Notre Dame Law Review

Volume 99 | Issue 4 Article 6

8-14-2024

Diverse Originalism, History & Tradition

Christina Mulligan
Brooklyn Law School

DIVERSE ORIGINALISM, HISTORY & TRADITION

Christina Mulligan *

The Supreme Court's New York State Rifle & Pistol Ass'n v. Bruen *decision appears to be an originalist opinion, ostensibly looking for the meaning of the Constitution's text by looking to the public's understanding of the language used. But* Bruen*'s test actually fails to follow a public meaning originalist methodology. The Court focuses present-day constitutional interpreters on evidence of constitutional meaning that only reflects a portion of the public—the politically empowered men who were in a position to pass legislation. Two unfortunate outcomes follow. First, by limiting potential evidence of public meaning so severely, the Court raises the risk that future decisions concerning regulations of arms will arrive at nonoriginalist results, both by the Supreme Court itself and by lower courts applying* Bruen*'s test. Second, by unnecessarily and incorrectly sending the message that the meaning of the Constitution to Framing- and Reconstruction-era white women and people of color doesn't matter, the* Bruen *majority unnecessarily contributes to the narrative that originalism doesn't care about these people, historically or today.*

* Professor of Law, Brooklyn Law School.

INTRODUCTION

The Supreme Court's *New York State Rifle & Pistol Ass'n v. Bruen* decision appears to be an originalist opinion, ostensibly looking for the meaning of the Constitution's text by looking to the public's understanding of the language used.[1] But by adopting its new test for identifying limitations on one's right to keep and bear arms, the Supreme Court actually fails to follow a public meaning originalist methodology because it so drastically limits the kind of evidence to which judges can refer when deciding if a regulation of the right to keep and bear arms is constitutional. By focusing judges and other decisionmakers on the historical analogues of present-day arms regulations, the Court focuses present-day constitutional interpreters on evidence of constitutional meaning that reflects only a portion of the public—the politically empowered men who were in a position to pass legislation.

But if one takes original *public* meaning seriously, the instruction to limit interpretive evidence to that which only reflects a portion of the public risks distorting the public meaning of the Constitution.[2] Other groups and counterpublics—including people of color, white women, and white men who lacked political power for reasons of class or changing political tides—become excluded from the "public" whose understanding of the Constitution crafts its contours.[3] Two unfortunate outcomes follow. First, by limiting potential evidence of public meaning so severely, the Court raises the risk that future decisions concerning regulations of arms will arrive at nonoriginalist results, both by the Supreme Court itself and by lower courts applying *Bruen*'s

1 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127–28 (2022) (quoting District of Columbia v. Heller, 554 U.S. 570, 605 (2008)).

2 *See* Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 413 (2018) ("[D]istorted interpretations can . . . occur if a present-day interpreter primarily looks at how the Constitution was understood by a subset of the public and mistakenly concludes that the views of the subset accurately represent the views of the majority or even the whole.").

3 The notion of "counterpublics" emerged in response to Jürgen Habermas's theory of the public sphere, which he described as where "something approaching public opinion can be formed." Jürgen Habermas, *The Public Sphere: An Encyclopedia Article*, *in* CRITICAL THEORY AND SOCIETY: A READER 136, 136 (Stephen Eric Bronner & Douglas MacKay Kellner eds., 1989). Habermas's critics observed that ideas about the "public sphere" needed to take into account discussions within "excluded and subordinated communities." *See* James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 716 (2016); *see also* Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *in* HABERMAS AND THE PUBLIC SPHERE 109, 113 (Craig Calhoun ed., 1992). These communities, excluded from the dominant public sphere, where separate discussions took place, came to be described as "counterpublics"—"sites where excluded or subordinated groups can develop and refine counter-discourses, both to maintain and develop their own meanings and identities and to re-engage the dominant 'public' sphere in a critical discourse." Fox, *supra*, at 716.

test. Second, by unnecessarily and incorrectly sending the message that the meaning of the Constitution to Framing- and Reconstruction-era white women and people of color doesn't matter, the *Bruen* majority unnecessarily contributes to the narrative that originalism doesn't care about these people, historically or today.[4]

This Essay proceeds in a straightforward way. Part I begins with a close reading of *Bruen*'s majority opinion, seeking to identify why the majority apparently limits the kind of evidence relevant to determining if arms regulation is constitutional, and arguing this limitation isn't justified under an original public meaning approach to constitutional interpretation. Part II expands upon the critique that *Bruen*'s test both increases the likelihood that future cases will unintentionally reach nonoriginalist results and unnecessarily contributes to alienating present-day white women and people of color from originalism and the Constitution. Part III concludes by describing how the Supreme Court can clarify *Bruen* in future cases to mitigate or avoid these effects.

I. HOW *BRUEN* FAILS TO BE ORIGINALIST

A. *Close Reading* Bruen

Bruen's missteps are revealed through a close reading of the case's majority opinion. The majority starts out by announcing the Court's rule: "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects the conduct. To justify its regulation . . . the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[5] Later in the opinion, the requirement is slightly rephrased as "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[6] Even later, the court seems to equate its test with interpreting the Constitution according to its original meaning, stating, "The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."[7]

The opinion recites its general approach to understanding the meaning of the Second Amendment. Echoing the methodology of

4 *See* Mulligan, *supra* note 2, at 428–31, 435–37 (discussing experiences of alienation from the Constitution and from originalism).

5 *Bruen*, 142 S. Ct. at 2126.

6 *Id.* at 2127.

7 *Id.* at 2131.

original public meaning originalism,[8] the majority repeats its statement from *District of Columbia v. Heller* that "'examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification' was 'a critical tool of constitutional interpretation,'"[9] and reiterates that in *Heller*, the majority looked to the writings of Founding-era legal scholars, nineteenth-century cases, discussions of the Second Amendment in Congress and in the public discourse after the Civil War, and the language of post–Civil War commentators.[10] The *Bruen* majority observes that the *Heller* Court noted the right to keep and bear arms was "not unlimited," for example, acknowledging there was a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[11] But despite noting the existence of some limits, the *Heller* Court reasonably stated that it was not "undertak[ing] an exhaustive historical analysis . . . of the full scope of the Second Amendment" in the case before it.[12]

Having situated *Bruen* in the context of what came before in *Heller*, the *Bruen* majority then describes what kind of evidence is relevant to determining whether a regulation of arms is consistent with this nation's historical tradition of firearm regulation, and therefore is constitutional. The majority makes several statements about what kind of evidence is *relevant*. For example, the Court notes that if a present-day regulation addressed a societal problem that existed in the eighteenth century onward, "the lack of a distinctly similar historical regulation addressing that problem is *relevant* evidence that the challenged regulation is inconsistent with the Second Amendment."[13] Similarly, if societal problems were addressed through different means historically than today, that "*could* be evidence that a modern regulation is unconstitutional."[14] And if jurisdictions tried to enact regulations on guns

8 Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1962–63 (2021) ("The public meaning of a legal text is the communicative meaning conveyed or made accessible to the public by the text, where 'the public' is understood as a linguistic community (or set of overlapping linguistic subcommunities) encompassing the contemporaneous competent speakers of the natural language in which the text was written, in the jurisdiction in which the text has legal effect." (footnote omitted)); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 933 (2009) ("The core idea of the revised theory [of originalism] is that the original meaning of the Constitution is the original public meaning of the constitutional text." (emphasis omitted)).

