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HISTORICAL ANALOGY AND THE ROLE MORALITY OF REASON-GIVING

DARRELL A.H. MILLER†

ABSTRACT

The Supreme Court has turned ever more to analogical reasoning from history and tradition to decide significant matters of public policy. Nowhere is this phenomenon more evident than in the Court's 2022 decision in New York State Rifle and Pistol Association v. Bruen*.*

The Court's crafting of a Second Amendment test that turns almost entirely on the strength of analogies—and on a topic of such intense public salience—has thrust analogical reasoning to the forefront of judicial and academic debate. While many have questioned the workability of Bruen*'s focus on historical analogs, this Essay is less concerned about the pragmatics of* Bruen *and more focused on the ethical implications of this type of reasoning. In sum, if the Supreme Court is going to decide constitutional cases through historical analogies, it should do so in a way that is functional as law and is intelligible to the three hundred million people for whom it rules.*

After outlining the role morality of reason-giving by judicial officers in our system of judicial review, this Essay provides an overview of the psychology of reasoning by analogy by both lawyers and lay persons and the role of generality, systematicity, and rules of relevance in constructing such analogies.

It then identifies three hazards confronting courts attempting to apply Bruen*'s analogical method: reliance on surface rather than*

† Melvin G. Shimm Professor of Law, Duke Law School. Thanks to Joseph Blocher, Maggie Lemos, Neil Siegel and Andrew Willinger for reviewing this Essay and for their helpful comments. Thanks to the editors of the *Duke Law Journal Online* for their work and for the opportunity to publish.

structural similarities; analogs that lack any stable or discernable rule of relevance; and finally, use of analogs so unmoored from public intuition and experience that they appear unreasonable or contrived.

Using Second Amendment litigation as an example, the Essay concludes by showing how the Court can articulate a system of analogical reasoning from history and tradition that avoids these pitfalls and is consonant with the role morality of judicial officers who must offer intelligible legal reasons for their decisions.

INTRODUCTION

The Supreme Court has turned ever more to analogical reasoning from history and tradition to decide significant matters of public policy. Nowhere is this phenomenon more evident than in the Court's 2022 decision in *New York State Rifle and Pistol Association v. Bruen*.[1]

In *Bruen*, the Court abandoned the conventional scope-and-tailoring approach to decide Second Amendment cases in favor of a new approach focused almost entirely on text, tradition, and analogical reasoning therefrom. Justice Clarence Thomas, writing for the majority, stated the new test this way: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[2]

Of course, the Court recognized, not every modern regulation will have a historical equivalent: "[w]hen confronting . . . present-day firearm regulations, this historical inquiry . . . will often involve reasoning by analogy—a commonplace task for any lawyer or judge."[3] And, "[l]ike all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'"[4] The Court declined to specify all the features that make two regulations "relevantly similar" although the court did point to "two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense."[5]

1. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).
2. *Bruen*, 597 U.S. at 24.
3. *Id.* at 28.
4. *Id.* at 28–29.
5. *Id.* at 29.

The Court's crafting of a Second Amendment test that turns almost entirely on the strength of analogies—and on a topic of such intense public salience—has thrust analogical reasoning to the forefront of judicial and academic debate.[6]

While many commentators,[7] lower court judges,[8] and even some Justices[9] have questioned the workability of *Bruen*'s new focus on historical analogs, this Essay is less concerned about the pragmatics of *Bruen* and more focused on the ethical implications of this type of reasoning in Second Amendment cases[10] and elsewhere.[11] In sum, if the

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6. *See*, *e.g.*, Frederick Schauer & Barbara A. Spellman, *Guns, Analogies, and Constitutional Interpretation Across Centuries*, 100 NOTRE DAME L. REV. (forthcoming 2024), https://papers.ssrn.com/abstract_id=4676643 [https://perma.cc/9UBA-WCU8]; Brannon P. Denning & Glenn H. Reynolds, *Retconning* Heller*: Five Takes on* New York State Rifle & Pistol Association, Inc. v. Bruen, 65 WM. & MARY L. REV. 79, 106 (2023).

7. *See, e.g.*, Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 105 (2023) [hereinafter Blocher & Ruben, *Originalism-by-Analogy*]; Jacob D. Charles, *The Dead Hand of A Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 71 (2023) [hereinafter Charles, *The Dead Hand of a Silent Past*]; Patrick J. Charles, *The Fugazi Second Amendment:* Bruen*'s Text, History, and Tradition Problem and How To Fix It*, 71 CLEV. ST. L. REV. 623, 624 (2023); Nelson Lund, Bruen*'s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279, 306 (2022).

8. *See* Atkinson v. Garland, 70 F.4th 1018, 1024 (7th Cir. 2023) ("[T]he historical analysis required by *Bruen* will be difficult and no doubt yield some measure of indeterminacy."); *id.* at 1029 (Wood, J., dissenting) (noting that with *Bruen* "[w]e are left with something not much better than the Goldilocks solution: history can't be viewed too specifically, and it can't be viewed too generally. It must be, like the bed, the chair, or the porridge, 'just right.'" (citing Jacob Charles, Bruen*, Analogies, and the Quest for Goldilocks History*, DUKE CTR. FOR FIREARMS L. BLOG (June 28, 2022), https://firearmslaw.duke.edu/2022/06/bruen-analogies-and-the-quest-for-goldilocks-history [https://perma.cc/6NA6-HZUB]); United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *25 (S.D. Miss. June 28, 2023) ("The new standard [in *Bruen*] has no accepted rules for what counts as evidence."); United States v. Charles, 633 F. Supp. 3d 874, 885 (W.D. Tex. 2022) (expressing concern that "the same regulation gets different results based on how adept at historical research the Government's attorneys are in a particular location or the time they have to devote to the task"); *see also* Judge Jed Rakoff, *Acknowledgement*, 80 N.Y.U. ANN. SURV. AM. L. 19, 20 (2023).

