

THE CONTINUING BATTLE OVER THE SECOND AMENDMENT

*Allen Rostron**

I. INTRODUCTION

The Supreme Court's decisions in *District of Columbia v. Heller*¹ and *McDonald v. City of Chicago*² settled several important controversies concerning the Second Amendment right to keep and bear arms.³ They also left many vital questions unanswered. Struggling with these unresolved issues, lower courts have produced a large and continually growing volume of decisions about the Second Amendment in recent years.

In an article published in 2012, I described a surprising trend in the lower court decisions.⁴ "Justice Antonin Scalia's majority opinion in *Heller* heavily emphasized historical investigation of the original meaning and traditional understandings of the right to keep and bear arms."⁵ The *Heller* majority "also viewed the right in categorical terms, suggesting that courts should try to clearly demarcate the types of guns, people, and activities protected" by the

* The William R. Jacques Constitutional Law Scholar and Professor of Law, University of Missouri-Kansas City School of Law. B.A. 1991, University of Virginia; J.D. 1994, Yale Law School. Before becoming a law school teacher, Professor Rostron worked as a senior staff attorney for the Brady Center to Prevent Gun Violence. The views expressed in this article are strictly his own and do not represent the positions of any other person or entity.

¹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

² *McDonald v. City of Chi.*, 561 U.S. 742 (2010).

³ *See Heller*, 554 U.S. at 635 (holding that the Second Amendment protects private individuals' possession and use of firearms unconnected to organized militia activities); *McDonald*, 561 U.S. at 750, 791 (holding that the right to keep and bear arms applies to state and local government actions through the Fourteenth Amendment); U.S. CONST. amend. II. The Second Amendment applies only to federal government action; in cases involving state or local government action, the right to keep and bear arms is part of the Fourteenth Amendment. *See McDonald*, 561 U.S. at 750, 791. But for the sake of simplicity, this Article will use the term "Second Amendment" broadly to cover the right to keep and bear arms even when technically the Fourteenth Amendment is the applicable provision.

⁴ Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 752 (2012) (describing the lower courts' shift away from a historical analysis when considering constitutional challenges to gun laws).

⁵ *Id.* at 706.

Second Amendment.⁶ While attempting to follow the Supreme Court's lead, the lower courts nevertheless drifted away from such a rigidly historical and categorical approach. They instead favored a more flexible, pragmatic sort of analysis, enabling them to weigh the burdens imposed by legal limits on firearms against the public policy concerns motivating such restrictions.⁷ The emerging consensus in the lower courts was that constitutional challenges to gun laws should be evaluated under an intermediate scrutiny approach that was "highly deferential to legislative determinations and [resulted in] all but the most drastic restrictions on guns being upheld."⁸ Historical analysis had "taken a backseat" to consideration of contemporary public policy implications.⁹

I argued that this result was both inevitable and commendable. It was an unavoidable result of the fact that "historical inquiries are extremely difficult and do not produce determinate answers to the types of detailed questions" raised by the array of constitutional challenges being brought against a wide variety of gun laws.¹⁰ The courts' cautious, sensible approach to these challenges deserved praise for giving appropriate deference to legislative decisions, respecting the wide variation in attitudes toward and experience with guns in different parts of the country, and being consistent with the American public's general consensus that the right to keep and bear arms should not preclude strong legal regulation of the possession and use of guns.¹¹ Moreover, the lower courts' approach had "the simple virtue of being candid," because it allowed judges to be honest and open about the policy calculus underlying their decisions, rather than pretending that historical analysis alone dictated the outcome of cases.¹²

Gun rights advocates essentially agreed with that assessment of the lower courts' approach, although they strongly condemned the phenomenon rather than praising it.¹³ They have begged the Supreme Court to take another step into the Second Amendment fray in order to provide additional guidance to "rectify the lower

⁶ *Id.*

⁷ *Id.* at 706–08.

⁸ *Id.* at 706–07, 752.

⁹ *Id.* at 752.

¹⁰ *Id.* at 756–57.

¹¹ *See id.* at 756–61.

¹² *Id.* at 761–62.

¹³ *See, e.g.*, Petition for Writ of Certiorari at 32, Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 134 S. Ct. 1364 (2014) (No. 13-137) (noting that the lower courts have taken steps to circumvent *Heller* and *McDonald*'s necessary implications).

courts' widespread, determined resistance to enforcing the enumerated, fundamental constitutional right to keep and bear arms."¹⁴ To date, they have been unsuccessful, as the Supreme Court has denied certiorari petitions in a string of cases concerning the right to keep and bear arms.¹⁵

This Article provides an updated look at the ongoing battle over the Second Amendment in the lower courts. To some extent, the situation is much the same as it was when I last surveyed this field in 2012.¹⁶ Judges have generally continued to apply a form of intermediate scrutiny that is very deferential to reasonable legislative determinations about what restrictions on guns address legitimate public safety concerns.¹⁷ At the same time, they have moved toward integrating more historical analysis into their approach to Second Amendment issues.¹⁸ History often will not provide any clear answers to modern Second Amendment questions, but courts are increasingly making efforts to glean whatever insight may be drawn from historical reflection. Meanwhile, a minority view has arisen to challenge the general consensus in the lower courts, with a small number of judges rejecting the use of any sort of intermediate scrutiny or other means-ends analysis and insisting that Second Amendment questions instead must be answered on the basis of nothing other than constitutional text, history, and tradition.¹⁹ These judges essentially demand that historical perspectives must dominate the interpretation and application of the Second Amendment, rather than being just elements of a broader and more complex methodology.

Two clear alternatives have thus emerged. Most judges have embraced a model of Second Amendment analysis that gives due consideration to historical evidence but sensibly recognizes that looking at the distant past neither can nor should entirely control

¹⁴ Brief of Amicus Curiae National Rifle Association of America, Inc. in Support of Petitioners at 15, *Drake v. Jerejian*, 134 S. Ct. 2134 (2014) (No. 13-827).

¹⁵ See, e.g., *Drake*, 134 S. Ct. at 2135; *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 134 S. Ct. 1365, 1365 (2014); *Nat'l Rifle Ass'n*, 134 S. Ct. at 1364; *Schrader v. Holder*, 134 S. Ct. 512, 512 (2013); *Woollard v. Gallagher*, 134 S. Ct. 422, 422 (2013); *Kachalsky v. Cacace*, 133 S. Ct. 1806, 1806 (2013).

¹⁶ Compare Rostron, *supra* note 4, at 752 (discussing in 2012 the courts' application of an intermediate scrutiny analysis to Second Amendment cases), with *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, No. 13-1876, 2014 WL 7181334, at *12 (6th Cir. Dec. 18, 2014) (noting that as of the end of 2014 most courts continue to apply intermediate scrutiny in Second Amendment cases).

¹⁷ See *infra* Part II.

¹⁸ See *infra* Parts II-IV.

¹⁹ See *infra* Part III.

today's judicial decision making about the right to keep and bear arms. A small band of insurgents argues otherwise, calling for a rigidly and purely backward looking approach. The struggle between these two camps is far from over, but already the cases have begun to reveal the shortcomings of attempts to decide Second Amendment issues using an exclusively historical approach.²⁰

Part II of this Article describes the standard analysis that courts have applied to Second Amendment issues in recent years, a two-step process that emphasizes historical evidence in determining the scope of the right to keep and bear arms but then employs an intermediate scrutiny analysis to determine the strength and effect of that right. Part III examines the views of a small minority of judges who insist that text, history, and tradition are the only legitimate elements of Second Amendment analysis. Part IV argues that the standard approach to the Second Amendment that has emerged in lower court decisions is a sound methodology that sensibly takes account of historical considerations where they provide some insight into the Second Amendment's meaning but does not pretend that history alone can provide answers to the complex array of issues facing courts in Second Amendment cases today.

II. THE STANDARD TWO-STEP MODEL OF SECOND AMENDMENT ANALYSIS

In the 1990s, scholars began to talk about the emergence of a "Standard Model" of Second Amendment interpretation.²¹ They meant that a large body of scholarship had taken the view that the Second Amendment provides an individual right to possess and use guns for purposes beyond participation in organized militia activities.²² The Supreme Court eventually embraced that Standard Model in *Heller*, ruling that the Second Amendment does indeed extend to private activities like having a gun for protection of one's home and family against criminals.²³

²⁰ See *infra* Part IV.

