Stephen P. Halbrook's Confused Defense of *Bruen*'s Novel Interpretive Rule

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Abstract. Stephen P. Halbrook is a giant in the field of Second Amendment studies, and I doubt that there is anyone from whom I've learned more about the history of the right to keep and bear arms. I was, therefore, surprised to find numerous fallacious arguments and technical errors in his response to my analysis of the Court's latest Second Amendment decision. Halbrook is also a very energetic and tenacious litigator in behalf of gun rights, and some of his defective arguments might have an appropriate place in a brief filed with a court. But they are not analytically effective or worthy responses to a scholarly article.

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Introduction

Justice Samuel Alito recently responded to a question about originalism by distinguishing between originalist judging and originalist scholarship.[1] Originalist Justices, he said, must engage with the "immediate practical consequences" of their decisions.[2] First, the sound principle of stare decisis dictates adherence to many non-originalist precedents.[3] Second, the Justices must frequently compromise with their colleagues, as they should, to produce a majority opinion of the Court.[4] I would add that practicing lawyers are even more constrained than the Justices. Litigators would often betray the duty of zealous advocacy that they owe their clients if they relied on what they think is the whole originalist truth and nothing but the originalist truth.

These constraints do not apply to scholars. Justice Alito emphatically asserted that stare decisis "has no place in any form of scholarship" and that scholars are not obliged to compromise their view of the truth with anyone.[5] I agree with both points, and with his implicit suggestion that academics may be obliged *not* to compromise their views.

Stephen P. Halbrook is a giant in the field of Second Amendment studies,[6] and I doubt there is anyone from whom I've learned more about the history of the right to keep and bear arms. I was, therefore, surprised to find numerous fallacious arguments and technical errors in his response to my analysis of the Court's latest Second Amendment decision.[7] Halbrook is also a very energetic and tenacious litigator in behalf of gun rights,[8] and some of his defective arguments might have an

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[1] Interview by John G. Malcolm, Vice President, Inst. Const. Gov.'t, Dir., Edwin J. Meese III Ctr. for Legal & Jud. Studs. & Ed & Sherry Gilbertson Senior Legal Fellow, Heritage Found., with Samuel A. Alito, Associate Justice, Supreme Court (Oct. 25, 2022) *in* HERITAGE FOUND., A CONVERSATION WITH JUSTICE SAMUEL ALITO 12–13 (2022).

[2] *Id.* at 12.

[3] *See id.* at 12–13.

[4] *Id.*

[5] *Id.* at 13.

[6] *See, e.g.*, Nelson Lund, *Foreword* to STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS, at vii–x (updated ed. 2019); Nelson Lund, *Outsider Voices on Guns and the Constitution*, 17 CONST. COMM. 701, 702 (2000) (reviewing STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876 (1998)).

[7] Stephen P. Halbrook, *Text-and-History or Means-End Scrutiny in Second Amendment Cases? A Response to Professor Nelson Lund's Critique of* Bruen, 24 FEDERALIST SOC'Y REV. 54, 55–56 (2023) (responding to Nelson Lund, Bruen*'s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279 (2022)).

[8] *See, e.g.*, *Home*, STEPHEN P. HALBROOK, PH.D: ATT'Y L. – SPECIALIZING CONST. CASES, https://perma.cc/Q8WH-VK8D.

appropriate place in a brief filed with a court. But they are not analytically effective or worthy responses to a scholarly article.

Leaving aside some inadvertent mischaracterizations of what I said,[9] I think Halbrook agrees with me about most of the important issues. We agree that the original meaning of the Second Amendment supports the holdings in *District of Columbia v. Heller*[10] and *New York State Rifle and Pistol Ass'n v. Bruen*.[11] We agree that interpretive questions that are fairly answered by the Constitution's text and history should be resolved on that basis alone whenever possible. We agree that many post-*Heller* decisions in the lower courts were irresponsible in their use of the familiar standard of "intermediate scrutiny."[12] We agree that *Bruen* was right to repudiate the use of that test. And we agree that willful judges can manipulate and pervert any interpretive approach the Supreme Court might adopt.

