NOTES

HISTORICAL ABSENCE AND CONSTITUTIONAL INTERPRETATION

Originalism — a school of constitutional interpretation defined by the pursuit of the Constitution's original meaning[1] — has long been celebrated and criticized for its forceful prescriptions for litigants, jurists, and historians.[2] As originalism has become increasingly central to jurisprudence, questions about how it may serve "as a workable prescription for judicial governance" have proliferated.[3] From questions of what to do with nonoriginalist precedent[4] to conversations about what exactly originalism is,[5] the school invites as many questions as it purports to answer. Originalism sits uncomfortably with many traditional judicial practices, causing some to reconsider these doctrines to facilitate originalism's implementation.[6]

This Note charts a different path. It draws attention to a type of originalist argument — the argument from historical absence — and the implementation issues it exacerbates. To address these challenges, it

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[1] *See* Lawrence B. Solum, Essay, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1245 (2019) [hereinafter Solum, *Originalism Versus Living Constitutionalism*] (noting that most originalist argument is defined by "the Fixation Thesis," or the belief that "the meaning of the constitutional text is fixed at the time each provision is drafted," and "the Constraint Principle," or the belief that constitutional interpretation "should, at a minimum, be consistent with the original meaning"); Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice 20–21 (Apr. 3, 2019) (unpublished manuscript), https://ssrn.com/abstract=2940215 [https://perma.cc/F53G-UPBN].

[2] Crafted as a conservative response to the perceived excesses of the Warren Court, originalism was intentionally disruptive. *See* Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 233 (2023). However, criticisms of history-based methodologies predate originalism and were also aimed at the Warren Court itself. *See, e.g.*, Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 119, 122 n.13.

[3] Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION 129, 139 (Amy Gutmann ed., new ed. 2018); *see, e.g.*, Andrew S. Oldham, *On Inkblots and Truffles*, 135 HARV. L. REV. F. 154, 170 (2022) ("[O]riginalism's credibility among practitioners depends . . . on its ability to guide lawyers interpreting the constitutional text.").

[4] *See* John O. McGinnis & Mike Rappaport, *Solving the Problem of Nonoriginalist Precedent*, LAW & LIBERTY (Mar. 9, 2023), https://lawliberty.org/solving-the-problem-of-nonoriginalist-precedent [https://perma.cc/SKA9-T4G8].

[5] *See* Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM 12, 15 (Grant Huscroft & Bradley W. Miller eds., 2011) (noting there is a "deep ambiguity in the meaning of originalism").

[6] *See, e.g.*, Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 263, 269 (2005) (arguing an "originalist rejection of precedent is not so radical as it at first appears," *id.* at 263, while recognizing exceptions that may bolster a precedent's vitality, *see id.* at 269); Randy E. Barnett & Lawrence B. Solum, *Making the Party Presentation Principle Safe for Originalism*, 174 U. PA. L. REV. (forthcoming 2026) (manuscript at 9), https://ssrn.com/abstract=5098251 [https://perma.cc/AWS8-5G99] (arguing that strong adherence to the party presentation principle "would be a substantial barrier to constitutional law moving towards adherence to the original meaning of the Constitution").

presents a modest framework that may be employed by courts required to consider these arguments. This Note conceives of arguments from historical absence as a style of assertion that centers the *lack* of historical evidence. A litigant hoping to rely upon historical absence may canvass the relevant historical record, find no sufficient historical analogue, and contend that this lack of evidence is itself supportive of their argument — typically, that a governmental practice would have been deemed (un)constitutional at the Founding. These arguments may be used both offensively (using historical absence to challenge a practice) and defensively (using historical absence to support a practice). Simply put, an offensive argument from historical absence may be: "No evidence supports the assertion that the original public meaning[7] of *X*, or any analogous original public meaning, would permit *Y*; thus, *Y* is impermissible." By contrast, a defensive argument may be: "No evidence supports the assertion that laws regulating *Y*, or its analogues, were treated as constitutionally suspect at the Founding; thus, the original public meaning of *X* was understood to permit *Y* and analogous regulations."[8]

Arguments from historical absence warrant distinct analysis. To begin, they do not map cleanly onto the oft-provided justifications for originalism. Many of the justifications for originalism — from predictability to stability to judicial restraint[9] — are premised upon its reliability and, to those who reject thin originalism, determinacy.[10] Arguments from historical absence are a poor fit for these justifications, as they derive fact from absence and rely upon a shared fiction that the evidence currently known is all there may be. Compared to affirmative evidence, evidence of historical absence may be more easily displaced and, as will be shown, invites judicial misuse. Originalists have discussed this

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[7] Arguments from historical absence have been made regarding Founder intent, and this Note's analysis does not turn on the style of originalism employed. However, because "[o]riginal intent fell out of favor among originalists more than thirty years ago," Solum, *Originalism Versus Living Constitutionalism*, *supra* note 1, at 1250, all examples focus on original public meaning.

[8] Argumentative reliance upon historical absence is particularly salient in the Second Amendment context. In *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Court premised Second Amendment litigation on absence: Legislation more burdensome than "analogous" Founding-era legislation may be unconstitutional, *id.* at 2145, but when a historical record of unchallenged legislation exists, the absence of any challenge may be probative of constitutionality, *see id.* at 2133.

[9] *See* Bill Watson, *The Plain-Meaning Fallacy*, 67 B.C. L. REV. 1, 3–4 (2026) (collecting justifications for originalism).

[10] *See* Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 461–62 (2016) (defining thin originalism as the belief that some constitutional "terms' original meanings do not include enough information, on their own, to resolve many constitutional questions," *id.* at 462). This debate regarding the scale and scope of constitutional "construction" (the process of giving text a legal effect) that may be accomplished through interpretive and historical work is ongoing. *Id.* at 463–64; *see* JACK M. BALKIN, LIVING ORIGINALISM 7 (2011).

problem and its potential remedies,[11] but jurists have likewise critiqued the solutions put forward.[12]

Moreover, though originalism's certainty of prescription from the historical record has long drawn the ire of historians,[13] its bases are more contestable when historical absence justifies particular outcomes.[14] The basic contours of this critique are well known. As courts struggle to navigate originalist obligations,[15] historians continually emphasize that "[t]hinking historically" requires time, effort, and expertise.[16] Despite misaligned skillsets[17] and timelines hostile to historical analysis,[18] courts must nonetheless parse historical silence, exacerbating historians' concerns. Historians contend that, even with a complete record, "the past is a foreign country."[19] Jurists have been called to navigate these foreign lands, relying upon history that may not exist as their guide. By contrast, though historians may be influenced by personal biases,[20] the historian's craft does not require them to make meaning from silence where no meaning is warranted.[21]

Furthermore, arguments from historical absence have an awkward relationship with current judicial doctrines. Scholars have long recognized the tension between the implementation of originalism and current

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[11] *See, e.g.*, Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 798–802 (2022) (discussing the problem of "the *objection from cluelessness*," *id.* at 799); *id.* at 803–04 (arguing that "we should distinguish the substance" required by standards of correctness from "decision procedures" that honor originalist values even in cases of uncertainty, *id.* at 803).

[12] *See, e.g.*, Oldham, *supra* note 3, at 161–63 (arguing that, even in Professor Stephen Sachs's "God's-Eye-View Case" for originalism, "we never know what we don't know," which limits the practical value of originalism as a standard, *id.* at 162).