²¹ See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463 (1995).

²² See *id.* at 466-75 (arguing that this right serves the purposes of enabling individuals to defend themselves and ensuring the existence of many well-armed citizens to serve in militias).

²³ See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding that the Second Amendment protects private individuals' possession and use of firearms unconnected to organized militia activities).

The resolution of that important threshold question about the reach of the Second Amendment led to a proliferation of constitutional challenges and new questions for courts to answer. In particular, while the Supreme Court's decisions in *Heller* and *McDonald* provided some clarification of the scope of Second Amendment rights, they offered little clear guidance about the strength of those rights.²⁴ Would the newly reinvigorated Second Amendment radically curtail governments' ability to regulate guns, or would it result in the invalidation of only the strictest legal constraints on guns?

As courts around the country have struggled to answer that question, a new Standard Model has begun to emerge in Second Amendment jurisprudence. Most judges have concluded that the Second Amendment requires a two-step analysis.²⁵

The first stage of the analysis considers whether the challenged law imposes a burden on conduct protected by the Second Amendment.²⁶ In other words, this step requires a court to decide whether the case even falls within the ambit of the Second Amendment. Courts have concluded that this analysis should be a "historical inquiry" that "seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification."²⁷ Courts thus must try to assess whether the challenged law restricts or regulates conduct that Americans in

²⁴ See Rostron, *supra* note 4, at 705, 716–17.

²⁵ The federal appellate courts for the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits have adopted the two-step analysis. See *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014); *Drake v. Filko*, 724 F.3d 426, 429 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014); *Peterson v. Martinez*, 707 F.3d 1197, 1208 (10th Cir. 2013); *Schrader v. Holder*, 704 F.3d 980, 988–89 (D.C. Cir.), *cert. denied*, 134 S. Ct. 512 (2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *United States v. Staten*, 666 F.3d 154, 159 (4th Cir. 2011); *Ezell v. City of Chi.*, 651 F.3d 684, 702–03 (7th Cir. 2011). The First Circuit has applied intermediate scrutiny but has not explicitly structured its analysis with the two-step approach. See *United States v. Carter*, 752 F.3d 8, 13 (1st Cir. 2014). The Eighth and Eleventh Circuits have not mentioned the two-step process in their Second Amendment decisions and have not specified a scrutiny level or other test for Second Amendment issues. See, e.g., *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 (11th Cir. 2012) ("[I]n passing on a Second Amendment claim, courts must read the challenged statute in light of the historical background of the Second Amendment."), *cert. denied*, 133 S. Ct. 856 (2013); *United States v. Bena*, 664 F.3d 1180, 1182–85 (8th Cir. 2011) (deciding Second Amendment issue based on a mixture of considerations including inferences drawn from *Heller*, historical evidence, and assessment of public safety implications).

²⁶ See, e.g., *Staten*, 666 F.3d at 159.

²⁷ *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

1791 regarded as being part of the right to keep and bear arms.²⁸

If the historical inquiry leads to the conclusion that the challenged law's effects fall outside the original scope of the right to keep and bear arms, that resolves the matter. The court will reject the claim that the law violates the Second Amendment.²⁹ But if the historical analysis instead suggests that the law burdens conduct that was part of the right to keep and bear arms in 1791 (or if the historical analysis is inconclusive), the court must proceed to the second part of the two-step approach.³⁰ Rather than looking to history, the second step of the analysis evaluates the challenged law from the perspective of contemporary public policy.³¹ This entails the application of some form of means-end scrutiny, which essentially amounts to asking whether the government shows a sufficient justification for the challenged law.³²

The Supreme Court has not specified a particular level of scrutiny or other means-ends test that should govern Second Amendment issues, although *Heller* did declare that the right must be protected by something more demanding than mere rational basis scrutiny.³³ Courts therefore tend to regard the matter as boiling down to a choice between intermediate scrutiny and strict scrutiny, and most opt for the former.³⁴ Intermediate scrutiny could take many

²⁸ One opinion has suggested that when the right to keep and bear arms applies to state or local government action through the Fourteenth Amendment, the historical inquiry should be "carried forward" to focus on understandings about the right to keep and bear arms as of 1868, when the Fourteenth Amendment was adopted. *Ezell*, 651 F.3d at 702. That would create the possibility that the scope or strength of the right to keep and bear arms might not be exactly the same in cases about state and local government actions as in cases about federal government actions. See Rostron, *supra* note 4, at 743–44; Allen Rostron, *The Intersection of Originalism and Jot-for-Jot Incorporation*, THE ORIGINALISM BLOG (May 18, 2012), <http://originalismblog.typepad.com/the-originalism-blog/2012/05/the-intersection-of-originalism-and-jot-for-jot-incorporationallen-rostron.html>.

²⁹ *Ezell*, 651 F.3d at 702–03.

³⁰ *Id.*

³¹ *Id.*

³² See, e.g., *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014); *Drake v. Filko*, 724 F.3d 426, 429 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014); *Peterson v. Martinez*, 707 F.3d 1197, 1208 (10th Cir. 2013); *Schrader v. Holder*, 704 F.3d 980, 989 (D.C. Cir.), *cert. denied*, 134 S. Ct. 512 (2013); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012); *United States v. Staten*, 666 F.3d 154, 159 (4th Cir. 2011); *Ezell*, 651 F.3d at 703.

³³ *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008); Rostron, *supra* note 4, at 716–17.

³⁴ See, e.g., *Chovan*, 735 F.3d at 1138; *Drake*, 724 F.3d at 435; *Schrader*, 704 F.3d at 989; *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96–97 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013); *Nat'l Rifle Ass'n of Am., Inc.*, 700 F.3d at 205; *Staten*, 666 F.3d at 159. *But see* *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, No. 13–1876, 2014 WL 7181334, at *17 (6th Cir. Dec. 18, 2014) (opting to apply strict scrutiny rather than intermediate scrutiny in Second Amendment cases).

forms,³⁵ but most courts have applied a moderate version of it that merely requires the government to show a reasonable fit between the challenged law and some substantial government objective.³⁶ Courts emphasize that this does not mean the challenged law must be the least restrictive means of achieving the objective.³⁷ They also suggest that the means-ends scrutiny is to some extent a sliding scale, with greater scrutiny applied if the law imposes a severe burden on conduct that is at the core of the Second Amendment.³⁸

Courts thus have settled on a standard formula for reviewing Second Amendment claims that provides room for both historical analysis and evaluation of contemporary policy implications. But in practice, the two-step model often winds up turning more on the second step than the first. Historical analysis does not provide clear answers to most of the difficult Second Amendment issues that courts face today, and history therefore continues to take an inevitable backseat to practical policy considerations.

For example, the Fourth Circuit was a pioneer in the development of the two-step approach to Second Amendment issues, but it has made a habit of bypassing the first step and skipping straight to the application of intermediate scrutiny.³⁹ In *United States v. Staten*, the court considered a challenge to the federal law that prohibits possession of guns by those convicted of misdemeanor crimes of domestic violence.⁴⁰ Arguing that people with misdemeanor convictions for domestic violence are outside the original scope of the right to keep and bear arms, federal prosecutors waded into the murky history of gun laws in England and the American colonies prior to the American Revolution.⁴¹ They contended that both “before and after” the guarantee of gun rights enshrined in the

³⁵ Rostron, *supra* note 4, at 746 & nn.273–74 (describing how “intermediate scrutiny” is not a single, unitary test but instead can cover a range of tests).

³⁶ *See, e.g., Staten*, 666 F.3d at 159.

³⁷ *Id.*

³⁸ *See, e.g., Chovan*, 735 F.3d at 1138; *Nat’l Rifle Ass’n of Am., Inc.*, 700 F.3d at 195; *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012).

³⁹ *United States v. Carter*, 669 F.3d 411, 416 (4th Cir. 2012) (“Under the first step, we have three times deferred reaching any conclusion about the scope of the Second Amendment’s protection.”); *see also* *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir.) (deciding to once again “hew to a judicious course” of skipping the first step of the two-part Second Amendment analysis and use intermediate scrutiny to uphold Maryland’s law requiring an applicant to show a “good-and-substantial-reason” for seeking a permit to carry a handgun in public), *cert. denied*, 134 S. Ct. 422 (2013).

