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ARTICLE

UNFINISHED LIBERTIES, INEVITABLE BALANCING

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In constitutional liberties cases, the Supreme Court has tried to reduce balancing, understood loosely to mean determining a right's contours based on sweeping political-moral considerations, not just text and history. It fears that today's balancing would displace a balance struck by the Founders. Balancing is indeed problematic—but this campaign to end it is bound to fail. Though avoidable for many constitutional rights, balancing is inevitable for general liberties like religion, the Second Amendment, and speech. This inevitability arises not from gaps in text or history but from these liberties' special role.

General liberties are irreducibly open-ended—not reducible to finite lists of specific laws or regulatory motives to be excluded. Thus, free speech is more than the sum of discrete rights to parade, burn flags, and give offense. Such liberties curb laws that differ unforeseeably in which interests they advance and how much. This makes it impossible for the Founders or anyone to say in advance when general liberties might (if applied categorically) come to block laws too important to give up. Hence the greater need to fix these rights' scope over time—not just through close

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analogical reasoning when text or history is vague but through looser normative reasoning in core cases. The task of drawing these rights' contours is thus always and necessarily unfinished. This account powerfully explains many otherwise bizarre features of the doctrinal histories of guns, religion, and speech. And it leaves foes of judicial balancing one option: to embrace more popular enforcement of liberties.

INTRODUCTION

Legal conservatives have long opposed balancing in constitutional cases, and the Supreme Court has taken up the cause.[1] Everyone agrees that rights should be "balanced" to serve good ends at tolerable costs. The question is whether rights will be balanced not just by their framers but also by those applying them over time. The Court is trying to avoid balancing in application—which it seems to understand loosely to mean determining a right's contours based on highly general political-moral considerations (like competing public interests), not just text, history, and narrow analogies.[2] The effort to avoid balancing reached a crescendo in *New York State Rifle & Pistol Ass'n v. Bruen*,[3] which replaced circuit courts' Second Amendment balancing with a "history and tradition" test.[4] That's unsurprising: Circuit courts' particular sort of balancing in gun cases needed reforming, having hollowed out an enumerated right.[5] (Lower court decisions upholding the law in *Bruen* proved the point.[6]) But the Court also hoped to avoid balancing more broadly, based on democratic legitimacy concerns that this author shares. For deep reasons, however, the broader campaign to avoid balancing is bound to fail.

True, as *Bruen* noted, some rights provisions—like the Confrontation[7] and Establishment Clauses[8]—can be applied without balancing except at

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1. See, e.g., Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1185 (1989) [hereinafter Scalia, The Rule of Law] (condemning "standardless balancing" by judges); see also N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129 (2022) (rejecting "any 'judge-empowering "interest-balancing inquiry"'" (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008))).

2. See infra section I.B. Some reserve the word "balancing" for direct cost–benefit analysis, which is just one instance of the category of analysis that this Article shows one cannot avoid *every* instance of: freeform political-moral reasoning about when the interest underlying a right is too light or when enforcing the right would unacceptably undermine other aspects of the common good. The narrower, cost–benefit sense of "balancing" may be more natural, and I doubt balancing in *that* sense is coherent in many cases, much less inevitable. See infra note 160. Still, conservative Justices use "balancing" to mean the broader category, and it's their campaign that this Article addresses, so "balancing" will be used to state this Article's inevitability thesis. Thanks to Professor Larry Solum for helpful discussion on this point among many.

3. 142 S. Ct. 2111 (2022).

4. See infra section III.B.2.a.

5. See United States v. Rahimi, 144 S. Ct. 1889, 1909 (2024) (Gorsuch, J., concurring) ("How did the government fare under [the pre-*Bruen*] regime? In one circuit, it had an 'undefeated, 50–0 record.'" (quoting Duncan v. Bonta, 19 F.4th 1087, 1167 n.8 (9th Cir. 2021) (en banc) (VanDyke, J., dissenting))).

6. See infra note 340 and accompanying text (arguing that *Bruen* should have rested on the fact that the challenged law blocked most people's ability to carry at all).

7. U.S. Const. amend. VI; see also infra note 238 and accompanying text.

8. U.S. Const. amend. I; see also Stephanie H. Barclay, Replacing *Smith*, 133 Yale L.J. Forum, 436, 442 (2023), https://www.yalelawjournal.org/pdf/BlarclayYLJForumEssay_33fxoyey.pdf [https://perma.cc/TJ4V-XCHN] [hereinafter

the semantic margins.[9] But balancing at the right's semantic core is inevitable for what this Article will call *general liberties*, including free speech,[10] free exercise,[11] and Second Amendment rights.[12] General liberties are rights that shield some conduct from indefinitely varied regulations. They differ from the kinds of rights *Bruen* held up as examples: rights defined by the specific regulations they exclude (like religious establishments) and positive rights to government resources (like a chance to confront witnesses).[13] With general liberties especially, the framers cannot do the needed balancing and adjusting of scope. So the rights' implementers must balance on a rolling basis. It's not that they must inevitably apply *their own* high-level moral theory (say, Judge Richard Posner's wealth-maximization view[14]).[15] They might channel a rights theory ascribed to the framing generation.[16] But they will inevitably rely on *some* broad normative considerations (competing rights or public interests) to draw and redraw the right's contours—which falls within the Court's critique of balancing as a way of "decid[ing] . . . case-by-case . . . whether the right is *really worth* insisting upon."[17] This inevitability flows not from general liberties' vagueness, breadth, or sparse text or history,

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Barclay, Replacing *Smith*] ("The Establishment Clause generally gives rise to categorical, rather than rebuttable, prohibitions.").

9. See N. Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022) (noting that courts consult history, not balancing tests, when enforcing the Confrontation and Establishment Clauses).

10. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

11. Id. ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

12. Id. amend. II ("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.").

13. See *Bruen*, 142 S. Ct. at 2156. Though some reserve the word "right" for categorical protections, here it will also cover presumptive protections that can be overridden. "Liberties" will denote rights against regulation of private conduct. And "balancing a liberty against public interests" will be shorthand for so balancing the *interests underlying* a liberty. Nothing substantive turns on these terminological choices.

14. For an account of Judge Posner's normative legal theory of wealth maximization, see generally Richard A. Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Stud. 103 (1979).

15. See infra notes 164–170 and accompanying text (arguing that it is not inevitable, and is undesirable, that courts apply their own moral theories).

16. See Steven J. Heyman, Righting the Balance: An Inquiry Into the Foundations and Limits of Freedom of Expression, 78 B.U. L. Rev. 1275, 1279–80 (1998) (contrasting "natural rights theory," which would limit free speech "by the rights of others" with "utilitarianism, which repudiated the concept of natural rights" and framed cases "as clashes between free speech and 'social interests'").

17. *Bruen*, 142 S. Ct. at 2129 (internal quotation marks omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)). For a survey of legal conservatives' compelling concerns about balancing, see infra section I.B.1; see also infra notes 164–170 and accompanying text (arguing that those concerns are not fully assuaged by restricting judges to relying on the framers' moral theory of rights).

but from their special role. Their purpose doesn't preclude balancing, as critics say,[18] but compels it.

General liberties offer adaptive protection, guarding certain conduct against whatever threats it might face as regulatory needs change.[19] So while all constitutional norms are "adaptive" in applying to many entities in many times and places, a general liberty varies in another way: in the *types of regulation* it protects against. For this, it must be irreducible to any finite list of specific regulations excluded. The liberty's scope cannot be concretely specified at its framing or any later point[20]—not even to a close approximation (which might've cabined later balancing to close analogical reasoning at the margins).[21] For example, free speech is not just shorthand for discrete rights to burn flags,[22] parade,[23] and preach at street corners.[24] Nor does it just forbid laws clearly serving illicit goals like the quashing of offensive speech.[25] Its scope can only be defined in presumptive terms that invoke the values or "rationale underlying" it.[26]

The special need to balance arises from this *irreducible open-endedness* of general liberties: their being defined so that they could always adapt to

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18. See, e.g., Laurent B. Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424, 1449 (1962) (arguing that balancing undercuts the First Amendment's "function as a constitutional limitation" and "virtually converts that amendment into its opposite" by turning "[a] prohibition against abridgment" into "a license to abridge"); see also *Bruen*, 142 S. Ct. at 2129 (arguing that "[t]he very enumeration of the right" precludes balancing and that "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all" (first alteration in original) (internal quotation marks omitted) (quoting *Heller*, 554 U.S. at 634)).

19. See infra section II.A.1.

20. Cf. United States v. Rahimi, 144 S. Ct. 1889, 1925–26 (2024) (Barrett, J., concurring) (noting that the Second Amendment "does not apply only to the catalogue of arms that existed in the 18th century, but rather to all weapons satisfying the '*general definition*' of 'bearable arms'" (emphasis added by *Rahimi*, 144 S. Ct. at 1926) (quoting *Bruen*, 142 S. Ct. at 2132)).

21. A right specified to a close approximation might be defined as, say, "protection from religious tests for office and their close analogues." See infra section I.B.2 (defining the "close analogical reasoning" needed to apply such a right and its contrasts with the balancing that legal conservatives oppose).

22. See Texas v. Johnson, 491 U.S. 397, 399 (1989) (invalidating a conviction for flag-burning in protest).

23. See Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 559 (1995) (protecting parade organizers' discretion to reject floats bearing messages they oppose).

24. See Cantwell v. Connecticut, 310 U.S. 296, 306–07 (1940) (invalidating a licensing requirement for religious solicitation).

25. See *Johnson*, 491 U.S. at 414 ("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

26. Frederick Schauer, Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 Geo. L.J. 899, 909 (1979) [hereinafter Schauer, Speech and "Speech"]; see also Frantz, supra note 18, at 1442 ("As treated by the balancing test, 'the freedom of speech' . . . is not affirmatively definable. It is defined only by the weight of the interests arrayed against it and it is inversely proportional to the weight accorded to those interests.").

block new laws, laws serving different aims to different degrees. Since *by design* the framers couldn't have foreseen which laws might be blocked, they couldn't have shrunk the liberty to allow for laws that would prove crucial. They could not have done the balancing and trimming up front even with endless time, precise words, and reams of text. That's why implementers will need to balance over time.[27] It's why general liberties' creation—the shaping of their core based on political-moral reasoning—is always necessarily *unfinished*.[28]

The Court's anti-balancing effort is abetted by a surprising dearth of arguments that balancing is inevitable.[29] Landmark works debate whether balancing is desirable,[30] thus presupposing it's avoidable (why else bother

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27. See infra section II.A.3.

28. Many critics of balancing think that a norm is purely *legal* only insofar as it can be applied without moral or policy reasoning. See infra notes 126–129 and accompanying text. It's against this backdrop that one might call a legal norm "unfinished" if its application requires some additional political-moral reasoning.

29. Three related works are worth flagging.

Professor Richard Fallon's book on rights takes "strict scrutiny as a starting point" and uses "reverse-engineering" to "work out what is or must be true about the nature of constitutional rights for them to be defined and applied" using that test, which Fallon then shows (at length) will involve balancing. See Richard H. Fallon, Jr., The Nature of Constitutional Rights: The Invention and Logic of Strict Judicial Scrutiny 4, 67 (2019) [hereinafter Fallon, Nature of Constitutional Rights]. Fallon then shows (at length) that this test will involve balancing. See id. This Article questions what Fallon's analysis takes as fixed. It asks whether some alternative to strict scrutiny or other balancing tests could be used—and answers "no" for certain rights based on their function. If Fallon shows that strict scrutiny involves balancing, this Article shows that one cannot avoid balancing by replacing strict scrutiny and similar tests.

Professor Fred Schauer argues that the scope of free speech makes it hard to build all needed exceptions "into our definition of a [free speech] right absolute in strength." Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 277 (1981) [hereinafter Schauer, Categories and the First Amendment]. This Article clarifies the kinds of scope that do and don't induce balancing, see infra sections II.A.1–.2; explains why a balancing-inducing scope is crucial to the function of not just speech but also other general liberties, see infra section II.A.1; shows how the resulting balancing runs afoul of the vision of judging behind the originalist movement, see infra Part I; and canvasses solutions for judicial balancing's foes, see infra Part IV.

Finally, an unpublished essay by Professor Larry Sager, brought to my attention by a reader, argues that some rights create Kantian "imperfect duties" that are defined "by an underlying set of values and desired outcomes rather than by a catalog of specific behaviors" and that therefore require "judgement and discretion" in core applications. See Larry Sager, Imperfect Constitutional Duties 1–2 (March 2024) (unpublished manuscript) (on file with the *Columbia Law Review*).

30. See Jamal Greene, How Rights Went Wrong: Why Our Obsession With Rights Is Tearing America Apart 89–90 (2021) [hereinafter Greene, How Rights Went Wrong] ("The rights Americans enjoy should depend on what the government has done to us and why it has done it . . . ."); see also Aharon Barak, Proportionality: Constitutional Rights and Their Limitations 8 (2012) ("[P]roportionality suffers from many shortcomings; still, none of the alternatives is better—or even as good as—proportionality itself."). For two bookends to voluminous scholarship, see generally T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943 (1987); Joseph Blocher, Categoricalism and Balancing in

arguing for or against it?). Some scholars suggest that balancing is required by a right's vague language, broad readings,[31] or thin historical records.[32] But many texts with these features are implemented with little balancing beyond modest analogical reasoning in marginal cases.[33] So arguments stressing these factors have left it open to balancing's critics to say that looser balancing, and balancing in core cases, should be as rare for religion, speech, and guns as it is for Confrontation Clause rights.[34] To prove *that* campaign hopeless, this Article identifies obstacles more peculiar to general liberties. While that more specific inevitability claim might strike some as obvious, to half the judiciary and many scholars such balancing seems obviously worth avoiding.[35] That's why the Court is trying to reduce it, with leading judges pressing it to go farther.[36]

I share critics' concerns about balancing. I do not think that balancing is endemic to constitutional law or that the law/politics distinction is everywhere hopelessly porous. As an originalist,[37] I think federal judges have only those powers lawfully delegated to them by the people and that

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First and Second Amendment Analysis, 84 N.Y.U. L. Rev. 375 (2009). For early interventions, see Frantz, supra note 18, at 1429–49 (critiquing the Supreme Court's balancing approach to free speech that was spearheaded by Justice Felix Frankfurter); Wallace Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance, 50 Calif. L. Rev. 821, 821 (1962) (responding to Frantz's critique). For a recent book-length treatment of the desirability of balancing in speech cases, see generally Alexander Tsesis, Free Speech in the Balance (2020).

31. See Philip Hamburger, More Is Less, 90 Va. L. Rev. 835, 837 (2004) ("[W]hen the right of free exercise of religion came to be defined broadly, it was rendered conditional on government interests.").

32. See, e.g., Mendelson, supra note 30, at 821 (noting the First Amendment's "highly ambiguous" "language" and "history"); see also Hugo L. Black, The Bill of Rights, 35 N.Y.U. L. Rev. 865, 867 (1960) (critiquing balancing but bracketing questions about "the marginal scope of each" right); cf. Timothy Endicott, Proportionality and Incommensurability, *in* Proportionality and the Rule of Law: Rights, Justification, Reasoning 311, 324 (Grant Huscroft, Bradley W. Miller, & Grégoire Webber eds., 2014) (finding balancing unavoidable in private law and sentencing).

33. See infra section I.B.2.

34. See infra section I.A.

35. See infra Part I; see also Joel Alicea & John D. Ohlendorf, Against the Tiers of Constitutional Scrutiny, Nat'l Affs., Fall 2019, at 72, 73 (critiquing a balancing approach to rights as faithless to the Constitution and inappropriate for judges); John O. McGinnis & Michael B. Rappaport, The Abstract Meaning Fallacy, 2012 U. Ill. L. Rev. 737, 767 (arguing against leaving the balancing of free speech "to future interpreters").

36. See Nat'l Republican Senatorial Comm. v. Fed. Election Comm'n, 117 F.4th 389, 398–401 (6th Cir. 2024) (Thapar, J., concurring) (calling for the replacement of tiers of scrutiny with a *Bruen*-style history-and-tradition approach in free speech cases); Club Madonna Inc. v. City of Miami Beach, 42 F.4th 1231, 1261 (11th Cir. 2022) (Newsom, J., concurring in part and concurring in the judgment) (critiquing First Amendment "doctrinal bloat" and arguing for a "text and history" approach akin to *Bruen*'s).

37. For a discussion of the sort of originalism I find compelling, see generally Jeffrey Pojanowski & Kevin C. Walsh, Enduring Originalism, 105 Geo. L.J. 97 (2016) (developing, with some modifications, the theory propounded in Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J. L. Pub. Pol'y 817 (2015)).

these include no general power to balance constitutional norms. Judges' doing so generally usurps the people's right to make major policy choices not settled by higher law. (While some rights were originally understood to require balancing in application, their enshrinement was not originally understood to authorize *judges* to do the balancing.[38]) And some courts have clearly overstepped by using balancing to gut, rather than carefully implement, enumerated rights.[39] Courts should do all they can to avoid or tame balancing, consistent with the Constitution's original understanding and stare decisis.[40] But having come to think balancing is inevitable for *general liberties*, I doubt courts can avoid it while remaining the sole enforcers of these rights.[41] (And yet rights should and will be enforced *somehow*.[42]) Other critics of judicial balancing who agree might support the kinds of popular enforcement sketched below.[43] Meanwhile, analyzing liberties as unfinished rights bears theoretical fruit. It crisply explains a remarkable range of patterns and pathologies in speech, religion, and Second Amendment law.

Part I reviews the Court's recent recapitulation of an enduring critique of judicial balancing: that it usurps the people's role and departs from a balance struck by the framers. This critique impugns doctrines that would have courts weigh costs and benefits case-by-case but also the "definitional balancing" by which courts settle on a rule meant to then

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38. See infra section III.A. If originalism and distaste for broad judicial discretion pulled in opposite directions—because the Constitution, as originally understood, gave judges broad discretion—I would follow the lead of originalism. Professor Joel Alicea has argued that the Second Amendment does delegate broad discretion. See J. Joel Alicea, *Bruen* Was Right, 174 U. Pa. L. Rev. (forthcoming 2025) (manuscript at 65–66), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5122492 [https://perma.cc/K2ER-XAH8] [hereinafter Alicea, *Bruen* Was Right]. Yet Alicea believes that courts' resulting reliance on highly general normative principles does not run afoul of *Bruen*'s critique of balancing because *Bruen* left room for analogical reasoning. See id. (manuscript at 67–68). By contrast, I read *Bruen* as insisting that such reasoning use only fairly narrow, concrete standards. That reading is reinforced by writings in other cases by some members of *Bruen*'s majority, as Alicea notes, see id. (manuscript at 34), but also by *Bruen*'s embrace of accounts of analogical reasoning that make such narrowness and concreteness integral to it—and by the need to distinguish the reasoning that *Bruen* meant to allow from the looser analogical reasoning that defines originalism's arch-rival, common law constitutionalism. See infra section I.B.2.

39. See supra notes 5–6 and accompanying text.

40. For ways to discipline balancing doctrines, see Gabrielle M. Girgis, Taming Strict Scrutiny, 76 Fla. L. Rev. (forthcoming 2025) (manuscript at 26–39), https://ssrn.com/abstract=4742225 [https://perma.cc/CEY3-FPNV] [hereinafter G. Girgis, Taming Strict Scrutiny].

41. As noted above and discussed below, courts *can* avoid applying their own overarching moral theory, as by channeling the Founders'. See supra text accompanying notes 14–17; infra notes 164–169 and accompanying text. But it *is* inevitable that they will often lack concrete guidance on what the relevant abstract theory requires, creating many of the same problems as more idiosyncratic judging.

42. See infra section IV.A.

43. See infra Part IV.

apply categorically.[44] It reaches strict and intermediate scrutiny, as many have shown[45] and section I.B confirms against those who think heightened scrutiny less problematic.[46] And the balancing critique reaches some, though not all, forms of judicial analysis often described as "analogical reasoning."[47] Yet it's not clear that general liberties have been enforced without balancing in these senses—not in our early practice or modern doctrine or in other democracies.[48]

Part II explains why. To offer adaptive protection for conduct as regulatory needs evolve, general liberties have to curb laws that will differ—unforeseeably—in which public interests they advance and how much. That makes it impossible to say in advance when these rights might undercut laws too valuable to give up. So what heightens these rights' need for balancing in implementation[49] (or "construction"[50]) is their special function, not just a general tendency of wooden rules to break down or a need to preserve political legitimacy,[51] justify popular precedents,[52] or deal with vagueness or broad scope.[53] After all, some broad norms can avoid

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44. See Aleinikoff, supra note 30, at 979–81 (critiquing definitional balancing).

45. See infra section I.A.

46. See, e.g., Barclay, Replacing *Smith*, supra note 8, at 448–61 (advocating "a version of strict scrutiny" that attempts to avoid criticisms of ahistoricism and judicial intervention).

47. See infra section I.B.2.

48. See infra section I.C.

49. See generally Richard H. Fallon, Jr., Implementing the Constitution 4 (2001) (observing that Justices "must craft doctrines and tests that reflect judgments of constitutional meaning but are not perfectly determined by it" to implement the Constitution).

50. Originalists distinguish interpretation (discerning meaning) from construction (giving legal effect to that meaning). See Randy E. Barnett & Evan D. Bernick, The Letter and the Spirit: A Unified Theory of Originalism, 107 Geo. L.J. 1, 10–13 (2018) (tracing the distinction's origins and influence).

51. See Jack M. Balkin, Living Originalism 29–34, 41, 59–64, 282 (2011) (urging reading certain texts this way to ensure that their application reflects each generation's moral vision, for the sake of political legitimacy). Balkin also touts flexible standards as giving governments leeway to meet evolving needs as "social, economic, and technological [conditions] change[]." Id. at 145. But to show a need for flexibility is not to show a need for balancing, or thus the "unfinishedness" of the legal norm, as this Article shows for certain rights. See infra note 227 (exemplifying this contrast with separation of powers). Moreover, Balkin's argument about the benefits of flexible standards leaves it open to critics to respond that their harms are greater. Cf. Scalia, The Rule of Law, supra note 1, at 1185 (condemning "standardless balancing" for undermining rule-of-law values). This Article makes a descriptive argument immune to that response: that for some rights, our legal culture has so persistently assigned them a job that creates such a felt *need* to balance that even those most critical of balancing cannot quash it. See infra Part III.