9 *Bruen*, 142 S. Ct. at 2127–28 (quoting District of Columbia v. Heller, 554 U.S. 570, 605 (2008)).

10 *Id.* (citing *Heller*, 554 U.S. at 605, 610, 614, 616–19).

11 *Id.* at 2128 (quoting *Heller*, 554 U.S. at 626–27).

12 *Heller*, 554 U.S. at 626.

13 *Bruen*, 142 S. Ct. at 2131 (emphasis added).

14 *Id.* (emphasis added).

previously rejected on constitutional grounds, that rejection "would provide *some probative evidence* of unconstitutionality."[15] The words *relevant*, *could*, and *some probative evidence* are notable choices here.

If one cares about the public's historical understanding of the Second Amendment's meaning, the kind of evidence described in all these historical situations certainly matters. It's notable that these examples are not initially presented as dispositive, suggesting that there could be other evidence that would also be relevant to deciding the boundaries of the Second Amendment. Implicitly, this language leaves room, in cases where there has been an ongoing societal problem and no historical regulation addressing it, for *other* evidence to indicate the regulation is constitutional. Similarly, it leaves room for other evidence to speak to cases where an ongoing societal problem was historically addressed through different means than it is today.

But given how the Court talks about historical regulations later in the opinion, it's not clear if the Court really intends to leave this possibility open. It's possible the "could" and "relevant" language represents the kind of writing one does when one doesn't want to foreclose the possibility that there's some set of unforeseen circumstances that would lead to another conclusion. Yet despite the majority's statement that it's only "relevant" if there was no historical regulation of an ongoing societal problem, the majority seems to have treated that fact as more dispositive when it comes to assessing the constitutionality of the proper cause requirement in *Bruen*. When it comes to the regulation in question, the majority identifies the societal problem being addressed by the proper cause requirement as handgun violence, particularly in "urban area[s],"[16] and concludes that there is not an "American tradition" of broadly prohibiting the public carry of commonly used firearms for personal defense.[17]

The majority does describe why prior regulation (or lack thereof) may be relevant but not dispositive later in the opinion, when it notes,

> While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. . . . Although [the Constitution's] meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply

15 *Id.* (emphasis added).

16 *Id.* (alteration in original) (quoting *Heller*, 554 U.S. at 634).

17 *Id.* at 2156.

> to circumstances beyond those the Founders specifically anticipated.[18]

Then the Court's explanation for how the Constitution applies in unanticipated scenarios gets a little imprecise. It points to how the meaning of "arms" was historically understood as a general definition of bearable arms, and thus the term covers arms that were not in existence at the time of the Founding but qualify as bearable arms.[19] The Court then uses that understanding to pivot:

> Much like we use history to determine which modern "arms" are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge.[20]

The Court notes that what matters is whether a modern and historical regulation are "relevantly similar" in ways which are "important,"[21] and understandably declines to "provide an exhaustive survey of the features that render regulations relevantly similar."[22] However, it emphasizes that a central consideration was "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified."[23] The Court also emphasizes that the analogical reasoning it endorses is not mechanical. Neither should the Court "'uphold every modern law that remotely resembles a historical analogue,' because doing so 'risk[s] endorsing outliers that our ancestors would never have accepted'" nor should it require the government to identify a "historical *twin*," rather than an analogue, of a modern-day regulation.[24]

The analogy the Court tries to draw here between the constitutional meaning of "arms" and constitutionally permissible regulations doesn't work. The reason the Second Amendment can cover guns that didn't exist at the Founding is because the text of the amendment uses

---

18 *Id.* at 2132. Here, the *Bruen* majority echoes what Jack Balkin identifies as the difference between the "original meaning" of the Constitution and its "original expected application." *See* JACK M. BALKIN, LIVING ORIGINALISM 6–7 (2011).

19 *Bruen*, 142 S. Ct. at 2132 (citing *Heller*, 554 U.S. at 582).

20 *Id.*

21 *Id.* (first quoting Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993); and then quoting Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 254 (2017)).

22 *Id.*

23 *Id.* at 2133.

24 *Id.* (alteration in original) (quoting Drummond v. Robinson Township, 9 F.4th 217, 226 (3d Cir. 2021)).

a general term, "arms," the definition of which many new weapons can satisfy. The meaning of "arms" stays fixed; however, the real-world objects it can reference have changed because the world has changed, not the meaning of the term "arms." However, it's not clear what follows from this observation about the meaning of "arms" for the question of how to understand present-day regulations of arms. The word "arms" is in the Constitution, and serves as the basis for understanding what weapons are covered. But none of the language the Court uses to discuss arms regulation, e.g., history, tradition, and regulation, appears in the text of the Second Amendment. Thus, it's not at all clear from the Supreme Court's language what the basis is, or what the source is, for determining how to think about regulating situations unexpected at the time of the Founding.

B. The Missing Basis for the Historical Tradition Test

Closely reading *Bruen* raises the question of what the basis or source is for the Court's test of regulatory constitutionality, and why that test appears to focus exclusively on historic regulations, as contrasted with other sources. The Court's narrow focus on historic regulations to identify the constitutional limitations on the right to keep and bear arms stands in surprising contrast to the many sources of public meaning, including public commentary, that the Court looked to in *Heller* to determine the reach of Second Amendment rights.

Why would the Court narrow its focus so much when considering limitations on the right to bear arms, after looking to a variety of sources to discern the right's reach? While historical regulations are certainly relevant, they hardly seem *exclusively* relevant. For instance, it certainly seems conceptually possible that there could be some arms regulation that no jurisdiction did pass, but that members of the public believed was constitutional. If that were the case, we could imagine the existence of contemporaneous commentary that said, "Well, surely we all know that *X* regulation of arms would be constitutional, but it doesn't seem important right now compared to other, unrelated legislative priorities," or "but there isn't the political will to pass it." In such a situation, there would certainly be a strong argument that the original public meaning of the Second Amendment allowed for the regulation, even in the absence of an actual regulation of the activity anywhere. But *Bruen* seems to foreclose this possibility by requiring the government to identify an actual historic regulation, analogous to the modern regulation, regardless of what the rest of the public commentary consisted of.

One possible explanation for the Court's choice is that the Court simply doesn't imagine there would ever be a case where the public meaning of the Second Amendment ever limits the reach of its "plain

text" in the absence of a historical analogue. This conclusion might be an assumption about the evidence—that there would never be the kind of evidence described above, which speaks to a belief that some regulation would be constitutional even if no one was interested in passing it. But even if there are no such examples jumping out to us, that kind of assumption by the Court would be surprising—the majority opinions of *Bruen* and *Heller* take enough pains not to assume results in circumstances not before them; it would be out of character for the Court to assume what potential evidence in other cases that were not before it would look like.