Halbrook and I disagree on two principal issues, which are important but narrow. First, Halbrook maintains that every single Second Amendment case can and should be resolved solely on the basis of the constitutional text plus America's historical tradition of firearms regulation.[13] Second, he believes that repudiation of the tiers-of-scrutiny framework necessarily implies the rejection of all other forms of means-end analysis.[14]

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[9] *See, e.g.*, Halbrook, *supra* note 7, at 55 (claiming I deny that many First Amendment cases have been decided solely on the basis of text and history). I did not deny any such thing. Nor did I argue that *Heller* conducted no historical analysis. *Contra id.* at 58. The Court certainly did so on some issues, but the Court's resolution of the very specific issue of handgun bans was not based on historical analysis.

[10] *See* 554 U.S. 570, 628–29 (2008) (holding that the Second Amendment protects a private individual right, not a right tied to militia service, and declaring unconstitutional a federal regulation forbidding civilians to possess handguns in the nation's capital).

[11] *See* 142 S. Ct. 2111, 2156 (2022) (declaring unconstitutional a state law forbidding civilians to carry a gun in public unless they can demonstrate a special need for self-protection distinguishable from that of the general community).

[12] "Intermediate scrutiny" is supposed to require the government to prove that its regulatory interest is important, significant, or substantial, and that the regulation is not substantially broader than necessary to achieve the government's goal. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)). As its terms suggest, this test is very easy to manipulate.

[13] *See* Halbrook, *supra* note 7, at 55–56.

[14] *See id.* The highest tier, "strict scrutiny," is supposed to require the government to prove that a challenged regulation is the "least restrictive means of achieving a compelling [government] interest." *E.g.*, McCullen v. Coakley, 573 U.S. 464, 478 (2014). Pre-*Bruen* courts seldom even purported to apply this test. *Heller* forbade the use of the lowest tier, "rational-basis review," which requires a challenger to prove that a legislature acted in a demonstrably irrational manner, 554 U.S. at 628 n.27, but many pre-*Bruen* courts applied intermediate scrutiny in a way that was hard to distinguish from rational-basis review. *See, e.g.*, Jackson v. City & Cnty. of S.F., 576 U.S. 1013, 1016–17 (2015) (denying

In my opinion, the constitutional text and historical practice simply cannot provide reliable originalist answers to every question that will arise under the Second Amendment. For that reason, I believe courts following the *Bruen* approach will inevitably (and probably often) smuggle means-end scrutiny into their analysis (as *Bruen* itself sometimes did) or issue ipse dixits (as both *Heller* and *Bruen* sometimes did).

Equally important, intermediate scrutiny is not the only form of means-end analysis that courts could adopt. In my view, a better approach would begin with the Second Amendment's end or purpose, which *Heller* and *Bruen* correctly identified: protecting and facilitating the exercise of the fundamental right of self-defense.[15] When legislatures regulate weapons for other ends, courts could require the government to prove that the means used to pursue such ends do "not vitiate the ability of Americans . . . to defend themselves against violent threats that the government cannot or will not prevent."[16]

This form of means-end scrutiny is not the inherently subjective intermediate-scrutiny approach that *Bruen* and Halbrook rightly condemn.[17] It is in my view no more subject to result-oriented abuse than *Bruen*'s insistence that questions unanswered by the relevant history must be resolved by looking for analogous regulations in the historical record.[18] That record contains very few regulations restricting the possession and carrying of weapons, as opposed to their misuse.[19] The paucity of such regulations in the relevant historical record cannot mean that novel regulations are always unconstitutional. For that reason, the *Bruen* rule creates new temptations for jurists who approve of challenged regulations on policy grounds to misrepresent the historical record, rely on false analogies, or simply substitute ipse dixits for legal analysis. Judges already have too many incentives to behave more like advocates or policymakers than like disinterested interpreters of the law. They don't need new ones.

certiorari) (Thomas, J., dissenting); Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706–07 (2012).

[15] *Bruen*, 142 S. Ct. at 2133; *see also Heller*, 554 U.S. at 599 ("Justice Breyer's assertion that individual self-defense is merely a 'subsidiary interest' of the [Second Amendment] . . . is profoundly mistaken." (citations omitted)).

[16] Randy E. Barnett & Nelson Lund, *Implementing* Bruen, L. & LIBERTY (Feb. 6, 2023), https://perma.cc/2RW8-KNHA; *see also* Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1375–76 (2009).

[17] *See, e.g.*, *Bruen*, 142 S. Ct. at 2127, 1229–30; Halbrook, *supra* note 7, at 76.