[13] *See* Jack M. Balkin, *Lawyers and Historians Argue About the Constitution*, 35 CONST. COMMENT. 345, 348–50 (2020).

[14] Originalists have recognized this problem and mounted several defenses. *See, e.g.*, Mike Rappaport, *An Important Difference Between Historians and Originalist Law Professors*, LAW & LIBERTY (Oct. 11, 2018), https://lawliberty.org/an-important-difference-between-historians-and-originalist-law-professors [https://perma.cc/QAD5-CVDW].

[15] *See* Clara Fong, Kelly Percival & Thomas Wolf, *Judges Find Supreme Court's* Bruen *Test Unworkable*, BRENNAN CTR. FOR JUST. (June 26, 2023), https://www.brennancenter.org/our-work/research-reports/judges-find-supreme-courts-bruen-test-unworkable [https://perma.cc/F7PR-RCQA].

[16] JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM 43 (2024).

[17] *See* Fong, Percival & Wolf, *supra* note 15.

[18] *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 157–58 (2023) (highlighting Professor Zachary Schrag, a historian who declined to serve as an expert witness in his field of study because sixty days would not be enough time to "adequately research" the issue at hand, *id.* at 158).

[19] Jonathan Gienapp, *Knowing How vs. Knowing That: Navigating the Past*, ORG. OF AM. HISTORIANS: PROCESS (Apr. 4, 2017), https://www.oah.org/process/gienapp-knowing-how [https://perma.cc/YC92-EAQY].

[20] *Cf.* Randy Barnett, *Challenging the Priesthood of Professional Historians*, WASH. POST: VOLOKH CONSPIRACY (Mar. 28, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/28/challenging-the-priesthood-of-professional-historians [https://perma.cc/Q4JJ-6V6T] (noting that former professor Michael Bellesiles's work was "calculated to engage directly in the debate over the 'meaning' of the Second Amendment"); *see infra* note 130 and accompanying text.

[21] *See* Kelly, *supra* note 2, at 156–57.

doctrines, especially those of stare decisis and party presentation,[22] but historical absence only exacerbates this issue. Regarding stare decisis, a given argument from historical absence may be persuasive the day it is made but patently false the next.[23] No clear judicial off-ramp exists despite this potentiality. Regarding the party presentation principle, litigants may, intentionally or otherwise, improperly argue that the historical record is vacant, leaving courts to determine if this silence is legitimate or merely the result of inadequate historical research. Though the Court may not view itself as strictly bound by party presentation,[24] its stance on lower court party presentation is comparably unclear.[25]

Finally, current structures (or, more accurately, their absence) invite judicial manipulation. Courts may approach historical absence without any guiding rationale regarding burdens of proof, deciding in some cases that arguments from historical absence are meaningful while disregarding them in the next.[26] Despite critiques of bias,[27] these decisions persist for years to come.

At the outset, two assumptions are in order. This Note assumes for the sake of argument that the pursuit of original public meaning,

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[22] *See, e.g.*, Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 1 (2016) ("Precedent poses a notoriously difficult problem for originalists."); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1863–66 (2012) (putting forward, while highlighting challenges for, the view that stare decisis may serve as a constitutional backdrop despite not being enshrined in the Constitution's text); Barnett & Solum, *supra* note 6 (manuscript at 2–3). *See generally* Michael L. Smith & Alexander S. Hiland, *Originalism's Implementation Problem*, 30 WM. & MARY BILL RTS. J. 1063 (2022) ("[T]he theories expounded in academic originalist circles are largely, if not entirely, impossible to implement." *Id.* at 1115.); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017) (evaluating Justice Scalia's approach to stare decisis as a "pragmatic exception" to originalism, *id.* at 1922 (emphasis omitted) (quoting Scalia, *supra* note 3, at 140)). *But see* Barnett, *supra* note 6, at 261 ("[P]erhaps *no one* really adheres to anything like a robust doctrine of precedent . . . .").

[23] *See, e.g.*, Mark Joseph Stern, *The Volunteer Moms Poring Over Archives to Prove Clarence Thomas Wrong*, SLATE (Aug. 31, 2023, at 05:45 ET), https://slate.com/news-and-politics/2023/08/moms-demand-action-gun-research-clarence-thomas.html [https://perma.cc/FF6E-TWBF] (highlighting activists who purport to have discovered evidence contradicting the belief that concealed carry restrictions are not historically founded).

[24] Sophie Li, Perttu v. Richards, HARV. L. REV. BLOG (Nov. 11, 2025), https://harvardlawreview.org/blog/2025/11/perttu-v-richards [https://perma.cc/3JF3-GUGA] (arguing the Court views itself as "free to deviate from party presentation" but has likewise "indicate[d that] lower federal courts are not").

[25] *Contrast* United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) (recognizing that "a modest initiating role for a court" may be appropriate in some circumstances, but stating that "as a general rule," lower courts may decide only the issues presented to them), *with* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 n.6 (2022) ("Courts are . . . entitled to decide a case based on the historical record compiled by the parties.").

[26] *See infra* pp. 1926–27.

[27] *See, e.g.*, Harper v. Hall, 886 S.E.2d 393, 457–58 (N.C. 2023) (Earls, J., dissenting) ("[T]he majority demonstrates how historical analysis can be weaponized to paint a distorted picture . . . ."); Eric Segall, *Originalism as Dangerous Nonsense*, DORF ON L. (Nov. 3, 2022), https://www.dorfonlaw.org/2022/11/originalism-as-dangerous-nonsense.html [https://perma.cc/9P8V-2Q3M] (arguing "[t]he use of originalism . . . does not result in accurate historical accounts" and instead reflects the individual's "policy preferences").

whether thick or thin, is worthwhile.[28] Originalists disagree about history's certainty, but they are nonetheless aligned in the pursuit of shared meaning. This Note further assumes that judges must sometimes attempt to perform originalism. Though "history and tradition" has become a flashpoint of critique,[29] the Court has bound lower courts to originalist analysis in at least the Second Amendment context.[30] This Note leaves normative debates aside and accepts the theory's jurisprudential role, proposing a framework to deal with the particularly hairy problem of arguments from historical absence.[31]

This Note proceeds in three Parts. Part I explores the role of arguments from historical absence in judicial decisionmaking, contending that they are essential to originalist constitutional interpretation and construction but bring with them intellectual danger, and concluding that they warrant neither wholesale acceptance nor disregard. Part II puts forward a framework amenable to judicial limitations that courts may employ when presented with arguments from historical absence. Part III applies this framework, showcasing how it addresses various concerns in originalist analysis.

I. HISTORICAL ABSENCE AS VIRTUE AND VICE

Arguments from historical absence are both beneficial and problematic for originalist interpretation. When employed under proper conditions, judges may find that arguments from historical absence empower them to perform their judicial role, enabling what may be a philosophically defensible pursuit of original public meaning while nonetheless serving as a practical necessity. However, currently, arguments from historical absence permit judicial inconsistency, enshrine bad precedent, and encourage lackluster originalist argumentation.

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[28] For an overview of the debate between thick and thin originalists, see JACK M. BALKIN, MEMORY AND AUTHORITY 101–11 (2024), and Stephanie Hall Barclay, Essay, *The Democratic Deficit of Living Originalism*, 173 U. PA. L. REV. 1965, 1966–68 (2025). *See also* Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 818 (1997) (arguing from the assumption that, even if "historical 'truth' may be ephemeral, historical 'falsity' is not," and bad interpretations may be criticized on these grounds).