Perhaps a better explanation for the limited type of evidence the Court focuses on in *Bruen* rests in how the Court understands the structure of the Second Amendment right. The Court frequently expresses that the Second Amendment "codified a *pre-existing* right" "inherited from our English ancestors."[25] The scope of that right could be conceptually understood in two ways: as a broad right, which is limitable in certain ways; or as a right that doesn't include the permissible limitations from the start. Under the first understanding, we would say there is a "right to bear arms" and that the law has recognized that certain regulations can abrogate the full scope of the right, such as the regulation for prohibiting carrying dangerous and unusual weapons.[26] On the second understanding, we would say the right to bear arms *itself* simply does not include the right to carry dangerous and unusual weapons.

As formulated, the two above ways of thinking about the right to bear arms have the same practical impact—choosing between these frameworks is not about identifying what laws are and are not constitutional. But, figuring out how the Court understands the right can help clarify why it looks at certain evidence to find constitutional meaning.

Consider the first understanding. There, the Second Amendment is useful for identifying what the full, positive scope of the right to bear arms is, using all the relevant evidence available to someone looking for the original public meaning of constitutional text. Because the amendment itself does not talk about limitations or exceptions to the right, the scope of any limitations and exceptions, if any, would seem to come from outside the constitutional text. But in the second understanding, the source of the right's limitations comes from the scope of the right mentioned in the text itself. From this perspective, the "right of the people to keep and bear Arms"[27] does not necessarily reference a right that absolutely protects all activities characterizable as keeping

25 *Id.* at 2127 (quoting District of Columbia v. Heller, 554 U.S. 570, 592, 599 (2008)).

26 *See, e.g.*, *id.* at 2128.

27 U.S. CONST. amend. II.

and bearing arms. Rather, because the Second Amendment enshrined a preexisting right, that right could be understood as having a preexisting scope that was not necessarily identical to *all* instances of keeping and bearing arms, or that did not protect rights absolutely. To understand the scope of the preexisting right at the time, we have to look at the scope it had at the time of the language's adoption. From this perspective, some regulations on keeping and bearing arms would be consistent with the original public meaning of the scope of the right to keep and bear arms.

Both understandings seem to be at play in the *Bruen* decision. Explicitly, the Court seems to say it is operating under the second perspective. It emphasizes that "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*" and that "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text."[28] So the Court seems to be saying that despite the text of the Second Amendment not describing limitations or exceptions, at least some limitations on bearing arms are consistent with the historical understanding of the text.

However, the test *Bruen* announces is somewhat more consistent with the first understanding. The majority first instructs judges to evaluate whether the Second Amendment's "plain text covers an individual's conduct"[29]—implying that the unstated, richer historical scope of the right is *not* what we're looking to for the Second Amendment's meaning, but rather the plain meaning of "keep and bear arms." It then says that the plain meaning can only be undercut by a history of analogous firearm regulation—either implying that historical practice brings something outside the four corners of the Constitution to bear, or returning again to the richer, historical understanding of what the preexisting *right* consisted of and suggesting its limitations can only be provided by contemporaneous laws, and not other sources of original public meaning.

Neither of the Court's apparent approaches is quite consistent with an original public meaning approach to originalism. The Court explicitly says that regulations can't be inconsistent with the amendment's text, so the source of those limitations has to be in there somewhere. But if the basis for arms regulation is part of the meaning of the "right of the people to keep and bear arms" then why focus on the "plain text" of the amendment first, only to then look at historical

28 *Bruen*, 142 S. Ct. at 2136–37 (first quoting *Heller*, 554 U.S. at 634–35; and then quoting Heller v. District of Columbia, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

29 *Id.* at 2126.

regulation to identify limitations? Some things are obviously outside both the plain text and the text in full context, and perhaps it's easier to identify irrelevant regulations by quickly saying they're not about "arms" or "carrying" without getting into the fuller context of the text. But this seems like an odd reason to start with the "plain text" given that the Court announces it is really looking for the original "public understanding" of the text—the text in its full historical context, which may not be particularly "plain."

The Court's brief discussion of liquidation may provide some explanation for why it looks solely to historical regulation to identify limitations on the right's scope. It notes, in a section discussing how to use historical evidence, that "in other contexts, we have explained that '"a regular course of practice" can "liquidate & settle the meaning of" disputed or indeterminate "terms & phrases"' in the Constitution."[30] In referencing liquidation, the Court here suggests that the scope of the Second Amendment is in- or underdeterminate and that historical practice has settled the boundaries of the right over time. The notion of "liquidation" allows unclear constitutional meaning to be settled over time, through a course of practice by government bodies, but not public opinion or interpretation alone[31]—perhaps this is why the Court looks solely to government regulation to implicitly "liquidate" the meaning of the right to keep and bear arms. But given that the Court does not attempt to interpret the meaning of "right to keep and bear arms" using all evidence of public meaning available before speaking of liquidation, the Court seems to skip the interpretive step, or at least conflate interpretation with liquidation. This is a mistake, or at least premature, because "[i]f first-order interpretive principles make the meaning clear in a given context, there is no need to resort to liquidation."[32] The Court continually emphasizes that the Second Amendment codified an existing right, and so to interpret the Second Amendment's text, to understand *both* what it covers and what it doesn't cover, we ought to look to the wide variety of sources that speak to the text's original public meaning. Only if we conclude that that meaning was unclear should we look to whether a course of practice has narrowed the permissible range of meaning of the clause.[33]

30 *Id.* at 2136 (quoting Chiafalo v. Washington, 140 S. Ct. 2316, 2326 (2020)).

31 *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 16–18 (2019) (describing how a course of deliberative practice by the government is necessary to liquidate a constitutional provision); *see also* Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms*, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION: ESSAYS ON THE PLACE OF GUNS IN AMERICAN LAW AND SOCIETY 233, 244–45 (Joseph Blocher et al. eds., 2023) (discussing liquidation of the right to bear arms).

32 Baude, *supra* note 31, at 13–14.

33 *See id.* at 13 (describing broadly how constitutional liquidation occurs).

Looking at whether some aspect of the Second Amendment's meaning has been liquidated may be necessary in some cases, but because liquidation only comes into play when public meaning has failed to provide clarity, it never should replace the initial task of interpretation and looking broadly for evidence of public meaning.