⁴⁰ 18 U.S.C. § 922(g)(9) (2013); *Staten*, 666 F.3d at 156.

⁴¹ *Staten*, 666 F.3d at 160; Brief for the United States at 20–31, *Staten*, 666 F.3d 154 (No. 10-5318).

English Declaration of Rights in 1689,⁴² “the English government retained the power to disarm individuals it viewed as dangerous.”⁴³ This included individuals convicted of crimes, but also those the government simply suspected of posing a threat, particularly Catholics.⁴⁴ Likewise, in the American colonies, “governments frequently disarmed those they perceived as dangerous,” whether that was Native Americans, slaves, free blacks, Catholics, or anyone who refused to swear an oath of loyalty to the colonial government.⁴⁵ While conceding that the colonies did not necessarily prohibit all convicted criminals from having guns, the prosecutors in *Staten* attributed that to practical necessities (such as the desire to have every able-bodied individual ready to help ensure the survival of frontier communities in constant peril), rather than to the notion that convicted criminals had a right to be armed.⁴⁶ The prosecutors in *Staten* also noted that when Anti-Federalists began drafting proposals for a constitutional amendment that would secure a right to bear arms under the new U.S. Constitution, they sometimes expressly indicated that the right would not apply to criminals.⁴⁷ Although the Second Amendment drew no such distinction between criminals and law-abiding individuals, the *Staten* prosecutors argued that it was nevertheless taken for granted that the Second Amendment would not give rights to criminals or other dangerous people.⁴⁸

The prosecutors thus made a valiant effort to prevail on the historical branch of the Second Amendment analysis by showing that a misdemeanor conviction for domestic violence puts a person outside the original scope of the right to keep and bear arms. But it was an attempt to answer a question that in fact has no clear answer. The concept of domestic violence was not even contemplated in the era of the Second Amendment’s adoption and therefore “[j]udges simply will be disappointed if they hope to find specific and clear historical evidence about the Founding generation’s attitude toward the rights of domestic abusers.”⁴⁹ The outcome of the historical analysis thus depends entirely on the

⁴² The Supreme Court deemed the English right to be “the predecessor to our Second Amendment.” *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008).

⁴³ Brief for the United States, *supra* note 41, at 21.

⁴⁴ *Id.* at 21–23.

⁴⁵ *Id.* at 23–24.

⁴⁶ *Id.* at 25–26.

⁴⁷ *Id.* at 27–28.

⁴⁸ *Id.* at 27–31.

⁴⁹ Rostron, *supra* note 4, at 751–52.

degree of generality at which the analysis may be conducted. If the government must present specific evidence that Americans in 1791 thought individuals with misdemeanor convictions for domestic violence lost gun rights, that will be impossible to do. But if it is sufficient for the government to show some evidence that there was a general sense in early America that particularly dangerous types of individuals should not have unqualified rights to be armed with weapons, the government can easily do that and the modern laws barring possession of guns by domestic violence misdemeanants can be upheld.

Perhaps recognizing the inevitable indeterminacy of the historical inquiry on this issue, the Fourth Circuit panel in *Staten* concluded that it was unnecessary to even undertake the historical portion of the Second Amendment analysis.⁵⁰ Rather than delving into the complexities of the historical debate, the court skipped ahead to the means-ends portion of the two-step approach to the Second Amendment and concluded that the challenged law survived intermediate scrutiny.⁵¹ Prosecutors cited studies showing that domestic violence is a serious problem and that abuse committed by a person with a gun is more likely to be deadly.⁵² That evidence plus “logic and common sense” was enough to convince the court that a reasonable fit existed between the challenged law and the interests motivating its enactment.⁵³

The Tenth Circuit likewise danced around the need for a difficult historical inquiry in *United States v. Huitron-Guizar*,⁵⁴ a case concerning the federal law that prohibits illegal aliens from possessing guns.⁵⁵ The court noted that the Second Amendment refers to the right of “the people” to keep and bear arms, and for constitutional purposes “the people” is generally regarded as meaning a group broader than just U.S. citizens but not necessarily

⁵⁰ *United States v. Staten*, 666 F.3d 154, 160 (4th Cir. 2011).

⁵¹ *Id.* at 160–68.

⁵² *Id.* at 163–67.

⁵³ *Id.* at 167. The Fourth Circuit did essentially the same thing in *United States v. Chapman*, a case involving the federal law prohibiting possession of guns by individuals subject to domestic violence restraining orders. *United States v. Chapman*, 666 F.3d 220, 223 (4th Cir. 2012). As in *Staten*, the court skipped the historical step of its two-part approach and proceeded straight to upholding the law under intermediate scrutiny. *Id.* at 225. And in *United States v. Carter* the Fourth Circuit remanded a challenge to the federal law prohibiting possession of guns by illegal drug users, 18 U.S.C. § 922(g)(3) (2013), and outlined what information the government would need to present to have the law upheld under intermediate scrutiny. *United States v. Carter*, 669 F.3d 411, 418–20 (4th Cir. 2012) (“[The government’s] burden should not be difficult to satisfy in this case.”).

⁵⁴ *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012).

⁵⁵ 18 U.S.C. § 922(g)(5)(A); *Huitron-Guizar*, 678 F.3d at 1165.

including all persons.⁵⁶ The court further noted that many historical sources, from the founding era on through the nineteenth century, described the right to keep and bear arms “in connection with the word ‘citizen,’” but it was still hard to know if this should be treated as categorically disqualifying non-citizens from the right’s scope.⁵⁷ The court queried whether gun ownership is more like “the private rights not generally denied aliens, like printing newspapers or tending a farm,” or “the rights tied to self-government, like voting and jury service, largely limited to citizens.”⁵⁸ The court noted that “the founders’ notion of citizenship was less rigid than ours,”⁵⁹ suggesting that it could be treacherous to resolve modern issues about citizenship and guns on the basis of evidence about stray remarks made more than two hundred years ago.⁶⁰ Faced with the parties’ failure to address the issue from a historical perspective, the Tenth Circuit panel in *Huitron-Guizar* opted to sidestep the historical inquiry and instead uphold the law under a very weak form of intermediate scrutiny.⁶¹ The court did not require the government to present any particular proof of the risks that motivated the challenged enactment, and instead the court simply relied on conjecture about why Congress might have felt illegal aliens should be disqualified from having guns.⁶²

Other judicial attempts to evaluate modern gun laws from a historical perspective have proven to be equally problematic. For example, the Eighth Circuit panel in *United States v. Bena* tried to offer historical justifications for the federal law prohibiting a person from possessing a gun while subject to a restraining order that prohibits harassing, stalking, or threatening an intimate partner.⁶³ Again, the court could not possibly be more specific than citing evidence of “a common-law tradition that the right to bear arms is

⁵⁶ *Huitron-Guizar*, 678 F.3d at 1167–68 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 269 (1990)).

⁵⁷ *Huitron-Guizar*, 678 F.3d at 1168.

⁵⁸ *Id.* at 1169.

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *Id.* at 1169–70.

⁶² *Id.* at 1170 (“Congress may have concluded that illegal aliens, already in probable present violation of the law, simply do not receive the full panoply of constitutional rights enjoyed by law-abiding citizens. Or that such individuals, largely outside the formal system of registration, employment, and identification, are harder to trace and more likely to assume a false identity. Or Congress may have concluded that those who show a willingness to defy our law are candidates for further misfeasance or at least a group that ought not be armed when authorities seek them.”).

