RESULTS, THEN HISTORY: CHOOSING HISTORY AND TRADITION BASED ON EXPECTED CASE OUTCOMES

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INTRODUCTION

The most prominent arguments for history-and-tradition (HAT) tests in constitutional law have focused on the degree to which such tests either constrain judicial discretion[1] or accurately reflect a binding original understanding.[2] But those are not the only, nor even the most intuitive, normative reasons for favoring HAT. A third argument might be the straightforward consequentialist prediction that HAT will lead to desirable case outcomes, such as achieving a proper accommodation between a constitutional right and permissible regulation. And indeed, when advocates (and sometimes scholars or even judges) argue for or against HAT tests, they sometimes begin with whether such tests will generally set a desirable degree of protection for the rights they care about.

There is nothing necessarily inappropriate about selecting or criticizing a methodology based on the outcomes it tends to deliver. The best interpretive methodology might well be the one that, in Cass Sunstein's words, "make[s] the American constitutional order better

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1 *See, e.g.*, United States v. Rahimi, 144 S. Ct. 1889, 1922 (2024) (Kavanaugh, J., concurring) (arguing for a "history-based methodology" on the basis that it "imposes a neutral and democratically infused constraint on judicial decisionmaking"); Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563, 579 (2024) (discussing argument for judicial constraint in *Bruen*).

2 Sherif Girgis, *Unfinished Liberties, Inevitable Balancing*, 125 COLUM. L. REV. 531, 542–43 (2025) ("*Bruen* warned that judges balancing might contradict a balance struck by the framers. . . . Every recent conservative Justice has embraced this point.").

rather than worse,"[3] and proper protection of rights is undeniably part of that order. But arguments based on case consequences are different from—and sometimes in deep tension with—those based on judicial constraint or original meaning. After all, such arguments require judges to *first* identify the ideal baseline of a right's protection and *then* choose HAT only if it points in that direction.

The goal of this short piece is to illustrate the use of these case-consequentialist, outcome-oriented arguments for HAT in the Second Amendment context, and to suggest what that experience may portend for other areas where HAT is currently being considered, including the First Amendment.[4] Part I shows how outcome-oriented arguments helped drive the adoption of HAT in *New York State Rifle and Pistol Association v. Bruen*—primarily as a means of addressing what some called the Second Amendment's "second-class" treatment.[5] Indeed, Justice Thomas would later write that providing more protection for gun rights was the "purpose" of HAT,[6] and it has been both celebrated[7] and condemned[8] in those consequentialist terms.

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3 CASS R. SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION 8 (2023).

4 United States v. Jimenez-Shilon, 34 F.4th 1042, 1054 (11th Cir. 2022) (Newsom, J., concurring) ("If we, as judges, conclude—as I've said we should—that Second Amendment rights shouldn't be casually balanced away by reference to manipulable means-ends balancing tests, we might need to start asking the bigger question: On what basis can we do exactly that when dealing with other, equally fundamental rights?" (emphasis omitted)).

5 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022) (quoting McDonald v. City of Chicago, 561 U.S. 742, 780 (2010) (plurality opinion)).

6 *Rahimi*, 144 S. Ct. at 1944 (Thomas, J., dissenting) (arguing that the majority's approach to historical comparators would, apparently even if historically accurate, give the government too much regulatory authority and thus "defeat[] the purpose of a historical inquiry altogether").

7 *See, e.g.*, United States v. Rahimi (*Rahimi I*), 61 F.4th 443, 461 (5th Cir. 2023) (Ho, J., concurring) (favorably referring to *Bruen* as a directive that "lower courts . . . be more forceful guardians of the right to keep and bear arms"), *rev'd*, 144 S. Ct. 1889 (2024); Stephen P. Halbrook, *Text-and-History or Means-End Scrutiny in Second Amendment Cases? A Response to Professor Nelson Lund's Critique of* Bruen, 24 FEDERALIST SOC'Y REV. 54, 55–56 (2023) ("We know from the post-*Heller* experience what to expect from a Second Amendment jurisprudence based on means-end scrutiny: naked value judgments imposed by federal judges who are hostile to the right to keep and bear arms. By contrast, *Bruen*'s text-and-history approach makes it far more difficult for judges to base their decisions in Second Amendment cases on their own policy preferences and moral judgments."). For a thorough and thoughtful account of the interplay between *Bruen*'s HAT test and heightened scrutiny alternatives, see generally Andrew Willinger, *History and Tradition as Heightened Scrutiny*, 60 WAKE FOREST L. REV. 415 (2025).