Bruen thus errs not by saying historic regulation is *strong* evidence of the Second Amendment's meaning, but by suggesting that it's the *only* evidence that matters when identifying limitations or lacunae in the right to keep and bear arms. It further errs by suggesting the "plain text" of the Second Amendment accurately defines the reach of the right, rather than explicitly delving into the meaning of the text in context to understand both the right's reach and its limitations. The exact logic that leads to these decisions is not entirely explicit, but seems to arise out of assumptions that limitations on the right to keep and bear arms cannot be located in the phrase "right to keep and bear Arms" and that those limitations must have been liquidated over time. But this logic is somewhat internally inconsistent even within *Bruen*, which repeatedly emphasizes that the Second Amendment codified a preexisting right, and looks to preratification practice even though preratification practice would not speak directly to the liquidation of a vague constitutional provision.

C. Taking Preexisting Rights Seriously

Given *Bruen*'s ambiguity, there is still room for future court decisions to develop a genuinely originalist jurisprudence around the right to bear arms. To sketch out what this approach could look like, it's useful to further explore what the majority might have meant when it said the Second Amendment codified a preexisting right.

The Court does not specify what the origins or nature of this preexisting right were. This kind of vagueness and ambiguity in the opinion is not surprising given the actual differences of opinion about the law within the majority. Readers will notice, for instance, that while the majority repeatedly says that the Fourteenth Amendment incorporated the Second Amendment against the states, the opinion never says which part of the Fourteenth Amendment does so—likely because several of the Justices hew to the view that incorporation occurs through the Due Process Clause and at least Justice Thomas believes that the right to keep and bear arms applies to the states via the Privileges or Immunities Clause.[34] It is similarly possible that the majority couldn't,

34 *Compare* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (holding "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*"), *with id.* at 806 (Thomas, J., concurring in part and concurring in judgment) (disagreeing that the Second Amendment "is enforceable against the States

or didn't want to, do the work of getting agreement on something as esoteric as the origins and nature of the "preexisting" right to bear arms. However, understanding what that right was helps illustrate why *Bruen*'s exclusive focus on legislative regulations is insufficient for understanding the boundaries of the right, and why that focus needs to be broadened in the future.

While *Bruen* doesn't expound on the nature of the preexisting right, *Heller* gives a few hints about how at least several members of the Court understood it. In *Heller*, the majority, written by Justice Scalia, noted that "Justice James Wilson interpreted the Pennsylvania Constitution's arms-bearing right . . . as a recognition of the natural right of defense 'of one's person or house'—what he called the law of 'self preservation.'"[35] *Heller* similarly quotes Blackstone, commenting on "the natural right of resistance and self-preservation," and "the right of having and using arms for self-preservation and defence,"[36] as well as a later article published in New York saying, "[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence."[37] In quoting these sources, *Heller* suggests that the Supreme Court considers the Second Amendment as being designed to codify or explicitly recognize a natural right—or at least, what the public at the time would have understood to be a natural right (regardless of whether there "really is" such a right).

Jud Campbell's scholarship on how Founding-era elites understood rights provides more context for these comments in *Heller*. In an essay on the right to bear arms, and more comprehensive work on the First Amendment, Campbell argues that—at least for the Founding-era elites whose writing he has access to—"rights" were understood then in a different way than they are generally understood in America today. Rather than acting as "trumps," Campbell explains, "Americans typically viewed natural rights as aspects of natural liberty that governments should help protect against private interference . . . and that governments themselves could restrain only to promote the

through a Clause that speaks only to 'process'" and arguing that "the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause").

35 District of Columbia v. Heller, 554 U.S. 570, 585 (2008) (quoting 2 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 1142 (Kermit L. Hall & Mark David Hall eds., 2007)).

36 *Id.* at 594 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *139–40).

37 *Id.* (alteration in original) (quoting BOSTON UNDER MILITARY RULE (1768–1769): AS REVEALED IN A JOURNAL OF THE TIMES 79 (Oliver Morton Dickerson ed., 1936)).

public good and only so long as the people or their representatives consented."[38]

Although the ability of the government to restrain rights to promote the public good invited contestation about what qualified as promoting the public good, the idea of "rights" still had meaningful content. As Campbell notes, "the Founders viewed discretionary royal licensing as a quintessential violation of natural rights. If the King or his agents could decide who could operate a printing press and who could possess certain firearms, that would plainly violate natural-rights principles."[39] The government's exercising subjective judgement about who could exercise their rights—echoing the proper cause requirement at issue in *Bruen*—would typically be a violation of the right. However, per Campbell, while "[t]he natural right to possess and carry weapons required the legislature to act impartially, . . . it did not correspond to determinate, legalistic restrictions on legislative power."[40]

Campbell explains also that the right to keep and bear arms, and to defend oneself, was not only thought of as a natural right, but sometimes as a type of "positive right."[41] Positive rights were rights that existed in the context of government—such as rights to jury trials and to vote.[42] Although they needed to be created by political society, "many Founders thought that some fundamental positive rights were created in the imagined social contract and could be identified through custom, without any need for constitutional enumeration."[43] The nature and scope of these "customary" positive rights could be understood through the common law.[44] For example, arbitrary disarmament would be understood as abridging a customary positive right to bear arms, because this behavior had been understood as doing so in the seventeenth century.[45] But Campbell observed, "[W]hile this right provided security against the problems of the past, it could not

38 Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 253 (2017) (emphasis omitted). Notably, Campbell recognizes a shift in how speech could be regulated by the late 1700s, by which time "expressive freedom also connoted a variety of more determinate legal protections" which included "the rule against press licensing" and immunization from regulation for making "well-intentioned statements of one's views." *Id.*

39 Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS. 31, 36 (2020).

40 *Id.*

41 *Id.* at 51.

42 *Id.* at 34.

43 *Id.* at 39 (citing Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL'Y 569, 577 (2017)).

44 *Id.* at 40.

45 *Id.*

necessarily resolve the problems of the future because its application to those problems was not yet settled."[46]

Indeed, Campbell sees both a natural-rights view and a positive-rights view of the right to bear arms as possessing some uncertainty. "[N]atural rights lacked legal specificity, and customary law rarely supplied clarity about how to address new problems."[47] So how does Campbell's historical context about preexisting rights inform *Bruen* and the regulation of arms?

To some degree, what we learn from Campbell's work depends on how much the Second Amendment was understood to "freeze" the understanding of the right to bear arms at the time of ratification, versus recognize the right which, under both the natural and positive rights view, had some space to evolve when new questions arose. "Freezing" the right would invite it to be treated analogously to the Seventh Amendment's right to a jury trial, which explicitly states that "right of trial by jury shall be preserved."[48] But even to the extent the exact content of the right was frozen (which seems not to be the case, in Campbell's view), the scope of the right would still be defined by all sorts of sources besides laws actually enacted. Enacted laws certainly would indicate that a regulation was permissible, but the absence of a law would not necessarily indicate that such a regulation for the "common good" would violate the law, any more than something being a twenty-first-century weapon, not in existence at the time of ratification, would disqualify it from being "arms."[49] To hold otherwise would limit the meaning of the Second Amendment to the "original expected application[s]" of the right to bear arms, cutting off future assessments of what regulations would be constitutional in new circumstances.[50]

---

46 *Id.*

47 *Id.* at 33.