[18] *Bruen*, 142 S. Ct. at 2129–31.

[19] *See, e.g.*, Nelson Lund, *Promise and Perils in the Nascent Jurisprudence of the Second Amendment*, 14 GEO. J. L. & PUB. POL'Y 207, 209–10 (2016); Barnett & Lund, *supra* note 16.

I. Halbrook's Fallacious Arguments

Halbrook throws up a lot of smoke by asserting that there are numerous interpretive mistakes in my article. He is quite wrong about that, as the following examples illustrate.

A. *Obiter Dicta*

One of Halbrook's important missteps is dismissing statements in *Heller* and *Bruen* that he cannot defend by treating them as obiter dicta.[20]

Heller does contain unsupported dicta endorsing various gun control laws, which were not questioned in *Bruen*.[21] I think, and perhaps Halbrook also thinks, that courts *should* disregard them unless and until they are supported by sound originalist analysis. But everyone knows that the lower courts, and even the Supreme Court itself, ordinarily treat the Court's dicta as if they were binding precedents. Of course, they don't *always* do so, but the same is true of Supreme Court holdings, which even the lower courts sometimes refuse to follow.[22]

It is, therefore, pretty strange for Halbrook to criticize me for taking seriously the Court's repeated and unsupported endorsements of constitutionally dubious gun control laws.[23] Such endorsements in *Heller*,[24] *McDonald v. City of Chicago*,[25] and *Bruen*,[26] as well as in the *Bruen* concurrence issued by Justice Brett Kavanaugh and Chief Justice John Roberts,[27] effectively authorize the lower courts to uphold lots of gun control laws without conducting the kind of historical analysis that *Bruen* purports to require. Of course, it's *possible* that the Court might someday repudiate these pronouncements. But the Justices themselves obviously don't see that day coming any time soon.

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[20] *See* Halbrook, *supra* note 7, at 55, 63–65.

[21] *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2007); *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring).

[22] *See, e.g.*, Windsor v. United States, 699 F.3d 169, 178 (2d Cir. 2012) (refusing to accept the holding in Baker v. Nelson, 409 U.S. 810 (1972)), *aff'd*, 570 U.S. 744 (2013).

[23] *See* Halbrook, *supra* note 7, at 63–65.

[24] 554 U.S. at 626–27.

[25] 561 U.S. 742, 786 (2010) (plurality opinion). The Court in *McDonald* held that the Fourteenth Amendment makes the Second Amendment applicable to state and local regulations in the same way that it applies to federal regulations under *Heller*. *Id.* at 791.

[26] 142 S. Ct. at 2133–34; *cf.* Nelson Lund, Bruen*'s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279, 295–96 (2022) (questioning the strength of the evidence on which *Bruen*'s endorsement was based).

[27] 142 S. Ct. at 2162 (Kavanaugh, J., concurring).

Calling the Court's endorsements of various gun control laws dicta, which they are, also does not change the fact that *Bruen* itself engaged in means-end analysis when explaining one of its endorsements. The Court approved "shall issue" licensing laws, which apparently did not exist until 1961, decades after New York adopted the very regulation invalidated in *Bruen*.[28] And that explanation shows that the *Bruen* Court (like the *Heller* Court before it) was not willing to wait for a sound text-and-history analysis before approving gun control laws that it likes (or that some members of the majority insisted on as the price of their votes).

Furthermore, Halbrook's attempt to suggest a text-and-tradition analysis that could someday replace the means-end analysis actually used in *Bruen* illustrates how problematic the Court's new test really is. Halbrook contends that the Court suggested that "shall issue" licensing regulations are analogous to "historically accepted government measures designed to prevent actually violent or dangerous people from bearing arms."[29] But he offers no examples of such regulations, and it's not as though no one has looked for them. There are a few historical examples of restrictions on politically mistrusted groups, including slaves, free blacks, American Indians, and suspected British loyalists.[30] This kind of racial and ideological discrimination, which is now unconstitutional, cannot legitimately be analogized to licensing requirements imposed on the general population.

