

BRUEN AND THE FOUNDING-ERA CONCEPTION OF RIGHTS

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New York State Rifle & Pistol Ass'n v. Bruen heralded a potential revolution in the Supreme Court's approach to adjudicating constitutional rights, rejecting judicial interest-balancing tests like the tiers of scrutiny in favor of a text-and-history methodology. Bruen staked the legitimacy of its methodology on its ability to faithfully capture the original meaning of the Second Amendment, yet Bruen never defended the historical accuracy of the conception of constitutional rights on which it rests.

Bruen's conception of rights cannot be taken for granted in light of recent scholarship by Jud Campbell, Jonathan Gienapp, and Jamal Greene challenging many of the assumptions about rights undergirding Bruen's methodology. These three scholars, whom I will refer to as the "rights revisionists," argue—to varying degrees—that the Founders placed much less importance on the text of the Bill of Rights than modern rights jurisprudence tends to do and viewed many constitutional rights as subject to extensive regulation by the political process, rather than serving as trumps on government action. Campbell and Gienapp have criticized Bruen for being premised on an ahistorical conception of rights, taking direct aim at Bruen's claim to legitimacy.

Thus far, no scholar has answered the rights-revisionist critique of the conception of rights Bruen assumes. But the critics of Bruen's methodology are mistaken. By describing the text as a "mere placeholder," they overlook Campbell's own descriptions of how the Founders understood the role of the text. By accusing Bruen of undercutting democratic governance, they misunderstand Bruen's methodology. And by disparaging Bruen's historical analysis because it assumes that rights generally operated as trumps on government action, they overstate the extent to which constitutional rights were seen

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as regulable by legislatures. On each of these points, Bruen’s methodology is not only grounded in the Founding-era conception of rights; it is potentially consistent with the rights revisionists’ own account of rights at the Founding.

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INTRODUCTION

In 2022, the Supreme Court issued its decision in *New York State Rifle & Pistol Ass’n v. Bruen*, holding that the Second Amendment protects an individual right to carry arms outside the home.¹ That holding, however, was not the most significant aspect of the decision; the most significant aspect was the methodology that the Court adopted for deciding Second Amendment cases. *Bruen* set forth a two-step test for evaluating the constitutionality of firearms regulations, with the first step focusing on the text of the Second Amendment and the second step focusing on “the Nation’s historical tradition of firearm regulation.”²

In doing so, the Court criticized and replaced the test that had been adopted by nearly all of the courts of appeals prior to *Bruen*, a test based on the tiers of scrutiny that have become a dominant feature of rights jurisprudence since the 1960s.³ By explicitly rejecting the tiers of scrutiny and opting for a text-and-history test under the Second Amendment, the Court signaled a potential revolution in its approach

1 See N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2134–35 (2022).

2 Id. at 2130, 2129–30.

3 See id. at 2125–27, 2127 n.4; Francesca Procaccini, *The End of Means-End Scrutiny*, 75 DUKE L.J. 875, 882 (2026).

to adjudicating constitutional rights disputes.⁴ The Court argued that its text-and-history methodology was “more legitimate”⁵ than judicial interest-balancing tests like the tiers of scrutiny because it “faithfully” captured “the balance struck by the founding generation.”⁶ *Bruen* therefore tied the legitimacy of its methodology to the methodology’s ability to reflect the way the Second Amendment was understood at the Founding.

Yet it is fair to say that *Bruen* assumed rather than proved the historical accuracy of its conception of constitutional rights.⁷ Scholars cannot make such an assumption, however, in light of recent work by Jud Campbell,⁸ Jonathan Gienapp,⁹ and Jamal Greene,¹⁰ whom I refer to as the “rights revisionists.” I should make clear that I do not intend that label to carry a pejorative or dismissive connotation. All three authors have described their own work as challenging an understanding of rights that has been dominant within American legal culture since at least the middle of the twentieth century.¹¹ So “rights revisionists” seems descriptively accurate.

These three scholars have argued that constitutional rights at the Founding were generally understood as grounded in the natural rights tradition.¹² The textual declaration of such rights in the Constitution often pointed the reader to a preexisting body of law and political theory outside the text, such that the text was a “mere placeholder[]” for the content of the right.¹³ And because natural rights were subject to government regulation for the common good, they were not generally

4 See Procaccini, *supra* note 3, at 879–82. *Bruen* presents its methodology as a faithful interpretation of *District of Columbia v. Heller*, 554 U.S. 570 (2008). See *Bruen*, 142 S. Ct. at 2127–30. In that sense it was *Heller*, not *Bruen*, that started this revolution. But *Bruen* is the case in which the Court expressly rejected the tiers of scrutiny, which the lower courts had (wrongly, in my view) interpreted *Heller* to permit, so *Bruen* is rightly seen as the decisive case. *Id.* at 2129.

5 *Bruen*, 142 S. Ct. at 2130.

6 *Id.* at 2133 n.7.

7 See Joseph Blocher & Reva B. Siegel, *The Ambitions of History and Tradition in and Beyond the Second Amendment*, 174 U. PA. L. REV. (forthcoming 2026) (manuscript at 17), <https://ssrn.com/abstract=5310411> [<https://perma.cc/88S6-2GQC>].

8 See, e.g., Jud Campbell, *Determining Rights*, 138 HARV. L. REV. 921 (2025).

9 See, e.g., JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* (2024).

10 See, e.g., JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* (2021).

11 See Campbell, *supra* note 8, at 923–24; GREENE, *supra* note 10, at xvii–xxi; JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 4–8 (2018).

12 See *infra* Section II.A.

13 See Campbell, *supra* note 8, at 941, 939–41 (quoting Mary Sarah Bilder, *Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter*, 94 N.C. L. REV. 1545, 1591 (2016)); GIENAPP, *supra* note 9, at 91–100.

seen as judicially enforceable trumps on government action.¹⁴ Rather, representative institutions like legislatures had significant authority to determine the limits of natural rights despite their enumeration in the Bill of Rights.¹⁵ Proceeding from these premises, Campbell and Gienapp have argued that *Bruen*'s methodology overstates the relevance of the constitutional text in recovering the original meaning of natural rights declared in the Bill of Rights¹⁶ and erroneously assumes that constitutional rights like the Second Amendment operate as judicially enforceable trumps on government action.¹⁷

Thus far, no scholar has answered the rights-revisionist critique of the conception of rights on which *Bruen* rests. But the critics of *Bruen*'s methodology are mistaken. By describing the text as a "mere placeholder[.]"¹⁸ they overlook Campbell's own descriptions of how the Founders understood the role of the text.¹⁹ By accusing *Bruen* of undercutting democratic governance, they misunderstand *Bruen*'s methodology.²⁰ And by disparaging *Bruen*'s historical analysis because it assumes that rights generally operated as trumps on government action, they overstate the extent to which constitutional rights were seen as regulable by legislatures.²¹ On each of these points, *Bruen*'s methodology is not only grounded in the Founding-era conception of rights; it is potentially consistent with the rights revisionists' *own account* of rights at the Founding.

In making this argument, I will proceed in four Parts. First, I will provide an overview of *Bruen*'s methodology. Second, I will set forth the main features of the rights-revisionist conception of rights and lay out Campbell's and Gienapp's critiques of *Bruen*'s methodology. Third, I will argue that the rights-revisionist conception of rights is potentially compatible with *Bruen*'s methodology. Campbell's and Gienapp's claims to the contrary are based on either a misunderstanding of *Bruen*'s methodology or assertions that are inconsistent with the relevant history—sometimes including their own descriptions of the relevant history. Finally, I will analyze whether and how *Bruen*'s use of a burden-shifting framework is compatible with the Founding-era conception of rights and the judicial role, a significantly underexplored question of constitutional theory.

14 See *infra* Section II.A.

15 See *infra* Section II.A.

16 See *infra* Section III.A.

17 See *infra* Section III.B.

18 See Campbell, *supra* note 8, at 941, 939–41 (quoting Bilder, *supra* note 13); GIENAPP, *supra* note 9, at 91–100.

19 See *infra* Section III.A.

20 See *infra* Section III.B.

21 See *infra* Section III.B.

This is not only a debate about intellectual history, though such a debate would be important and worthwhile on its own. At issue is the future of how the Court adjudicates constitutional rights disputes.²² *Bruen* has put forward a new methodology for doing so, one that it presents as a superior alternative to judicial interest-balancing tests. But because *Bruen* ties the legitimacy of its methodology to the Founding-era conception of rights, if its methodology is ahistorical, *Bruen*'s coherence and legitimacy would be undermined, and *Bruen*'s nascent revolution might falter. The stakes of the historical critique of *Bruen*'s conception of rights are, therefore, quite high, and with some of the nation's leading scholars offering such critiques, the need for a defense of *Bruen*'s conception of rights is pressing. I offer that defense here.

I. *BRUEN'S METHODOLOGY*

I will begin with an overview of *Bruen*'s methodology. Because I have provided an exposition and defense of *Bruen*'s methodology from a conceptual and doctrinal perspective elsewhere,²³ here I will only give a brief summary of the methodology and assume the correctness of my interpretation of *Bruen*, even though I concede that it is a contestable view. Thus, my focus in this Article will be on the *historical* soundness of *Bruen*'s methodology, not on its conceptual or theoretical soundness.²⁴ The historical analysis I offer in Part III below serves to reinforce the historical premises on which *Bruen*'s methodology rests.

Turning, then, to that methodology: *Bruen* adopts a two-part test for adjudicating Second Amendment claims.²⁵ Step One is a "textual analysis"²⁶ that focuses on the original linguistic meaning of the Second Amendment—what the words meant at the time they were ratified.²⁷ The Court already performed almost all of the textual analysis necessary for Step One in *District of Columbia v. Heller*, which expounded the original linguistic meaning of the Second Amendment on its way to holding that the Amendment protects an individual right

22 It is unclear whether the rights revisionists believe that their historical arguments ought to influence constitutional adjudication as a general matter. They have offered no normative argument to that effect. They seem to assume that what they regard as the most defensible form of originalism would require taking into account the Founding-era conception of rights, though they acknowledge that some forms of originalism might not. *See generally* Jud Campbell, *Originalism's Two Tracks*, 104 B.U. L. REV. 1435 (2024); GIENAPP, *supra* note 9, at 217.

23 *See generally* J. Joel Alicea, *Bruen Was Right*, 174 U. PA. L. REV. 13 (2025).

24 *Id.* at 19–20, 19 n.45, 20 nn.46–52.

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

26 *See id.* at 2127 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008)).

27 Alicea, *supra* note 23, at 23.

to keep and bear arms for self-defense.²⁸ The principal task of courts at Step One is to apply the original linguistic meaning recovered by *Heller* to the facts of a given case.²⁹

The Second Amendment's operative clause contains three "textual elements"³⁰ relevant to the Step One inquiry: (1) "the people," (2) "keep and bear," and (3) "Arms."³¹ The Amendment focuses on *who* the rights claimant is, the *conduct* in which the rights claimant engaged or wishes to engage, and the *object* the rights claimant employed or wishes to employ as part of that conduct. The question at Step One is whether the rights claimant has satisfied all three textual elements under "the plain text of the Second Amendment."³² So, for example, in *Bruen*, because the rights claimants in that case were part of "the people," the handguns they wished to carry were "Arms," and the carrying of those arms in public for self-defense was a component of "bear[ing]" those arms, their legal claim fell within the original linguistic meaning of the Second Amendment.³³

Under *Bruen*, when a claim or defense falls within the plain text of the Second Amendment, "the Constitution presumptively protects that conduct," and the burden shifts to the government to rebut the presumption.³⁴ Put another way, Step One gives rise to an "initial conclusion" that must be "confirmed" by historical analysis at Step Two.³⁵ Whether this burden shift leads to a distorted understanding of the original meaning of the Second Amendment is a problem left unaddressed by *Bruen*. I will respond to that concern in Sections III.A and IV below.

Assuming we get past Step One's textual analysis, Step Two is a historical analysis. The question at Step Two is whether the government's regulation "is consistent with the Nation's historical tradition of firearm regulation."³⁶ *Bruen*—like *Heller*—presupposes that the Second Amendment "codified a pre-existing right" and "was not intended to lay down a novel principle."³⁷ It therefore recognizes that historical tradition, not text, determines the constitutionality of a firearms

28 See *Heller*, 554 U.S. at 576–600.

29 See Alicea, *supra* note 23, at 23.

30 See *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 592).

31 See U.S. CONST. amend. II.

32 See *Bruen*, 142 S. Ct. at 2134.

33 See *id.* at 2134–35.

34 *Id.* at 2126.

35 *Id.* at 2127 (quoting *Heller*, 554 U.S. at 592).