48 U.S. CONST. amend. VII; *see* Randy E. Barnett & Lawrence B. Solum, *Originalism after* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 467 (2023) (explaining "the role of historical tradition in *Bruen* would be analogous to the role that the historical tradition of trial by jury plays in the context of the Preservation Clause of the Seventh Amendment, which 'preserve[s]' a preexisting 'common law' right, the content of which is defined by the historical tradition of the right to jury trial as it existed in 1791" (alteration in original) (footnote omitted) (first citing Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 872–926 (2013); and then citing Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 185–92 (2000))).

49 *Cf.* Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. REV. 1795, 1800 (2023) ("[N]o principled approach to originalism would license a court to engage in *selective* updating through its analogical reasoning, for example by expanding the class of modern 'Arms' while limiting legislatures' efforts to expand the class of persons who are protected from gun harms.").

50 *See* BALKIN, *supra* note 18, at 6–7.

While this could be a conceptually plausible interpretation of what the Second Amendment's ratification did, it seems to be both inconsistent with Campbell's contextual description of rights thinking, as well as with originalist thinking in general.

To the extent the right was being recognized, which seems closer to Campbell's view, such recognition leaves space for the right to continue to evolve, in accordance with the right's natural- and/or positive-law nature.

In both possibilities, where the right to keep and bear arms is frozen by the Second Amendment or recognized by the Second Amendment, the scope of the right—both its reach and potential limitations—at the time of adoption matters. And given that the Court is purportedly looking to the "public understanding" of the amendment, that scope should be understood through reference to the whole public's understanding of that right, both just before and just after the amendment's adoption.

D. The Context of the Fourteenth Amendment

Talking about whether the Second Amendment "froze" or "recognized" the right to bear arms at the time of its ratification, of course, distracts from the more complicated question of how the right to bear arms applied to the states, and even the federal government, following the ratification of the Fourteenth Amendment. Indeed, the *Bruen* majority sidesteps the critical question of which time period is most appropriate for understanding the scope of the right to bear arms. *Bruen* reiterates the observation in *Heller* that "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*."[51] It then waffles on which "when" is relevant for understanding the constitutionality of New York's law, waving its metaphorical hands by saying that the time period doesn't really matter in this case, because "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry."[52] The Court repeats that "individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government" and that it has assumed that "the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791."[53] But then it also nods its head to the

51 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2136 (2022) (quoting District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008)).

52 *Id.* at 2138.

53 *Id.* at 2137.

"ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified . . . (as well as the scope of the right against the Federal Government)."[54]

While *laws* analogous to the regulation at issue in *Bruen* might have been similar in both the late eighteenth and mid-nineteenth centuries, *Bruen*'s exclusive focus on analogous, enacted laws obscures some of the key differences between the two periods, which looking at all evidence of public meaning is more able to capture. Much recent scholarship explores the intellectual environment at the time of the ratification of the Fourteenth Amendment,[55] and *Bruen*'s narrow focus wrongly pushes much of the discussion of this environment off the table. A more originalist *Bruen* would have not only looked at all evidence of public meaning, but also would have evaluated how the right to keep and bear arms, and how the Second Amendment, was understood during the Fourteenth Amendment's adoption.

II. POTENTIAL CONSEQUENCES OF *BRUEN*

A. Wrong Results

1. Failing to Consider All Evidence of Public Meaning

Bruen's apparent direction to exclusively look at laws that regulated arms at the time of the adoption of the Second or Fourteenth Amendments is unfortunate for a number of reasons. Most obviously, the direction risks interpreters of the Constitution reaching wrong conclusions, by wrongly limiting the evidence considered when interpreting the Constitution and constructing applications of the Constitution. One of this author's previous articles, *Diverse Originalism*, discussed the importance of referencing diverse sources of constitutional meaning to correctly identify what members of the public understood the Constitution to mean. In particular, it noted, "distorted interpretations [of what the Constitution meant] can . . . occur if a present-day interpreter primarily looks at how the Constitution was understood by a subset of the public and mistakenly concludes that the views of the

54 *Id.* at 2138 (first citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, at xiv, 223, 243 (1998); and then citing Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441 (2022)).

55 *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (2021); William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185 (2024).

subset accurately represent the views of the majority or even the whole."[56] Instead,

> [i]f public-meaning originalists seek to understand the Constitution as it was understood by the public, the meanings of the entire public must be considered. Ignoring the understanding of lower-class Americans, black Americans, German-speakers, or women *ex ante* presumes that the views of elite, white, English-speaking men were either identical to other groups' interpretations, or were the best or most reasonable interpretations of the Constitution.[57]

Bruen narrows the focus of originalist interpretation even further than usual, not merely focusing on the general views of elite, white, English-speaking men, but exclusively on the elite, white, English-speaking men who held political power in the jurisdictions that passed regulations on arms usage. The interpretive danger of looking at only *passed* laws is revealed by looking at Michael McConnell's 1996 essay *The Originalist Case for* Brown v. Board of Education.[58] In that essay, McConnell builds his argument that the original understanding of the Fourteenth Amendment required school desegregation by looking at the discussion of proposed legislative text that was *not* passed into law.[59]

In his essay, McConnell looked "at the years immediately following ratification of the [Fourteenth] Amendment—to the debates over enforcement of the Amendment."[60] He focused on the debates surrounding the law that became the Civil Rights Act of 1875[61]—a law that largely escapes focus now, because it was struck down as unconstitutional a few years after it was enacted.[62] However, the Civil Rights Act of 1875 was not struck down for reasons related to segregation, and the debates about the Act can reveal what those who discussed it believed the Fourteenth Amendment required and permitted.[63]

Senator Charles Sumner's initial proposal for what would become the Civil Rights Act of 1875 guaranteed "equality in access to various types of public accommodation" and "unquestionably forbade segregation, and not just exclusion from facilities."[64] The bill was debated

---

56 Mulligan, *supra* note 2, at 413.

57 *Id.*

58 Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J.L. & PUB. POL'Y 457 (1996).

59 *Id.* at 458.

60 *Id.* at 459.

61 Act of Mar. 1, 1875, ch. 114, 18 Stat. 335.

62 McConnell, *supra* note 58, at 459 (citing The Civil Rights Cases, 109 U.S. 3 (1883)).

63 The Act was invalidated because of the state action question. *See id.* at 459 n.11; Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1090–91 (1995).