[29] *See, e.g.*, Emily Bazelon, *How "History and Tradition" Rulings Are Changing American Law*, N.Y. TIMES MAG. (Apr. 29, 2024), https://www.nytimes.com/2024/04/29/magazine/history-tradition-law-conservative-judges.html [https://perma.cc/FD4Q-LBEV].

[30] *See Bruen*, 142 S. Ct. at 2132–33.

[31] Previous scholarship on the topic of evolving historical records has focused on internal Supreme Court engagement with originalist precedent. *See* Haley N. Proctor, *"Will the Meaning of the Second Amendment Change . . . ?": Party Presentation and Stare Decisis in Text-and-History Cases*, 98 N.Y.U. L. REV. ONLINE 453, 455 (2023) (limiting discussion to "the narrow question whether" a Supreme Court decision that relied on historical inquiry to discern the meaning of a constitutional provision "binds the Supreme Court in future cases").

A. As Virtue

Arguments from historical absence have proven to be a necessary component of originalism. This Note posits three primary virtues of historical absence: (1) Absence may be informative of constitutional meaning given sufficient information; (2) absence fits well into the view that originalism is a valuable standard of correctness, even with imperfect implementation; and (3) absence is foundational to any hopes the school may have for broader implementation.

First, when supported by a sufficiently voluminous record, well-reasoned arguments from historical absence may permit jurists to determine some aspects of the Constitution's original meaning. One may never truly be certain of the history yet to be discovered,[32] but an expansive record may better support inferences from historical absence. This is not to say that properly scoped claims based in historical absence will solve originalism's implementation issues — not even a complete historical record could do such a thing.[33] Rather, arguments from historical absence may allow jurists to probe at the Constitution's edges.

What was the original public meaning of the Second Amendment? Determining the answer is difficult,[34] but historical absence may tell us what it was not. In *New York State Rifle & Pistol Ass'n v. Bruen*,[35] for example, the Court drew from historical absence to invalidate a special-need requirement for concealed firearm carriage.[36] Writing for the majority, Justice Thomas emphasized the lack of historical evidence supporting New York's law.[37] Accepting that firearms have changed greatly since the Founding,[38] the absence of any analogous regulation may tell a decisionmaker that the Second Amendment did not permit the *present* regulation, even if that same decisionmaker cannot define the Second Amendment's every contour. Though *Bruen* is partly a story of burdens of proof,[39] historical absence nonetheless helped the Court attempt to understand the loose outline of the Second Amendment.

Second, arguments from historical absence may honor originalism's intended values even when they fail to capture original public meaning. As Professor Stephen Sachs argues, judicial decisionmaking is built upon several kinds of "oughts."[40] A judge bound by originalist precedent *ought* to apply the original public meaning of a given constitutional

[32] *See* Oldham, *supra* note 3, at 162.

[33] *See* Sachs, *supra* note 11, at 793.

[34] *See, e.g.*, Oldham, *supra* note 3, at 158.

[35] 142 S. Ct. 2111 (2022).

[36] *Id.* at 2122.

[37] *See id.* at 2139–40, 2145–50.

[38] *See* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 110 (2000) (arguing "the very idea of being accidentally killed by [a firearm] was itself hard to conceive" at the Founding).

[39] *See infra* pp. 1926–27.

[40] Sachs, *supra* note 11, at 805.

phrase.[41] However, our historical understanding is woefully incomplete, and "'guess correctly' is hardly useful advice."[42] As such, a judge looking to perform originalism properly when facing an incomplete historical record is left with two primary options: imperfectly attempt originalism or forgo its application. Faced with such a choice, an originalist may believe that a judge *ought* to attempt originalism, with historical absence serving as one tool.[43] Not all historical absence is created equally, and different forms of judicial action in response to that silence may be required.[44] However, even if one accepts imperfect execution and uncertain results, attempting originalist analysis may be normatively preferable to forgoing it altogether.

Take, for example, *United States v. Chadwick*.[45] Asked to determine the permissibility of the government's warrantless search of a locked and closed container over which federal officers had complete control,[46] the Court faced competing arguments from historical absence. To defend this search, the government contended that "[n]othing in the pertinent history" supported the assertion "that the Fourth Amendment was intended to upset the settled practice allowing [warrantless] searches [outside the home] if supported by probable cause."[47] In response, Chadwick argued that "[t]he government introduce[d] no evidence which affirmatively establishe[d] or . . . indicate[d] . . . searches of personal property" were intended to be left unprotected.[48] Chadwick further contended "that there is no recorded evidence of controversy" because "except for the narrowly circumscribed search-incident-to-arrest, there were no such warrantless searches in public."[49]

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[41] Sachs highlights the Borkian inkblot as a particular example of tension within oughts. *Id.* In this hypothetical, an amendment states: "Congress shall make no" but is otherwise obscured. *See Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 249 (1987) (statement of Judge Robert H. Bork). A judge ought to give the Constitution's text its full force, but of course, "one who tries guessing at what's underneath should be impeached." Sachs, *supra* note 11, at 805.

[42] Sachs, *supra* note 11, at 804.

[43] *See id.* at 804–05. In the case of the Borkian inkblot, Sachs argues that a court should entirely disregard the obscured provision. But such a choice would not limit Congress at all — "the one thing we know the enactors *didn't* mean to do!" *Id.* at 804.

[44] Statutes are typically upheld barring constitutional defect, so a court should not strike down a statute if its only defect is hidden. *Id.* at 806–07. However, in the Second Amendment context, when a regulated entity falls within the amendment's "plain text," the government must justify the regulation by producing affirmative evidence of a historical tradition consistent with it. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022). Thus, as laid out in *Bruen*, a court must strike down laws based on historical absence. *See id.* at 2135. Though *United States v. Rahimi*, 144 S. Ct. 1889 (2024), incorporates considerations of "the principles that underpin our regulatory tradition," *id.* at 1898, this analysis nonetheless continues to turn upon the need for an extant record.

[45] 433 U.S. 1 (1977), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991).

[46] *Id.* at 3–4. The agents had probable cause but lacked a warrant, consent to search, or any belief that exigent circumstances existed. *Id.*

[47] Brief for the United States at 25, *Chadwick*, 433 U.S. 1 (No. 75-1721).

[48] Brief for the Respondents at 25–26, *Chadwick*, 433 U.S. 1 (No. 75-1721).

[49] *Id.* at 27.

In deciding a warrant was required,[50] the Court expressed hesitancy regarding the value of silence while nonetheless drawing from it. Writing for the majority, Chief Justice Burger maligned historical silence, arguing it "tells us little about the Framers' attitude toward" the search at issue.[51] However, Chief Justice Burger simultaneously contended that even "if there is little evidence that the Framers intended the Warrant Clause to operate outside the home, there is no evidence . . . that they intended to exclude" all searches outside the home from its protections.[52] In doing so, the Court acknowledged both the potential value of historical absence and its significant flaws. Yet the Court ultimately turned to nonoriginalist reasoning for relief.[53] A Court more committed to the virtues of attempting originalism may have explored these arguments in greater depth.