9. Transcript of Oral Argument at 16–17, United States v. Rahimi, No. 22-915 (2023) (stating that "I'm just trying to understand how the *Bruen* test works" in the context of a prohibition on guns possessed by those under a domestic violence restraining order) (Jackson, J.); *id.* at 38 ("[T]here seems to be a fair bit of division and a fair bit of confusion about what *Bruen* means and what *Bruen* requires in the lower courts.") (Kagan, J.).

10. The political realities of Supreme Court staffing and personnel indicate that *Bruen* is not going to be overturned, and the historical analog approach—at least in its core formulation—is here to stay. But if it is here to stay, then there is a least-worst version of the approach that's possible, and this Essay aims to explore what that version looks like.

11. It is possible that the methodology described in *Bruen* will not stay confined to Second Amendment cases. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 370 n.1 (2022) (citing *Bruen* as a potential "rejection of the idea of balancing interests in this (or maybe in any) constitutional context") (Breyer, J.; Kagan, J.; Sotomayor, J., dissenting); TransUnion LLC v.

Supreme Court is going to decide constitutional cases through historical analogies, it should do so in a way that is functional as law and is intelligible to the three hundred million people for whom it rules. This short Essay explains why and suggests how that may be accomplished.

Part I discusses the role morality of reason-giving by judicial officers in our system of judicial review. Part II provides an overview of the psychology of reasoning by analogy by both lawyers and lay persons and the role of generality, systematicity, and rules of relevance in constructing such analogies. Part III identifies cases in which courts applying the *Bruen* test have struggled to articulate their reasons in a way that comports with the principle that opinions must be both sufficiently general to operate as law and also accessible to the public. Using Second Amendment litigation as an example, it then explains how the Court can articulate a system of analogical reasoning from history and tradition that is consonant with the role morality of judicial officers who must offer intelligible legal reasons for their decisions.

I. THE ROLE MORALITY OF JUDICIAL REASON-GIVING[12]

If the Hamiltonian chestnut is true, judicial decisions are authoritative because of their reasoning.[13] Certainly, judges can (and sometimes do) exercise raw power; but when deciding cases, it is usually not thought morally (or perhaps even legally[14]) sufficient for

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Ramirez, 594 U.S. 413, 424 (2021) (looking for "concreteness" of injury for Article III by reference to whether "plaintiffs have identified a close historical or common-law analogue for their asserted injury"); Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After* Bruen, 18 DUKE J. CONST. L. & PUB. POL'Y 59, 88–94 (2023) (discussing history, tradition and analogy approach in First Amendment cases).

12. Role morality is a broad field of politics and ethics. Even the word "role" is a bit indeterminate. Still, it's widely recognized that occupants of different roles—professor, doctor, parent, mentor—adhere to distinct norms and comply to distinct moral obligations simply by occupying that role. *See* Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 294 (2023). On the topic of judicial role morality in particular, see generally Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109, 118–25 (2018) (describing ongoing "[d]ebates over judicial role").

13. *See* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The judiciary . . . has no influence over either the sword or the purse . . . and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . . .").

14. *See* Harris v. Rivera, 454 U.S. 339, 344 (1981) ("Although there are occasions when an explanation of the reasons for a decision may be required by the demands of due process, such occasions are the exception rather than the rule."); *Cf.* Stafford v. Neurological Med., Inc., 811 F.2d 470, 474 (8th Cir. 1987) ("With this authority [to set aside a jury verdict] comes the need to

judges to justify a decision solely by dint of their judicial commission.[15] Rather, it's incumbent upon judges to offer what the legal process school described as "reasoned elaboration."[16] Judicial reason-giving is what distinguishes a society founded upon law as an exercise in public reason[17] from those "totalitarian regimes where law [is] synonymous with the fiats of officials."[18]

A necessary condition of judicial legitimacy, then, is that the judicial officer support her decision with reasons.[19] Having reasons establishes that the decision is grounded in the legal arguments of the litigants and not the product of will or chance.[20] Parties voluntarily submit their disputes to a judicial process assuming that it's more legitimate than a lottery or despotism.[21] Those subjected to involuntary

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give reasons. A district court does not properly exercise its discretionary authority when it fails to articulate the analysis utilized to justify upsetting a jury's verdict.").

15. It is for this reason that Justice William Brennan's remark that "[f]ive votes can do anything around here" is often seen as particularly stark. *See* H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 16 (2008) (quoting JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 54 (1995)). Relatedly, judges publicly renounce "logrolling" or vote-trading across different cases, suggesting a strong norm against naked power politics in judicial decision-making. *See* F. Andrew Hessick & Jathan P. McLaughlin, *Judicial Logrolling*, 65 FLA. L. REV. 443, 445 (2013) ("Judges and scholars have almost uniformly condemned the practice, and judges have insisted that vote trading does not occur."); *see also* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review*?, 101 YALE L.J. 31, 106 (1991) ("[U]nder prevailing ethical norms judges cannot engage in the sort of logrolling that legislators commonly employ.").