52. See Ronald Dworkin, The Moral Reading of the Constitution, N.Y. Rev. Books (Mar. 21, 1996), https://www.nybooks.com/articles/1996/03/21/the-moral-reading-of-the-constitution/ (on file with the *Columbia Law Review*) (arguing that reading rights provisions as embodying principles is needed to justify canonical cases).

53. See supra note 31 and accompanying text.

balancing (and some narrow ones can't).[54] And while rights defined in vague terms will have uncertain application at their semantic edges, courts in those cases need only use a cabined *sort* of analogical reasoning or give political actors the benefit of the doubt.[55] Both tacks presuppose a core in which analogical reasoning and deference are unnecessary. That's what general liberties lack. Though some of their doctrines may be categorical, there will always be core applications that require balancing.

Open-endedness doesn't plague many criminal procedure rights[56] or rights against discrete types of regulation like religious establishments as currently applied.[57] So these rights' costs are more constant and easier to anticipate; framers can shrink their scope to avoid intolerable costs, reducing the need to balance later. It's no accident that the balancing-free rights *Bruen* held up involved the Confrontation and Establishment Clauses.[58] General liberties' distinctive role demands a different approach.

The inevitability claim is not conceptual.[59] It's not that our notions of "right" or "liberty" imply balancing or that we can't *imagine* other implementations. It's about the incompatibility of two aims. We can't avoid ex post balancing of a right while also having it shield conduct from unforeseeably varying laws. With rights playing that adaptive role (more than with others), applying them categorically is as predictably untenable as following rules designed by someone who could see only their benefits, not their costs. It's like following a rule that wasn't balanced ex post *or* ex ante. While some have floated ways to avoid freeform balancing and categoricity alike, Part II offers related reasons to expect the failure of the two main proposals. One approach tries to stick to close analogical reasoning. The other would have the law list which regulatory goals will justify burdening these rights, in hopes of avoiding extralegal balancing by courts. Both predictably face a dilemma—between crippling the ability to

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54. See infra section II.A.2. To preview: A right could be broad but not open-ended if the regulations it covered were numerous but concretely specifiable. Then balancing over time would not be inevitable as it is for open-ended rights.

55. See James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 151 (1893) (urging that laws be upheld unless they are "unconstitutional beyond a reasonable doubt").

56. Not *all* other rights are balancing-free. For example, some contain normative terms that invite case-by-case balancing. See, e.g., U.S. Const. amend. IV (barring "unreasonable" searches and seizures).

57. See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022) (referring to a few discrete historic "hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment"); see also Shurtleff v. City of Boston, 142 S. Ct. 1583, 1608–10 (2022) (Gorsuch, J., concurring in the judgment) (discussing six concrete practices as constitutive of religious establishments under the First Amendment).

58. See supra note 9.

59. Cf. Robert Alexy, A Theory of Constitutional Rights, at xviii, 47–56 (Julian Rivers trans., 2002) (arguing that balancing is required because, as a conceptual matter, rights are "optimization requirements").

regulate or destroying these rights' open-endedness—that pushes implementers back to balancing.[60]

All this has prima facie upshots for interpretation and judging. Since categorically applying open-ended rights is predictably untenable, we should not lightly assume their creators made them categorical. And if judges try to apply them categorically anyway, we should expect their efforts to fail. The same impulse—to avoid untenable outcomes—that suggests designers likely *defined* these rights to require balancing, would eventually move judges to apply them that way despite their scruples.

Part III confirms these upshots historically. Our legal culture,[61] including originalists, has long treated three texts as enshrining adaptive, open-ended liberties: the U.S. Constitution's free exercise, free speech, and Second Amendment rights. The Founders read these to capture rights that would guard against indefinitely varied laws and be regulable for sufficiently weighty public interests.[62] (A word will be added about unenumerated liberties like the abortion right announced in *Roe v. Wade*.[63]) And these rights' modern judicial enforcement over eight decades has had just the features predicted by the "unfinished" model.[64] Attempts to eliminate open-endedness have always sparked counterreactions.[65] Categorical rules have repeatedly cratered.[66]

For long stretches after the Founding, to be sure, the First and Second Amendments were not vigorously enforced by courts. The transition to courts' enforcing them as sources of open-ended rights may have been contingent on various historical factors and so initially avoidable. But since courts have done so,[67] Part III shows, our legal culture has resisted efforts to reread these texts as enshrining more discrete rights. The Roberts Court, the keenest of all to stamp out balancing,[68] has consistently reintroduced it sub silentio under all three rights. Even scholarly proposals for ending balancing would do the same—precisely to preserve these rights' open-endedness.[69] Thus, Part III offers strong inductive evidence

60. See infra section II.A.3.

61. The term "legal culture" signals that even if not every official holds this view, enough do that all attempts to stray from it are overtaken by counterreactions—as when Congress moves to counteract a Supreme Court case rejecting the view or when the Court's own doctrine soon evolves to do so. See infra section III.B.

62. See infra section III.A.

63. See infra note 280.

64. See infra section III.B.

65. See infra section III.B.1.a.

66. See infra section III.B.3.a.

67. This Article does not attempt to defend that initial interpretation, so it needn't take a position on the proper method of constitutional interpretation. It shows only that once we *have* committed to reading these texts to ground open-ended rights, balancing in their application will be inevitable.

68. See infra note 415 and accompanying text.

69. See infra sections III.B.1.b (showing this with scholarly proposals for free exercise), III.B.2.b (showing the same for gun rights), III.B.3.b (showing the same for speech).

that *our legal culture is firmly committed* to the role for these rights that then makes balancing inevitable.

Part IV sketches ways out for foes of judicial balancing. We should not cease rigorous enforcement of these rights. But while balancing must therefore happen, not all balancing need be done by judges. Courts can hold each state to the protections offered by a majority of states[70] or standards set by Congress in statutes framed to match each liberty's scope.[71] That would keep judges' balancing revisable by the people's representatives. While this Article can't exhaustively assess such proposals, it needn't. Each is explored elsewhere. Part IV puts those proposals in conversation with this Article's core analysis about the inevitability of balancing. It casts them as solutions to concerns the anti-balancing Court has raised but cannot resolve for itself.

I. THE CAMPAIGN AGAINST BALANCING

This Part breaks down the Court's concerns about balancing, uses those concerns to define the kinds of balancing the Court aims to curb, and ends on a note of caution about that aim: There is no clear example of a regime enforcing general liberties without balancing, whether here or abroad, present or past.

A. *The Court's Concerns*

The anti-balancing campaign came to full bloom in *Bruen*.[72] That case held invalid under the Second Amendment a law requiring those seeking to carry guns to show a special need for self-defense.[73] The Court spent pages inveighing against circuit court doctrines calling for strict or intermediate scrutiny,[74] requiring gun laws to be substantially related to an important state interest or narrowly tailored to a compelling one.[75] *Bruen* leveled two objections to these tiers of scrutiny and any test asking "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[76]

First, in an originalist vein, *Bruen* warned that judges balancing might contradict a balance struck by the framers. Constitutional rights are "the very *product* of an interest balancing by the people," which it is judges' job

70. See infra section IV.B.

71. See infra section IV.C.

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

73. Id. at 2156.

74. See id. at 2125–30.

75. Id.

76. Id. at 2129 (internal quotation marks omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (Breyer, J., dissenting)).

to follow.[77] "[T]he very enumeration of the right" thus disempowers judges "to decide on a case-by-case basis whether the right is *really worth* insisting upon."[78] Faithful judges will only apply a right's "original contours" as revealed by history, Justice Amy Coney Barrett later explained.[79]

Every recent conservative Justice has embraced this point. Justice Antonin Scalia wrote for a majority that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," even if "future judges think that scope too broad."[80] Chief Justice John Roberts, for a nearly unanimous Court, declared balancing in free speech cases "startling and dangerous" because "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."[81] Justice Brett Kavanaugh, citing an influential piece by Professor Joel Alicea and John Ohlendorf, stressed in *United States v. Rahimi* that tiers of scrutiny depart from "original meaning."[82] Others in *Rahimi* agreed.[83]

Of course, this originalist concern assumes the framers struck a balance that speaks to the case at hand. *Bruen*'s second concern is more general: that it's improper for unelected judges to make moral and policy choices between rights and public interests or other political-moral norms.[84] *Bruen* declared such reasoning "legislative" and less "legitimate" for judges.[85] "In a functioning democracy," Justice Neil Gorsuch later wrote, "policy choices" among moral and social goods "usually belong to the people and their elected representatives."[86] Justice Kavanaugh in *Rahimi* likewise wrote that "reliance on history is more consistent with the properly neutral judicial role than" heightened scrutiny, which has judges "subtly (or not so subtly) impose their own policy views."[87] And his

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77. Id. at 2131 (internal quotation marks omitted) (quoting *Heller*, 554 U.S. at 635).

78. Id. at 2129 (internal quotation marks omitted) (quoting *Heller*, 554 U.S. at 634).

79. See United States v. Rahimi, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring) (internal quotation marks omitted).

80. *Heller*, 554 U.S. at 634–35; see also *Bruen*, 142 S. Ct. at 2129 (quoting *Heller*, 554 U.S. at 634).

81. United States v. Stevens, 559 U.S. 460, 470 (2010).

82. See *Rahimi*, 144 S. Ct. 1889, 1921 (2024) (Kavanaugh, J., concurring) (internal quotation marks omitted) (quoting Alicea & Ohlendorf, supra note 35, at 73).

83. See, e.g., id. at 1908–09 (Gorsuch, J., concurring).

84. These concerns can come apart. If the right's designers framed it in moral terms, judges might have to choose between moral neutrality and fidelity to original meaning. See supra note 38.

85. *Bruen*, 142 S. Ct. at 2130–31.

86. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1160 (2023) (plurality opinion). While *National Pork Producers* involved claims rooted in the dormant Commerce Clause, not an individual right, id. at 1161, the point quoted here applies to rights cases, too.

87. See *Rahimi*, 144 S. Ct. at 1912 (Kavanaugh, J., concurring).

concerns were echoed separately by Justices Thomas, Gorsuch, and Barrett.[88]

B. *When Balancing Raises Those Concerns*

When does judicial analysis trigger these worries about balancing, especially the concern about judges playing lawmakers? Two types of moral analysis fall *outside* this critique and this Article's definition of "balancing." One needs a moral argument for adopting a method of interpretation, originalist or otherwise.[89] And when law "runs out"—when the legal text or doctrine is semantically vague—judges may have to make normative judgments about whether a case within the vague concept's "penumbra" is analogous to cases within its "core"[90] meaning.[91] But *Bruen*'s critique does cover any broad political-moral (as opposed to textual or historical) assessment of when the interest in a right is too light to vindicate or when enforcing the right would unacceptably undermine other elements of the common good (unless the case falls in a right's semantic margins).

1. *Heightened Scrutiny* and *Utilitarian Reasoning*. — *Bruen*'s condemnation of balancing is illuminated by an opinion by then-Judge Kavanaugh that *Bruen* repeatedly cited, which was interpreting *Heller*'s critique of balancing (which *Bruen* also invoked).[92] For Kavanaugh, judges

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88. See id. at 1908 (Gorsuch, J., concurring) ("As judges charged with respecting the people's directions in the Constitution . . . our only lawful role is to apply them . . . ."); id. at 1924–26 (Barrett, J., concurring) (urging reliance on history to identify the rights' contours); id. at 1946 (Thomas, J., dissenting) ("The Second Amendment is 'the very *product* of an interest balancing by the people.' It is this policy judgment . . . 'that demands our unqualified deference.'" (citations omitted) (first quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008); then quoting *Bruen*, 142 S. Ct. at 2131)).

89. See J. Joel Alicea, Practice-Based Constitutional Theories, 133 Yale L.J. 568, 579 (2023) ("It is widely accepted among scholars that . . . only a normative argument can justify telling judges that they *ought* to follow a particular theory of adjudication." (footnotes omitted)).

90. Here, "core" means "nonpenumbral" cases—those falling squarely within the semantic range of a text or implementing doctrine or other canonical formulation of the right, and not in a zone of vagueness created by a (nonnormative) concept in such a formulation. Cf. H.L.A. Hart, The Concept of Law 251 (Paul Craig ed., 3d ed. 2012) (defining penumbral cases in terms of semantic vagueness). Some use "core" instead to mean a right's *most important* exercises. See, e.g., Wrenn v. District of Columbia, 864 F.3d 650, 657 (D.C. Cir. 2017) (equating the "Amendment's 'core'" with exercises of the right "where the need for [self-defense] is 'most acute'" (first quoting Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1257 (D.C. Cir, 2011); then quoting *Heller*, 554 U.S. at 628)). This Article sets aside the second use of "core" because it doesn't track all that matters to balancing's critics. They oppose balancing anytime it substitutes for the people's policy judgments (more than is inevitable given the limits of language). So the question here is not whether judges can avoid balancing in cases involving the most important conduct, but whether they can avoid it in cases involving conduct our system is unwilling to exclude from the right's coverage.

91. See infra section I.B.2.

92. See, e.g., *Bruen*, 142 S. Ct. at 2129 n.5 (citing *Heller II*, 670 F.3d at 1277 (Kavanaugh, J., dissenting)).

"balanc[e]" whenever they make "some assessment of whether the law in question is sufficiently important to justify infringement on an individual constitutional right."[93] This surely happens in case-by-case ("ad hoc") balancing[94] and utilitarian "cost–benefit analysis"[95] that tries to reduce all costs and benefits to a single metric. But it also occurs when judges balance in creating rules meant to then apply categorically to some cases ("definitional" or "categorical" balancing)[96]—which the Court has recently denounced as "dangerous."[97]

Even strict scrutiny was for then-Judge Kavanaugh "undoubtedly" a balancing test in the sense of "requir[ing] a contemporary judicial assessment of the strength of the asserted government interests in imposing a particular regulation."[98] Justice Scalia agreed, calling strict scrutiny a "balancing test" when gutting decades-old free exercise precedents precisely to stop judicial balancing.[99] Justices Thomas and Gorsuch made similar points in *Rahimi*, in which Justice Kavanaugh again stressed that tiers of scrutiny, like other forms of balancing, ask judges to decide whether a regulation "is sufficiently reasonable or important," a "highly subjective judicial evaluation[]."[100]

Some think courts balance problematically only when deciding if a law's benefits outweigh its costs.[101] That inquiry is unconstrained because

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93. *Heller II*, 670 F.3d at 1282 (Kavanaugh, J., dissenting).

94. See, e.g., Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (addressing the free speech claims of public employees by balancing "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs").

95. Id.

96. See New York v. Ferber, 458 U.S. 747, 763–64 (1982) (holding that the harms of child sexual abuse material "so overwhelmingly outweigh[] the expressive interests . . . that no process of case-by-case adjudication is required"). A court also balances "categorically" if it holds (without supporting text or history) that a liberty does not "cover" certain conduct—does not even require heightened scrutiny of the legal burdens on it—because the conduct does not sufficiently realize the interests underlying the right. See Frederick Schauer, Codifying the First Amendment: *New York v. Ferber*, 1982 Sup. Ct. Rev. 285, 303 [hereinafter Schauer, Codifying the First Amendment] ("[T]he determination of lack of coverage is made solely on the basis of the First Amendment value of the utterance itself . . . ."); cf. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (deeming certain "classes of speech" to be "of such slight social value" that their regulation poses no constitutional problem).

97. United States v. Stevens, 559 U.S. 460, 470 (2010).

98. *Heller*, 670 F.3d at 1282 (Kavanaugh, J., dissenting).

99. See Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 883 (1990) (rejecting a reading of free exercise that would require judicial balancing for its application).

100. United States v. Rahimi, 144 S. Ct. 1889, 1920–21 (2024) (Kavanaugh, J., concurring) (condemning "means-end scrutiny, heightened scrutiny, tiers of scrutiny, rational basis with bite, or strict or intermediate or intermediate-plus or rigorous or skeptical scrutiny" as "policy" tests "requir[ing] judges to weigh the benefits against the burdens" and decide if "the law is sufficiently reasonable or important").

101. Cf. Stephanie H. Barclay, Constitutional Rights as Protected Reasons, 92 U. Chi. L. Rev. (forthcoming) (manuscript at 18) (on file with the *Columbia Law Review*) [hereinafter

it tries to compare incommensurables—say, educational benefits against religious burdens.[102] By contrast, it might seem coherent and more lawlike for courts to say whether a law's benefits clear a fixed threshold like strict scrutiny's "compelling interest" test—especially if this test is almost categorically "fatal."[103] But whatever the most natural use of the *word* "balancing,"[104] strict scrutiny should raise many of the same substantive concerns as looser normative reasoning. Indeed, everything captured in this Article's definition of "balancing"[105] raises *the* concern that has always powered legal conservative thought: that judicial review should apply law, not make it.

First, strict scrutiny is not effectively fatal, with courts of appeals applying it to uphold laws "nearly one third of the time, typically without reversal."[106] Courts that do treat it as fatal make exceptions to its application based on unstated policy concerns.[107] And as "a cottage industry"[108] of scholarship has documented, the supposedly well-defined tiers of scrutiny routinely "break[] down"[109] into a "sliding scale" of balancing through the "creation over and over again of" intermediate tiers.[110] Whole books explain how strict scrutiny "requires judges to engage recurrently in only minimally structured appraisals of the significance of competing values or interests."[111]

Second, since the "compellingness" of a law's benefits can be judged only against alternatives, strict scrutiny asks whether there are less restrictive means of serving a law's goals.[112] But there almost always are.

Barclay, Protected Reasons] (defining balancing to involve a comparison of "the weight or value of the government interference with a weight or value of the right"). Barclay's preferred approach to adjudicating rights would *not* simply ask whether a challenged law is necessary to serve a "compelling" interest. Barclay's nuanced view is discussed in section III.B.1.b.

102. See id. (manuscript at 18–21).

103. Cf. Gerald Gunther, The Supreme Court, 1971 Term–Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972) (stating that the Warren Court's application of strict scrutiny was, in the equal protection context, "fatal in fact").

104. See supra note 2.

105. See infra note 159 and accompanying text.

106. Fallon, Nature of Constitutional Rights, supra note 29, at 43 (citing Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 796 (2006)).

107. See infra section III.B.3.a (discussing endless cratering of free speech rules).

108. See Paul Yowell, Proportionality in United States Constitutional Law, *in* Reasoning Rights: Comparative Judicial Engagement 87, 98 (Liora Lazarus, Christopher McCrudden & Nigel Bowles eds., 2014) [hereinafter Yowell, Proportionality].

109. See id. at 98.

110. Kathleen M. Sullivan, Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing, 55 Alb. L. Rev. 605, 606 (1992).

111. See Fallon, Nature of Constitutional Rights, supra note 29, at 67.

112. See R. George Wright, Electoral Lies and the Broader Problems of Strict Scrutiny, 64 Fla. L. Rev. 759, 771 (2012) (internal quotation marks omitted).

Thus, as shown below,[113] the question becomes whether alternatives could advance a law's goals enough and without intolerable costs: balancing.

Third, the compellingness inquiry itself raises some of the concerns invoked against cost–benefit analysis. If costs and benefits are incommensurable, neither is greater, so judges weighing them would have to make policy judgments not drawn from legal materials. And doing that in a conflict between rights and democratically enacted laws would undermine the democratic value of having citizens make major policy choices.[114] But so would compelling-interest determinations.

Nor can preexisting law set benchmarks regarding "compellingness" that could seriously constrain courts. Regulatory goals are too varied for that. Suppose a precedent called some vaccine mandate's quantum of health benefit sufficient. That would tell us nothing about how to assess the marginal educational benefits of two years of schooling[115] or the security benefits of some prison protocol[116] or the health benefits of prohibiting tobacco advertisements within one thousand feet of schools rather than some smaller radius.[117] The *Bruen* majority seems to agree that precedents on what counts as "compelling" are little help. Its members later denied that courts could consistently assess the compellingness of benefits of affirmative action that were "question[s] of degree."[118] They saw no neutrally identifiable "point at which there exists," say, "sufficient 'innovation and problem-solving.'"[119]

Of course, many doctrines require line-drawing.[120] For this Court, line-drawing here is worse. It involves not just some arbitrariness, or narrow moral reasoning about a private-law dispute, but a political-moral judgment about the worth of a democratically supported law. To say whether an interest is "compelling" is not like saying whether a five-foot-

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113. See infra sections I.A, III.B.1.b.

114. See Barclay, Protected Reasons, supra note 101 (manuscript at 21–24).

115. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 217–29 (1972) (analyzing the state's interest in requiring compulsory education until age sixteen).

116. See, e.g., Holt v. Hobbs, 574 U.S. 352, 362 (2015) (reviewing a prison security measure).

117. See, e.g., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561–63 (2001) (invalidating such a rule because its marginal benefits over a smaller-radius ban were insufficient to justify the costs).

118. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2166–67 (2023).

119. Id. (quoting Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 656 (M.D.N.C. 2021), rev'd by *Students for Fair Admissions*, 143 S. Ct. 2141). As this example shows, moreover, while the Court sometimes sidesteps the "compellingness" inquiry by skipping to the question of whether a challenged law is narrowly tailored, there are important cases in which the Court has declared the state's interest not compelling. See, e.g., Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 357–60 (holding as much of an asserted "anticorruption interest" in campaign finance regulations).

120. See G. Girgis, Taming Strict Scrutiny, supra note 40 (manuscript at 34) (discussing the injury-in-fact requirement for Article III standing).

eleven-inch man is "tall." The former question would, as Justice Kavanaugh observed, elude "neutral" benchmarks in "disputed and controversial areas in law"[121] and could contradict the policy judgments of the people's representatives.[122]

Justice Kavanaugh is not idiosyncratic in tracing concerns about balancing to an ideal—morally neutral judicial review—that would cut against compelling-interest inquiries as much as cost–benefit analysis. The neutrality ideal has driven the conservative legal movement for a half-century. It stretches from Justice William Rehnquist's 1970s insistence that judges shouldn't inquire into which "governmental objectives" are "'important,' and which are not,"[123] to Justice Barrett's 2020s refusal to "second-guess[] the moral judgments" of voters or "policy decisions reserved for politicians."[124] This norm reflects two ideas: (1) A judge's job is to say only what the law is,[125] and (2) law is sharply distinct from politics (or political morality).[126] Professor Larry Alexander, calling the second premise "formalism,"[127] argues that law *must* be nonmorally specified because its whole point is to get around political-moral disagreement. When we have to coordinate but disagree on what is morally best to do, law offers a nonmorally specified basis for convergence like original intent.[128] In fact, Alexander thinks a norm is pure positive law *only* to the

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121. Brett M. Kavanaugh, Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions, 92 Notre Dame L. Rev. 1907, 1915 (2017).

