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# FEAR OF BALANCING

## Introduction

As a new Supreme Court majority settles into a new era of constitutional adjudication, the Justices will confront important methodological questions. How are they to go about interpreting the Constitution? In the Second Amendment case of *United States v. Rahimi*,[1] many of the Justices wrote separately to debate broader methodological questions about constitutional interpretation. They expressed a shared desire to turn away from judicial "balancing" of interests in adjudicating constitutional rights in favor of Founding Era understandings. That is a healthy instinct, but Founding Era understandings may in truth lead to balancing, so maintaining an originalist approach and an opposition to balancing is trickier than it seems. In future cases the Justices may need to resolve this tension by emphasizing the presumption of constitutionality, by making greater

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[1] 602 U.S. 680 (2024).

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use of the principles of general law, or by crafting more rule-like doctrines for adjudication.

## I. *Rahimi* as Methodology

The question presented in *Rahimi* had a straightforward answer that the Court got right. What is more significant, however, is what the Justices had to say about problems of constitutional interpretation that go well beyond the question presented in *Rahimi*, and well beyond the Second Amendment.

### A. The Second Amendment Question

18 U.S.C. § 922(g)(8)(C)(i) makes it a federal crime for a person to possess a gun if he is the subject of a domestic violence restraining order that "includes a finding that such a person represents a credible threat to the physical safety of [a covered] intimate partner or child."[2]

The Second Amendment to the Constitution says that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[3] In *District of Columbia v. Heller*,[4] the Supreme Court interpreted the Second Amendment to protect an individual right not limited to service in an organized militia. And in *New York State Rifle and Pistol Association, Inc. v. Bruen*,[5] the Court concluded that the scope of that individual right should be derived from historical practice.

In *Rahimi*, the Court concluded that Section 922(g)(8)(C)(i) was consistent with the Second Amendment as interpreted in *Heller* and *Bruen*.[6] In my view, this was straightforwardly correct, for three reasons that Professor Robert Leider and I sketched out shortly before *Rahimi* was decided.[7]

*First*, the Second Amendment (and the Fourteenth Amendment) protect a pre-existing right to keep and bear arms, whose scope was

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[2] 18 U.S.C. § 922(g)(8)(C)(i).

[3] U.S. Const. amend. II.

[4] 554 U.S. 570 (2008).

[5] 597 U.S. 1 (2022).

[6] *Rahimi*, 602 U.S. at 699–700.

[7] *See* William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 Notre Dame L. Rev. 1467, 1509–14 (2024).

generally expounded by general law at the time of the Founding and Reconstruction.[8]

*Second*, *Bruen*'s references to historical and analogical reasoning were a call for courts to perform a version of that general law inquiry—an inquiry into "the law of the past"[9]—to understand the principles under which a legislature could regulate the right to keep and bear arms.[10]

*Third*, there was strong historical evidence that one such principle was that legislatures could limit the use of weapons by those who had been proven to be dangerous, as then-Judge Barrett had argued in a prominent dissenting opinion in the Seventh Circuit.[11]

Under those basic premises, *Rahimi* was a straightforward case.[12] This is more or less what Chief Justice Roberts said in his opinion for an eight-Justice majority. The Court reiterated that, under *Bruen*, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition,"[13] and that judges must "'apply[] faithfully the balance struck by the founding generation to modern circumstances.'"[14] It reiterated that "when a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.' The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'"[15] The Court then employed this methodology to quickly survey historical examples that "confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."[16]

Justice Thomas, the author of *Bruen*, did not believe that the historical examples supported a general dangerousness principle. In his

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[8] *Id.* at 1470–82.

[9] *See Bruen*, 597 U.S. at 25 n.6 (quoting William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 Law & Hist. Rev. 809, 810–11 (2019)).

[10] *See* Baude & Leider, *supra* note 7, at 1485–95.

[11] Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

[12] *See* Baude & Leider, *supra* note 7, at 1509–14.

[13] United States v. Rahimi, 602 U.S. 680, 692 (2024) (citing *Bruen*, 597 U.S. at 26–31).

[14] *Id.* (quoting *Bruen*, 597 U.S. at 29).

[15] *Id.* (citation omitted) (quoting *Bruen*, 597 U.S. at 30); *see also id.* at 691 (observing that *Heller* and *Bruen* "were not meant to suggest a law trapped in amber").

[16] *Id.* at 698.

view, historical laws disarming dangerous persons "were driven by … quashing treason and rebellion," rather than "preventing interpersonal violence."[17] Other laws, such as sureties, did aim to prevent interpersonal violence, but did not disarm individuals.[18] These are fair quibbles, which Professor Leider and I bracketed in our earlier work,[19] but ultimately my view is that unless one is trying to distill the general law to an artificially low level of abstraction,[20] the more natural inference is that legislatures could use their regulatory authorities to provide for the disarmament of dangerous people. That is what Section 922(g)(8)(C)(i) does, and so it is constitutionally permissible.

### B. METHODOLOGICAL FIRST PRINCIPLES

If the fate of Section 922(g)(8)(C)(i) were all that were at stake in *Rahimi*, there would be little more to say. But Chief Justice Roberts's eighteen-page opinion was followed by forty-nine pages of concurrences which focused less on the fate of the statute and more on a broader question: How should the Court interpret the Second Amendment in general, and, for that matter, the Constitution in general?