Third, arguments from historical absence are an invaluable tool for judges who, in practice, must navigate uncertain originalist waters. Even though thousands of valuable sources are either unknowable or knowable but presently unknown, jurists must nonetheless dispose of the argument before them, relying upon historical absence to facilitate that pursuit.[54] The Ninth Circuit's recent decision in *Wolford v. Lopez*[55] highlights this practical necessity. *Wolford* concerned the contours of the "sensitive places" exception, assumed to be historically founded in *Bruen*,[56] as applied to over a dozen restrictions in Hawaii and California.[57] Ultimately, the court deemed many of the restrictions historically

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[50] *Chadwick*, 433 U.S. at 15–16.

[51] *Id.* at 8.

[52] *Id.*

[53] *See id.* at 9 (noting the Court "do[es] not write on a clean slate" and relying upon precedent).

[54] *See* Blocher & Ruben, *supra* note 18, at 156–57 (noting that the historical record "is replete with silences," *id.* at 156, and that "historians [may] have yet to uncover" extant on-point sources, *id.* at 157); *id.* at 158 (noting that historically "most regulation and enforcement [concerning weapons] was local," reducing the likelihood that evidence of these efforts has been preserved); *cf. National Archives by the Numbers*, NAT'L ARCHIVES (Mar. 6, 2026), https://www.archives.gov/about/info/national-archives-by-the-numbers [https://perma.cc/BH5J-PEF2] (highlighting the 13.5 billion pieces of paper stored in the Archives).

[55] 116 F.4th 959 (9th Cir. 2024), *cert. granted*, 146 S. Ct. 79 (2025).

[56] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022) (citing, inter alia, District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

[57] *See Wolford*, 116 F.4th at 971–72 (quoting HAW. REV. STAT. §§ 134-9.1, 134-9.5 (2023)) (identifying the "fifteen types of property" deemed sensitive places by Hawaii, *id.* at 971); *id.* at 973–75 (quoting CAL. PENAL CODE § 26230 (West 2023)) (identifying the "more than two dozen types of property" deemed sensitive places by California, *id.* at 973).

founded.[58] The court navigated this new terrain in part by embracing some arguments from historical absence.[59]

As *Wolford* and *United States v. Hemani*[60] now pend before the Court and the parties continue to push the limits of judicial capacity,[61] the need for practical tools to implement originalism has come to the fore. Courts have struggled to follow originalist premises.[62] In recognizing these limitations and facing ever-busy dockets, courts may believe arguments from historical absence are vital.

B. As Vice

Though historical absence may serve various needs, arguments relying upon it bring with them several issues. These issues are not entirely unique to arguments from historical absence,[63] but as arguments from historical absence are analytically distinct from other types of originalist evidence,[64] some degree of pause is warranted. Even if one accepts the theoretical value of historical absence, its practical limitations undercut its purported benefits.

Insufficient guidance regarding presumptive burdens currently permits inconsistent judicial decisionmaking.[65] Though judicial constraint may no longer be "the 'heart and soul' of originalism,"[66] the question of

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[58] *See id.* at 1002–03.

[59] The court distilled two relevant considerations. First, "if courts unanimously confirmed [analogous] laws as constitutional, that evidence . . . suggests that the laws were constitutional." *Id.* at 981. Second, the court asked "whether the constitutionality of the historical regulations was disputed." *Id.* This inquiry calls on states to deploy defensive arguments from historical absence — the lack of historical challenge supports constitutionality. *See id.*

[60] No. 24-40137, 2025 WL 354982 (5th Cir. Jan. 31, 2025) (per curiam), *cert. granted*, 146 S. Ct. 326 (2025). *Hemani* concerns an as-applied challenge to 18 U.S.C. § 922(g)(3), a statute criminalizing possession of a firearm while being an unlawful user of a controlled substance. *See id.* at *1 (citing 18 U.S.C. § 922(g)(3)). In response to the government's suggested analogue of vagrancy laws, Hemani has alleged that there is "no history or tradition [of] restricting firearms for vagrants." Brief in Opposition for Ali Hemani at 10, *Hemani*, 146 S. Ct. 326 (No. 24-1234).

[61] *See, e.g.*, Brief of Petitioners at 35, Wolford v. Lopez, 146 S. Ct. 79 (2025) (No. 24-1046) (arguing that "[t]here is no evidence" that a 1771 New Jersey law limiting firearm carriage on another's private property was "'ever enforced' against anyone who was neither a poacher nor a trespasser" (quoting *Bruen*, 142 S. Ct. at 2149 (2022))); Respondent's Brief at 30, *Wolford*, 146 S. Ct. 79 (No. 24-1046) (arguing that "[t]here is no evidence" that Founding-era restrictions on firearm carriage on private property were ever challenged despite three appellate courts having "considered challenges" to the restrictions).

[62] Blocher & Ruben, *supra* note 18, at 138 (arguing "[t]he early returns from post-*Bruen* cases" show that the required historical inquiry is difficult to manage).

[63] *Cf.* Sachs, *supra* note 11, at 793 (arguing originalism is "uncertain [in] the way that legal rules *in general* are uncertain").

[64] *See supra* notes 9–12 and accompanying text.

[65] *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 73–74 (2023).

[66] William Baude, Essay, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2217 (2017) (quoting Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011)).

when historical absence means anything at all remains unresolved.[67] As discussed, historical absence, when supported by a sufficient record, may be informative.[68] But parties may draw from identical sources and proffer opposed conclusions.[69] No decision procedure for evaluating arguments from historical absence requires consistency from jurists across decisions. The juxtaposition of the historical absence employed in *Dobbs v. Jackson Women's Health Organization*[70] and *Bruen* exemplifies this challenge. As Professor Jacob Charles notes, the Court employed "oscillating methods" across these cases, recognizing in *Dobbs* that the purported absence of restrictions on abortion before a certain period was not dispositive while holding in *Bruen* that "[i]f gun-related conduct was permitted in early American society, it was a legal right."[71]

Furthermore, the practical uncertainties of historical absence may undercut the values it supposedly serves. A higher court, presented with an argument from historical absence, may find such an argument dispositive and rest well, knowing it has ruled properly on the arguments before it.[72] However, a lower court later presented with clear and convincing evidence to the contrary is left adrift. The justifications for previous reliance upon historical silence may have vanished, but the precedent remains. If arguments from historical absence may justify decisions meriting stare decisis, the practical ramifications of these once-true arguments are significant. Insofar as originalism "asks questions of the past that the past cannot answer,"[73] similar concerns arise when one asks a question that the past can answer, just not on a court's schedule.

Finally, as showcased by *Citizens United v. FEC*,[74] unguided arguments from historical absence can undercut their own value, relegating themselves to rhetorical flair. *Citizens United* concerned a challenge to

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[67] *See* Charles, *supra* note 65, at 79 (arguing that *Bruen* has "inflate[d] judicial discretion at the same time it veils transparency").

[68] *See supra* notes 32–39 and accompanying text.

[69] *Compare* Brief for the United States, *supra* note 47, at 24 (citing TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 39, 41, 43 (1969)) (arguing "the historical record reflects no similar concern by the colonists" over improper searches of chattels outside the home), *with* Brief for the Respondents, *supra* note 48, at 27–28 (citing TAYLOR, *supra*, at 24–29, 28, 29, 39) (arguing that "true warrantless search . . . was a power rarely exercised" at the Founding, *id.* at 27).

[70] 142 S. Ct. 2228 (2022).

[71] Charles, *supra* note 65, at 74; *see Dobbs*, 142 S. Ct. at 2255; N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022). Enumeration of the right at issue in *Bruen* may explain some, but not all, of this difference. Other enumerated rights are not granted a similar thumb on the scale such that the absence of historical restrictions ends the inquiry. *See* Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 69–70 (2022) (comparing the Court's frameworks for analyzing First and Second Amendment challenges).