16. Lonny Sheinkopf Hoffman, *A Window into the Courts: Legal Process and the 2000 Presidential Election*, 95 NW. U. L. REV. 1533, 1559 (2001) (reviewing SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 (2001)) ("'Reasoned elaboration' means an insistence that judges justify their decision through analysis of the existing precedents and legal authorities, supported by reason, and set forth in writing.").

17. John Rawls described "public reason" as "ways of reasoning and inference appropriate to fundamental political questions . . . by appealing to beliefs, grounds, and political values it is reasonable for others also to acknowledge." JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 27 (2003). Rawls continues that justification based on public reason is not just "valid argument[s] from given premises," but depends upon shared premises that all have endorsed after a process of reflection. *Id*.

18. G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 285–86 (1973).

19. *See* Ruth Bader Ginsburg, *The Obligation To Reason Why*, 37 FLA. L. REV. 205, 221 (1985) ("A judgement expressing no reasons presents the appearance of arbitrariness."); *see also* Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 999 (2008) (stating the proposition as "[a]djudication is legitimate only if judges have sufficient reasons to justify their legal decisions").

20. Schwartzman, *supra* note 19, at 1002.

21. *Id.* ("If for whatever reason the parties preferred an arbitrary solution, adjudication would not be necessary. They could simply select a random decision procedure to resolve their dispute.").

adjudication, as in the area of criminal law, have even more cause to want their fate decided as a matter of reason and not power or fortune.[22]

Relatedly, "the principle of legal justification" means that judicial officers "act legitimately only if they have reasons that those subject to them can, in principle, understand and accept."[23] This reflects a basic respect for the agency of those governed by the judicial decision; failure to supply a reason for a decision is to forsake the basic consent model of liberal democracies.[24] "Giving reasons," then "[is] a sign of respect."[25]

The American practice of federal judicial review, which empowers unelected and life-appointed officers to thwart the will of democratically accountable majorities, makes the reason-giving norms of judicial behavior all the more imperative.[26] The Justices write with the assumption that their decrees will be obeyed on the basis of consent rather than coercion. A judicial decision nullifying duly enacted legislation that amounted to no more than a naked assertion of judicial supremacy places the third branch in a dangerously exposed political position.[27] A decision whose reasoning is so convoluted or recondite as to be unintelligible may not provide much better cover.[28]

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22. *Id.* at 1003 ("When the parties have not chosen to settle their dispute by adjudication, the imposition of a decision without reason is a form of oppression.").

23. *Id.* at 1004.

24. *Id.*

25. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 658 (1995).

26. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995) ("[M]odern judges write opinions . . . to reinforce our oft-challenged and arguably shaky authority to tell others—including our duly elected political leaders—what to do."); *see also* Ray Forrester, *Supreme Court Opinions - Style and Substance: An Appeal for Reform*, 47 HASTINGS L.J. 167, 173 (1995) ("Within our system of judicial supremacy, written opinions become the judicial concession to democracy—to the exercise of elitist power over a mass of consenting subjects."); *see also* POWELL, *supra* note 15, at 84 ("The very purpose of the written Constitution, in other words, is to supply rules of law that we can make sense of cognitively.").

27. *See, e.g.*, Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 866 (1992) ("[T]he Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.") *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

28. *Cf.* LON L. FULLER, THE MORALITY OF LAW 36 (rev. ed. 1969) (describing a situation where lawmaking can fail because the law couldn't be understood "by an ordinary citizen or by a trained lawyer").

One need not accept judges as fiduciaries[29] to recognize that in our system of judicial review, published, public, intelligible decisions help narrow the gap between the people and politically insulated elites.[30] Consequently, especially—although not exclusively—in those cases where deeply contested matters of public law and public policy are at issue, decisions intelligible only to a small cadre of lawyers and government bureaucrats do little to instill confidence that the judicial branch is issuing decisions in the name of "the people."[31]

Finally, in a common law system like ours, a judicial decision resolves the dispute between the parties but also becomes the public good of precedent.[32] As Professor Fred Schauer has observed, giving reasons in a common law system is not only about the present; it is also about the future. "To provide a reason in a particular case is . . . to transcend the very particularity of that case." [33] In giving a reason for a decision, the reason offered must be at a level of generality that "encompass[es] at least one result other than the one that prompted giving the reason in the first place."[34] Decisions supported by reasons that cannot be generalized to any other circumstance have a whiff of the irrational, or the political.[35]

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29. *See generally* Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013) (explaining how the judges-as-fiduciaries framework offers practical insights for judges in democratic governments, while admitting that it is not the only theory).

30. *Id.* at 742 (emphasizing the need for "*comprehensible* and *intelligible* judicial opinions" to facilitate a "meaningful dialogue" between the judiciary and the people); *see also* Schauer, *supra* note 25, at 658 (decision makers who rely on voluntary compliance with the rightness, rather than authoritativeness, of the decision give reasons "to bring the subject of the decision into the enterprise.").

31. *See* Michael Serota, *Intelligible Justice*, 66 U. MIAMI L. REV. 649, 656 (2012).

32. Schwartzman, *supra* note 19, at 1003 ("[T]he demand for justification can be issued not only by present litigants but also by any future parties whose claims will be controlled by a court's prior decisions."); *see also* Neil Siegel, *The Wages of Crying* Roe*: Some Realism About* Dobbs v. Jackson Women's Health Organization, 2 J. AM. CONST. HIST. (forthcoming) (manuscript at 4–5) ("A judicial opinion is principled if the court articulates reasons for its ruling; it decides the case only in virtue of those articulated reasons; and it is prepared to apply those reasons to other issues to which the reasons apply.").