122. Indeed, absent any benchmark fixed across all cases, judges may tacitly set the benchmark for a given law's benefits based on their assessment of its costs—thus weighing costs against benefits after all.

123. See Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting).

124. See Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1167 (2023) (Barrett, J., concurring in part).

125. See United States v. Rahimi, 144 S. Ct. 1889, 1921 (Kavanaugh, J., concurring) (2024) ("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.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))); see also Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation: Federal Courts and the Law 3, 22 (Amy Gutmann ed., new ed. 2018) [hereinafter Scalia, Common-Law Courts] ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.").

126. See Larry Alexander, "With Me, It's All er Nuthin'": Formalism in Law and Morality, 66 U. Chi. L. Rev. 530, 530–31 (1999) [hereinafter Alexander, Formalism] (arguing that "[l]aw is essentially formalistic, and morality is not in the slightest degree formalistic" and defining "formalism" as "adherence to a norm's prescription without regard to the background reasons the norm is meant to serve," even in case of conflict).

127. See id. at 531.

128. See Larry Alexander, Originalism, the Why and the What, 82 Fordham L. Rev. 539, 539–40 (2013) (defending originalism on the grounds that "[w]e do not agree about what we ought to do," as a matter of "first-order" (i.e., moral and political) "reasoning," "but we do agree that we need to settle the matter," and originalism does that).

extent that it can be applied without fresh political-moral reasoning.[129] So while a law's creators should weigh values in deciding what society will do, Alexander thinks, applying the law means following their decision without reopening that moral dispute. Adding the first premise—that judges must only apply law—yields the ideal: judges should be morally neutral.

From this angle, judges overstep when deciding whether a law's marginal benefit is compelling, not just whether benefits outweigh costs. Both determinations reopen the "quintessentially political"[130] question—how to square private interests with democratically supported laws—that liberties exist to displace (assuming they are legal norms, not aspirations[131]). Both make law in the formalist's sense rather than applying the political-moral conclusions of the framers—the resounding charge of balancing critics.[132]

2. *Only Some "Analogical" Reasoning.* — Does *Bruen*'s critique of balancing reach analogical reasoning? A form of analogical reasoning pervades all law. When vague words create borderline applications of a legal text or doctrine,[133] most agree judges may ask if a case is analogous to those within the legal concept's core.[134] Then-Judge Kavanaugh wrote that for "close questions at the margins" of gun rights, courts should "reason by analogy."[135] *Bruen* called such reasoning "a commonplace task for any lawyer or judge."[136]

But how does this lawyerly analogical reasoning differ from the common-law reasoning conservatives condemn as illegitimate in public law,[137] and which is *the* defining feature of originalism's rival, living

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129. See Alexander, Formalism, supra note 126, at 531.

130. Alicea & Ohlendorf, supra note 35, at 81.

131. Some argue that these rights were originally understood not as making law but as declaring natural rights for political actors to heed. See infra section III.A.

132. Patrick M. McFadden, The Balancing Test, 29 B.C. L. Rev. 585, 641 (1988) ("Balancing test opponents have often asserted that it is the *legislator's* task to balance the interests of social groups . . . [to] establish a rule of law to govern future behavior; judges are to take those rules and apply them as written, the balance already having been struck."); see also id. at n.299 (offering a "small sampling" of judicial and scholarly quotations in support).

133. See Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 415 (1985) ("Prototypically, a vague, ambiguous, or simply opaque linguistic formulation of the relevant rule generates a hard case.").

134. As noted above, others might say that in such marginal cases, courts should defer to the political actors. See Thayer, supra note 55, at 151 (urging that courts uphold laws unless their unconstitutionality is beyond a "reasonable doubt"). But this would not avoid balancing when balancing is required to identify the right's core in the first place. See infra section II.A.3 (arguing that this is so for general liberties).

135. See Heller v. District of Columbia, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

136. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).

137. See, e.g., Kavanaugh, supra note 121, at 1915 (lamenting that balancing tests involve "old-fashioned common-law judging"); id. at 1917 (arguing that the "compelling interest" test "is inherently a common-law test," and "common-law tests almost by definition

constitutionalism?[138] After all, common law analogizing (if cases *A* and *B* involved a tort, so must *C*) is thought to involve political-moral analysis: Since any two cases are alike and different in many ways, the question is whether they are alike in *normatively relevant* ways.[139] If *Bruen* rejects political-moral analysis in liberties cases, what analogical reasoning does it accept?

Bruen cited two accounts as guides.[140] For Professor Cass Sunstein, analogical reasoning rejects (a) top-down analysis (deduction) from moral principles that are (b) general enough to cover all questions and (c) thorough enough to provide complete justifications from first principles.[141] It reflects, among other things, a "focus on particulars; incompletely theorized judgments; and principles operating at a low or intermediate level of abstraction."[142] The other work cited in *Bruen*, by Professors Barbara Spellman and Fred Schauer, finds empirical-psychological support for the difference made by this focus on concrete examples.[143] When judges start with concrete examples, certain factual features will strike them as salient (thanks to their education and training) and lead to different and more convergent outcomes than purer policy reasoning would.[144] The examples drive the identification of principles and not vice versa,[145] thus limiting discretion.[146] Call this "close" analogical

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call on judges to assess whether they think the law is important enough to uphold in light of the larger values at stake").

138. See generally David A. Strauss, The Living Constitution (2010) [hereinafter Strauss, The Living Constitution] (giving a common-law-based account of living constitutionalism).

139. See William Gummow, The Strengths of the Common Law, 44 Hong Kong L.J. 773, 777 (2014) (noting that "the common law method of adjudication [puts an] emphasis upon balancing competing interests"); David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 900 (1996) [hereinafter Strauss, Common Law Constitutional Interpretation] ("Moral judgments—judgments about fairness, good policy, or social utility—have always played a role in the common law, and have generally been recognized as a legitimate part of common law judging."); see also supra note 137.

140. See *Bruen*, 142 S. Ct. at 2132.

141. See Cass R. Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741, 746–50 (1993) [hereinafter Sunstein, On Analogical Reasoning]; see also *Bruen*, 142 S. Ct. at 2132 (citing Sunstein, On Analogical Reasoning, supra).

142. Sunstein, On Analogical Reasoning, supra note 141, at 746 (emphasis omitted).

143. See Frederick Schauer & Barbara A. Spellman, Analogy, Expertise, and Experience, 84 U. Chi. L. Rev. 249, 250 (2017) (discussing existing research); see also *Bruen*, 142 S. Ct. at 2132 (citing Schauer & Spellman, supra).

144. See Schauer & Spellman, supra note 143, at 265 (noting that "judges may . . . see legally infused analogies that others would ignore").

145. See id. at 265–66. For a related account of analogical reasoning, see generally Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, 109 Harv. L. Rev. 923 (1996).

146. See Darrell A.H. Miller, Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second, 122 Yale L.J. 852, 936 (2013) ("[F]orcing the judge to engage at some level with the historical materials, even at the level of analogical reasoning, controls discretion to a degree that is absent without such a process.").

reasoning. Since it falls beyond the Court's critique, this Article limits "balancing" to political-moral reasoning *less* constrained by legal sources than what Sunstein, Schauer, and Spellman describe.

Examples illustrate the contrast. Close analogical reasoning drove a recent case involving a borderline application of the ministerial exception, a First Amendment doctrine exempting from antidiscrimination law a church's choice of ministers.[147] The Court reasoned that if ministers include church employees who are *called* "ministers" and are duty-bound to convey the faith, it should reach teachers who have the duty without the label.[148] In finding the two analogous, the Court did not weigh costs and benefits or generate a political-moral theory of church autonomy. It did not say the interests served by church autonomy there fell above some threshold or that the antidiscrimination interest fell below another.[149] It inferred from historical examples that our legal traditions care about church control over "faith and doctrine," not labels.[150] The history constrained the moralizing. The Court might need to invoke broader moral principles if a case's facts differ along many more dimensions from any historical analogues. For just such reasons, one scholar has argued, free speech cases reviewing social media regulations cannot rely on historical analogues and must apply looser standards.[151]

As these examples suggest, the close analogical reasoning blessed by *Bruen* might differ only in degree from the looser reasoning it condemned. (Compare rules allowing players to move along a checkerboard three spaces per turn versus five.) But even if the two sit on a spectrum, they sit at opposite ends, which could matter. If close analogical reasoning is more determinate and hews closer to political traditions, it might produce more convergence and better honor popular sovereignty. That's the theory.[152]

A more bright-line difference could also separate close analogical reasoning from looser forms: whether courts consult only framing-era analogues or ones found in later precedents, too. The first approach informs Seventh Amendment jury right cases. To decide if that right extends to some adjudication, the Court draws analogies to examples in

147. See Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020) (describing the ministerial exception doctrine and new question presented under it).

148. See id. at 2066.

149. Of course, even "close" analogical reasoning is not wholly morally neutral. See, e.g., Miller, supra note 146, at 917–27 (discussing the challenges of synthesizing messy traditions).

150. See *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2061–64.

151. See Gregory M. Dickinson, Beyond Social Media Analogues, 99 N.Y.U. L. Rev. Online 109, 127 (2024), https://nyulawreview.org/wp-content/uploads/2024/03/99-NYU-L-Rev-Online-109.pdf [https://perma.cc/SV7U-J7WW] ("Online platforms are a generational technology that defies analogy and requires fresh consideration via appropriate doctrinal tools.").

152. If there isn't a real difference in *practice* between close analogical reasoning and what *Bruen* opposes, then it is even easier to show that what *Bruen* opposes is inevitable.

place in 1791 and not the growing cache found in precedents.[153] This matters because "closely analogous to" is not transitive, just as "close to" isn't. Sometimes, Founding-era case *A* is closely analogous to precedent *B*, and *B* is to *C*, but *A* is *not* closely analogous to *C*. Then the jury right will not extend to *C* even if *B* might have favored that. So forcing judges to find a framing-era analogue for a general-liberty claim[154] could limit the influence of their moral analysis on outcomes.[155] It could prevent judges from layering fresh moral assessments upon earlier ones by other judges. (Compare rules letting players move one space along a checkerboard from a fixed starting-point versus from wherever they had landed in the last turn. Ranges would differ dramatically.)

That judicial layering of moral assessments may be why living constitutionalism, though claiming to rely on analogical reasoning, is anathema to legal conservatives. Its hallmark is reasoning not just from Founding-era history but "most heavily [from] earlier judicial decisions,"[156] as its purveyors have stressed.[157] That's what Scalia condemned as "preeminently a common-law way of making law, and not the way of construing a democratically adopted text."[158] That's balancing.

* * *

Judges balance in the sense that offends *Bruen* when they

(1) go beyond *close* analogical reasoning, as defined above, in

(2) determining based on broad political-moral considerations (rather than reading off legal sources *without* such normative reasoning),

(3) in nonmarginal (non-semantic-borderline) cases,

(4) whether (a) the private interests normally served by a right are too light to vindicate or (b) enforcing the right would unacceptably undermine other aspects of the common good (including competing rights or public interests), in a given case or range of cases.[159]

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153. See Miller, supra note 146, at 872–92 (describing Seventh Amendment analogical reasoning).

154. Imagine requiring free speech challenges to show that a law is closely analogous to the licensing regimes condemned as prior restraints at the Founding. See Near v. Minnesota, 283 U.S. 697, 733 (1931) (Butler, J., dissenting) (stressing the centrality of prior restraints to Founding-era free speech).

155. See Miller, supra note 146, at 886 (noting the limited extent of policy analysis in Seventh Amendment cases).

156. Strauss, The Living Constitution, supra note 138, at 62.

157. See Strauss, Common Law Constitutional Interpretation, supra note 139, at 879, 892 (noting that the common law approach "rejects the notion that law must be derived from some authoritative source" and holds that "relatively new practices that have slowly evolved . . . from earlier practices deserve acceptance more than practices that are older but that have not been subject to testing over time").

158. See Scalia, Common-Law Courts, supra note 125, at 40.

159. Cf. United States v. Rahimi, 144 S. Ct. 1889, 1920 (2024) (Kavanaugh, J., concurring) (stating that "[w]hatever the label[,] . . . [a] balancing approach is policy by

That is what this Article means by "balancing."

Three caveats. First, this Part has defined "balancing" as broadly as demanded by the concerns driving judicial and scholarly critiques. But even if balancing is inevitable, not everything that falls under those critiques is inevitable. (It's inevitable that courts will use *some* form of reasoning that falls in the balancing category, but not that they will use *each* form that does. Some forms can be avoided entirely.) *Truly* comparing incommensurable costs and benefits isn't inevitable since it's impossible.[160] The peculiarities of intermediate and strict scrutiny may be inapt and avoidable for certain rights (like the Second Amendment[161]). What will be inevitable are political-moral determinations that applying the right would be unacceptable. Those needn't rest on utilitarianism. That free exercise shouldn't cover human sacrifice could rest on natural rights theory. That free speech shouldn't destroy trial subpoenas or the trademark system[162] may rest on moral intuitions about the needs of "any well-governed society."[163] Still, when these conclusions cannot be read off legal materials, judges invoking them are doing what offends *Bruen*.

Second, it isn't inevitable that interpreters balance using their *own* overarching political-moral theory (and judges shouldn't). An interpreter might be a utilitarian but consult a natural-rights theory ascribed to the right's framers (or, say the "evolving standards of decency" held by "society," not by themselves).[164] Still, it will be the *interpreter's* understanding and application of a highly general political-moral theory (even if not their *own* theory) that often controls. For with general liberties, *by design*,[165] cases at the right's core will more often raise normative questions that go far beyond any that the framers considered (or recorded answers to). In those cases, perhaps interpreters trying to channel the framers' high-level moral theory would diverge less, and their

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another name" if it requires judges to decide whether, given a law's "benefits" and "burdens," "the law is sufficiently reasonable or important").

160. More precisely, costs and benefits in rights cases are often incomparable with respect to the most plausibly relevant governing values, making it impossible to judge one simply greater (or the two equal) in *relevant* respects.

161. Compelling interest tests are an odd fit for weeding out invalid "gun laws," which "almost always aim at the most compelling goal—saving lives." See Wrenn v. District of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017).

162. See infra note 418 (describing a case in which a refusal to balance would have called all of trademark law into question).

163. Kunz v. New York, 340 U.S. 290, 300 n.3 (1951) (Jackson, J., dissenting) (internal quotation marks omitted) (quoting Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 18 (1948)) (noting that Alexander Meiklejohn, known as an absolutist about free speech, uses this phrase to justify certain exceptions to the right).

164. See Trop v. Dulles, 356 U.S. 86, 101 (1958); see also Heyman, supra note 16, at 1279 (discussing framing-era natural rights thinking). This will not be possible when a judge thinks the alternative moral theory meaningless or incoherent. Cf. Germain Grisez, Against Consequentialism, 23 Am. J. Juris. 21, 41–49 (1978) (arguing that consequentialism is "incoherent" and "literally meaningless").

165. See infra section II.A.1.

own retail moral intuitions would do less work, than if they were applying their own general theory. But they would still diverge and act on their moral intuitions more than interpreters following *non*morally specified instructions, thus triggering formalist concerns about balancing.[166] That's why Justice Scalia thought that even judges' attempts to apply *our legal order's* moral values would yield "judicial personalization of the law."[167] Besides, whatever the theoretical difference between applying one's own overarching moral theory and applying the Founders', in practice, the difference may be small. Founding-era moral theories left interpreters great discretion to use freeform political-moral reasoning, recognizing the same highly general justifications for burdening rights as modern balancing tests: public health, safety, morals, and the like.[168] Both sets of approaches would make public safety the main touchstone for reviewing gun laws, for instance.[169] If the modern tests raise democratic legitimacy concerns when applied by judges, as the Court thinks, so must older rights theories (especially if the Founders did not authorize judges to apply them, as section III.A recounts).

Finally, the thesis isn't that balancing is inevitable in every general-liberties case. Some implementing doctrines *can* be read off original understandings and applied categorically—including for quite important protections like the rule against laws driven on their face by hostility to religion.[170] And some existing balancing tests can be discarded. The thesis is that categorical rules can't *exhaust* a general liberty's core. Balancing will be inevitable in many core (non-semantic-borderline) cases that our legal culture is unwilling to push outside the right's coverage.

C. *Reason to Doubt the Campaign: The Track Record*

Bruen's effort to banish judicial balancing of general liberties runs into a striking fact: It's never been done.

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166. As noted, see supra notes 126–129, formalists like Alexander think that law is necessary when and because we have to coordinate our actions but disagree on what is morally best to do. But Alexander stresses that even people who "generally agree about the content of their moral rights and duties at a high level of abstraction" will often disagree on the more specific "moral questions" that law must settle. See Alexander, Formalism, supra note 126, at 532.

167. See Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 863 (1989).

168. See infra sections III.A (discussing the Founders' general approach), III.B.1.b (discussing Founding-era thought on free exercise), III.B.2.b (discussing Founding-era thought on gun rights).

169. See infra section III.B.2. One key difference is that Founding-era thought had a backstop against laws that would prevent most people from exercising the right at all, see infra note 381 and accompanying text, which some modern courts have allowed, see supra note 5 and accompanying text.

170. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1993) (calling the principle "well understood").

Abroad, while a few *non*liberty rights are absolute (like the right against torture[171]), general liberties are defined in charters to allow exceptions expressed in moral terms.[172] They're enforced through proportionality analysis,[173] which first asks whether a regulation burdens a right, is rationally related to an important purpose, and impairs the right as little as necessary; it then asks whether the margin of benefit realized is disproportionate to the burden.[174] The last two prongs require the fresh assessment of degrees of value condemned by the conservative critique of balancing, and they prove crucial in practice. Courts invalidating laws do so "nearly always under the rubric of 'necessity' or 'balancing'" or both together, such that "a single test of means-end . . . 'balancing'" controls.[175] And this method's reach is vast. Professor Francisco Urbina writes, citing scholars from different systems:

> [Proportionality analysis] is the default test for adjudicating human rights disputes in jurisdictions from all five continents, both national and international, and in civil and common law legal traditions. . . . [It is] a 'near universal' legal test, a 'staple of adjudication on fundamental rights in international and domestic courts[,]' . . . and 'unquestionably the dominant mode of resolving public law disputes in the world today[.]'[176]

Finally, at home, as shown below, balancing pervaded Second Amendment law before *Bruen* and the modern doctrine and early history of other liberties.[177] *Bruen*'s attempt to banish it faced such serious challenges that two years later, the Court's revisions to it re-invited balancing.[178] And more trial and error won't help because, as the next Part shows, balancing is compelled by the purpose we assign general liberties.

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171. Paul Yowell, Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review 25 (2018) (calling this the "classic example of an absolute right" in many systems).

172. See Barclay, Protected Reasons, supra note 101 (manuscript at 56–57) (noting that "limitation clauses" of this sort are found in "the Universal Declaration of Human Rights, . . . the European Convention on Human Rights, the Canadian Charter of Rights and Freedoms, [and] the South African Bill of Rights," as well as in several "statutory bills of rights" (footnotes omitted)).

173. See Vicki C. Jackson, Constitutional Law in an Age of Proportionality, 124 Yale L.J. 3094, 3110–21 (2015) (noting that Canadian courts use a "proportionality test to determine whether" rights may be limited). Globally, proportionality analysis is used for many rights, not just liberties.

174. See id. at 3111–14.

175. Yowell, Proportionality, supra note 108, at 91 .

176. Francisco J. Urbina, A Critique of Proportionality and Balancing 1 (2017) (citations omitted).

177. See infra sections III.A–.B.

178. See infra section III.B.2.a.

II. THE INEVITABILITY OF BALANCING LIBERTIES

Any sensible creators of a legal norm will try to "balance" by designing the norm to serve worthy ends at tolerable costs from the outset. But that's more feasible for some norms than others. Any norm will create *some* pressure to balance ex post as well. But the need for that is higher for general liberties: rights defined by reference to conduct to be shielded from state interference of all sorts. These can be contrasted with liberties defined by direct reference to the regulations they forbid (like religious tests for office) and positive rights to government resources (like confronting witnesses).[179]

This Part uses a thought experiment to explore why constitutional designers might opt for general liberties and shows that what makes them appealing also requires greater-than-usual balancing in their enforcement. Part III will then show that the Free Speech and Free Exercise Clauses and Second Amendment have in fact been treated as enshrining general liberties.

A. *General Liberties: Unfinished Protections*

General liberties' point is to provide adaptive protection. This forces on them a structure—irreducible open-endedness—that requires balancing in core applications, making them "unfinished." After explaining these features of general liberties and how they differ from vagueness or breadth, this section explains *why* open-endedness heightens the need to balance ex post.

1. *Adaptive and Irreducibly Open-Ended.* — To see why a system might constitutionalize a general liberty for, say, religious conduct, consider the limits of three alternative forms of protection.

First, lawmakers could carve custom accommodations for religion into each regulation at its drafting—as by adding a religious exemption clause to a military draft bill. This wouldn't help when lawmakers don't care enough to avoid burdening religion.

A second approach would offer *constitutional* protection, but more narrowly than a free exercise clause. The ban on religious establishments, as currently interpreted, binds political actors, unlike the first approach. But it blocks only a narrow range of threats and requires constitutional designers to have foreseen those threats with specificity (in this example, laws compelling religious attendance, choice of church leaders, and

179. General liberties are typically enshrined in laws guarding "the freedom of *X*" or "the right to do *X*" or forbidding laws "prohibiting *X*," for some private conduct *X*. Of course, a particular constitution's framers might use such language to enshrine a more discrete right, in which case what this Part argues about general liberties would not apply.

funding of religious ministers).[180] Such protection offers no help against unforeseen harms.[181]

Of course, even such specific rights will be vague at the margins. So *some* currently unforeseen harms could be blocked—if they fall in the zone of vagueness created by the word "establishment" or a key word in one of its defining doctrines (like "minister" in the ministerial exception doctrine). Judges may use close analogical reasoning to count a new kind of employee as a "minister,"[182] for instance. But what this second form of protection cannot do is block laws that are not establishments *or* close analogues.