64 McConnell, *supra* note 58, at 459–60.

for three and a half years.[65] McConnell emphasized, "It must be understood that, at the time, the only conceivable source of congressional authority to pass the civil rights bill was the authority under Section five to enforce the substantive provisions of the Fourteenth Amendment. Support for the bill was, therefore, tantamount to an interpretation of the Amendment."[66]

Between the bill's introduction in 1870 and its amended passage in 1875, majorities in both the House of Representatives and the Senate supported the language requiring desegregation.[67] But the bill did not pass with the desegregation requirements intact, because various procedural rules in the House required a two-thirds majority, which was never reached.[68] Democrats took control of the House after the election in November 1874.[69] Republicans still wanted to pass the bill, and Democrats were willing if it was amended to permit supposed "separate-but-equal" schools.[70] Not wanting to endorse the idea of "separate-but-equal," Republicans acquiesced to removing coverage of schools from the bill altogether.[71] McConnell explains, "That did not mean that their constitutional interpretation had changed, but only that their political power to achieve enforcement of that interpretation had changed."[72]

McConnell's example of the Civil Rights Act of 1875 illustrates how the laws that pass don't always definitively tell us what the constitutional powers or rights they relate to include. As McConnell notes, "On one fateful date in June, 1874, the switch of just two votes would have carried the measure, and the requirement of school desegregation would have been written into the law."[73] Our conclusion about whether the Fourteenth Amendment forbade de jure segregation of public schools does not depend on the political decision-making of two members of Congress. It does not depend on whether one needed a fifty-percent or two-thirds majority of the House of Representatives to pass a bill. And it does not depend on whether Democrats or Republicans won elections in 1874. It depends on the public meaning of the amendment—what members of the public understood the text, in context, to mean. And McConnell reminds us, "Large majorities of both houses of Congress, and even larger majorities of supporters of the

65 *Id.* at 460.
66 *Id.* (footnote omitted).
67 *Id.* at 463.
68 *Id.*
69 *Id.* at 464.
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.* at 463.

Fourteenth Amendment, concluded that it forbade de jure segregation of public schools."[74] But if we only looked at statutes implementing the Amendment, all this evidence would be invisible.

Now, one might wonder whether the nature of the nondiscrimination requirements of the Fourteenth Amendment and the right to keep and bear arms protected through the Second and Fourteenth Amendments are different enough that this comparison is inapt. The question of whether the Fourteenth Amendment forbids segregation is directly a question about the Fourteenth Amendment's scope, whereas the question of whether a regulation of arms falls outside the right to keep and bear arms may or may not be answered outside the text of the Second Amendment via liquidation. But as the previous Sections already discussed, there's no reason to consider the entire body of evidence of original public meaning to determine the reach of the right to keep and bear arms, while abrogating use of that same evidence to determine the right's limitations. Information about the reach and limits of the "right of the people to keep and bear Arms"[75] is located in the original public meaning of the phrase, and the evidence relevant to both is identical. Even if some indeterminacies concerning the right existed and were liquidated following adoption, all sorts of evidence of public meaning could still speak to the scope of the right, just as all sorts of evidence of public meaning could speak to whether the Fourteenth Amendment forbade segregation.

2. Nudging Towards Original Expected Applications

Bruen further risks lower courts reaching wrong results because its narrow focus on legislation, perhaps inadvertently, nudges judicial actors to evaluate the constitutionality of arms regulation with a view to whether the regulation would have been expected historically. Although Justice Thomas points out that laws must be analogous in relevant ways and implies modern problems may find historical analogues in laws that are not about the *exact* same issue, the historical tradition test employed in *Bruen* pushes judges to look for laws that were specifically similar to the regulation at issue.[76] Using the words of Jack Balkin, the test nudges interpreters to look for the "original expected application[s]" of the Second Amendment, rather than the "original public meaning."[77] When combined with the fact that we're only looking at sources endorsed by those with legislative power, we may then only see a *subset* of the original expected applications.

---

74 *Id.* at 464.

75 U.S. CONST. amend. II.

76 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131–33 (2022).

77 *See* BALKIN, *supra* note 18, at 6–7, 49.

Reva Siegel describes how *Bruen*'s test can lead to judicial error, citing *United States v. Perez-Gallan*,[78] a case decided under the *Bruen* framework which concluded that the government could not prohibit someone under a court order for partner violence from possessing a firearm, reasoning that the problem of domestic partner violence existed before the Founding and was largely ignored by the legal system.[79] While Siegel believes "*Bruen* does not require this result," she is concerned that it "provides judges opportunities to 'ventriloquiz[e] historical sources with their own values,' to employ law of earlier eras to infuse traditional understandings of gender into contemporary constitutional decisions."[80] There are multiple errors in the reasoning that Siegel describes, each of which illustrates how *Bruen*'s test diverges from original public meaning originalism. Primarily, the judge's reasoning illustrates how *Bruen*'s test does not easily take into account the possibility that the absence of a regulation could be explained by a legal or cultural belief (here, beliefs about domestic violence and the role of women in society) that was unrelated to the constitutionality of arms regulation. Without the ability to distinguish among reasons laws were not passed, *Bruen*'s test freezes all sorts of "expected applications" of the right to keep and bear arms, which have little to do with the original meaning of the right. Second, *Bruen* ignores the possibility that even if the men in a position to legislate did not concern themselves with violence in the home, others might have interpreted the right to bear arms to permit governments to pass this type of regulation. And finally, by only looking at the Second Amendment in isolation, courts avoid considering whether the context of the passage of the Fourteenth Amendment might reach back and alter the scope of the Second.

B. Unnecessary Alienation

Although *Bruen* is nominally an originalist decision, the test it announces risks leading to nonoriginalist results. But beyond *Bruen*'s

78 640 F. Supp. 3d 697 (W.D. Tex. 2022).

79 Reva B. Siegel, Commentary, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 904–05 (2023) (citing *Perez-Gallan*, 640 F. Supp. 3d. at 710); *see also* United States v. Rahimi, 61 F.4th 443, 457 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688, 2688–89 (2023).

80 Siegel, *supra* note 79, at 905 (footnote omitted) (quoting Blocher & Siegel, *supra* note 49, at 1829); *see also* Peter M. Shane, *The Trickle-Down Supreme Court*, WASH. MONTHLY (Dec. 14, 2022), https://washingtonmonthly.com/2022/12/14/the-trickle-down-supreme-court/ [https://perma.cc/WXX6-NZ3L] ("There is nothing subtle about how *Perez-Gallan* constitutionalized traditional misogyny."); *see also* Blocher & Siegel, *supra* note 49, at 1799–800 (arguing that *Bruen* does not require gun regulation to match practices in the distant past).

legal impact, the decision's historical tradition test also serves to unnecessarily contribute to the alienation many women and people of color feel from the Constitution generally and from originalism specifically. This alienation has a past and present component—people can feel alienated from the Constitution and originalism because the ratification periods largely excluded women and people of color from positions of power, and people can feel alienated from the practice of originalism today because originalism's present-day advocates do not seem especially sympathetic to their interests.[81] The past and present alienation contribute to each other. When originalists don't look to diverse sources in the past, they not only risk missing important evidence of public meaning, they also send the signal that diverse voices aren't important today.[82]

How originalists talk about and engage with women and people of color rightly affects how the originalist method is perceived today. An essay by Jacob Levy about libertarianism and welfare makes the point by analogy:

> Think about the different ways that market liberals and libertarians talk about "welfare" from how they talk about other kinds of government redistribution. There's no talk of the culture of dependence among farmers, although they receive far more government aid per capita than do the urban poor. . . . But once the imagined typical welfare recipient was a black mother, welfare became a matter not just of economic or constitutional concern but of moral panic about parasites, fraud, and the long-term collapse of self-reliance.[83]

Levy recognized that even when a person purportedly objected to welfare programs *in general*, the public would notice when those objections were not evenly raised. In situations like this, many black Americans would reasonably conclude that many of those who supposedly objected to the government providing a social safety net did so for racist reasons.