33. Schauer, *supra* note 25, at 641.

34. *Id.* at 644.

35. *Id.* at 653 ("Perhaps some decisions are simply too narrow to be rational."). See also the February 7, 1936, letter from Justice Harlan Stone to then-Professor Felix Frankfurter:

> I can hardly see the use of writing judicial opinions unless they are to embody methods of analysis and of exposition which will serve the profession as a guide to the decision of future cases. If they are not better than an excursion ticket, good for this day and trip only, they do not serve even as protective coloration for the writer of the opinion and would much better be left unsaid.

To summarize, key components to the role morality of reason-giving in our system of judicial review are that those reasons must be publicly available, sufficiently clear to be comprehensible to those whom they bind, and sufficiently general to operate as law. The next part discusses how these three obligations relate to the form of reasoning that Justice Thomas describes in *Bruen* as "commonplace" among lawyers and judges—reasoning by analogy.[36]

II. ANALOGY, RULES OF RELEVANCE, AND REASON-GIVING

Lawyers and judges describe reasoning from analogy as one of the core competencies of the profession.[37] Yet, everything about this form of argument is controversial, down to fundamental disagreement about whether analogical reasoning is actually a form of reasoning at all, as opposed to an error in logic or a form of rhetoric.[38] Notwithstanding these critiques, its use is everywhere in legal practice, and this Essay assumes it will remain central to judicial reason-giving for the foreseeable future.

The steps in reasoning from analogy, as Professors Fred Schauer and Bobbie Spellman have explained, take the following form: some phenomenon has a set of features (the *source*); a decision maker must assess some other phenomenon (the *target*). The decision maker thinks about connections between the source and the target (*mapping*) and based on those connections renders a conclusion that the target is sufficiently similar to the source to be understood or treated like the source or is insufficiently similar to the source that it should be treated differently.[39]

CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 13 (1969) (citing ALPHEUS T. MASON, THE SUPREME COURT: VEHICLE OF REVEALED TRUTH OR POWER GROUP, 1930–1937, at 41 (1953)). The Court's attempt to confine the equal protection decision in *Bush v. Gore*, 531 U.S. 98 (2001) to the facts of the 2000 election was roundly criticized on these grounds. *See* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650 (2001).

36. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 28 (2022).

37. *See* Clarke v. United States, 915 F.2d 699, 708 (D.C. Cir. 1990) (describing analogical reasoning as "the core of the adjudicatory process"); *see also* LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT 4 (2005) ("There is something distinctive about legal reasoning which is its reliance on analogy.").

38. EDWARD H. LEVI, INTRODUCTION TO LEGAL REASONING 3 n.5 (1949) (describing the logical flaw as the "fallacy of the undistributed middle"); Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 765 (2006) ("Reasoning by analogy as a mode of judicial expression is a surface phenomenon. It belongs not to legal thought, but to legal rhetoric.").

39. This is a summary of the process described in Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 254 (2017).

Much of the work in analogical reasoning is done in the mapping portion of the exercise, and this task is both the most difficult and—in legal cases—the most consequential.[40] Given that "any two items have a potentially infinite number of points of similarity and points of difference,"[41] the mapping between the source and the target requires application of a "rule of relevance"[42] to determine which similarities and differences matter, and which do not.

Spellman notes that mapping can take place on two tracks: attributes and relations. Attributes are the "superficial" or "surface" features that are "physically visible or explicitly described."[43] Color or shape, for example, are attributes. Relations are those links between two things, like comparative size—"bigger" or "smaller"—or phenomena like causation.[44] In experiments, those under time constraint will focus on surface attributes; those with more time or training will consider relational similarities.[45] When asked to assess the quality of analogies in these experiments, test subjects revealed that "the depth and structure of the relational similarities matters more than the attribute similarities."[46]

Moreover, experimental data indicates that laypersons not only tend to ignore isolated, superficial similarities when conducting tasks that require analogical thinking, they also favor those features that

40. *See id.* at 254; *see also* Cass R. Sunstein, *Analogical Reasoning* 7 (Harvard Public Law Working Paper No. 21-39, 2021), https://ssrn.com/abstract=3938546 [https://perma.cc/929Y-JHSP].

41. Frederick Schauer, *Analogy in the Supreme Court:* Lozman v City of Riviera Beach, Florida, 2014 SUP. CT. REV. 405, 416.

42. *Id.* at 421.

43. Barbara A. Spellman, *Judges, Expertise and Analogy*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 149, 151 (David E. Klein & Gregory Mitchell, eds., 2010).

44. *Id.*

45. For example, in an experiment in which subjects were shown a photo of a tow truck pulling a car down a road and another where a similar car is shown pulling a motorboat down a road, subjects under time constraints "matched" the cars (a surface similarity); subjects with more time "matched" the two vehicles (tow truck, car) that were pulling another item (car, boat) that was incapable of moving on the road itself (a relational similarity). *See id.*; Dedre Gentner & Arthur B. Markman, *Similarity Is Like Analogy: Structural Alignment in Comparison*, *in* SIMILARITY IN LANGUAGE, THOUGHT AND PERCEPTION 122–24 (1995) (showing how under experimental conditions of a pair of causal scenes, subjects with more time produced relational mapping while those subjects with less time mapped based on surface attributes).

46. Spellman, *supra* note 43, at 151 (citing Dedre Gentner & Kenneth J. Kurtz, *Relations, Objects, and the Composition of Analogies*, 30 COGNITIVE SCI. 609 (2006) and Dedre Gentner, Mary Jo Rattermann, & Kenneth D. Forbus, *The Roles of Similarity in Transfer: Separating Retrievability from Inferential Soundness*, 25 COGNITIVE PSYCH. 524 (1993)); *see also* Gertner & Markman, *supra* note 45, at 119 ("In many of our studies we find that pairs with relational commonalities are rated as more similar than with only attribute commonalities.").

exhibit some kind of systematicity—correspondences that "connect[] to a larger matching structure."[47] This larger matching structure can be composed of a number of relational features that are task or goal-driven.[48] Features and relations that cannot be mapped into a larger set of higher order relationships tend to be disregarded in performing analogical tasks.[49]

Cognitive science experiments also suggest that both lawyers and laypersons measure the strength of analogies, not by the number of surface similarities alone but by reference to some structural or relational similarity.[50] Lawyers and judges are perhaps better able to identify and articulate a rule of relevance (and perhaps are obliged to for rule-of-law reasons); but whether it's a lawyer or layperson, it is the relational, systemic aspects that appear to determine the strength of the analogy, not the surface similarities or dissimilarities alone. As Schauer explains:

> When people perceive the blue car as similar to the red car but not to the blue dress, for example, they are reflecting a world—or at least their world—in which car-ness is ordinarily more salient than blue-ness and thus comes across to them as immediately and unreflectively obvious.[51]

Both lawyers and laypersons live in a world where the salience of similarities often have to do with pragmatics or purposes along other margins, even unconscious.[52] Schauer provides the example of two vehicles that are "long narrow enclosures with metal on all sides" designed to transport people across the country; hence, "but for the

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47. Catherine A. Clement & Dedre Gentner, *Systematicity as a Selection Constraint in Analogical Mapping*, 15 COGNITIVE SCI. 89, 129 (1991).

48. *Id.* at 127.

49. *Id.* at 92.

50. *See id.* at 129 ("The results indicate that . . . subjects prefer those matches and make those predictions that maintain a highly systematic correspondence between the two analogous domains."); SPELLMAN, *supra* note 46, at 151; Arthur B. Markman & Dedre Genter, *Structural Alignment During Similarity Comparisons*, 25 COGNITIVE PSYCH. 431, 433 (1993) ("Other work [by researchers] has demonstrated that subjects often find relational matches more compelling than attribute matches.").

51. Schauer, *supra* note 41, at 421.

52. Keith J. Holyoak & Kyunghee Koh, *Surface and Structural Similarity in Analogical Transfer*, 15 MEMORY & COGNITION 332, 334 (1987) ("The surface versus structural distinction depends on whether or not a feature is causally relevant to goal attainment."); *see also* Schauer & Spellman, *supra* note 39, at 266 ("[A]nalogies do not just exist. They are based on principles, rules, or goals that are necessary to support the conclusion that one thing is similar to another.").

fact that it flies, an airplane is little more than a bus."[53] Schauer's example is provocative, and he uses the bus-is-a-plane as a *reducio ad absurdum*, but the fact that it's a *reducio* reveals that people tend to assess the strength of analogs along some functional axis. Along one margin—transportation, perhaps—yes, a bus and a plane are "alike"; but along another—flight, or the capacity to cause catastrophic harm—they are not. Whether the person is a lawyer or not, the social context under which the person is asked to evaluate the analog can be quite significant in determining whether the analog is "correct." There may be a set of existing intuitions, practices, or knowledge that constrain just how much latitude a legal officer has in describing something as similar or dissimilar.[54]

In sum, the psychological gap between the legal assessment of the "rightness" of analogs and the laypersons' assessment of the "rightness" of analogs may not be as wide as conventionally thought. Both lawyers and laypersons tend to focus on relational qualities within a system rather than surface qualities;[55] and, if a "rule of relevance" animates the evaluation of a "good" versus "poor" analogy for both citizen and judge alike,[56] then whether any given argument from analogy meets the standard of intelligibility must be measured by both the intuitive and the stated rule of relevance of both groups.[57]

III. PRINCIPLED ANALOGICAL REASONING FROM HISTORY AND TRADITION

In the case of Second Amendment litigation, the courts confront a threefold danger: first, lapse into an analogical process driven by

53. Schauer, *supra* note 41, at 415.

54. As Schauer points out, people go to the hardware store rather than the electrical appliance store to find power tools; people most often "group red bicycles with bicycles of other colors rather than with red ties and red meat." Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 584 (1987)

55. *See supra* notes 50–51 and accompanying text.

56. Schauer, *supra* note 41, at 423 ("[T]here is a rule of relevance lying behind all analogies, even if it is not consciously perceived as such.").

57. Doubtless, lawyers may see relationships based on their experience and training that non-lawyers will not. Lawyers will organize the world around legal principles rather than non-legal ones. Schauer and Spellman use the example of how First Amendment principles make Nazis and civil rights marches "similar" for free speech purposes. *See* Schauer & Spellman, *supra* note 6, at 16. But this isn't the kind of analogical process the *Bruen* court is asking to be performed. Instead, the analogy is more like what are the relational features of the source and the target that makes them relevantly similar (or dissimilar) and then extracting a legal conclusion from that set of features. *See id.* at 6 ("Guns are regulated and/or protected not on account of what they look like but because of what they can *do* and cause.").

surface rather than structural similarities;[58] second, construction of analogs that cannot be explained by any stable or discernable rule of relevance; third, use of analogs so unmoored from public intuition and experience that they appear unreasonable or contrived.[59] Each of these dangers posed by reasoning by analogy threaten to violate the very principle of reason-giving upon which the judiciary's legitimacy rests.

Lower courts are struggling to negotiate these hazards.[60] Consider, for example, how the district court in *Antonyuck v. Nigrelli*, made distinctions apparently on little more than the surface similarities (or dissimilarities) between different categories of "sensitive places."[61] As Professors Joseph Blocher and Eric Ruben document, in the span of ten weeks, the district court issued three opinions[62]: In the first opinion, the district court all but struck down any sensitive place that the *Bruen* Court had not already specifically identified, because of the "fact that vast majority of the other states . . . did not have statutes restricting firearms at those very locations."[63] In a second opinion, over a month later, the court revised this approach but indicated that analogs "generally requires a thing to be so similar to another thing as to be useful for some purpose (such as a determination of whether the two things form part of the same tradition)"[64] and therefore, historical laws cannot be analogous "if it is clearly more distinguishable than it is similar to the thing to which it is compared."[65] In a third opinion, the district court acknowledged that it must "broaden its conception of

58. *See* Schauer & Spellman, *supra* note 6, at 6–8.

59. *Cf.* Schauer, *Precedent*, *supra* note 54, at 587 ("[M]any . . . rules of relevance come from the larger world, and, to the extent they are relied upon in framing precedent, the law is inevitably constrained in its short-term ability to alter its own starting points.").

60. *See* Transcript of Oral Argument at 38, United States v. Rahimi, No. 22-915 (Nov. 7, 2023) ("[T]here seems to be a fair bit of division and a fair bit of confusion about what *Bruen* means and what *Bruen* requires in the lower courts.") (Kagan, J.). For two comprehensive critiques, see generally Blocher & Ruben, *Originalism-by-Analogy*, *supra* note 7, and Charles, *The Dead Hand of a Silent Past*, *supra* note 7. For a partial defense, see generally William Baude & Robert Leider, *The General Law Right To Bear Arms*, 99 NOTRE DAME L. REV. (forthcoming 2024), https://ssrn.com/abstract=4618350 [https://perma.cc/YJ23-GMT2] (arguing that the task of analogical reasoning in *Bruen* is to find the principles that unify the discrete regulatory analogs in a fairly traditional common law fashion).

61. Antonyuk v. Chiumento, No. 22-2908, 2023 WL 8518003, at *290–91 (2d Cir. Dec. 8, 2023).

62. *See* Blocher & Ruben, *Originalism-by-Analogy*, *supra* note 7, at 139–42.

63. Antonyuk v. Bruen, 624 F. Supp. 3d 210, 256 (N.D.N.Y. 2022).

64. Antonyuk v. Hochul, 635 F. Supp. 3d 111, 131 (N.D.N.Y. 2022), *appeal withdrawn*, No. 22-2379, 2022 WL 19396512 (2d Cir. Nov. 14, 2022).

65. *Id.*

what constitutes an 'analogue' and focus its attention on the justification for, and burden imposed by[] it[], with the understanding that generally the Court should not uphold a modern law that only remotely resembles its historical analogues."[66]

The result was an incomprehensible series of decisions where prohibitions on guns in summer camps were unconstitutional, then constitutional;[67] prohibitions on guns in Times Square went from unconstitutional to constitutional;[68] and prohibitions on guns on mass transit were unconstitutional, except for buses "during the period before school."[69] Given the shifting reasoning between the different opinions, and the lack of a coherent and stable rule of relevance underpinning the use of analogy, it appears that the court lapsed into making decisions based on superficial similarities and dissimilarities, rather than how these different regulations were analogous or disanalogous within a *system* of relational similarities concerning firearms and regulation.

Further, courts are seemingly forcing the political branches to legislate with historical sources as if they were lower court judges preparing a record for review.[70] This makes reasoning at a level of generality sufficient to operate as a publicly intelligible legal principle all the more important. It is one thing to say that the Constitution commands lower courts to conduct difficult historical discovery and fact-finding to evaluate the analogical predicates of a new piece of legislation; it seems quite another to say that it requires a legislature proposing such legislation to ask first: what is the historical analog for what we need to do?, rather than: what are the contemporary realities that make this policy proposal urgent and necessary? Failing to articulate reasons at a sufficient level of generality to operate as a legal

66. Antonyuk v. Hochul, 639 F. Supp. 3d 232, 297 (N.D.N.Y. 2022).

67. Blocher & Ruben, *Originalism-by-Analogy*, *supra* note 7, at 140–41 (2023).

68. *Id.* at 141.

69. *Id.*; *see also* Antonyuk v. Hochul, 639 F. Supp. 3d 232, 330 (N.D.N.Y. 2022).

70. Justice Jackson raised this kind of concern in her oral argument in *United States v. Rahimi*:

> But let's say I'm a legislator today in Maine, for example, and I'm very concerned about what has happened in that community, and my people, the constituents, are asking me to do something. Do you read *Bruen* as step one being go to the archives and try to determine whether or not there's some historical analogue for the kinds of legislation that I'm considering?