8 *See, e.g.*, Ian Millhiser, *The Supreme Court's New Gun Ruling Means Virtually No Gun Regulation Is Safe*, VOX (June 23, 2022, at 15:00 ET) https://www.vox.com/2022/6/23/23180205/supreme-court-new-york-rifle-pistol-clarence-thomas-second-amendment-guns [https://perma.cc/B59G-697H]; Mark Joseph Stern, *Clarence Thomas' Maximalist Second Amendment Ruling Is a Nightmare for Gun Control*, SLATE (June 23, 2022, at 12:23 ET) https://

If more protection of gun rights "makes the American constitutional order better"—even at some cost to judicial constraint[9]—then *Bruen* has been a success; far more gun rights claims have succeeded in the past three years than in the fifteen years after *District of Columbia v. Heller*.[10] But these outcome-oriented arguments sit uncomfortably with arguments that emphasize HAT's supposed constraint on judicial discretion. After all, if the Second Amendment is "the very *product* of an interest balancing by the people,"[11] then what business do modern judges have in deciding whether to accept that balance based on how much protection it accords to particular rights? If the method is selected based on its propensity to achieve desirable outcomes but its application forbids open discussion of outcomes, how are judges to handle cases in which HAT and the desired baseline are at odds?

Part II explores the resulting tensions. The case-consequentialist argument for HAT suggests that the method should be preferred because it will approximate the proper baseline of protection for a given right—a baseline that is not found in history. But in particular cases, the test will occasionally miss the mark in one direction or the other—it will either underprotect the right (when history and tradition suggest more regulatory authority than the idealized baseline) or it will overprotect the right (when history and tradition would disable regulation in undesirable, embarrassing, or even catastrophic ways). These are familiar problems of under- and over-breadth for any legal rule. Sometimes the law requires their acceptance; sometimes they are carved out by reference to the rule's underlying purposes[12] or some overriding value.[13]

But the latter moves are difficult within the HAT framework, precisely because the method's stated interpretive commitments purport to rule out such consequentialist tailoring.[14] In Second Amendment

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slate.com/news-and-politics/2022/06/supreme-court-new-york-concealed-carry-law-gun-control-bruen.html [https://perma.cc/BSX5-FL8G].

9 *See* Rebecca L. Brown, Lee Epstein & Mitu Gulati, *Guns, Judges, and Trump*, 74 DUKE L.J. ONLINE 81, 102–03 (2025); Eric Ruben, Rosanna Smart & Ali Rowhani-Rahbar, *One Year Post-*Bruen*: An Empirical Assessment*, 110 VA. L. REV. ONLINE 20, 23 n.12, 29 tbl.1 (2024).

10 District of Columbia v. Heller, 554 U.S. 570 (2008). *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 126–28 (2023); Ruben et al., *supra* note 9, at 24, 29 tbl.1.

11 *Heller*, 554 U.S. at 635.

12 *See* Anita S. Krishnakumar, *Practical Consequences in Statutory Interpretation*, 139 HARV. L. REV. 679, 729–31 (2026).

13 As-applied challenges, for example, permit people subject to an otherwise constitutional prohibition to carve themselves out from its coverage.

14 United States v. Rahimi, 144 S. Ct. 1889, 1912 (2024) (Kavanaugh, J., concurring) ("[A]bsent precedent, there are really only two potential answers to the question of how to determine exceptions to broadly worded constitutional rights: history or policy. . . . The

cases, judges have tried to solve these problems in two primary ways. One is to shift levels of generality so as to avoid undesirable outcomes while still invoking historical-analogical reasoning.[15] When that proves impossible and the historical evidence is too glaring to generalize away—as with the history of regulations disarming "dangerous" groups like Black Americans, Native Americans, and Loyalists[16]—supporters of HAT simply pivot and treat the history as cautionary rather than instructive. In this way, history can be made to support the desired baseline even when the two are in direct conflict.

The Conclusion shows how these moves fit into a larger substantive and methodological campaign: The cases are shielded from HAT, and HAT is shielded from the embarrassing outcomes that its honest application would yield. As to the methodology, this manifests as a form of motte-and-bailey argumentation[17]: Stating the preferred-but-vulnerable form of an argument (i.e., that "historical tradition" is the sole basis of constitutionality[18]) before retreating to an undesirable-but-defensible form when challenged (i.e., that courts should instead look to "the principles that underpin our regulatory tradition"[19]) and then—this is the crucial part that some invocations of the motte and bailey miss—*returning* to the broad territory once the attack subsides. This is an unprincipled form of argument, whether made in favor of HAT or any other interpretive method.