A third protection would be constitutionalized, too, but it wouldn't specify the protected acts or excluded laws. It would declare some specific and readily identifiable *state motives* so at odds with a private interest as to be always fatal. An example is the bar on laws driven by religious animus.[183]

While this right would govern regulations covering a wide range of conduct, it faces other limits. In focusing on impermissible motives for regulation, it could not stop laws that burden religion for reasons that are *legitimate but insufficiently weighty*—like a ban on beards for Muslim prisoners, which only slightly increases security.[184] It's impossible to foresee with specificity all the laws that might appeal to lawmakers as social conditions change, in hopes of saying which wouldn't do *enough* good to justify burdens on religion.[185]

So designers opt for a general liberty—rather than the three devices above—to bind political actors in ways they cannot concretely spell out now. Rather than identify specific laws or motives to exclude, they name a general category of conduct to shield (religious exercise) or a general set of state interests to preclude (those not compelling). And they resist efforts to reduce that protection to more concrete ones that could be exhaustively listed. They regard the right as *irreducibly open-ended* ("irreducibly" because the open-endedness cannot be eliminated without destroying the right's function).

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180. See Shurtleff v. City of Boston, 142 S. Ct. 1583, 1609 (2022) (Gorsuch, J., concurring in the judgment).

181. Constitutionalizing a preexisting right—as *Bruen* said the Second Amendment did—might be a special case of this second approach. If free speech were understood to exclude just prior restraints and bans on seditious libel, then it would be a special case of forbidding discrete policies—it forbade *two* discrete policies.

182. See supra notes 147–150 and accompanying text.

183. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729–31 (2018) (invalidating a state action that putatively reflected religious hostility).

184. See Holt v. Hobbs, 574 U.S. 352, 363–64 (2015) (finding such a rationale for regulation compelling in principle but insufficiently threatened in the case at hand).

185. Moreover, while such a right can easily guard against laws that are *on their face* driven by illicit goals, those applying such a right to block laws with *hidden* illicit motives would have to engage in balancing, as seen below. See infra sections III.B.1.b, III.B.3.b.

Open-endedness makes the right adaptive. It's not just that such rights are "intended to endure for ages to come,"[186] applying to varied entities, times, and places. Even the ban on religious tests for office is "adaptive" in that sense, protecting new religions as they arise. Rather, irreducibly open-ended rights vary in the *types of regulations* they guard against (as the ban on religious tests does not). They provide relief even as regulatory needs change—relief from threats that aren't even close analogues of today's.

Some interests demand this flexibility. Given the variety of faiths and religious rules, it's impossible to spell out the conduct needed for everyone's adequate religious exercise. For the right to keep and bear arms, technological and social changes make "ample alternative" means of self-defense a moving target.[187] And the sheer variety of human activities that involve speech or realize self-expression makes a standing general protection appealing.[188]

Those creating adaptive rights are "guess[ing] about the future" and not just drawing on their "know[ledge] about the past and the present and what they want to avoid,"[189] to use Professor Kim Lane Scheppele's framework. Scheppele calls shields against known dangers (like religious tests for office) "aversive" and rights against unknown harms "aspirational."[190] General liberties are at the far aspirational end. Or in Professor Jed Rubenfeld's terms, general liberties are more like commitments than contractual duties.[191] While the latter are knowable with specificity as fruits of a careful bargain, "[c]ommitments characteristically turn out to require more than the parties who made them bargained for."[192] General liberties' *distinctive value* is to outrun initially foreseeable duties by a comfortable margin.

This structure gives these rights political import, which might shape their legal development.[193] Since general liberties must be expressed with

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186. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413–16 (1819).

187. This is the D.C. Circuit's gloss on the substance of gun rights protections in Wrenn v. District of Columbia, 864 F.3d 650, 662–63 (D.C. Cir. 2017) (internal quotation marks omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008)).

188. See Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting) (noting that "much, perhaps most, human behavior takes place through speech" and "much, perhaps most, law regulates that speech in terms of its content").

189. Kim Lane Scheppele, Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models, 1 Int'l J. Con. L. 296, 298 (2003) (emphasis omitted).

190. See id. at 299 (emphasis omitted) (contrasting aversive and aspirational constitutionalism).

191. See Jed Rubenfeld, Revolution by Judiciary: The Structure of American Constitutional Law 114 (2005) [hereinafter Rubenfeld, Revolution].

192. Id.

193. Of course, some concrete rights have political import, too. But concreteness reduces political significance, *holding the subject-matter constant*. There are national advocacy groups for the Free Exercise but not Religious Test Clause.

bold colors and majestic sweep, they easily align with moral principles simple enough to resonate with the public (or be opposed by it). They can be written on a napkin and become rallying points for national movements,[194] advocacy groups, and impact-litigation firms. The Free Speech Clause has the ACLU[195] and the Foundation for Individual Rights and Expression.[196] The Free Exercise Clause has the Becket Fund for Religious Liberty[197] and Americans United for the Separation of Church and State.[198] The Second Amendment has the NRA and Sandy Hook Promise.[199] A reticulated rights scheme with a dozen exception clauses could not so resonate with hearts and minds. And this resonance might sustain pressure to *keep* general liberties open-ended,[200] working against lawyers' tendency to reduce abstractions to technical doctrines.[201]

2. *Not Just Broad or Vague at the Margins.* — A right's irreducible open-endedness should not be confused with the text's sparseness or vagueness or the right's breadth, factors that do *not* generally induce balancing in core cases.

Though constitutions cannot "partake of the prolixity of a legal code,"[202] brief texts don't always yield open-ended norms or balancing, as proven by examples in section II.B. Nor is irreducible open-endedness about vagueness in the (non-normative[203]) words of the right's text or other canonical formulation.[204] Words are vague if they have borderline

194. See Greene, How Rights Went Wrong, supra note 30, at 18 (calling "[t]he Second Amendment[] . . . a rallying cry for an entire political party"); Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1790 (2004) [hereinafter Schauer, Boundaries] (describing the Free Speech Clause's "considerable rhetorical power and argumentative authority" in American public life).

195. See Free Speech, ACLU, https://www.aclu.org/issues/free-speech [https://perma.cc/839R-MXVK] (last visited Mar. 10, 2025).

196. See What We Defend: Free Speech, FIRE, https://www.thefire.org/defending-your-rights/free-speech [https://perma.cc/Z6JG-L5BK] (last visited Mar. 10, 2025).

197. See Religious Communities, Becket, https://becketfund.org/area-of-practice/religious-communities/ (on file with the *Columbia Law Review*) (last visited Mar. 10, 2025).

198. See Americans United for Separation of Church and State, http://www.au.org [https://perma.cc/S3BV-BVCF] (last visited Oct. 30, 2024).

199. See NRA, http://home.nra.org [https://perma.cc/NT9W-9EFB] (last visited Oct. 30, 2024); Sandy Hook Promise, https://www.sandyhookpromise.org/ (on file with the *Columbia Law Review*) (last visited Oct. 30, 2024).

200. See infra section III.B.1.a (describing popular opposition to a case attempting to narrow free exercise).

201. See infra section III.B.3.a (exploring this tension in free speech law).

202. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

203. Vague *normative* terms—like "reasonable" or "public interest"—plainly require normative reasoning for their application. Here, open-endedness is being contrasted instead with vague *non*normative terms that might define a right: terms like "speech" and "religion."

204. If the constitutional text refers to the right by a term of art, then the text's ordinary meaning does not define the right's substance. Perhaps the contours of "the freedom of

applications (is seventy-six degrees Fahrenheit "hot" weather?). Since "religion" is vague (does deep ecology count?), so is "religious exercise." But almost all texts have vague terms[205] where "law runs out"[206] and close analogical reasoning is needed.[207] Yet general liberties are more prone to balancing and not just at those semantic margins, as shown below.[208] And many questions about them don't arise from linguistic vagueness. When courts decide whether paintings or political donations are protected speech, they aren't mulling the boundaries of the dictionary definition of "speech" (since those things clearly fall outside it).[209] The same is true when courts hold that subpoenas to testify do not interfere with free speech (since what subpoenas compel *is* "speech").[210] Vagueness cannot be the whole story or even the better part of it.

Third, open-endedness is not breadth if that means a large number or variety of excluded regulations.[211] A right defined by a long catalog would be broad but not open-ended if all barred regulations could be listed with concreteness ("no ban on flag burning"). Then little balancing would be required for its implementation. Broad powers provisions most clearly illustrate the difference between breadth and open-endedness. In applying the Necessary and Proper Clause, courts have read "necessary" broadly to let Congress regulate in new ways as conditions change.[212] But they have not had to balance the harms and benefits of different readings of the Clause; the power it creates isn't "unfinished."

In short, irreducible open-endedness is not about a right having fuzzy borders or encompassing numerous activities (or excluded laws). It exists when the set of activities or laws (numerous or not) that fall within the right's semantic borders (fuzzy or not) cannot be listed because *the borders*

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speech" cannot be traced by looking up "freedom" and "speech" in laymen's dictionaries. Still, whatever the right's substance, it could in principle be captured more directly using *some* proposition. As to that canonical formulation, the points being made here would apply.

205. Cf. Roy Sorenson, Vagueness, Stan. Encyc. Phil. (Edward N. Zalta & Uri Nodelman eds., Feb. 8, 1997), https://plato.stanford.edu/entries/vagueness/ [https://perma.cc/QH2S-4TW7] (last updated June 16, 2022) (explaining what makes a term vague).

206. Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019).

207. See supra note 135 and accompanying text.

208. See infra section II.B, Part III.

209. Cf. Schauer, Categories and the First Amendment, supra note 29, at 270 (arguing that it would make the First Amendment absurdly expansive to "define 'speech' by reference to Webster's dictionary" since "we fix prices with speech, . . . make contracts with speech, commit perjury with speech, discriminate with speech, extort with speech, threaten with speech, and place bets with speech").

210. See infra note 427.

211. Cf. McGinnis & Rappaport, supra note 35, at 748–49 (distinguishing "general" meaning, which is broad and encompasses unforeseen cases, from "abstract meaning," which gives "future decision makers discretion to determine what it covers").

212. See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414–19 (1819).

are, by design, not fully drawn. The right's contours simply aren't settled—not in terms one could read off without balancing.

Such a right must be framed in presumptive terms—as presumptively covering whatever satisfies a general description (or vague *normative* terms) reflecting a right's "rationale"[213]: religiously motivated conduct, speech advancing autonomy or truth-seeking, arms fit for self-defense. As new weapons are made, new religions arise, and new forms of communication and self-expression emerge, such rights come to cover regulations implicating public interests in new ways and to different degrees. And whether to override the presumption is decided by those applying the right.

By analogy, suppose Jones lists groceries for their housemate Smith to buy, trying to balance nutritional value against cost. The list would contain vagueness if an entry used words with borderline applications—like "crackers," which might or might not cover matzah. Close analogical reasoning would be needed to apply a request for "tuna or, if they're out of that, a close substitute," which would force Smith to decide if salmon offers similar nutrients at comparable cost. The list would be broad if it had many items spanning many food groups but still not open-ended if each were as specific as "the Costco brand of 2% milk." But the list would be open-ended if Jones couldn't specify items to a close approximation. Not knowing the store, Jones might ask for "the best fish there, unless too pricy" or "other cheap and healthy enough items." General liberties' guidance is like that.

3. *Why the Shaping (and Hence Balancing) of Irreducibly Open-Ended Norms Is Always Unfinished*. — To see why an open-ended liberty requires ex post balancing, consider an extreme and fanciful example of the dynamic. Suppose the President, ravenous for deregulation but too lazy to make case-by-case choices, has asked a supportive Congress to repeal all laws passed on Wednesdays. Once Congress gets to work, it will feel enormous pressure to balance that instruction against the value of some of the laws on the chopping block—like the Social Security Act of 1935.[214] That pressure to balance will not come from vagueness in the President's charge (regarding, say, laws passed at midnight between Tuesday and Wednesday). Nor from breadth: the pressure to balance would remain if the instruction's scope were slashed in half and applied only to Wednesdays in odd-numbered years. Rather, the issue is that the President's instruction—effectively a regulation of regulations—would cut against an *unforeseen* set of laws serving different interests to different degrees. So the costs of implementing it would vary unforeseeably, with some proving unacceptable. (A law's being passed on a Wednesday is no reason to think it dispensable.) This would push those applying the norm, Congress, to save laws that proved too important to lose.

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213. See Schauer, Speech and "Speech," supra note 26, at 909.

214. See Pub. L. No. 74-271, 49 Stat. 620 (1935).

Thus, it's more realistic to expect Presidents proceeding in such broad strokes to issue a standard, not a rule—requesting repeal of, say, all laws passed on Wednesdays that could be forgone *without undue cost*.

A still more refined approach would have the President going statute by statute. The costs of each potential repeal would be more apparent since each law's discrete benefits would be easier to assess. And so the President could do the balancing when drawing up requests, reducing the need or pressure for Congress to balance when implementing them.

General liberties are far less blunt than the first approach, but more like the first two than the last. Unlike rights against a discrete regulation, a general liberty's point is to offer roving protection from an unforeseen range of laws that, if allowed to stand, would have served different interests to different degrees. (And the affected interests would vary because they concern conduct out in the world—like speech or religious exercise—and not just an internal government process like cross-examination.) True, a liberty's trigger for presumptively blocking laws—"does this regulate speech/religious exercise/armed self-defense?"—is not *as* useless an indicator of the laws' importance as "passed on a Wednesday." But it doesn't bring the liberty's potential implications into sharp enough focus to allow the framers to make the needed exceptions themselves.

That leaves two possibilities. First, framers might make the right categorical, in which case its appliers would feel intense pressure to balance anyway, as new costs came to light. The pressure would come from a desire to limit blowback or real-world harms.[215] It's the sort of pressure the *Rahimi* Court was expected to feel to find *some* way to uphold laws disarming those subject to domestic violence restraining orders.[216] It's the motivation that the Court recently had to avoid blowing up the trademark system in the name of free speech even if there was no balancing-free basis for saving it.[217]

Of course, constitutional amendment is preferable to faithless application. But if adaptive, open-ended rights were framed in categorical terms, an "apply faithfully, amend as necessary" approach would be

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215. Professor Richard Fallon describes the relevant sort of pressure thus:

> In order to justify claims to obedience in their resolution of reasonably disputable cases, judges and Justices must implicitly represent that acquiescence in their decisions will produce better outcomes than would result otherwise, either generally or in a particular case. The pressure to produce morally attractive results for the future encourages the imputation of supporting interests and purposes to constitutional provisions that explain and justify morally attractive results for the future.

Fallon, Nature of Constitutional Rights, supra note 29, at 81 (footnote omitted).

216. See Josh Blackman, A Reversal in *Rahimi* Will Be Tougher to Write Than Critics Admit, Volokh Conspiracy (Nov. 21, 2023), https://reason.com/volokh/2023/11/21/a-reversal-in-rahimi-will-be-tougher-to-write-than-critics-admit/ [https://perma.cc/Z7YC-6NGX].

217. See infra note 418 and accompanying text.

unworkable. For the combination of adaptive function and categorical design would provide a *predictably endless series* of needs for amendment. As with a self-driving car programmed to miss oncoming traffic at intersections, the solution for such a right wouldn't be to keep sending it to the repair shop (through amendment) but to reprogram it (making it noncategorical) or retire it (perhaps by underenforcing it in favor of flexible statutory protection[218]).

The second possibility is thus likelier: the framers would formulate the right to direct its appliers to balance to avoid undue costs as they emerged—say, by defining a right to free exercise absent a compelling state interest.

Either way, no preexisting materials—text, history, traditions—will settle the right's scope in a way likely to prove sustainable. The shaping of the right's contours based on political-moral reasoning will remain always unfinished.

Courts cannot avoid this by sticking to close analogical reasoning. Such reasoning begins with early concrete examples and decides new cases using *low-level-of-generality* rules of relevant similarity.[219] This will fail whether courts work from examples of protected conduct or permitted regulation.

First, hewing to discrete early protections (like the rule against prior restraints on speech) would destroy liberties' power to shield against unforeseeable laws as society's needs changed—the ability for which these liberties were, by hypothesis, selected. So interpreters would have to rely on *broad* principles of similarity to early protections, principles that more directly apply the interests behind the right (like autonomy or democracy).[220] That's balancing. This drift is confirmed over and over below.[221]

Second, presuming broad protection and identifying exceptions using close analogies to those early *regulations* (like obscenity laws) would intolerably shrink the state's ability to regulate, as also confirmed below.[222] So appliers would fall back on broader principles of relevant similarity that more directly capture the public interests in regulating: balancing again.

The unworkability of close analogical reasoning is guaranteed by the problem that general liberties are tailored to solve: managing needs for (a) versatile protection for certain conduct and (b) varying regulation.

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218. See infra Part IV.

219. See supra section I.B.2 (distinguishing close from looser analogical reasoning).

220. See Schauer, Speech and "Speech", supra note 26, at 909 (emphasizing that free speech coverage is determined by the "rationale underlying" the right).

221. See infra sections III.B.2.b, III.B.3.b, and IV.A (discussing examples of this proposed approach to defining gun rights and free speech).

222. See infra section III.B.2.a (discussing this approach to defining permissible gun laws).

Hewing to early protections would give short shrift to (a), and early regulations, (b).

A similar dilemma dooms efforts to have the law specify in advance which regulatory goals will justify overriding a right, in hopes of preventing courts from having to decide afresh. The ends declared sufficient will be defined either broadly (like "health") or narrowly ("the quantum of health advanced by this smallpox vaccine mandate"). Narrow definitions would hamstring regulation. Broad ones would gut the right, allowing almost any regulation to stand. And attempts to draw lines—by allowing, say, "laws that promote health *enough*"—would induce balancing.[223]

Nor could interpreters avoid balancing through Thayerian deference—deference to regulations outside the right's core—if that core can't be identified without balancing.[224]

Thus, assuming that to create law is to supplant political-moral reasoning,[225] an adaptive legal norm's creation is never finished. So if First and Second Amendment rights are adaptive, the search for their "original contours"[226]—discernible from ratification without balancing—is a mistake.

B. *Why Most Regulations and Other Constitutional Rights Differ*

While some other rights or ordinary regulations also induce balancing, most differ systematically from general liberties in this respect.[227]

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223. See infra section III.B.1.a (identifying examples of this dynamic).

224. Cf. Richard W. Garnett, The Political (and Other) Safeguards of Religious Freedom, 32 Cardozo L. Rev. 1815, 1826 (2011) (arguing that balancing can be avoided through the identification of the Free Exercise Clause's "core commands"); Thayer, supra note 55, at 151 (urging deference when a law is not clearly unconstitutional).

225. See supra notes 126–129 and accompanying text.

226. United States v. Rahimi, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring) (noting that in *Rahimi*, "the Court uses history" to determine "the scope of the pre-existing right that the people enshrined in our fundamental law"); see id. ("Call this 'original contours' history: It looks at historical gun regulations to identify the contours of the right.").

227. This section focuses on rights and regulations, but it's worth adding a word about constitutional powers. Professor Shalev Gad Roisman, who thinks balancing should be used in the separation of powers, admits that it has historically been much rarer there than in rights cases. See Shalev Gad Roisman, Balancing Interests in the Separation of Powers, 91 U. Chi. L. Rev. 1331, 1371 (2024) ("Although interest balancing is an entirely commonplace mode of constitutional analysis, it has yet to take hold in the separation of powers."). But there's an obstacle to separation of powers balancing, which may explain its absence: While it's hard enough to project the concrete harms and benefits of allowing certain actions in the world (like flag burning, see Texas v. Johnson, 491 U.S. 397, 419–20 (1989)), it seems much harder to project the impact on people's interests of allowing a certain allocation of interbranch powers (like letting Congress interfere in the President's recognition of foreign powers, see Zivotofksy v. Kerry, 576 U.S. 1, 32 (2015)). See, e.g., Adrian Vermeule, Does the Separation of Powers Protect Liberty?, New Dig. (Sept. 30, 2024), https://thenewdigest.substack.com/p/does-the-separation-of-powers-protect

When regulations prohibit specific private conduct for specific ends, it's easier for drafters to limit their overinclusiveness and need for later balancing. (Exceptions prove the rule: laws that are less defined—covering behaviors of unknowably varying costs—include generic exemptions letting courts balance.[228]) General liberties differ in that they are, again, *regulations of* regulations, and of very different ones, each of which would prohibit its own specific conduct to advance its own public ends.

Second, rights other than general liberties—as against religious establishments (six discrete forms of eighteenth-century support for state churches[229] or their close analogues)—forbid state actions one can list more concretely. This concreteness makes it easier to foresee the public goals these rights might hinder and shrink the rights to head off intolerable costs. The same goes for rights against regulations manifestly driven by illicit motives (like religious hostility[230]). Since their motives can't justify even small burdens and don't require balancing to ferret out,[231] the norm can apply categorically.

Third, many criminal procedural rights—like confrontation or double jeopardy—do not directly shield private conduct or thus hamper the state's pursuit of interests affected by conduct out in the world.[232] They concern a governmental process, prosecution, occurring in controlled environments.[233] So their costs—like nonpunishment of some percentage

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[https://perma.cc/7TRX-A4BZ] (stressing the near-impossibility of predicting the impact on individual liberty of various separation of powers rules); cf. Daryl J. Levinson, Law for Leviathan: Constitutional Law, International Law, and the State 139–62 (2024) (arguing that balance of powers doctrines hardly constrain officials).

Even if interpreters don't *balance harms and benefits* in cases defining powers, they may feel a need to promote flexibility otherwise—as by adopting a broad reading of "necessary" in the Necessary and Proper Clause, to let Congress regulate in new ways as societal needs change. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413–16 (1819) (doing so). That is different from supposing that the legal norm created by the Clause is "unfinished"—that its legal content inevitably changes, requiring balancing for its enforcement.