[72] *See, e.g.*, Reese v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 127 F.4th 583, 600 (5th Cir. 2025) (stating that "[t]he federal government has presented scant evidence" defending the laws at issue and holding them "unconstitutional in light of our Nation's historic tradition of firearm regulation"); Reply Brief of Plaintiffs-Appellants at 2, *Reese*, 127 F.4th 583 (No. 23-3003).

[73] Kelly, *supra* note 2, at 156.

[74] 558 U.S. 310 (2010).

the Bipartisan Campaign Reform Act of 2002[75] (BCRA) and its ban on independent expenditures on "electioneering communication[s]" in support of a candidate by corporations and unions.[76] Though the parties did not center originalist arguments,[77] Justices Stevens and Scalia debated whether the First Amendment's original understanding justified overruling *Austin v. Michigan Chamber of Commerce*,[78] overruling a portion of *McConnell v. FEC*,[79] and striking down a portion of the BCRA.[80]

In his dissent in relevant part,[81] Justice Stevens assailed the majority's "perfunctory attempt"[82] to base its decision in the First Amendment's original understanding, arguing "there [was] not a scintilla of evidence" that the Founders believed the First Amendment "would preclude regulatory distinctions based on the corporate form."[83] In his concurrence, written solely to "address Justice Stevens' discussion of '[o]riginal [u]nderstandings'" of the First Amendment,[84] Justice Scalia took issue with the burden of proof that Justice Stevens placed on Citizens United.[85] Justice Scalia instead implied that either the government or the dissent bore the burden of showing a regulation was consistent with the amendment's original meaning, arguing the dissent failed to

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[75] Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code).

[76] *Citizens United*, 558 U.S. at 320–21 (quoting 2 U.S.C. § 441b(b)(2) (2006), *invalidated by*, Citizens United v. FEC, 558 U.S. 310 (2010)).

[77] The issue received minimal briefing. *See* Brief for Appellant, *Citizens United*, 558 U.S. 310 (No. 08-205) (not briefing the original meaning or understanding of the First Amendment); Brief for the Appellee, *Citizens United*, 558 U.S. 310 (No. 08-205) (same); Reply Brief for Appellant, *Citizens United*, 558 U.S. 310 (No. 08-205) (same); Supplemental Brief for Appellant, *Citizens United*, 558 U.S. 310 (No. 08-205) (same); Supplemental Brief for the Appellee, *Citizens United*, 558 U.S. 310 (No. 08-205) (same); Supplemental Reply Brief for the Appellee, *Citizens United*, 558 U.S. 310 (No. 08-205) (same). Only one brief of amicus curiae raised the issue. *See* Brief Amicus Curiae of Center for Constitutional Jurisprudence in Support of Appellant at 2, *Citizens United*, 558 U.S. 310 (No. 08-205) (arguing that "there is no evidence that the First Amendment was originally understood to authorize Congress to prohibit speech related to an election based on" wealth, concentrated media power, or negative campaigning).

[78] 494 U.S. 652 (1990).

[79] 540 U.S. 93 (2003).

[80] *See Citizens United*, 558 U.S. at 364–65. *Compare id.* at 385–93 (Scalia, J., concurring) (arguing that the majority opinion "conform[ed] . . . with the original meaning of the First Amendment," *id.* at 392), *with id.* at 425–32 (Stevens, J., concurring in part and dissenting in part) (arguing that the Court "cannot be certain how a law such as [the BCRA] meshes with the original meaning of the First Amendment," *id.* at 432).

[81] Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, joined only Part IV of the majority opinion, which upheld the BCRA's disclaimer and disclosure provisions, *see id.* at 366–71 (majority opinion), and "emphatically dissent[ed] from its principal holding," *id.* at 396 (Stevens, J., concurring in part and dissenting in part).

[82] *Id.* at 425 (Stevens, J., concurring in part and dissenting in part).

[83] *Id.* at 426.

[84] *Id.* at 385 (Scalia, J., concurring) (emphasis omitted).

[85] *Id.* at 386.

"provide even an isolated statement from the founding era to the effect that corporations are *not* covered."[86]

Without a system articulating which party carried the burden of meaning-making, these diverging arguments neutralized one another. The Justices temporarily embraced a shared understanding of the proper standard but remained at an impasse.[87] Indeed, Justice Stevens expressly acknowledged Justice Scalia's concurrence while remaining resolute in his certainty that Citizens United bore the burden of proof.[88] Historical absence, without sufficient guidance, may serve as little more than a rhetorical tool.

II. CHARTING A PATH FORWARD

Having laid out the complexities inherent in arguments from historical absence, this Part aims to articulate a framework that properly balances the concerns they raise and their varied justifications. Judges, especially those facing Second Amendment challenges, have their work cut out for them. As such, this framework aims to emphasize the roles best played by judges and those best left to academics. Since *District of Columbia v. Heller*[89] first reshaped Second Amendment jurisprudence, many judges have embraced a division of labor sensitive to these diverging skillsets.[90] This framework further calls for judges to recognize the challenges innate in both strong and weak reliance upon originalist precedent.

To begin, higher courts must determine and more clearly state the conditions under which they assign value to historical silence. The probative value of silence is bound to vary in different areas of constitutional interpretation,[91] and no general framework can address all possible circumstances. However, higher courts have an obligation to litigants and lower courts to clarify what forms of silence are legally significant. Additionally, higher courts must more precisely articulate

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[86] *Id.* While Justice Scalia raised several challenges, he continually returned to this implied burden shifting. *See id.* at 389 (arguing Justice Stevens "offer[ed] no evidence" that the First Amendment "was originally understood to exclude such associational speech from its protection"); *id.* at 393 ("[T]he dissent offers no evidence about the original meaning of the text to support any such exclusion.").

[87] *Cf.* Oldham, *supra* note 3, at 161 (arguing that, without "God-like omniscience," the distinction between originalist standards and procedures "turns more" on procedure than standards of correctness (citing Sachs, *supra* note 11, at 787–88, 829–30)).

[88] Justice Stevens argued that "Justice Scalia adduce[d] no statements to suggest" that the Founders would read the First Amendment as protecting the speech rights of corporations and that his colleague failed to "dislodge[] [his] basic point" that the Founders "held a . . . narrow view of corporate rights." *Citizens United*, 558 U.S. at 430 (Stevens, J., concurring in part and dissenting in part).

[89] 554 U.S. 570 (2008).

[90] Andrew Willinger & Eric Ruben, *Judge–Scholar Collaboration and the Second Amendment*, 78 SMU L. REV. 397, 402–11 (2025).

[91] *See supra* note 44 and accompanying text.

the logic they employ. Within originalist frameworks, a given rule is only worthwhile insofar as it reflects a defensible historical interpretation. Higher courts must articulate the role, if any, that historical absence played in the disposition of the case. This articulation, paired with a clear statement regarding the level of generality employed, will facilitate precedential clarity. Lower courts, in turn, must be more open to challenges to existing precedent that erroneously relied upon historical absence. Originalism's implementation issues remain,[92] but these adjustments provide firmer footing for arguments from historical silence.