There is a reason that *Rahimi* generated such a robust methodological debate. The Second Amendment presents today's Justices with a doctrinal blank slate. Without the path dependence of numerous precedents, the Justices see an opportunity to describe from first principles how the adjudication of constitutional rights ought to work—to borrow from what they see as working well in other areas of law and to reject what they believe is not.

The Court's opinion in *Bruen*, for instance, contained several central analogies to recent decisions championing a categorical historical approach to the First Amendment;[21] it also endorsed the originalist

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[17] *Id.* at 755–57 (Thomas, J., dissenting).

[18] *Id.* at 764; *cf.* George A. Mocsary, *In Denial About the Obvious: Upending the Rhetoric of the Modern Second Amendment*, 2024 CATO SUP. CT. REV. 201, 215 ("Justice Thomas's disagreement with the majority was about *Bruen*'s application, not *Bruen*'s method.").

[19] Baude & Leider, *supra* note 7, at 1510 n.258.

[20] *Cf. infra* note 58.

[21] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 24–25 (2022) (citing United States v. Stevens, 559 U.S. 460, 468–71 (2010)); *id.* at 17, 24 (quoting Konigsberg v. State Bar, 366 U.S. 36, 50 n.10 (1961)); *id.* at 36 (citing Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 480–82 (2020)); *id.* at 37 (citing Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117, 122–25 (2011)); *id.* at 70–71; *see also id.* at 82 (Barrett, J., concurring) (citing *Espinoza*, 591 U.S. at 482); *Rahimi*, 602 U.S. at 716–17 (Kavanaugh, J., concurring); *id.* at 724 (citing Republican

approach to the Confrontation Clause of the Sixth Amendment led by Justice Scalia in various opinions for the Court.[22] And by counterpoint, the Justices have also used Second Amendment cases to express their skepticism of doctrinal tools such as the tiers of scrutiny well known to First Amendment and Fourteenth Amendment case law.[23]

The opinions in *Rahimi* therefore present an especially rich opportunity to debate and analyze how to interpret the Constitution. Those debates will affect not just the future of the right to keep and bear arms, but the future of many other constitutional rights as well.

What they reveal is a pivotal phalanx of Justices who are openly committed to two things: an originalist method of constitutional interpretation, and an opposition to judicial "balancing" in constitutional adjudication. But it will be trickier for the Justices to maintain both of those commitments than their opinions in *Rahimi* let on.[24]

## II. Methodological Commitments

A central debate that emerged from the *Rahimi* opinions involved the role of judicial "balancing" in constitutional adjudication.

Three of the Justices who joined the *Rahimi* majority opposed *Bruen*'s project in the first place. Justice Sotomayor, who dissented in *Bruen*,[25] penned a concurrence saying that while "[e]ven under *Bruen*, this is an easy case," she "remain[ed] troubled by *Bruen*'s myopic focus on history and tradition," and preferred "the means-end scrutiny that this Court rejected in *Bruen*. . . ."[26] Justice Kagan, also a *Bruen*

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Party of Minn. v. White, 536 U.S. 765, 785 (2002)); *id.* at 728 (citing Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 535–36 (2022)); *id.* at 738 (Barrett, J., concurring) (citing Vidal v. Elster, 602 U.S. 286, 322–24 (2024) (Barrett, J., concurring in part)).

[22] *Bruen*, 597 U.S. at 25 (quoting Giles v. California, 554 U.S. 353, 358 (2008)); *id.* at 37 (citing Crawford v. Washington, 541 U.S. 36, 42–50 (2004)); *id.* at 71; *see also Rahimi*, 602 U.S. at 710 (Gorsuch, J., concurring) (citing *Crawford*, 541 U.S. at 54); *id.* (citing *Giles*, 554 U.S. at 358–61); *id.* at 728 (Kavanaugh, J., concurring) (citing *Crawford*, 541 U.S. at 47–50).

[23] *Bruen*, 597 U.S. at 17–25; *id.* at 29 n.7; *see also Rahimi*, 602 U.S. at 710–11 (Gorsuch, J., concurring); *id.* at 712–13; *id.* at 731–32 (Kavanaugh, J., concurring); District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008).

[24] For other recent analyses of the tensions and omissions in these opinions, see Stephen Breyer, *Pragmatism or Textualism*, 138 Harv. L. Rev. 717, 765–69 (2025); and Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 Harv. J.L. & Pub. Pol'y 563, 599–604 (2024).

[25] *See Bruen*, 597 U.S. at 83 (Breyer, J., dissenting).

[26] *Rahimi*, 602 U.S. at 703, 706 (Sotomayor, J., concurring).

dissenter,[27] joined the concurrence.[28] Justice Jackson was not on the Court when *Bruen* was decided, but her *Rahimi* concurrence declared that she "disagree[d] with the methodology of that decision" and "would have joined the dissent had I been a Member of the Court at that time."[29] These Justices appear to be comfortable with the Second Amendment balancing tests that had prevailed in the lower courts before *Bruen*.

But in *Rahimi*, the Justices who *joined Bruen* expressed a different methodological theme—one that centered an originalist approach to constitutional interpretation and also rejected judicial balancing of constitutional rights.

### A. ORIGINALISM

Justices Gorsuch, Barrett, and Kavanaugh each professed fidelity to originalist interpretations of the Constitution, though each with their own spin.