⁶³ 18 U.S.C. § 922(g)(8) (2013); *United States v. Bena*, 664 F.3d 1180, 1183–84 (8th Cir. 2011).

limited to peaceable or virtuous citizens,” but concluded that such a showing of a general historical tradition of denying gun rights to bad people is sufficient.⁶⁴

While the historical approach to the Second Amendment often fails to yield persuasive results, it has fared a little better in cases posing particularly easy questions. For example, the Sixth Circuit decision in *United States v. Greeno* included historical justifications for upholding laws that increase the length of prison sentences for drug trafficking that involves possession of a firearm.⁶⁵ The court sensibly recognized that it would be impossible to find historical evidence about the specific issue before the court, because drug trafficking laws and sentencing guidelines did not exist in early America, and therefore the inquiry needed to look more broadly at “whether the Second Amendment right, as historically understood, protected the possession of weapons by individuals engaged in criminal activity.”⁶⁶ Not surprisingly, the court concluded that Americans have a longstanding understanding that the right to keep and bear arms does not give people a right to use weapons to carry out criminal activities.⁶⁷ But even on this seemingly “no brainer” issue, the historical evidence cited by the court was far less robust than one might expect. The court relied primarily on nineteenth-century statutes under which the use of a weapon increased the seriousness of the offense.⁶⁸ As for evidence from 1791 or earlier, the court mentioned only a law review article’s discussion of a 1788 guidebook for justices of the peace, sheriffs, and constables which described “the common law crime of affray”⁶⁹ and how law enforcement agents “were empowered to disarm individuals who r[o]de about armed in terror of the peace.”⁷⁰ While the court in *Greeno* was undoubtedly correct to conclude that arming oneself to commit crimes fell outside the original scope of the Second Amendment, its opinion hints at the difficulty of presenting historical evidence to prove even the most seemingly

⁶⁴ *Bena*, 664 F.3d at 1184.

⁶⁵ *United States v. Greeno*, 679 F.3d 510, 519–20 (6th Cir. 2012); U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (2013) (providing for two-level increase in offense level where the offender possessed a dangerous weapon such as a firearm).

⁶⁶ *Greeno*, 679 F.3d at 519.

⁶⁷ *Id.* at 520.

⁶⁸ *Id.* at 519–20.

⁶⁹ Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 501 (2004).

⁷⁰ *Greeno*, 679 F.3d at 519 (quoting Cornell & DeDino, *supra* note 69, at 501) (internal quotations omitted).

simple propositions about the right.

The Eleventh Circuit's ruling in *GeorgiaCarry.Org, Inc. v. Georgia* provides another telling example. The case concerned a challenge to a Georgia law prohibiting possession of a gun “[i]n a place of worship, unless the governing body or authority of the place of worship permits the carrying of weapons or long guns by license holders.”⁷¹ Approaching the issue from a historical perspective, the court presented an array of quotations from Blackstone, Locke, and America's founders affirming the importance of private property rights.⁷² The court concluded that the right to keep and bear arms, however important it may be, could not have been intended to trump the fundamental right to control the use of one's private property.⁷³ That is an entirely sensible conclusion, but from the standpoint of historical evidence alone, it could be attacked as lacking sufficient support. The Eleventh Circuit opinion included evidence establishing the general importance of property rights, but nothing that specifically addressed the intersection of property rights and gun rights.⁷⁴ The historical evidence thus shed some general, suggestive light on the question before the court but did not precisely and conclusively answer it.

In case after case, the historical record proves to support many possible views rather than leading to any one definitive conclusion. Courts have wisely recognized this and declined to make historical considerations the sole or even predominant factor in interpretation and application of the Second Amendment.

III. THE MINORITY VIEW

While courts generally have downplayed the role of historical analysis in Second Amendment cases, a small minority of dissenting judges have insisted that history should be the exclusive basis for determining the meaning and effect of the right to keep and bear arms. This minority bloc disavows the use of intermediate scrutiny, strict scrutiny, or any other test that involves assessing the strength of the government's interests and determining whether they are sufficient to justify the challenged infringement of rights.

Judge Brett Kavanaugh of the District of Columbia Circuit forged

⁷¹ GA. CODE ANN. § 16-11-127(b)(4) (2014); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1248–49 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 856 (2013).

⁷² *GeorgiaCarry.Org*, 687 F.3d at 1261–65.

⁷³ *Id.* at 1265–66.

⁷⁴ *Id.* at 1261–63.

this view, declaring that “*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”⁷⁵ Judge Kavanaugh explained that “tradition” meant the “post-ratification history” of the Second Amendment, for looking at what people thought about the Second Amendment in the period after its adoption could shed light on how the public understood the provision at the time it was added to the Constitution.⁷⁶ For instance, nineteenth-century sources might help us understand better what the right to keep and bear arms meant in 1791.

While the text of the Second Amendment obviously matters a lot for the broadest sorts of questions, such as whether the right to keep and bear arms applies only to militias or to private individuals, the text is not going to shed any light on more specific questions about the constitutionality of particular gun laws.⁷⁷ The text does not, for example, say anything specific about whether a state can require a license for carrying a concealed weapon in public, restrict access to guns for people below a certain minimum specified age, or prohibit possession of guns by felons or other categories of people with an elevated risk of misusing guns. So when judges say the Second Amendment should be applied based only on text, history, and tradition, the “text” portion of their methodology is a mirage and their analysis ultimately boils down to

⁷⁵ *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

⁷⁶ *Id.* at 1272.

⁷⁷ The Second Amendment’s text might be enough to resolve all cases if one interpreted it to mean that governments cannot impose any legal restrictions on guns. One could argue that when the Second Amendment says the right to keep and bear arms shall not be infringed, it means it shall not be impaired in any manner. Some Supreme Court justices like Hugo Black or William O. Douglas may have taken such an absolutist approach to the First Amendment’s protection of freedom of speech. See generally L. A. Powe, Jr., *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 COLUM. L. REV. 371, 372 (1974) (“Justice [Douglas] has undergone a slow evolution from a willingness to weigh and balance individual rights against governmental powers to an approach bordering on absolutism.”); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960) (“It is my belief that there *are* ‘absolutes’ in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be ‘absolutes.’”). Whatever merit such an approach might have for freedom of speech, it is not a realistic option for the right to keep and bear arms. Taken to its extreme, for example, an absolute prohibition of any government regulation of firearms would mean that public schools could not stop kindergarten students from carrying guns in classrooms. The Supreme Court has sensibly rejected any sort of absolutist approach to the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“Like most rights, the right secured by the Second Amendment is not unlimited.”).

being entirely based on evidence about history and tradition. In other words, interpreting and applying the Second Amendment becomes entirely a matter of asking what happened in the past. According to Judge Kavanaugh, the Supreme Court's decisions in *Heller* and *McDonald* completely rejected the idea that Second Amendment analysis should include any "examination of costs and benefits" or "empirical inquiry."⁷⁸

Although he has not attracted a large following, Judge Kavanaugh is not entirely alone in his views.⁷⁹ He gained an ally when Judge Jennifer Walker Elrod of the Fifth Circuit endorsed his position, declaring that "unless and until the Supreme Court says differently," she believes Judge Kavanaugh's approach to the Second Amendment is correct and nothing but text, history, and tradition should matter.⁸⁰ Judge Samuel Der-Yeghiayan of the U.S. District Court for the Northern District of Illinois likewise has embraced the view that Second Amendment cases should be decided on the basis of only text, history, and tradition.⁸¹

This small minority of judges advocating a purely historical approach acknowledge that the Supreme Court never explicitly endorsed their view.⁸² In other words, the Supreme Court never said that only text, history, and tradition matter.⁸³ But the proponents of the purely historical approach point out that Justice Scalia's opinion in *Heller* repeatedly referred to historical and traditional understandings of what was protected by the right to

⁷⁸ *Heller*, 670 F.3d at 1280, 1282 (Kavanaugh, J., dissenting).

⁷⁹ In a Ninth Circuit case, *United States v. Chovan*, Judge Carlos Bea hinted that he might be persuaded to adopt the text-history-tradition approach, but did not pursue the point because the parties in the case had conceded that a means-ends scrutiny test should be used instead. *United States v. Chovan*, 735 F.3d 1127, 1142–43, 1152 (9th Cir. 2013) (Bea, J., concurring), *cert. denied*, 135 S. Ct. 187 (2014).

⁸⁰ See *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting). Many other judges have emphasized the importance of looking to history in Second Amendment cases, but without going quite so far as to say that text, history, and tradition are the exclusive considerations. See, e.g., *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 (11th Cir. 2012) (emphasizing the importance of considering the Second Amendment's historical background), *cert. denied*, 133 S. Ct. 856 (2013).

⁸¹ *Gowder v. City of Chi.*, 923 F. Supp. 2d 1110, 1119 (N.D. Ill. 2012) (finding Second Amendment violation where Chicago declined to permit possession of a firearm by person with non-violent misdemeanor criminal record). Perhaps recognizing that the Seventh Circuit has not treated text, history, and tradition as the exclusive considerations in Second Amendment cases, Judge Der-Yeghiayan concluded that the challenged law should be struck down even if intermediate or strict scrutiny applied. *Id.* at 1123–26.