It is of course far beyond the scope of this short piece to fully resolve these tensions, let alone the broader question of how to select a method of constitutional interpretation.[20] My much more limited goal, in the context of this symposium about HAT in First Amendment cases, is to use the Second Amendment to illustrate some of the challenges ahead.

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policy approach rests on the philosophical or policy dispositions of the individual judge. History, not policy, is the proper guide.").

15 Joseph Blocher & Reva B. Siegel, *The Ambitions of History and Tradition in and Beyond the Second Amendment*, 174 U. PA. L. REV. 633, 697 (2026).

16 Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders*, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION: ESSAYS ON THE PLACE OF GUNS IN AMERICAN LAW AND SOCIETY 131, 132, 136 (Joseph Blocher, Jacob D. Charles & Darrell A. H. Miller eds., 2023); Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, 31 (2023).

17 *See infra* notes 63–65 and accompanying text (explaining the motte-and-bailey fallacy).

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

19 *Rahimi*, 144 S. Ct. at 1898.

20 For discussions of how to choose a method of constitutional interpretation, see, for example, SUNSTEIN, *supra* note 3; Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535 (1999); Francisco J. Urbina, *Reasons for Interpretation*, 124 COLUM. L. REV. 1661 (2024).

I. CASE CONSEQUENTIALISM AND HAT: HISTORY AS A REMEDY FOR "SECOND CLASS" TREATMENT

The Second Amendment is the area of constitutional rights law in which HAT has thus far reached its apex, and seems likely to be a harbinger of things to come.[21] This Part first shows how the adoption of HAT in *Bruen* was driven by a desire to provide more protection to gun rights—an argument from case consequences—and then identifies some of the complications that justification has raised.

After its 2008 decision in *District of Columbia v. Heller* established that the Second Amendment extends to individual private purposes like the possession of weapons for self-defense in the home,[22] the Supreme Court largely avoided elaborating a doctrinal test with which to implement that right, leaving the task to lower courts. For more than a decade, the federal courts of appeals developed and applied what became known as the two-part framework.[23] Under that test, courts would first ask whether the conduct at issue fell within the scope of the Second Amendment (an inquiry that often relied on historical analysis).[24] If it did, then courts would proceed to the second step and apply some level of scrutiny, the strictness of which was typically calibrated based on how close the challenged law came to the "core" interest protected by the Amendment: self-defense, especially in the home.[25] Often but not always, this meant intermediate scrutiny, and the vast majority of gun laws were upheld.[26]

Despite the near unanimity of its use—all but one circuit explicitly adopted it, and the lone outlier did not reject it—the two-part framework had its detractors. Perhaps the most prominent was then-Judge Brett Kavanaugh, who, in an influential dissent in a case known as *Heller II*, argued that Second Amendment cases should be resolved solely on the basis of "text, history, and tradition" and—when those sources ran out—analogies thereto.[27] Notably, Judge Kavanaugh argued that this test was compelled by *Heller* itself, not that it should be embraced because it would provide more protection for gun rights.[28] Indeed, he suggested that "governments appear to have more flexibility and

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21 Blocher & Siegel, *supra* note 15, at 683.

22 District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

23 *See Bruen*, 597 U.S. at 2126–27 (describing the test and noting its broad adoption).

24 *See id.* at 2126.

25 *See id.*

26 *See* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1492–96 (2018).

27 Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1271, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

28 *See id.* at 1272–73.

power to impose gun regulations under a test based on text, history, and tradition than they would under strict scrutiny."[29]

This new test earned some significant support.[30] But whereas Kavanaugh had disclaimed any interest in providing more protection for gun rights, the historical test he invoked was most often used as a deregulatory tool. As Andrew Willinger points out in his insightful comparison of history-based tests and heightened scrutiny, "notwithstanding Kavanaugh's prediction, federal judges [who advocated HAT] pre-*Bruen* universally either took no position on the outcome or would have struck down the law being challenged despite the majority in the case voting to uphold that law under intermediate scrutiny."[31] Indeed, Kavanaugh himself would have struck down the assault weapons law at issue in *Heller II*.[32]