Justice Gorsuch emphasized that the Constitution's core commands are "the people's directions in the Constitution—directions that are 'trapped in amber.'"[30] He amusingly co-opted this quotation from the Chief Justice's majority opinion, where the Chief had emphasized that constitutional doctrine was *not* trapped in amber.[31]

Justice Barrett invoked a more explicitly positivist strain of originalism—one that was "built on two core principles."[32] First, "that the meaning of constitutional text is fixed at the time of its ratification,"[33] and second, that that meaning "'remains law until lawfully altered.'"[34] She also correctly recognized that historical evidence was relevant both to "elucidat[ing] how contemporaries understood the text" but also to "the more complicated role of determining the pre-existing right that the people enshrined in our fundamental law," which one

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[27] *Bruen*, 597 U.S. at 83 (Breyer, J., dissenting).

[28] *Rahimi*, 602 U.S. at 702 (Sotomayor, J., concurring).

[29] *Id.* at 741 (Jackson, J., concurring).

[30] *Rahimi*, 602 U.S. at 709 (Gorsuch, J., concurring) (quoting *id.* at 691 (majority opinion)).

[31] *Id.* at 691 (majority opinion).

[32] *Id.* at 737 (Barrett, J., concurring).

[33] *Id.*

[34] *Id.* (quoting Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 782 (2022)).

might call "'original contours' history."[35] The Second Amendment protects a pre-existing right, and so we must understand history—the law of the past—to know what it is that it protects.[36]

Justice Kavanaugh delivered the most extensive essay on the role of text, history and tradition in constitutional interpretation. This essay emphasized originalism as a constraint on judges, citing classic works by Judge Bork and Justice Scalia.[37] Justice Kavanaugh first stressed the importance of following the Constitution's text in cases where it is clear and specific, supplying an almost comically long list of examples from the document.[38] He then discussed the importance of using history, rather than judicial policymaking, in resolving disputes about the meaning of the text in cases where it is less clear or less specific. His essay ranged from the use of pre-Founding background history, to Founding Era history probative of original meaning, to post-Founding practice more relevant to liquidation, gloss, and the like.[39]

### B. FEAR OF BALANCING

A second common denominator that emerged from these opinions was opposition to balancing. Justices Gorsuch, Kavanaugh, and Barrett all insisted that they were not deciding the merits of gun control provisions or determining the importance of the right to bear arms.

Justice Gorsuch emphasized that it was "the people [who] ratified the Second Amendment" who had decided that gun rights were "vital to the preservation of life and liberty" even though "an arms-bearing citizenry posed some risks."[40] By contrast, he wrote, today's judges "have no authority to question that judgment" and their "only lawful role is to apply" it.[41] And while Justice Gorsuch did not deny that

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[35] *Id.* at 738–39.

[36] *Accord* Baude & Leider, *supra* note 7, at 1486–95.

[37] *Rahimi*, 602 U.S. at 718 (Kavanaugh, J., concurring) (first quoting Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971); then quoting Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989); and then quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989)).

[38] *Id.* at 715.

[39] *Id.* at 719–30. Professor Sherif Girgis highlights that the theoretical differences between Justice Kavanaugh and Justice Barrett, which "track[ ] an old cleavage in legal conservatism," also explain their different attitudes toward post-ratification tradition. Sherif Girgis, *Originalism's Age of Ironies*, 138 HARV. L. REV. F. 1, 13 (2024).

[40] *Rahimi*, 602 U.S. at 709 (Gorsuch, J., concurring).

[41] *Id.*

originalist reasoning "may sometimes be difficult," he concluded that "that path offers surer footing than any other this Court has attempted. . . ."[42] "Come to this Court with arguments from text and history," he proposed, "and we are bound to reason through them as best we can. . . . Allow judges to reign unbounded by those materials, or permit them to extrapolate their own broad new principles from those sources, and no one can have any idea how they might rule."[43]

Justice Kavanaugh argued that when dealing with "vague constitutional text" without established judicial precedent, "there are really only two potential answers to the question of how to determine exceptions to broadly worded constitutional rights: history or policy."[44] History was better, Justice Kavanaugh argued, because it "establishes a 'criterion that is conceptually quite separate from the preferences of the judge himself.'"[45]

Justice Kavanaugh emphasized this dichotomy and his allergy to judicial balancing many times throughout his concurrence. To quote only a few choice passages:

> When the text is vague and the pre-ratification history is elusive or inconclusive, post-ratification history becomes especially important. Indeed, absent precedent, there can be little else to guide a judge deciding a constitutional case in that situation, unless the judge simply defaults to his or her own policy preferences.[46]

> [T]hat kind of balancing approach to constitutional interpretation departs from what Framers such as Madison stated, what jurists such as Marshall and Scalia did, what judges as umpires should strive to do, and what this Court has actually done across the constitutional landscape for the last two centuries.[47]

> The subjective balancing approach forces judges to act more like legislators who decide what the law should be, rather than judges who "say what the law is."[48]

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[42] *Id.* at 711, 712.

[43] *Id.* at 712.

[44] *Id.* at 717 (Kavanaugh, J., concurring).

[45] *Id.* at 718 (quoting Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 864 (1989)).

[46] *Id.* at 723.

[47] *Id.* at 731.

[48] *Id.* at 732 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

> Deciding constitutional cases in a still-developing area of this Court's jurisprudence can sometimes be difficult. But that is not a permission slip for a judge to let constitutional analysis morph into policy preferences under the guise of a balancing test that churns out the judge's own policy beliefs.[49]

This shared opposition to balancing is also what drove the biggest methodological cleavage between these Justices—the cleavage about how much to rely on history and tradition when the original meaning of the Constitution has run out.