But Levy's essay also recognized that a political philosophy's historic association with racism need not dictate its association in the future. His comment about the intellectual history of progressivism and free-market politics is also analogously instructive for originalists:

---

81 Mulligan, *supra* note 2, at 400.

82 *See id.* at 402, 436–37 (arguing that by "incorporating more diverse perspectives into constitutional interpretation, and by honestly wanting to do so, originalists and originalist practice can demonstrate that diverse perspectives are important, and that diverse populations matter").

83 Jacob T. Levy, *Black Liberty Matters*, NISKANEN CTR.: OPEN SOC'Y (Sept. 20, 2017), https://niskanencenter.org/blog/black-liberty-matters [https://perma.cc/T3LH-QVQN].

> [L]ibertarian, individualist, and market-liberal ideas, concepts, slogans, and advocates aren't alone in having a history that is entangled with white supremacy. Hardly any set of social ideas in American intellectual history lacks such an entanglement. This is as true of the technocratic progressivism associated with the racist Woodrow Wilson as it is of the populist democracy associated with the racist Andrew Jackson. . . . There's no good reason to sever "democracy" or "progressivism" from their complicated genealogies while tying "federalism" or "freedom of association" to theirs.[84]

In recent decades, progressives have been effective at separating progressive ideas from racist ones they were historically associated with. That separation required some revision of progressive philosophies. This change in how progressive ideas are perceived illustrates that it's possible for other ideas to be revised in similar ways, and originalism—currently deeply associated with conservative, Republican, or libertarian white men—is a prime candidate for revision.

The Supreme Court's gun rights cases contribute to the narratives that lead to alienation in a complex way. *Bruen*'s predecessor case, *McDonald v. City of Chicago*, emphasized that one of the main purposes of the Fourteenth Amendment was to protect the rights of black Americans in the South to defend themselves against violently racist white people.[85] But when gun rights advocates did not come out in droves to condemn Philando Castile's death, it wasn't hard for observers to conclude that black people only get gun rights—or lip service about gun rights—when convenient.[86] The dissonance raises the dark

---

84 *Id.* (emphasis omitted).

85 *See* McDonald v. City of Chicago, 561 U.S. 742, 770–78 (2010); *see also* Daniel S. Harawa, NYSRPA v. Bruen*: Weaponizing Race*, 20 OHIO ST. J. CRIM. L. 163, 166 (2022) ("By spending so much time discussing race, *Heller* and *McDonald* sent an unmistakable message: in Second Amendment cases, race matters. And implicitly: America's history of gun control is racist, and thus we must be skeptical of efforts to regulate guns today.").

86 *See, e.g.*, Khiara M. Bridges, *The Supreme Court, 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 31 (2022) ("The Court 'protects' people of color only when it serves conservative ends."); *see also* Zamir Ben-Dan, NYSRPA v. Bruen *and New York: A Lost Opportunity for Racial Equity in the Polarizing Gun Conversation*, 26 CUNY L. REV. 1, 9–10 (2023) ("The NRA in particular has generally been quiet about racial justice issues within gun discourse; for example, the NRA had nothing of relevance to say regarding the police killings of Alton Sterling and Philando Castile . . . ."); Mulligan, *supra* note 2, at 437 (citing Leon Neyfakh, *Philando Castile Should Be the NRA's Perfect Cause Célèbre. There's Just One Problem.*, SLATE (June 17, 2017, 4:47 PM), https://slate.com/news-and-politics/2017/06/after-jeronimo-yanez-acquittal-philando-castile-should-be-the-nras-perfect-cause-celebre-why-isnt-he.html [https://perma.cc/2YC2-YLE2] ("It feels banal to even say it out loud: If Castile had been white instead of black, the [National Rifle Association] would have been rallying behind him and his family since the moment of his death and fundraising off his memory for the rest of time."); Open Letter from Tamika D. Mallory, Co-President, Women's March Inc., to Wayne LaPierre, Jr., Chief Exec. Officer & Exec. Vice President, Nat'l Rifle Ass'n, https://perma.cc/W63X-V7N8 (criticizing the NRA for, among other

prospect that *McDonald*'s emphasis on protecting the rights of historical (and now dead) black people merely served as a convenient way to protect the rights of living white people today.[87]

Bruen is even less amenable to simple narratives than *McDonald*. Several amici argued that New York's proper cause law harmed black gun owners or emphasized the existence of racial bias in the enforcement of gun laws.[88] Dan Harawa postulated that *Bruen* would just lead to more *Terry* stops and harassment of black people with guns.[89] Thinking about *Bruen*, Khiara Bridges wrote in her foreword to the *Harvard Law Review*, "[T]he answer to the question of what racial justice requires is difficult in the context of guns. . . . Black people are ravaged when guns proliferate, and they are ravaged when the nation uses the carceral system to contain the proliferation of guns."[90] Along similar lines, Shaun Ossei-Owusu opined before the *Bruen* decision was published that "any ruling offered by the Court will be disastrous for Black people."[91] In the counterfactual world where the dissent prevailed, black communities would be "policed and punished by institutions that reasonable people have identified as adverse to those communities"[92] and people would be left to "live in overpoliced or underpoliced neighborhoods all but powerless to protect themselves where the state

---

actions, failing to "defend[] the civil rights of [Philando] Castile, a law-abiding gun owner who can be heard in video footage clearly notifying the officer that he was carrying a licensed firearm")) (arguing "originalism is undermined when supporters of an individual right to bear arms express profound concerns about particular white Americans' rights being protected, but fail to rally when a police officer shoots and kills a black man who had informed the officer that he was legally carrying a gun").

87 *Cf.* Harawa, *supra* note 85, at 172 ("[T]he Court has spun the meta narrative that gun control is racist without having to worry about the consequences of expanding the Second Amendment for living and breathing Black people, and without thinking about whether Black people today will be able to fully exercise their Second Amendment rights as newly envisioned by the Court.").

88 Brief of the Black Attorneys of Legal Aid et al. as *Amici Curiae* in Support of Petitioners at 5, N.Y. State Pistol & Rifle Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843); Brief for Amicus Curiae National African American Gun Ass'n, Inc. in Support of Petitioners at 4, *Bruen*, 142 S. Ct. 2111 (No. 20-843); Brief of Black Guns Matter et al. as *Amici Curiae* in Support of Petitioners at 10, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

89 *See* Harawa, *supra* note 85, at 175 ("Putting it all together, Black people lawfully carrying guns in public increases the chance that they will be stopped and searched. The price of Black people exercising their Second Amendment rights may well be their Fourth Amendment freedoms.").