The argument in favor of HAT soon dovetailed with what was quickly becoming the dominant rhetorical claim in gun rights advocacy: that the Second Amendment was being treated as a "second-class right."[33] HAT was presented as a solution to this problem—a way to beef up protection for the right to keep and bear arms. These arguments came to a head in *Bruen*, as many gun rights advocates argued for adoption of HAT because, in the words of one gun industry amicus brief, "[t]he right to carry arms in public is as fundamental today as it was when the Second Amendment was ratified, and it should not be relegated to second-class constitutional citizenship with an 'intermediate scrutiny' standard of review."[34]

In his majority opinion for the Court in *Bruen*, Justice Thomas—who had prominently echoed the "second-class right" argument in a

29 *Id.* at 1274 (emphasis omitted).

30 *See, e.g.*, Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen. N.J., 974 F.3d 237, 257 (3d Cir. 2020) (Matey, J., dissenting), *vacated sub nom.*, Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Bruck, 142 S. Ct. 2894 (2022); Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 702–07 (6th Cir. 2016) (Batchelder, J., concurring in most of the judgment); Houston v. City of New Orleans, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting).

31 Willinger, *supra* note 7, at 436.

32 *Heller II*, 670 F.3d at 1285 (Kavanaugh, J., dissenting).

33 Eric Ruben & Joseph Blocher, *"Second-Class" Rhetoric, Ideology, and Doctrinal Change*, 110 GEO. L.J. 613, 616 (2022).

34 Brief of the National Shooting Sports Foundation Inc. as Amicus Curiae in Support of the Petitioners at 5, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843); *see also* Brief of Amici Curiae Representative Claudia Tenney and 175 Additional Members of the U.S. House of Representatives in Support of Petitioners at 12–13, *Bruen*, 142 S. Ct. 2111 (No. 20-843) ("Because no balancing test can protect Second Amendment rights, the Court should clarify that the correct standard of review for Second Amendment challenges is the 'text, history, and tradition' test set forth in *Heller*. Justice Kavanaugh's dissent in *Heller II* makes the case quite cogently . . . .").

string of opinions[35]—strongly suggested his agreement with this line of argument:

> If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of "intermediate scrutiny" often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here. The Second Amendment "is the very product of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense. It is this balance—struck by the traditions of the American people—that demands our unqualified deference.[36]

Bruen was understood—and celebrated by many—as a directive that lower courts should, in the words of Fifth Circuit Judge James Ho, "be more forceful guardians of the right to keep and bear arms."[37]

Judge Ho wrote that line in the course of voting to strike down a federal law disarming people subject to certain qualifying domestic violence restraining orders—a decision that many regarded as an alarming and potentially embarrassing application of *Bruen*'s method.[38] In *United States v. Rahimi*, the Supreme Court reversed 8–1, but with concurrences and a dissent suggesting that the "second-class right" argument for HAT still carried weight.[39] In his solo dissent, Justice Thomas

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35 *See* Jackson v. City & Cnty. of San Francisco, 576 U.S. 1013, 1014 (2015) (Thomas, J., dissenting from denial of certiorari); Friedman v. City of Highland Park, 577 U.S. 1039, 1043 (2015) (Thomas, J., dissenting from denial of certiorari); Voisine v. United States, 579 U.S. 686, 716 (2016) (Thomas, J., dissenting); Peruta v. California, 582 U.S. 943, 947–48 (2017) (Thomas, J., dissenting from denial of certiorari); Silvester v. Becerra, 583 U.S. 1139, 1150 (2018) (Thomas, J., dissenting from denial of certiorari).

36 *Bruen*, 142 S. Ct. at 2131 (2022) (emphasis omitted) (citation omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008)).

37 United States v. Rahimi (*Rahimi I*), 61 F.4th 443, 461 (5th Cir. 2023) (Ho, J., concurring), *rev'd*, 144 S. Ct. 1889 (2024).

38 *See, e.g.*, Kelly Roskam, *Opinion: The Fifth Circuit's* Rahimi *Decision Protects Abusers' Access to Guns. The Supreme Court Must Act to Protect Survivors of Domestic Violence*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Mar. 1, 2023), https://publichealth.jhu.edu/center-for-gun-violence-solutions/2023/opinion-the-fifth-circuits-rahimi-decision-protects-abusers-access-to-guns-the-supreme-court-must-act-to-protect-survivors-of-domestic-violence [https://perma.cc/CQ78-83KQ].