228. Thus, the Civil Rights Act of 1964, which bars certain types of discrimination for a wide range of employers, includes a general exception for bona fide occupational qualifications. See Jane Wells May, Recent Development, The Bona Fide Occupational Qualification Exception—Clarifying the Meaning of "Occupational Qualification," 38 Vand. L. Rev. 1345, 1348–49 (1985).

229. See supra note 57 and accompanying text.

230. See Sherbert v. Verner, 374 U.S. 398, 402 (1963) (defining such a right).

231. But see infra section III.B.3.b (arguing that balancing *is* required if free speech protects against laws driven by illicit motives even when those motives are *not* so manifest).

232. See Jeffrey L. Fisher, Categorical Requirements in Constitutional Criminal Procedure, 94 Geo. L.J. 1493, 1533 (2006) (contrasting in this regard "provisions that directly regulate how the government may treat its citizens" with rights about "what procedures they must follow in order to treat them in certain ways"). At least one criminal procedural right—the Fourth Amendment—plausibly requires balancing by its terms, which bar "*unreasonable* searches and seizures." U.S. Const. amend. IV (emphasis added).

233. See Fisher, supra note 232, at 1535 ("Trials raise a fairly limited and predictable set of permutations for any particular problem, as compared to the messy, unstructured world . . . .").

of guilty persons—are easier to predict and more constant. Technology hasn't transformed the price of capping prosecutions as it has transformed the risks of allowing access to arms in common use.[234] Thus, with rights like double jeopardy, the balancing to settle on a sensible scope can be done up front, after which "the propriety of challenged regulations is not judged by strict scrutiny"[235] "or anything resembling heightened review."[236] The Self-Incrimination Clause has "a hard core which, once located, does not yield to accommodate 'competing interests.'"[237] And the confrontation right "admit[s] only those exceptions established at the time of the founding."[238] It's unsurprising that an early balancing critic cited self-incrimination[239] and *Bruen* singled out confrontation as model rights without balancing.[240]

The contrast between general liberties and process-focused norms is proven by the exceptions. Take *Mathews v. Eldridge*,[241] which read the Due Process Clause to guarantee some process for deprivations of "property" spanning a wide and not-entirely-foreseeable set of government benefits.[242] This required balancing (to determine what's "due") that wasn't necessary when protecting traditional property forms.[243] Balancing also became necessary when the Takings Clause was read to require something more open-ended than payment for outright dispossession—compensation for regulations of all sorts that might diminish property value.[244] Whether these developments were sound or inevitable is irrelevant to this Article's

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234. See id. ("The dynamics of criminal trials . . . are a great deal more static. . . . [Thus,] bright-line procedural rules, enforced as categorical requirements, are far more likely to weather well than bright-line substantive rules.").

235. Cf. Lawrence Rosenthal, The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control, 92 Wash. U. L. Rev. 1187, 1234 (2015).

236. Cf. Adam Winkler, Scrutinizing the Second Amendment, 105 Mich. L. Rev. 683, 694 (2007).

237. See Frantz, supra note 18, at 1437.

238. Crawford v. Washington, 541 U.S. 36, 54 (2004).

239. See Frantz, supra note 18, at 1437 ("No amount of sloganizing against 'absolutes' can explain why a hard core is possible for the fifth amendment, but not for the first.").

240. See N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022) (citing favorably the use of history rather than policy reasoning in Confrontation and Establishment Clause cases).

241. 424 U.S. 319 (1976).

242. See Jud Campbell, Natural Rights and the First Amendment, 127 Yale L.J. 246, 316 n.319 (2017) [hereinafter Campbell, First Amendment] ("[P]rocedural due process rights have vastly expanded in scope (covering 'new property,' for instance), while now providing only a 'flexible' degree of 'procedural protections as the particular situation demands,' rather than an inflexible set of common-law procedural rules." (citation omitted) (quoting *Mathews*, 424 U.S. at 321)).

243. See *Mathews*, 424 U.S. at 321 (weighing the private value of the denied benefit against the risk of error and cost to the government of providing the requested process).

244. See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124–25 (1978) (defining a multifactor balancing test for determining when a regulatory taking has occurred).

thesis about general liberties.[245] But they support this Article's point that once a norm is treated as open-ended, balancing ensues.

Equal protection deserves its own article, but it may be fair to note how that norm, too, is in transition, though in the opposite direction—toward a more "finished" state.[246] Suppose equal protection means freedom from distinctions that are arbitrary or subordinate or inflict stigma, which means *insufficiently justified*. Then cases will be rife with balancing.[247] The Court has cabined such balancing by hanging back—identifying just a few "suspect classifications," or grounds for legal action triggering special scrutiny, and declining for decades to add any.[248] On this reading, the Court curbed equal protection balancing by underenforcing equal protection.[249]

Now, even as to the ur-suspect classification, race, the Court has become increasingly formalist, as seen in the arc of its affirmative action cases. Rather than draw lines between plainly invidious racial policies and affirmative action for ostensibly good ends, as it once tried, the Court has adopted a near-categorical bar on race-based sorting for college admission.[250] It's done so partly *because* a more equivocal approach might require a weighing of interests too "standardless" for any "court [to] resolve."[251] And rather than rest this categorical rule on prior balancing, the Court has claimed to read it directly off the history of the Fourteenth Amendment, understood as a measure to banish "any distinctions of law

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245. This Article argues only that (1) our legal culture stubbornly expects general *liberties* to be open-ended and (2) *any* open-ended right will require balancing. *Mathews* and *Penn Central* reinforce (2) without touching on (1).

246. Equal protection is not a "general liberty" in this Article's sense because it is not defined in terms of a form of private conduct to be protected from state interference of varied sorts. It's defined in terms of certain forbidden grounds for distinguishing among persons.

247. See, e.g., Craig v. Boren, 429 U.S. 190, 208–09 (1976) (rejecting a generalization underlying a sex-based law, not as false or irrational, but as insufficient to justify the cost of reinforcing sex stereotypes); see also Aleinikoff, supra note 30, at 968 (describing equal protection tiers of scrutiny beginning to "crack[]" and give way to "a sliding-scale balancing approach").

248. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015) (invoking the Equal Protection Clause against laws denying same-sex marriage recognition without imposing heightened scrutiny of orientation-based classifications); Romer v. Evans, 517 U.S. 620, 623–24, 630–36 (1996) (doing likewise for a state constitutional provision targeting gay and lesbian people).

249. But see infra Part IV (proposing underenforcement of constitutional norms, in favor of statutory norms mimicking them, to allay concerns about judicial balancing in general liberties cases).

250. Compare California v. Bakke, 438 U.S. 265, 311–15 (1978) (Powell, J., concurring) (declaring the educational benefits of diversity a compelling interest capable of justifying race-based affirmative action in university admissions), with Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2166 (2023) (rejecting similar proposed interests as "not sufficiently coherent for purposes of strict scrutiny").

251. See *Students for Fair Admissions*, 143 S. Ct. at 2167–68.

based on race or color."[252] The more plausible it is to enforce equal protection through categorical rules supported by history alone, the more "finished" a norm it might be.

III. THE ACCOUNT'S EXPLANATORY POWER

The last Part identified a function that makes certain kinds of rights appealing: adaptive, open-ended protection for conduct. As this Part shows, the Free Exercise and Free Speech Clauses and Second Amendment were originally expected to enshrine such protection (though not mainly through courts). After a period of judicial nonenforcement, they've been read the same way by courts and scholars, both originalist and nonoriginalist.[253] The resulting case law confirms Part II's hypothesis that such rights require balancing. And having come to expect such protection, this Part also shows, our legal culture has resisted efforts to reread these texts as enshrining more discrete rights, with even the most determined foes of balancing repeatedly failing to avoid it. All this is strong inductive evidence that our legal culture is firmly committed to the open-endedness that in turn makes ex post balancing under these Amendments inevitable.

A. *Early American Practice*

Early America regarded free speech, free exercise, and the right to keep and bear arms as open-ended and pervasively subject to balancing.

Professors Jud Campbell and Jamal Greene have highlighted late-eighteenth and early-nineteenth-century understandings.[254] The Founders' social-contract theory distinguished between natural and positive rights.[255] Natural rights concerned private conduct possible in "a world without government,"[256] including speech, religion, and the use of arms. *Positive* rights were "defined in reference to governmental action" like jury trials.[257] While positive rights were "determinate rules about what the government had to do or could not do, regardless of [lawmakers']

252. See id. at 2159 (internal quotation marks omitted) (quoting Supplemental Brief for the United States on Reargument at 41, Brown v. Bd. of Educ., 348 U.S. 886 (1954) (No. 1), 1953 WL 78291).

253. As a result, this Article needn't wade into debates about methods of interpretation.

254. See, e.g., Campbell, First Amendment, supra note 242, at 264–94; see also Greene, How Rights Went Wrong, supra note 30, at 7–57.

255. See Campbell, First Amendment, supra note 242, at 252–53, 268 (noting that for American elites in the Founding era, "rights were divided between *natural rights* . . . and *positive rights*").

256. See id. at 268.

257. Jud Campbell, Natural Rights, Positive Rights, and the Right to Keep and Bear Arms, 83 Law & Contemp. Probs. 31, 39 (2020) [hereinafter Campbell, Right to Keep and Bear Arms].

assessments to the contrary,"[258] natural rights were not so "absolute."[259] They "were regulable in promotion of the public good,"[260] though "[d]ecisions about the public good . . . were left to the people and their representatives—not to judges."[261]

This confirms Part II many times over. General liberties like religion, armed self-defense, and speech were open-ended and subject to balancing: "expansive in scope . . . but weak in their legal effect."[262] So they were unfinished norms, with their "boundaries" set more by "policy-driven analysis" over time than by "judicial judgments"[263] finding original content. And as section II.A.1 argued that open-ended rights would resonate with moral principles enjoying popular support, early Americans saw these liberties as "constitutional lodestar[s]"[264] or "hortatory" "reminder[s]" of moral principles.[265] Finally, as section II.B predicts, procedural rights—"bans on bills of attainder, religious tests for holding public office," and the "right to a jury" and other "judicial process"—were thought easier for judges to enforce categorically as "supreme law, superseding any contrary legislation."[266]

To be sure, natural rights (general liberties) were thought to have *some* "unalienable" elements that lawmakers could not violate. But first, even those were often defined by a moral standard, not a rule. The expressive right to make "well-intentioned statements of one's thoughts," for instance, was "subject . . . to the natural-law proscription against abridging the rights of others."[267] Second, "legal 'trumps'" against specific regulations (like "prior restraints on the press")[268] were enforced by courts "only after the polity itself—through a political settlement—had already rejected" them.[269] So even determinate rules weren't fixed at ratification but arose in ways responsive to changing social needs. And most important, no liberty's protections were fully exhausted by such rules. Each remained a font of new protections to be specified through political-moral reasoning over time. This held true for speech but also religious

258. Id.

259. Campbell, First Amendment, supra note 242, at 276.

260. Id. at 255.

261. Id. at 276.

262. Id. at 259.

263. Id.

264. See Campbell, Right to Keep and Bear Arms, supra note 257, at 36.

265. See Campbell, First Amendment, supra note 242, at 266–67.

266. See Jud Campbell, Judicial Review and the Enumeration of Rights, 15 Geo. J.L. & Pub. Pol'y 569, 577–78 (2017) [hereinafter Campbell, Judicial Review].

267. Campbell, First Amendment, supra note 242, at 306–07.

268. Id. at 253.

269. Campbell, Right to Keep and Bear Arms, supra note 257, at 33.

exercise[270] and the keeping and bearing of arms;[271] for federal liberties but also their state law cousins.[272]

So the Court's vision of a balance struck once and for all by the Founders was not the Founders' vision. While the Court speaks "as if the Speech Clause contains a full set of doctrinal rules" and new rules "would 'revise th[e] [policy] judgment' that '[t]he First Amendment itself reflects,'" the Clause enshrined no such "judgment" and "recognized only a few established rules, leaving broad latitude for" politicians "to determine which regulations of expression would promote the public good."[273]

This modest role for judges "survived into the early twentieth century."[274] When courts assumed more exclusive responsibility for enforcement, the doctrine evolved as one would expect if these rights continued to be seen as open-ended. The first ad hoc balancing rights case arose in 1939,[275] only eight years after the first Court case upholding a free speech claim.[276] And judicial balancing quite generally began to spread in the 1930s and 1940s,[277] just as the Court was starting to enforce liberties.

B. *Modern Doctrine*

With the shift to judicial enforcement, Part II's account would make several predictions. First, courts would apply these liberties against widely varied regulations. Second, to combine indefinite scope and ex post limitation, judges would have to proceed in two steps: deciding if a law falls in the liberty's ambit ("coverage"[278]) and then, if so, whether the law should prevail anyway. The latter or both would apply a standard.[279]

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270. See Campbell, Judicial Review, supra note 266, at 588–89 (noting that beyond a "core protection" against "religious persecution," "the Founders did not suggest that judges had primary authority to determine the proper bounds of natural liberty when governmental powers collided with religious concerns in other ways").

271. See Campbell, Right to Keep and Bear Arms, supra note 257, at 34–39 (describing implications for the Second Amendment).

272. See id. at 41–48 (discussing state law cases).

273. See Campbell, First Amendment, supra note 242, at 257 (first and third alterations in original) (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).

274. See id. at 259.

275. See Frantz, supra note 18, at 1425 (identifying Schneider v. New Jersey, 308 U.S. 147 (1939), as the first free speech balancing case).

276. See Strauss, The Living Constitution, supra note 138, at 66 ("The Court did not actually uphold a free speech claim until 1931 . . . .").

277. See Aleinikoff, supra note 30, at 948.

278. See Schauer, Speech and "Speech," supra note 26, at 905 n.33.

279. Standards "identify a set of purposes or values and rely on downstream decisionmakers to conform the law to those purposes or values." Jamal Greene, The Supreme Court, 2017 Term—Foreword: Rights as Trumps?, 132 Harv. L. Rev. 28, 60 (2018) [hereinafter Greene, Rights as Trumps?]. By contrast, a rule "requires for its application nothing more than the determination of the happening or non-happening of physical or mental events—that is, determinations of *fact*." Id. (internal quotation marks omitted)

Third, resulting doctrines would fall into three buckets. A doctrine might be too specific to capture the liberty's full scope, applying to a narrow set of regulations whose benefits were clear enough to be taken into account by the court devising the doctrine. Or a doctrine might direct future judges to decide whether to withhold protection case-by-case. And doctrines both general and rigid would crumble under pressure to balance anyway.

Fourth, attempts to avoid balancing through close analogical reasoning would face a dilemma—between truncating the right or crippling the state's ability to regulate—that pushed right back to looser balancing.

These predictions capture modern liberties doctrine perfectly.[280] They fit the conduct of individual jurists—like Justice Hugo Black—who espoused absolutism but strayed from it.[281] Indeed, they fit the trajectory

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(quoting Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 139 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

280. How does this Article's analysis bear on unenumerated liberties—to privacy, contraception, sexual intimacy, abortion under *Roe*, and the like? For a discussion of privacy rights, see generally Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737 (1989). These face the same forced choice as enumerated liberties. Each will be either open-ended and subject to balancing, or so specific as to bar just a concretely specified set of regulations, allowing the weighing to be done by the court announcing the doctrine. Privacy as such is open-ended, and cases applying it have balanced to derive its concrete implications. See Roe v. Wade, 410 U.S. 113, 152–56 (1973), overruled by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). But some of those implications—like the right to contraception, see Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965)—were rights against a concrete type of regulation (bans on using contraceptives). Since the costs and benefits seemed apparent, up front, and constant, *Griswold* could do the balancing itself. Likewise for the right to same-sex sexual conduct. See Lawrence v. Texas, 539 U.S. 558, 567 (2003). These are "finished" norms.

Roe lies between *Griswold*'s definiteness and free speech's open-endedness, but closer to *Griswold*. While *Roe* applied strict scrutiny to abortion laws, see 410 U.S. at 154, it could do most of the balancing itself. Because the right was primarily to a discrete procedure, the countervailing state interests were foreseeable and constant: fetal life and the safety of the procedure itself. See id. Still, *some* balancing proved necessary when courts reviewed regulations advancing a foreseen interest like safety *to different degrees* (as with clinic regulations), see Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016), abrogated by *Dobbs*, 142 S. Ct. 2228, or pursuing the rare state interest *un*addressed in *Roe*, see Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from the denial of rehearing en banc) (noting that precedents had not addressed "anti-eugenics" justifications for bans on abortions sought because of fetal sex or race).

281. Justice Black insisted that having judges balance enumerated rights would upset the "very object of adopting" them as rights, see Konigsberg v. State Bar of Cal., 366 U.S. 36, 61–65 (1961) (Black, J., dissenting), but he was led "to vote to sustain many laws believed to be unconstitutional under the first amendment even by more conservative colleagues not sharing his 'absolute' commitment." William Van Alstyne, A Graphic Review of the Free Speech Clause, 70 Calif. L. Rev. 107, 114 n.15 (1982). Justice Black often "trimmed the most problematic results of his absolutist test by finding categorical exceptions to the categorical rule," in the end proving "quicker than many balancing-inclined Justices to find that certain

of scholars writing *without* the pressures of judging. Of those like Alexander Meiklejohn who defined free speech in narrow, absolutist terms (centered on political speech), almost all came to construe it more broadly and support some balancing.[282] Even today's scholars trying to cabin balancing's role invariably end up reinforcing it. And these efforts' failure is inductive evidence of one final point. Not only do open-ended rights resist reduction to a list of discrete protections, as Part II would predict; but having read the First and Second Amendments as enshrining such open-ended rights, our legal culture seems firmly committed to continuing to read them so.[283]

1. *Free Exercise*

a. *Doctrinal Whiplash.* — The Court inaugurated modern free exercise doctrine in *Sherbert v. Verner*.[284] *Sherbert* read free exercise as open-ended—a presumptive shield from any substantial burden on religion, whatever the law's intent or the type of conduct regulated.[285] Since very different behaviors can be religious—including "compliance with sumptuary rules governing dress, diet, the use of property; the observance of sacred times (feasts and holy days) and places (pilgrimages to shrines); rites connected with important events in the believer's life (birth, death, maturity, marriage)"[286]—the range of countervailing regulatory interests was vast: antidiscrimination laws;[287] grooming regulations;[288] prison protocols;[289] food-inspection regulations;[290] historic preservation laws;[291] truancy

speech acts fell completely outside the bounds of the First Amendment." Blocher, supra note 30, at 384.

282. See Schauer, Categories and the First Amendment, supra note 29, at 275 n.46 (explaining that such scholars eventually "expanded" the category far beyond political speech and concluding that "Professor Bork is the only one left" defending the narrow-but-absolute view).

283. This is somewhat more questionable as to the Second Amendment, whose modern doctrine has the shallowest roots and remains controversial, but even there, a major overhaul seems unlikely. See infra section IV.A.

284. 374 U.S. 398 (1963).

285. See id. at 406–08 (imposing heightened scrutiny on such laws).

286. John H. Garvey, What Are Freedoms For? 49 (1996).

287. Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 190 (2012) (holding a minister's employment discrimination suit against a religious institution to be barred by the First Amendment).

288. See, e.g., Singh v. McHugh, 109 F. Supp. 3d 72, 74–75 (D.D.C. 2015) (challenging the military's refusal to accommodate a Sikh student's religious practice of wearing a turban), amended and superseded by 185 F. Supp. 3d 201 (D.D.C. 2016).

289. See Abdulhaseeb v. Calbone, 600 F.3d 1301, 1306 (10th Cir. 2010) (involving the denial of a halal diet for an incarcerated Muslim individual).

290. See James E. Ryan, Note, *Smith* and the Religious Freedom Restoration Act: An Iconoclastic Assessment, 78 Va. L. Rev. 1407, 1446 (1992) ("[E]xemptions exist in food inspection laws for the ritual slaughter of animals, and for the preparation of food in accordance with religious practices.").

291. See Colin L. Black, Comment, The Free Exercise Clause and Historic Preservation Law: Suggestions for a More Coherent Free Exercise Analysis, 72 Tul. L. Rev. 1767, 1767–68 (explaining how historic preservation laws can lead to free exercise challenges).

laws;[292] and so on. As Part II would predict, this right was repeatedly balanced. Though substantial burdens triggered strict scrutiny, the scrutiny applied was feeble.[293] And soon exceptions to scrutiny were made without a basis in *Sherbert* or the text—as for regulations of governmental affairs, even when they "virtually destroy[ed]" a religion.[294]

The Court sought to end that balancing in *Employment Division v. Smith* by reducing free exercise to something definite: a shield against only regulations that target religion.[295] But just as one would predict if the open-endedness of liberties were a deep-seated commitment of our system, that change unleashed "[t]orrents of legal criticism" and "almost universal displeasure"[296] among advocates, scholars, and lawmakers protesting that "the free exercise guarantee in the Religion Clause of the First Amendment has been declared null and void."[297] In response, Congress did what it had "never" done: "enact[] a statute imposing on the federal and state judiciary an obligation to"[298] undo the ruling's effect. The Religious Freedom Restoration Act (RFRA),[299] codifying *Sherbert*'s strict scrutiny and exemptions from incidental burdens, "was supported by one of the broadest bipartisan coalitions in recent political history," including religious-minority groups and secular outfits.[300] It passed by voice vote in the House and 97-3 in the Senate and was signed into law by President Bill Clinton.[301]

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292. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 216–18 (1972) (highlighting the clash between Amish religious values and compulsory education).

293. See Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 881–82 (1990) (noting a paucity of cases granting exemptions from neutral and generally applicable laws); see also Michael A. Helfand, Religious Institutionalism, Implied Consent, and the Value of Voluntarism, 88 S. Cal. L. Rev. 539, 583 (2015) ("[The Supreme Court's] trajectory toward widening the scope of interests that could be considered compelling captured the core intuition that religious liberty claims must be, in fact, balanced against other important and compelling government interests.").

294. See Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (internal quotation marks omitted) (quoting Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F. 2d 688, 693 (9th Cir. 1986)).

295. See 494 U.S. at 879 (finding that the right to free exercise didn't "relieve an individual of the obligation to comply with" generally applicable laws). This Article takes no position on whether *Smith* was rightly decided on prudential grounds rooted in concerns about judicial balancing.