Transcript of Oral Argument at 55, United States v. Rahimi, 143 S. Ct. 2688 (2023) (No. 22-915); Charles, *The Dead Hand of a Silent Past*, *supra* note 7, at 151 ("[A] legislature's statement that it intends to tap into a specific historical tradition of firearms regulation can help support arguments for a law's constitutionality.").

principle puts legislators in the position of responding to the potentially obscure history-and-analogy demands of the judicial branch rather than the needs of their constituents.

Courts issuing decisions in the post-*Bruen* world can help mitigate these concerns, maintain their own legitimacy, and comply with their duties as reason-giving officials by conforming to the following principles. First, the analogy must be understood at a sufficient level of generality to operate as law; second, the rule of relevance that the court adopts must comport with public intuitions about what makes things alike or unalike in the context of arms; third the level of generality of the rule of relevance must work at a commensurate level across the rights/regulation equation.[71]

A. The Analogy Must Be Sufficiently General to Operate as Law

First, a publicly intelligible reason must be sufficiently general to operate as a legal principle. As discussed above, the duty for a judicial officer to offer a *legal* reason is an obligation to give a reason at a level of generality that supports both the case at issue and potentially future cases.[72] Accepting only those analogs that share surface similarities is to lapse into the "law of the churn" fallacy.[73]

Historical materials about "arms" are not just about flintlocks; nor are prohibitions of firearms in "schools,"[74] "church[es]"[75] and "markets"[76] just about identifying surface similarities between some modern "sensitive place" and a school, church or market.[77] Instead, as Professors Will Baude and Robert Leider have encouraged, the search

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71. Some of these arguments are reflected in Brief of Second Amendment Law Scholars as Amici In Support of Petitioner at 7–8, 10, 14, United States v. Rahimi, No. 22-915.

72. *See supra* notes 32–35 and accompanying text.

73. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 474–75 (1897):

> There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant.

74. *See, e.g.*, An Act to Regulate the Keeping and Bearing of Deadly Weapons, ch. XXXIV, § 3, 1871 Tex. Gen. Laws 1st Sess. 25, 25–26 (prohibiting weapons in "any church or religious assembly, any school room, or other place where persons are assembled for amusement or for educational or scientific purposes, or into any circus, show, or public exhibition of any kind, or into a ball room, social party, or social gathering, or to any election precinct on the day or days of any election"); Huntsville, Mo., Ordinance in Relation to Carrying Deadly Weapons (July 12, 1844).

75. Act to Regulate, *supra* note 74, at 25.

76. Statute of Northampton, 2 Edw. 3, c.3 (1328) (Eng.).

77. Blocher & Ruben, *Originalism-by-Analogy*, *supra* note 7, at 157.

must be for some principle, relationship, or rule of relevance that connects the source with the target.[78]

For example, a regulation on parading with arms and a regulation on concealed carry are disanalogous as far as surface features go, but connected when the principle is understood as government power to regulate how firearms may be carried.[79] A historical regulation prohibiting an inebriated person from firing guns may evince more than a surface similarity with intoxication,[80] and reveal a structural similarity of keeping firearms out of the hands of persons who are dangerous, or are suffering from some kind of diminished impulse control.[81]

Choosing the level of generality at the level of principle isn't just about functionality. Rather, it is what it means to render a *legal* decision, one that applies beyond the facts of the instant case.[82]

B. The Rule of Relevance Cannot Drift Too Far From Public Intuition

Second, although the public is not likely to have a fully formed "rule of relevance" to address every contested Second Amendment issue, it is doubtful that they have *no* intuitions about similarities and dissimilarities in this area based on their own experience. Decisions where the rule of relevance as stated by judges appear counterintuitive or drift too far from people's actual experience may threaten judicial credibility.

One federal judge's infelicitous comparison of an AR-15 to a Swiss army knife—at least rhetorically—had this kind of effect.[83] A less

78. *See generally* Baude & Leider, *supra* note 60 (arguing that *Bruen* relies on concepts of general law, which looks to derive principles from various legal materials).

79. *See id.* at 20 (citing Commonwealth v. Murphy, 44 N.E. 138, 138 (Mass. 1896)).

80. United States v. Connelly, Case No. EP-22-CR-229(2)-KC, 2023 WL 2806324, at *12 (W.D. Tex. Apr. 6, 2023) ("Section 922(g)(3) breaks with historical intoxication laws by prohibiting not just firearm use by those who are actively intoxicated but also firearm possession by those who use controlled substances, even somewhat irregularly.").

81. United States v. Costianes, No. CR JKB-21-0458, 2023 WL 3550972, at *5 (D. Md. May 18, 2023) ("The Government has shown that § 922(g)(3) is 'relevantly similar' to historical regulations aimed at preventing potentially dangerous persons from possessing and using firearms, such as individuals convicted of felonies, individuals suffering from mental illness, and intoxicated individuals.").

82. Blocher & Ruben, *Originalism-by-Analogy*, *supra* note 7, at 145 ("What is needed, then, are principles of relevant similarity tied in an articulable way to the shared goals and functioning of law.").

83. Miller v. Bonta, 542 F. Supp. 3d 1009, 1014 (S.D. Cal. 2021) ("Like the Swiss Army Knife, the popular AR-15 rifle is a perfect combination of home defense weapon and homeland defense

rhetorical, and more consequential, example of a rule of relevance drifting from public intuition are arguments that a firearm is in "common use"—and therefore constitutionally protected—by analogy to another popular commercial product that isn't a weapon, like a pickup truck.[84]

There may be good arguments that a particular firearm is in "common use" because of its popularity as a weapon used for self-defense; but that relationship—commonly used for self-defense—is the margin upon which most people group weapons; not on a margin like whether a particular weapon is more popular than an automobile.