This framework is aimed at two interrelated vices. Arguments from historical absence, despite their place in originalist argumentation, suffer from acute challenges of indeterminacy and instability. Though stare decisis remains a guiding presumption,[93] courts must recognize these vices and be more amenable to scholarship challenging previous historical understandings. If reliance upon stare decisis is too strong, courts run the risk of building upon those understandings and exacerbating the error.[94] If reliance is too weak, originalism will fail to serve as "a workable prescription" — the error recognized at the outset of this Note.[95]

A. From Higher Courts, Precision

Higher courts must craft decisions able to stand the test of time. Rather than calling for the complete embrace or disregard of historical absence, this framework encourages higher courts to more clearly develop their theoretical premises. Courts must articulate the burden of proof to which they held the parties, the degree to which an argument from historical absence influenced a given decision, and the level of generality employed.

Courts must determine why certain forms of silence are meaningful and articulate who bears the burden of proof in determining that silence is probative. As seen in *Chadwick*, circumstances will arise in which both parties present arguments from historical absence,[96] and courts may approach this issue largely as they see fit so long as they remain

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[92] *See* Smith & Hiland, *supra* note 22, at 1065; Peruta v. County of San Diego, 742 F.3d 1144, 1155 n.6 (9th Cir. 2014) (noting courts "will inevitably miss some" historical precedents).

[93] *See* Richard H. Fallon, Jr., Essay, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 573 (2001).

[94] For example, scholarship may show that the Second Amendment's original meaning is more complicated than was recognized in *Heller*. *See* Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, HARV. L. REV. BLOG (Aug. 7, 2018), https://harvardlawreview.org/blog/2018/08/corpus-linguistics-and-the-second-amendment [https://perma.cc/M7V4-L746].

[95] Scalia, *supra* note 3, at 139; *see also* Smith & Hiland, *supra* note 22, at 1065 ("[O]riginalism is difficult, if not impossible, to implement . . . .").

[96] *See supra* pp. 1924–25.

faithful to vertical stare decisis.[97] Take, for example, Fourth Amendment jurisprudence. Though originalists have staked an initial interpretive view on Fourth Amendment originalism,[98] courts may face offensive[99] and defensive[100] arguments from historical absence, and no precedent requires consistent interpretive methods. As critics contend that originalism fails to serve as a neutral school of interpretation,[101] judges implementing originalism carry a heavy burden. Burdens of proof may themselves be destiny,[102] so courts hoping to follow through on their obligations must work to determine why and how silence matters.

Having defined which party bears the burden of meaning-making, courts must then internally determine the silence's significance. This significance may take two forms. Arguments from historical absence may have a contributory effect (that is, if the prevailing party had not argued from historical absence, the case's outcome would be unchanged), as was exemplified in *Citizens United*.[103] In such circumstances, later historical challenges need not affect a decision's precedential value, as lower courts would continue treating the decision's nonhistorical reasoning as precedential despite error in the decision's historical analysis. Or arguments from historical absence may have a dispositive effect (that is, if the prevailing party had not argued from historical absence, the case would have been decided differently), as has been seen in much of the modern Second Amendment regime.[104] While historical absence may contribute to erroneous decisions without

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[97] The Court has resolved this issue in the Second Amendment context. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2135 (2022) (noting New York bore the burden of "show[ing] that [its] proper-cause requirement [was] consistent with this Nation's historical tradition of firearm regulation").

[98] *See* Wyoming v. Houghton, 526 U.S. 295, 299 (1999) (calling for courts to "inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed").

[99] *See, e.g.*, Brief of *Amicus Curiae* Fourth Amendment Historians in Support of Respondent at 7–8, United States v. Jones, 565 U.S. 400 (2012) (No. 10-1259) (arguing that "[t]here were no circumstances in which the common law tolerated" any analogous government action as was at issue in *Jones*).

[100] *See, e.g.*, Reed Sawyers, *For Geofences: An Originalist Approach to the Fourth Amendment*, 29 GEO. MASON L. REV. 787, 800 (2022) (arguing that a government practice must have been "constitutionally prohibited at the Founding" to warrant judicial intervention).

[101] *See, e.g.*, sources cited *supra* note 27; Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism — And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1158 (2023) (arguing that "[o]riginalism developed in significant part in an effort to legitimate the screening of judges" rather than as a neutral form of constitutional interpretation).

[102] *Cf.* Thomas More L. Ctr. v. Obama, 651 F.3d 529, 560 (6th Cir. 2011) (Sutton, J., concurring in part) ("Level of generality is destiny in interpretive disputes . . . .").

[103] *See* Citizens United v. FEC, 558 U.S. 310, 341 (2010). The Court noted at the outset that "[b]oth history and logic" supported its ruling. *Id.* While a theoretical extensive alternative history may have been persuasive, *Citizens United* was not decided on historical grounds.

[104] *See supra* note 44; Wolford v. Lopez, 116 F.4th 959, 981 (9th Cir. 2024) (noting the States were expected to "show a historical tradition" through reference to Founding-era regulations).

being dispositive, judges will more readily be able to determine that precedent should be adjusted in dispositive cases.

Relatedly, jurists must state the level of generality employed to judge particular analogies. This issue is both significant and challenging for tradition-based approaches to constitutional interpretation.[105] For example, a court faced with a modern law disarming domestic abusers would not find a historical analogue at a narrow level of generality.[106] However, by expanding the inquiry to include laws regulating those who are "dangerous or unvirtuous," this issue vanishes.[107] This challenge is particularly significant for arguments from historical absence. Despite the Court's attempted intervention,[108] courts may pick and choose the generality they employ without due care. What is first alleged to be silence may, upon review, simply be a particularly narrow level of generality. This Note does not purport to solve this issue, but it calls for courts to be more forthcoming regarding the standards they employ.

Wolford provides an imperfect but informative example. There, California and Hawaii attempted to defend their bans on firearm carriage in banks by analogizing to Founding-era laws concerning "'Fairs' and 'Markets,'" as well as regulations of firearms in governmental buildings.[109] In rejecting this argument, the court highlighted the dissimilar characteristics: Fairs and markets tend to be "dynamic" and "congested," not sufficiently "analogous to a trip to a bank to deposit a check."[110] Furthermore, accepting the constitutionality of a ban on firearms in governmental buildings, the analogy failed "because financial institutions generally are privately owned and operated and . . . serve a . . . nongovernmental purpose."[111] While there are certainly worse cases of uncertainty following *Bruen*,[112] the *Wolford* court left unstated the appropriate level of generality. Though fairs and markets are dissimilar

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105 Blocher & Ruben, *supra* note 18, at 162.

106 *See* Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders*, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION 131, 132 (Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller eds., 2023).

107 *Id.* at 135. Had the Court in *Bruen*, for example, adopted a narrow level of generality, the case may have been decided differently. Blocher & Ruben, *supra* note 18, at 163–64.

108 United States v. Rahimi, 144 S. Ct. 1889, 1903 (2024) (holding that the Fifth Circuit improperly sought "a 'historical twin'" for the regulation at issue (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022))).

109 Reply Brief of Defendant-Appellant Anne E. Lopez at 24–26, *Wolford*, 116 F.4th 959 (Nos. 23-16164, 23-4354 & 23-4356).

110 *Wolford*, 116 F.4th at 999.