⁸² See, e.g., *Heller*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

⁸³ *Id.* ("To be sure, the Court never said something as succinct as 'Courts should not apply strict or intermediate scrutiny but should instead look to text, history, and tradition to define the scope of the right and assess gun bans and regulations.'").

keep and bear arms and what fell outside its reach.⁸⁴ And by contrast, the Supreme Court did not use intermediate scrutiny or any other means-end or government interest analysis in striking down the law at issue in *Heller*:

As to the ban on handguns, for example, the Supreme Court in *Heller* never asked whether the law was narrowly tailored to serve a compelling government interest (strict scrutiny) or substantially related to an important government interest (intermediate scrutiny). If the Supreme Court had meant to adopt one of those tests, it could have said so in *Heller* and measured D.C.'s handgun ban against the relevant standard. But the Court did not do so; it instead determined that handguns had not traditionally been banned and were in common use—and thus that D.C.'s handgun ban was unconstitutional.⁸⁵

This argument fails to account adequately for a significant passage in the Supreme Court's opinion in *Heller*. The majority opinion in that case concluded that the District of Columbia's ban on possession of handguns, even for purposes of self-defense within one's home, was such a drastic restriction that it would be invalid "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."⁸⁶ That statement suggests that the Supreme Court was not going to make an unnecessary and premature decision in *Heller* about what level of scrutiny should apply, but that it would be necessary and appropriate for courts to adopt such a test in future cases involving laws not so obviously unconstitutional.⁸⁷

Judges promoting the purely historical approach to the Second Amendment have not offered a persuasive explanation for that passage, and instead they have simply tried to minimize its significance. According to Judge Kavanaugh, the Supreme Court merely "noted in passing" that the District of Columbia's laws would fail under tests like intermediate scrutiny or strict scrutiny.⁸⁸ The Supreme Court's remark was "more of a gilding-the-lily

⁸⁴ See *Houston*, 675 F.3d at 449 (Elrod, J., dissenting); *Heller*, 670 F.3d at 1271–73 (Kavanaugh, J., dissenting).

⁸⁵ *Heller*, 670 F.3d at 1273 (Kavanaugh, J., dissenting).

⁸⁶ *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

⁸⁷ See *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 n.9 (2d Cir. 2012) (“[*Heller*] implies, if anything, that one of the conventional levels of scrutiny would be applicable to regulations alleged to infringe Second Amendment rights.”), *cert. denied*, 133 S. Ct. 1806 (2013).

⁸⁸ *Heller*, 670 F.3d at 1277 (Kavanaugh, J., dissenting).

observation” than a meaningful indication that one of the customary scrutiny tests ultimately would be applied to Second Amendment issues.⁸⁹

That is one reasonable interpretation of the Supreme Court’s statement. Perhaps the Court was essentially saying, “no means-ends scrutiny test applies to the right to keep and bear arms, but even if such a test were used, the District of Columbia’s laws would flunk it.” But that is certainly not the only plausible interpretation of the Supreme Court’s remark. The simplest interpretation would be that the Supreme Court was not deciding whether a test like intermediate scrutiny or strict scrutiny would apply, and so lower courts have been doing exactly the right thing by taking up that open question and proposing approaches that they think would be appropriate.

Likewise, the judges favoring a purely historical approach to the Second Amendment point to the Supreme Court’s presumption in *Heller* that certain types of longstanding gun regulations are constitutionally permissible.⁹⁰ But once again, this reads too much into what the Supreme Court actually said. The Court did not say that a long historical pedigree is the *only* way a gun law can be valid. The Court’s suggestion that certain types of longstanding gun laws are constitutional should not be transformed into a rule that any type of gun law first introduced in the modern era must be unconstitutional.

The Supreme Court’s decisions simply did not provide any clear framework for evaluating constitutional challenges to the wide range of gun laws that impose restrictions less drastic than the handgun bans at issue in *Heller* and *McDonald*. The small minority of lower court judges who insist that text, history, and tradition alone should control in Second Amendment cases are not clearly contradicting any instructions provided by the Supreme Court in *Heller* or *McDonald*, but neither is the minority bloc’s approach clearly commanded by anything in the Supreme Court’s rulings.

IV. EVALUATING THE STANDARD MODEL AND THE MINORITY VIEW

Until the Supreme Court revisits the Second Amendment and provides additional guidance, lower court judges will have to continue debating and deciding how to resolve purported conflicts

⁸⁹ *Id.*

⁹⁰ *Id.* at 1273 (citing *Heller*, 554 U.S. at 626–27).

between gun laws and the right to keep and bear arms. While only a small number of judges currently insist that text, history, and tradition should be the exclusive considerations, litigants bringing gun rights cases will certainly make a push to expand that number. And even if most judges continue to adhere to the standard two-step analysis, they will need to make important choices about how to apply that analysis, including how much to emphasize its historical component versus its consideration of contemporary public policy implications. The cases already decided by the courts in recent years provide some basis for beginning to evaluate the relative merits of these approaches.

An unmistakable conclusion that one can already draw from the cases is that deciding constitutional issues through historical analysis is no easy task.⁹¹ Even Judge Kavanaugh, a seminal proponent of the text-history-tradition approach, admits that “analyzing the history and tradition of gun laws in the United States does not always yield easy answers.”⁹² Justice Scalia similarly acknowledged in *McDonald* that “[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.”⁹³

While the historical route is difficult, its preeminent virtue is supposed to be its objectivity. Justice Scalia argued in *McDonald* that a historically focused method is clearly “much less subjective, and intrudes much less upon the democratic process.”⁹⁴ He went on to claim that the historical method “is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.”⁹⁵

That sounds good in theory. If we really could look to the past and find clear and definite answers to the specific questions that arise in Second Amendment cases today, we might want to go that

⁹¹ Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 935 (2013) (“Judges are not historians, and so, in addition to the risk that they will not understand the materials they are charged to consult, there is the additional risk that they will not conduct a dispassionate examination of the historical evidence and will simply marshal historical anecdotes to achieve what they have already decided is the preferred outcome.”).

⁹² *Heller*, 670 F.3d at 1275 (Kavanaugh, J., dissenting).

⁹³ *McDonald v. City of Chi.*, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring).

⁹⁴ *Id.* at 804.

⁹⁵ *Id.*

route. It would provide a way to decide cases based on something more neutral and objective than judges' instincts or speculations about the likely effects of stricter or laxer regulatory regimes for guns. But as the pile of lower court decisions about the Second Amendment continues to grow, the shortcomings and failed promises of the historical approach become ever more evident.

A. *Registration Requirements*

Litigation about the constitutionality of gun registration laws provides one example. After the Supreme Court's ruling in *Heller*, the District of Columbia revised its gun laws in an effort to maintain tight restrictions on guns while complying with the Supreme Court's decision.⁹⁶ Among other things, the District of Columbia required registration of all firearms.⁹⁷ The District of Columbia Circuit upheld the registration requirement for handguns, concluding that "the basic requirement to register a handgun is longstanding in American law."⁹⁸ The court found that America has no similar tradition of requiring registration of rifles and shotguns, and therefore the case needed to go back down to the district court for the development of a more thorough factual record on the interests served by requiring registration of long guns.⁹⁹

Rather than upholding the registration law for handguns and remanding the issue for long guns, Judge Kavanaugh would have simply invalidated the registration requirements for all firearms.¹⁰⁰ His dissenting opinion insisted that Second Amendment analysis should take into account only text, history, and tradition,¹⁰¹ and it illustrated the weaknesses of that approach.

A registration requirement, by itself, does not disarm anyone.¹⁰² In other words, it does not stop anyone from keeping and bearing arms, and instead simply means that certain information about the gun and its owner will be disclosed to and maintained by the

⁹⁶ See Allen Rostron, *Protecting Gun Rights and Improving Gun Control After District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 395–99 (2009).

⁹⁷ D.C. CODE § 7-2502.01(a) (2014).

⁹⁸ *Heller v. District of Columbia*, 670 F.3d 1244, 1254 (D.C. Cir. 2011).