39 *See* United States v. Rahimi, 144 S. Ct. 1889, 1909 (Gorsuch, J., concurring) ("How did the government fare under that regime? In one circuit, it had an 'undefeated, 50–0 record.'" (quoting Duncan v. Bonta, 19 F.4th 1087, 1167 n.8 (9th Cir. 2021) (en banc) (VanDyke, J., dissenting))); *see also* Sherif Girgis, *Originalism's Age of Ironies*, 138 HARV. L. REV. F. 1, 12 (2024) ("Justices Gorsuch and Kavanaugh would retort that [federal courts of appeals] converged [on the two-part framework] at the price of gutting the Second Amendment.").

went even further in advocating HAT as a means of expanding gun rights, arguing that the majority's recognition of historical comparators for the modern domestic violence law would result in too much regulatory authority, which would "*defeat[] the purpose of a historical inquiry altogether*."[40]

The dissent in *Rahimi* confirms that, at least in the mind of *Bruen*'s author, the historical test serves the "purpose" of giving gun rights more protection. Justice Thomas's complaint is not that the majority's reading of the history was inaccurate, but that it would result in a "regulatory blank check"[41]—a result that apparently must be rejected even if the historical record suggests it. The baseline assumption of the right's protection therefore calibrates the application of HAT, not the other way around.

Again, there is nothing inappropriate about selecting a method of constitutional interpretation based in part on the results it is likely to deliver. Choosing an interpretive method is a normative enterprise, after all,[42] and proper protection of rights is a legitimate normative position.[43] Nor is it illegitimate to argue for a rule on the basis that it will tend to deliver good results, even if its application in any particular case must be made without regard to those consequences—that's just rule utilitarianism. The challenge for a case-consequentialist argument

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40 *Rahimi*, 144 S. Ct. at 1944 (Thomas, J., dissenting) (emphasis added). The passage reads in full:

> The Court's contrary approach of mixing and matching historical laws—relying on one law's burden and another law's justification—defeats the purpose of a historical inquiry altogether. Given that imprisonment (which involved disarmament) existed at the founding, the Government can always satisfy this newly minted comparable-burden requirement. That means the Government need only find a historical law with a comparable justification to validate modern disarmament regimes. As a result, historical laws fining certain behavior could justify completely disarming a person for the same behavior. That is the exact sort of "regulatory blank check" that *Bruen* warns against and the American people ratified the Second Amendment to preclude.

Id. (citation omitted) (quoting *Bruen*, 142 S. Ct. at 2133).

41 *Id.* (quoting *Bruen*, 142 S. Ct. at 2133).

42 *See* J. Joel Alicea, *Practice-Based Constitutional Theories*, 133 YALE L.J. 568, 579 (2023) ("It is widely accepted among scholars that . . . only a normative argument can justify telling judges that they ought to follow a particular theory of adjudication." (emphasis omitted)); Urbina, *supra* note 20, at 1665 (arguing that "normative reasons and only normative reasons can ultimately justify interpretive choice"). Not everyone agrees. *See* Stephen E. Sachs, *Is and Ought in Constitutional Law: A Response to Joel Alicea*, 48 HARV. J.L. & PUB. POL'Y 345, 348 (2025) ("[T]he moral case for originalism rests on its being true: *originalism really is the law around here, and judges and officials should say so.*").

43 Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1300 (2015) (suggesting three primary criteria for selecting a prescriptive constitutional theory: "promoting rule of law values," "facilitating political democracy," and "defining a morally defensible set of individual rights").

in favor of HAT is that it sits uncomfortably alongside the method's avowed *rejection* of considering contemporary consequences.

Put another way, it is hard to simultaneously argue that HAT provides the only legitimate baseline for gun rights and *also* that judges should adopt HAT because it provides more protection for gun rights. The latter presumes a baseline of protection that originates from somewhere outside of history, which is very hard for advocates of HAT to account for within a method that emphasizes history as a limit on judicial discretion. As Reva Siegel and I have suggested elsewhere, perhaps "[a]fter forging originalist theory as a critique of the Court, the Justices who identify as originalists are only now learning how to reconcile their theories of judicial review with the responsibilities of the judicial role."[44] Acknowledging the discretion involved in both selecting and applying a method—including, critically, the choice of when *not* to be originalist[45]—may be uncomfortable for a theory that has generally been advocated as a way to avoid judicial discretion. But the alternative raises serious problems of transparency and democracy: "In an effort to displace responsibility for judgment onto the past, the Justices have produced a body of law that encourages them to hide value-based reasoning from the public . . . ."[46]