111 *Id.*

112 Consider the litigation regarding "a New York regulation barring guns from various places including behavioral-health centers, playgrounds, nursery schools, and homeless shelters" and the three contradictory opinions it produced. Blocher & Ruben, *supra* note 18, at 139; *see id.* at 139–41 (citing Antonyuk v. Bruen, 624 F. Supp. 3d 210 (N.D.N.Y. 2022); Antonyuk v. Hochul, 635 F. Supp. 3d 111 (N.D.N.Y. 2022); Antonyuk v. Hochul, 639 F. Supp. 3d 232 (N.D.N.Y. 2022)). With each redetermination, the court seemingly shifted the standards to which New York's restrictions were held, causing some restrictions to be deemed constitutional in one opinion and unconstitutional in the next. *Id.* at 140–41.

because they contain "commercial, political, and social elements,"[113] any extrapolation from these negatives ultimately relies upon contestable inference. A decision structure requiring the court to more clearly lay out its analysis may provide a necessary guide to lower courts navigating evidence that may one day be persuasive.

B. From Lower Courts, Action

Having created a system that encourages clearer higher court analysis, this Note calls for lower courts to embrace an adjusted originalist role: serving as the first engagement point for challenges to previously dispositive arguments from historical absence. While this requires aggressive lower court action, the analytical framework discussed above may limit the screening required. Regardless, in a system that relies upon historical absence to justify historical conclusions, lower courts will inevitably face litigants that purport to challenge the bases of originalist precedent.

The fundamental challenge for district courts concerns the balance between vertical stare decisis and the need to correct historical inaccuracies. Vertical stare decisis, despite questions raised regarding its horizontal counterpart,[114] typically garners strong support,[115] creating a tension for lower courts within originalism. If one takes originalist thought seriously, lower courts may be bound to apply precedent that, based on the evidence before them, seems clearly erroneous.[116] No procedure currently allows lower courts to take part in addressing this problem.

Rather than calling for a fundamental reimagining of the judicial role, this framework opts for the systemic embrace of a practice courts already pursue: narrowing from below to encourage appellate review. As defined by Professor Richard Re, narrowing from below occurs when lower courts "interpret[] [precedent] not to apply, even though [they] think that the precedent is best read to apply."[117] While unambiguous

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[113] *Wolford*, 116 F.4th at 999.

[114] *See* Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 392 (2007) (arguing that, empirically, "in the Supreme Court, there exists no strong norm of stare decisis").

[115] *See* Curtis Bradley & Tara Leigh Grove, *Disfavored Supreme Court Precedent in the Lower Federal Courts*, 111 VA. L. REV. 1353, 1362 & n.27 (2025) (noting that "both judges and commentators often describe vertical stare decisis, unlike horizontal stare decisis, as absolute," *id.* at 1362, and collecting sources, *id.* n.27).

[116] This issue is not entirely dissimilar to that which lower court originalists face when bound by "nonoriginalist Supreme Court precedent." Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J.L. & PUB. POL'Y 257, 288 (2022). However, where lower court originalists may find nonoriginalist precedent indefensible, that tension is one of methodology. Here, a lower court may be bound by originalist precedent, believe the methodology is correct, and nonetheless believe the precedent is unjustifiable. This is especially salient for historical absence, as it invites greater uncertainty than a concrete, even if incomplete, historical record.

[117] Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 923 (2016).

precedent forecloses the practice,[118] "provocative narrowing" — narrowing from below intended to "provoke higher court review" — allows lower courts to play a more active role.[119] Though the "legitimacy" of provocative narrowing is contestable in other contexts,[120] it is a solution particularly well suited to address precedential arguments from historical absence.

The oft-cited stare decisis factors,[121] insofar as they continue to carry weight,[122] are a poor fit for the issue of erroneous claims of historical absence. At first blush, it is not apparent that historical absence warrants future deference at all.[123] Even accepting some degree of deference, however, it must be limited. If deference is strong, it may invite lower courts to build upon erroneous precedent and exacerbate the harm. By contrast, properly qualified narrowing from below invites lower courts to raise potential concerns while remaining true to vertical stare decisis.

Provocative narrowing of holdings based on historical absence is appropriate when four conditions are met. First, a given precedent must be legitimately and reasonably narrowed, even if that narrowing is not necessarily its best reading. The requirements of judicial candor in the realm of precedent are nuanced.[124] However, improperly distinguishing otherwise on-point precedent is inappropriate.[125] Second, the case at hand must concern precedent that embraced a dispositive argument from historical absence. As noted, arguments from historical absence may raise varying levels of concern, and not all precedent may be narrowed on this ground.[126] Third, this evidence must comport with the

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[118] *Id.* at 937.

[119] *Id.* at 956. Note, though, that provocative narrowing is distinct from "anticipatory overruling." *Id.* at 941. Anticipatory overruling by lower courts is a more aggressive move, requiring "strong evidence" that the reviewing appellate court will be similarly persuaded. *Id.* at 942.

[120] *Id.* at 960.

[121] In short, whether (1) a precedent is "unworkable," (2) it has garnered substantial reliance interests, (3) the law has evolved such that the precedent has become an "anachronism," and (4) its factual premises have changed. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[122] *See Dobbs*, 142 S. Ct. at 2266 (calling the *Casey* Court's stare decisis analysis "exceptional").

[123] *Cf.* Allison Orr Larsen, *Is History Precedent?*, 78 STAN. L. REV. 365, 369–70 (2026) (cataloguing types of historical evidence that do and do not warrant future deference).

[124] *Cf.* David L. Shapiro, Essay, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 734 (1987) (highlighting various ways in which a judge may approach precedent, from the "jaded" belief that precedent may always be distinguished to the belief that certain precedent may not be distinguished "with fair argument").

[125] For example, a lower court could not in good faith distinguish *Bruen* if New York were to pass a law identical to that struck down. Though a lower court may legitimately believe this new evidence would persuade the Court to reconsider *Bruen*, farcical narrowing is inappropriate. *See id.* ("[T]here are times when a precedent cannot be distinguished away even under the narrowest approach consistent with fair argument . . . .").

[126] *See supra* p. 1931; *cf.* Re, *supra* note 117, at 959–60 (discussing the Montana Supreme Court's provocative narrowing of *Citizens United*, and its eventual reversal, in W. Tradition P'ship, Inc. v. Att'y Gen., 271 P.3d 1 (Mont. 2011), *rev'd per curiam sub nom.*, Am. Tradition P'ship, Inc. v. Bullock, 567 U.S. 516 (2012)).

precedent's stated level of generality. Though new evidence may be presented, courts should not be led astray by insufficiently analogous evidence. Finally, out of an abundance of caution, courts should engage in provocative narrowing only in cases of substantial evidence. In the Second Amendment context, the Court has similarly required more than a "little evidence,"[127] and a presumption in favor of precedential vitality limits potential disruption. Historical absence may, theoretically, be mooted by individual pieces of evidence, but aggressive review of this nature is likely to be unworkable.

Still, questions of reliance and judicial inconsistency abound. As Professors Michael Smith and Alexander Hiland argue, one of originalism's greatest faults is that it may invite changes to the law "with each generational update of the major corpus linguistics databases."[128] Smith and Hiland are correct: "Predictability and stability" necessarily suffer when historical understandings change.[129] However, by limiting provocative narrowing to circumstances in which these four conditions are met, some concerns are ameliorated. Rather than inviting courts to overturn precedent without adequate justification, akin to flipping an originalist switch, this framework more closely resembles a one-way ratchet. Barring situations of outright academic fabrication,[130] definitive proof of analogous sources will displace the previous historical absence and, with it, a decision's justification. This will invite some precedential disturbance, but such a problem is innate in originalist implementation.