36 See *id.* at 2130.

37 *Id.* at 2127 (emphasis omitted) (quoting *Heller*, 554 U.S. at 592, 599 (alterations and internal quotation marks omitted)).

regulation once the rights claimant has satisfied Step One, though the historical analysis cannot contradict the text.³⁸

Because *Bruen* proceeds from originalist premises, the historical analysis at Step Two focuses on the years immediately surrounding ratification, though the Court has yet to clarify whether the relevant ratification year is 1791 (when the Second Amendment was ratified) or 1868 (when the Fourteenth Amendment was ratified).³⁹ To carry its evidentiary burden, the government need only show that a “historical tradition” supports its regulation.⁴⁰ It need not show that the modern regulation is a “historical twin” of a prior statute.⁴¹ Traditions, of course, “are *reflected in* practices, but they are not *reducible to* practices. A tradition describes some principle or set of principles that *explain* and *unify* the practices. But it is the principles, not the practices, that constitute the tradition.”⁴² That is why the Court, in *Bruen* and *United States v. Rahimi*, respectively, described the Step Two inquiry as “applying constitutional principles to novel modern conditions”⁴³ and as looking for “principles that underpin our regulatory tradition.”⁴⁴

The government can only succeed at Step Two by demonstrating that the ends and means of its modern regulation are similar to the ends and means reflected in the principles that constitute our historical tradition of firearms regulation.⁴⁵ In *Rahimi*, for instance, the Court concluded that our regulatory tradition of surety and affray laws reflected the same end—“preventing individuals who threaten physical harm to others from misusing firearms”⁴⁶—and the same means—temporary disarmament—as 18 U.S.C. § 922(g)(8)(C)(i).⁴⁷ It sustained the constitutionality of the federal statute on that basis.⁴⁸ In this way, Step Two attempts “to apply faithfully the balance [of interests] struck by the founding generation to modern circumstances.”⁴⁹

Importantly, at Step Two, the government is not limited to historical statutes as evidence of a regulatory tradition. In its Step Two

38 Alicea, *supra* note 23, at 35–38, 54.

39 *Id.* at 32–35.

40 *Bruen*, 142 S. Ct. at 2130 (emphasis added).

41 *Id.* at 2133.

42 Alicea, *supra* note 23, at 35–36.

43 *Bruen*, 142 S. Ct. at 2134 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

44 *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) (citing *Bruen*, 142 S. Ct. at 2131–34).

45 See *Bruen*, 142 S. Ct. at 2133.

46 *Rahimi*, 144 S. Ct. at 1896.

47 See Alicea, *supra* note 23, at 51–60.

48 *Rahimi*, 144 S. Ct. at 1902.

49 *Bruen*, 142 S. Ct. at 2133 n.7.

analysis, *Bruen* relies on treatises,⁵⁰ the common law,⁵¹ state judicial opinions,⁵² and “the public discourse surrounding Reconstruction”⁵³ reflected in congressional hearings, government reports, and newspapers.⁵⁴ Thus, the government may rely on any historical source that points to a historical tradition of firearms regulation.⁵⁵

In short, *Bruen*’s two-step test is designed to recover the original “contours of the right” to keep and bear arms.⁵⁶ It does so by giving due importance to the text of the Second Amendment to determine whether the right to keep and bear arms is implicated in the case and to draw an “initial conclusion”⁵⁷ about the modern regulation’s constitutionality. It then turns to history to flesh out the substance of the right and determine definitively whether the right has been violated.

II. RIGHTS REVISIONISM

A. *The Revisionist Account*

With this understanding of *Bruen*’s methodology and assumptions in mind, let us turn to the account of rights offered by the rights revisionists. I do not contend that Campbell, Gienapp, and Greene agree on all aspects of the account I sketch here.⁵⁸ What matters, for my purposes, is that where Greene and Gienapp give an account of rights, their accounts are consistent with Campbell’s,⁵⁹ and because

50 *See id.* at 2143, 2148–49.

51 *Id.* at 2145–46.

52 *Id.* at 2146–47.

53 *Id.* at 2150.

54 *Id.* at 2150–52.

55 *See* Alicea, *supra* note 23, at 49–50.

56 *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024).

57 *Bruen*, 142 S. Ct. at 2127.

58 Greene, for instance, is concerned almost exclusively with rebutting the idea that constitutional rights were seen as judicially enforceable trumps on government action at the Founding. GREENE, *supra* note 10, at 7–13; Jamal Greene, Foreword, *Rights As Trumps?*, 132 HARV. L. REV. 28, 109–15 (2018). This is only one facet of the accounts given by Campbell and Gienapp. Gienapp, on the other hand, makes far more sweeping and categorical claims about how the Constitution was understood at the Founding than either Campbell or Greene, such as his claim that, at ratification, the “Constitution was not conventional law in any plain sense.” GIENAPP, *supra* note 9, at 158. *But see* Kevin C. Walsh, *In the Beginning There Was Positive Law: Section 25, Calder v. Bull, and Constitutional Continuity*, 36 YALE J.L. & HUMANS. 524, 533–40 (2026) (arguing—dispositively in my view—that Gienapp is mistaken about this); William Baude & Stephen E. Sachs, *Yes, The Founders Were Originalists*, 36 YALE J.L. & HUMANS. 346, 347–56 (2026) (same). I leave aside Gienapp’s broader claims because they go beyond my focus here on the Founding-era conception of rights.

59 Indeed, Gienapp largely relies on Campbell’s work for his understanding of rights at the Founding. *See* GIENAPP, *supra* note 9, at 93–100 & 299–302 nn.159–204 (relying extensively on Campbell’s work).

Campbell's is the most detailed account of rights among the three authors, I will mostly rely on Campbell in describing rights revisionism.

The revisionist account is rooted in a social-contractarian understanding of political authority.⁶⁰ On this view, we begin by imagining human beings in a state of nature, prior to any government.⁶¹ In a state of nature, all human beings enjoy natural rights, which are "capacities one could exercise without a government," such as the freedom to think, speak, and "enjoy the fruits of one's labor."⁶² While no political authority exists to regulate natural rights in a state of nature, such rights are nonetheless subject to the limitations of the natural law.⁶³

But we often have difficulty identifying the requirements of the natural law, and even when we do, it leaves innumerable matters of conduct underspecified, which makes social coordination in furtherance of the common good impossible.⁶⁴ The natural law does not, for example, tell us which side of the road to drive on to avoid injuring others, even though avoiding injuring others is generally a requirement of the natural law.⁶⁵ These features of natural law create the need for an authority to both identify and make more determinate the requirements of the natural law.⁶⁶ Accordingly, a group of people unanimously agree to leave the state of nature and enter into a social contract under which the group has political authority to regulate the actions of its members in furtherance of the common good.⁶⁷ This political society, in turn, delegates some portion of its power to a government.⁶⁸

But not just any kind of government. The people had to maintain control over their natural rights, which meant that only republican government was consistent with the social contract.⁶⁹ In Gienapp's words, "one protected liberty not by disabling government power but rather by empowering government in the right kind of way. This meant, above all, constructing representative institutions that, by

60 Campbell, *supra* note 8, at 929.

61 *Id.*

62 *Id.*

63 *Id.* at 930.

64 *See id.* at 931.

65 J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 22–23 (2022).

66 Campbell, *supra* note 8, at 931.

67 *Id.* at 929.

68 *Id.* at 929–30; *see* Letter from James Madison to Nicholas P. Trist (Feb. 15, 1830), *in* 1 THE FOUNDERS' CONSTITUTION 239, 240 (Philip B. Kurland & Ralph Lerner eds., 2000) (describing this two-step social compact).

69 Campbell, *supra* note 8, at 934.

embodying the people's will, protected the people's liberty."⁷⁰ A small class of natural rights were "inalienable" in the sense that they were "outside the political society's control" and were seen as "trumps" on government action.⁷¹ The right to self-defense was one such right, though the "boundaries" of inalienable rights—such as the conditions under which the use of violence for self-defense was permissible—remained determined by representative institutions.⁷² But most natural rights were "retained natural rights" subject to broad regulation in furtherance of the common good.⁷³ The people regulated their retained natural rights through various representative institutions, including the common law, legislatures, and juries.⁷⁴ Thus, "natural-rights discourse was as much about process as it was substance. For Americans, preserving rights mostly entailed preserving self-determination."⁷⁵

Specifications and regulations of natural rights through the common law or written positive law could—but did not always⁷⁶—give rise to "fundamental positive rights."⁷⁷ These rights "specif[ied] things that the government had to do or could not do."⁷⁸ Common law rights such as the freedom of the press and the right to a trial by jury,⁷⁹ as well as written, positive law rights not based in customary law like the right against bills of attainder,⁸⁰ were "'exceptions' to legislative authority."⁸¹ In the case of common law rights that had achieved this status, it was because they were "so strengthened by long usage as not to be

70 Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 1783, 1789 (2021).

71 Jud Campbell, *Fundamental Rights at the American Founding*, in 4 THE CAMBRIDGE HISTORY OF RIGHTS: THE EIGHTEENTH AND NINETEENTH CENTURIES 182, 186 (Dan Edelstein & Jennifer Pitts eds., 2025). While it is unclear whether Vincent Phillip Muñoz should be considered part of the rights-revisionist camp, he has written extensively about many of the same themes as they have. His writings on inalienable rights are an example. See VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES 53–59 (2022).

72 Campbell, *supra* note 71 (emphasis omitted).

73 *Id.* at 190–93; see also Jonathan Gienapp, Response, *The Foreign Founding: Rights, Fixity, and the Original Constitution*, 97 TEX. L. REV. ONLINE 115, 119 (2019).

74 See Campbell, *supra* note 8, at 934–37; GREENE, *supra* note 10, at 12.

75 Campbell, *supra* note 8, at 937.

76 Many specifications of natural rights did not achieve the status of fundamental positive rights and remained adjustable by representative institutions. See Campbell, *supra* note 71, at 194–95; Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL'Y 569, 576–77 (2017).

77 Campbell, *supra* note 71, at 196.

78 *Id.* at 195.

79 *Id.*

80 *Id.* at 196.

81 *Id.* at 195 (quoting Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 8 THE PAPERS OF JAMES MADISON, at 350, 351 (Robert A. Rutland et al. eds., 1973)).

repealable by the ordinary legislature.”⁸² Fundamental positive rights were judicially enforceable to the extent that their contours were clear,⁸³ and they functioned as “trumps” on government power.⁸⁴

Type of Right	Description
Inalienable Rights	Natural rights that are not subject to political authority under the terms of the social contract. Serve as trumps on government action.
Retained Natural Rights	Natural rights that are subject to general regulation by political authority to further the common good. Do not serve as trumps on government action.
Fundamental Positive Rights	Rights created by positive law as determinations, specifications, or implementations of natural rights. Such rights are so longstanding and widely accepted that they function as trumps on government action.

Figure 1. Categories of rights at the Founding according to Campbell.

By contrast, as noted above, retained natural rights were not seen as judicially enforceable exceptions to government power.⁸⁵ Rather, they were subject to regulation for the common good.⁸⁶ That meant that fundamental positive rights—even to the extent that they concretized natural rights—did not exhaust the content of natural rights. There always remained space within the domain of natural rights that did not function as judicially enforceable limits on government

82 *Id.* at 196 (quoting Federal Farmer, Letter VI (Dec. 25, 1787), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 979, 984 (John P. Kaminski et al. eds., 2004)).

83 *Id.* at 197.

84 Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 253 (2017).

85 Campbell, *supra* note 71, at 190–93; *see also supra* note 73 and accompanying text.

86 Campbell, *supra* note 71, at 190–93.

authority.⁸⁷ This area of non-concretized natural rights was safeguarded through representative institutions, as described earlier.⁸⁸

These three different types of rights—inalienable, retained, and fundamental positive—had implications for the enumeration of rights in texts like the federal Bill of Rights. Sometimes, a text merely declared the existence of a natural right, such as the free exercise of religion.⁸⁹ In such instances, the text did not specify the right's contours—the right was not a “textual object[.]”⁹⁰ Rather, the text was a “mere placeholder[.]”⁹¹ pointing the reader outside the text, requiring the reader “to identify the content of the law by referring to preexisting principles.”⁹² In other instances, the text served a specificatory function. In those cases, the text “create[d] positive, fundamental law by determining rights.”⁹³ That is, the text made more determinate the contours of a natural right or created positive law means of safeguarding that right such as “trial by jury, Habeas corpus laws, [and] free press[.]”⁹⁴ Where “lawmakers had textually specified the content of the law,” “a text-bound interpretive approach made sense,”⁹⁵ since “the content of the right depend[ed] on the verbal formula used to specify that right.”⁹⁶

To make matters more complicated still, sometimes a constitutional text, despite declaring a natural right, pointed readers to preexisting principles outside the text that functioned as trumps. As noted above, this could happen in two ways. A component of a natural right might be inalienable, in which case it was outside the power of government to regulate.⁹⁷ Or some aspect of the natural right had been concretized and settled through representative institutions like the common law to such an extent that it had become a fundamental positive

87 See Campbell, *supra* note 84, at 253, 256.

88 *Id.* at 276; see also *supra* note 74 and accompanying text.

89 See Campbell, *supra* note 71. For more discussion of the Free Exercise Clause in relation to declaratory rights, see MUÑOZ, *supra* note 71, at 23–40.

90 Campbell, *supra* note 8, at 941; see also Gienapp, *supra* note 73, at 119–21.

91 Campbell, *supra* note 8, at 941 (quoting Bilder, *supra* note 13).

92 *Id.* at 939; see also GIENAPP, *supra* note 9, at 91–100.

93 Campbell, *supra* note 8, at 938.

94 *Id.* at 945 (first alteration in original) (quoting Letter from Thomas Jefferson, Sec’y of State, to Noah Webster, Jr. (Dec. 4, 1790), in 18 THE PAPERS OF THOMAS JEFFERSON 131, 132 (Julian P. Boyd ed., 1971)); see also *id.* at 944 (“But even when altering their content, specificatory provisions rarely created rights out of whole cloth. Rather, they determined rights. Specificatory provisions thus did not challenge the received wisdom that rights predated government and that bills of rights were, in a sense, declaratory.” (emphasis omitted)).