Nor is the unconstitutionality of these specific criteria the only flaw in trying to use them to identify a historical tradition of disarming anyone whom a legislature deems to be "dangerous." The more general problem is one of overbreadth. Quite apart from history and tradition, the Second Amendment does not permit a legislature to forbid poor people to possess firearms on the ground, however plausible it may be, that they are more likely than rich people to commit violent crimes. Similarly, it is hard to see why the Second Amendment would permit the government to impose a firearm ban on any individual without a particularized judicial finding, supported by adequate evidence, of conduct that evinces a proclivity to misuse guns.[31]

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[28] *See id.* at 2138 n.9 (majority opinion); Lund, *supra* note 26, at 291–92. "Shall issue" regulations generally require the government to issue a license to carry a weapon in public if the applicant meets certain objective criteria, such as "passing a background check and taking a handgun safety class." Lund, *supra* note 26, at 291.

[29] Halbrook, *supra* note 7, at 66.

[30] *See, e.g.*, Binderup v. Att'y Gen. U.S., 836 F.3d 336, 368 (3d Cir. 2016) (en banc) (Hardiman, J., concurring in part and concurring in the judgments).

[31] Consider, for example, 18 U.S.C. § 922(g)(8):

> It shall be unlawful for any person- . . . who is subject to a court order that-

Halbrook next argues that *Bruen*'s disapproval of lengthy wait times and exorbitant fees for licenses is not based on means-end analysis but is "simply an application of *Bruen*'s core holding that the text and history of the Second Amendment protect the right of ordinary citizens to carry firearms in common use."[32] If the logic of Halbrook's assertion were valid, it could just as easily be used to strike down shorter wait times and less-than-exorbitant fees. These are all burdens on the core right recognized in *Bruen*, and they cannot be distinguished on constitutional grounds unless one performs a means-end analysis or simply distinguishes them by fiat.

Finally, Halbrook notes that "shall issue" regulations typically authorize concealed carry and suggests that this is relevant because nineteenth-century courts upheld laws that restricted concealed carry without restricting open carry.[33] Even assuming that this history is actually relevant, *Bruen* endorsed shall issue laws in jurisdictions that do not permit unlicensed open carry.[34]

In the end, Halbrook seems to rest his defense of the Court's dictum on the fact that the *Bruen* petitioners conceded that shall issue regulations are constitutional.[35] But nothing compelled the Court to say anything at all about this issue, let alone to employ an implicit means-end analysis that conflicts with the new legal test that *Bruen* purported to adopt.

> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; . . .
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> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Applying *Bruen*'s history-and-tradition test, the Court of Appeals for the Fifth Circuit held that this statute is unconstitutional on its face. United States v. Rahimi, 61 F.4th 443, 461 (5th Cir. 2023), *cert. granted,* 143 S. Ct. 2688 (2023). Whether or not this interpretation of *Bruen* is accepted by the Supreme Court, the overbreadth problem independently renders the statute problematic.

32 Halbrook, *supra* note 7, at 66.

33 *Id.* at 74.

34 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2138 n.9 (2022).

35 Halbrook, *supra* note 7, at 74–75.

B. Heller*'s Holding*

Halbrook disputes my claim that *Heller*'s specific holding—that D.C.'s ban on handguns violated the Second Amendment—rested on the popularity of handguns in the twenty-first century.[36] But he cannot deny that *Heller*, in fact, did rely on the popularity of handguns today.[37] Nor does he cite any historical evidence showing that handgun bans were considered unconstitutional in the founding period. Nor does he cite any statements in *Heller* asserting that the D.C. law was unconstitutional *because* such bans did not exist during the founding period. Instead, he says that *Heller* found "several reasons" for concluding that the Constitution specifically protects the possession of handguns.[38]

Halbrook notes, accurately enough, that handguns fall within the meaning of the word "Arms" in the Second Amendment.[39] But the constitutional text does not imply that *all* arms are protected, and *Heller* specifically rejected the notion that they are.[40] So *Heller*'s rationale for invalidating D.C.'s law was not and could not have been, as Halbrook suggests, "based squarely on the plain text of the Second Amendment."[41]

Next, Halbrook cites *Heller* for the proposition that "the Amendment protects 'arms in common use at the time for lawful purposes like self-defense.'"[42] Here again, *Heller* neither said nor implied that *all* arms in common use are protected. What *Heller* did say is this: "We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[43] The awkward double negative in this sentence precludes the inference that *all* weapons in common use are protected. Justice Antonin Scalia was a careful writer, and he surely knew that saying non-humans will not be admitted to heaven does not imply that all humans *will* be admitted.