90 Bridges, *supra* note 86, at 83–85.

91 Shaun Ossei-Owusu, *The Itchy Trigger Finger of Clarence Thomas*, BALLS & STRIKES (Nov. 4, 2021), https://ballsandstrikes.org/scotus/clarence-thomas-bruen-recap [https://perma.cc/C7VE-TPGV].

92 Bridges, *supra* note 86, at 85 (citing DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM (2021)) (characterizing Ossei-Owusu's position).

fails to do so."[93] On the other hand, under the majority opinion, Ossei-Owusu expects, "Black folks and members of other marginalized communities will bear the brunt" of an increase of guns in public places.[94] As Bridges observes, "*Bruen* does not eliminate the dangers attendant to the presumption that black people are armed and dangerous."[95] "One can only shudder at the prospect of police officers, who already say they feel threatened by Black skin, operating under the presumption that a Black person they encounter on the beat is legally strapped."[96]

Bridges and Ossei-Owusu's ambivalence about *Bruen* makes sense. Both the reach and limitations of the right to bear arms are now nominally race neutral, but they apply in situations where issues of race and racism in the United States are most present. Conscious and unconscious racial biases will affect how the law is enforced, regardless of the scope of the Second Amendment. Focusing too hard on whether upholding or striking down the law in *Bruen* is narrowly better for black people is a distraction from the more fundamental issue, the reason it's not clear which outcome in *Bruen* is better in the first place—that many people in America still have a conscious or unconscious bias against black people and many other people of color, and that underlying bias will manifest in all sorts of laws so long as it exists.

Amid this discussion of *Bruen*'s practical effects is a recognition that its methods contribute to alienation by sending the message that it is unimportant how women, people of color, and anyone else lacking political power originally understood the Constitution. As Reva Siegel observes, *Bruen*'s methods "elevate the significance of laws adopted at a time when women and people of color were judged unfit to participate and treated accordingly by constitutional law, common law, and positive law."[97] But, as discussed throughout this Essay, original public meaning originalism does not instruct us to sideline diverse, nonlegislative evidence of public meaning. *Bruen* ignores the full public's understanding of the Constitution without justification, thus continuing to send the message to potential and current skeptics of originalism that originalism is the province of elite white men—a message that is both unfortunate and unforced.

Given that Justice Thomas wrote the majority decision in *Bruen*, its inadvertent message is striking. Maybe the fact that *Bruen*'s historical tradition test sidelines much evidence of public meaning—and particularly the robust evidence of black Americans' understanding of the

93 Ossei-Owusu, *supra* note 91.
94 *Id.*
95 Bridges, *supra* note 86, at 85.
96 Ossei-Owusu, *supra* note 91.
97 Siegel, *supra* note 79, at 901.

Fourteenth Amendment[98]—doesn't matter to Justice Thomas, or any of the Justices, so long as the test leads to the outcomes they believe are correct. But adopting a test that, on its face, renders the views of black leaders, women's rights advocates, and any speaker who was out of power irrelevant assumes without proving the Constitution's original public meaning. Without looking at the views of the entire public, we do not know what they understood the law required, and we cannot be guided by their thought process.

Moreover, ignoring the whole public's original understanding of the Constitution in *Bruen* undermines and weakens original public meaning originalism as a whole, by contributing to the narrative that originalism is hostile at worst and indifferent at best to the views and interests of everyone who isn't a white man. That narrative makes it less likely that diverse interpreters today will want to take originalism seriously, reinforcing the reality that present-day originalists tend to be conservative, libertarian, or Republican white men. With a more homogenous group of people engaged with originalism, it becomes more likely that originalist interpreters will inadvertently and unconsciously reinforce the cognitive biases we all bring to bear when interpreting another's meaning.[99] In contrast, a more diverse group of interpreters would be more able to take advantage of each other's diverse perspectives and identify each other's interpretive biases and distortions. In this way, more diverse constitutional interpreters make it easier to triangulate the Constitution's meaning, and make it more likely that interpreters will reach accurate conclusions.[100]

---

98 *See generally* 1 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840–1865 (Philip S. Foner & George E. Walker eds., 1979); 2 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840–1865 (Philip S. Foner & George E. Walker eds., 1980); *Digital Records*, COLORED CONVENTIONS PROJECT, https://omeka.coloredconventions.org [https://perma.cc/98RK-MXVP] (hosting primary source documents from "colored conventions" from 1830 to 1899); *see also* Fox, *supra* note 3 (exploring black discourse around the Reconstruction amendments).

99 *See* Mulligan, *supra* note 2, at 391–92 ("[O]riginalism's reputation as white, male, and conservative, libertarian, or Republican may create self-perpetuating effects. By accidentally projecting one's own concerns onto the founding generation, interpretations of the Constitution's meaning may come to reflect not only the views of the Founders, but of those observing the Founders today.").

100 *Id.* at 405; *cf.* Christina Mulligan, Michael Douma, Hans Lind & Brian Quinn, *Founding-Era Translations of the U.S. Constitution*, 31 CONST. COMMENT. 1, 16 (2016) (arguing that the existence of multiple translations of the Constitution creates the ability to "triangulate" common elements and clarify original meaning); Lawrence M. Solan, *The Interpretation of Multilingual Statutes by the European Court of Justice*, 34 BROOK. J. INT'L L. 277, 293 (2009) ("The ability to compare different versions and then to triangulate . . . brings out nuances that can help the investigator gain additional insight into the thoughts of the original drafter.").

III. SAVING *BRUEN* AND ORIGINALISM

So what's the way forward? Although *Bruen* uses historical evidence and likely reaches an originalist outcome, it is not, in fact, an originalist opinion. It is *selectively* originalist, looking only to the interpretations of those who held enough power to pass legislation, rather than to the public as a whole. For advocates of original public meaning originalism, this decision is a step backward, further away from the law created when *the public* ratified the Constitution and its amendments. And for those who believe that originalism need not be an interpretive method primarily associated with conservative white men, it is a particularly unfortunate opinion, because it incorrectly directs us to look away from some of the most important figures in American history whose contributions are less recognized than they should be.

But *Bruen*'s test can be saved with some clarifications and adjustments. The Court must implicitly reevaluate what it means for the "plain text" of the Second Amendment to cover an individual's conduct, because the scope of the "right" is hardly plain—it can only be understood in historical context, which is richer than the phrase "right to keep and bear arms" might initially suggest to our modern eyes. And the Court must clarify that while past legislation on gun regulation is important and relevant evidence of what legislation was constitutional, past legislation is not the *only* relevant evidence. Interpretations of the right to keep and bear arms by legislators in the political minority matter. Interpretations by nonlegislators matter. And interpretations by white women and people of color matter, because they were all part of the public whose understanding creates the meaning of the Constitution.