As the Court's conservative majority grapples more openly with the challenges of originalist adjudication, this tension sometimes breaks into the open. Given this Symposium's focus on the First Amendment, one particularly notable case in that regard is *Vidal v. Elster*,[47] a First Amendment case decided just days before *Rahimi*. Justice Thomas announced the opinion of the Court, upholding the constitutionality of the Lanham Act's prohibition on trademarking other people's names because that provision "has deep roots in our legal tradition" and "[w]e see no reason to disturb this longstanding tradition."[48] The Court was unanimous as to the result, but only Justices Alito and Gorsuch joined Justice Thomas on this point.[49] Justice Barrett wrote separately and pointedly to emphasize that whatever else might be said about HAT, it is judicial choice all the way down: "Relying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is *itself* a judge-made

44 Blocher & Siegel, *supra* note 15, at 673.

45 Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 233 (2023) ("If the originalist Justices are prepared to rest their decisions on originalist premises only some of the time, they should acknowledge as much . . . .").

46 Blocher & Siegel, *supra* note 15, at 673.

47 Vidal v. Elster, 144 S. Ct 1507 (2024).

48 *Id.* at 1519, 1523.

49 *Id.* at 1512.

test."[50] Justice Barrett was not explicitly suggesting that HAT can or should be justified based on expected case outcomes. But by emphasizing the inevitability of judicial choice, she powerfully highlighted that history is not self-justifying.

The point here is not to critique originalists for occasionally considering modern consequences—even case outcomes—nor to deride "cafeteria originalism."[51] Rather, it is to identify one particular kind of consequentialism—choosing HAT based on predicted case outcomes—and some of the particular tensions it can cause. The next Part identifies some ways in which judges sidestep these tensions.

II. CONSEQUENTIALISM WITHIN HAT: PROBLEMS OF UNDER- AND OVERPROTECTION

The relationship between consequentialism and originalism (or HAT) is nothing new, but it takes on a particularly difficult form when, as laid out in Part I, the very reason for adopting HAT was to achieve better consequences. How, then, are judges to respond when faithful application of HAT in a particular case or set of cases deviates from the chosen baseline, either by under- or overprotecting the right?

In the Second Amendment context, given that HAT was selected in part to provide more protection for gun rights, the problem of underprotection is easy to illustrate. Whatever his intent in saying as much, then-Judge Kavanaugh was not wrong to suggest that in many cases, HAT supports far more regulatory authority than other tests might. To take one clear example, history and tradition seem very clearly to accept the constitutionality of outright bans on concealed carry—a point that *Heller* itself emphasized.[52] And yet it is impossible to imagine that advocates of HAT would accept such a result;[53] indeed, it arguably should have led to a different result in *Bruen*, given that the New York law being challenged there applied only to the concealed carry of handguns. In that important instance, then, the method fails to deliver the rights-protective results that led to its selection in the first place.

Once HAT has been adopted—including its avowed rejection of the relevance of contemporary consequentialism—it is especially hard to explain these departures from the historical record. In an insightful piece arguing against "*Bruen*-iz[ing]" the Free Exercise Clause, Professors Stephanie Barclay, Doug Laycock, Michael McConnell, and Mark

50 *Id.* at 1532 (Barrett, J., concurring).

51 *See* Jack M. Balkin, *We Are All Cafeteria Originalists Now (and We Always Have Been)*, 33 WM. & MARY BILL RTS. J. 323 (2024).

52 District of Columbia v. Heller, 554 U.S. 570, 626, 629 (2008).

53 *See* Willinger, *supra* note 7, at 475.

Storslee emphasize precisely this point: "*Bruen*'s approach has no good way—maybe no way at all internal to its premises—to distinguish times and events when historical government regulation was honoring constitutional rights from times and events when we were violating them, sometimes flagrantly."[54] This is a powerful and laudably transparent case-consequentialist argument against HAT on the basis that it would risk ratifying historical traditions that significantly underprotected religious freedom. And the key phrase is "internal to its premises"—that is, *Bruen*'s purported nonconsequentialism deprives it of any straightforward way to be rights-expansive when history suggests otherwise.