As noted above, Justice Kavanaugh's answer was: *very much*. To him, the only real choices are "history or policy,"[50] so judges who wish to avoid making policy decisions must use history—history to figure out the original meaning of the Constitution, and still more history (however late in the day) to close the gap.

Justice Barrett, by contrast, reiterated her longstanding skepticism of "'freewheeling reliance on historical practice'"[51] and rejected the view that "'tradition,' standing alone, is dispositive."[52] Justice Barrett had voiced that skepticism in earlier separate opinions in *Bruen*,[53] *Samia v. United States* (a self-incrimination case),[54] and *Vidal v. Elster* (a free speech case).[55] On Justice Barrett's more specifically positivist view, judges should turn to history only when a legal rule tells them to do so—such as originalism, liquidation, stare decisis, and so on.[56] History without law to drive it does not make the judge's task any easier or better.

But again, despite this important dispute between Justice Kavanaugh and Justice Barrett about the relevance of post-Founding history in constitutional interpretation (a dispute in which I favor Justice Barrett's view, for what it is worth),[57] what is especially striking is

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[49] *Id.* at 736.

[50] *Id.* at 717.

[51] *Id.* at 738 (Barrett, J., concurring) (quoting N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 83 (2022) (Barrett, J., concurring)).

[52] *Id.*

[53] *Bruen*, 597 U.S. at 81–83 (Barrett, J., concurring).

[54] Samia v. United States, 599 U.S. 635, 656–57 (2023) (Barrett, J., concurring in part and concurring in the judgment).

[55] Vidal v. Elster, 602 U.S. 286, 322–25 (2024) (Barrett, J., concurring in part).

[56] *Rahimi*, 602 U.S. at 738 (Barrett, J., concurring).

[57] Because I share Justice Barrett's view that the central reason to follow the original meaning of the Constitution is that it is the law, rather than because it is especially good at constraining judges, *compare* William Baude, *Is Originalism Our Law?*, 116 Colum. L. Rev. 2349, 2391–97 (2015), *with* William Baude, *Originalism as a Constraint on Judges*, 84 U. Chi. L. Rev. 2213, 2228–29 (2017), I share her view that we ought to focus on whether and when the law gives special status to post-ratification practices. *Accord* Girgis, *supra* note 39, at 13.

what both sides of the dispute have in common. Both of them saw it as common ground that judges should avoid freewheeling analysis in which judges pick and choose their sources or preferred outcomes, even while they disagreed on exactly how methodologically to accomplish that goal.[58]

### C. TENSIONS

In my view, the Justices' willingness to embrace originalism as the central task of constitutional interpretation, and their unwillingness to embrace judicial balancing, are both very good things. The problem is that these commitments are in tension with one another.

One aspect of this tension, highlighted by the Kavanaugh/Barrett dispute, is that sometimes the original meaning of a specific constitutional provision can be too hard to discern, or too indeterminate. Justice Kavanaugh is right that when the original meaning of the constitutional text is vague or ambiguous, judges need some way to decide the cases nonetheless, and their own policy views about the justice of the cause are not good material for filling the gap. Especially in a world of political and judicial polarization, it is better for judges deciding constitutional cases to try to decide them on the basis of something other than their policy preferences. But Justice Barrett is right that "history," without a more defined legal methodology, is not a sufficient way to fill that gap either. And she is right that a judge, whose job is to follow the law, needs not just *some* gap-filler, but a *legal* gap-filler.

A second aspect of this problem, which is more fundamental, is that the original understanding of constitutional rights *was not hostile to balancing*. Among the many works of legal scholarship cited in the *Rahimi* opinions and for that matter in the *Bruen* opinions, perhaps the most glaring omissions were works by Professors Jamal Greene, Jud Campbell, and others illustrating that many Founding Era

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[58] Finally, it is worth noting that Justice Thomas's dissent, while less focused on methodology, also reflected an opposition to the use of "generalized principles," *Rahimi*, 602 U.S. at 775 (Thomas, J., dissenting), arguing that the government's approach—"and indeed any similar, principle-based approach—would hollow out the Second Amendment of any substance," *id.* at 775. It expressed concern that the majority's approach to synthesizing the historical materials would result in "the exact sort of 'regulatory blank check' that *Bruen* warns against and the American people ratified the Second Amendment to preclude." *Id.* at 772 (quoting *Bruen*, 597 U.S. at 30).

constitutional rights were not absolutes and relied on a notion of balancing.[59]

At and after the Founding, legislatures were expected to make reasonable determinations about how to regulate individual liberty in order to better protect and preserve the liberty of all. This was a basic tenet of social contract theory that formed a backdrop to reading the constitutional bills of rights.[60]

To be sure, constitutional rights still constrained the power to legislate. If the legislature trenched on the core of a protected constitutional right, the legislation was unconstitutional. If the legislature trenched on a constitutional right that had been expounded with specificity through precedent and practice, the legislation was unconstitutional. And if the legislature regulated a constitutional right in unreasonable ways, the legislation was unconstitutional. But these inquiries, especially the latter, entailed a great degree of balancing—balancing the rights of each individual against the common good. The now-familiar intuiting that rights are necessarily "trumps" is a modern one.[61]

So too the obsession of today's originalist judges with avoiding any policy determinations is somewhat anachronistic. Though that does not mean it is wrong. Judges at the time of the enactment of the Bill of Rights or the Fourteenth Amendment lived in a different legal environment—one that could still take for granted various unwritten principles of law, even of fundamental rights, as being widely shared

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[59] *See*, *e.g.*, Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 268–80 (2017) [hereinafter Campbell, *Natural Rights and the First Amendment*]; Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 Const. Comment. 85, 90–98 (2017) [hereinafter Campbell, *Republicanism and Natural Rights at the Founding*]; Jamal Greene, How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart 7–31 (2021).