95 *Id.* at 939.

96 *Id.* at 966.

97 See *supra* notes at 71–72 and accompanying text.

right.⁹⁸ For example, the Free Speech Clause is a declaratory provision that refers to a natural right, but part of the right to free speech included the *inalienable* natural right to make “well-intentioned statements of one’s views,”⁹⁹ which entailed “more determinate legal protection[.]” against government regulation.¹⁰⁰ The Free Press Clause, though part of a larger natural right to free expression, “often referred specifically to the rule against press licensing” or prior restraints, which had become a settled, fundamental positive rule that bounded legislative power.¹⁰¹ In these ways, components of declaratory constitutional provisions could sometimes serve as trumps, as illustrated in this simplified stacked Venn diagram:

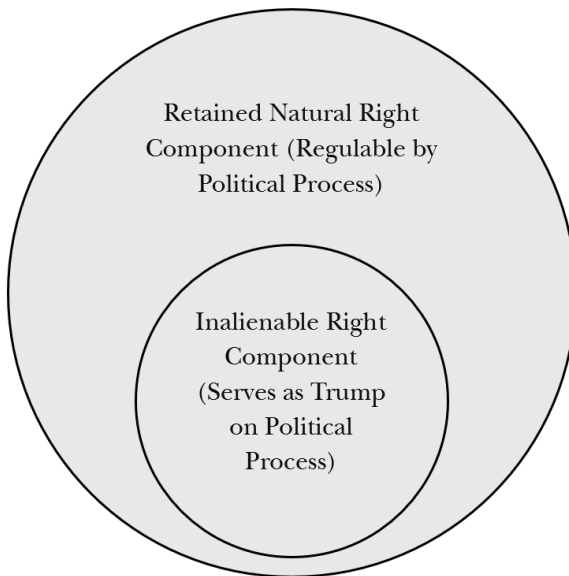


Figure 2. Possible components of a declaratory constitutional right.

Thus, identifying the scope of judicially enforceable, legislature-trumping rights was complex. One had to figure out whether a provision was declaratory or specificatory, and even once that had been done, one could not assume that a declaratory provision gave the legislature free rein to regulate for the common good. A careful parsing of preexisting law was necessary to make such distinctions.¹⁰²

98 See *supra* notes at 76–84 and accompanying text

99 Campbell, *supra* note 84.

100 *Id.*

101 *Id.*

102 See Campbell, *supra* note 8, at 940.

B. Distinguishing Rights Revisionism from Modern Rights Jurisprudence

This account of rights differs in several ways from the Supreme Court's rights jurisprudence since at least the 1960s.¹⁰³ First, it is firmly rooted in a natural law/natural rights conception of rights.¹⁰⁴ Under this view, some rights, though declared in written law, preexist political authority and are not created by legal text. Even those rights that are created through legal text are specifications of natural rights or prudential ways of safeguarding natural rights. By contrast, modern rights jurisprudence is heavily influenced by the idea that rights owe their existence to being part of the positive law and would not exist otherwise.¹⁰⁵

Second, rights revisionism generally contends that natural rights would be part of our fundamental positive law even if they had never been enumerated in the Constitution.¹⁰⁶ This assertion is related to, but is not logically entailed by, the rejection of positivistic notions of rights described in the preceding paragraph. By contrast, modern rights jurisprudence assumes that enumeration was required to elevate natural rights to the status of fundamental positive law superseding all other sources of positive law.¹⁰⁷

Third, and related to the first point, the rights-revisionist view places significantly less weight on the wording of textual declarations of natural rights. The text is a "mere placeholder[]" for principles that lie outside the text,¹⁰⁸ so it makes little sense to parse the text of the Free Speech Clause in the same way that one might sensibly parse the words of a purely positive law provision like the Recess Appointments Clause.¹⁰⁹

Fourth, this account of rights understands declaratory rights provisions like the Free Speech Clause to be "expansive in scope—applying to all forms of expression—but weak in their legal effect."¹¹⁰ Whereas modern rights jurisprudence generally conceives of rights as legal trumps on government action,¹¹¹ rights revisionism sees rights as trumps in only a limited domain, with the remaining space left open to reasonable government regulation for the common good.¹¹² It is

103 *Id.* at 927; GREENE, *supra* note 10, at 7.

104 Campbell, *supra* note 8, at 924–25.

105 Campbell, *supra* note 71, at 182.

106 *See* Campbell, *supra* note 8, at 923–24.

107 Campbell, *supra* note 71, at 182; Campbell, *supra* note 8, at 923–24.

108 Campbell, *supra* note 8, at 941 (quoting Bilder, *supra* note 13).

109 *See id.* at 939–40.

110 Campbell, *supra* note 84, at 259.

111 *See* Mark L. Rienzi, *Religious Liberty and Judicial Deference*, 98 NOTRE DAME L. REV. 337, 353–66 (2022) (demonstrating the triumph of the rights-as-trumps view).

112 *See* Campbell, *supra* note 84, at 276.

therefore skeptical of claims that the legal content of rights is fixed (whether through original meaning or by judicial decree), rather than subject to continuous elaboration and modification through representative institutions through time.¹¹³ As Greene has argued, “[T]he provisions of the Bill of Rights . . . [are] best viewed as protecting self-governance, not individual liberty from the majority.”¹¹⁴

Finally, as Campbell has pointed out, because of the central importance of representative institutions in maintaining the people’s control over their own rights, rights revisionism is antithetical to legal tests that arrogate to judges, rather than to the people, the role of determining the contours and limits of natural rights.¹¹⁵ The tiers of scrutiny, for example, are fundamentally at odds with the Founding-era conception of the judicial role in the adjudication of rights claims, since the tiers place judges, rather than representative institutions, in charge of determining rights.¹¹⁶

III. *BRUEN* AND RIGHTS REVISIONISM

Some of these distinctive features of rights revisionism have led Campbell and Gienapp to criticize *Bruen*’s methodology as inconsistent with the Founding-era conception of rights in at least two ways, which map onto the two steps of the *Bruen* analysis.

First, Campbell and Gienapp argue that *Bruen* Step One places too much weight on textual analysis given that the Second Amendment is declaratory of a natural right.¹¹⁷ Gienapp faults Step One for “beginning with” and “closely analyzing the precise formula of the text,” which he regards as contrary to the natural rights assumptions of the Founding.¹¹⁸ Campbell calls Step One the “most problematic” part of the *Bruen* analysis because it “derives the presumptive boundaries of the right through close textual analysis based on the meaning of the words at a particular moment in time, thus treating the Bill of Rights as a specificatory instrument.”¹¹⁹

113 See Campbell, *supra* note 8, at 978–81; GREENE, *supra* note 10, at 9.

114 GREENE, *supra* note 10, at 13.

115 Alicea, *supra* note 23, at 70–71 (analyzing Campbell’s work on this point).

116 *Id.* Here, Greene seems to disagree, advocating something like the tiers of scrutiny despite his rights revisionism. See GREENE, *supra* note 10, at xx, xxii–xxiii.

117 See Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS. 31, 51 (2020) (describing the right as a natural right). As noted below, *Bruen* likewise describes the right to keep and bear arms as a natural right. See *infra* notes 129–30 and accompanying text.

118 GIENAPP, *supra* note 9, at 216–17; see also Campbell, *supra* note 117, at 51–52.

119 Campbell, *supra* note 8, at 982; see also Jud Campbell, *Originalism and the Nature of Rights*, PANORAMA (Nov. 27, 2023), <https://thepanorama.shear.org/2023/11/27/originalism-and-the-nature-of-rights/> [<https://perma.cc/63JJ-ARBD>]; Campbell, *supra* note 117, at 51 n.145.

Second, Gienapp contends that *Bruen* Step Two presupposes that the Second Amendment is “fully determinate and non-regulable,” functioning as a trump on government action, but in fact the Second Amendment was meant to “ensure legitimate and robust self-governance” through representative institutions that could regulate the right to keep and bear arms through “precise[ly the] kind of means-ends analysis *Bruen* seeks to curb.”¹²⁰ Campbell likewise criticizes Step Two for assuming that the right to keep and bear arms was “fully determined from the get-go, barring subsequent determinations,” even while proceeding from “quasi-declaratory” premises.¹²¹ In Campbell’s view, “The net result is a jumbled interpretive method” that “undercuts democratic authority in countless ways that the Founders never intended.”¹²²

These criticisms of *Bruen* are mistaken. They rest on a combination of overstatement, a misunderstanding of *Bruen*’s methodology and premises, and, in some instances, a misreading of the historical record.

A. *The Role of the Text*

Let us begin with the criticisms of Step One and with a few points that the revisionist account gets right. The revisionist contention that the Founders were steeped in the natural law and natural rights traditions and would not have conceived of rights in positivist terms¹²³ is clearly correct and is, in fact, accepted even among scholars who disagree with the rights revisionists on other important points.¹²⁴ Campbell is spot-on in saying that the Founders would not have regarded the natural rights placed in the Bill of Rights as “textual objects.”¹²⁵ Rather, “When the text merely referred to a preexisting right . . . it was second nature to identify the content of the law by referring to preexisting principles.”¹²⁶

This understanding of the relationship between natural rights and constitutional text is fully consistent with Step Two of *Bruen*. Like *Heller*, *Bruen* starts from the premise that the Second Amendment “was not intended to lay down a novel principle but rather codified a right

120 GIENAPP, *supra* note 9, at 216–17.

121 Campbell, *supra* note 8, at 982; *see also* Campbell, *supra* note 119.

122 Campbell, *supra* note 8, at 982.

123 *See supra* notes 103–05 and accompanying text.

124 *See, e.g.,* Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J.L. & LIBERTY 1, 13–15 (2010).

125 *See* Campbell, *supra* note 8, at 941.

126 *Id.* at 939.

inherited from our English ancestors.”¹²⁷ In *Heller*’s words, the Second Amendment was “not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.”¹²⁸ *Bruen* affirms that “it has always been widely understood that the Second Amendment . . . codified a *pre-existing* right,”¹²⁹ one “rooted in ‘the natural right of resistance and self-preservation.’”¹³⁰ Thus, the “delineat[ion of] the contours of the right” is performed through historical analysis at Step Two,¹³¹ and in determining the contours of the right, the Court looks to the preexisting “principles underlying the Second Amendment.”¹³²

Nonetheless, Gienapp criticizes Step One for “closely analyzing the precise formula of the text.”¹³³ But from the premise that the text is merely declaratory of a preexisting right, it does not follow that the precise wording of the text should play no significant role in understanding the scope of the right. The First Congress paid careful attention to the wording of the Bill of Rights in an effort to capture—as much as the spare wording of its provisions allowed—the understanding of the rights that preexisted their enumeration. It therefore makes sense for *us* to pay careful attention to the words they chose.

There is ample historical evidence to support this conclusion.¹³⁴ During the congressional debates over the Bill of Rights, James Madison repeatedly urged his colleagues to “confine [them]selves to an enumeration of simple acknowledged principles.”¹³⁵ This meant that the wording of the amendments had to reflect such “simple

127 *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2127 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (alterations and internal quotation marks omitted)).

128 *Heller*, 554 U.S. at 592 (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1875)).

129 *Bruen*, 142 S. Ct. at 2127 (alteration in original) (quoting *Heller*, 554 U.S. at 592).

130 *Id.* at 2157 (Alito, J., concurring) (quoting *Heller*, 554 U.S. at 594).

131 *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024) (citing *Bruen*, 142 S. Ct. at 2126).

132 *Id.* at 1898.

133 GIENAPP, *supra* note 9, at 217.

134 For additional evidence, see Philip Hamburger, *Campbell’s Constitution* 30–33 (Mar. 18, 2026) (unpublished manuscript), <https://ssrn.com/abstract=6424878> [<https://perma.cc/A4SC-EA8H>].

135 See 1 ANNALS OF CONG. 766 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison), as reprinted in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 157, 167 (Helen E. Veit et al. eds., 1991); *Congressional Intelligence*, DAILY ADVERTISER (N.Y.), Aug. 17, 1789, reprinted in *CREATING THE BILL OF RIGHTS*, *supra*, at 150, 152 (statement of Rep. James Madison); *Sketch of Proceedings of Congress*, GAZETTE OF THE U.S., June 10, 1789, reprinted in *CREATING THE BILL OF RIGHTS*, *supra*, at 64, 66 (statement of Rep. James Madison); 1 ANNALS OF CONG. 441, 450, 459 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison), as reprinted in *CREATING THE BILL OF RIGHTS*, *supra*, at 69, 69, 79, 86.

acknowledged principles.” Indeed, in introducing his proposed amendments, Madison criticized the wording of some state declarations of rights for “limit[ing rights] too much to agree with the common ideas of liberty”—that is, for failing to accurately reflect the preexisting understanding of certain rights.¹³⁶

Given the goal of producing amendments whose text aligned with the well-accepted preexisting scope of the declared rights, it is not surprising that, throughout the debates over the Bill of Rights, members of the House objected to the wording of various proposed amendments for failing to achieve this goal. One such objection, for example, occurred during the debate over the Double Jeopardy Clause, when Egbert Benson resisted the wording of the draft clause as “contrary to the right heretofore established.”¹³⁷ Samuel Livermore disagreed, arguing that the wording was “declaratory of the law as it now stood,” such that “striking out the words” that Benson wanted to omit “would seem as if they meant to change the law by implication.”¹³⁸ Livermore sought to have the text reflect “the usages of law and practice among us.”¹³⁹ Similar concerns about the extent to which the text captured settled principles were expressed about the Self-Incrimination Clause,¹⁴⁰ the Cruel and Unusual Punishments Clause,¹⁴¹ and what would eventually become the Establishment and Free Exercise Clauses.¹⁴² Indeed, the wording of the proposed amendments underwent “considerable debate & alteration” in the words of Congressman William Loughton Smith.¹⁴³

136 1 ANNALS OF CONG. 456 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 69, 83.

