

**READING LAWS, NOT MINDS: THE “WHY”
INQUIRY AFTER *BRUEN***

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ABSTRACT

*This Article identifies a tension at the center of the Supreme Court’s post-*Bruen* Second Amendment doctrine. In other areas of the law, the Court rejects legislative history and subjective legislative intent, insisting that judges “read words, not minds.” But under *Bruen*’s second step, courts must ask “why” historical firearm regulations burdened the right to keep and bear arms. That inquiry often requires courts to infer the purposes of old laws—an inquiry resembling the one the Court has rejected in other contexts. Given the Court’s concern with discerning legislative purpose in other arenas, we argue that it would be more consistent for courts to ask, at *Bruen*’s second step, what an ordinary person would have understood a historical law’s expressive message to be. This approach also answers the unresolved question regarding the “level of generality” at which courts should consider laws: Courts should ascertain the law’s expressive message at the level of generality at which an ordinary person would understand the law, which, we suggest, would often be at a high level of generality.*

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INTRODUCTION

Legislative history is “no longer in vogue.”¹ This past Term, the six-Justice majority in *FS Credit* faulted legislative history for asking courts to “divin[e] how Congress would have wanted courts to resolve the question presented,” a project resting on “the fictional premise that hundreds of legislators . . . shared a unified private view” of a statute’s purpose.² Moreover, legislative history “violates the fundamental precept that ‘[w]e are governed by laws, not by the intentions of legislators.’”³ “The judicial task,” the Court said, “is to read words, not minds.”⁴

Yet this proposition sits in tension with the Court’s recent flurry of post-*Bruen* Second Amendment cases. Under *New York State Rifle & Pistol Ass’n v. Bruen*, a modern firearm regulation survives only if it is “relevantly similar” to a historical analogue in terms of both “how and why” it burdens the right to keep and bear arms.⁵ The “why” analysis requires courts to identify the purpose of laws enacted at the Founding or during Reconstruction—centuries-old statutes whose records are often thin, fragmentary, or gone.⁶

This Essay identifies this contradiction and offers a way to resolve it. **Part I** surveys the Court’s many repudiations of legislative history and legislative intent. **Part II** shows how the post-*Bruen* “why” inquiry—in *Rahimi*, *Hemani*, and *Wolford*—resembles the inquiry into legislative purpose and intent that the Court forbids elsewhere. **Part III** proposes a solution more consistent with the Court’s own commitments: Courts should treat a law as an expressive, public message, and ask not what its drafters

1. Transcript of Oral Argument at 156, *Learning Resources, Inc. v. Trump*, 607 U.S. 229 (2026) (No. 24-1287).

2. *FS Credit Opportunities Corp. v. Saba Cap. Master Fund, Ltd.*, 146 S. Ct. 1546, 1557 (2026).

3. *Id.* (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment) (alterations in original)).

4. *Id.* at 1557 n.5.

5. 597 U.S. 1, 29 (2022).

6. *Id.* at 30; *United States v. Hemani*, 146 S. Ct. 1677, 1686 (2026) (“[T]he more closely a contemporary law mirrors a well-established historical analogue in purpose and operation, the more likely it is to be upheld.”).

privately sought to accomplish, but what general purpose an *ordinary person* would understand the law to serve. We suggest that this purpose should usually be understood at a high level of generality, as an ordinary person, not versed in the law, would understand the *expressive function* of the law.

I. READING WORDS, NOT MINDS

The modern Court's hostility to legislative history rests on a simple premise: that the *text* of the law as it is passed "is the will of the majority of both houses, and the only mode in which that will is *spoken is in the act itself*."⁷ Hundreds of legislators may vote for a text for different reasons, and their compromise is on the *text*, rather than any *purpose*. As Justice Scalia put it: "[W]e should try to give the text its fair meaning, whatever various committees might have had to say—thereby affirming the proposition that we are a Government of laws, not of committee reports."⁸ Put another way: "[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."⁹

This is no longer Justice Scalia's lone view, but instead an interpretive ground that a majority of the Court follows.¹⁰ Even Justices sometimes friendlier to legislative history accept its limits. As Justice Kagan explained, "[l]egislative history . . . is meant to clear up ambiguity, not create it."¹¹ Many scholars say the same: A legislature is "a 'They,' not an 'It,'" with no unified intent to find,¹² so courts should abandon "the pretense of legislative intent" altogether.¹³

7. *Conroy*, 507 U.S. at 519 (Scalia, J., concurring in judgment) (emphasis in original) (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845)).

8. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 621 (1991) (Scalia, J., concurring in judgment).

9. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (Scalia, J.).

10. *See, e.g.*, *FS Credit Opportunities Corp. v. Saba Cap. Master Fund, Ltd.*, 146 S. Ct. 1546, 1557 (2026); *Bostock v. Clayton Cnty.*, 590 U.S. 644, 653 (2020) ("[T]he limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

11. *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011) (Kagan, J.).

12. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239 (1992).

13. John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2397 (2017).

II. THE “WHY” INQUIRY AS PURPOSIVISM IN DISGUISE

Bruen’s “why” prong asks courts to do the very thing the Court appears to forbid in other contexts: identify the purpose behind an enactment. As Justice Barrett explained, *Bruen* does not “simply [ask] whether two laws targeted similar conduct.”¹⁴ Rather, it asks “*why* they targeted that conduct—that is, what ‘reason’ justified the restriction.”¹⁵ But because *Bruen* analogizes modern laws to historical ones, the inquiry runs on the historical record—preambles, enactment circumstances, and surrounding legal culture—and ends up resembling the same inquiry into legislative history and purpose that the Court has rejected in other contexts.¹⁶

Consider the tension in the Court’s post-*Bruen* cases. In *Rahimi*, the Court sustained 18 U.S.C. § 922(g)(8) by distilling from surety and going-armed laws a shared *purpose*: disarming those who “pose[] a clear threat of physical violence to another.”¹⁷ It rested not on the text alone but on what those regimes were *for*, pitched at a chosen level of generality—not so broad as “public safety” nor as specific as the statutes’ application to their particular circumstances, but something in between. Justice Barrett’s concurrence acknowledged that “[c]ourts have struggled with . . . [this] level of generality problem” in the “wake of *Bruen*,” and argued that “[a]nalogical reasoning’ under *Bruen* demands a wider lens: Historical regulations reveal a principle, not a mold.”¹⁸

Hemani further illustrates the level of generality problem.¹⁹ In parsing *why* the historical laws existed, the Court understood habitual-drunkard laws to narrowly “focus[] on habitual drunkards because their drinking rendered them practically incapacitated and incapable of managing their affairs.”²⁰ While we agree that the ordinary person would likely have understood habitual-drunkard laws accordingly, the Court’s dismissal of surety laws presents a closer call, with more room for subjectivity. Reasoning that surety laws “did not normally require a showing that an

14. *Wolford v. Lopez*, 146 S. Ct. 2032, 2060 n.10 (2026) (Barrett, J., concurring).

15. *Id.* (emphasis in original) (quoting *United States v. Rahimi*, 602 U.S. 680, 692 (2024)); *see also id.* at 2044 (majority opinion) (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 29 (2022)) (“[A] court must also consider ‘why’ the analogue restricted the keeping or bearing of arms—that is, whether its rationale was similar to that of the new law.”).

16. Other scholars have highlighted the tension between the Court’s rejection of legislative history as a tool of statutory interpretation and its use of such evidence to interpret constitutional amendments. *See, e.g.*, Jack Wilkins, Note, *The Incompatibility of Textualist and Originalist Approaches to Legislative History*, 138 HARV. L. REV. 863, 864 (2025).

17. 602 U.S. at 698.

18. *Id.* at 739–40 (Barrett, J., concurring) (citation omitted).

19. *See United States v. Hemani*, 146 S. Ct. 1677, 1687–89 (2026).

20. *Id.* at 1689.

individual posed a threat of violence” and “[i]nstead . . . sought to protect the community from scandals against good morals,” the Court held that these laws were “nothing like the purpose the government ascribes to [18 U.S.C.] § 922(g)(3).”²¹ But in the government’s telling, surety laws addressed the risk of harm posed by “anyone who posed a risk of future misbehavior, including misuse of firearms,”²² and, significantly, “extended to all common drunkards.”²³ While certainly not a “dead ringer” for 18 U.S.C. § 922(g)(3),²⁴ it is unclear why the expressive function of surety laws would not support the law’s purpose: disarming persons who are found to pose a risk of harming others in the future due to a pattern of misbehavior. *Hemani* thus illustrates the subjectivity of reconstructing the aims of nineteenth-century legislatures—and why, perhaps, the Court forbids this inquiry in other contexts.²⁵

Wolford demonstrates this tension most clearly. In rejecting Hawaii’s historical analogues to its laws prohibiting armed entry onto private property, the majority stated that the “*obvious aim* [of the historical laws] was to prevent the distinctive harms and risks associated with unauthorized hunting.”²⁶ Why was this the “obvious” aim? It was not so “obvious” to the other Justices. Justice Barrett noted that an “anti-poaching” law could support a broader purpose than simply “anti-poaching,” and stated that targeting “specific places that are prone to particular abuses of the right” was a potential fit.²⁷ Justice Kagan, in contrast, found the “why” satisfied because the old and new laws alike addressed “the dangers and harms that

21. *Id.* at 1691 (internal quotation marks and citation omitted).