[60] *See* Campbell, *Republicanism and Natural Rights at the Founding*, *supra* note 59, at 87–92; Jud Campbell, *Determining Rights*, 138 Harv. L. Rev. 921, 929–37 (2025) [hereinafter Campbell, *Determining Rights*].

[61] *See* Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 Harv. L. Rev. 28, 109–10 (2018); Campbell, *Determining Rights*, *supra* note 60, at 979–81. For a canonical modern formulation, see Ronald Dworkin, Taking Rights Seriously 191–92 (1977). To be sure, there were *some* Founding Era rights that were closer to absolutes, for instance because they were grounded in a specific positive law custom or because they were seen as inalienable. *See* Campbell, *Natural Rights and the First Amendment*, *supra* note 59, at 280–90; *see also* William Baude & Stephen E. Sachs, *The "Common-Good Manifesto*," 136 Harv. L. Rev. 861, 892 (2023) (reviewing Adrian Vermeule, Common Good Constitutionalism (2022)).

across Anglo-American jurisdictions.[62] It was perhaps easier for them to apply well-settled policies of unwritten law, without worrying that in doing so they were *applying the judge's own views*, because of this generally shared legal culture.

Approaching this problem today poses greater difficulties for judges. Some may be skeptical that there is such a thing (if there ever was) as well-settled principles of unwritten law shared across jurisdictions. Others may believe such principles exist but doubt that judges will really try to follow them. Still others may believe that judges will *try*, but doubt that they will succeed in doing anything other than following their own hearts. If any of this is true, then today's originalist judges need to think harder—or at least to think differently—about how to ensure that they are neutrally and fairly adjudicating cases under our inherited Constitution.

## III. Alternatives to Balancing

Now some say that balancing is simply inevitable. That is Professor Sherif Girgis's analysis, at least when it comes to "general liberties … defined by reference to conduct to be shielded from regulations of various sorts," such as free speech and arms bearing.[63] But there are strategies the Justices can use to reduce the need for judicial balancing, if they are as serious about it as they claim.

I will briefly describe three: deference, the general law approach, and the construction of rules.

### A. The Presumption of Constitutionality

For all that the *Rahimi* opinions denied judicial balancing, they gave almost no attention to one of the oldest and most straightforward ways of avoiding it: judicial deference. On this view, when other legal materials run out, judges should decide constitutional cases with the presumption of constitutionality—by deferring to the legislature's decision. There is much to be said for this approach.

*First*, at a conceptual level, this is a straightforward alternative to the other options canvassed in *Rahimi*—namely, the broad use of

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[62] *See* William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 Stan. L. Rev. 1185, 1193–1206 (2024).

[63] Sherif Girgis, *Unfinished Liberties, Inevitable Balancing*, 125 Colum. L. Rev. (forthcoming 2025) (manuscript at 3) (on file with author).

postenactment history and judicial policymaking. Justice Kavanaugh's repeated insistence that those were really the only two alternatives is a false dichotomy. A rule that judges should defer to legislative regulations of rights in cases of doubt does not call for judicial policymaking; it calls for judges to permit the products of *legislative* policymaking. And rather than defer to the traditions of a rolling period of the past, it defers to the decisions of legislators whose enactments remain law in the present.[64]

*Second*, and importantly, some form of deference to legislators in constitutional cases is *itself* sanctioned by text, history and tradition. The presumption of constitutionality can potentially be stated as a correlate of the constitutional text itself: "[I]t is simply that, as a matter of correct interpretation of the text, the proper hermeneutic principle is that indeterminacy does not warrant judicial invalidation of legislation or executive actions that fall within the range of meaning of the specific text at issue."[65]

Additionally, as discussed above, Professors Greene and Campbell argue that the Founding Era conception of rights was one that centered on the role of legislatures, representative of the people, to regulate individual rights where necessary for the common good.[66] The very idea of retaining natural rights entailed self-determination, so while judicial review was present in this system, it was limited.[67]

Still further, as Professor Christopher Green has demonstrated, in the early republic judges insisted that statutes could be set aside only when they were clearly unconstitutional, which they grew to equate with a standard of unconstitutionality beyond a "reasonable doubt."[68] And as Professor Derek Webb has more recently expanded, a "'triple helix' of judicial restraint"—"(1) the presumption of constitutionality,

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[64] *See id.* (manuscript at 62–66).

[65] Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's* Unwritten Constitution, 81 U. Chi. L. Rev. 1385, 1436 (2014) (reviewing Akhil Reed Amar, America's Unwritten Constitution (2012)).

[66] *See* Greene, *supra* note 59, at 12–13, 30–31; Campbell, *Natural Rights and the First Amendment*, *supra* note 59, at 253, 263, 270–76.

[67] *See* Greene, *supra* note 59, at 30; Campbell, *Natural Rights and the First Amendment*, *supra* note 59, at 287, 302, 305, 316; Campbell, *Republicanism and Natural Rights at the Founding*, *supra* note 59, at 86–87, 98–103, 106–08, 112.

[68] Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. Tex. L. Rev. 169, 172–88 (2015).