III. APPLYING THE FRAMEWORK

This Note's pursuits have thus far been largely academic. Having shown that arguments from historical absence have already found a place in constitutional interpretation and articulated a guiding framework, this Part showcases how this framework may guide judicial decisionmaking.

A. Range v. Attorney General United States *and Higher Court Precision*

Range v. Attorney General United States[131] (*Range II*) showcases the challenges embedded in guideless higher court decisionmaking. There, the court faced an as-applied challenge to 18 U.S.C. § 922(g)(1),[132] a

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127 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2142 (2022).

128 Smith & Hiland, *supra* note 22, at 1111.

129 *Id.*

130 *E.g.*, James Lindgren, *Fall from Grace:* Arming America *and the Bellesiles Scandal*, 111 YALE L.J. 2195, 2229 (2002) (reviewing MICHAEL A. BELLESILES, ARMING AMERICA (2000)) ("Nearly every sentence that Bellesiles wrote about probate records in the original hardback edition of *Arming America* is false.").

131 124 F.4th 218 (3d Cir. 2024).

132 *See id.* at 223.

"life-long prohibition" of firearm ownership for individuals convicted of a crime punishable by imprisonment for a term exceeding one year.[133] In granting Range's as-applied challenge on Second Amendment grounds, the court clearly stated the relevant factors warranting the exception.[134] The *Range II* court and courts facing Second Amendment challenges have a slightly easier task, as the Court in *Bruen* articulated the presumptive analytical burdens and the dispositive effect of historical absence.[135] As such, courts must primarily engage with the level of generality challenge, clarifying the standards to which they hold litigants.

By focusing primarily on the insufficiency of the evidence before it, the *Range II* court fell short of this obligation. The court held that three forms of evidence were inadequate. First, evidence concerning limitations on firearm ownership for certain classes of Americans was unpersuasive, as these regulations either would now violate other constitutional provisions (such as those "based on race and religion") or were based on "reasonabl[e] fear[]" of armed rebellion (such as colonists' fear of an uprising of British Loyalists).[136] Second, evidence of dissimilar punishment — say, "the Founding-era practice of punishing some nonviolent crimes with death" — was insufficient.[137] Third, evidence of Founding-era disarmament was unconvincing, as it required only that the felon "forfeit[] . . . the specific weapon used" in the crime "without affecting the perpetrator's right to keep and bear arms generally."[138] This articulation leaves future jurists to wonder what may have moved the analytical needle.

This Note's framework does not require the *Range II* court to have envisioned all potentially persuasive alternative evidence. However, it would encourage the court to articulate the *kinds* of evidence that may have been sufficiently persuasive.[139] Whether it be permanent restrictions on property ownership for minor offenses or restrictions that affected an individual beyond the enforcement necessary to redress the particular crime alleged, the court failed to articulate more clearly the level of generality it employed.

Higher courts will likely find aspects of this exercise challenging. However, those challenges undergird a system that recognizes gaps in knowledge without elevating those gaps beyond necessity. The *Range*

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[133] United States v. Rahimi, 144 S. Ct. 1889, 1931 (2024) (Thomas, J., dissenting); *see* 18 U.S.C. § 922(g)(1).

[134] *Range II*, 124 F.4th at 232.

[135] *See supra* note 44.

[136] *Range II*, 124 F.4th at 229–30.

[137] *Id.* at 231.

[138] *Id.*

[139] Simply articulating the inverse of the insufficient evidence would be similarly inadequate. For example, the court may not have said it would be persuaded by evidence of constitutional regulations that limited firearm ownership without reasonable fear of rebellion.

II court has enshrined historical absence into law for an indeterminate future, with lower courts being told of only three kinds of insufficient evidence. Rather than permitting this uncertainty, this Note's framework would have required more work from the court in the first instance.

B. A Play on Duncan v. Bonta *and Lower Court Action*

Duncan v. Bonta[140] highlights the need for lower court engagement. Decided mere months before *Bruen*, *Duncan* concerned a challenge to California Penal Code § 32310,[141] which prohibits possession of magazines able to hold more than ten rounds of ammunition.[142] As Professor Allison Orr Larsen notes, the majority "mostly avoid[ed] history-and-tradition analysis."[143] However, writing in dissent and joined by two judges, Judge Bumatay drew heavily from history, emphasizing that there were "no longstanding prohibitions against" "[f]irearms and magazines capable of firing more than ten rounds."[144] Though Judge Bumatay's view has yet to win the day, it has caught the attention of at least one jurist outside the Ninth Circuit.[145]

As Larsen notes, though, Professor Robert Spitzer has complicated Judge Bumatay's view.[146] Writing two years after *Duncan*, Spitzer argues that this historical silence was meaningless, as "available, affordable, [and] reliable multi-shot firearm[s]" did not exist until the "multi-shot revolver" in the 1830s.[147] Rather, the historical record suggests that any earlier multi-shot firearms were exceedingly uncommon or never actually produced.[148]

Suppose that Judge Bumatay had won the day — a not-implausible possibility considering the majority's avoidance of history and tradition.[149] If California then attempts to defend new legislation limiting access to large-capacity magazines by drawing from Spitzer's work, lower courts must turn to the framework. Assuming its four factors are met, the lower court may permissibly limit *Duncan*'s applicability. *Duncan* itself invites various possibilities: The statute at issue criminalized receipt, purchase, and possession of large-capacity magazines; it lacked a grandfather clause; and it left Californians with relatively few paths

[140] 19 F.4th 1087 (9th Cir. 2021), *vacated*, 49 F.4th 1228 (9th Cir. 2022).
[141] CAL. PENAL CODE § 32310 (West 2021).
[142] *Duncan*, 19 F.4th at 1095; *see* CAL. PENAL CODE §§ 16740, 32310(c) (West 2021).
[143] Larsen, *supra* note 123, at 389.
[144] *Duncan*, 19 F.4th at 1140 (Bumatay, J., dissenting).
[145] *See* Hanson v. District of Columbia, 120 F.4th 223, 270 n.176 (D.C. Cir. 2024) (Walker, J., dissenting).
[146] *See* Larsen, *supra* note 123, at 390.
[147] Robert J. Spitzer, *Understanding Gun Law History After* Bruen*: Moving Forward by Looking Back*, 51 FORDHAM URB. L.J. 57, 79 (2023).
[148] *Id.* at 72–84.
[149] *See Duncan*, 19 F.4th at 1103.

forward.[150] Though California could not defend an otherwise identical statute, this framework invites lower court action in the face of persuasive historical evidence.

CONCLUSION

Originalism's implementation issues remain difficult to resolve. Arguments from historical absence, both necessary and perilous for originalist interpretation, embody many of these concerns. Questions of stare decisis, levels of generality, and burdens of proof abound, and they do not have easy answers. This Note calls for courts to be forthcoming about the standards to which they hold litigants when historical absence is employed: Courts must articulate what matters, why it matters, and whom they expect to carry a given burden.

The proposed framework calls for modest developments in judicial reasoning. Though it may bring with it certain pitfalls, a framework that recognizes the limitations innate in the disposition of a case on a truncated timeline may nonetheless be worthwhile. As it stands, the current system of ad hoc analysis will not be able to withstand future developments in historical understanding. Accepting that originalism is premised upon accuracy to a moment in time, courts may only pursue such a goal through procedures that recognize the knowledge we lack.

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[150] *See id.* at 1141 (Bumatay, J., dissenting).