Finally, Halbrook disputes my claim that *Heller* did not base its holding on the absence of historical precedents for a handgun ban.[44] For

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36 *Id.* at 56–58.

37 *See* District of Columbia v. Heller, 554 U.S. 570, 629 (2007) ("Whatever the reason [for their popularity], handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.").

38 Halbrook, *supra* note 7, at 56.

39 *Id.* at 56–57.

40 *See* 554 U.S. at 624–25.

41 Halbrook, *supra* note 7, at 57. Of course, it is *consistent* with the text, but it is not *based squarely* on the text.

42 *Id.* (quoting *Heller*, 554 U.S. at 624).

43 554 U.S. at 625.

44 Halbrook, *supra* note 7, at 57.

evidence, he points out that *Heller* rejected the government's attempt to analogize the D.C. handgun ban to a 1783 fire-safety law that forbade Boston residents from keeping loaded firearms in buildings.[45] The government's analogy was certainly inapt, as were other analogies that the Court rejected. But it is a logical error to infer that the rejection of these analogies implies that the specific holding in the case was based on the absence of laws analogous to handgun bans in the founding period. *Heller* did not make that error. It would be absurd, moreover, to assume that every regulation of weapons that was not enacted must have been considered ipso facto unconstitutional. *Heller* did not make that error either.

C. *Bearable Arms*

Halbrook says, "[T]he Second Amendment refers to arms that a person can 'bear' or carry, which eliminates heavy weapons."[46] The language of the Second Amendment implies no such thing. If it did, a law authorizing the government "to imprison and rehabilitate violent criminals" would not authorize the imprisonment of criminals who cannot be rehabilitated. In both cases, there might be extratextual evidence that supports the conclusion, but it cannot be legitimately inferred from the text alone. And Halbrook offers no extratextual evidence that "the right of the people to keep and bear Arms" excludes the keeping of heavy weapons.

Halbrook needs this invalid inference in order to defend his claim that bans on very destructive weapons such as cannons (which were *not* banned historically) can be upheld without applying means-end analysis.[47] But needing an inference to make your case doesn't make the inference valid. Halbrook also quotes the more plausible claim in *Heller* and *Bruen* that the Second Amendment "extends, prima facie, to all instruments that constitute bearable arms."[48] This statement says that all bearable arms are presumptively covered, but not that *only* bearable arms are covered. The Court left open the possibility that only bearable arms are covered, but it neither implied that proposition nor provided any evidence supporting the proposition. Once again, Halbrook does not recognize how careful and precise a writer Justice Scalia was.

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45 *Id.*; *Heller*, 554 U.S. at 631.

46 Halbrook, *supra* note 7, at 67.

47 *Id.* at 66–67.

48 *Id.* at 67 n.71 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022) (quoting *Heller*, 554 U.S. at 582)).

Halbrook is also wrong to refer to a "historical tradition of banning weapons that are dangerous and unusual."[49] Halbrook provides no evidence that such a historical tradition of banning the *possession* of such weapons ever existed. There was, of course, a tradition of forbidding people to *bear* certain kinds of weapons in public under certain circumstances, which *Heller* mentioned, but that is a much different kind of regulation.[50]

I am confident that the courts will not recognize a constitutional right to possess a cannon, or a (bearable) hand grenade, let alone a (bearable) Stinger missile, or a (bearable) suitcase nuclear bomb. But that won't be because there are historical examples of bans on extremely destructive weapons. Instead, the courts will rely, openly or covertly, on means-end analysis.

D. *"Sensitive Places"*

Halbrook says: "*Bruen* recalls *Heller*'s dictum about 'longstanding' laws forbidding the carrying of firearms in sensitive places like schools and government buildings."[51]

Here is what *Heller* actually said:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[52]

Grammatically, the "longstanding prohibitions" in this sentence are distinct from "laws forbidding . . ." and from "laws imposing . . . ." The word "longstanding" modifies only the prohibitions specified in the first phrase, not the laws described in the other two phrases.

What Justice Scalia wrote about sensitive-place regulations applies to all such regulations, not just those that are "longstanding." It was a mistake to issue such a dictum, but that is not a good reason to misinterpret it. The *Bruen* Court may have thought that such regulations were "longstanding," but the opinion offers no evidence that such regulations were common in America in 1791 or for a considerable length of time after the Bill of Rights was adopted.[53]

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49 Halbrook, *supra* note 7, at 67.