(2) the clear error rule, and (3) the reasonable doubt standard"—was firmly "liquidated" over the course of the nineteenth century.[69]

To the extent that the opinions in *Rahimi* acknowledged this approach at all they did so with an equivocal shrug. "Some judges will apply heightened scrutiny with a presumption in favor of deference to the legislature. Other judges will apply heightened scrutiny with a presumption in favor of the individual right in question," Justice Kavanaugh lamented.[70] Or they did so with a hand-waving invocation of the burden of proof: "A regulation is constitutional only if the government affirmatively proves that it is 'consistent with the Second Amendment's text and historical understanding,'" Justice Barrett said, quoting *Bruen*.[71] But if the Justices are serious about both being originalists and avoiding judicial policymaking, they would do well to more seriously contemplate the longstanding approach that their predecessors developed for doing both.

To be sure, doctrines of judicial deference have themselves evolved over time. The classical doctrines of judicial restraint rested on two institutional premises: one judicial and one legislative.[72] The judicial premise was that judicial review should be exercised with delicacy because taking a judgment out of the hands of the legislature was a matter of high stakes—with no easy way to correct a mistaken decision. That view remains true. The legislative premise was that legislatures took very seriously their obligations to the Constitution, and so legislation was only enacted after it had survived serious constitutional scrutiny. That premise is much more contestable and indeed often false today.[73]

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[69] Derek A. Webb, *The Lost History of Judicial Restraint*, 100 Notre Dame L. Rev. 289, 294, 302–03 (2024).

[70] United States v. Rahimi, 602 U.S. 680, 733 (2024) (Kavanaugh, J., concurring).

[71] *Rahimi*, 602 U.S. at 737 (Barrett, J., concurring) (quoting N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 26 (2022)). To be fair, one might conclude that this burden-shifting is entailed by *Bruen*'s two-part test, especially if one reads *Bruen* to say (at "Step One") that any regulation that falls within the unqualified text of the Second Amendment is presumptively unconstitutional, and then to say that the regulation can only be saved if (at "Step Two") the government rebuts the presumption of unconstitutionality with historical evidence. J. Joel Alicea, Bruen *Was Right*, 174 U. Pa. L. Rev. (forthcoming 2025) (manuscript at 9–10, 30–32), https://ssrn.com/abstract=5122492.

[72] *See* Green, *supra* note 68, at 192–97.

[73] *See* Note, *Should the Supreme Court Presume that Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 Harv. L. Rev. 1798, 1804–08 (2003); *see also* Keith E. Whittington, *James Madison Has Left the Building*, 72 U. Chi. L. Rev. 1137, 1148–58 (2005) (reviewing J. Mitchell Pickerill,

Perhaps relatedly, many courts no longer adhere to the "reasonable doubt" standard of judicial review.[74] Indeed, the standard is sufficiently eyebrow raising that when the Wisconsin Supreme Court recently employed the reasonable doubt rule to deny a religious challenge to the state's unemployment tax,[75] the Catholic Charities Bureau sought certiorari on the reasonable doubt standard, arguing that it was something between "a hortatory expression" and simply "'dead' in federal courts."[76] The Supreme Court even briefly agreed to review the standard when it granted the Catholic Charities Bureau's petition, but then quickly beat a retreat, amending the cert grant to include only the merits and not the presumption of constitutionality.[77] Perhaps that is just as well for now, as the Court does not appear ready to fully appreciate the tradition of judicial deference to legislation, but this is something the anti-balancing Justices will need to confront someday.

In any event, even if neither law nor logic calls for a presumption of constitutionality that is so strong as to require proof beyond a reasonable doubt, they could still call for *some* presumption—at least one strand of Webb's "triple helix"[78] remains unbroken. The Justices should give that presumption some attention in constitutional cases and recognize that, beyond "history or policy,"[79] another approach to resolving close constitutional cases is to let legislatures resolve them.[80]

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Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System (2004)).

[74] *See* Hugh Spitzer, *Reasoning v. Rhetoric: The Strange Case of* "*Unconstitutional Beyond a Reasonable Doubt*," 74 Rutgers U. L. Rev. 1429, 1440–45 (2022).

[75] Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n, 3 N.W.3d 666, 686 (Wis. 2024).

[76] Petition for Writ of Certiorari at 32–33, Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n, No. 24-154 (U.S. Aug. 9, 2024), 2024 WL 3815281 (first quoting Spitzer, *supra* note 74, at 1460; and then quoting Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 Calif. L. Rev. 519, 553 (2012)).

[77] Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n, No. 24-154, 2024 WL 5100663, at *1 (U.S. Dec. 13, 2024), *amended by* No. 24-154, 2024 WL 5112872 (U.S. Dec. 16, 2024).

[78] *See* Webb, *supra* note 69, at 294.

[79] United States v. Rahimi, 602 U.S. 680, 717 (2024) (Kavanaugh, J., concurring).

[80] I cannot resist observing that making use of the presumption of the constitutionality more frequently would also help the Court address another recurring problem it discussed in a slate of concurrences last year: "the best processes for analyzing likelihood of success on the merits" when considering "emergency applications in cases … where a party has sought to enjoin enforcement of a new state or federal law." Labrador v. Poe, 144 S. Ct. 921, 928 (2024)

### B. THE GENERAL LAW APPROACH

The presumption of constitutionality is simply a presumption, and it will never be able to eliminate all hard cases—at best it can only reduce them by relocating them to a new boundary. And even in the days of deep deference, judicial review of individual rights was still alive and important. When a legislature abridged the core of an individual right, or regulated it in sufficiently unreasonable ways, courts would uphold individual rights by saying so.[81] So beyond the presumption of constitutionality, originalist Justices might engage in more searching judicial review by reviving the techniques of their forebears.