⁹⁹ *Id.* at 1259–60. On remand, the district court upheld the long gun registration requirement on the ground that it is substantially related to government interests in public safety and protecting police. *Heller v. District of Columbia*, No. 08-1289, 2014 U.S. Dist. LEXIS 66569, at *61 (D.D.C. May 15, 2014).

¹⁰⁰ *Heller*, 670 F.3d at 1269–70 (Kavanaugh, J., dissenting).

¹⁰¹ *Id.* at 1271–72.

¹⁰² Of course, a registration requirement could be part of a broader law that also includes restrictions on who can have a firearm.

government. A vigorous and complex debate could be had about the potential benefits and disadvantages of such a registration system, such as whether keeping track of firearms would help to prevent them from being transferred to those prohibited from having them or whether the existence of a registration system would increase the risk of a tyrannical government someday tracking down and confiscating all guns from private hands.¹⁰³

Judge Kavanaugh could not consider any of those policy issues, or at least he could not admit to considering them, because he insists that Second Amendment issues must be decided through historical analysis alone without any regard to what policy effects the result may have.¹⁰⁴ But his historical analysis of the District of Columbia's registration laws begged the question. He asserted that there is a long tradition of not requiring registration of guns in America.¹⁰⁵ Even that is debatable, for Kavanaugh brushed aside early American laws that required all militia members to regularly submit their arms for inspection.¹⁰⁶ But even assuming Kavanaugh was correct in his factual assertion, it is unclear why the lack of historic precedent for requiring registration of guns necessarily leads to the conclusion that America has a historic tradition of recognizing a *right* not to register guns. In other words, if we conclude that "Americans have rarely or never been required to do X," that could mean there is a tradition of Americans having a right not to be forced to do X, but it also could mean that for all sorts of other reasons governments have simply not chosen to require people to do X even though they would be entitled to do so.

When it comes to issues other than guns, judges like Antonin Scalia have realized this. For example, in *Lawrence v. Texas*,¹⁰⁷ the Supreme Court struck down a Texas law that prohibited homosexual sodomy.¹⁰⁸ While Texas argued that laws prohibiting same-sex sodomy had ancient roots, the Supreme Court observed that in fact the historical record showed it was very rare for anti-

¹⁰³ See, e.g., James B. Jacobs & Kimberly A. Potter, *Comprehensive Handgun Licensing & Registration: An Analysis & Critique of Brady II, Gun Control's Next (and Last?) Step*, 89 J. CRIM. L. & CRIMINOLOGY 81, 101 (1998); Elaine Vullmahn, Comment, *Firearm Transaction Disclosure in the Digital Age: Should the Government Know What Is In Your Home?*, 27 J. MARSHALL J. COMPUTER & INFO. L. 497, 518–19 (2010).

¹⁰⁴ *Heller*, 670 F.3d at 1295–96 (Kavanaugh, J., dissenting). Indeed, Judge Kavanaugh claims that as a policy matter, he might favor measures like requiring registration of guns. *Id.*

¹⁰⁵ *Id.* at 1292.

¹⁰⁶ *Id.* at 1293.

¹⁰⁷ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁰⁸ *Id.* at 578.

sodomy laws to be applied to “consenting adults acting in private.”¹⁰⁹ Justice Scalia pointed out the need to be careful about what conclusions to draw from such historical evidence.¹¹⁰ He observed that there are obvious practical obstacles to prosecuting people for consensual acts occurring in private.¹¹¹ How would police even find out about the acts? As a result, the fact that governments rarely punished people for such acts would not necessarily mean America had a tradition of thinking that people have a right to engage in those acts.¹¹² The lack of prosecutions could be attributable to factors other than a longstanding consensus or traditional understanding that a right exists.¹¹³

In his analysis of gun registration requirements, Judge Kavanaugh made the sort of mistake that Justice Scalia condemned. Judge Kavanaugh leapt to the conclusion that if something (like requiring registration of guns) was rarely done in the past, it must be because people believed it violated individual rights. One could just as easily interpret the historical record in the opposite direction, pointing out that gun registration was not required and therefore there is no evidence in early American history of gun registration requirements being struck down as invalid. Those now arguing that they have a right not to register guns thus cannot point to any evidence in history or tradition for the existence of such a right. In short, when the historical record does not really contain any specific evidence one way or the other about the existence of a particular right, that lack of historical evidence can too easily be twisted into supporting any side of an issue.

B. Carrying Guns in Public

The indeterminacy of historical perspectives on the Second Amendment can also be seen in the clash of federal appellate decisions about laws restricting the carrying of guns in public. Some laws have been upheld, others have been struck down, and history has proven to be incapable of definitively resolving the debate.¹¹⁴

¹⁰⁹ *Id.* at 569.

¹¹⁰ *See id.* at 597–98 (Scalia, J., dissenting).

¹¹¹ *Id.* at 597.

¹¹² *Id.*

¹¹³ *See id.*

¹¹⁴ Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1500, 1519–20, 1528–29 (2014) (arguing that the history-

Among the courts upholding restrictions on public carrying of guns, the Second Circuit has been the most blunt in its rejection of the purely historical approach to the Second Amendment. In *Kachalsky v. County of Westchester*, the court considered a challenge to the New York law requiring a person to show “proper cause,” such as a special need for protection, before being issued a license to carry a concealed handgun.¹¹⁵ The court reviewed historical evidence, including founding era gun laws and nineteenth century court decisions,¹¹⁶ and found that “[h]istory and tradition do not speak with one voice here” and instead “[w]hat history demonstrates is that states often disagreed as to the scope of the right to bear arms.”¹¹⁷ Even if the court believed it should decide the issue based entirely on “this highly ambiguous history and tradition,” it would be impossible to do so because the historical sources did not address the validity of a statute like the New York law, which does not completely prohibit the carrying of handguns but instead requires the showing of a special reason for a license to do so.¹¹⁸ The court recognized that “[a]nalogizing New York’s licensing scheme (or any other gun regulation for that matter) to the array of statutes enacted or construed over one hundred years ago has its limits.”¹¹⁹

The Second Circuit nevertheless made room in its analysis for historical considerations. In particular, the Second Circuit looked to history and tradition to help determine how demanding the means-ends scrutiny of a challenged law should be.¹²⁰ Although the court found in *Kachalsky* that the historical record could not answer the specific question of whether a state can require a showing of special need for a license to carry a handgun in public, history and tradition shed helpful light on the issue at a much more general level. The court found a longstanding tradition in America of widespread and extensive regulation of the carrying and use of guns in public.¹²¹ While not clearly demonstrating whether New York’s challenged law should be upheld, the historical tradition suggested that

and-tradition approach would lead to the uncomfortable conclusion that the Second Amendment provides a right to carry firearms openly but not concealed).

¹¹⁵ *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012) (quoting N.Y. PENAL LAW § 400.00.2(f) (McKinney 2014)), *cert. denied*, 133 S. Ct. 1806 (2013).

¹¹⁶ *Kachalsky*, 701 F.3d at 91, 94–95.

¹¹⁷ *Id.* at 91.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 93–96.

¹²¹ *Id.* at 94–95.

regulating the carrying of handguns in public does not substantially burden a right at the very core of the Second Amendment's protection and therefore New York's law should not receive the most exacting sort of judicial scrutiny.¹²² The court applied intermediate scrutiny, gave substantial deference to the legislature's prerogative to make policy judgments, and upheld the statute.¹²³

Other circuits soon followed this lead. Recognizing the long history of legal restrictions on carrying concealed guns in America, the Tenth Circuit concluded that the Second Amendment does not provide a right to carry concealed weapons, upholding Colorado's refusal to grant concealed-carry licenses to people who do not reside in Colorado.¹²⁴ The Third Circuit upheld New Jersey's law requiring a showing of "justifiable need" for a permit to carry handguns in public, agreeing with *Kachalsky's* conclusion that history analysis is inconclusive on whether the Second Amendment provides a right to bear arms outside the home.¹²⁵ Likewise, the Fourth Circuit upheld Maryland's requirement that a person have a "good and substantial reason" to receive a permit to carry a handgun in public without even undertaking a historical analysis, concluding that the law survived intermediate scrutiny and therefore it was unnecessary to wade into a treacherous historical bog about the right's scope.¹²⁶

The Seventh Circuit broke ranks and struck down Illinois laws prohibiting the carrying of guns in public.¹²⁷ Unlike the laws in other states requiring a showing of proper, justifiable, or substantial need for carrying a gun, the Illinois law flatly prohibited people from carrying loaded guns in public, whether carried openly or concealed.¹²⁸ This law made Illinois an outlier, the only state in the nation maintaining a general ban on carrying guns outside the home.¹²⁹ Judge Richard Posner's majority opinion in the case examined historical evidence going back more than seven centuries into English history.¹³⁰ But rather than finding that this historical information actually answered the question before the court, Judge

¹²² *Id.* at 96–97.