137 *Id.* at 781 (statement of Rep. Egbert Benson), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 182, 186.

138 *Id.* at 782 (statement of Rep. Samuel Livermore), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 182, 186.

139 *Sketch of Proceedings of Congress*, GAZETTE OF THE U.S., Aug. 22, 1789, reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 179, 180 (statement of Rep. Samuel Livermore).

140 1 ANNALS OF CONG. 782 (1789) (Joseph Gales ed., 1834) (statement of Rep. John Laurance), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 182, 187 (expressing concern that “this clause contained a general declaration, in some degree contrary to laws passed”).

141 *Sketch of Proceedings*, *supra* note 139 (expressing concern that the words “bail” and “fines” were “indefinite” and that the clause had “no meaning”); 1 ANNALS OF CONG. 782 (1789) (Joseph Gales ed., 1834) (statement of Rep. Samuel Livermore), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 182, 187; *id.* (statement of Rep. William Loughton Smith) (agreeing that the clause was “too indefinite”).

142 Several members debated the wording of these provisions. See, e.g., 1 ANNALS OF CONG. 757 (1789) (Joseph Gales ed., 1834) (statement of Rep. Peter Silvester), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 157, 157.

143 Letter from William Smith to Otho H. Williams (Aug. 22, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 135, at 285, 285 (emphasis omitted); see PAULINE MAIER,

The debates over the Second Amendment, specifically, reinforce the notion that the Founders took care with the wording of constitutional provisions. When the House was considering the Second Amendment, the text included this caveat: “but no person, religiously scrupulous, shall be compelled to bear arms.”¹⁴⁴ Benson moved to strike this phrase from the amendment on the grounds that “it will be impossible to express it in such a manner as to clear it from ambiguity.”¹⁴⁵ The ambiguity of the text would be a problem, in Benson’s view, because it would license judges to intrude on a question that should be left “to the benevolence of the legislature.”¹⁴⁶ As Benson said: “If this stands part of the constitution, it will be a question before the judiciary, on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not.”¹⁴⁷ Benson saw the religious exemption as creating an unnecessary problem, since exemption from bearing arms in the militia was “no natural right” that had been recognized, and, presumably, because the goal was to enumerate only well-established rights, it would be “extremely injudicious to intermix matters of doubt with fundamentals.”¹⁴⁸ The implication of Benson’s speech being that those provisions that survived into the Bill of Rights should only be “fundamentals” of which there was no “doubt” to their previously settled nature.¹⁴⁹

Perhaps one or more of the provisions I just used as examples might be considered specificatory,¹⁵⁰ and since rights revisionists see specificatory amendments as textual objects, such examples would not seem as probative of the relevance of text for declaratory amendments. But as Campbell has observed, “even when debating declaratory

RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 453 (2010) (“The House made some minor changes in the amendments proposed by the committee of the whole, and some not so minor.”).

144 1 ANNALS OF CONG. 778 (1789) (Joseph Gales ed., 1834), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 182, 182.

145 *Id.* at 780 (statement of Rep. Egbert Benson), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 182, 184.

146 *Id.* at 779–80.

147 *Id.* at 780.

148 *Id.*

149 Benson’s motion lost. *Id.*; CREATING THE BILL OF RIGHTS, *supra* note 135, at 30 n.13. The Senate eventually stripped the religious exemption clause from what would become the Second Amendment. *Id.* at 38 n.13.

150 See, e.g., Campbell, *supra* note 117, at 40 (describing the Establishment Clause as specificatory, though without using that term). Insofar as Benson was right that the religious exemption provision of the Second Amendment was not a natural right and had no clear meaning in then-existing law (as fundamental positive rights would), this provision would be specificatory. See 1 ANNALS OF CONG. 780 (1789) (Joseph Gales ed., 1834) (statement of Rep. Egbert Benson), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 182, 184.

proposals, Congressmen remained attentive to the text.”¹⁵¹ In addition to the Double Jeopardy Clause example described above—which Campbell notes was intended to be “a declaratory restatement of the common-law rule”¹⁵²—Campbell gives the example of the debate over the Fourth Amendment.¹⁵³ Elbridge Gerry objected to the wording of the draft Fourth Amendment as “mistake[n]” and proposed a change that was adopted,¹⁵⁴ apparently—in Campbell’s interpretation—to “ensure” that the provision reflected preexisting principles.¹⁵⁵ Benson¹⁵⁶ and Livermore,¹⁵⁷ in turn, proposed further changes to the Fourth Amendment, which Benson described as a “declaratory provision,” but they were rejected.¹⁵⁸ A similar punctiliousness about wording is seen in discussion of a proposed declaratory amendment relating to speech, press, conscience, and trial-by-jury rights that was intended to bind the states,¹⁵⁹ and in discussion of the Prefatory Clause of the Second Amendment.¹⁶⁰ In short, as Campbell has said, because the goal was merely to declare uncontroversial principles, “members of the First Congress expressed agnosticism about the amendments alongside profound concern about their wording.”¹⁶¹ Thus, Campbell concludes, “Even with respect to declaratory provisions . . . the text and drafting history are probative evidence of how the right was understood.”¹⁶² There is no historical basis for criticizing *Bruen*’s attention to the text of the Second Amendment.

Unlike Gienapp, Campbell does not criticize *Bruen* for paying attention to the text. Rather, he argues that *Bruen* places *too much weight* on the text because it “derives the presumptive boundaries of the right through close textual analysis based on the meaning of the words at a

151 Campbell, *supra* note 8, at 963.

152 *See id.*

153 *Id.* at 963–64.

154 1 ANNALS OF CONG. 783 (1789) (Joseph Gales ed., 1834) (statement of Rep. Elbridge Gerry), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 182, 188.

155 *See* Campbell, *supra* note 8, at 964.

156 1 ANNALS OF CONG. 783 (1789) (Joseph Gales ed., 1834) (statement of Rep. Egbert Benson), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 182, 188. (arguing that the wording was “not sufficient”).

157 *Id.* (statement of Rep. Samuel Livermore) (suggesting a change in wording to make the clause “an affirmative proposition”).

158 *Id.* (statement of Rep. Egbert Benson).

159 *See id.* at 784 (statement of Rep. Samuel Livermore), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 182, 189 (arguing that the language was “not well expressed”).

160 *See id.* at 780 (statement of Rep. Elbridge Gerry), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 182, 184 (objecting to the wording “on account of the uncertainty with which it is expressed”).

161 Campbell, *supra* note 8, at 964.

162 *Id.* at 976.

particular moment in time.”¹⁶³ Essentially, Campbell criticizes *Bruen* for shifting the burden to the government at Step Two based on the textual analysis at Step One, since the text was supposed to be a “mere placeholder[]” for the principles outside of the text.¹⁶⁴

But if, as Campbell rightly says, the First Congress demonstrated “profound concern about [the] wording” of declaratory provisions like the Second Amendment,¹⁶⁵ and if the reason the First Congress paid such close attention to the text was, in Samuel Livermore’s words, to ensure that they were “declar[ing] . . . the law as it [then] stood,”¹⁶⁶ it makes sense to treat a violation of the text as *prima facie* evidence of a violation of the underlying right. True, as Madison conceded, the text could only describe the right as well as “the nature of the language would admit.”¹⁶⁷ We know that there were, in fact, aspects of the right that were not fully captured by the text, such as the regulatory tradition recognized in *Rahimi* of permitting temporary disarmament of those who “pose[] a clear threat of physical violence to another.”¹⁶⁸ But that is why *Bruen* only establishes a *presumption* based on Step One’s textual analysis, a presumption that can be rebutted after Step Two’s historical analysis recovers the more precise scope of the right. But *Bruen*’s notion that the text can provide *prima facie* evidence of a rights violation is well-grounded in the debates of the First Congress.

Indeed, we see a heavy emphasis on the text of a declaratory rights provision in the first major constitutional rights dispute of the early Republic: the fight over the Sedition Act. This text-based approach was consistent with a general emphasis on text in the interpretation of the Constitution in the early Republic,¹⁶⁹ both among judicial¹⁷⁰ and non-judicial¹⁷¹ actors. Critics of the Sedition Act often claimed that the plain text of the First Amendment was *sufficient* to demonstrate the Act’s unconstitutionality, not just *prima facie* evidence of it.¹⁷²

163 *Id.* at 982.

164 *Id.* at 939, 941 (quoting Bilder, *supra* note 13).

165 *Id.* at 964.

166 1 ANNALS OF CONG. 782 (1789) (Joseph Gales ed., 1834) (statement of Rep. Samuel Livermore), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 182, 186.

167 *Id.* at 758 (statement of Rep. James Madison), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 157, 158.

168 United States v. Rahimi, 144 S. Ct. 1889, 1901 (2024).

169 See DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS 26–27 (2020); Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution,”* 72 IOWA L. REV. 1177, 1187–97 (1987).

170 See CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 39–51 (rev. ed. 1994).

171 See *id.* at 17–38.

172 See, e.g., 8 ANNALS OF CONG. 2105 (1798) (statement of Rep. Nathaniel Macon) (arguing that the bill “directly violated the letter of” the Press Clause); *id.* at 2106–07 (statement of Rep. Joseph McDowell) (expressing hope that, after the text of the First

Congressman Nathaniel Macon, for example, responded to a defense of the Act by Massachusetts's Harrison Gray Otis by stating: "When the words of the Constitution were so express, it seems impossible they could be understood as the gentleman from Massachusetts had represented them."¹⁷³ Madison strongly condemned the Sedition Act as "positively forbidden by" the First Amendment's text.¹⁷⁴ It is a striking fact that only seven years after ratification of the Bill of Rights, in the first major dispute over constitutional rights, one side invoked the text of a declaratory provision as strong evidence of unconstitutionality. These early interpreters apparently saw no problem with placing such weight on the text. Nor should we find *Bruen*'s more modest reliance on the text objectionable.

B. *The Fixed Legal Content of the Right*

A similar dynamic is present at Step Two: The rights revisionists assail *Bruen* on grounds that either misunderstand *Bruen*'s methodology or that, on the revisionists' own historical account, ought not be objectionable. As a reminder, Gienapp and Campbell criticize Step Two for treating the content of rights as "fully determined from the get-go, barring subsequent determinations."¹⁷⁵ In Campbell's words, *Bruen* assumes that "the First Congress struck the balance when it adopted the Bill of Rights, and there's simply no more balancing to do."¹⁷⁶

1. Terminological Disputes

In evaluating this critique, it is important to begin by showing that part of the disagreement between Campbell and *Bruen* is a terminological one that, while perhaps conceptually important, does not affect

Amendment was read, "the unconstitutionality of this bill would have been so evident, that it would have been rejected without debate"; *id.* at 2142 (statement of Rep. John Nicholas) (arguing that the bill was unconstitutional given that "the prohibition is express, 'shall pass no law to abridge'").

173 See *id.* at 2151 (statement of Rep. Nathaniel Macon). Campbell and Gienapp argue that the Sedition Act debates reflect a change in the understanding of rights after the First Congress. Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 561–67 (2019); Gienapp, *supra* note 73, at 126–31. I will respond to that argument below.

174 James Madison, Virginia Resolutions of 1798, *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528, 528 (Jonathan Elliot ed., 2d ed. 1836).

175 Campbell, *supra* note 8, at 982; see GIENAPP, *supra* note 9, at 216–17.

176 Jud Campbell, The History of Natural Law in American Law, at 12:57 (Mar. 20, 2024), <https://cit.catholic.edu/events/the-history-of-natural-law-in-american-law/> [<https://perma.cc/GJP9-J2HN>]. These remarks were given at an event co-sponsored by the Center for the Constitution and the Catholic Intellectual Tradition, which I direct.

how courts should adjudicate rights disputes. Recall Campbell's distinction between retained natural rights that are regulable by the government for the common good and inalienable rights or fundamental positive rights that serve as trumps on government action (see the chart above).¹⁷⁷ And keep in mind that any given enumerated constitutional right might map onto one or more of these three categories of rights. For instance, Campbell acknowledges that declaratory constitutional rights can contain a mixture of retained natural rights on the one hand and inalienable or fundamental positive rights on the other, such that some aspects of a constitutional right are subject to regulation for the common good while others are not (see the Venn diagram above).¹⁷⁸ In his view, that is true of the Free Speech and Press Clauses of the First Amendment, which he claims "recognized any customary legal principles that protected speech and the press while also recognizing that, apart from these rules, Congress was otherwise free to limit expression in pursuit of the public good."¹⁷⁹

This typology is consistent, in application, with how *Bruen* understands the Second Amendment. *Bruen* uses text and history to identify the fixed legal content of the right while otherwise allowing legislatures to regulate for the common good. To be clear, I am not arguing that *Bruen* consciously adopts the understanding and categorization of rights Campbell articulates. Rather, my point is that, when *Bruen* simultaneously asserts that its methodology does not impose a "regulatory straightjacket"¹⁸⁰ and that "[t]he Second Amendment 'is the very *product* of an interest balancing by the people,'"¹⁸¹ it says nothing that, in application, necessarily contradicts Campbell's notion that some conduct involving firearms remains subject to regulation while other conduct does not. Campbell calls the domain subject to regulation *retained natural rights*,¹⁸² whereas *Bruen* seems to conceive of that same domain as simply *not part of the right*.¹⁸³ Campbell calls the domain of fixed legal content *fundamental positive rights*,¹⁸⁴ whereas *Bruen* seems to conceive of that same domain as simply *the right*.¹⁸⁵ But both ways of thinking about rights agree that there is some conduct involving firearms subject to regulation and other conduct that is not subject to regulation.