22. Brief for Petitioner at 22, *United States v. Hemani*, 146 S. Ct. 1677 (2026) (No. 24-1234), 2025 WL 3708950, at *17.

23. *Id.* (quoting *United States v. Harris*, 114 F.4th 154, 163 (3d Cir. 2025)).

24. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 30 (2022).

25. The Eighth Circuit recently held that the prosecution of a marijuana user under 18 U.S.C. § 922(g)(3) did not violate the Second Amendment where the government produced evidence that the defendant “began using marijuana when he was 13 years old; . . . used marijuana on a regular basis; and a sample of his urine taken following his arrest tested positive for marijuana metabolites.” *United States v. Baxter*, 181 F.4th 898, 904 (8th Cir. 2026). The Eighth Circuit held that this level of marijuana usage, combined with expert testimony regarding the “strong connection between chronic cannabis use and aggression and violence,” was sufficient to establish that § 922(g)(3), as applied to the defendant, “was sufficiently analogous to . . . Founding-era going-armed laws.” *Id.* The Eighth Circuit also relied on *Rahimi*’s statement that “the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others.” *See id.* (quoting *United States v. Rahimi*, 602 U.S. 680, 693 (2024)) (alterations omitted). Although we observe tension in the Court’s dismissal of surety laws in *Hemani*, that tension may be partially reconcilable if *Hemani* is limited to its facts.

26. *Wolford v. Lopez*, 146 S. Ct. 2032, 2052 (2026) (emphasis added). The *Wolford* majority implied that the purpose in *Rahimi*, in contrast, was not obvious, as it noted that Justice Thomas’s dissent in *Rahimi* showed that “*Heller*’s history-based methodology—true to the warning contained in that ground-breaking decision—is not mechanical” and requires an exercise of “judgment.” *Id.* at 2044–45 (citing *District of Columbia v. Heller*, 554 U.S. 570, 626–628 (2008)).

27. *Id.* at 2058 (Barrett, J., concurring) (internal quotation marks and citation omitted).

someone with a gun can cause on another person's property."²⁸ Rather than bury the analysis in the word "obvious," the majority should have parsed what an ordinary person would have understood the expressive function of the law to be.²⁹

The lower courts have taken the instruction, and the result resembles purpose-hunting. Take, for instance, the decision the Supreme Court reversed in *Rahimi*. In the underlying appeal, the Fifth Circuit held that 18 U.S.C. § 922(g)(8)—the purpose of which was "to protect . . . person[s] from 'domestic gun abuse'"—was not analogous to any "relevantly similar" historical law.³⁰ While it, like the Supreme Court, held that the "why" of surety laws was relevantly similar to § 922(g)(8), the Fifth Circuit concluded, contrary to the Supreme Court, that "'going armed' laws were tied to violent or riotous conduct and threats to society" and thus too dissimilar from the "why" of § 922(g)(8).³¹

Or consider the varying interpretations of historical analogues to § 922(g)(1)'s felon-in-possession ban. The Eighth and Third Circuits have interpreted the history and tradition underlying the felon-in-possession ban differently as it applies to non-violent felons.³² While the Eighth Circuit held that "[h]istory shows that the right to keep and bear arms was subject to restrictions that included prohibitions on possession by certain groups of

28. *Id.* at 2061 (Kagan, J., dissenting). Justices Sotomayor and Jackson similarly disagreed as to the purpose of anti-poaching laws. *See id.* at 2073–75 (Jackson, J., dissenting).