296. See Eugene Gressman & Angela C. Carmella, The RFRA Revision of the Free Exercise Clause, 57 Ohio St. L.J. 65, 67 (1996).

297. See, e.g., Richard John Neuhaus, Polygamy, Peyote, and the Public Peace, First Things (Oct. 1, 1990), https://www.firstthings.com/article/1990/10/polygamy-peyote-and-the-public-peace [https://perma.cc/28GG-CW8P].

298. Gressman & Carmella, supra note 296, at 67.

299. Pub. L. No. 103–141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (2018)).

300. See Stephanie H. Barclay & Mark L. Rienzi, Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions, 59 B.C. L. Rev. 1595, 1603 (2018).

301. See Bill Clinton, President, Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 Weekly Comp. Pres. Doc. 2377–78 (Nov. 16, 1993),

Eventually, a counterreaction to *Smith* emerged within the judiciary, too. While some cases after *Smith* were consistent with it, granting relief from ordinances or enforcement actions that applied *only* to religiously motivated conduct[302] or seemed to reflect disparagement of religion,[303] the Court didn't stop there. Under the Most Favored Nation (MFN) theory, which purports to honor *Smith*'s rule allowing generally applicable laws, the Court applies strict scrutiny to laws burdening religion if they exempt even one secular activity that equally affects the state's interests.[304] Because no law pursues its goals at all costs, each can be understood to leave out some secular conduct.[305] So to give MFN theory limits, courts balance.[306] Not only does MFN theory require strict scrutiny; balancing is also latent in the premise of its *trigger* for scrutiny: religion's being "devalued."[307] Religion is devalued only when denied exemptions that have been given to secular conduct that is just as harmful *and not more important*.[308] These

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https://www.govinfo.gov/content/pkg/WCPD-1993-11-22/pdf/WCPD-1993-11-22-Pg2377.pdf [https://perma.cc/PU7F-BLHS].

302. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (invalidating an ordinance "gerrymandered" to suppress religious conduct).

303. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1726–31 (2018) (invalidating a state agency order reflecting "hostility toward [petitioner's] sincere religious beliefs").

304. See Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (demanding scrutiny of regulations "treat[ing] *any* comparable secular activity more favorably than religious exercise" (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) (per curiam))).

305. See, e.g., Alan Brownstein, Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality, 18 J.L. & Pol. 119, 199 (arguing that "the very foundation for the most favored nation framework is intellectually incoherent"); Zalman Rothschild, Free Exercise's Lingering Ambiguity, 11 Calif. L. Rev. Online 282, 283–87 (2020), https://www.californialawreview.org/online/free-exercises-lingering-ambiguity [https://perma.cc/V8AL-BTVG] (summarizing debates).

306. See Andrew Koppelman, The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty, 108 Iowa L. Rev. 2237, 2245–56 (2023) (explaining why letting any secular exception trigger scrutiny leads to balancing); Christopher C. Lund, Second-Best Free Exercise, 91 Fordham L. Rev. 843, 863–69 (2022) (crediting *Tandon*'s MFN approach with reviving free exercise balancing). For a description of problems with MFN theory, see generally Zalman Rothschild, The Impossibility of Religious Equality, 125 Colum. L. Rev. 453 (2025).

307. See Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2614 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (warning against "'devalu[ing] religious reasons' for [conduct] 'by judging them to be of lesser import than nonreligious reasons'" (quoting *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 537–38)). "Devalued" is the word used by then-Judge Samuel Alito in an opinion widely credited with promoting an MFN approach, as explained by Gabrielle Girgis, An Architect of Religious Liberty Doctrines for the Roberts Court, Harv. J.L. & Pub. Pol'y Per Curiam, Spring 2023, at 1, 4, https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2023/04/Girgis-Gabrielle-vFF1.pdf [https://perma.cc/6EZ3-ZR5L].

308. After all, to devalue something is to treat it less well than it deserves—or less well than *equally deserving* things. See Lund, supra note 306, at 865 ("You cannot say whether the government has devalued religion without first deciding, either implicitly or explicitly, what the true value of religion really is."); see also Mark L. Movsesian, Law, Religion, and the

ultimately political-moral criteria have led to "politically polarized results."[309] So the balancing has reemerged in a doctrine supposedly implementing *Smith*, which had tried to flee balancing. The institution keenest to banish balancing from free exercise has confirmed the right's open-endedness and need for balancing.

b. *Objections and Counterproposals.* — Courts cannot avoid balancing by just stretching some existing categorical doctrines or shrinking free exercise to a right against certain specific motives or justifications for regulation.

One categorical doctrine, the ministerial exception, protects churches' choices of ministers "no matter how important the government interest" in interfering.[310] Yet this is the opposite of an open-ended protection. It applies to one concretely specified regulation—employment antidiscrimination law—and only for religious organizations and only as to their ministers.[311] It's no broader than an accommodation written directly into antidiscrimination statutes. It offers no reason to hope that all free exercise protections could be rendered categorical.

Professor Stephanie Barclay would avoid balancing by reducing free exercise to a shield against laws not necessary to serve select state interests.[312] It's established that religious hostility cannot justify laws burdening religion,[313] nor can the goal of setting religious orthodoxy.[314] Barclay would capture free exercise with a few more delineations of which interests can and can't justify burdens on religion, based on which "specific government interests . . . were viewed at the Founding as inherent limitations on" the right.[315]

COVID-19 Crisis, 37 J.L. & Religion 9, 18–19 (2022) (arguing that in COVID-19 lockdown cases, Justices' determinations rested "on whether the authorities had fairly excluded worship services from the set of activities they had permitted," which "necessarily entailed implicit balancing and 'value judgments' about the importance of religious exercise, compared to things like grocery shopping and dining out" (quoting Note, Constitutional Constraints on Free Exercise Analogies, 134 Harv. L. Rev. 1782, 1790 (2021))).

309. Movsesian, supra note 308, at 23 ("A study by Zalman Rothschild of more than 100 [COVID-19-related] cases in the federal courts reveals that not a single Democratic-appointed judge has ruled in favor of religious plaintiffs in any of them. By contrast, '66% of Republican-appointed judges' have done so, and '82% of Trump-appointed judges.'" (footnote omitted) (quoting Zalman Rothschild, Free Exercise Partisanship, 107 Cornell L. Rev. 1067, 1068 (2022))).

310. Barclay, Replacing *Smith*, supra note 8, at 442–43.

311. See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 180–89 (2012) (describing the ministerial exception).

312. See Barclay, Replacing *Smith*, supra note 8, at 448–60.

313. See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 n.1 (2022); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729–31 (2018).

314. See Sherbert v. Verner, 374 U.S. 398, 402, 410 (1963) (explaining that the people cannot be punished for having religious beliefs contrary to those of the governmental authorities).

315. See Barclay, Replacing *Smith*, supra note 8, at 460.

This important proposal ultimately reintroduces balancing at two stages. First, to leave enough leeway to regulate, Founding-era sources defined sufficient justifications broadly: "peace," "safety," and the curbing of "licentiousness or immorality."[316] These categories include almost any legitimate purpose, such that only irrational laws would violate free exercise.[317] Allowing "too general" a "justification" could sanction "[n]early all" regulations.[318] So judges would have to ask if a law advances these interests *enough*. Fine-grained questions of degree arise regarding all police-power interests[319]—health,[320] safety,[321] morals,[322] and the general welfare.[323] Addressing them requires political-moral reasoning: balancing.[324]

Balancing also arises under Barclay's proposal when courts decide whether a law is "necessary" for some purpose.[325] As Barclay concedes, "[p]roving necessity" often requires asking "whether the government has other means of accomplishing its goal that don't involve burdening religion."[326] But there are always alternatives. The real question, as John Hart Ely observed long ago, is whether they're good enough—realizing

316. Id. at 457 (internal quotation marks omitted) (quoting Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1461–62 (1990)).

317. Barclay makes a related point in rejecting a proposal to uphold only laws analogous to ones accepted at the Founding. See id. at 466–67. Barclay objects that this would vindicate a parent's right to "beat[] her seven-year-old son with a coat hanger," since "[t]here is no strong historical pedigree of child-protection laws at the Founding Era." Id. And anticipating that someone might respond by going more general and identifying a tradition of "protect[ing] public safety," Barclay warns that this would gut free exercise since "government could tie just about any regulation in any context to public safety." Id. at 468.

318. United States v. Rahimi, 144 S. Ct. 1889, 1938 (2024) (Thomas, J., dissenting); see also id. at 1908 (Gorsuch, J., concurring) (warning against "extrapolat[ing]" too general a value from the text (internal quotation marks omitted) (quoting Giles v. California, 554 U.S. 353, 375 (2008) (plurality opinion) (Scalia, J.))); id. at 1926 (Barrett, J., concurring) ("[A] court must be careful not to read a principle at such a high level of generality that it waters down the right.").

319. See Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 390–95 (1926) (describing police powers).

320. See supra note 117 and accompanying text (discussing a case questioning the benefits of regulation limiting tobacco-product advertising near children).

321. See supra note 116 and accompanying text (discussing a case questioning the benefits of prison security rules).

322. See Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 801–03 (2011) (questioning the benefits of a regulation limiting children's exposure to violent or offensive video games).

323. See Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2166–67 (2023) (observing that the effect of affirmative action policies on diversity is "a question of degree" that "no court could resolve").

324. See supra section I.B.2 (defining "balancing" based on the Court's critique).

325. See supra note 312 and accompanying text.

326. See Stephanie H. Barclay, Strict Scrutiny, Religious Liberty, and the Common Good, 46 Harv. J.L. & Pub. Pol'y 937, 948 (2023).

the interest enough without being too costly.[327] Deciding that means balancing.

Justice Kavanaugh made related points in a case pitting a death row inmate's religious request to have his pastor lay hands on him during execution against the state's interest in reducing security risks.[328] Texas allowed only the pastor's presence.[329] In-between options included allowing "touch on a part of the body away from IV lines,"[330] letting the minister speak but not touch the inmate, and many others. Justice Kavanaugh asked "where to draw the line—that is, how much additional risk of great harm is too much for a court to order the State to bear[?]"[331] Indeed, since security concerns stemmed from the execution chamber's cramped size,[332] another alternative was razing the chamber and building a larger one. Yet that would have been so costly that no court would cite the state's failure to pursue it as evidence of ignoring less restrictive alternatives. (The Court has conceded that "cost may be an important factor in the least-restrictive-means analysis,"[333] and it comes in degrees.) Thus, proving a regulation's necessity is not just an empirical inquiry but involves an assessment of costs and benefits.

Thus, on this approach, judges would ultimately decide if a regulation advances peace, safety, or public morals to a sufficient degree, in part by seeing if alternatives would promote the same interest without too much loss to its degree of realization and without imposing undue side costs: balancing.

2. *The Second Amendment*

a. *From Deference to Chaos (and Back?).* — Second Amendment doctrine's compressed history vividly exemplifies the legal system's commitment to general liberties' open-endedness and the untenability of close analogical reasoning (as opposed to balancing). But with this right, the open-endedness flows less from variety in the types of interests served by gun laws than from variety in *how* and, especially, *how much* they serve their aims.

Modern Second Amendment enforcement began when *District of Columbia v. Heller*[334] announced a right to possess and carry arms for self-defense. So defined, the right is open-ended, covering conduct implicating state interests in different ways and degrees. Cases have

327. See John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1486–87 (1975).

328. See Ramirez v. Collier, 142 S. Ct. 1264, 1287 (2022) (Kavanaugh, J., concurring).

329. Id. at 1272–73 (majority opinion).

330. Id. at 1281.

331. Id. at 1288 (Kavanaugh, J., concurring).

332. Cf. id. ("[M]any executions historically were outdoor public hangings where the presence of religious advisors did not raise the same risks to safety, security, and solemnity that their presence in a small execution room does.").

333. See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 730 (2014).

334. 554 U.S. 570 (2008).

featured clashes with zoning ordinances, age limits, domestic violence restraining orders, bail conditions, people's control over their land, bans on carrying near courthouses and preschools and stadiums and health centers, and regulations of bump stocks, drug use, immigration, mental illness, and much else.[335]

That open-endedness has required balancing. Given the text's generality, a wooden application "would be cataclysmic," encompassing "[a] man strolling along Pennsylvania Avenue with a tactical nuclear warhead under his arm."[336] While *Heller* gave little guidance, what it did say illustrated the pressure to make exceptions ex post for regulations not embraced at the Founding: *Heller* treated as presumptively lawful some "longstanding" regulations that it is very hard to imagine courts invalidating (like bans on carrying in schools—or courthouses!) but that only arose quite recently.[337] When lower courts tried to fill the doctrinal gaps, all adopted tests that openly balanced self-defense against a law's benefits.[338] And since gun laws serve public safety to indefinitely varying degrees, the Second Amendment's framers couldn't have specified in concrete *non*moral terms how *much* safety benefit was required. In a recent case illustrating the point, the Eighth Circuit invalidated an age restriction on carrying. It acknowledged empirical evidence that younger people are more dangerous but questioned whether the age limit would "reduce the risk of danger" by *enough*, relative to existing restrictions.[339]

Bruen failed to end the balancing. *Bruen* itself could (and should) have been decided on categorical grounds: that the law requiring a special need to carry for self-defense destroyed most people's ability to bear arms *at all*.[340] Such categorical reasoning will suffice when challenged

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335. For scholarship surveying cases following *Bruen*, see generally Jacob D. Charles, The Dead Hand of a Silent Past: *Bruen*, Gun Rights, and the Shackles of History, 73 Duke L.J. 67, 122–45 (2023); Eric Ruben, Rosanna Smart & Ali Rowhani-Rahbar, One Year Post-*Bruen*: An Empirical Assessment, 110 Va. L. Rev. Online 20 (2024), https://virginialawreview.org/wp-content/uploads/2024/02/Ruben_Book.pdf [https://perma.cc/DS6M-RNXR].

336. Miller, supra note 146, at 897.

337. See *Heller*, 554 U.S. at 626; see also Michael P. O'Shea, The Concrete Second Amendment: Traditionalist Interpretation and the Right to Keep and Bear Arms, 26 Tex. Rev. L. & Pol. 103, 128–29 (2021) (explaining that some of the putatively "longstanding" gun prohibitions date back only to the 1960s).

338. See N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2174–75 (2022) (Breyer, J., dissenting) (describing the courts' of appeals "consensus" two-step framework post-*Heller*).

339. See Worth v. Jacobson, 108 F.4th 677, 694 (8th Cir. 2024).

340. See Wrenn v. District of Columbia, 864 F.3d 650, 665 (D.C. Cir. 2017) (holding that conditioning the right to carry on establishing a special need for self-defense "*completely* prohibits most residents from exercising the constitutional right to bear arms" and so must fail on categorical grounds as an "obliteration[] of an enumerated constitutional right" (citing *Heller*, 554 U.S. at 629)).

regulations are sweeping—as in *Heller*, too.[341] But it won't suffice for review of most gun laws, so *Bruen* issued broader guidance. It declared lower courts' two-step analysis (triggering and then applying heightened scrutiny), shown above to be inevitable for some applications of open-ended rights,[342] was "one step too many."[343] Yet *Bruen*'s test also had two steps—asking whether the plaintiff's conduct fell within the text's plain meaning and, if so, whether it should stand anyway.[344] *Bruen* simply tried to avoid policy reasoning at step two by having judges defer to the people's balance as reflected in political traditions: A law would survive only if analogous to regulations with a long history.[345] About this test, two points: It was criticized as unsound and even baffling, though the Court's motivation to use it is explained by this Article's account of general liberties as open-ended. And the test proved unstable in ways also predicted by that account and confirmed by the revisions made in *Rahimi*.

First, *Bruen*'s test was criticized for assuming that the historical absence of a law suggests it was long thought unconstitutional—as if lawmakers always "legislated to the maximum extent of their constitutional authority."[346] Lawmakers might fail to adopt a regulation for many other reasons[347]—like high costs or lack of need.[348] Why assume that historical absence suggests invalidity?[349]

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341. See *Heller*, 554 U.S. at 628 (holding that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights," the challenged "total[] ban[]" on "handgun possession in the home" would have to fail muster).

342. See supra notes 278–279 and accompanying text.

343. See *Bruen*, 142 S. Ct. at 2127–30.

344. See id.

345. See id.

346. See Charles, supra note 335, at 111.

347. See Leah M. Litman, Debunking Antinovelty, 66 Duke L.J. 1407, 1468 (2017) (listing several).

348. See id. at 1428 (describing alternative explanations for legislative choices).

349. Alicea thinks *Bruen* avoids this assumption by requiring a historical analogue only when plaintiffs have shifted the burden of proof onto the government by showing that their conduct falls under the plain text. See Alicea, *Bruen* Was Right, supra note 38 (manuscript at 30). But the problem remains: Why assume that regulations *of conduct within the plain text* that were never adopted must have been thought unlawful? Once it's accepted that the right has nontextually specified limits, why assume that all such limits have been exemplified by past regulations? Alicea contends that *Bruen* allows evidence other than early regulations to support a challenged law, but Justice Thomas, *Bruen*'s author, treated the lack of "a single historical regulation" as dispositive in United States v. Rahimi, 144 S. Ct. 1889, 1930 (2024) (Thomas, J., dissenting), in which Justice Gorsuch also stressed that under *Bruen*, "the government must establish that . . . the challenged law" is comparable to "a historically recognized regulation," id. at 1907 (Gorsuch, J., concurring) (citing *Bruen*, 142 S. Ct. at 2133). Alicea adds that, in any event, he hadn't found principles defining the right's scope that did *not* register in prior positive law, see Alicea, *Bruen* Was Right, supra note 38 (manuscript at 30), but he was able to tie any principle to some early regulation only by defining principles at a high level of generality, in a way that both depends on fairly unconstrained political-moral reasoning and would justify more of it by judges, id.

This Article's account of liberties as open-ended rights explains *Bruen*'s choice. Once the Court decided to use historical-analogue reasoning (to avoid balancing), it could require a history of one of two things: specific regulations analogous to the challenged one, or specific rights claims analogous to the challenger's.[350] But the latter would've reduced this general liberty to a finite list of concrete practices historically protected or those plus their close analogues. That would have destroyed the right's open-endedness. So it was to keep the right protective against indefinitely many unforeseen laws that *Bruen* had to define it abstractly (based on plain text) and require a regulatory tradition to support the rare exception. In other words, the Court was cornered into adopting a test lacking any apparent *theoretical* justification by two desires: to keep the right open-ended and to avoid the balancing that would ordinarily ensue. The second goal required a historical-analogue test, and the first required a default of broad protection, with history being used to justify narrow exceptions, not vice versa.

Second, *Bruen*'s test was unworkable and required balancing.[351] It produced "discrepan[t]" results with "statistically significant gap[s]" in outcomes reached by "Republican- and Democratic-nominated judges."[352] *Bruen* did "not meaningfully constrain[]"[353] judicial policy reasoning partly because its criteria for drawing analogies—"how and why the regulations burden a law-abiding citizen's right to armed self-defense"[354]—are easily reduced to cost and benefit. And courts can easily view these "at a high level of abstraction—treating all [gun] regulations as serving the same broad purpose of reducing gun violence," for example.[355] All this reinvites balancing, as Justice Stephen Breyer noted in dissent.[356]

True, *Bruen* urged deference to "the balance struck by the founding generation,"[357] not today's judges. And one might think this standard determinate because here harms and benefits are of the same quantifiable kind. Gun laws' benefits are the lives saved from accidental or unlawful shootings; their harms are the lives lost from hampered self-defense. So if

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(manuscript at 35–42). For related concerns, see infra notes 358–359 and accompanying text.

350. Cf. Schauer, Categories and the First Amendment, supra note 29, at 280–81 (discussing "the choice between" determining the scope of free speech by "defining [protected conduct] in" versus "defining [regulable conduct] out").

351. See Joseph Blocher & Eric Ruben, Originalism-by-Analogy and Second Amendment Adjudication, 133 Yale L.J. 99, 105 (2023) (noting "wildly manipulable and unpredictable case outcomes" under *Bruen*).

352. Ruben et al., supra note 335, at 24.

353. See id. at 25.

354. *Bruen*, 142 S. Ct. at 2132–33.

355. See Charles, supra note 335, at 138.

356. See *Bruen*, 142 S. Ct. at 2179 (Breyer, J., dissenting) ("Ironically, . . . the Court believes that the most relevant metrics of comparison are a regulation's means (how) and ends (why)—even as it rejects the utility of means-end scrutiny.").

357. See id. at 2133 n.7 (majority opinion).

a longstanding law saved thirteen lives for every twelve it took by curbing self-defense, perhaps new laws are analogous if their ratio of lives saved to lost is 13:12 or better. That *empirical* criterion isn't balancing, *Bruen*'s defenders might argue.

The problems with this rescue effort are manifold. For one thing, it's so hard to count lives saved and lost due to any gun law—much less a series of older ones—that judges trying to eyeball the matter might end up making normative judgments after all. More important, harms and benefits cannot be reduced to a ratio of lives to lives because other goods are at stake. For example, bans on carrying near sensitive sites implicate people's peace of mind and liberty interests in visiting stadiums and theaters.

Finally, this test, too, is unjustified. If the historical absence of a particular regulation doesn't mean it was thought unlawful,[358] the same goes for the absence of regulations with a certain burden-to-benefit ratio. A sound doctrinal test could not be: "Do past regulations have a ratio of cost to benefit at least as unfavorable to self-defense as this one?" It would have to be: "Does this regulation have a ratio of cost to benefit that the principles enshrined in the Second Amendment would condemn?" But that is the question this test was supposed to help answer.[359]

Bruen had to be revised in *Rahimi* in ways that confirm the prediction above[360] that efforts to stick to close analogical reasoning either truncate the right or cripple the state's ability to regulate, pushing courts back to looser balancing. *Rahimi* upheld a law disarming people subject to domestic-violence restraining orders.[361] Justice Thomas, *Bruen*'s author, dissented, saying the law had no close historical analogues.[362] The majority

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358. See supra notes 346–348 and accompanying text.