And yet those who support HAT on rights-expanding, case-consequentialist grounds can and do make such arguments, generally by treating undesirable history as cautionary—or even as something that, in the negative, illustrates the "true" nature of the right. The gun industry amicus brief quoted above, for example, argued for HAT as a means to give gun rights more protection while also warning that "the Court should be careful not to limit the scope of the Second Amendment by relying too heavily on the historical arguments that appear in the petitioners' brief."[55] The argument was not that the petitioners' historical arguments were inaccurate, but that they should read to provide *further* support for a broader right—that historical regulation simply "demonstrate[s] why the Second Amendment is such an important bulwark of freedom."[56] The result is that even historical evidence of regulation can be made to support a rights-expansive outcome.

When HAT is justified as a way to provide more protection for a right, it might be harder to imagine the inverse problem of history leading to *over*protection. And yet it is not hard to find examples even within the Second Amendment cases. In *United States v. Brown*, a district court judge who has been very critical of *Bruen*'s method struck down the federal law restricting possession of machine guns.[57] Some

54 Eugene Volokh, *The Court Shouldn't* Bruen*-ize the Free Exercise Clause*, VOLOKH CONSPIRACY (Mar. 8, 2025, at 17:26 ET) https://reason.com/volokh/2025/03/08/the-court-shouldnt-bruen-ize-the-free-exercise-clause/ [https://perma.cc/Q28C-6BXG] (quoting analysis by Michael McConnell, Douglas Laycock, Stephanie Barclay, and Mark Storslee, arguing against adoption of *Bruen* in Free Exercise cases because, *inter alia*, it would underprotect religious liberty, given historical "attempts to impose Protestant forms of governance on Catholic Churches, to force all children to attend public schools, and to stamp out the Native American sun dance. We could go on, but we think the point is plain.").

55 Brief of the National Shooting Sports Foundation, *supra* note 34, at 12 ("The Court should be careful in relying on historical evidence.").

56 *Id.*

57 United States v. Brown, 764 F. Supp. 3d 456, 459–61, 465–66 (S.D. Miss. 2025). *See also* United States v. Morgan, No. 23-10047, 2024 WL 3936767, at *2 (D. Kan. Aug. 26, 2024) (finding that the defendant's "machinegun and Glock switch are bearable arms within the

scholars who favor broad gun rights have derided such decisions as "uncivil obedience" to *Bruen*,[58] rather than an attempt to enforce it. That is, although these decisions nominally extend the Second Amendment in the particular context, they threaten to undermine the rights-expansive project with embarrassing results.

Perhaps more prominently, as noted above, the Fifth Circuit's decision in *Rahimi* opened *Bruen*'s method to serious critique. It was quickly corrected by the Justices, who in an 8–1 decision restated *Bruen*'s holding that modern gun laws must be "consistent with this Nation's historical tradition"[59] more broadly: "As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with *the principles that underpin* our regulatory tradition."[60] This shift in the level of generality allowed the Court to uphold the domestic violence prohibitor on historical grounds, despite the relative dearth of laws targeting domestic violence in the Founding era.

In that respect, the reasoning in *Rahimi* is less reminiscent of then-Judge Kavanaugh's dissent in *Heller II* than it is of then-Judge Barrett's dissent in *Kanter v. Barr*, a case evaluating the constitutionality of the federal law prohibiting gun possession by felons.[61] Adopting a HAT approach, Barrett surveyed the broad history of gun regulation—including laws targeting Black Americans, Native Americans, and Catholics—and concluded that "[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns."[62] The lingering question, of course, is what happens when the two are *not* consistent.

CONCLUSION: MOTTE-AND-BAILEY ORIGINALISM

The moves described above indicate that debates about HAT are not simply about the "facts" of history and tradition, but about calibrating those facts to a desired balance between rights and regulation—a balance that emerges from somewhere other than history. With regard to case outcomes, this has an element of "heads I win, tails you lose," allowing judges to preserve case outcomes from the method. But what

plain text of the Second Amendment" because they are "arms that can be carried in the hand").

58 Leo Bernabei, Bruen *as* Heller*: Text, History, and Tradition in the Lower Courts*, 92 FORDHAM L. REV. ONLINE 1, 15 (2024); George A. Mocsary, *Treating Young Adults as Citizens*, 27 TEX. REV. L. & POL. 607, 619 (2023).

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

60 United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024) (emphasis added).

61 *See* Kanter v. Barr, 919 F.3d 437, 438–39 (7th Cir. 2019), *abrogated by*, *Bruen*, 142 S. Ct. 2111 (2022).

