (Breyer, J., dissenting) (“At best, the numerous justifications that the Court finds for rejecting historical evidence give judges ample tools to pick their friends out of history’s crowd. At worst, they create a one-way ratchet that will disqualify virtually any ‘representative historical analogue’ and make it nearly impossible to sustain common-sense regulations necessary to our Nation’s safety and security.”).

128. *See* Adam M. Samaha, *Looking over a Crowd — Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554, 556 (2017) (identifying Justice Scalia’s reliance on this and related phrases).

of American history and set down at whichever waystation they want. Only by changing or explaining its doctrinal decisions about time can the Court avoid the impression that this is the intended result.