177 See *supra* Figure 1; *supra* notes 71, 76–88 and accompanying text.

178 See *supra* Figure 2; *supra* notes 99–101 and accompanying text.

179 Campbell, *supra* note 84, at 307.

180 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022).

181 *Id.* at 2131 (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008)).

182 Campbell, *supra* note 71, at 190–191.

183 See e.g., *Bruen*, 142 S. Ct. at 2129–30.

184 Campbell, *supra* note 71, at 196. Recall that fundamental positive rights are those that have been "so strengthened by long usage as not to be repealable by the ordinary legislature." *Id.* (quoting Federal Farmer, *supra* note 82).

185 See e.g., *Bruen*, 142 S. Ct. at 2129–30.

They simply disagree about how to *describe* the boundary between the two domains, as illustrated by these simplified Venn diagrams (*Bruen*'s on the left and Campbell's on the right):

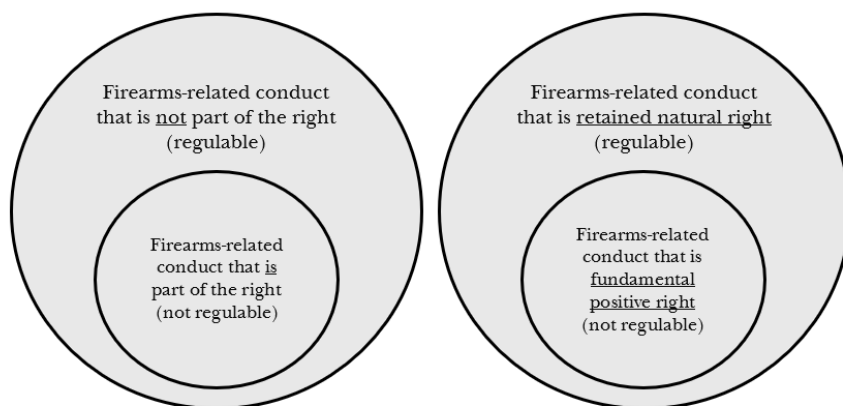


Figure 3. Comparison of *Bruen*'s and Campbell's typologies.

In fact, insofar as the Second Amendment “referred *exclusively*” to “more determinate customary rules, without directly recognizing a retention of the broader (but shallower) natural right,”¹⁸⁶ then there would be no tension *at all* between *Bruen*'s description of the Second Amendment and Campbell's. *Bruen* and Campbell would agree that the domain of fixed legal content simply *was* “the right” declared by the Second Amendment, with no retained natural right recognized by the text. Campbell notes the possibility of this interpretation in the First Amendment context and points out that “Federalists in the late 1790s . . . often interpreted the First Amendment in precisely this way.”¹⁸⁷ The same could, in principle, be true of the Second Amendment. But the larger point here is that, even if the Second Amendment does recognize a domain of retained natural rights, one could easily

186 See Campbell, *supra* note 84, at 307.

187 *Id.* Indeed, Michael McConnell has argued that the Ninth Amendment reinforces this understanding of enumerated constitutional rights. In his view, the Ninth Amendment was designed to make clear that the non-judicially enforceable retained natural rights domain was not abolished by virtue of codifying the judicially enforceable fundamental positive rights domain, such that the enumerated rights operate as trumps against any government action that falls within their scope. See McConnell, *supra* note 124, at 18–25. I find McConnell's interpretation of the Ninth Amendment persuasive, which is why it does not trouble me—as it does Campbell and Randy Barnett—to draw such a clear distinction between enumerated and unenumerated natural rights for purposes of judicial review. See Campbell, *supra* note 76, at 583–91; Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 76–78 (2006).

redescribe *Bruen*'s methodology to accord with Campbell's conceptual categories.

Having identified this terminological dispute, we can now see that, under *Bruen*—as redescribed using Campbell's terminology—there is a good deal more “balancing to do,”¹⁸⁸ as legislatures make “subsequent determinations” about the retained natural rights component of the constitutional right to keep and bear arms.¹⁸⁹ For example, as *Bruen* noted, there is a historical tradition allowing legislatures to determine whether to prohibit the possession of arms in “sensitive places” defined by certain criteria.¹⁹⁰ Because prohibiting possession of arms in such places does not offend the fixed legal content of the Second Amendment (content derived from either inalienable rights or fundamental positive rights), such regulation occurs within the domain of retained natural rights. It is therefore within the legislature's power to decide whether to prohibit such arms and in which locations (provided that those locations satisfy the historical criteria for sensitive places).¹⁹¹

Indeed, within the domain of retained natural rights subject to government regulation, *Bruen* enables democratic action by taking away from judges the power to override—on the basis of their own normative views—the legislature's quintessentially political judgments about the common good.¹⁹² That is why *Bruen* abjures the tiers of scrutiny, which it sees as a “judge-empowering ‘interest-balancing inquiry’”¹⁹³ that made constitutional rights into “the evolving product of federal judges.”¹⁹⁴ As Campbell has argued, such interest-balancing by judges was antithetical to the Founding-era conception of the judicial role,¹⁹⁵ and to that extent, *Bruen* is a vindication of legislative power over the adjustment of rights and duties for the common good.¹⁹⁶

188 Campbell, *supra* note 176, at 13:03.

189 Campbell, *supra* note 8, at 982.

190 *Bruen*, 142 S. Ct. at 2133 (quoting David B. Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 236 (2018)).

191 See Alicea, *supra* note 23, at 37, 54.

192 *Id.* at 65–77.

193 *Bruen*, 142 S. Ct. at 2129 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008)).

194 *Id.* at 2133 n.7.

195 See Alicea, *supra* note 23, at 71 (describing Campbell's account of the role of courts at the Founding).

196 See *Heller v. District of Columbia*, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (arguing that governments seemingly “have *more* flexibility and power to impose gun regulations under a test based on text, history, and tradition than they would under strict scrutiny”).

2. The Scope of Fixed Legal Content

Since Campbell acknowledges that some component of declaratory constitutional rights can be fixed and is not subject to regulation, his objection to *Bruen*'s methodology is better formulated as an objection to *how much* of the constitutional right to keep and bear arms *Bruen* regards as fixed. He thinks that, because the rights claimant's success at Step One creates a presumption against government regulation, because Step One's presumption is based on the text of the Amendment, and because the text of the Amendment is broad and "unqualified,"¹⁹⁷ *Bruen*'s methodology is likely to result in a constitutional right with a broad domain of fixed, non-regulable content, which Campbell believes is an inaccurate understanding of how much of the Second Amendment's content was fixed.¹⁹⁸ That is why he claims that *Bruen*'s methodology "undercuts democratic authority in countless ways that the Founders never intended."¹⁹⁹ Essentially, Campbell believes that the inner circle of the following Venn diagram should be quite small, while *Bruen*'s methodology results in an inner circle that is much bigger:

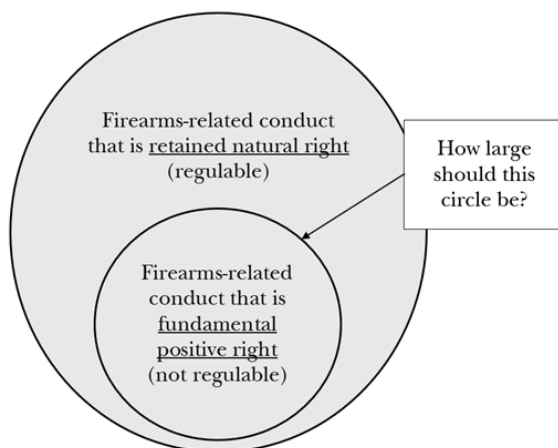


Figure 4. Regulable versus non-regulable domains of the Second Amendment.

But it is fair to ask how Campbell can be so confident that the Second Amendment does not enshrine a constitutional right with

197 *Bruen*, 142 S. Ct. at 2126 (quoting *Konigsberg v. State Bar*, 366 U.S. 36, 50 n.10 (1961)).

198 See Campbell, *supra* note 8, at 982.

199 See *id.*

expansive fixed content. During debates over the ratification of the original Constitution,²⁰⁰ during debates over the Bill of Rights in the First Congress,²⁰¹ and during debates over the Sedition Act,²⁰² there were many statements indicating a conception of the Bill of Rights as primarily composed of fixed legal content that trumped legislative authority.²⁰³ These statements often described enumerated rights as exceptions to, or the opposite of, legislative power.²⁰⁴ And as Campbell

200 See, e.g., Debates in the Convention of the Commonwealth of Massachusetts (Jan. 23, 1788) (statement of Gen. Samuel Thompson), in 2 DEBATES, *supra* note 174, at 1, 80 (“But where is the bill of rights which shall check the power of this Congress; which shall say, *Thus far shall ye come, and no farther.* The safety of the people depends on a bill of rights.”); The Debates in the Convention of the State of Pennsylvania (Oct. 28, 1787) (statement of James Wilson), in 2 DEBATES, *supra* note 174, at 415, 436 (“A bill of rights annexed to a constitution is *an enumeration of the powers* reserved.”); Debates in the Convention of the State of North Carolina (July 28, 1788) (statement of James Iredell), in 4 DEBATES, *supra* note 174, at 1, 149 (“If we had formed a general legislature, with undefined powers, a bill of rights would not only have been proper, but necessary; and it would have then operated as an exception to the legislative authority in such particulars.”).

201 See, e.g., 1 ANNALS OF CONG. 743 (1789) (Joseph Gales ed., 1834) (statement of Rep. William Loughton Smith), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 112, 126 (describing the U.S. Bill of Rights as “nothing like” the “amendments made to the constitution of Great-Britain” because Parliament’s power was “absolute without control” in relation to those rights); Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 135, at 218, 218 (“[I]n the arguments in favor of a declaration of rights you omit one which has a great weight with me, the legal check which it puts into the hands of the judiciary.”).

202 See, e.g., Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, in 4 DEBATES, *supra* note 174, at 540, 540–41 (arguing that the First Amendment “withheld from the cognizance of federal tribunals” any authority over the subjects of the Amendment); Madison’s Report on the Virginia Resolutions, in 4 DEBATES, *supra* note 174, at 546, 571 (arguing that the First Amendment, “instead of supposing in Congress a power that might be exercised over the press, provided its freedom was not abridged, meant a positive denial to Congress of any power whatever on the subject”).

203 For additional evidence and argumentation, see Hamburger, *supra* note 134, at 19–41.

204 Randy Barnett has argued that the best way to implement the Founding-era conception of rights is to see rights as “exceptions” to government power only insofar as the government either “prohibit[s] or unnecessarily regulate[s] rightful behavior.” See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 236–37, 262 (2004). Where the government does not prohibit rightful conduct, or regulates rightful conduct in the service of the common good, rights would not operate as trumps on government action. *Id.* While I acknowledge that there is a conceptual distinction between prohibiting conduct rather than regulating it, I do not think Madison and other Founders shared Barnett’s view of when rights operate as trumps. As I read the historical materials, the Founders did not draw the distinctions Barnett does when describing the “exceptions” to government power. Rather, they seemed to see constitutional rights as categorically trumping government action within the right’s domain because such enumerated rights had expansive fixed legal content. See *supra* Section III.B. Nonetheless, I note Barnett’s view here because it is distinct from either my view or Campbell’s. Whereas I perceive declaratory constitutional rights as likely containing expansive fixed legal content, and Campbell

has acknowledged, descriptions of “exceptions” to legislative power at the Founding were indicative of rights that served as trumps.²⁰⁵

I do not claim that this is the *only* view found in such debates; any fair reading of the historical record would acknowledge differing conceptions of constitutional rights that existed at the Founding.²⁰⁶ Nor do I dispute that the Founders sometimes had political incentives to emphasize certain understandings of rights.²⁰⁷ And, of course, any truly comprehensive analysis of the nature of constitutional rights at the Founding would require more than highlighting statements during the ratification debates and in Congress; it would require a true immersion in the historical sources.²⁰⁸ (Though it is worth noting that my historical survey below is no different from Campbell and Gienapp’s in focusing on “elite political debates, often held in formal settings, especially on the floors of the first Congresses.”²⁰⁹) Nonetheless, in light of the many statements reflecting something like a rights-as-trumps view, there is strong evidence that the dominant conception of constitutional rights at the Founding assumed a large domain of fixed legal content that was not regulable by the legislature.

At the Virginia ratification debate, for instance, James Monroe urged the need for a bill of rights to “expressly secure[] *or except*[]” rights from the federal government’s “general power.”²¹⁰ The language of “exception,” as noted above, typically indicated a rights-as-

perceives them as likely containing little fixed legal content, Barnett seems to fall somewhere in the middle. I thank Barnett for bringing these nuances to my attention.