62 *Id.* at 451, 457 (Barrett, J., dissenting).

about the converse problem: preserving the method from embarrassing outcomes?

Here, we see a different set of framing devices, some of which entrench and defend HAT (or originalism more generally) by redefining principles and holdings in a way that makes them virtually impervious to critique. One way this happens is by toggling back and forth between broad-but-vulnerable positions (i.e., that HAT answers everything) and narrow-but-defensible ones (i.e., that history matters) so as to preserve the possibility of reasserting the former.

This is a form of what the philosopher Nicholas Shackel calls a motte and bailey:

> A Motte and Bailey castle is a medieval system of defence in which a stone tower on a mound (the Motte) is surrounded by an area of land (the Bailey), which in turn is encompassed by some sort of a barrier, such as a ditch. Being dark and dank, the Motte is not a habitation of choice. The only reason for its existence is the desirability of the Bailey, which the combination of the Motte and ditch makes relatively easy to retain despite attack by marauders. When only lightly pressed, the ditch makes small numbers of attackers easy to defeat as they struggle across it: when heavily pressed the ditch is not defensible, and so neither is the Bailey. Rather, one retreats to the insalubrious but defensible, perhaps impregnable, Motte. Eventually the marauders give up, when one is well placed to reoccupy desirable land.[63]

A motte-and-bailey fallacy is one in which the arguer advances two propositions, one that is desirable but broad and hard to defend (the bailey) and one that is narrow and easy to defend (the motte).[64] Once challenged on the bailey, the arguer retreats to the motte and can then reclaim the broader bailey once the attack subsides,[65] perhaps even undermining the attack by characterizing it as a ridiculous challenge to the impregnable motte rather than a successful taking of the vulnerable bailey.

The motte-and-bailey fallacy has been invoked by other scholars in the context of various methodological debates, generally to call out what they see as unprincipled attempts to distinguish away bad consequences.[66] But the purpose of a motte and bailey is not simply to avoid

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63 Nicholas Shackel, *The Vacuity of Postmodernist Methodology*, 36 METAPHILOSOPHY 295, 298 (2005).

64 *See id.*

65 *See id.*

66 *See, e.g.*, William Baude & Stephen E. Sachs, *The "Common-Good" Manifesto*, 136 HARV. L. REV. 861, 870 (2023) (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION (2022)); Guha Krishnamurthi, *Interpreting Textualist Slogans*, 109 IOWA L. REV. ONLINE 15, 26 (2023) (critiquing textualism); Mark W. Smith & Dan M. Peterson, *Big Data Comes for Textualism: The Use and Abuse of*

defeat; the final step is to "reoccupy desirable land." The point is that any motte-and-bailey maneuver must be understood in the context of a broader battle, the goal of which is not simply to avoid losing (the motte, recall, is "insalubrious") but to *retake the bailey*.

In the context of the methodological debates, then, critics must be attuned to the fact that it is not enough to prove that HAT will lead to bad consequences in one case or another. HAT's defenders will simply retreat to the motte. Consider *Bruen* as a bailey and *Rahimi* as a possible motte. That is one way, at least, to evaluate *Rahimi*'s purported application of *Bruen* on the basis of a proposition that few would contest: "Our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others."[67] (Justice Thomas and the Fifth Circuit refused this retreat and fought a rearguard action on the bailey.) But if that is *all* that *Rahimi* means, then it has done very little to correct the confusion that plagues the lower courts in the aftermath of *Bruen*, and we might well see the Court retake the bailey—perhaps in *Viramontes v. Cook County*, the pending case involving the constitutionality of assault weapons bans.[68] That is, having resolved one easy case in a way that saves face for the historical-analogical method—proving that, at least sometimes, "[h]istory is consistent with common sense"[69]—the Justices might then return to applying a different version of *Bruen* in the next case. This would mark the completion of a motte and bailey. One hopes that the Justices might instead more honestly and transparently recognize the judicial discretion and power involved in choosing a historical approach to constitutional doctrine based on the outcomes it is supposed to deliver.

Corpus Linguistics in Second Amendment Litigation, 70 DRAKE L. REV. 387, 458–59 (2022) (raising corpus linguistic critiques of *Heller*).

67 United States v. Rahimi, 144 S. Ct. 1889, 1902 (2024).

68 Viramontes v. Cook County, No. 25-238, 2026 WL 1871322 (U.S. June 30, 2026) (mem.).

69 Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).