¹²³ *Id.* at 96–101.

¹²⁴ *Peterson v. Martinez*, 707 F.3d 1197, 1201, 1211 (10th Cir. 2013).

¹²⁵ *Drake v. Filko*, 724 F.3d 426, 431–32 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014).

¹²⁶ *Woollard v. Gallagher*, 712 F.3d 865, 868, 876 (4th Cir.), *cert. denied*, 134 S. Ct. 422 (2013).

¹²⁷ *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

¹²⁸ *Id.* at 934.

¹²⁹ *Id.* at 940.

¹³⁰ *Id.* at 936–37.

Posner simply concluded that the Supreme Court's decision in *Heller* tied his hands when it came to whether the Second Amendment protects the right to carry guns in public.¹³¹ *Heller* concluded that the Second Amendment provides a right to defend oneself, the need to defend oneself exists in public as well as in the home, and therefore *Heller* must mean the right extends to public possession and use of guns.¹³² In dissent, Judge Ann Claire Williams explained how in fact the historical evidence was inconclusive.¹³³ The case thus represents a victory for gun rights at the bottom line, for the court struck down the Illinois ban, but none of the judges in the case found that the historical evidence actually was sufficient to answer the question presented.¹³⁴ One thought the historical evidence was ambiguous at best, and the other two felt they had no choice but to accept *Heller's* historical conclusions.¹³⁵

A Ninth Circuit panel relied even more heavily on history in *Peruta v. County of San Diego*¹³⁶ when it struck down California's law requiring applicants to show "good cause" for receiving licenses to carry concealed weapons.¹³⁷ But even in *Peruta*, the historical record alone could not carry the day. In applying the first part of the standard two-step approach to the Second Amendment, the Ninth Circuit opinion undertook a very extensive analysis of historical evidence in an effort to establish that carrying guns in public for purposes of self-defense is an activity within the scope of the right to keep and bear arms.¹³⁸ Proving that general proposition may have been enough to resolve the case if California had prohibited all possession of firearms outside the home, but California had not done so.¹³⁹ California law instead provided for the granting of licenses to carry concealed guns, but required a showing of "good cause" for such a license to be granted.¹⁴⁰ San Diego interpreted this to mean an applicant needed a reason beyond just a generic interest in personal safety.¹⁴¹ None of the historical

¹³¹ *Id.* at 941–42.

¹³² *Id.* at 942.

¹³³ *Id.* at 947 (Williams, J., dissenting).

¹³⁴ *Id.* at 942 (majority opinion); *id.* at 947 (Williams, J., dissenting).

¹³⁵ *Id.* at 942 (majority opinion); *id.* at 947 (Williams, J., dissenting).

¹³⁶ *Peruta v. Cnty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014). The Ninth Circuit is considering whether the case should be reheard en banc. *Peruta v. Cnty. of San Diego*, No. 10-56971 (9th Cir. Dec. 3, 2014).

¹³⁷ *Peruta*, 742 F.3d at 1148, 1179.

¹³⁸ *Id.* at 1153.

¹³⁹ *Id.* at 1147–48.

¹⁴⁰ *Id.* at 1148.

¹⁴¹ *Id.*

evidence presented by the court specifically addressed the validity of such a restriction.

Once again, history could only take a court so far, and at that point, the court had to make a leap forward to a conclusion based on more than just text, history, and tradition. The Ninth Circuit panel in *Perulta* concluded that the California “good cause” requirement, as interpreted by San Diego, went too far.¹⁴² Rather than merely regulating or restricting the right to bear arms, it effectively “destroyed” the right to carry guns in public for the typical person with no exceptional need for carrying a weapon.¹⁴³ That is a plausible (but very debatable) conclusion to reach, but in the end it was based not on history but on an analogy to the Supreme Court’s decision in *Heller*. The *Peruta* panel felt that requiring proof of an atypical need for carrying a gun came too close to the complete prohibition of handgun possession struck down in *Heller*.¹⁴⁴ Again, that is a plausible conclusion, but it is ultimately reached through assessment of the severity of the burden imposed by the challenged law and interpretation of the *Heller* precedent, rather than by historical investigation.

If any doubts remained as to whether history alone dictated the result in *Peruta*, Judge Sidney Thomas’s dissenting opinion in the case eliminated them. Judge Thomas reviewed the evidence of history and tradition, perusing the same sources on which the majority in the case relied, and concluded “this history does not provide a ready or easy answer to this case.”¹⁴⁵ While often looking at the same sources, the majority and the dissent in *Peruta* focused on answering different questions. While the majority went to the historical record in search of support for the general notion that people have a right to carry guns in public, Judge Thomas’s dissent zeroed in on the more specific question of whether people have a right to carry *concealed* guns in public.¹⁴⁶ Asking different questions, the judges naturally found different answers. Judge Thomas concluded that history and tradition do not establish the existence of a right to carry concealed guns.¹⁴⁷ If the Second Amendment provides a right to carry guns outside the home, it is a right to carry them openly rather than concealed, and the *Peruta*

¹⁴² *Id.* at 1169–70.

¹⁴³ *Id.* at 1170.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1184 (Thomas, J., dissenting).

¹⁴⁶ *Id.* at 1181.

¹⁴⁷ *Id.* at 1191.

majority therefore had gone astray by striking down legal restrictions on concealed carry licenses and failing to undertake a historical analysis sufficiently attuned to the precise question facing the court.¹⁴⁸

C. Age Limits

A similar phenomenon has occurred in litigation about gun laws setting minimum age limits. For example, the National Rifle Association has attacked the federal law prohibiting federally licensed firearm dealers from selling handguns to anyone under twenty-one years old,¹⁴⁹ claiming that individuals acquire full Second Amendment rights at the age of eighteen.¹⁵⁰ A Fifth Circuit panel upheld the law, and by a narrow margin, the full court declined to rehear the case en banc.¹⁵¹

Both sides of the court looked at the issue from a historical perspective, and their opinions proved that “the answers that one derives from this sort of historical inquiry depends greatly on the level of generality of the questions asked.”¹⁵² The judges who upheld the challenged law emphasized the general notion that gun safety regulations were common in early America, including laws aimed at disarming particular groups thought to pose heightened public safety concerns.¹⁵³ In the founding era, people were not regarded as adults with full legal rights until the age of twenty-one, and therefore the right to keep and bear arms would not have been violated by laws restricting access to guns for people below that age.¹⁵⁴ The court thus upheld the challenged law, but conceded that it did so by considering the historical evidence “[a]t a high level of generality.”¹⁵⁵ The court was “unable to divine the Founders’ specific views on whether 18-to-20-year-olds had a stronger claim than 17-year-olds to the Second Amendment guarantee” and “[t]he Founders may not even have shared a collective view on such a

¹⁴⁸ *Id.* at 1194–96.

¹⁴⁹ 18 U.S.C. § 922(b)(1), (c)(1) (2013).

¹⁵⁰ *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 188 (5th Cir. 2012).

¹⁵¹ *Nat’l Rifle Ass’n, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 714 F.3d 334, 335 (5th Cir. 2013).

¹⁵² Rostron, *supra* note 4, at 742.

¹⁵³ *Nat’l Rifle Ass’n of Am., Inc.*, 700 F.3d at 200 (“It appears that when the fledgling republic adopted the Second Amendment, an expectation of sensible gun safety regulation was woven into the tapestry of the guarantee.”).

¹⁵⁴ *Id.* at 201–02.