205 Campbell, *supra* note 71, at 195 (quoting Letter from James Madison to Caleb Wallace, *supra* note 81) (describing a speech by Madison using such language as referring to rights that, in Campbell’s words, “could not ‘be altered or abolished by the ordinary laws’” (quoting Federal Farmer, *supra* note 82, at 983)).

206 See, e.g., 1 ANNALS OF CONG. 459 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Jackson), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 69, 86 (A bill of rights was unnecessary to protect against legislative infringement because “[d]o we not belong to the mass of the people? Is there a single right but, if infringed, will affect us and our connections as much as any other person?”). This statement is consistent with the rights revisionists’ argument that “Americans did not think that individual liberty was protected primarily through limiting government; rather they assumed that liberty was often best protected by empowering government ‘in the right kind of way.’” Gienapp, *supra* note 73 (emphases omitted) (quoting GIENAPP, *supra* note 11, at 166); see GREENE, *supra* note 10, at 13.

207 See Campbell, *supra* note 173, at 548–51.

208 See GIENAPP, *supra* note 9, at 40–44.

209 See GIENAPP, *supra* note 11, at 13; Campbell, *supra* note 84, at 260 n.47.

210 The Debates in the Convention of the Commonwealth of Virginia (June 10, 1788) (statement of James Monroe), in 3 DEBATES, *supra* note 174, at 1, 218 (emphasis added).

trumps view.²¹¹ Alexander Hamilton used the same language in describing constitutional rights.²¹²

During the First Congress, when introducing the amendments that would become the Bill of Rights, Madison contrasted the status of rights under the British Constitution,²¹³ which were “unguarded,”²¹⁴ with the bill of rights he was proposing, which would “limit and qualify the powers of government, by excepting out of the grant of power

211 Monroe’s description of a bill of rights as doing something to “secure[]” rights that would otherwise be left *insecure* is likewise consistent with the notion that enumerating constitutional rights would give them a different status vis-à-vis government power, though I acknowledge that that is not the only possible interpretation. See, e.g., Debates in the Convention of the Commonwealth of Massachusetts, *supra* note 200 (Jan. 30, 1788) (statement of Samuel Nason), in 2 DEBATES, *supra* note 174, at 1, 134 (“[L]et us consider the Constitution without a bill of rights. When I give up any of my natural rights, it is for the security of the rest; but here is not one right secured, although many are neglected.”); The Debates in the Convention of the Commonwealth of Virginia, *supra* note 210 (June 5, 1788) (statement of Patrick Henry), in 3 DEBATES, *supra* note 174, at 1, 44 (“The rights of conscience, trial by jury, liberty of the press, all your immunities and franchises, all pretensions to human rights and privileges, are rendered insecure, if not lost, by this change [of government proposed by the Constitution], so loudly talked of by some, and inconsiderately by others.”); *id.* (June 7, 1788), in 3 DEBATES, *supra* note 174, at 1, 137; Debates in the Convention of the State of North Carolina, *supra* note 200 (statement of Samuel Spencer), in 4 DEBATES, *supra* note 174, at 1, 137 (“There is no declaration of rights, to secure to every member of the society those unalienable rights which ought not to be given up to any government. Such a bill of rights would be a check upon men in power.”).

212 THE FEDERALIST NO. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.”).

213 There are other statements like this in which the Founders contrasted the legal status of rights under the British constitution with the legal status of rights under the U.S. Constitution. See, e.g., 1 ANNALS OF CONG. 743 (1789) (Joseph Gales ed., 1834) (statement of Rep. William Loughton Smith), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 112, 126. Statements like these, in addition to other evidence, are why I am deeply skeptical of the continuity that Campbell and Gienapp see between the British understanding of rights regulation and the American understanding of rights regulation. See *infra* note 304.

214 1 ANNALS OF CONG. 453 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 69, 81. As in the ratification debates, there were many statements during the Bill of Rights debates of the First Congress describing a Bill of Rights as necessary to secure rights that were otherwise insecure. See, e.g., *id.* at 443 (statement of Rep. Benjamin Goodhue), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 69, 72 (describing the proposed amendments as “secur[ing] in a stronger manner [the people’s] liberties from the inroads of power”); *id.* at 760 (statement of Rep. Elbridge Gerry), as reprinted in CREATING THE BILL OF RIGHTS, *supra* note 135, at 153, 160 (Rights of expression “ought to be secure,” and that “can only be done by making a declaration to that effect in the constitution.”).

those cases in which the government ought not to act, or to act only in a particular mode.”²¹⁵ Notably, Madison made his comments after identifying categories of rights akin to Campbell’s typology of inalienable natural rights, retained natural rights, and fundamental positive rights, while maintaining that “whatever may be the form” of a bill of rights, its purpose was to lay down “exceptions” to government power.²¹⁶ And to drive the point home—and contrary to Greene’s assertion that “[t]he backers of the Bill of Rights were not interested in protecting minorities from majority tyranny”²¹⁷—Madison repeatedly characterized bills of rights as operating “against the majority in favor of the minority.”²¹⁸

Famously, Madison followed these statements up by pointing out that, once a bill of rights was added to the Constitution:

[I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.²¹⁹

As Campbell has noted, natural rights were generally not judicially enforceable unless some component of them had become sufficiently determinate and established in law to become fundamental positive rights.²²⁰ Madison’s description of the judiciary as an “impenetrable bulwark” against legislative power based on “rights expressly stipulated

215 *Id.* at 454 (statement of Rep. James Madison), as reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 135, at 69, 81; see *id.*, as reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 135, at 69, 80 (describing bills of rights as “barriers against power”); *id.*, as reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 135, at 69, 81 (describing enumerated rights as “exceptions” to power); *id.* at 456, as reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 135, at 69, 83 (same).

216 *Id.* at 454, as reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 135, at 69, 81.

217 GREENE, *supra* note 10, at 13.

218 1 ANNALS OF CONG. 454 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison), as reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 135, at 69, 81; *id.* at 454–55 (“The prescriptions in favor of liberty, ought to be levelled against that quarter where the greatest danger lies But this is not found in either the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority.”); *Sketch of Proceedings*, *supra* note 135, reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 135, at 64, 67 (“[T]he great danger lies not in the Executive, but in the great body of the people—in the disposition which the majority always discovers, to bear down, and depress the minority.”).

219 1 ANNALS OF CONG. 457 (1789) (Joseph Gales, ed., 1834) (statement of Rep. James Madison), as reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 135, at 69, 83–85.

220 Campbell, *supra* note 71, at 190–97.

for in the constitution by the declaration of rights”²²¹—without a similar description of the legislature’s ongoing power to regulate such rights—suggests a relatively expansive view of the fixed content of those rights. Such a rights-as-trumps view would be consistent with Madison’s later position in the Virginia Resolutions of 1798²²² and with Thomas Jefferson’s views expressed in a letter to Madison in March 1789.²²³ It would be the same understanding of the inverse relationship between rights and powers captured in Madison’s letter to George Washington in December 1789, where Madison said: “If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured . . . by declaring that they shall not be abridged . . . , or that the former shall not be extended.”²²⁴

Campbell is of course aware of all these statements, and he devotes considerable time to offering an alternative interpretation of Madison’s remarks about the Bill of Rights to support his view that Madison did not, in fact, hold a rights-as-trumps understanding of the Bill of Rights.²²⁵ Respectfully, I find Campbell’s interpretation rather strained and difficult to square with what Madison says.²²⁶ It is worth noting, in this regard, that by Campbell’s own account, the vast majority of scholars have interpreted Madison’s remarks as I do.²²⁷

The same theme of rights-as-trumps is found on both sides of the Sedition Act debates.²²⁸ Campbell points out that “Federalists in the late 1790s . . . often interpreted the First Amendment” as referring

221 1 ANNALS OF CONG. 457 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison), *as reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 135, at 69, 83–84.

222 Madison’s Report on the Virginia Resolutions, *supra* note 202 (describing the Press Clause as “a positive denial to Congress of any power whatever on the subject”).

223 Letter from Thomas Jefferson to James Madison, *supra* note 201, at 218–19 (describing a bill of rights as potentially “cramp[ing] government in it’s useful exertions” and as “put[ting] into the hands of the judiciary” a “legal check” on government power).

224 Letter from James Madison to President George Washington (Dec. 5, 1789), *in* 5 DOCUMENTARY HISTORY, *supra* note 82, at 221, 222.

225 See Campbell, *supra* note 8, at 947–67.

226 Stephanie Barclay makes a similar argument against Campbell’s interpretation of Madison’s remarks. See Stephanie Hall Barclay, *Constructing Constitutional Rights*, 138 HARV. L. REV. F. 140, 152–54 (2025).

227 See Campbell, *supra* note 76, at 570 n.3 (collecting sources); see also MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 574 (2016) (describing Madison as having “embrac[ed] Jefferson’s argument [about the judicial enforceability of the Bill of Rights] as his own”).

228 As shown later in this paragraph, though the Federalists and Republicans differed in the extent to which they looked to the common law to fill in the content of the First Amendment, they both manifested a rights-as-trumps view, with the Federalists looking primarily to the common law as a trump and the Republicans looking primarily to the text as a trump.

“exclusively to . . . more determinate customary rules, without directly recognizing a retention of the broader (but shallower) natural right.”²²⁹ John Allen, for example, asserted that “[t]he freedom of the press and opinions was never understood to give the right of publishing falsehoods and slanders, nor of exciting sedition, insurrection, and slaughter, with impunity.”²³⁰ Harrison Gray Otis agreed: “The terms ‘freedom of speech and of the press,’ he supposed, were a phraseology perfectly familiar in the jurisprudence of every State, and of a certain and technical meaning.”²³¹ The “technical meaning” accorded with “the definitions of the English law, and provided for the punishment of defamatory and seditious libels” like those outlawed by the Sedition Act.²³²

On the Republican side, Gienapp observes that they “were conceiving an important set of liberties as absolute barriers against government interference, as discrete privileges or immunities that stood in opposition to the very thrust of government power.”²³³ Republicans did not disagree with the Federalists about the importance of preexisting law (such as the common law) in giving content to the right. Edward Livingston, for example agreed that the proper question was “what was the liberty enjoyed at the time this declaration was agreed to.”²³⁴ But Madison thought the content of the right to the freedom of the press was much broader under American law by 1789 than it had been under the British common law.²³⁵

Taken together with our earlier discussion of the role of constitutional text,²³⁶ what emerges from the Sedition Act debates is an approach to resolving constitutional rights disputes that gives great weight to the text of declaratory provisions like the Free Speech and Free Press Clauses, looks to preexisting law (like the common law) to recover the full content of the right, and treats the right as a trump on government action. In short, what emerges is something that looks an awful lot like *Bruen*’s methodology and its conception of rights.

229 Campbell, *supra* note 84, at 307 (emphasis omitted).

230 8 ANNALS OF CONG. 2097 (1798) (statement of Rep. John Allen).

231 *Id.* at 2147 (statement of Rep. Harrison Gray Otis).

232 *Id.* at 2148.

233 Gienapp, *supra* note 73, at 129.

234 8 ANNALS OF CONG. 2153 (1798) (statement of Rep. Edward Livingston).

235 See Madison’s Report on the Virginia Resolutions, *supra* note 202, in 4 DEBATES, *supra* note 174, at 546, 570 (“The state of the press . . . under the common law, cannot, in this point of view, be the standard of its freedom, in the United States.”); *id.* (“In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . .”).

236 See *supra* Section III.A

Campbell and Gienapp argue that the Republicans' understanding of rights, in particular, was a departure from the understanding prevalent in 1789.²³⁷ But Gienapp concedes that the "Republicans claimed merely to be restoring the original fixed meaning of the First Amendment"²³⁸ and that the Anti-Federalists "beg[a]n to lay the groundwork" for the Republicans' view a decade earlier.²³⁹ Thus, to discount the rights-as-trumps views that were prevalent by 1798, one would have to believe that the conception of rights had changed radically in less than a decade, even though those advocating rights as trumps in 1798 claimed to be faithful to the original meaning of the First Amendment and even though some of them had played a role in enacting the First Amendment. While it is possible that Campbell and Gienapp are right to discount the views manifested during the Sedition Act debates, it seems more likely that the understanding of rights that was dominant in 1798 was also dominant in 1789.

The repeated descriptions of the Bill of Rights as exceptions to government power throughout the late 1780s and into the 1790s are not easily reconciled with the rights revisionists' argument that the Bill of Rights did not primarily operate as a trump on government action. Indeed, these are the kinds of statements that have led so many eminent legal historians—including Philip Hamburger and Michael McConnell—to argue that the rights codified by the Bill of Rights operated as trumps.²⁴⁰

Given the fact that the broadly worded text of the Amendment was chosen carefully to reflect the nature of the right²⁴¹ and that the historical support for a rights-as-trumps view, the proposition that the Second Amendment (as well as other declaratory amendments) likely had an expansive fixed content (while acknowledging some retained natural right space subject to regulation) has a strong basis in the Founding-era history.²⁴²

237 See Campbell, *supra* note 173; Gienapp, *supra* note 73, at 126–31.

238 See Gienapp, *supra* note 73, at 131.

239 *Id.* at 128.

240 See, e.g., Philip Hamburger, *The Inversion of Rights and Power*, 63 BUFF. L. REV. 731, 738–52 (2015); McConnell, *supra* note 124, at 12–20.