In the nineteenth century, constitutional rights were seen and adjudicated partly through the lens of "what we now call general law. Though referred to by different names, this shared body of unwritten law was not derived from any enactment by a single sovereign but instead 'existed by common practice and consent among a number of sovereigns.'"[82] These general law rights were secured by the Privileges or Immunities Clause of the Fourteenth Amendment and the provisions of the Bill of Rights that were understood to codify pre-existing customary and natural rights, such as freedom of speech, freedom of the press, and the right to keep and bear arms.[83]

Judges who wish to pursue an originalist approach to rights adjudication could look to the practices and constitutional decisions of the states over time to help understand the contours of those rights. As discussed above, in the case of the right to keep and bear arms, this method could point to something very much like the approach taken in *Rahimi*: the recognition that disarming those proven to be

(Kavanaugh, J., concurring in the grant of stay). Justice Kavanaugh has expressed doubt about the usefulness of the maxim that courts "should simply try to 'preserve the status quo,'" arguing that "[t]here is no good blanket answer to the question of what the status quo is. Each conception of the status quo is defensible, but there is no sound or principled reason to pick one over another. . . ." *Id.* at 930. The presumption of constitutionality provides a sound and principled reason to treat newly enacted legislation as the status quo. This presumption would of course be subject to rebuttal for "plainly unconstitutional . . . laws." *Id.* at 931. Whether that same presumption would apply to administrative actions is another matter.

[81] Baude & Leider, *supra* note 7, at 1489.

[82] Baude, Campbell & Sachs, *supra* note 62, at 1190 (footnote omitted) (quoting William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984)).

[83] *Id.* at 1235–36.

dangerous was a reasonable regulation of the right to bear arms.[84] But in other cases—such as permanent disarmaments,[85] the exclusion of guns from "sensitive places,"[86] the regulation of gun length or magazine size,[87] and so on—courts would have to make judgments about the reasonableness of the regulations, their purposes, and the burdens they impose. That would be the originalist and traditionalist approach.

This approach will look uncomfortably like balancing, but it is not of the same kind as the tiers of scrutiny that Justice Kavanaugh seems to especially disfavor.[88] As Professor Leider and I have described it:

> [W]hat the traditional approach permitted was a sort of *rights-based* interest balancing, where the state could regulate a right for limited purposes, such as to protect the rights of others. It did not necessarily allow legislatures to restrict a right simply out of disagreement with the value of the right. And even when the legislature had the power to restrict rights out of public necessity, restrictions could not be so severe as to amount to a nullification of the right.[89]

And it is not the "freewheeling" use of history that Justice Barrett has especially rejected.[90] Rather, judges consider the history and tradition of regulation of particular individual rights under a specific legal theory: the theory that those individual rights were understood to have a scope defined by the principles of "general law," and that these cases and statutes can be used as evidence of what those general law principles were. But as noted above, this way of thinking about the law has become so unfashionable today that it may be quite some time before judges are ready to ask it to bear all of the weight in constitutional cases.

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[84] Baude & Leider, *supra* note 7, at 1509–14.

[85] *Id.* at 1510 n.258, 1511–12.

[86] *Id.* at 1506–08.

[87] *Id.* at 1504–05.

[88] *See* United States v. Rahimi, 602 U.S. 680, 731–34 (2024) (Kavanaugh, J., concurring).

[89] Baude & Leider, *supra* note 7, at 1491 (footnotes omitted); *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 948–52 (1987) (emphasizing the sharp break between the now-familiar "balancing" approach that emerged in the mid-twentieth century and the traditional approach that prevailed before that).

[90] *Rahimi*, 602 U.S. at 738 (Barrett, J., concurring) (quoting N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 83 (2022) (Barrett, J., concurring)).

### C. CONSTRUCTING RULES

A third strategy the Justices might use to avoid the balancing of individual rights is to construct a series of doctrinal rules as they decide a series of cases over time. These rules would hopefully be grounded in historical sources and constitutional principles but presented in more easily administrable ways. The doctrine could take on a life of its own.

Something like this may describe the Court's approach to many aspects of free speech doctrine today. Today the Court has demarked "historic and traditional categories" of unprotected speech that trace "[f]rom 1791 to the present . . . in a few limited areas. . . ."[91] The original and historical understanding of free speech did not necessarily have such sharp contours between completely protected and unprotected speech, making the modern doctrine something of a translation or extrapolation.[92]

Today the Court frequently employs rules of viewpoint and content neutrality to determine which speech restrictions are constitutionally suspected. But as discussed, the original and historical understanding of free speech did not have a strong neutrality principle, instead turning on the reasonableness of legislative regulations in pursuance of the common good.[93] The modern doctrine of neutrality arose in part as a reaction to the anxieties of legal realism and the need for judges to articulate more neutral principles in deciding which restrictions on speech they would uphold and which they would not.[94]

One could imagine the Court pursuing a similar strategy over time with other individual rights. There are at least three major challenges with such a strategy, however.

The first is that it is a difficult approach for an originalist to justify. As the free speech examples show, there is often a noticeable difference between the modern doctrinal rule and the law of the past,

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[91] United States v. Stevens, 559 U.S. 460, 468 (2010) (first quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment); and then quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992)).

[92] *See* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 Harv. L. Rev. 2166, 2177–79, 2201–03, 2214–18 (2015).

[93] *See supra* note 62 and accompanying text.

[94] *See* Jud Campbell, *The Emergence of Neutrality*, 131 Yale L.J. 861, 892–93, 928–43 (2022).

and the originalist grounding for modern doctrine is thought to be very weak.[95] I suspect that most modern free speech doctrine can still be grounded in originalism—this depends on the details of the differences, the legal changes that might justify them, and on the relationship between constitutional standards and constitutional decision procedures[96]—but it is true that it is a *difficult* approach to justify.[97]

The second challenge is that the Court has not been especially consistent in pursuing that strategy even where it claims to do so. While the *Bruen* majority invoked the Court's categorical historical approach to the First Amendment as a favorable analogy, it downplayed the fact that other aspects of First Amendment doctrine also frequently employ means-ends scrutiny through forms of heightened scrutiny that the majority and especially Justice Kavanaugh disfavored.[98] This may be a bad omen. Just as the Court's First Amendment doctrine has not proven as categorical or rule-based as sometimes advertised, it is easy to imagine that the same thing might happen in the Second Amendment and other areas.

The third challenge is that articulating such rules requires the Court to decide a reasonably plentiful number of cases on the topic. The First Amendment rules emerged over many decades of adjudication of many free speech claims. In the past twenty years, the Court has decided only five Second Amendment cases, and has only begun to address the most basic questions about the scope of the right.[99] And it does not seem to be interested in picking up the pace. After *Rahimi*, the Solicitor General asked the Court to immediately resolve three pending petitions about the scope of Section 922(g)'s ban on felons possessing firearms, observing that the range of

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[95] *See, e.g.*, Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 Tex. L. Rev. 221, 251–52 (2023); David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, *in* Eternally Vigilant: Free Speech in the Modern Era 33 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

[96] On originalist standards and decision procedures, see generally Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 Harv. L. Rev. 777 (2022).

[97] *Cf.* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. 605, 670 n.259 (2024) (suggesting that "modern First Amendment doctrine . . . often captures the original meaning of freedom of speech and freedom of the press, as applied to modern circumstances" and that "one might construct a truly marvelous proof of this, which this margin is too narrow to contain").

[98] *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 22–25 (2022); United States v. Rahimi, 602 U.S. 680, 731 (2024) (Kavanaugh, J., concurring).

[99] Those five cases are, in order, *Heller*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *Caetano v. Massachusetts*, 577 U.S. 411 (2016), *Bruen*, and *Rahimi*.

pending petitions would help the Court articulate a rule that would guide the lower courts.[100] The Court summarily granted, vacated, and remanded them all without opinion.[101] Sometimes it seems that fear of balancing might lead to a fear of opining in the first place.

### D. MIXED METHODS

None of these approaches are a complete and sufficient alternative to all kinds of judicial balancing in all cases. Deference to legislatures allows legislatures to balance rights in many cases and still requires judges to decide when the legislature has gone too far. The general law approach still requires courts to compare the legislature's purpose in regulating the right to the scope of the burden it has imposed. Constructing a doctrine still requires the Court to decide what kind of doctrine to construct.

But each of these approaches responds to a different potentially troubling element of judicial balancing. Deference to legislatures replaces some judicial balancing with legislative balancing; it makes balancing more democratic and authoritative. The general law approach constrains balancing with a historically guided and rights-oriented approach; it makes balancing more lawful and legitimate. Constructing doctrine replaces case-by-case or ad hoc balancing with the ex ante elaboration of neutral principles; it makes balancing more predictable and impersonal.

Indeed, analysis of these approaches in combination helps to remind us that the disfavored concept of balancing entails several different but related judicial approaches. Different judges might disfavor different parts of balancing and for different reasons. Over time, the Justices may find that these frameworks will let them define and avoid whatever is especially bad about balancing while accepting the parts that are inevitable or even desirable.

Interestingly, in *Rahimi* the Court's decision can be justified by all three of these approaches, perhaps in combination. The Court articulated, as if through construction, the principle that legislatures may regulate firearms so as to disarm the dangerous. That principle

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[100] Supplemental Brief for the Federal Parties at 6–7, Garland v. Range, 144 S. Ct. 2706 (2024) (No. 23-374).

[101] *Range*, 144 S. Ct. 2706; Doss v. United States, 144 S. Ct. 2712 (2024) (mem.); Jackson v. United States, 144 S. Ct. 2710 (2024) (mem.).

can be derived from the general law approach. And it led the Court to uphold the constitutionality of a federal statute.[102] But of course many harder cases will await the Justices where the relative power of these approaches will be put to a greater test.

## Conclusion

It might seem overly credulous to put so much stock in the Justices' methodological statements. When we see the Justices insisting on their adherence to originalism, or denying that the most powerful judges in the country engage in policymaking, we might hear Ralph Waldo Emerson in the background: "[T]he louder he talked of his honor, the faster we counted our spoons."[103]

But methodologies lay down a marker. They invite readers to judge the judges, to see if they have lived up to their promises or fallen short.[104] The opinions in *Rahimi* lay down markers for originalism and opposition to judicial balancing, thus inviting us all to judge over the next few decades whether their authors can manage to live up to both.

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[102] Indeed, the chief methodological critique of the dissent was that the majority's approach would lead the government to win too many cases. *Rahimi*, 602 U.S. at 772 (Thomas, J., dissenting); *cf. supra* note 58.

[103] Ralph Waldo Emerson, The Conduct of Life 184 (1867).

[104] *See* Stephen E. Sachs, Life After *Erie* 1 (Nov. 1, 2023), https://ssrn.com/abstract=4633575.