359. Justice Barrett seems to read *Bruen* as imposing only the latter, less informative test. She warns that early regulations cited by *Bruen* "do not themselves have the status of constitutional law." United States v. Rahimi, 144 S. Ct. 1889, 1925 n.* (2024) (Barrett, J., concurring). They "help illuminate [the right's] original scope" by spotlighting its limits—and only *some* of its limits, since there is no reason to "assume[] that founding-era legislatures maximally exercised their power to regulate." Id. at 1925 & n.*. But if early laws are only evidence, and avowedly partial evidence, of what the right leaves out, the right's positive content recedes further into the mist. If text and early laws don't capture all the right's contours, how else to identify them? If the right's substance is a set of principles, which early regulations only partially illustrate, where do the principles come from? If it's assumed that all the principles just happened to be mentioned in debates about early regulations, is that any better than "assum[ing] that founding-era legislatures maximally exercised their power to regulate"? See id. at 1925. In all events, any principles defining the right would have to allow for balancing, for reasons given in section II.A.3.

360. See supra section II.A.3 (discussing the unworkability of sticking to close analogical reasoning).

361. See *Rahimi*, 144 S. Ct. at 1902–03.

362. The *Rahimi* majority cited traditions of enacting surety laws, which made dangerous persons post bonds they would lose if they harmed others, and going-armed laws, which barred the public brandishing of dangerous weapons. See id. at 1900–01. *Rahimi* took these to establish a tradition of disarming dangerous persons. See id. at 1901. Justice Thomas

reaffirmed the right's open-endedness (the impossibility of defining its scope by practices "that could be found in 1791"[363]) and so widened the focus from historical analogues to "*the principles that underpin* our regulatory tradition."[364] As Justice Sonia Sotomayor observed, this marked a change toward more responsiveness to modern conditions.[365]

Other opinions reinforced the inadequacy of close analogical reasoning. When Justice Barrett rejected a demand for close historical analogues as too restrictive for lawmakers,[366] Justice Thomas warned that the alternative—reliance on "general principles"—would defer *too much*, gutting the right.[367] Justice Barrett seemed confident that judges could "pull[] sufficiently narrow and determinate "principle[s] from . . . history."[368] Besides, she wrote in a free speech case days earlier, hewing close to historical analogues just "delays the inevitable," for "[e]ventually, the Court will encounter a restriction without a historical analogue and be forced to articulate a test for analyzing it."[369] But if open-ended liberties guard against laws that aren't even close analogues of past threats, it's also true that "trying to stick to low-level or determinate principles" pulled from history, as Justice Barrett would, "only delays an inevitable move to broader principles" that require balancing.[370] Scholarly attempts to stick to close analogues confirm as much.[371]

b. *Objections and Counterproposals.* — Professors William Baude and Robert Leider have argued that *Bruen* avoided problematic balancing by treating the Second Amendment as a general-law right elaborated through anodyne analogical reasoning.[372] The general law was "common to Anglo-American legal systems rather than . . . the creation of local law" and was rooted in "history and custom," not legislative fiat.[373] General law was identified "by looking to a wide range of cases, parsing the close cases,

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argued that neither involved total disarmament. See id. at 1933, 1942–43 (Thomas, J., dissenting).

363. Id. at 1897 (majority opinion).

364. Id. at 1897–98 (emphasis added) (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131–33 (2022)).

365. See id. at 1905–06 (Sotomayor, J., concurring).

366. See id. at 1925 (Barrett, J., concurring) (arguing that demanding close historical analogues for challenged regulations would "assume[] that founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority").

367. See id. at 1945 (Thomas, J., dissenting).

368. See id. at 1925–26 (Barrett, J., concurring).

369. Vidal v. Elster, 144 S. Ct. 1507, 1532 (2024) (Barrett, J., concurring in part).

370. Sherif Girgis, Originalism's Age of Ironies, 138 Harv. L. Rev. Forum 1, 15 (2024), https://harvardlawreview.org/wp-content/uploads/2024/11/138-Harv.-L.-Rev.-F.-1.pdf [https://perma.cc/54VN-FDSS] [hereinafter S. Girgis, Age of Ironies].

371. See infra note 466.

372. See William Baude & Robert Leider, The General-Law Right to Bear Arms, 99 Notre Dame L. Rev. 1467, 1488–95 (2024).

373. Id. at 1472, 1475.

setting aside unusual outliers, and trying to distill the general principles."[374] This was not a problematic sort of balancing but "a common task for a treatise writer, a restatement reporter, or a traditional common-law judge."[375] Does that show that Second Amendment rights require only close analogical reasoning? A close look suggests not.

Under general-law principles, a gun law could fall if it lacked "a fair relation to the preservation of the public peace and safety"[376] or was "disproportionate to the legitimate ends sought to be achieved."[377] This, like Barclay's free-exercise proposal,[378] requires judges to apply general moral standards. Indeed, Baude and Leider conceded that "some form of interest balancing" is necessary even though "*Bruen* seemed to deny [this]."[379] But they thought *Bruen* opposed only "modern utilitarian balancing tests (such as intermediate scrutiny)."[380] Those differ from "[t]raditional rights-based interest balancing," under which a state can "regulate a right for limited purposes, such as to protect the rights of others," but cannot act on "disagreement with the value of the right" or obliterate the right.[381] But as Part I shows, *Bruen*'s concerns reach beyond intermediate scrutiny and cost–benefit analysis. They cover any fresh assessment of the sufficiency of a law's benefits or reliance on broad principles leaving ample room for judges' moral analysis to shape outcomes.

Baude and Leider's framework requires moral reasoning of both kinds. A core general-law principle was that "the legislature may regulate and limit the mode of carrying arms."[382] As Baude and Leider concede, a principle so broad would warrant analogies that "may seem odd and loose," as between bans on groups parading with firearms and bans on concealed carry.[383] Indeed, today, scores of laws can be described as regulating and limiting the mode of carrying. Are they all permissible? If not, what will judges consider if not the extent of the regulatory burden and the public benefit?

3. *Free Speech*

a. *Sprawling Tests and Cratering Rules.* — Our legal culture's commitment to open-ended liberties is on most flamboyant display in free speech. This right is invoked in diverse and originally unforeseeable

374. Id. at 1488.

375. Id.

376. Id. at 1489 (internal quotation marks omitted) (quoting Britt v. State, 681 S.E.2d 320, 322 (N.C. 2009)).

377. Id.

378. See supra section III.B.1.b.

379. See Baude & Leider, supra note 372, at 1491.

380. See id.

381. Id. at 1491–92.

382. See id. at 1490 (internal quotation marks omitted) (quoting Commonwealth v. Murphy, 44 N.E. 138, 138 (Mass. 1896)).

383. See id.

regulatory contexts. Its doctrines ask whether the speech is valuable enough or the regulation too valuable. Broad rules are riddled with exceptions. The right has resisted scholarly attempts to reduce it to protections concrete enough to obviate balancing. Indeed, as one would predict if open-endedness breeds balancing, this right's *unparalleled* open-endedness, implicating myriad public interests, has spawned "by far the most complex" rights doctrine "in all of United States constitutional law."[384]

Protected conduct includes "profanity, pornography, blasphemy, nude dancing, paintings, . . . advertising, campaign financing, insults, falsehoods concerning public figures, and the advocacy of unlawful conduct short of imminent incitement."[385] It spans video games,[386] tattoos,[387] atonal instrumental music,[388] wedding websites,[389] social media posts,[390] campaign donations,[391] union dues,[392] advertisements,[393] the burning of flags,[394] and the wearing of armbands.[395] The right protects some speech on public property,[396] some public school teacher and student speech, and some public employee speech.[397] It protects associations from disclosing memberships.[398] It covers speech unimaginable to past generations—data sets, search engine results, software codes, modern-professional speech.[399] And so it implicates many public interests. A hopelessly underinclusive sampling might mention

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384. See Vikram David Amar & Alan Brownstein, Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine, 2020 U. Ill. L. Rev. 1, 5.

385. Rubenfeld, Revolution, supra note 191, at 21.

386. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011).

387. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1060 (9th Cir. 2010).

388. See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) (calling the "music of Arnold Schoenberg" "unquestionably shielded").

389. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2312 (2023).

390. See Lindke v. Freed, 37 F.4th 1199, 1201–02 (6th Cir. 2022) (considering whether a governmental official's deletion of a citizen's social media comments violated the First Amendment), vacated and remanded, 144 S. Ct. 756 (2024).

391. Buckley v. Valeo, 424 U.S. 1, 14–23 (1976) (per curiam).

392. Janus v. AFSCME, 138 S. Ct. 2448, 2463–64 (2018).

393. See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980) (noting that the First Amendment protects promotional advertising).

394. Texas v. Johnson, 401 U.S. 397, 399 (1989).

395. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969).

396. See Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939) ("The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; . . . but it must not, in the guise of regulation, be abridged or denied.").

397. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

398. NAACP v. Alabama, 357 U.S. 449, 466 (1958).

399. See David S. Han, Compelled Speech and Doctrinal Fluidity, 97 Ind. L.J. 841, 862 (2022) ("[C]ourts have extended First Amendment protection to, for example, search engine results, computer code, scientific and technical details, professional speech, and factual instructions for illegal or dangerous activities." (footnotes omitted)).

success in war, suppression of violence, privacy, aesthetics, fair trials, electoral integrity, workplace efficiency, the character of children, health and safety through product warnings and informed consent, and much more.[400]

Most of the central doctrines involve judicial balancing.[401] Content- and viewpoint-based regulations survive only if they're the least restrictive means to advancing a compelling state interest.[402] Content-neutral laws face intermediate scrutiny.[403] Expressive-conduct regulations must substantially advance an important interest unrelated to expressive content.[404] Public employee speech regulations must "arrive at a balance" between the employee's interest and the state's interest in managing the workplace.[405]

Because the trigger for strict scrutiny is officially wide (any content-based regulation) and stringent (nearly fatal), it has seen endless manipulation.[406] Even when laws clearly regulate speech for its communicative content, courts sometimes withhold strict scrutiny—in cases involving antidiscrimination, securities, antitrust, labor, evidence, and commercial law "and countless other areas."[407] Likewise for "regulation of . . . prescription drugs," "of doctor-patient confidentiality," "of income tax statements," "of commercial airplane briefings," "of signs at petting zoos," "and so on."[408] "[E]ven the briefest glimpse at the vast universe of widely accepted content-based restrictions on communication

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400. See R. George Wright, Why Free Speech Cases Are as Hard (and as Easy) as They Are, 68 Tenn. L. Rev. 335, 350–52 (2001) (listing these and fifteen other interests and related cases).

401. The most salient categorical speech doctrines *exclude* speech from protection. See United States v. Stevens, 559 U.S. 460, 468–69 (2010) (listing obscenity, defamation, fraud, incitement, and speech integral to criminal conduct as excluded categories of speech). It's no surprise that those are more stable: Since they permit regulation, judges don't have to scale them back to make room for regulations made pressing by new social conditions.

402. See Reed v. Town of Gilbert, 576 U.S. 155, 159 (2015) (finding that a law concerning political signage could not survive strict scrutiny).

403. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (allowing that "government may impose reasonable restrictions on the time, place, or manner of protected speech").

404. See United States v. O'Brien, 391 U.S. 367, 377 (1968) (demanding such a justification).

405. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

406. See, e.g., Vidal v. Elster, 144 S. Ct. 1507, 1525 (2024) (Barrett, J., concurring in part) ("[I]n certain situations, this presumption [against the constitutionality of content-based regulations] is inapplicable . . . ." (citation omitted)); see also Randy J. Kozel, Content Under Pressure, 100 Wash. U. L. Rev. 59, 64–65 (2022) (describing the cratering of legal presumptions against content-based regulation); cf. Greene, Rights as Trumps?, supra note 279, at 33 ("When an ex ante choice of category largely determines the ex post decision, manipulation of that choice is to be expected . . . .").

407. Schauer, Boundaries, supra note 194, at 1766–68.

408. Reed v. Town of Gilbert, 576 U.S. 155, 177–78 (2015) (Breyer, J., concurring in the judgment).

reveals that" speech covered by the right "is the exception and the speech that may routinely be regulated is the rule."[409] Attempts to explain this using doctrinal exceptions for speech integral to illegal conduct have reflected not lines drawn at ratification but balancing by courts.[410]

Even within the First Amendment's coverage, nothing is sacred. Content regulations are allowed under the secondary effects doctrine.[411] Regulations designed to curb offensive speech—striking at the bedrock of free speech—are allowed under a "captive audience" doctrine.[412] The supposedly absolute bar on prior restraints has seen cratering.[413] And the Court has been busy "recategorizing, reclassifying, and misapplying scrutiny in ways that have impaired the significance of each step of the process and of each level of scrutiny."[414] These changes reflect new rounds of definitional balancing, creating rules meant to apply to a subset of cases categorically. But the ever-present "possibility of" further exceptions means that even cases applying a doctrine by its terms are relying on a tacit "substantive" judgment "that the application is not bizarre or unjust."[415]

One might object that the Roberts Court, which has tried to avoid free speech balancing,[416] is different. But it hasn't managed to avoid balancing. It has upheld content-based restrictions on communication for interests it deemed important enough (like antiterrorism).[417] It has avoided absurd results (like collapse of the trademark system) only by relying on precedents that could rely on nothing more than their own balancing.[418] Even in opinions staking absolutist positions, it has hedged, making powerful exceptions traced not to text or history but, one supposes, a fresh policy choice.

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409. See Schauer, Boundaries, supra note 194, at 1768.

410. See Eugene Volokh, The "Speech Integral to Criminal Conduct" Exception, 101 Cornell L. Rev. 981, 985–87 (2016) (explaining that the court's jurisprudence around speech integral to illegal conduct serves as a "guide to generating other exceptions").

411. See, e.g., John Fee, The Pornographic Secondary Effects Doctrine, 60 Ala. L. Rev. 291, 292 (2009) (describing the secondary effects doctrine, which justifies some content-discriminatory regulation of pornography).

412. See Caroline Mala Corbin, The First Amendment Right Against Compelled Listening, 89 B.U. L. Rev. 939, 943–51 (2009).

413. See Melville B. Nimmer, Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment § 4.06 (student ed. 1984) (giving examples).

414. Alex Chemerinsky, Tears of Scrutiny, 57 Tulsa L. Rev. 341, 393 (2022).

415. See Cass R. Sunstein, Problems With Rules, 83 Calif. L. Rev. 953, 987–88 (1995).

416. See United States v. Stevens, 559 U.S. 460, 470 (2010) (rejecting the use of a balancing test for free speech coverage as "startling and dangerous" and endorsing a historical inquiry instead).

417. See, e.g., Holder v. Humanitarian L. Project, 561 U.S. 1, 39 (2010).

418. See S. Girgis, Age of Ironies, supra note 370, at 15–16 (showing that a recent Roberts Court case would have had no way to assess the constitutionality of trademark restrictions without relying on a precedent resting on freeform balancing and that demanding a Founding-era analogue would have required it to declare all trademark law unconstitutional).

Take *NIFLA v. Becerra*, which held that forcing "crisis pregnancy centers" to tell clients about low-cost abortions would unconstitutionally compel speech.[419] Dissenting, Justice Breyer argued that if forcing professionals to speak is presumptively unconstitutional, myriad regulations would be imperiled, including "securities law or consumer protection law," medical disclosure laws, building safety codes, and food safety regulations.[420] The majority attempted to leave room for "purely factual and uncontroversial disclosures about commercial products."[421] Yet it offered no legal basis for the constitutional lines drawn by that "generally phrased disclaimer,"[422] as Justice Breyer described it. Thus, one of the Roberts Court's most categorical-sounding free speech cases made a significant ad hoc exception reflecting a partial balancing away.

The same duality—vast categorical protection with unexplained hedges—appeared in *303 Creative LLC v. Elenis*.[423] The Court affirmed a web designer's right not to create wedding websites for same-sex couples even if she made such websites for opposite-sex couples.[424] The Court ruled on rule-like grounds: the website was "pure speech," which "the First Amendment categorically prohibit[ed] government from compelling persons to engage in."[425] And the Court understood "pure speech" to include any custom-created words expressing the creator's ideas.[426] Yet this combination of breadth and absoluteness, Professor Robert Post argued, would undercut subpoenas; malpractice regulation of doctors, lawyers, and accountants; and "a raft of statutory obligations to report various events and circumstances" like workplace injuries.[427] The Court didn't explain how such regulations could survive its analysis except to quote *NIFLA*'s vague disclaimer.[428]

There's reason to think that if pressed, the Court would balance. *303 Creative* rejected the dissent's charge that it was gutting antidiscrimination law.[429] But applied by its categorical terms, a rule against compelling pure speech would seem to affect "almost every application of public

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419. See 138 S. Ct. 2361, 2368 (2018).

420. See id. at 2380 (Breyer, J., dissenting).

421. See id. at 2376 (majority opinion).

422. Id. at 2381–83 (Breyer, J., dissenting).

423. 143 S. Ct. 2298 (2023).

424. See id. at 2321–22.

425. Robert Post, Public Accommodations and the First Amendment: *303 Creative* and "Pure Speech", 2023 Sup. Ct. Rev. 251, 271 (2024).

426. See id. at 264.

427. See id. at 273.

428. *303 Creative*, 143 S. Ct. at 2317–18 (allowing that "the government may sometimes 'requir[e] the dissemination of purely factual and uncontroversial information'" (alteration in original) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995))).

429. See id. at 2318 (rejecting dissent's claim that *303 Creative* would grant businesses "a 'right to refuse to serve members of a protected class'" (quoting id. at 2322 (Sotomayor, J., dissenting))).

accommodations laws."[430] In Post's example, real-estate brokers barred from selling homes only to white clients would be forced to "*speak* to Black clients in the same way."[431] So to vindicate its assurances in *303 Creative*, the Court would have to find such a claim unworthy—not harmful enough to free speech interests or too harmful to public ones. This fits an enduring pattern in which courts treat compulsions of speech as either fatal or "not implicating the right . . . at all," in both cases on "inscrutable" grounds.[432]

Unreasoned complexity is everywhere in free speech. To peek down one rabbit hole—libel law, governed by *New York Times Co. v. Sullivan*[433] and its progeny—is to glimpse a "bewildering variety of constitutional standards" drawing lines between public and private figures, public and private concerns, compensatory and punitive damages.[434] Many other areas—child sexual abuse material, invasion of privacy, symbolic speech, offensive speech—boast their own "corpus of subrules, principles, categories, qualifications, and exceptions."[435] Efforts to simplify have repeatedly "broken down," producing doctrine "rival[ing] the Internal Revenue Code in its complexity."[436] The continual spinning off of new rules for new contexts confirms this right's irreducible open-endedness and the need to balance any open-ended norm as new applications arise.

b. *Objections and Counterproposals.* — Scholars have tried to show that current doctrine isn't as broad or committed to balancing as it seems. Consider the efforts of then-Professor Elena Kagan and Professors Rick Pildes and Jed Rubenfeld.

Pildes argued[437] and Kagan elaborated[438] that free speech cases are about policing governmental motives. According to Kagan's influential argument, the case law's point is to flush out "improper governmental motives,"[439] excluding laws driven by people's wish "to suppress ideas that challenge (just because they challenge) and to privilege ideas that ratify (just because they ratify) their own belief systems."[440] This might suggest free speech is not open-ended—that it only forbids (categorically) laws with a specific motive.

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430. Post, supra note 425, at 284.

431. Id. at 284.

432. See Amar & Brownstein, supra note 384, at 6.

433. 376 U.S. 254 (1964).

434. See Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 473 & n.165 (1996).

435. Schauer, Codifying the First Amendment, supra note 96, at 308–09.

436. Vincent A. Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449, 471 (1985).

437. See Richard H. Pildes, Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law, 45 Hastings L.J. 711, 727–29 (1994) (noting that "*justifications* behind governmental actions must become paramount to judicial evaluation").

438. See Kagan, supra note 434, at 414–15.

439. See id. at 414.

440. Id. at 434.

Kagan's account explains a great deal, but it doesn't challenge the thesis that speech is irreducibly open-ended and requires balancing. First, Kagan doesn't argue that this account can explain doctrines applied "when the government performs the increasingly important functions of speaker, employer, and educator."[441] So if it would violate widespread notions of free speech to eliminate protection for public employees or public school students, Kagan's account did not show free speech to be less than open-ended. More important, her proposal could not and did not try to explain when speech is "covered" and so subject to this no-illicit-motive norm in the first place. Those coverage determinations, highlighted by Schauer[442] and discussed above,[443] involve balancing.

Finally, even for issues clearly within her sights, Kagan did not say the case law excludes only laws that *actually* owe their existence to illicit motives. She thought that would be too hard to establish; courts need proxies.[444] And—here's the key—the doctrines used as proxies for illicit motive are, Kagan admitted, rife with balancing.[445] They effectively ask if the balance of a law's cognizable harms and benefits is so unattractive that only a further, illicit motive could explain the law's adoption. So even if the case law's *purpose* is just motive-policing, Kagan conceded that it necessarily *operates* by means of balancing. Fully spelled out, the doctrine asks whether speech deemed valuable enough to warrant coverage has been restricted for marginal benefits deemed great enough (and at marginal costs deemed light enough) that lawmakers should not be suspected of having the wrong motives.

Consider, finally, Rubenfeld's paradigm-case method.[446] Rubenfeld argued that constitutional framers intend for a norm to have certain concrete applications. Courts should honor those but also apply the norm to analogous situations. If free speech law has this structure,[447] can it stick to the close analogical reasoning *Bruen* allowed?

No. Rubenfeld's free speech account requires more freewheeling use of moral principles. He identified two paradigm applications: forbidding prior restraints[448] and (soon after ratification) protecting the criticism of government that was targeted by the Alien and Sedition Acts.[449] To get from these two discrete applications to today's wildly varied protections,

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441. See id. at 432.

442. See Schauer, Speech and "Speech", supra note 26, at 95 n.33 (defining free speech "coverage" as the scope of speech upon which burdens will trigger heightened scrutiny in the first place, and distinguishing it from free speech "protection," or cases in which the court applying heightened scrutiny will rule for the free speech claimant).