¹⁵⁵ *Id.* at 203.

subtle and fine-grained distinction.”¹⁵⁶ Recognizing that judges are not expert historians and thus “face institutional challenges in conducting a definitive review of the relevant historical record,”¹⁵⁷ the court went on to hold that the challenged law should be upheld under intermediate scrutiny even aside from the historical analysis.¹⁵⁸

By a vote of eight to seven, the full Fifth Circuit opted not to rehear the case,¹⁵⁹ but the dissenters’ opinion revealed how historical analysis conducted at a more fine-grained level could easily lead to results that would be troubling from a modern public policy perspective. Rather than “rummaging through random ‘gun safety regulations’ of the 18th century and holding that these justify virtually any limit on gun ownership,” the dissenters zeroed in on the specific issue of age.¹⁶⁰ They cited evidence that in the American colonies, the obligation to serve in the militia, including the duty to possess arms, generally began at the age of sixteen.¹⁶¹ Around or shortly after the time of the Second Amendment’s adoption, states raised the age for obligatory militia service to eighteen,¹⁶² but they continued to give younger males the option to participate voluntarily.¹⁶³ The dissenters concluded that this historical evidence means eighteen year olds enjoy the full right to keep and bear arms.¹⁶⁴ But the dissenters could just as easily have construed the historical record to mean that the right begins at a younger age, for their opinion contains at least as much historical support for drawing the line at sixteen as it does for making eighteen the minimum age.

D. The Right to a Particular Firearm

On many issues, history and tradition provide no clear answer. For proponents of the purely historical approach, this means the government simply loses. For example, in *Houston v. City of New*

¹⁵⁶ *Id.* at 204.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 205–11.

¹⁵⁹ *Nat’l Rifle Ass’n, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 714 F.3d 334, 335 (5th Cir. 2013).

¹⁶⁰ *Id.* at 339 (Jones, J., dissenting).

¹⁶¹ *Id.* at 340–42.

¹⁶² *Id.* at 340.

¹⁶³ See Rostron, *supra* note 4, at 742 (“[H]alf a million soldiers in the Civil War were sixteen or younger, and even today seventeen-year-olds can join the military with their parents’ permission.”).

¹⁶⁴ *Nat’l Rifle Ass’n, Inc.*, 714 F.3d at 342.

Orleans, the Fifth Circuit considered whether the Second Amendment can be violated by a police department's refusal to return a firearm confiscated during an arrest.¹⁶⁵ Like other courts that have considered the same issue,¹⁶⁶ the Fifth Circuit concluded that "[t]he right protected by the Second Amendment is not a property-like right to a specific firearm."¹⁶⁷ The court sensibly recognized that a claim seeking the return of one particular firearm would be better analyzed as a due process issue, because the claimant's real complaint is loss of an item of property rather than deprivation of the ability to use firearms.¹⁶⁸ In her dissent, Judge Elrod insisted that a purely historical analysis must govern Second Amendment issues, and the government therefore should lose the case because it "has not marshaled any historical evidence that the Second Amendment categorically does not protect particular firearms."¹⁶⁹ Judge Elrod did not cite any historical evidence or claim that any historical evidence contradicted the government's position in the case. Instead, she simply insisted that whenever the historical record tells us nothing one way or the other about the validity of a Second Amendment claim, the government loses.¹⁷⁰ For many of the questions that courts face in Second Amendment cases today, there will be nothing in the historical record that provides a specific answer, and therefore Judge Elrod's approach is a recipe for disaster for a wide swath of gun regulations currently in place. Judge Elrod would improperly elevate historical evidence to be the only means of deciding Second Amendment issues and then pretend the lack of relevant answers in the historical record is a basis for deciding cases rather than a telling signal that courts should broaden their analysis to consider more than just history.¹⁷¹

¹⁶⁵ *Houston v. City of New Orleans*, 675 F.3d 441, 443–44 (5th Cir. 2012).

¹⁶⁶ *See, e.g., Walters v. Wolf*, 660 F.3d 307, 317–18 (8th Cir. 2011).

¹⁶⁷ *Houston*, 675 F.3d at 445.

¹⁶⁸ *Id.* at 445–46.

¹⁶⁹ *Id.* at 449–50 (Elrod, J., dissenting).

¹⁷⁰ *See id.* at 450.

¹⁷¹ Judge Elrod suggested in her *Houston* dissent that the Second Amendment should apply to a dispute about the seizure of a particular firearm, even if the complaining person remains free to possess and use any other guns, because otherwise it would be like "holding that the Free Speech Clause affords no protection against the government preventing the publication of a particular editorial in the *New York Times* because there are plenty of other newspapers that might publish the piece." *Id.* That is a flawed analogy. The *Houston* case involved a situation where a person was merely prevented from using one particular gun to exercise his right to keep and bear arms, but he remained free to exercise that right with any other firearm. *Id.* at 445 (majority opinion). In Judge Elrod's hypothetical, taking away the right of one newspaper (the *New York Times*) cannot be justified on the ground that *others* are still able to exercise the right in question. *See id.* at 450 (Elrod, J., dissenting). That is a very

V. CONCLUSION

As the battle over the Second Amendment rolls on in courts and law reviews, it is vital to remember the real-world consequences of the debate. A relentless series of high-profile tragedies involving firearms have made headline news since the Supreme Court's decisions in *Heller* and *McDonald* opened the latest rounds of the debate over the right to keep and bear arms. In 2011, the scene was Tucson, Arizona, where six people were killed and thirteen others were wounded in a shooting at U.S. Representative Gabby Gifford's meeting with constituents in a supermarket parking lot.¹⁷² A year later, a gunman killed a dozen people and injured more than fifty others during a midnight show in a movie theater in Aurora, Colorado.¹⁷³ At the end of 2012, a young man killed twenty children and a half dozen adult staff members at Sandy Hook Elementary School in Newtown Connecticut.¹⁷⁴ A year later, twelve died during a shooting rampage at the Washington Navy Yard.¹⁷⁵ In 2014, national attention fixated on Isla Vista, California, where a young man undertook a killing spree as revenge against women for rejecting him.¹⁷⁶

While those sorts of incidents receive widespread attention, thousands of other crimes or accidents involving guns occur every year and receive relatively little attention.¹⁷⁷ Meanwhile, an enormous number of responsible, law-abiding Americans safely exercise their right to keep and bear firearms every day.¹⁷⁸ Guns can be used to do good things or bad things, and the nation should be striving to safeguard the right to keep and bear arms while

different scenario. Judge Elrod's newspaper analogy would be fitting if the government in *Houston* had tried to justify the elimination of one person's right to keep and bear arms on the ground that other people in society would still be able to have guns. Put another way, a valid analogy for the *Houston* case would be if a journalist complained that his freedom of expression had been violated by a government action that prevented him from writing with one particular pencil.

¹⁷² Rhonda Bodfield, *Rep. Giffords Shot, Critical*, ARIZ. DAILY STAR, Jan. 9, 2011, at A1.

¹⁷³ Jennifer Brown, *Midnight Massacre, Aurora Theater Shooting*, DENVER POST, July 21, 2012, at 1A.

¹⁷⁴ Mark Arsenault, *Mass Killing One of Worst Ever in US*, BOS. GLOBE, Dec. 15, 2012, at A1.

¹⁷⁵ Editorial, *Regret, Reloaded*, WASH. POST, Sept. 17, 2013, at A22.

¹⁷⁶ Adolfo Flores et al., *Isla Vista Rampage*, L.A. TIMES, May 25, 2014, at 1.

¹⁷⁷ See Josh Blackman & Shelby Baird, *The Shooting Cycle*, 46 CONN. L. REV. 1513, 1531–32 (2014).

¹⁷⁸ See, e.g., President Barack Obama, Remarks on Gun Violence, (Jan. 16, 2013), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201300018/pdf/DCPD-201300018.pdf> (“There are millions of responsible, law-abiding gun owners in America who cherish their right to bear arms for hunting or sport or protection or collection.”).

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simultaneously crafting gun laws and policies that protect and promote the use of guns for socially beneficial purposes while reducing the risk of their harmful misuse.

In short, policymakers need to achieve a reasonable balance of gun rights and regulation. Likewise, judges interpreting and applying the Second Amendment need to strike a similarly sound balance. Courts should seek to respect the right to keep and bear arms without transforming it into an undue restriction on legislative efforts to place reasonable restrictions and regulations on guns. In doing so, judges should look to the history of gun use and regulation in America's past as one appropriate element of constitutional analysis, but without making history the exclusive or even predominant means of determining the Second Amendment's meaning and effect.