241 See *supra* Section III.A.

242 Two additional, tentative points should be made here. First, while I have focused on whether *Bruen's* methodology is compatible with the conception of rights in 1791, it is possible that, even if the understanding of rights was unsettled in 1791, it became liquidated over time into a rights-as-trumps conception. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 8–21 (2019). The victory of the Jeffersonians' conception of rights in the 1800 election, coupled with the settlement of their understanding of rights thereafter, would support such an argument. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 23 (1998) (“[A] popular majority adjudicated the First Amendment question in the election of 1800 . . .”). I have not reviewed the historical record sufficiently

But even if one remains skeptical that constitutional rights like the Second Amendment were understood to have an expansive fixed legal content, there remains a strong argument in favor of the assumptions undergirding *Bruen*'s methodology, at least for those who believe that originalism and stare decisis are compatible.²⁴³ That is because, at worst, it is *unclear* whether *Bruen* is based on an ahistorical conception of rights, and in light of that ostensible unclarity, it makes little sense for the Court to overthrow the understanding of rights on which—by the rights revisionists' own description—much of modern rights jurisprudence rests.²⁴⁴ To be clear, this reason for retaining *Bruen*'s conception of rights is specific to the task of constitutional adjudication, rather than the task of intellectual history in which Campbell and Gienapp are engaged, so it is no criticism of those scholars that they have not addressed this point in advancing their historical arguments about the Founding. But insofar as one concedes that it is at least "doubtful" whether constitutional rights were understood to have significant fixed legal content at the Founding, that should suffice—as a matter of constitutional adjudication—to retain the assumptions undergirding Step Two of *Bruen*.²⁴⁵

Once those assumptions are in place, Step Two's methodology follows. Insofar as the Second Amendment declared a right that had a significant core of fixed legal content, Campbell's work confirms that the way to recover that content was by doing what *Bruen* does—

to be confident that such settlement occurred, so I only note the possibility here, but any argument against *Bruen*'s conception of rights would have to reckon with the possibility that liquidation occurred, assuming that liquidation is a legitimate way to adjudicate constitutional rights disputes. If liquidation occurred, then a *Bruen*-like analysis would presumably look to the period when the conception of rights became liquidated, which would likely be in the early 1800s. It is unlikely that there would be many significant differences in an originalist interpretation of the Bill of Rights in the early 1800s as compared with 1791.

Second, as noted above, the Court has left open the question of whether 1791 or 1868 is the correct ratification year for interpreting the right to keep and bear arms. See *supra* note 39 and accompanying text. Insofar as the correct year is 1868, it is notable that Akhil Amar has argued that "the core applications and central meanings of the right to keep and bear arms and other key rights were very different in 1866 than in 1789," with the 1866 understanding of the right being more "focused on protecting minorities against even responsive, representative, majoritarian government" and "more negative than positive." AMAR, *supra*, at 223, 215–16. This suggests that a rights-as-trumps view may have been the 1868 conception of rights, even if it was not in 1791. So, again, any broad argument against *Bruen*'s conceptions of rights is incomplete unless it engages with this possibility.

243 See, e.g., John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 829 (2009); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 5–8 (2001).

244 See Campbell, *supra* note 8, at 923–24; GREENE, *supra* note 10, at xvii–xxi; GIENAPP, *supra* note 11, at 4–8.

245 See Nelson, *supra* note 243, at 19 (quoting *Goodell v. Jackson*, 20 Johns. 693, 729 (N.Y. 1823)).

examining the legal materials at the time of the text's enactment. "When the text merely referred to a preexisting right— . . . a declaratory approach—it was second nature to identify the content of the law by referring to preexisting principles."²⁴⁶ Those principles were found primarily in common law,²⁴⁷ but they could also be found in other legal sources.²⁴⁸ In Samuel Livermore's words during the First Congress's debates over the Bill of Rights, we look to "the usages of law and practice" at the Founding to recover the content of declared rights.²⁴⁹ As noted above, this is exactly what the Federalists did during debates over the Sedition Act—they examined the "established common law meaning" of the freedom of speech and of the press to recover its determinate limits.²⁵⁰ *Bruen*'s Step Two therefore approaches the Second Amendment as the Founders approached other declaratory texts: by looking to "the law as it [then] stood"²⁵¹ in seeking the "contours of the right."²⁵²

IV. HISTORICAL ACCURACY AND BURDEN SHIFTING

But even if Founding-era history supports paying close attention to the text of a declaratory provision,²⁵³ and even if treating declaratory rights as having expansive fixed legal content is consistent with the Founding-era conception of rights,²⁵⁴ one might still object to *Bruen*'s separation of text and history into two steps and its establishment of a burden-shifting regime between the two steps. Recall that *Bruen* Step One is text focused, while Step Two is history focused, and once the rights claimant succeeds at Step One, the burden shifts to the government at Step Two.²⁵⁵ One way to interpret Campbell's objection to *Bruen*'s methodology²⁵⁶ is that it would be better to examine the text

246 Campbell, *supra* note 8, at 939. For an extended discussion of recovering preexisting law, see generally William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467 (2024).

247 See, e.g., Campbell, *supra* note 8, at 939; Campbell, *supra* note 84, at 253, 256, 290–94.

248 See Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1434–35 (looking to state declarations of rights).

249 *Sketch of Proceedings*, *supra* note 139.

250 See Campbell, *supra* note 173, at 561.

251 1 ANNALS OF CONG. 782 (1789) (Joseph Gales ed., 1834) (statement of Rep. Samuel Livermore), as reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 135, at 182, 186.

252 *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024).

253 See *supra* Section III.A.

254 See *supra* Section III.B.

255 See *supra* Part I.

256 Namely, Campbell's objection that *Bruen*'s two-step, burden-shifting methodology "undercuts democratic authority in countless ways that the Founders never intended" by distorting the original meaning. Campbell, *supra* note 8, at 982.

and history together, rather than separately, and to do so without using burdens of proof or, at least, without a burden-shifting regime.²⁵⁷ If text and history are both essential to recovering the original meaning of a declaratory provision like the Second Amendment, why not consider both types of evidence simultaneously, without burdens of proof? Would that not be more likely to produce an accurate understanding of the original meaning than *Bruen*'s methodology?

These questions overlook a key difference between the enterprises of legal history and constitutional adjudication: In constitutional adjudication, the legal dispute has to be resolved in favor of one party or another. As Gary Lawson observes, when a scholar confronts a situation in which the truth or falsity of a legal proposition is indeterminate, "the only rational response is to proclaim that one simply does not know the answer. . . . There is no a priori reason to rule out the possibility that a line of inquiry will end up with a shrug of the shoulders and a puzzled expression."²⁵⁸ But "[a] judge does not appear to have available, even in theory, the option of throwing up one's hands and saying, 'I dunno.' The case must be decided."²⁵⁹ If a judge were to refuse to decide a case, it would be "a refusal to grant the requested relief" sought by one of the parties, and that would, in effect, mean deciding the case for the party seeking to maintain the status quo.²⁶⁰ Judges cannot avoid the imperative to decide the case before them, and burdens of proof are the way in which judges produce "adjudicative determinacy" even in the face of "epistemological indeterminacy."²⁶¹ As *Bruen* recognized, "'legal inquiry is a refined subset' of a broader 'historical inquiry,' and it relies on 'various evidentiary principles and default rules' to resolve uncertainties."²⁶² Burdens of proof are, therefore, an inescapable part of constitutional adjudication—

257 Note that the argument I am considering here relates to the necessity of *burdens* of proof, not to *standards* of proof. Presumably, Campbell would agree that we need standards of proof to judge whether some alleged historical fact is true. What he could be interpreted as disputing is whether we need burdens of proof, which is discussed below.

258 GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 115 (2017).

259 *Id.*

260 *See id.*

261 *Id.* Notice that, because burdens of proof only serve their function in the presence of indeterminacy, they should affect only a minority of cases, at least if one believes (as I do) that most originalist historical inquiries will result in a fairly clear answer. That burdens of proof affect only a minority of cases does not answer Campbell's objection to burden-shifting regimes, but it at least ameliorates the ostensible problem he identifies, even if his critique were fully accepted.

262 *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2131 n.6 (2022) (quoting William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 810–11 (2019)).

even for an originalist judge—provided that one concedes that indeterminacy about the original meaning will inevitably arise.²⁶³

The inescapability of burdens of proof in the adjudication of legal disputes explains why “[t]he concept of the burden of proof dates back to Roman law.”²⁶⁴ Eighteenth-century English treatises and judicial opinions discussed burdens of proof, “plac[ing] the burden of proof either on the plaintiff or on the party making an assertion.”²⁶⁵ They even used burden-shifting regimes similar to *Bruen*’s, in which “proof of a fact” would “shift to an opposing party the burden of rebutting the inference naturally arising from that fact.”²⁶⁶ Thus, “the idea of specifying the burden of proof must have been widely known” in England and America in the eighteenth century,²⁶⁷ both before and after the Founding.²⁶⁸ Indeed, the presumption of constitutionality is a burden of proof specific to constitutional adjudication that was well established at the Founding.²⁶⁹

Because *Bruen* was concerned with the adjudication of constitutional disputes about the right to keep and bear arms—not with the scholarly pursuit of truth even unto indeterminacy—it had little choice but to allocate burdens of proof. The option of conducting a text-and-history analysis absent burdens of proof was simply not available to the Court.

The real question in *Bruen* was *who* should bear the burden of proof. The relationship between adjudicative tools (like burdens of proof) and originalism is an underexplored area in constitutional

263 See LAWSON, *supra* note 258, at 25. As Lawson notes, indeterminacy can be reduced through standards of proof, rules of admissibility of evidence, and other adjudicative tools, but it seems impossible to completely eliminate indeterminacy without burdens of proof. *Id.*; see also Charles F. Capps, *Does the Law Ever Run Out?*, 100 NOTRE DAME L. REV. 983, 1011–17 (2025) (arguing that burdens of persuasion, along with other closure rules, eliminate indeterminacy in law).

264 See John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA. L. REV. 1569, 1592 (2015).

265 *Id.*

266 *Id.* at 1592–93.

267 *Id.* at 1593.

268 The widespread recognition and use of burdens of proof contrasts sharply with the absence of historical support for the kind of normative analysis required by the tiers of scrutiny. See Alicea, *supra* note 23, at 70–71 (summarizing the historical evidence against the tiers of scrutiny). Thus, while the burdens of proof mandated by *Bruen* are not themselves part of the original meaning of the Second Amendment (though they are arguably required by originalist theory, as discussed below, see *infra* notes 277–81 and accompanying text), they are consistent with the Founding-era understanding of the judicial role, unlike the tiers of scrutiny. See Alicea, *supra* note 23, at 70–71.

269 See Derek A. Webb, *The Lost History of Judicial Restraint*, 100 NOTRE DAME L. REV. 289, 303–13 (2024); John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 880–904 (2016).

theory. While much has been written about constitutional construction,²⁷⁰ this body of scholarship rarely discusses tools like burdens of proof,²⁷¹ focusing instead on normative theories that fill in the gaps in originalist interpretations.²⁷² Lawson's work is a notable exception in its engagement with adjudicative tools from an originalist perspective.²⁷³ As Lawson points out, it is unclear whether burdens of proof are constructions in the way that that term is typically used, since the original meaning might sometimes allocate the burden of proof directly, and, even when it does not, there might be logical reasons why the burden of proof can only be allocated in one way consistent with originalism.²⁷⁴ There is much that could be said here, but I will offer only a brief sketch of how an originalist court should think about burdens of proof.

In determining how to allocate burdens of proof, an originalist court does not have free rein to allocate according to its own policy preferences, as that would distort the original meaning.²⁷⁵ It could not, for instance, allocate the burden of proof to whichever party has more political power in order to level the political playing field. Rather, an originalist court should be guided by two principles (assuming no stare decisis considerations are in play).²⁷⁶ First, it must not allocate the burden of proof in a way inconsistent with the original understanding of the judicial role, which generally structures and limits whatever a federal court does, including the allocation of burdens of proof. If, for example, there are burdens of proof that constituted "background principle[s] against which the Constitution was ratified and that would

270 See, e.g., Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013).

271 See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 59–99 (2011).

272 Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1235 (2012) (describing burdens of proof as "very different kinds of 'constructions' from those that" other originalists usually have in mind).

273 See, e.g., LAWSON, *supra* note 258, at 117–24. Capps's important article examines the issue less extensively as part of a broader argument about whether the law ever runs out. See Capps, *supra* note 263.

274 Lawson, *supra* note 272; Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 425 (1996).

275 LAWSON, *supra* note 258, at 123.

276 While these principles guide the allocation of burdens, there are likely to be prudential considerations that also come into play. For example, while one of the two principles outlined below is that courts should minimize the risk of deciding cases contrary to the original meaning, it is conceivable that the best way to minimize the risk of error as much as possible in a given case would, in theory, require allocating burdens in an unworkable or impractical way. Since that would be self-defeating, prudence would dictate choosing a different, more workable burden-shifting regime even if doing so would marginally increase the risk of error.

have been widely acknowledged by informed members of the public in 1789”—as Lawson has argued—then there would be a strong argument that an originalist court must incorporate those burdens of proof.²⁷⁷ Second, because the court is tasked with deciding cases according to law,²⁷⁸ and because an originalist court sees the original meaning as defining what the law is,²⁷⁹ it must allocate the burden of proof in a way designed to minimize the risk of deciding cases contrary to the original meaning of the provision in question.²⁸⁰ While the first principle is directly derived from the original meaning of the judicial role, this second principle is a “basic principle of rational thinking,” assuming one acknowledges the original meaning as the content of the law.²⁸¹

Bruen’s methodology satisfies both criteria. Step One places the burden on the rights claimant²⁸² to prove that “the plain text of the Second Amendment protects [the rights claimant’s] proposed course of conduct.”²⁸³ This follows from the presumption of constitutionality that is arguably required by the original understanding of the judicial role.²⁸⁴ It would have been constitutionally dubious of *Bruen* to allocate the initial burden of proof to the government and thereby create a presumption of *unconstitutionality* for firearms regulations.