443. See supra note 278 and accompanying text.

444. See Kagan, supra note 438, at 434.

445. See id. at 442–43, 453–54.

446. See Rubenfeld, Revolution, supra note 191, at 15–18.

447. Id. at 21–29.

448. See id. at 21.

449. See id. at 23.

Rubenfeld dialed up the level of generality. He inferred a vast anticensorship principle.[450] That principle sweeps in the polar opposite direction of prior restraints—not just executive action to stop ideas from going to press but legislation to punish speech afterward.[451] It protects not just criticisms of officials, or speech about the government, or about matters of public interest, or all public discourse, but every expression of opinion on empirical or theoretical matters and the nonpropositional expression in abstract art and video games and other entertainment.[452] Yet the norm somehow also lets government control speech involving "facts" rather than opinions, and presumably in tax and securities filings, subpoenas, and the like.[453]

Whatever might be said of the move from two discrete points to a far-reaching anticensorship norm applying only when it wouldn't do too much harm, it cannot be said to involve the close, incompletely theorized, low-level-of-generality reasoning that *Bruen* insisted on.[454] Indeed, Rubenfeld conceded that implementing his proposed principle would require continual balancing[455] that sounds in "policy[] and justice" and reflects "ineluctably normative, even ideological judgment."[456]

IV. WAYS OUT: BALANCING BY THE PEOPLE

To avoid all judicial balancing, one would have to make liberties more definite or take judges entirely out of their enforcement. Neither is realistic. But it is possible to make judicial enforcement more answerable to political actors, as favored by critics.[457] Though this Part can't provide a complete account of how, none is necessary. Each proposal below draws on other work, which this Part puts in conversation with this Article's core inevitability claim. If balancing is inevitable but judicial balancing is problematic, the schemes discussed here are partial solutions. This Part

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450. See id. at 25.

451. Id.

452. Id. at 21; see also Jed Rubenfeld, The First Amendment's Purpose, 53 Stan. L. Rev. 767, 788, 818–19 (2001) [hereinafter Rubenfeld, The First Amendment's Purpose].

453. See Rubenfeld, The First Amendment's Purpose, supra note 452, at 820; see also id. at 819 (explaining it is "tolerable for state actors to declare the truth about how many miles a certain car has been driven, but not how many gods there are" because "an injunction against false statements of fact is" something that "no legal system—indeed no communicative system—can do without").

454. See supra notes 141–146 and accompanying text.

455. See Rubenfeld, The First Amendment's Purpose, supra note 452, at 786.

456. See Rubenfeld, Revolution, supra note 191, at 16.

457. For a general exploration of legislative specification of rights, see generally Grégoire Webber, Paul Yowell, Richard Elkins, Maris Köpcke, Bradley W. Miller & Francisco J. Urbina, Legislated Rights: Securing Human Rights Through Legislation (2018). On the benefits of legislative rights-balancing, see William N. Eskridge & Christopher R. Riano, Marriage Equality: From Outlaws to In-Laws 688–702 (2020).

canvasses each one's strengths and weaknesses after first discussing what *won't* work.

A. *False Starts*

It seems unrealistic to remake general liberties as less than open-ended. The Court tried and failed to do so with free exercise.[458] Since then, it has shown interest only in expanding protection.[459] For free speech, too, the trajectory has been relentlessly expansionist,[460] and two conservatives at the Court's center have ruled out any overhaul to avoid balancing.[461]

A revamping might seem more feasible for gun rights because that doctrine is "younger than the first iPhone"[462] and in flux.[463] The revision most consonant with *Bruen*'s spirit would say that Second Amendment cases should be resolved through analogical reasoning, but of a more justified sort than *Bruen*'s. Recall that *Bruen* requires the government to establish an analogy between the challenged law and historically prevalent ones.[464] But past generations' failures to adopt a regulation don't prove that they would've thought it unlawful. So a revised test might flip the presumption and require a closely analogous *rights claim* with deep historical roots.

But that is unlikely to happen in the foreseeable future. First, eliminating the open-endedness of Second Amendment rights but not others would be seen as making gun rights "second-class," which some

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458. See supra section III.B.1.a.

459. See Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring, joined by Kavanaugh, J.) (finding "textual and structural arguments against *Smith* are more compelling"); id. at 1883 (Alito, J., concurring in the judgment, joined by Thomas & Gorsuch, JJ.) (calling for *Smith* to be overruled).

460. See Han, supra note 399, at 861 (describing "a story of steady and rapid expansion"); see also Leslie Kendrick, First Amendment Expansionism, 56 Wm. & Mary L. Rev. 1199, 1212–19 (2015).

461. See Vidal v. Elster, 144 S. Ct. 1507, 1524–25 (2024) (Barrett, J., concurring in part) (favoring the adoption of broad principles, rather than historical tests, to implement free speech rights); see also United States v. Rahimi, 144 S. Ct. 1889, 1921 (2024) (Kavanaugh, J., concurring) ("To be clear, I am not suggesting that the Court overrule cases where the Court has applied those heightened-scrutiny tests. . . . [But] I am arguing against extending those tests to new areas . . . ."); Amy Coney Barrett, A Conversation With Justice Amy Coney Barrett Transcript, Ctr. for the Const. & the Cath. Intell. Tradition (Feb. 15, 2024), https://cit.catholic.edu/a-conversation-with-justice-amy-coney-barrett-transcript/ [https://perma.cc/P9Z4-BZRD] ("[T]he world as we find it is full of these tests, is full of the [tiers] of scrutiny. . . . [I]n the First Amendment area, I don't think the answer is to say, 'We're going to strip all this down.'").

462. Wrenn v. District of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017) (citing District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).

463. See United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023) ("Considering the issue afresh, we conclude that *Bruen* requires us to re-evaluate our Second Amendment Jurisprudence . . . . "), rev'd and remanded by 144 S. Ct. 1889 (2024); see also supra section III.B.2.a (describing *Rahimi*'s apparent revision of *Bruen*).

464. See supra section III.B.2.a.

Justices denounced earlier courts for doing.[465] Second, to limit gun claims to close analogues of protections recognized at ratification, the latter would need to be numerous enough to avoid shrinking the right into oblivion. But they'd also need to be concrete enough to allow for close analogical reasoning rather than a return to broad principles and balancing. And the most sophisticated effort to explain how that might go, by Professor Darrell Miller, shows that the ratification-era analogues are not numerous and determinate enough.[466] So Second Amendment rights, too, are likely to stay open-ended.

Thus, one might wonder if the only way to avoid having judges balance liberties is to stop them from enforcing liberties at all. Yet it's too late for that. For eighty years, the United States' legal culture has taken it for granted that, as Justice Robert Jackson put it in an iconic First Amendment case, "The very purpose of a Bill of Rights was to *withdraw* certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials[,] and to establish them as legal principles *to be applied by the courts*."[467] It is a commonplace that unelected judges need to enforce these liberties' protections for minorities and dissidents.[468]

But hybrid approaches—sharing power between courts and legislatures—may be available.

B. *Shifting Power to States*

The Court often uses history and tradition to gloss liberties.[469] *Bruen* made regulatory traditions central to Second Amendment cases, as had

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465. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022) ("The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" (quoting McDonald v. City of Chicago, 561 U.S. 742, 780 (2010))).

466. See Miller, supra note 146, 918–25 (noting that the level of generality at which analogues are described is crucial). After finding specific historical support for a few modest protections, as against laws "destroying" the right, id. at 925, especially at home, id. at 920, Miller floats as alternatives some highly general moral standards that would reintroduce balancing—including a right to carry "anywhere one has a reasonable apprehension of violence," id. at 921. While Miller also identifies intermediate options—for example, allowing carrying "in any circumstance in which one is threatened with imminent injury or death"—he admits none has unique support in the sources. Id. at 920. And the last position Miller considers, requiring a showing of imminent harm, would be too restrictive for *Bruen*, which rejected a law requiring a special need for self-defense.

467. See West Virginia. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added).

468. Greene, How Rights Went Wrong, supra note 30, at 9 (describing widespread view that "it is the peculiar province of a judge to uphold the constitutional rights of minorities, dissenters, and the oppressed against the majoritarian preferences of the legislature or the executive").

469. Professor Marc DeGirolami has written extensively on this. See, e.g., Marc O. DeGirolami, Traditionalism Rising, 24 J. Contemp. Legal Issues 9, 9–21 (2023) (documenting recent uses of traditionalist interpretation).

Heller, in blessing certain regulations as longstanding.[470] A recent free speech case held that local school board members could be sanctioned for certain speech partly because of a long history of such sanctions.[471] Earlier cases have held that the First Amendment protects public university professors' academic freedom because it had long been protected by states.[472] Others held that a public setting was not a "public forum" subject to stringent speech protections because states had not traditionally allowed speech there.[473] Some have proposed taking a similar approach to free exercise.[474]

Traditionalist cases effectively outsource judgments about general liberties' scope from federal courts to states by holding each state to the majority practices of the states generally. The rationale may be that longstanding state practice makes an activity protected under the federal Constitution, so that outlier states that keep regulating it are violating a new strain of a federal right.[475] Or perhaps state practice is evidence of a right's contours.[476] Either way, states can do the needed rights-balancing, as someone must, but not courts, as *Bruen* preferred.[477] Having judges look to state practices may also better fit the originalist expectation that the rights' judicially enforceable elements would reflect political settlements.[478]

Still, this approach has its limits. If a regulation became popular enough to spread to most states, it couldn't be held invalid. Yet some laws that might be popular with lawmakers should fall—like bans on speech that criticizes incumbents. Relatedly, if courts take their cues from the majoritarian practices of a majority of states, minorities might be overlooked. If only a small minority uses peyote religiously, states will rarely exempt it from drug laws.[479] And this method of legal change is slow. It

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470. See supra note 337 and accompanying text.

471. See Hous. Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1259 (2022).

472. See Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (citing the nation's tradition of "safeguarding academic freedom" as grounds to deem this "freedom . . . a special concern of the First Amendment"); see also Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion) ("The essentiality of freedom in the community of American universities is almost self-evident.").

473. See Burson v. Freeman, 504 U.S. 191, 215 (1992) (Scalia, J., concurring in the judgment).

474. See William J. Haun, Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition, 46 Harv. J.L. & Pub. Pol'y 419, 444–50 (2023) (urging the use of historical analogues to elaborate the scope of free exercise rights).

475. See Sherif Girgis, Living Traditionalism, 98 N.Y.U. L. Rev. 1477, 1512–13 (2023) [hereinafter S. Girgis, Living Traditionalism] (explaining this rationale for traditionalist adjudication of rights claims).

476. See id. at 1519.

477. Cf. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (arguing that evolving historical traditions capture "the balance struck by this country").

478. See supra section III.A.

479. Cf. Emp. Div. v. Smith, 494 U.S. 872, 889 n.5 (1990) (condemning such balancing when undertaken by judges).

may take decades for majorities within a majority of states to change laws for long enough to move court doctrines. Meanwhile, minorities suffer without judicial relief.

Finally, traditionalist judicial interpretation might allow balancing by political actors only up to an arbitrary point.[480] If states reject a certain regulation as too unimportant to justify a burden on speech, and courts endorse this judgment, but later social changes increase the need for that law, states will be stuck. The first to try to revive the law would see it struck down under precedent. So once a traditionalist precedent is in place, it may be hard to ensure that the doctrine on that issue *remains* responsive to the popular will, thus undercutting traditionalism's purpose.[481] As a way of having the people do the balancing, traditionalism might undermine itself over time.

C. *Shifting Power to Congress*

A better approach might combine judicial enforcement with political checks. To protect minorities, courts could keep enforcing general liberties. But they could enforce them as a matter of *statutory* law so that their balancing could be more easily changed by the people. And to subject all the states at once to these protections and make them revisable directly rather than through slow evolution across many states, the statutes could be adopted by Congress under Section Five of the Fourteenth Amendment.[482] In short, courts could give Congress leeway to enforce each liberty's substance through statutes and apply those while underenforcing the related constitutional texts in the spirit of the Last Resort Rule, which urges courts to prefer nonconstitutional grounds of decision whenever possible.[483] (But to ensure continuity of vigorous enforcement, courts should underenforce these rights *only* when Congress has offered statutory protection.)

Underenforcement is nothing new. As Professor Lawrence Sager has shown, the Court sometimes underenforces a constitutional norm on the ground that courts lack competence to administer it fully.[484] This occurs in equal protection and political question doctrine cases. In a similar vein, *Bruen*'s concern that balancing is beyond courts' competence, plus the inevitability of balancing for general liberties, could lead the Court to underenforce those rights constitutionally. The Court could enforce

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480. See S. Girgis, Living Traditionalism, supra note 475, at 1520–23, 1529–54.

481. See id. at 1539–54.

482. See U.S. Const. amend. XIV, § 5.

483. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (urging that courts "not 'formulate a rule of constitutional law'" if there are other grounds for decision (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885))).

484. For discussion of the institutional concerns driving underenforcement, see generally Lawrence G. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978).

whatever components of a liberty can be applied with only modest balancing[485] while letting Congress protect it more widely.

Congress attempted just that after *Employment Division v. Smith*, which eliminated free exercise protections from incidental burdens.[486] As noted, Congress passed RFRA to apply the pre-*Smith* standard to federal and state actors.[487] Professor Eugene Volokh touted this approach.[488] Because RFRA was framed in general terms, it gave judges leeway to consider the needs of minorities or other parties whom lawmakers might have overlooked. (Indeed, a disproportionate number of religious liberty claimants have been religious minorities.[489]) But since RFRA was statutory, Congress retained an override if it became unhappy with courts' handling of some issue.[490] Still, overriding exemptions by statutory amendment would require concentrated political will—another insulation for minorities, especially if the Equal Protection Clause would bar responses clearly reflecting animus.

This approach—extended to other liberties, like speech—could give minorities the benefits of judicial implementation while giving lawmakers final say on policy balancing. It would also keep faith with original understandings if Campbell and Greene are right.[491] Under free exercise, Campbell wrote, judges would enforce the norm against laws based on religious hostility but otherwise give lawmakers the lead in balancing liberties against public interests.[492] Judges could do the same now, and not just for free exercise.

One might object that a different approach would be needed when it comes to defining liberties' scope against Congress itself. But while it may

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485. While some aspects of each liberty will always require balancing, some are categorical (like the free exercise ministerial exception). See supra notes 147–151 and accompanying text.

486. See 494 U.S. 872, 882 (1990).

487. See City of Boerne v. Flores, 521 U.S. 507, 515 (explaining Congress's goals in passing RFRA).

488. See Eugene Volokh, A Common-Law Model for Religious Exemptions, 46 UCLA L. Rev. 1465, 1469–70 (1999) (noting that this approach "let[s] courts decide in the first instance whether an exemption is to be granted" while also ensuring that "courts' decisions aren't final").

489. See Luke W. Goodrich & Rachel N. Busick, Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases, 48 Seton Hall L. Rev. 353, 369–77 (2018) (finding that many religious minorities are "represented in a disproportionately high share of religious liberty decisions" in the Tenth Circuit).

490. Some have criticized RFRA as potentially protecting unjust discrimination. See, e.g., Douglas NeJaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 Yale L.J. 2516, 2574–78 (2015) (arguing that religious refusals can cause dignitary harm). Those contested applications, whatever their merits, are not essential to this proposal. One could reject them and still embrace the proposal wholesale. Indeed, part of the proposal's value is to make unjust applications of the right revisable by political action.

491. See supra section III.A.

492. See supra note 270 and accompanying text.

seem optimistic to expect Congress to tie its own hands—and no Congress can formally bind the next—this concern should not be exaggerated. RFRA applied the same free exercise standard to the states, federal regulations, and federal statutes except when the latter expressly exempted themselves.[493] There would likely be political pressure to treat federal and state governments similarly, due to the unthinkability[494] of a bifurcated approach. Still, this uneasy application to Congress is one disadvantage relative to the states-first approach above.

City of Boerne v. Flores[495] might seem an obstacle to applying a RFRA-like statute to the states. *Boerne* held that RFRA's application to the states overstepped Congress's Section Five powers, which let Congress prevent or remedy constitutional rights violations *only as those rights are understood by the Court*.[496] Under *Boerne*, Congress may not take a broader view of liberties than the Court's,[497] as RFRA had done by assuming, contra *Smith*, that free exercise bars some incidental burdens on religion.[498]

But conflict with the Court on a right's presumptive scope is not essential to this proposal. When Congress and the Court agree on a right's presumptive reach, *Boerne* needn't be read to bar Congress from tinkering with the balancing done in courts' retail implementation of it. On the contrary, *Boerne* said statutes need only bear "congruence and proportionality"[499] to preventing or curing rights-violations. So Congress may ban conduct that "is not itself unconstitutional"[500] and "must have wide latitude in determining"[501] the line between permissible prophylactic measures under Section Five and improper ones "that make a substantive change in the governing law."[502] Since *Boerne* allows Congress to be somewhat over- and under-inclusive in enforcing liberties by statute, it might let Congress revise the balancing done by judges applying such statutes.[503]

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493. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 6(a), 107 Stat. 1488, 1489 (codified as amended at 42 U.S.C. § 2000bb–3(a)).

494. Cf. Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

495. 521 U.S. 507 (1997).

496. See id. at 536 (declaring that when Congress "act[s] against the background of a judicial interpretation of the Constitution already issued, . . . in later cases and controversies the Court will treat its precedents with the respect due them under settled principles").

497. See id. ("[T]he courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution.").

498. See id. at 515 (explaining Congress's motivations).

499. Id. at 508.

500. Id. at 518.

501. Id. at 508.

502. Id. at 519–20.

503. This proposal requires Congress to act first by passing RFRA-like statutes for other liberties. Could the Court instead make the first move toward sharing power? Professor Henry Monaghan proposed that when the Court went beyond identifying a right's substance and engaged in policy reasoning to fashion implementing rules, it should declare its policy

If there remains tension with *Boerne*, trimming it might be warranted based on original meaning or prior precedent. As Professors Robert Post and Reva Siegel showed at the time, *Boerne* departed from decades of precedent more favorable to Congress's Section Five power,[504] which had fostered a "dialogue between the Court's legal interpretation of the Constitution and the constitutional ideals democratically embraced by the nation."[505] *Boerne* has also been criticized by originalists like Professor Michael McConnell.[506] And Professors Jud Campbell, William Baude, and Stephen Sachs have uncovered evidence that some members of Congress at ratification expected that laws passed under Section Five, "reflecting Congress's constitutional interpretation[,] would receive significant deference from the courts."[507] That is all this proposal would ask.

CONCLUSION

The anti-balancing campaign is misconceived. It treats as finished at the Founding what must remain unfinished: liberties flexible enough to curb indefinitely many unforeseen laws. Unfinished rights collide over time with new public interests or rights, some pressing—so limits are imposed ex post. If courts are the main enforcers, those limits will come from courts, and any effort to eliminate judicial balancing will backfire.[508] The Court must think bigger—or more modestly. To defer to balances struck by the people when the people who adopted these rights didn't settle their scope, the people's representatives over time should play some role.

The unfinished-rights account carries other lessons about constitutional reasoning and rights. First, until there is a shift toward more popular enforcement, the inevitability of *judicial* balancing will undercut one argument for originalism in these rights cases: that it shrinks judges' discretion in matters of high politics. In fields in which no approach can serve that instrumental function, originalism has to stand on more

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premises subconstitutional and open to congressional revision. See Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 31 (1975). But it's unlikely that today's Court, averse to balancing and criticized for playing politics, would avow that some of its decisions rest on policy conclusions not dictated by the Constitution.

504. See Robert C. Post & Reva B. Siegel, Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power, 78 Ind. L.J. 1, 30–45 (2003) (reviewing decades of precedent).

505. Id. at 3.

506. See Michael W. McConnell, Institution and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 174–81 (1997) (critiquing *Boerne* from an originalist perspective).

507. See William Baude, Jud Campbell & Stephen E. Sachs, General Law and the Fourteenth Amendment, 76 Stan. L. Rev. 1185, 1246 (2024).

508. See supra section III.B.

formalist arguments or none.[509] To be sure, the fact that balancing and evolution are inevitable under the First and Second Amendments would not mean that originalism falls silent there. But it would suggest something suggested by Campbell's work on those texts' original understanding: that cases applying them are ones in which originalism and living constitutionalism, though they differ in theoretical foundations, converge in their practical implementation.[510]

Second, this Article's account saps force from one of the most common and potent critiques of major rights cases: that they drew novel, ahistorical constitutional lines. For one target, take *New York Times Co. v. Sullivan*[511] which, as noted, declared it contrary to free speech to allow libel suits against public (but not private) figures unless the defendants acted with knowledge or recklessness (but not negligence).[512] Against this oddly specific rule, Justice Thomas recently lodged a familiar battery of charges[513]: *Sullivan* didn't apply "the First Amendment as it was understood by the people who ratified it" but "fashioned its own" rules "by balancing the 'competing values at stake,'" making it a "policy-driven decision[] masquerading as constitutional law."[514] *Sullivan* did draw policy lines. But if our system resists all efforts to erase those from general-liberties law, that objection cannot be fatal.

Finally, the "unfinished" idea sheds light on design choices, doctrinal development, and critique elsewhere. General liberties are unusual but not unique. With other unfinished norms, too, the magma of political-moral reasoning will keep breaking through the rock of legal formalism. Balancing not admitted will happen, only less transparently. And deference to political settlements will offer one way out of the morass.

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509. Cf. J. Joel Alicea, *Dobbs* and the Fate of the Conservative Legal Movement, City J., Winter 2022, https://www.city-journal.org/article/dobbs-and-the-fate-of-the-conservative-legal-movement [https://perma.cc/K7AQ-7ST2] (distinguishing originalism advocates "who saw [it] as a means to achieving some other substantive end" like judicial restraint and those who thought it "logically entailed by the Constitution and the principles on which it rested"); cf. also S. Girgis, Age of Ironies, supra note 370, at 12–13 (comparing Justices Kavanaugh's and Barrett's more instrumental and more formalist arguments for originalism, respectively).

510. Cf. S. Girgis, Age of Ironies, supra note 370, at 18 (arguing that Justice Barrett's theoretically purer originalism leads to an application of the Free Speech Clause that looks similar to that recommended by nonoriginalist scholars like Ronald Dworkin and David Strauss).

511. 376 U.S. 254 (1964).

512. See id. at 279–80.

513. See McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari) (critiquing *Sullivan*, 376 U.S. 254).

514. Id. (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974)).