50 *See Heller*, 554 U.S. at 627; Lund, *supra* note 16, at 1362.

51 Halbrook, *supra* note 7, at 63.

52 *Heller*, 554 U.S. at 626–27.

53 *See* Lund, *supra* note 26, at 295. Delaware's 1776 constitution prohibited bearing arms at polling places or assembling the militia nearby. *See* David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 203,

E. *A Preexisting Right*

Halbrook endorses *Heller*'s claim that "the very text" of the Second Amendment implies that it codified a preexisting right, apparently because of the definite article in the phrase "the right of the people."[54] But this is a linguistic fallacy. One could write a constitutional amendment, for example, that said, "The right to medical care at government expense shall not be infringed." Such language does not imply the preexistence of a right to free medical care.

In another effort to show that *Heller* had historical evidence that the Second Amendment codified a preexisting right, Halbrook refers to the English Declaration of Rights of 1689, which provided "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law."[55] Surely Halbrook does not believe that *this* is the preexisting right protected by the Second Amendment. *Heller* certainly didn't say so. Instead, the Court relied for the proposition that the Second Amendment codified a preexisting right on an ipse dixit in an 1876 Supreme Court opinion.[56]

There certainly was a preexisting right to keep and bear arms in 1791. Everyone has the right to do anything the law permits, and there apparently were virtually no laws (state or federal) restricting people's freedom to keep and bear arms, so long as they did not misuse their weapons. But that does not imply that the Second Amendment codified a right to anything and everything that was not forbidden in 1791. Neither *Heller* nor *Bruen* made any such inference.

The right that was codified in the Second Amendment was not the absolute and unrestricted right that its bare language may suggest. It had to be a narrower right, though obviously not so narrow as the right-to-arms provision in the English Declaration of Rights. One might surmise that the Second Amendment has the same scope as the right-to-arms provisions in some early state constitutions. In 1791, four states had such provisions, but their wording varied, and all of them differed from the

233–34 (2018) (cited in *Bruen*, 142 S. Ct. at 2133). This provision would not have been affected by the adoption of the Second Amendment, which originally applied only to federal regulations. In any case, it obviously does not imply a general authorization for gun bans in places that a legislature deems "sensitive." A fortiori, similarly narrow eighteenth-century colonial regulations do not imply such an authorization. *See id.* at 235–37 (surveying Pennsylvania, New Jersey, and Maryland state laws enacted in the 1700s to ban hunting on private land without permission).

54 Halbrook, *supra* note 7, at 57, 59.

55 *Id.* at 59–60 (internal quotations omitted).

56 *See Heller*, 554 U.S. at 592 (citing United States v. Cruikshank, 925 U.S. 542, 553 (1876)).

wording of the Second Amendment.[57] And because the states had adopted so few legal restrictions on possessing or carrying firearms, the relevant history tells us very little about their scope, just as it tells us very little about the scope of the right codified in the Second Amendment.

In sum, the linguistic fallacy on which Halbrook relies would throw little light on the original meaning of the Second Amendment even if it were not a fallacy.

F. Bruen*'s Novel Test*

Halbrook disputes my claim that *Bruen* adopted a novel test when it insisted that each and every question must be resolved solely by reference to the constitutional text and historical practice.[58] He seems to think that I'm wrong because the Court has *sometimes* relied solely on text and history in First Amendment cases.[59] That's another logical error. In any event, neither *Bruen* nor Halbrook cites any First Amendment precedents announcing that each and every case must be decided solely on this basis. That's hardly surprising when one considers that the tiers-of-scrutiny framework, which *Bruen* condemned, has been routinely used in First Amendment cases for many decades, as the Court pointed out in *Konigsberg v. State Bar of California*,[60] which *Bruen* itself cited with approval.[61]

Halbrook says: "As *Bruen* explains, to survive a First Amendment challenge 'the government must generally point to *historical* evidence about the reach of the First Amendment's protections.'"[62] *Bruen* did *not*

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57 *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 208–09 (2006).

58 Halbrook, *supra* note 7, at 60–61. *Bruen* formulated its test as follows:

> [W]e hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022) (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

59 Halbrook, *supra* note 7, at 61–63.

60 366 U.S. 36 (1961).