Choosing a rule of relevance that is, in some ways, responsive to public intuition doesn't mean that judges ignore their expertise or require them to decide cases based on non-legal grounds. It simply means that the stated rule of relevance—"dangerous" or "suitable for self-defense" or "sensitive place"—must not drift too far from the experience of ordinary citizens.[85]

C. The Rule of Relevance Must Be Understood Symmetrically

Finally, the rule of relevance for analogs must be understood at a commensurate level of generality across the rights/regulation divide.[86] This is not only for functional reasons, but for reasons of public comprehension. As discussed above, laypersons often approach analogical tasks with regard to the systems in which they operate.[87]

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equipment."), *vacated*, No. 21-55608, 2022 WL 3095986 (9th Cir. Aug. 1, 2022). In fairness, Judge Roger Benetiz was not saying that AR-15s are like Swiss Army knives in such surface ways that justify treating them similarly in all areas of law, but his flourish demonstrates the risk that the comparisons will expose how much analogs are used for rhetorical rather than analytical purposes.

84. Kolbe v. Hogan, 813 F.3d 160, 174 (4th Cir. 2016) ("[W]e note that in 2012, the number of AR- and AK-style weapons manufactured and imported into the United States was more than double the number of Ford F-150 trucks sold, the most commonly sold vehicle in the United States."), *aff'd in part, rev'd in part en banc*, 849 F.3d 114 (4th Cir. 2017).

85. *See* Schauer, *supra* note 54, at 587 (discussing how, because "rules of relevance come from the larger world," judges are somewhat constrained in how they can choose a rule of relevance).

86. Darrell A.H. Miller, *Second Amendment Equilibria*, 116 NW. U. L. REV. 239, 271 (2021) (urging that "analogy has to take place on *both* the rights and the regulation side of the equation"); Blocher & Ruben, *Originalism-by-Analogy*, *supra* note 7, at 167 ("Whatever principles a court selects, the level of generality selected for historical analogy should be applied symmetrically.").

87. *See* Clement & Gentner, *supra* note 47, at 129; *see also* Schauer & Spellman, *supra* note 6, at 22 ("People prefer analogies with more deep structural/relational similarities between internal structures of the source and target.").

Selection of features of a source and target are often the product of not just surface similarities, but how they relate to and rationalize a web of contexts, values and goals. A suitable analog along one margin may be unsuitable along another.

To extend the example from Schauer: It's likely that individuals, when asked to compare planes and buses, would consider them similar if the question being asked is transportation. But if pressed to decide whether, given that both buses and aircrafts are forms of transportation, the regulations for the licensing of airline pilots should be no more extensive than those required for the licensing of bus drivers, most persons would say that would be absurd. Aircrafts are more dangerous than buses, the risk of catastrophic injury is greater, and therefore the analog for licensing of airline pilots should be the licensing required to operate comparably dangerous equipment.

In a similar way, both a club and a firearm are weapons suitable for self-defense, and therefore could be understood as analogous to each other if the question is what is an arm for self-defense. But a club and a firearm have quite different levels of lethality, even if we acknowledge that they are both suitable for self-defense; and therefore, even though both may be similar in that they are "arms," the rule of relevance for a regulation on firearms should operate along the margin of its dangerousness (or the converse, its promotion of public safety).[88]

In this way, the symmetrical level of generality for a rule of relevance—objects suitable for self-defense; regulations adapted to promote public safety—can reflect the kind of systematicity that governs how the public assesses the "accuracy" of an analogy.

CONCLUSION

The Court's approach to Second Amendment cases in *Bruen* is likely to remain the law of the land for the foreseeable future. Moreover, given the methodological inclinations of a majority of the current justices, it is possible that a historical-traditional-analogical approach to constitutional adjudication may work its way into disputes beyond the right to keep and bear arms.[89] This presents a risk to the Court's already-shaky legitimacy, if the style of analogical reasoning from history and tradition departs too far from the comprehension of

88. *See* Blocher & Ruben, *Originalism-by-Analogy*, *supra* note 7, at 168 (discussing usefulness for self-defense and promotion of public safety as the level of generality to examine both rights and regulations).

89. *See supra* note 11 and accompanying text.

the hundreds of millions of people in whose name the justices rule. This Essay has attempted to show how courts can faithfully implement *Bruen*'s methodology in a way that also satisfies the role-morality of judges in our system of judicial review.

Suppose, though, the Court's legitimacy remains undiminished by a method that, over time, proves to be unwieldy to judges and unintelligible to the public. Perhaps because other factors are more important to maintaining judicial legitimacy; perhaps because most people don't care about reasons—they only care about results.[90] Even then, the role morality of judicial reason-giving should still cause judges to implement historical analogs as legally intelligible principles along the lines described here—whether or not anyone cares to listen.

90. Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 129 (2021) ("[T]o the extent the public approves of the judiciary, its approval is not likely a result of its assessment of judicial opinions."); *see also* Joseph R. Grodin, *Developing A Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988) (stating that in judicial elections "voters tend to cast their ballots on the basis of whether or not they like the results in the cases that the judge has decided"). *But see* Jordan M. Singer, *The Mind of the Judicial Voter*, 2011 MICH. ST. L. REV. 1443, 1446 ("[T]o most people a fair process matters more than a specific outcome.").