At that point, the Court had two options: maintain the burden on the rights claimant at Step Two, or shift the burden to the government. *Bruen* rightly shifts the burden to the government to minimize the risk of error in deciding cases according to the original meaning. As shown above, there is a strong historical basis for treating a violation of the text of the Second Amendment as *prima facie* evidence that the underlying right declared by the text has been violated.²⁸⁵ Because the Founders were attempting to capture the contours of the right as accurately as reasonably possible with concise language, once the rights

277 Lawson, *supra* note 274.

278 William Baude & Samuel L. Bray, Comment, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 161 (2023).

279 Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 789–90 (2022).

280 As discussed below, because burdens of proof are designed to lead to decisions even if a court is unsure about the original meaning, it is perhaps inevitable that the decisions produced by burdens of proof will sometimes contradict the original meaning that in fact exists as a historical reality (though the court is unable to determine what that original meaning is). That is why I say burdens of proof must be allocated in a way that would “minimize” the risk of error, not eliminate it.

281 Lawson, *supra* note 272.

282 Alicea, *supra* note 23, at 26 n.95.

283 N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2134 (2022).

284 See *supra* note 267–69 and accompanying text; Lawson, *supra* note 274.

285 See *supra* Section III.A.

claimant has carried his burden under Step One, we should presume that the regulation in question is unconstitutional as a matter of original meaning.²⁸⁶ This presumption has implications for how we think about the allocation of the burden at Step Two (in the sense of the burden of persuasion).²⁸⁷ If the rights claimant bore the burden at Step Two, then an indeterminate historical record would cut against the rights claimant and result in a decision in favor of the government, *even though* an indeterminate historical record gives a court no reason for questioning its prior determination at Step One that the right had presumptively been violated. It would be like saying $1 + 0 = 0$. It makes more sense, if the goal is to decide cases in a way that minimizes the risk of error, to shift the burden to the government at Step Two, such that an indeterminate historical record cuts against the government and results in a decision in favor of the rights claimant who has already shown (through success in the textual analysis at Step One) that the government has likely violated his rights (i.e., $1 + 0 = 1$).²⁸⁸ Allocating the burden to the government at Step Two satisfies the judicial imperative to decide cases in the face of indeterminacy while minimizing the risk that those decisions will be inconsistent with the original meaning.

This conclusion is reinforced if one focuses on the question being answered at Step Two and the incentives of the parties (though this goes more to the burden of production). The question at Step Two is whether there is a regulatory tradition supporting the government's modern regulation. Obviously, the government has the stronger

286 See *supra* Section III.A.

287 The phrase "burden of proof" is sometimes used to refer collectively to both the burden of persuasion and the burden of production. See LAWSON, *supra* note 258, at 8. The burden of persuasion is "the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries*, 512 U.S. 267, 272 (1994). The burden of production is "the burden of going forward with evidence." *Id.* *Bruen* allocates both the burden of persuasion and the burden of production to the government at Step Two. See *Bruen*, 142 S. Ct. at 2130 (describing Step Two as placing the burden of production on the government, stating that the government must "point to historical evidence" (emphasis omitted)); *id.* at 2141 n.11 (describing Step Two as placing the burden of persuasion on the government and stating that, where the government comes forward with evidence of uncertain interpretation, such uncertainties will be resolved against the government because the government "shoulder[s] the burden" at Step Two).

288 To carry this mathematical analogy further, the government's success discharging its burden at Step Two is the equivalent of $1 - 1 = 0$. Given that, as *Bruen* correctly says, declaratory provisions like the Second Amendment require looking outside the text to fully recover the meaning of the preexisting right, see *supra* Section III.A, if the government carries its burden of demonstrating a historical tradition supporting its regulation at Step Two, that should—and does, under *Bruen*—defeat the rights claimant's successful textual argument at Step One. "Zero" means that the default rule of government regulation for the common good applies.

incentive to find such evidence, so allocating the burden of proof to the government at Step Two aligns legal doctrine with the parties' incentives. If the burden of proof remained on the rights claimant at Step Two, the court would be asking the rights claimant to prove a negative (i.e., the absence of a historical tradition supporting the government's regulation), so the rights claimant would have little incentive to do a thorough job finding examples that support the government's regulation.²⁸⁹ To maximize the chances that the parties will bring relevant historical evidence to the court's attention—and thereby minimize the risk of error—it makes more sense to align incentives with burdens by placing the burden of proof on the government at Step Two.²⁹⁰

Of course, by enabling decisionmaking despite an indeterminate historical record, burdens of proof may create errors. One can imagine a hypothetical scenario in which a rights claimant succeeds at Step One, there was (as an objective historical reality) an established tradition supporting the government's regulation, the government cannot prove the existence of such a tradition due to the loss of historical evidence to the mists of time, and the result is a decision for the rights claimant, contrary to the objective original meaning. But errors based on the same evidentiary problems could occur in the other direction if the burden were on the rights claimant at Step Two. The question is not whether a burden of proof may create errors; it is which allocation of the burden *minimizes* the risk of errors. For the reasons just given,

289 True, sometimes legal doctrine requires a party to prove a negative *and* allocates burdens in a way that does not align with the parties' incentives. For example, when a party moves for summary judgment on a claim or defense on which the nonmoving party would have the burden of persuasion at trial, and if the moving party does so on the basis that the nonmoving party does not have sufficient evidence in the record to carry her burden of persuasion at trial, the moving party has the burden of persuasion (on the motion) of demonstrating that (a) there is no genuine dispute of material fact that (b) there is an absence of evidence supporting the nonmoving party's claim or defense. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). (Of course, the moving party could instead attempt to affirmatively disprove an element of the nonmoving party's claim or defense rather than an absence of evidence in favor of that claim or defense, which would alter the hypothetical.) This proof of a double negative requires the moving party to walk through the relevant evidence in the record to show the lack of a genuine dispute of material fact and the absence of evidence supporting the nonmoving party's claim or defense. *Id.* As Justice Brennan once observed, this is “somewhat trick[y],” since the incentive for the moving party is to do a minimal job of searching through the record. *Id.* at 332 (Brennan, J., dissenting). But at least in the context of summary judgment, there is generally a closed record post-discovery to which both parties have access, whereas in the *Bruen* context, the “record” at Step Two is the entire history of Anglo-American arms regulation, which greatly exacerbates the problem of misaligning incentives with burdens.

290 This discussion of incentives is an example of the role prudential considerations play in allocating burdens of proof. The goal is to minimize the risk of error, but the way of attaining that goal requires the kind of prudential reasoning described above.

placing the burden on the government at Step Two is more likely to minimize errors.

What about the alternative of considering text and history together in a single step rather than separating them out into two steps? In fact, this is no alternative at all, just a repackaging of the same options outlined above. If text and history were considered simultaneously in a single step, the rights claimant would have to bear the burden in the analysis, given the presumption of constitutionality.²⁹¹ But because either the text or the history could be indeterminate, courts would still have to decide whether allocating the burden to the rights claimant in a single-step scenario would entail requiring the rights claimant to have the better textual argument *and* the better historical argument, or only require the rights claimant to have the better argument as to text *or* history. If courts opted for the latter view, the result would be little different in substance from *Bruen*'s current approach that allocates the burden to the government at Step Two, since a rights claimant can prevail despite only affirmatively proving his case at Step One's textual analysis.²⁹² If courts adopted the former view, the result would be no different in substance from *Bruen*'s two-step approach but with the burden on the rights claimant at Step Two, which is not a sensible burden allocation for the reasons discussed above. So a one-step analysis would not meaningfully alter the considerations described earlier. It would just take what are in truth two steps and conceal them as one step. Separating the textual and historical analyses allows courts to respect the presumption of constitutionality at Step One while minimizing the risk of error at Step Two by shifting the burden to the government.

It must be acknowledged, however, that burdens of proof are more complicated where the fact-finding involved undergirds a legal interpretation, as is true under *Bruen*'s methodology. The linguistic and historical facts involved in determining the scope of the right to keep and bear arms under *Bruen*'s methodology are legislative facts, not adjudicative facts.²⁹³ They are facts about the world, not facts about the individual parties.²⁹⁴ Burdens of proof usually operate against the

291 See *supra* note 269 and accompanying text; Lawson, *supra* note 274, at 426.

292 One difference is that the one-step scenario described here would allow the rights claimant to potentially prevail based on a strong historical argument with an indeterminate textual argument (i.e., the equivalent, under *Bruen*, of the rights claimant losing at Step One but prevailing at Step Two). But given how broadly worded the text of the Second Amendment is, it seems very unlikely that many—if any—cases would be decided differently under this version of the one-step scenario as compared with *Bruen*'s current two-step analysis.

293 See Haley N. Proctor, "Will the Meaning of the Second Amendment Change . . .?": Party Presentation and *Stare Decisis* in Text-and-History Cases, 98 N.Y.U. L. REV. 453, 462–63 (2023).

294 See Eric Berger, *Gross Error*, 91 WASH. L. REV. 929, 947–48 (2016).

backdrop of the party-presentation principle, under which courts decide cases based solely on the evidence put forward by the parties.²⁹⁵ And *Bruen* reaffirms the party-presentation principle's salience in Second Amendment cases when it says that "[c]ourts are thus entitled to decide a case based on the historical record compiled by the parties."²⁹⁶ But the party-presentation principle "sits less easily when the factual dispute the court resolves will support a description of the law. The description of the law that results from the court's resolution of the factual dispute may create a precedent that will govern in future cases and controversies."²⁹⁷ It seems strange—and perhaps unjust—to allow one party's incompetent legal presentation to dictate a precedent-determining finding of historical fact, a precedent that will bind all those who are subject to the court's jurisdiction.²⁹⁸

There are two ways of avoiding—or at least mitigating—these complications stemming from *Bruen*'s burden-shifting regime. One way would be for courts to "supplement [the government's] submission with its own historical research,"²⁹⁹ as courts often do when adjudicating legislative facts generally.³⁰⁰ This would lessen the possibility of the strange outcome described above while still according a role to the burden of proof. Courts would not be limiting themselves to the parties' evidentiary submissions, but indeterminacy in the historical record would still require a decision against the government.

The other way to ameliorate the problem would be for courts to revisit precedents that were decided based on an indeterminate and incomplete historical record. If the text supports the rights claimant but the historical record is indeterminate, the rights claimant should win, but in such a scenario, that is not because the original meaning is definitive. As Lawson points out, burdens of proof allow courts to reach decisions without conclusively resolving the underlying question of whether some proposition is true or false.³⁰¹ If later historical evidence comes to light that supports the government's regulation, courts should be willing to reconsider their prior historical findings and, therefore, their interpretation of what the law is.³⁰² Of course, under conventional *stare decisis* doctrine,³⁰³ such a reconsideration would have to take into account reliance interests and other stability-related

295 See *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

296 *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2131 n.6 (2022).

297 Proctor, *supra* note 293.

298 See *id.* at 463.

299 *Id.*

300 See Haley N. Proctor, *Rethinking Legislative Facts*, 99 NOTRE DAME L. REV. 955, 985–86 (2024).

301 See LAWSON, *supra* note 258, at 116–17.

302 See Proctor, *supra* note 293, at 465–69.

303 *E.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275–78 (2022).

concerns in deciding whether to overrule a precedent decided on the basis of *Bruen*'s burden-shifting regime.

But none of these caveats change the basic point: *Bruen*'s employment of burdens of proof is necessary to its task of constitutional adjudication, and its allocation of those burdens is designed to minimize—rather than exacerbate—errors about the original meaning of the Second Amendment.

CONCLUSION

Bruen's methodology is historically sound. It is grounded in the Founding-era conception of rights and is potentially consistent with the rights-revisionist account of constitutional rights, at least in application. Rather than set themselves against *Bruen*'s methodology, the rights revisionists should work to reconcile *Bruen*'s methodology with their understanding of rights, as I have attempted to do here, or propose reforms to the methodology if no full reconciliation can be achieved.³⁰⁴ If they take up that challenge, they may one day be able to join me, even if in a qualified way, in affirming that *Bruen* was right.

304 One major difference between the assumptions undergirding rights revisionism and the assumptions undergirding *Bruen* is that *Bruen* seems to presuppose that the ratification of the Constitution marked a fundamental departure from the British model of unwritten constitutionalism by separating higher and ordinary positive law. That is partly why *Bruen* thinks the enumeration of rights in the Bill of Rights was significant: It elevated those rights to a legal status that they otherwise would not have had. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2129 (2022) (“[T]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008))). Rights revisionists tend to think that the Founders saw much more continuity between the British and American models in 1787, *GIENAPP*, *supra* note 11, at 11–12, which is why rights revisionists regard the enumeration of constitutional rights as much less important than *Bruen* assumes, *see* Campbell, *supra* note 8, at 923–24. This disagreement may prevent a full reconciliation between *Bruen*'s methodology and rights revisionism.