61 *See* Halbrook, *supra* note 7, at 61–63. The text immediately following footnote ten in *Konigsberg* makes it clear that the Court has used interest balancing "throughout its history." 366 U.S. at 49–51.

62 Halbrook, *supra* note 7, at 62 (quoting *Bruen*, 142 S. Ct. at 2130, out-of-context).

say that this applies *generally* in First Amendment cases. It applies at the first step of the Court's traditional two-step analysis, which is the same kind of analysis that the post-*Heller* lower courts persistently relied on.[63] Only a narrow class of First Amendment cases are decided at the first step, and, as *Konigsberg* highlights, the Court has long used interest-balancing under the tiers of scrutiny to resolve cases outside that narrow class.

II. A New Way Forward?

Bruen itself indirectly endorsed a form of means-end analysis that is similar to the one I advocate. After noting that the Court's new test will sometimes require a search for historical analogues to modern regulations, *Bruen* says:

> While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense. As we stated in *Heller* and repeated in *McDonald,* "individual self-defense is 'the *central component*' of the Second Amendment right." Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are "*central*" considerations when engaging in an analogical inquiry.[64]

In a footnote to this passage, *Bruen* warns that courts may not engage in "independent" means-end scrutiny that would revise the balance struck by the founding generation.[65] This warning rightly condemns the kind of interest-balancing the lower courts frequently conducted under the rubric of intermediate scrutiny. But Halbrook is mistaken when he insists, without a supporting argument, that every use of means-end scrutiny necessarily revises the balance struck by the founding generation.[66] And that is a very serious error because it leads him to pose a false choice between *Bruen*'s new interpretive framework and the kind of illegitimately "independent" interest balancing conducted by many pre-*Bruen* courts in the name of intermediate scrutiny.

The Supreme Court could and should generalize *Bruen*'s willingness to sometimes ask "how and why the [challenged] regulations burden a law-abiding citizen's right to armed self-defense."[67] If it did so, endorsing the use of constitutionally appropriate means-end scrutiny might lay the basis for a coherent and intellectually honest jurisprudence. And Halbrook may have unwittingly offered a way to promote such a

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63 *See, e.g.*, *Konigsberg*, 366 U.S. at 49–51, 49 n.10.

64 142 S. Ct. at 2133 (cleaned up).

65 *Id.* at 2133 n.7.

66 Halbrook, *supra* note 7, at 66.

67 142 S. Ct. at 2133 (quoted in context at text accompanying note 64 above).

development. Perhaps the Court could interpret *Bruen*'s statements about relying solely on text and tradition in every single case as "mere dicta."

Conclusion

At least since William Blackstone set out to reform legal education, lawyers have aspired to establish themselves as a scholarly profession. That obviously does not mean that every practicing lawyer, or for that matter every sitting judge, could be expected to display all the skills and attitudes appropriate to a full-time academic. Nor should they try to do so. Even apart from competing demands on their time, lawyers and judges are frequently deterred from the uncompromising pursuit of the truth by their duties to their clients, or by their obligation to respect either horizontal or vertical stare decisis. On multi-member appellate courts, judges often experience an additional constraint arising from the undesirable confusion in the law that can arise when a decision is not explained in a majority opinion.

Like everyone who engages in scholarly research of any kind, lawyers, judges, and legal academics also face the temptation to compromise appropriate standards of scholarship in order to advance their personal self-interest. The temptations may arise from a variety of sources, including the individual's financial interests, the desire for respect or popularity, hopes for professional advancement, or policy views that can warp what should be the disinterested analysis of the law.

The Supreme Court's opinion in the *Bruen* case is an attempt to inject more scholarly discipline into the interpretation of the Second Amendment. That is a noble undertaking, and one that was invited by what the *Bruen* Court reasonably considered an excessively policy-driven approach to the review of firearms regulations by the lower courts. Worthy motives, however, do not guarantee successful outcomes.

For reasons that I have set out in detail, I doubt that *Bruen*'s novel interpretive rule will have the effect the Court is seeking. I hope I will be proven wrong. But Stephen P. Halbrook's barrage of fallacious arguments and technical errors will not advance either the development of an intellectually respectable jurisprudence or the pursuit of truth about the Constitution's original meaning.