29. Even the text of the historical laws the majority relied upon is not so clear. Take, for example, the 1721 Pennsylvania law that prohibited "'carry[ing] any gun or hunt[ing] on the improved or inclosed lands of any plantation' . . . without securing 'license or permission from the owner.'" *See id.* at 2051 (majority opinion) (quoting 1721 Pa. Laws, ch. 246, § 3). In the majority's telling, the text states the purpose of the law: "prevent[ing] 'divers[e] Abuses, Damages and Inconveniences' that 'ha[d] ar[i]se[n] by Persons carrying Guns, and presuming to hunt on other people's lands.'" *Id.* (quoting 1721 Pa. Laws, ch. 246 § 2). But the Court jumps to a narrow interpretation of that purpose: "'prevent[ing] Pennsylvanians from hunting on their neighbors' land.'" *Id.* (quoting *Lara v. Comm'r Pa. State Police*, 125 F.4th 428, 443 (3d Cir. 2025)) (emphasis added). The plain text seems to reveal a broader statutory purpose: that problems arose when Pennsylvanians went on to another's land while armed without permission. *See id.* at 2061 (Kagan, J., dissenting). The subjectivity of interpreting the "why" of a historical law from its text exemplifies the problem. Under our proposed approach, the ordinary person's understanding of the expressive function of the law is the principal inquiry. Here, an ordinary person would have read the law at a higher level of generality, as Justice Kagan did. *Id.* After all, the law prohibits "carry[ing] any gun or hunting," not only carrying any gun *while* hunting, and the preamble suggests that a wide variety of problems ("divers[e] [a]buses") had arisen when individuals entered another's land while armed without consent. *See id.* at 2051 (majority opinion) (emphasis added) (citation omitted).

30. *United States v. Rahimi*, 61 F.4th 443, 455 (5th Cir. 2023) (quoting *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 30 (2022)).

31. *Compare id.* at 457–60, with *United States v. Rahimi*, 602 U.S. 680, 698 (2024).

32. *Compare United States v. Jackson*, 110 F.4th 1120, 1126–29 (8th Cir. 2024) (rejecting a Second Amendment challenge to the application of the felon-in-possession ban to a non-violent drug offender), with *Range v. Att'y Gen.*, 124 F.4th 218, 230–32 (3d Cir. 2024) (en banc) (holding that the "dangerousness" rationale cannot justify the application of the felon-in-possession ban to a felon convicted of making a fraudulent statement in connection with an application for food stamps).

people,”³³ the Third Circuit rejected that same interpretation as “far too broad” and “operat[ing] at such a high level of generality that it waters down the right.”³⁴ Each side claims to have recovered the reason why the founding generation acted. Their disagreement is a quarrel over legislative purpose, conducted across a gulf of two centuries. To make matters more difficult, courts have been forced to weigh the motives of long-dead legislatures as to facially discriminatory laws, asking whether race- or religion-based disarmament reflected any permissible judgment about danger at all.³⁵

The pattern is clear: To examine the “why” of laws, courts must read preambles, weigh enactment history, and attribute motives to long-dead legislatures—doing under the Second Amendment what the Court has spent forty years forbidding everywhere else.³⁶

III. THE ORDINARY-PERSON APPROACH

The way out is not to abandon the “why” but to refine it so that it clearly does not require “reading minds.” Begin with a familiar idea from the philosophy of law: A statute is not only a command but an “expressive” public message.³⁷ In enacting a law, a legislature expresses to the community a general statement of what it values and what it condemns—a message ordinary people grasp without consulting committee reports. A ban on firearms in a courthouse says something—“keep weapons away from the

33. *Jackson*, 110 F.4th at 1126.

34. *Range*, 124 F.4th at 230 (internal quotation marks and citations omitted).

35. *See* United States v. Williams, 113 F.4th 637, 656 (6th Cir. 2024). The Justices split sharply over the relevance of the Black Codes as historical analogues in *Wolford* as well. *Compare* 146 S. Ct. 2032, 2053 (2026) (“Hawaii’s claim that [the Black Codes, a] tainted artifact[,] illuminates the original understanding of the right . . . cannot be taken seriously.”), *with id.* at 2060 (Barrett, J., concurring) (“It is beyond me why Hawaii would claim that these vile laws[, the Black Codes,] can justify its present-day restriction.”), *and id.* at 2078 (Jackson, J., dissenting) (“I am not suggesting that courts *must* accept Black Codes as historical analogues. My point is merely that the Court cannot have it both ways. Either history does matter, and if so, *all* potentially relevant historical experiences must be thoroughly examined to determine whether they reflect our Nation’s history and tradition of firearm regulation. Or, it does not, and the Court should just admit that the test it has created is boundless, allowing it to accept or excise any historical analogue it chooses for any reason it prefers.”).

36. *See also* Transcript of Oral Argument at 39:21–40:6, *Wolford v. Lopez*, 146 S. Ct. 2032 (2026) (No. 24-1046) (Kagan, J.) (“Mostly, in our constitutional law, . . . we’ve steered clear from trying to evaluate motive, purpose, directly. . . . [W]e create rules that maybe are meant to ferret out bad motive, but we kind of think it’s . . . a bad road to go down if we ask . . . whether the state has acted pretextually in doing one thing or another.”); *id.* at 42:7–13 (Kavanaugh, J.) (“Here, there’s no sufficient history supporting the regulation, end of case. Isn’t that kind of the straightforward way rather than getting into this whole new elaborate pretext analysis, which, as Justice Kagan says, sounds like what we moved away from?”).

37. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996); *see also* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000).

administration of justice”—and an ordinary observer hears it. The “why” a court should explicitly seek to recover under *Bruen* is that public message, not the private aims of those who voted.

The inquiry draws on public-facing sources, such as a law’s text, structure, operation, and public legal context. But there should be a heavy thumb on the scale for consideration of mass sources that the public would have understood, such as newspapers (as Justice Barrett used in her *Wolford* concurrence),³⁸ and a weight *against* arcane legislative purpose that the general public would not be privy to or care about. The method may also consider a law’s “mischief”—the public problem it addressed—rather than its drafters’ wishes, a move some committed textualists accept.³⁹

However—and here is the crucial point—because ordinary readers do not parse statutes at the finest grain, we contend that this approach should usually yield a fairly broad “purpose.” For example, a courthouse ban protects the integrity of judicial proceedings, not one specific form of intimidation; a surety law prevents threatened breaches of the peace, not one bond procedure. In our view, *Rahimi* most faithfully applied this principle. Disarming persons under domestic-violence orders has no Founding-era twin, but “mitigat[ing] demonstrated threats of physical violence” does—which is why *Rahimi* came out as it did.⁴⁰

True, this inquiry might be difficult. But as the members of the Court’s majority have explained in other contexts, a search for original public meaning at least provides an objective goal for the Court to look toward. Operationally, our proposed inquiry is more akin to a paradigm shift than a change in the methodological framework instructed by *Bruen*. We suggest

38. See *Wolford*, 146 S. Ct. at 2057, 2059 n.8 (Barrett, J., concurring).

39. See Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 970 (2021) (“[T]he mischief rule . . . directs attention to the generating problem, which is public and external to the legislature, something that can be considered observable in the world.”). *Hemani* does a good job of this. In ascertaining the purpose of the habitual-drunkard laws offered by the government as analogues, the Court relied on sources reflecting the ordinary public’s understanding of the level of drinking that rendered a person a habitual drunkard who needed to be disarmed. See *United States v. Hemani*, 146 S. Ct. 1677, 1688 (2026) (“[T]he American Temperance Society called those who drank 12 ounces of hard liquor daily mere occasional drunkards. As the Society saw things, it took 24 ounces to qualify as a confirmed drunkard. Given all this, it seems the government’s historical laws targeted habitual drunkards not merely because they regularly used intoxicants, or even sometimes used them to excess. Instead, those laws focused on habitual drunkards because their drinking rendered them practically incapacitated and incapable of managing their affairs.” (internal quotation marks and citation omitted)).

40. See *United States v. Rahimi*, 602 U.S. 680, 698 (2024) (“When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.”). But see *id.* at 752–53 (Thomas, J., dissenting) (arguing that “the risk of interpersonal violence” is a problem “that has persisted since the 18th century, yet was addressed through . . . materially different means” (internal quotation marks and citation omitted)). See also Jordan Al-Rawi, *The Case for Relaxing Bruen’s Historical Analogues Approach: Rahimi, Domestic Violence Regulation, and Gun Ownership*, 39 BERKELEY J. GEND. L. & JUST. 93, 101–02, 110–12 (2024).

that judges perform a familiar task—ascertaining what an ordinary person would have reasonably understood a historical law to mean at the time it was enacted—based on the same types of historical sources that courts have already been considering. The abstraction is not unlimited, and “public safety” cannot answer every case or the right dissolves. But this objective method explains the results more honestly than the intent-hunting it would replace.

Going forward, one can frame *Rahimi*, *Hemani*, and *Wolford* as turning on whether the historical and modern laws *send relevantly similar public messages*—not on what any legislator subjectively wanted. An ordinary observer reads that message based on the plain text of the law itself and societal context. The ordinary public does not wade into the drafters’ minds—which is just what *Bruen* says judges are supposed to do.

CONCLUSION

Bruen makes courts ask “why” a regulation burdens the right to keep and bear arms, even as the Court insists everywhere else that judges read words, not minds. The contradiction is real, but it is not fatal. Every law sends a public message, a familiar idea from philosophy of law literature. And a law’s “why” can be read the way the Court reads any other legal text—objectively, from the law’s words, structure, operation, and setting, at the level of generality an ordinary person would understand. That approach satisfies *Bruen*’s demand for a historical “why” while honoring the Court’s deeper conviction that “[w]e are governed by laws, not by the intentions of legislators.”⁴¹

41. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment).