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Judging History: How Judicial Discretion in Applying Originalist Methodology Affects the Outcome of Post-Heller Second Amendment Cases

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**JUDGING HISTORY: HOW JUDICIAL DISCRETION IN
APPLYING ORIGINALIST METHODOLOGY AFFECTS THE
OUTCOME OF POST-*HELLER* SECOND AMENDMENT CASES**

Mark Anthony Frassetto*

ABSTRACT

This Article aims to assess how the federal appellate courts have applied the originalist methodology in Second Amendment cases in the decade since *Heller*. It reviews how courts’ varying approaches to historical analysis—specifically, how courts have addressed what historical period to look to, how prevalent a historical tradition must be, and whether to address history at a high or low level of generality—can drastically affect the outcome of cases. As Justice Scalia acknowledged in *McDonald*, “Historical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.”¹ Examining how courts answer these threshold questions and make nuanced judgments about history is necessary if courts are going to make consistent and predictable decisions in Second Amendment cases.

In researching this Article, the author looked at fifty of the most significant Second Amendment cases across the federal circuit courts and analyzed their treatment of several methodological points. Ultimately, this research shows that while there is a near unanimous national consensus within the federal circuit courts on the overall framework for assessing Second Amendment challenges—known as the “two-step test” or the “two-part test”—there are important unresolved methodological issues that have an important impact on how Second Amendment cases are analyzed and decided. These methodological issues, which exist within the consensus framework, allow judges to influence the ultimate decision in a case while appearing to apply objective criteria. This Article aims to bring these issues to the fore and to encourage further consideration of these important originalist methodological points.

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¹ *McDonald v. City of Chicago*, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring).

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INTRODUCTION

District of Columbia v. Heller marks the high point for the Supreme Court's originalist jurisprudence.² Relying nearly exclusively on an originalist methodology, the Supreme Court, for the first time, identified the right protected by the Second Amendment as an individual right to keep and bear arms for purposes of self-defense.³ The *Heller* decision, which ruled on the limited issue of whether Washington, D.C. could completely prohibit handguns within the home,⁴ was only the start of a wave of Second Amendment litigation.⁵ In 2010, this wave became a tsunami after the Supreme Court's decision in *McDonald v. City of Chicago* incorporated the right against the

² (*Heller I*), 554 U.S. 570, 595 (2008); see Jamal Greene, *Heller Highwater? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 325 (2009) (discussing the reactions to the *Heller I* Court's use of originalism).

³ *Heller I*, 554 U.S. at 595.

⁴ See *id.* at 573–75 (citing D.C. Code §§ 7-2501.01(12), 7-2502.01(a), .02(a)(4) (2001)).

⁵ See Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1434–35 (2018) (discussing the increase in “law, scholarship, and advocacy” since the *Heller I* decision).

states through the Fourteenth Amendment, which allowed for widespread challenges to state gun laws.⁶ Given *Heller*'s originalist methodology, history has played a uniquely important role in Second Amendment litigation challenging a wide array of federal, state, and local gun laws.

This Article aims to assess how the federal appellate courts have applied the originalist methodology in Second Amendment cases in the decade since *Heller*. It reviews how courts' varying approaches to historical analysis—specifically, how courts have addressed what historical period to look to, how prevalent a historical tradition must be, and whether to address history at a high or low level of generality—can drastically affect the outcome of cases. As Justice Scalia acknowledged in *McDonald*, “Historical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.”⁷ Examining how courts answer these threshold questions and make nuanced judgments about history is necessary if courts are going to make consistent and predictable decisions in Second Amendment cases.

In researching this Article, the author looked at fifty of the most significant Second Amendment cases across the federal circuit courts and analyzed their treatment of several methodological points.⁸ Ultimately, this research shows that while there is a near unanimous national consensus within the federal circuit courts on the overall framework for assessing Second Amendment challenges—known as the “two-step test” or the “two-part test”—there are important unresolved methodological issues that have an important impact on how Second Amendment cases are analyzed and decided.⁹ These methodological issues, which exist within the consensus framework, allow judges to influence the ultimate decision in a case while appearing to apply objective criteria.¹⁰ This Article aims to bring these issues to the fore and to encourage further consideration of these important originalist methodological points.

Part I of this Article discusses the *Heller* decision, the post-*Heller* consensus framework of the two-part test, and the methodological issues this Article addresses. Part II examines important issues in analyzing history within the originalist framework, namely which historical time periods are relevant and how to treat distinct historical traditions within an originalist framework. Part III discusses how a court's narrow or broad definition of the right being burdened impacts the outcome of the

⁶ See 561 U.S. at 791 (plurality opinion).

⁷ *Id.* at 803–04 (Scalia, J., concurring).

⁸ See generally, e.g., *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019) (mem.); *Peruta v. County of San Diego (Peruta I)*, 742 F.3d 1144 (9th Cir. 2014), *rev'd en banc (Peruta II)*, 824 F.3d 919 (9th Cir. 2016); *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir. 2012); *Ezell v. City of Chicago (Ezell I)*, 651 F.3d 684 (7th Cir. 2011); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

⁹ See *infra* Part III.

¹⁰ See *infra* Part III.

case and, similarly, how a court's narrow or broad consideration of historical laws analogous to the at-issue law affects the outcome. Part IV examines how the courts have used history in Second Amendment cases, specifically what role historical analysis plays in selecting the level of scrutiny to apply to a law that impacts a right protected by the Second Amendment. Finally, this Article will provide some overall conclusions, namely arguing that courts should be cognizant and transparent about the methodological decisions they are making and draw from a broad array of historical sources when doing the originalist analysis.

I. *HELLER* AND ITS PROGENY

A. *The Heller Decision and Originalism*

The Supreme Court's decision in *Heller*, written by the late Justice Scalia, was the end result of years of work by both scholars and attorneys advocating for an individual rights interpretation of the Second Amendment, as well as those seeking to persuade the Court to employ an originalist methodology of constitutional interpretation.¹¹

The Court began its opinion by announcing it would be using original-public-meaning originalism as its constitutional methodology—a form of originalism that looks to how an ordinary speaker of the English language would have understood a term in the Constitution at the time of its ratification¹²:

In interpreting [the Second Amendment], we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.¹³

¹¹ See Jennifer Tucker, *Introduction to A RIGHT TO BEAR ARMS? THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT 4* (Jennifer Tucker, Barton C. Hacker & Margaret Vining eds., 2019) (examining the historical scholarship behind individual-rights interpretation leading up to the *Heller* decision). See generally ERIC J. SEGAL, *ORIGINALISM AS FAITH* (2018) (discussing the history of the originalism debates from the Founding until present day).

¹² For an explanation of Original Public Meaning Originalism, see generally Lawrence Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* (Grant Huscroft & Bradley W. Miller eds., 2011).

¹³ *Heller I*, 554 U.S. 570, 576–77 (2008) (second alteration in original) (first quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931); and then citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824)).

This search for original public meaning, however, went beyond just the text of the Second Amendment.¹⁴ This is because the Second Amendment did not create an individual right “to possess and carry weapons in case of confrontation”; instead, it “recognize[d] the pre-existence of the right and declare[d] only that it ‘shall not be infringed.’”¹⁵ As a result, the search for original public meaning went beyond the Second Amendment’s text to the understanding of the right as it existed at the time the Bill of Rights was ratified.¹⁶ In its search for the pre-existing original public meaning, the Court included citations to more than 100 historical sources, stretching from the late seventeenth to the late nineteenth century.¹⁷ These sources included seventeenth-century English statutes,¹⁸ eighteenth-century American newspapers,¹⁹ historical treatises,²⁰ and late nineteenth-century state court decisions.²¹ The Court found these materials—spread over 200 years of Anglo-American history—confirmed that the Second Amendment protected an individual right to keep and bear arms.²²

The Court also made clear that the right protected by the Second Amendment is subject to traditional types of regulation.²³ That limiting language, often assumed to be a necessary compromise to secure a fifth vote from Justice Anthony Kennedy,²⁴ stated:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases,

¹⁴ See *Heller I*, 554 U.S. at 576–86.

¹⁵ *Id.* at 592 (quoting U.S. CONST. amend. II).

¹⁶ See *id.* at 576–86.

¹⁷ See *id.* Arguably, sources in *Heller* go as far back as the fourteenth century, as one citation to an early eighteenth-century treatise is really just a reference to a 1348 proclamation by Edward III: “In the 21st Year of King Edward the Third, a Proclamation Issued, that no Person should bear any Arms within London, and the Suburbs.” *Id.* at 587 n.10 (quoting JOHN BRYDALL, PRIVILEGIA MAGNATUM APUD ANGLOS: OR, A DECLARATION OF THE DIVERS AND SUNDRY PREHEMINENCIES, OR PRIVILEGES, ALLOWED BY THE LAWS, AND CUSTOMS OF ENGLAND, UNTO THE FIRST-BORN AMONG HER MAJESTIES SUBJECTS, THE TEMPORAL LORDS OF PARLIAMENT XXXIII (London, 1704)).

¹⁸ See *id.* at 582, 587–88, 593.

¹⁹ See *id.* at 594, 604.

²⁰ See *id.* at 577, 582, 607.

²¹ See *id.* at 585–86.

²² See *id.* at 602, 605–18.

²³ See *id.* at 626–27.

²⁴ See, e.g., Nina Totenberg, Moderator, Guns and the Supreme Court at the Aspen Institute, Washington D.C., at 16:13 (Sept. 15, 2016), <https://www.aspeninstitute.org/videos/guns-supreme-court/> [<https://perma.cc/FR2G-36XD>] (Moderating a discussion on guns and the judiciary, Nina Totenberg, Legal Affairs Correspondent for NPR, described a dinner conversation with Justice Scalia shortly after *Heller I*: “I said to the Justice, ‘You know that section, the . . . not going to have an exhaustive list section, doesn’t really sound like you. It sounds more like your fifth vote, Justice Kennedy [presumably].’ And he—here’s the shrug part—, he went [shrugging motion and sound].”).

commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.²⁵

The *Heller* majority also stated that “prohibitions on carrying concealed weapons” have generally been upheld and bans on “M-16 rifles and the like” are constitutional, even though those weapons could be useful in militia service.²⁶ In a footnote, the Court also made clear that the enumerated lawful regulations in the decision were only examples, stating the list did “not purport to be exhaustive.”²⁷ By providing a non-exhaustive list of presumptively constitutional regulations, the Court left open what other regulations are presumptively constitutional and why, as well as the meaning of “longstanding.”²⁸

B. Post-Heller Litigation and the Two-Step Framework

The *Heller* majority abstained from creating a legal framework to analyze future Second Amendment cases and acknowledged that the Court could not “clarify the entire field” in its “first in-depth examination of the Second Amendment.”²⁹ In the absence of detailed guidance from the Supreme Court, the federal appellate courts have uniformly adopted a framework known as “the two-step test.”³⁰ Under the two-step test, courts first analyze whether a challenged law regulates conduct protected by the Second Amendment.³¹ To make this determination, courts rely primarily on the text, history, and tradition of the right to keep and bear arms, as well as *Heller*, *McDonald*, and relevant decisions from federal courts of appeals.³² That is, courts

²⁵ *Heller I*, 554 U.S. at 626–27.

²⁶ *Id.*

²⁷ *Id.* at 627 n.26.

²⁸ *See id.* at 721 (Breyer, J., dissenting) (criticizing the majority’s non-exhaustive list of gun prohibitions that would be constitutional).

²⁹ *See id.* at 635.

³⁰ *See, e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

³¹ *See id.*

³² *See, e.g., id.* at 89–91; *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *Heller II*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell I*, 651 F.3d 684, 701–04 (7th Cir. 2011); *see also* C. Kevin Marshall, *Why Can’t*

look to whether “the law harmonizes with the historical traditions associated with the Second Amendment guarantee.”³³ This analysis centers on whether the challenged law is “longstanding,” because *Heller* stated certain “longstanding” provisions are “presumptively lawful” and allowed for the identification of additional presumptively lawful provisions through “an exhaustive historical analysis.”³⁴

If, after conducting the step one analysis, a court determines the regulated conduct falls outside the scope of the Second Amendment, the court will uphold the law (unless it was challenged on other grounds).³⁵ If a court finds the regulated conduct is covered by the Second Amendment, then the court applies one of the traditional tiers of constitutional scrutiny, which ask how important the government interest is and whether the regulation is adequately tailored to accomplish that interest.³⁶ The required showing by the government depends on how much of an impact the regulation has on the Second Amendment right and whether the challenged law affects the core or peripheries of the Second Amendment, ranging from essentially no showing necessary for regulations that are de minimis impingements to categorical rejection of the most extreme regulations such as the handgun ban at issue in *Heller*.³⁷

C. Methodological Questions at Step One of the Two-Step Analysis

Courts implementing step one of the originalist analysis in the wake of *Heller* must make several important methodological decisions.³⁸ What historical time period

Martha Stewart Have a Gun?, 32 HARV. J.L. & PUB. POL’Y 695 (2009) (discussing the possible inconsistency with the *Heller I* decision’s identification of prohibitions on firearm possession by felons as longstanding and the history of gun regulation).

³³ *Nat’l Rifle Ass’n*, 700 F.3d at 194 (citing *Heller I*, 554 U.S. at 577–628).

³⁴ *Heller I*, 554 U.S. at 626–27, 627 n.25.

³⁵ See *Marzzarella*, 614 F.3d at 89.

³⁶ See *id.*; *Nat’l Rifle Ass’n*, 700 F.3d at 195.

³⁷ Some courts have rejected the tiers of scrutiny and opted to simply strike down laws with a severe impact on the Second Amendment right without applying any of the traditional tiers of scrutiny. See *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017) (“[W]e needn’t pause to apply tiers of scrutiny, as if strong enough showings of public benefits could save this destruction of so many commonly situated D.C. residents’ constitutional right to bear common arms for self-defense in any fashion at all. Bans on the ability of most citizens to exercise an enumerated right would have to flunk any judicial test that was appropriately written and applied, so we strike down the District’s law here apart from any particular balancing test.”). In many cases a court’s characterization of a challenged regulation as a “ban” is decisive in determining its validity. See Joseph Blocher, *Bans*, 129 YALE L.J. 308, 311–13 (2019).

³⁸ Many of the leading originalist scholars have suggested that both steps of the two-step framework should rightfully be considered part of an originalist analysis. See generally, e.g., Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018). This scholarship distinguishes between the concepts of constitutional interpretation—the process of discovering the linguistic meaning or semantic content of

should be considered when assessing the scope of the right to keep and bear arms?³⁹ Most notably, should the scope of the right as applicable to the states be assessed at the time of the ratification of the Fourteenth Amendment rather than the Second Amendment?⁴⁰ What is the relevant historical time period to assess when considering whether a law is longstanding? How prevalent must a law be to be considered longstanding?⁴¹ How should courts treat disparate regional traditions?⁴² How should courts treat laws upheld under legal traditions inconsistent with *Heller*?⁴³ Courts also have to consider the level of generality at which to consider the conduct regulated by the challenged law, as well as any historical regulations analogous to the challenged law.⁴⁴ Using a broader or narrower definition of the conduct and a broader or narrower view of analogous regulations can have a dramatic impact on the outcome of a case.⁴⁵ Each of these questions is addressed in the sections below.

the constitutional text—and construction—the process that gives a text legal effect either through translating into a legal doctrine or applying the text. See Lawrence Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010). This interpretation-construction distinction maps on neatly to the Second Amendment two-part framework, with the step one historical analysis being the constitutional interpretation and the application of scrutiny being the method of constitutional construction. See generally Barnett & Bernick, *supra*. This specific analysis has been endorsed by prominent originalists Barnett and Bernick who described the two-step framework as “good-faith constitutional construction.” *Id.* at 32–36. Barnett and Bernick state that in the Second Amendment context, “originalist interpretation” is often incapable of resolving “certain hard constitutional questions.” *Id.* at 38. As a result, courts “have developed implementing doctrines which distinguish reasonable from unreasonable regulations of firearms,” including the two-step framework. *Id.* at 40. Other prominent originalists have adopted the interpretation-construction approach to originalism, or something similar, without addressing the Second Amendment specifically. See Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 560 (2006) (distinguishing between a constitutional provision’s “sense”—the meaning historically expressed by constitutional language or the information constitutional text conveys—and its “reference”—the tangible outcomes accomplished by the language; see also William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015) (describing “inclusive originalism” which allows judges to look “to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them”). See generally Solum, *supra*; Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 120 (2010). But see ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 13–15 (2012) (rejecting the interpretation-construction distinction and describing the entire endeavor as the result of an “embarrassing linguistic gaffe”). This Article does not wade into the debate on what is and is not originalism, but focuses on the text, history, and tradition analysis at step one.

³⁹ See *Heller I*, 554 U.S. at 626–27.

⁴⁰ See *infra* Section II.A.1.

⁴¹ See *infra* Section II.A.2.

⁴² See *infra* Section II.B.2.

⁴³ See *infra* Section II.B.3.

⁴⁴ See *infra* Section III.A.

⁴⁵ See *infra* Section III.A.

II. ANALYZING HISTORY

A. What Historical Time Period Should Be Considered When Assessing the Scope of the Right to Keep and Bear Arms?

In *Heller*, Justice Scalia's majority opinion considered historical sources, ranging from the seventeenth century to the late nineteenth century, when analyzing the scope of the Second Amendment.⁴⁶ Since then, courts have split on exactly what laws from what historical time periods are relevant, particularly when state laws are challenged under the Second Amendment, as incorporated by the Fourteenth Amendment,⁴⁷ rather than a federal law subject only to the 1791 Bill of Rights.

1. The Second Amendment vs. the Fourteenth Amendment

Courts have taken three approaches to the question of whether the original public understanding of the right to keep and bear arms should be assessed on a different historical baseline depending on whether a challenged regulation is a federal law or state law. The first approach treats the relevant time period for challenges to federal and state gun laws as the founding period, essentially from the final quarter of the eighteenth century to the early nineteenth century.⁴⁸ Courts adopting this approach have generally relied on language from Justice Alito's plurality decision in *McDonald*, which states that the "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'"⁴⁹

The most notable cases using this approach were written by Judge O'Scannlain of the Ninth Circuit.⁵⁰ O'Scannlain looked to founding-era sources in two cases addressing challenges to state public carry permitting systems.⁵¹ O'Scannlain believed this

⁴⁶ See generally *Heller I*, 554 U.S. 570 (2008).

⁴⁷ See generally *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (incorporating the right against the states through the Fourteenth Amendment).

⁴⁸ See *infra* Section II.A.

⁴⁹ *McDonald*, 561 U.S. at 765 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1963)); see also *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1541 (2020) (Alito, J., dissenting) (pointing out that New York City provided "no evidence of laws in force around the time of the adoption of the Second Amendment that prevented gun owners from practicing outside city limits"); *McDonald*, 561 U.S. at 766 n.14 (declaring it a "well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government").

⁵⁰ See generally *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019) (mem.); *Peruta I*, 742 F.3d 1144 (9th Cir. 2014), *rev'd en banc*, 824 F.3d 919 (9th Cir. 2016).

⁵¹ See *Young*, 896 F.3d at 1063, 1063 n.14; *Peruta I*, 742 F.3d at 1155 n.5 (9th Cir. 2014). For a more detailed look at Judge O'Scannlain's understanding of Second Amendment history, see generally Diarmuid O'Scannlain, *Glorious Revolution to American Revolution: The English Origin of the Right to Keep and Bear Arms*, 95 NOTRE DAME L. REV. 397 (2019).

approach was compelled by both Justice Scalia's *Heller* majority and Justice Alito's statement in the *McDonald* plurality that the Second Amendment "is fully binding on the States" and does not provide a "watered-down, subjective version of the individual guarantees."⁵² O'Scannlain understood this language to require lower courts deciding Second Amendment challenges to state laws to look to the 1791 understanding, stating:

Because *Heller* ascribed less weight to evidence from the post-Civil War period when interpreting the Second Amendment's restrictions on the federal government, it necessarily follows that the evidence is less probative when interpreting the Amendment's restrictions on state and local governments.⁵³

Using the 1791 understanding of the right to keep and bear arms, O'Scannlain found both Hawaii and California's good-cause public carry licensing laws unconstitutional.⁵⁴ O'Scannlain's approach has been applied by several judges in the Ninth Circuit.⁵⁵

Judge Posner also adopted this approach in an earlier decision striking down Illinois's prohibition on carrying firearms in public.⁵⁶ Posner stated that "1791, the year the Second Amendment was ratified[,] [is] the critical year for determining the [Second A]mendment's historical meaning, according to *McDonald*."⁵⁷ Like O'Scannlain, Posner also found that history failed to justify the challenged regulations.⁵⁸

The second approach, which has been adopted by a group of judges in the First, Seventh, and Ninth Circuits, as well as by Justice Thomas, analyzes challenges to state gun laws based on the understanding of the right at the time of the ratification of the Fourteenth Amendment.⁵⁹ This view was articulated in the context of the right

⁵² *McDonald*, 561 U.S. at 785–86 (plurality opinion).

⁵³ *Young*, 896 F.3d 1044, 1059 n.12 (citing *Heller I*, 554 U.S. 570, 614 (2008)); *see also Peruta I*, 742 F.3d at 1155 n.5.

⁵⁴ *See Young*, 896 F.3d at 1067–71 (finding that a statute restricting open carry only to individuals "whose job[s] entail[] protecting life or property" destroys a core right in the Second Amendment).

⁵⁵ *See Peruta I*, 742 F.3d at 1155 n.5 (citing *Heller I*, 554 U.S. at 586, 614) (holding that nineteenth-century judicial interpretations of the Second Amendment's meaning are more probative than twentieth-century interpretations); *id.* at 1189 (Thomas, C.J., dissenting); *Teixeira v. County of Alameda*, 822 F.3d 1047, 1054 (9th Cir. 2016), *abrogated by reh'g en banc*, 873 F.3d 670 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1988 (2018) (mem.); *Teixeira v. County of Alameda*, 873 F.3d 670, 683–84 (9th Cir. 2017) (en banc), *aff'g* No. 12-CV-03288 -WHO, 2013 WL 4804756 (N.D. Cal. Sept. 9, 2013), *cert. denied*, 138 S. Ct. 1988 (2018) (mem.); *id.* at 699 (Bea, J., dissenting).

⁵⁶ *See Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

⁵⁷ *Id.* at 935.

⁵⁸ *Id.* at 935–36, 942. For Judge Posner's views on *Heller* and the Second Amendment, see Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), <https://newrepublic.com/article/62124/defense-looseness> [<https://perma.cc/4CV3-85R4>].

⁵⁹ *See, e.g., Ezell I*, 651 F.3d 684, 702–03 (7th Cir. 2011) ("*McDonald* confirms that when state- or local-government action is challenged, the focus of the original-meaning inquiry is

to keep and bear arms by Seventh Circuit Judge Sykes in a pair of decisions striking down Chicago's prohibition on firing ranges:

Heller suggests that some federal gun laws will survive Second Amendment challenge because they regulate activity falling outside the terms of the right as publicly understood when the Bill of Rights was ratified; *McDonald* confirms that if the claim concerns a state or local law, the “scope” question asks how the right was publicly understood when the Fourteenth Amendment was proposed and ratified.⁶⁰

Sykes cites to a nine-page range⁶¹ of Justice Alito's plurality opinion in *McDonald*, where the plurality looked to the period surrounding the Civil War before concluding, “the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”⁶²

This view was also adopted in an opinion written by Judge Selya for a unanimous panel of the First Circuit in *Gould v. Morgan*, a challenge to the enforcement of Boston and Brookline's public carry licensing rules.⁶³ In *Gould*, Selya stated:

Because the challenge here is directed at a state law, the pertinent point in time would be 1868 (when the Fourteenth Amendment was ratified). . . . This date contrasts with the date of ratification of the Second Amendment itself (1791). It is not at all clear to us that the scope of the Second Amendment should be different when analyzing a federal law than when analyzing a state law.⁶⁴

Judge Hardiman also adopted this approach in a concurring opinion joined by four other judges in the Third Circuit, citing Judge Sykes's opinion.⁶⁵ Sykes's fellow Seventh Circuit Judge, Judge Manion, also adopted this approach in a dissenting opinion in a case challenging assault weapon and large capacity magazine prohibitions.⁶⁶

carried forward in time; the Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified.”)

⁶⁰ *Id.* at 702 (citing *Heller I*, 554 U.S. at 625–28).

⁶¹ *See Ezell I*, 651 F.3d at 702–03.

⁶² *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010).

⁶³ *See* 907 F.3d 659, 669 (1st Cir. 2018).

⁶⁴ *Id.* at 669, 669 n.3.

⁶⁵ *See Binderup v. Att'y Gen.*, 836 F.3d 336, 362 (3d Cir. 2016) (en banc) (Hardiman, J., concurring) (citing *Ezell I*, 651 F.3d at 702) (Judge Hardiman's concurrence was joined by Judges Fisher, Chagares, Jordan, and Nygaard).

⁶⁶ *Friedman v. City of Highland Park*, 784 F.3d 406, 414–15 (7th Cir. 2015) (Manion, J., dissenting) (“If the weapons are covered by the Second Amendment, we then examine whether the asserted right (i.e., the activity affected by the regulation) is likewise covered.

Finally, Justice Thomas adopted this view in his concurring opinion in *McDonald*⁶⁷ and in his dissent from certiorari in *Rogers v. Grewal*, where he relied on post-ratification history to “inform our understanding of the right to keep and bear arms guaranteed by the Fourteenth Amendment as a privilege of American citizenship.”⁶⁸ Notably, Justice Thomas would use this Reconstruction-Era history to clarify the meaning of the right to bear arms as incorporated through the Privileges and Immunities Clause rather than the Due Process Clause,⁶⁹ but this still shows a need to look to the scope of rights at the time of incorporation, rather than their inclusion in the original Bill of Rights.

The focus of the second approach on 1868 makes sense for those who fully adopt the original-public-meaning originalism applied by Justice Scalia in *Heller*.⁷⁰ Because the Second Amendment only applies to the states through the Due Process Clause of the Fourteenth Amendment,⁷¹ the scope of the right incorporated should be assessed based on the public meaning of the right to bear arms at the time of incorporation.⁷² This approach, however, risks the Second Amendment breaking into two different rights, one that applies against the federal government and one that applies against the states.⁷³ The first approach, focusing on 1791, avoids this bifurcated Second Amendment right. It is also supported by language in Justice Alito’s *McDonald* opinion.⁷⁴ However, it ignores the history surrounding the incorporation of the right in the Fourteenth Amendment.⁷⁵ While perhaps less messy, the first approach is in

To do this, we examine how the asserted right was publicly understood when the Fourteenth Amendment was ratified (or Second Amendment in the case of federal regulation)” (citing *Ezell I*, 651 F.3d 684, 702 (7th Cir. 2011)).

⁶⁷ See *McDonald*, 561 U.S. at 837–38 (Thomas, J., concurring in part and concurring in the judgment).

⁶⁸ *Rogers v. Grewal*, 140 S. Ct. 1865, 1873 n.6 (2020) (Thomas, J., dissenting from denial of certiorari) (citing *McDonald*, 561 U.S. at 837 (Thomas, J., concurring in part and concurring in the judgment)) (arguing that the Second Amendment right to bear arms was understood to protect public carry at the time the Fourteenth Amendment was ratified).

⁶⁹ See *McDonald*, 561 U.S. at 837–40 (Thomas, J., concurring in part and concurring in the judgment).

⁷⁰ See *Heller I*, 554 U.S. 570, 616–18 (2008).

⁷¹ *McDonald*, 561 U.S. at 791 (plurality opinion). Or rather, given the divide in *McDonald*, four-fifths through the Due Process Clause and one-fifth through the Privileges and Immunities Clause. See *id.* at 806 (Thomas, J., concurring in part and concurring in the judgment).

⁷² See Mark Anthony Frassetto, *The First Congressional Debate on Public Carry and What It Tells Us About Firearm Regionalism*, 40 CAMPBELL L. REV. 335, 354–55 n.115 (2018) (discussing the debate on the relevant time period for a historical analysis).

⁷³ See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 216–17 (1998) (discussing the difficulty of squaring the individual right to bear arms of John Bingham, Jacob Howard, and Thaddeus Stevens with the “rather different vision of the Second Amendment’s Anti-Federalist architects, George Mason and Elbridge Gerry”).

⁷⁴ See *McDonald*, 561 U.S. at 761–65.

⁷⁵ See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting);

tension with the originalist methodology demanded by *Heller*, because it ignores the original public meaning of the Fourteenth Amendment.⁷⁶

The third approach is best described as a “hybrid” approach. Rather than determining the scope of the right to keep and bear arms during a single historical period, judges using the third approach look broadly to Anglo-American tradition.⁷⁷ This approach operates under the often unspoken assumption that the right remained consistent, or at least consistent enough, during the assessed historical periods to make conclusions about the scope of the right applicable to both the 1791 founding period and the 1868 Fourteenth Amendment period.⁷⁸ The approach has the advantage of providing a much larger body of regulation and court opinions to draw from when assessing the scope of the right at both the federal and state level and avoiding potential disparities between the founding-era and Reconstruction-Era understandings of the right to bear arms. Rather than drawing solely from the sparse founding-era tradition and its difficult-to-parse English common law sources, the hybrid approach allows the inclusion of more modern case law and statutory regimes. Its wide-ranging approach to history can also draw some support from *Heller*, which incorporated historical sources spanning more than two centuries to come to its conclusion.⁷⁹

Michael D. Ramsey, *Beyond the Text: Justice Scalia’s Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1967–68 (2017).

⁷⁶ See *McIntyre*, 514 U.S. at 375 (Scalia, J., dissenting) (“I doubt that the Fourteenth Amendment time-warped the post-Civil War States back to the Revolution.”); Ramsey, *supra* note 75, at 1967–69 (discussing Justice Scalia’s apparently contradictory opinions on this issue); see also Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1099–1100 (1995) (discussing whether the 1868 understanding of the Establishment Clause should be controlling in Establishment Clause cases).

⁷⁷ See *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *Peruta II*, 824 F.3d 919, 929–33 (9th Cir. 2016) (en banc), *cert. denied*, (*Peruta III*), 137 S. Ct. 1995 (2017); *Wrenn v. District of Columbia*, 864 F.3d 650, 658 (D.C. Cir. 2017); *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012); *United States v. Rene E.*, 583 F.3d 8, 11–12, 15–16 (1st Cir. 2009) (“The cases cited above evidence a view, from at least the Civil War period, that regulating juvenile access to handguns was permissible on public safety grounds and did not offend constitutional guarantees of the right to keep and bear arms. There is some evidence that the founding generation would have shared the view that public-safety-based limitations of juvenile possession of firearms were consistent with the right to keep and bear arms.”); *Duncan v. Becerra*, 970 F.3d 1133, 1150 (9th Cir. 2020) (“In our circuit, we have looked for evidence showing whether the challenged law traces its lineage to founding-era or Reconstruction-era regulations.”).

⁷⁸ See *Peruta II*, 824 F.3d at 929 (“As will be seen, the history relevant to both the Second Amendment and its incorporation by the Fourteenth Amendment lead to the same conclusion”); see also Lash, *supra* note 76, at 1099–1100 (discussing the problems with this assumption in the context of the Establishment Clause).

⁷⁹ See Mark Anthony Frassetto, *The Use and Misuse of History in Second Amendment Litigation*, in *A RIGHT TO BEAR ARMS? THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT* 206 (Jennifer Tucker, Barton C. Hacker & Margaret Vining eds., 2019).

The Supreme Court's originalist bloc—Justices Thomas, Gorsuch, and Kavanaugh—has expressed some approval for this hybrid approach. In a dissent from denial in a case challenging San Diego County's public carry licensing standard, Justices Thomas and Gorsuch described “[t]he relevant history” as “cases and secondary sources from England, the founding era, the antebellum period, and Reconstruction.”⁸⁰ While a judge on the United States Court of Appeals for the District of Columbia Circuit, Justice Kavanaugh adopted a view that looked both to “historical justifications”⁸¹ and “tradition (that is post-ratification history)” as a “critical tool of constitutional interpretation” in a Second Amendment case.⁸² While that case involved the Second Amendment, rather than the Second Amendment as incorporated through the Fourteenth Amendment, Kavanaugh made clear that the Supreme Court has consistently looked to post-ratification history and tradition to determine the scope of rights.⁸³

The hybrid approach, while correcting some problems with the other approaches, has two significant problems of its own—one methodological and one practical. The methodological issue is that drawing from such a broad range of history is potentially inconsistent with *Heller*, which declared, “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them,” a concept known as the fixation thesis which is central in originalist scholarship.⁸⁴ In other words, using such a broad array of historical sources is inconsistent with the idea that the Second Amendment had a single, fixed meaning at the time of its ratification. The practical flaw is that bringing in a broader array of historical sources raises the inevitability that some of the sources will be inconsistent, allowing for the discretion of judges to replace the objectivity that an originalist approach is intended to produce.⁸⁵

That being said, courts would also be putting a thumb on the scale by ignoring relevant historical materials, which could justify the constitutionality of duly enacted laws. This type of methodological decision, especially one limiting the consideration

⁸⁰ *Peruta III*, 137 S. Ct. 1995, 1998 (2017) (Thomas, J. dissenting from denial of certiorari).

⁸¹ *Heller II*, 670 F.3d 1244, 1272 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (quoting *Heller I*, 554 U.S. 570, 635 (2008)).

⁸² *Id.* (quoting *Heller I*, 554 U.S. at 635).

⁸³ *Id.* at 1274 n.6.

⁸⁴ *Heller I*, 554 U.S. at 634–35. See generally Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015).

⁸⁵ For a stark example, compare An Act for the Better Security of the Inhabitants by Obliging the Male White Persons to Carry Fire Arms to Places of Public Worship, 1770, reprinted in 1775–1770 GA. COLONIAL LAWS 471 (1932) (requiring “every male white inhabitant of this province” to “carry with him a gun, or a pair of pistols, in good order and fit for service” when attending church or another place of worship), with An Act to Preserve the Peace and Harmony of the People of this State § 1, 1870 Ga. Laws 421 (prohibiting a person to “carry about his person any dirk, bowie-knife, pistol or revolver, or any other kind of deadly weapon, to any court of justice, or any election ground or precinct, or any place of public worship, or any other public gathering in this State”).

of scope to solely the founding period, would ignore large portions of the American legal tradition when deciding Second Amendment cases. In this way, the hybrid approach's practical flaw is also its biggest advantage, allowing courts to draw in a broader range of historical materials in order to generate more conclusive answers.

2. How Old Do Laws Have to Be to Be Longstanding?

In performing the step one analysis, courts must also decide how old a regulatory tradition has to be to make it “longstanding” and thus presumptively lawful.⁸⁶ This analysis arises from the safe harbor provisions in *Heller*, which state, in part:

[N]othing in our opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.⁸⁷

Scalia's opinion then goes on to explain that the “presumptively lawful regulatory measures” in this list were only “examples” and the list does not “purport to be exhaustive.”⁸⁸ Many circuit courts have combined these two sections of *Heller* to create a step one test that establishes a presumption of constitutionality for long-standing regulations.⁸⁹

But this test requires a difficult threshold question: how long ago must a regulation have first been enacted for the court to consider it longstanding?⁹⁰ The answer to this question is, in many cases, decisive in determining whether or not a gun regulation is inconsistent with the Second Amendment. During the founding period, laws existed regulating the carrying and discharge of firearms in public, the storage of gunpowder, and training mandates tied to service in the militia, but the modern firearms regulatory framework did not develop until the late nineteenth and early twentieth century.⁹¹ By that point, the administrative state had developed sufficiently to make regulations such as licensing, registration, and background checks realistic to implement, and

⁸⁶ See *Heller I*, 554 U.S. at 626–27.

⁸⁷ *Id.*

⁸⁸ *Id.* at 627 n.26.

⁸⁹ See, e.g., *Drake v. Filko*, 724 F.3d 426, 433 (3d Cir. 2013); *Heller II*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

⁹⁰ For an earlier effort to analyze this question, see Eric Ruben & Joseph Blocher, *supra* note 5, at 1491–92.

⁹¹ For an overview of the development of American gun laws, see generally Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROBS., 2017, at 55.

technology had developed sufficiently such that it made sense to regulate different kinds of firearms.⁹²

The Supreme Court already answered part of this question in *Heller*, making clear that the historical analysis does not end on the day the Second Amendment (or Fourteenth Amendment) was ratified.⁹³ In *Heller*, the Court looked to “Postenactment legislative history,” that is, an “examination of a variety of legal and other sources to determine *the public understanding of a legal text in the period after its enactment or ratification.*”⁹⁴ Justice Scalia’s opinion in *Heller* looked well beyond the period immediately preceding ratification of the Second Amendment and included an analysis of historical materials “through the end of the 19th century.”⁹⁵ Justice Scalia’s opinion also refers to laws that were first enacted in the early twentieth century as “longstanding prohibitions.”⁹⁶ Given that under *Heller* itself, the longstanding period need not go back to ratification, it leaves open the question of what exactly the time period is.⁹⁷

While often not explicit about the answer, courts have generally split across two conclusions: setting the cutoff at either the tail end of the nineteenth century or the first third of the twentieth century.⁹⁸ While this roughly thirty-year difference might seem small when considering the long run of Anglo-American legal history, many modern firearms regulations were enacted during the period of disagreement, so this thirty-year timespan has a real impact on how cases are decided.⁹⁹

The Third Circuit has adopted the view that laws enacted in the early twentieth century are longstanding.¹⁰⁰ In a 2013 decision, the court found that a public carry law that “existed in New Jersey in some form for nearly 90 years” was sufficiently

⁹² See *id.* For a case study on the transition to modern firearms regulation, see generally Frassetto, *supra* note 72, at 335.

⁹³ See *Heller I*, 554 U.S. at 605.

⁹⁴ *Id.* (emphasis added).

⁹⁵ *Id.*

⁹⁶ *Id.* at 626.

⁹⁷ A small number of judges have rejected this analysis, instead demanding that laws precisely mirror those of the founding. See *Mance v. Sessions*, 896 F.3d 699, 714 (5th Cir. 2018) (en banc) (Owen, J., concurring) (“In the present case, the Government has offered no evidence that an in-state sales requirement has a founding-era analogue or was historically understood to be within the ambit of the permissible regulation of commercial sales of firearms at the time the Bill of Rights was ratified.”); see also *United States v. McCane*, 573 F.3d 1037, 1048 (10th Cir. 2009) (Tymkovich, J., concurring) (“But more recent authorities have *not* found evidence of longstanding [felon] dispossession laws. . . . Instead they assert, the weight of historical evidence suggests felon dispossession laws are creatures of the twentieth—rather than the eighteenth—century. . . . Together these authorities cast doubt on a categorical approach to felon dispossession laws.” (citations omitted)).

⁹⁸ Compare *Drake v. Filko*, 724 F.3d 426, 433–34 (3d Cir. 2013), *with id.* at 450 (Hardiman, J., dissenting).

⁹⁹ See generally Repository of Historical Gun Laws, DUKE CTR. FOR FIREARMS LAW, <https://law.duke.edu/gunlaws/> [<https://perma.cc/4HRP-KSCL>] (last visited Dec. 8, 2020) (database containing a substantial repository of historical firearms laws).

¹⁰⁰ *Drake*, 724 F.3d at 432, 434.

longstanding to be presumptively lawful.¹⁰¹ Similarly, the D.C. Circuit found handgun registration laws first enacted in the early twentieth century were “deeply enough rooted in our history to support the presumption that a registration requirement is constitutional.”¹⁰² The D.C. Circuit justified its decision by noting that the *Heller* Court considered laws prohibiting the possession of firearms by felons to be longstanding, “although states did not start to enact them until the early 20th century,” and at “about the same time, states and localities began to require registration of handguns.”¹⁰³

This view was also adopted by the Fifth Circuit, which found that early twentieth century laws should be considered longstanding because “*Heller* demonstrates that a regulation can be deemed ‘longstanding’ even if it cannot boast a precise founding-era analogue. . . . After all, *Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid-20th century vintage.”¹⁰⁴ Similarly, the Ninth Circuit noted, “early twentieth century regulations might . . . demonstrate a history of longstanding regulation if their historical prevalence and significance is properly developed in the record.”¹⁰⁵ Judge Clifton of the Ninth Circuit noted in a dissenting opinion: “Numerous states adopted good cause limitations on public carry in the early 20th century. Laws from this time period may also be considered ‘longstanding’ under *Heller*.”¹⁰⁶

Other judges have expressed more skepticism about twentieth-century laws being longstanding for purposes of understanding rights prior to that time but have nonetheless found such laws longstanding. The Seventh Circuit, while noting that “we do take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791,”¹⁰⁷ described it as “weird to say” that a law enacted in the 1990s is unconstitutional in the 2010s, “but will become constitutional” when it becomes “longstanding” in the 2040s.¹⁰⁸ Similarly, in *Binderup v. Attorney General*, Judge

¹⁰¹ *Id.*

¹⁰² *Heller II*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (relying on the *Heller I* majority’s statement that other early-twentieth-century laws were longstanding).

¹⁰³ *Id.* (citing Marshall, *supra* note 32, at 708).

¹⁰⁴ Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 196 (5th Cir. 2012); *see also* United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010); Peterson v. Martinez, 707 F.3d 1197, 1211 (10th Cir. 2013) (“*Heller* demonstrates that a regulation can be deemed ‘longstanding’ even if it cannot boast a precise founding-era analogue *Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid-20th century vintage.” (alteration in original)).

¹⁰⁵ *Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015).

¹⁰⁶ *Young v. Hawaii*, 896 F.3d 1044, 1079 (9th Cir. 2018) (Clifton, J., dissenting) *reh’g en banc granted*, 915 F.3d 681 (9th Cir. 2019) (mem.).

¹⁰⁷ *Skoien*, 614 F.3d at 641; *see also* *Binderup v. Att’y Gen.*, 836 F.3d 336, 351 (3d Cir. 2016) (en banc).

¹⁰⁸ *Skoien*, 614 F.3d at 641; *see also* *Friedman v. City of Highland Park*, 784 F.3d 406, 408 (7th Cir. 2015) (“From the perspective of 2008, when *Heller* was decided, laws dating to the 1920s may seem to belong to a ‘historical tradition’ of regulation. But they were enacted

Fuentes joined by six of his colleagues in the Third Circuit noted the disagreement among courts about whether a law in effect for “50 years is a long enough period of time to entrench a constitutional tradition” but went on to find that the “categorical ban on felons possessing firearms is rooted deeply enough in our tradition to operate as a *bona fide* disqualification from the Second Amendment right.”¹⁰⁹

Other courts and judges have read *Heller*’s language in a more restrictive manner. Judge Hardiman, for example, rejected a Third Circuit panel majority’s view that the *Heller* Court’s inclusion of laws first passed in the twentieth century meant that other laws enacted during the same period were similarly longstanding.¹¹⁰ Hardiman instead tied the language of *Heller* to founding-era “[d]ebates from the Pennsylvania, Massachusetts, and New Hampshire ratifying conventions, which . . . confirm that the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses.”¹¹¹ Judge Hardiman left unexplained how eighteenth-century debates qualified as either “longstanding” regulations or “prohibitions on the possession of firearms by felons.”¹¹²

Similarly, a Ninth Circuit panel found that a law passed in 1938 “did not represent a ‘longstanding’ prohibition.”¹¹³ And a per curiam decision from a Fifth Circuit panel “assume[d], without deciding,” that “‘these early twentieth century state residency restrictions’ . . . are not ‘presumptively lawful regulatory measures.’”¹¹⁴

At least two prominent conservative judges advocate for a far more extreme approach, one that seems to go against the language of *Heller*, and would not consider any law enacted after the founding period “longstanding.” Judge Owen of the Fifth Circuit would require “a founding era analogue” or evidence that the challenged regulation was “within the ambit of the permissible regulation of commercial sales of firearms at

more than 130 years after the states ratified the *Second Amendment*. Why should regulations enacted 130 years after the *Second Amendment*’s adoption (and nearly 60 years after the Fourteenth’s) have more validity than those enacted another 90 years later? Nothing in *Heller* suggests that a constitutional challenge to bans on private possession of machine guns brought during the 1930s, soon after their enactment, should have succeeded—that the passage of time creates an easement across the *Second Amendment*. If Highland Park’s ordinance stays on the books for a few years, that shouldn’t make it either more or less open to challenge under the *Second Amendment*.” (emphasis added) (citations omitted)).

¹⁰⁹ 836 F.3d at 391 (Fuentes, J., dissenting).

¹¹⁰ See *Drake v. Filko*, 724 F.3d 426, 448–49 (3d Cir. 2013) (Hardiman, J., dissenting).

¹¹¹ *Id.* at 450 (alteration in original) (quoting *United States v. Barton*, 633 F.3d 168, 173 (2011)). Hardiman took the same approach in his concurrence in *Binderup v. Attorney General*, 836 F.3d at 361–62 (Hardiman, J., concurring).

¹¹² See *Heller I*, 554 U.S. 570, 626 (2008).

¹¹³ *Teixeira v. County of Alameda*, 822 F.3d 1047, 1057 (9th Cir. 2016) (citing *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013)), *abrogated by reh’g en banc*, 873 F.3d 670 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1988 (2018) (mem.).

¹¹⁴ *Mance v. Sessions*, 896 F.3d 699, 704 (5th Cir. 2018) (per curiam) (first quoting *Mance v. Holder*, 74 F. Supp. 3d 795, 805 (N.D. Tex. 2015); and then quoting *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion)).

the time the Bill of Rights was ratified” in order for it to be “longstanding.”¹¹⁵ In the same vein, Judge Tymkovich of the Tenth Circuit stated that because “felon dispossession laws are creatures of the twentieth—rather than the eighteenth—century,” doubt should be cast “on a categorical approach to felon dispossession laws.”¹¹⁶

While courts have disagreed about the proper timing for considering a law longstanding at step one of the Second Amendment framework, the methodology most consistent with *Heller* would place the line in the early twentieth century. This methodology has practical benefits, too. Considering history from a period faced with public safety threats more similar to those in the present day—gun violence due to prohibition committed using modern firearms—makes an originalist approach more useful when deciding current controversies. Further, to the extent historical evidence from a more relevant period is absent or ambiguous, the early-twentieth-century tradition is the best historical evidence available to clarify the historical scope of regulation and decide Second Amendment cases on originalist grounds.

B. Prevalence, Regional Variation, and Alternative Legal Traditions

Courts have encountered three additional historical issues in the step one analysis. The most prominent of these issues is how prevalent a historical tradition must be to place an analogous contemporary regulation either (1) outside of the scope of the Second Amendment and, therefore, lawful, or (2) to qualify the regulation as longstanding and, therefore, also presumptively lawful.¹¹⁷ In a federal system like the United States, regulatory unanimity is virtually unheard of, so a prevalence standard of something other than one hundred percent is necessary.¹¹⁸ Another issue is how to determine whether a regionally significant regulatory tradition is sufficiently prominent to place a regulation outside the scope of the Second Amendment. The last issue is whether and how to incorporate into the Second Amendment analysis historical legal and regulatory traditions adopted and upheld based on an interpretation of the Second Amendment that is inconsistent with the Supreme Court’s decision in *Heller*.

1. How Prevalent Must a Regulatory Tradition Be to Fall Outside the Scope of the Second Amendment or Be Considered Longstanding?

An open question courts grapple with in Second Amendment litigation is how widespread a historical regulatory tradition must be to be considered presumptively lawful. *Heller* provides a partial answer to this question.¹¹⁹ In *Heller*, the Court

¹¹⁵ *Id.* at 713–14 (Owen, J., concurring).

¹¹⁶ *United States v. McCane*, 573 F.3d 1037, 1048 (10th Cir. 2009) (Tymkovich, J., dissenting).

¹¹⁷ *See, e.g.*, *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194–95 (5th Cir. 2012) (describing the first prong of analysis under *Heller I*).

¹¹⁸ *See, e.g.*, *infra* text accompanying note 135.

¹¹⁹ *See generally Heller I*, 554 U.S. 570 (2008).

rejected the idea that a 1783 Boston ordinance, which prohibited bringing loaded firearms into a dwelling-house, established a tradition of such regulations, stating, “we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home.”¹²⁰ This portion of *Heller* instructs courts that a single ordinance in one city is not enough, at least when it “contradicts the overwhelming weight of other evidence.”¹²¹ Yet *Heller* also established that unanimity is not required.¹²² Justice Scalia rejected the idea that “different people of the founding period had vastly different conceptions of the right to keep and bear arms,” because “the Bill of Rights codified venerable, widely understood liberties.”¹²³ So if a number of states enacted a provision it would show that the regulated conduct was not widely understood to be within the right’s scope.¹²⁴ *Heller*, therefore, leaves open the question of precisely how many state laws or local ordinances need to exist to establish the presumptive legality of an analogous contemporary regulation.

While this question is a critical part of the step one analysis, it has garnered scant attention from the circuit courts. Most frequently, when the historical record is mixed as to whether a regulatory tradition is prevalent or not, courts skip the step one analysis and go straight to the step two analysis of applying tiers of constitutional scrutiny.¹²⁵ When courts have considered this issue, unsurprisingly, they have not agreed on what number of state laws or local ordinances are necessary to make a law longstanding or outside the scope of the Second Amendment.¹²⁶ Judge Sykes of the Seventh Circuit said that “if the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected—then there must be a second inquiry into the strength of the government’s justification for restricting or regulating the exercise of Second Amendment rights.”¹²⁷ Judge Williams of the Seventh Circuit took a

¹²⁰ *Id.* at 631–32 (discussing Act of Mar. 1, 1783, ch. XIII).

¹²¹ *Id.* at 632.

¹²² *Id.* at 604–05.

¹²³ *Id.* The accuracy of this claim is called into question by the founding-era debate around the constitutionality of the Sedition Acts. *See generally* Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517 (2019).

¹²⁴ *See Heller I*, 554 U.S. at 604–05.

¹²⁵ *See, e.g.,* *Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012) (noting that “[w]hat history demonstrates is that states often disagreed as to the scope of the right to bear arms” before moving onto step two); *see also* Ruben & Blocher, *supra* note 5, at 1493 (finding that seventy-three percent of courts do not analyze historical sources in Second Amendment cases).

¹²⁶ *Compare, e.g., Ezell I*, 651 F.3d 684, 703 (7th Cir. 2011) (holding that inconclusive historical evidence of an activity’s protected status demands a step two analysis), *with id.* at 713–14 (Rovner, J., concurring in the judgment) (arguing that the inconclusive evidence requires acknowledgment of a more limited Second Amendment scope), *and* *Moore v. Madigan*, 702 F.3d 933, 947 (7th Cir. 2011) (Williams, J., dissenting) (suggesting that ambiguous historical evidence of an activity’s protected status is “step one of the analysis”).

¹²⁷ *Ezell I*, 651 F.3d at 703.

different view in a dissent from a different opinion striking down an Illinois prohibition on carrying handguns in public.¹²⁸ Williams wrote that if the history was “ambiguous,” “then it does not seem there was ‘a venerable, widely understood’ right.”¹²⁹

While not yet widely addressed, this is a question courts will have to grapple with as history remains an important part of the Second Amendment analysis. *Heller* provides guidance for how the lower federal courts should move forward, but a more coherent Second Amendment analysis will require a more precise approach. Judge Williams’s approach seems the most methodologically sound—to the extent inconsistencies exist in a regulatory tradition, those inconsistencies undermine the notion that a right was widely understood.¹³⁰

2. How Are Inconsistent Regional Traditions Treated?

Another critical question is how courts should handle distinct regional historical regulatory traditions when conducting the step one analysis. As in the present day, historically, gun laws were substantially less stringent in the American South, especially during the Antebellum period.¹³¹ For example, while many Southern states allowed the carrying of firearms in public if the weapons were carried in an open rather than concealed manner, many states in the North completely prohibited the carrying of weapons in public absent an immediate need for self-defense.¹³² Correspondingly, in several Southern states, courts gave the right to keep and bear arms broader effect than in Northern states—although they still viewed the right substantially more narrowly than argued for by present-day gun rights advocates.¹³³ After the Civil War, several Western states developed a unique regulatory tradition in which the carrying of arms was unlimited in rural and frontier areas, but completely prohibited in cities and towns, and especially sanctioned in places of public gathering such as schools, markets, and dance halls.¹³⁴ There was also variation at the local level,

¹²⁸ *Moore*, 702 F.3d at 947 (Williams, J., dissenting).

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ *See* Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 *YALE L.J.F.* 121, 124–28 (2015); *see also* Frassetto, *supra* note 72, at 354–55 (describing historical regional variation in public carry regulation).

¹³² Ruben & Cornell, *supra* note 131, at 127, 130–33.

¹³³ *Compare, e.g.,* *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822) (striking down a Kentucky law prohibiting concealed carry), *and* *Nunn v. State*, 1 Ga. (1 Kelly) 243, 245 (1846) (striking down a Georgia law prohibiting open carry), *with* Ruben & Cornell, *supra* note 131, at 131 n.53 (“In light of the fact that restrictions on public carry were well accepted in places like Massachusetts and were included in the relevant manual for justices of the peace, the [correct] inference is that violations were enforced at the justice of peace level, but did not result in expensive appeals that would have produced searchable case law.” (citations omitted)).

¹³⁴ *See, e.g.,* Act of Feb. 2, 1860, 1860 N.M. Laws 94 (prohibiting public carry of deadly

as many cities across the country completely prohibited the carrying of firearms, while others banned carrying concealed weapons and remained silent on open carry.¹³⁵

This means that when assessing the constitutionality of gun laws under the Second Amendment, the historical record will sometimes pull in more than one direction based on the region and time period examined.¹³⁶ How these historical traditions are prioritized could often prove critical in deciding Second Amendment cases. Courts and scholars, however, have thus far generally overlooked this issue, with all of the discussion coming in cases challenging state public carry laws.¹³⁷

As with the prevalence analysis discussed above, most frequently, when regulatory traditions are regionally inconsistent, courts punt on the step one analysis.¹³⁸ The Second Circuit, for example, noted that regional differences caution the court against making broad pronouncements about the scope of the right to keep and bear arms, stating: “History and tradition do not speak with one voice here. What history

weapons except in travel between towns and providing for increased minimum and maximum fines for public carry in public assemblies); Act of Dec. 2, 1876, ch. 52, § 1, 1876 Wyo. Sess. Laws 352 (prohibiting public carry of deadly weapons within cities, towns, and villages); Act of Mar. 4, 1881, ch. 37, § 23, 1881 Kan. Sess. Laws 92 (requiring all cities with populations exceeding fifteen thousand inhabitants to prohibit public carry of dangerous or deadly weapons); Act of Mar. 18, 1889, no. 13, 1889 Ariz. Sess. Laws 30 (prohibiting public carry of certain weapons within settlements, towns, villages, and cities except in cases of persons traveling or facing certain danger and providing for increased minimum and maximum fines for public carry in public assemblies); Act of Feb. 4, 1889, 1889, § 1, Idaho Laws 23 (prohibiting public carry of deadly weapons in cities, towns, villages, and public assemblies).

¹³⁵ See, e.g., L.A., CAL., ORDINANCE 35–36 (1878) (complete prohibition); NASHVILLE, TENN., ORDINANCE ch. 108 (Dec. 26, 1873) (complete prohibition); SUPERIOR, WIS., ORDINANCE no. 286, § 18 (Nov. 25, 1896) (concealed weapons). While legally this distinction is significant, in practical effect, all would have functioned in a similar manner prohibiting the public carrying of firearms in the vast majority of circumstances. There is little evidence that carrying firearms openly was common during the antebellum period and what evidence does exist indicates that it was extremely rare to non-existent. See *State v. Huntly*, 25 N.C. (3 Ired.) 418, 422 (1843) (per curiam) (“A gun is an ‘unusual weapon,’ wherewith to be armed and clad. No man amongst us carries it about with him, as one of his every-day accoutrements—as a part of his dress—and never, we trust, will the day come when any deadly weapon will be worn or wielded in our peace-loving and law-abiding State . . .”); *State v. Smith*, 11 La. Ann. 633, 634 (1856) (describing openly carrying a handgun as “the extremely unusual case of the carrying of such weapon in full open view, and partially covered by the pocket or clothes”).

¹³⁶ See *supra* text accompanying notes 31–34.

¹³⁷ This is unsurprising as the argument largely did not exist until the publication of an excellent article by Professors Eric Ruben and Saul Cornell in the *Yale Law Journal Forum* arguing that during the antebellum period Northern and Southern states had radically different gun laws and views on firearms rights. Ruben & Cornell, *supra* note 131. For a discussion on similar constitutional implications of the historical urban-rural divide in gun regulation, see Joseph Blocher, *Firearm Localism*, 123 *YALE L.J.* 82 (2013).

¹³⁸ See, e.g., *Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012); *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018).

demonstrates is that states often disagreed as to the scope of the right to bear arms, whether the right was embodied in a state constitution or the Second Amendment.”¹³⁹

The First Circuit took a similar course, stating: “After a diligent search for the answer to this question, we find . . . that there is no national consensus, rooted in history, concerning the right to public carriage of firearms.”¹⁴⁰ Judge Selya’s majority opinion rejected relying on the traditions of one region—the South—noting that “[c]ourts that have found the history conclusive relied primarily on historical data derived from the antebellum South.”¹⁴¹ The majority found it “unconvincing to argue that practices in one region of the country reflect the existence of a national consensus about the implications of the Second Amendment for public carriage of firearms.”¹⁴² When viewed through “a wider angled lens,” the history “tells a different tale . . . that ‘states and their predecessor colonies and territories have taken divergent approaches to the regulation of firearms.’”¹⁴³ The court went on to find that because “the national historical inquiry does not dictate an answer,” it was appropriate to assume the right to bear arms was implicated and apply scrutiny, rather than attempt to glean answers from the historical record.¹⁴⁴

The most in-depth debate on this issue appeared in the Ninth Circuit’s now-vacated decision in *Young v. Hawaii*, a 2–1 decision in which the majority found Hawaii’s open carry licensing system unconstitutional.¹⁴⁵ In a dissent, Judge Clifton chastised the majority for its conclusion that historical sources “reveal a single American voice,”¹⁴⁶ noting that the majority’s historical analysis “focus[ed] solely on the laws and decisions from one region, the antebellum South.”¹⁴⁷ Clifton noted that “the jurisdictions relied upon by the majority opinion, . . . Kentucky, Tennessee, Alabama, Georgia, and Louisiana[,] . . . were all slave states, and the decisions relied upon by the majority opinion all date from before the Civil War.”¹⁴⁸ Like the First Circuit, Clifton argued: “To suggest that the approach of the antebellum South reflected a national consensus about the Second Amendment’s implications for public carry of firearms is misguided” and “there was no single voice on this question, as there is not today.”¹⁴⁹ The majority rejected the critique, stating, “we cannot agree

¹³⁹ *Kachalsky*, 701 F.3d at 91; *see also* *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) (quoting *Kachalsky*, 701 F.3d at 91).

¹⁴⁰ *Gould*, 907 F.3d at 669.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 669–70 (quoting *Young v. Hawaii*, 896 F.3d 1044, 1076, 1078 (9th Cir. 2018) (Clifton, J., dissenting), *reh’g en banc granted*, 915 F.3d 681 (9th Cir. 2019) (mem.)).

¹⁴⁴ *Gould*, 907 F.3d at 670.

¹⁴⁵ *See* 896 F.3d 1044.

¹⁴⁶ *Id.* at 1080 (Clifton, J., dissenting).

¹⁴⁷ *Id.* at 1076.

¹⁴⁸ *Id.* at 1076.

¹⁴⁹ *Id.* at 1077, 1080.

with the dissent's choice to cast aside Southern cases [because] *Heller* placed great emphasis on cases from the South."¹⁵⁰

The *Young* majority's historical analysis is misguided for two reasons. First, as discussed above, Justice Scalia's decision in *Heller* states that the Second Amendment codified "widely understood liberties," so to the extent that regional traditions show at least one region of the United States did not extend the right to bear arms to particular regulated conduct, that provides strong evidence that the Second Amendment does not protect that conduct.¹⁵¹ Second, at least in the Fourteenth Amendment context, to the extent one regional tradition should be given more weight, it should be the Northern tradition.¹⁵² Northern Republicans drafted the Fourteenth Amendment and were the primary force behind its ratification, and Northern states made up nineteen of the twenty-seven states necessary for ratification.¹⁵³ Even if one rejects the idea that Northern views should predominate when analyzing the Fourteenth Amendment, it would seem incongruous, given the history of the Fourteenth Amendment's drafting and ratification, to use the Second Amendment to impose the Antebellum Southern view of a constitutional right across the nation.¹⁵⁴

3. What Impact Do Historical Legal Traditions Inconsistent with *Heller* Have on the Second Amendment Analysis?

Another issue that has arisen with the step one analysis is how to treat Nineteenth Century cases that analyzed the Second Amendment, or the analogous state right to bear arms provisions, as rights tied to militia service rather than a purely individual right. Speaking in fairly general terms, there are three historical legal views of constitutional right to arms provisions¹⁵⁵: the individual rights view adopted by *Heller*,¹⁵⁶ an individual right to possess arms in order to facilitate militia service,¹⁵⁷ and a

¹⁵⁰ *Id.* at 1057 n.9 (majority opinion).

¹⁵¹ *See Heller I*, 554 U.S. 570, 605 (2008).

¹⁵² *See* Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 DUKE J. CONST. L. & PUB. POL'Y 167, 205 (2017) ("[T]he text of the Amendment should be read through the lens of Northern views of equality, due process, and the privileges of citizens, not as if the Amendment was genuinely co-authored by the South.").

¹⁵³ *See* Frassetto, *supra* note 72, at 357.

¹⁵⁴ *See* Green, *supra* note 152, at 205 n.167 (noting that there were "a few Republicans who described the Fourteenth Amendment as the export of Northern civil liberties to the South").

¹⁵⁵ *See generally* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U.L. REV. 585 (2011) (discussing defense, hybrid, and collective interpretations of the Second Amendment).

¹⁵⁶ *See* *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822).

¹⁵⁷ *See generally, e.g.,* *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871); *English v. State*, 35 Tex. 473 (1871).

collective right to a militia.¹⁵⁸ In the nineteenth and twentieth centuries, many state supreme courts interpreted right to bear arms provisions using the latter two categories, and upheld gun laws with this understanding.¹⁵⁹ These traditions are plainly inconsistent with the result in *Heller*. If Second Amendment cases involved an ordinary common-law-style case law analysis that builds on precedent, these traditions would be irrelevant going forward; however, because the step one analysis seeks to determine the original public understanding of the scope of the right to bear arms, then these cases still matter. Regardless of the means by which a gun regulation is upheld, that case still provides evidence of the public understanding of the right to bear arms during the relevant historical period.¹⁶⁰

Thus far, this issue has been most relevant in the public carry context because of the relatively large number of nineteenth-century public carry cases applying militia-related approaches. The most extensive discussion of the issue appears in a series of public carry decisions issued by Judge O’Scannlain of the Ninth Circuit, who rejects the relevance of these cases.¹⁶¹ For example, in a majority opinion in *Peruta v. County of San Diego*, Judge O’Scannlain put this concept in Orwellian terms: “We set out to review the bulk of precedents from this period. All are, in a broad sense, equally relevant, for every historical gloss on the phrase ‘bear arms’ furnishes a clue of that phrase’s original or customary meaning. Still, some cases are more equal than others.”¹⁶²

Judge O’Scannlain went on to determine that historical cases that did not recognize an individual right to bear arms had little evidentiary value when assessing the scope of the Second Amendment.¹⁶³ The Supreme Court denied a writ of certiorari in the *Peruta* case, but in a dissent from its denial, Justice Thomas, joined by Justice Gorsuch, broadly agreed with Judge O’Scannlain’s historical analysis, stating: “The panel opinion below pointed to a wealth of cases and secondary sources from England, the founding era, the antebellum period, and Reconstruction, which together strongly suggest that the right to bear arms includes the right to bear arms in public in some manner.”¹⁶⁴

Judge O’Scannlain took a similar approach in *Young v. Hawaii*, rejecting the relevance of nineteenth-century cases that did not recognize state and federal right

¹⁵⁸ See generally, e.g., *Walburn v. Territory*, 59 P. 972 (Okla. 1899); *State v. Buzzard*, 4 Ark. 19 (1842); *City of Salina v. Blaksley*, 83 P. 619 (1905).

¹⁵⁹ See, e.g., *Andrews*, 50 Tenn. (3 Heisk.) at 165; *English*, 35 Tex. at 473; *Walburn*, 59 P. at 972; *Buzzard*, 4 Ark. at 18; *City of Salina*, 83 P. at 619.

¹⁶⁰ See *supra* text accompanying notes 11–16, 31–33.

¹⁶¹ See generally, e.g., *Peruta I*, 742 F.3d 1144 (9th Cir. 2014), *rev’d en banc*, 824 F.3d 919 (9th Cir. 2016); *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *reh’g en banc granted*, 915 F.3d 681 (9th Cir. 2019) (mem.).

¹⁶² *Peruta I*, 742 F.3d at 1155.

¹⁶³ *Id.* at 1156; see also *Peruta II*, 824 F.3d at 954 n.7 (Callahan, J., dissenting) (“Some authorities are unpersuasive as they rely on a pre-*Heller* interpretation of the Second Amendment as being limited to a right to bear arms for purposes of maintaining a ‘well-regulated’ militia.”).

¹⁶⁴ *Peruta III*, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting from denial of certiorari).

to bear arms provisions as protecting an individual right.¹⁶⁵ O’Scannlain specifically identified *State v. Buzzard*, an 1842 Arkansas Supreme Court case upholding a state public carry law because the state constitution did not protect an individual right to bear arms,¹⁶⁶ stating that “with *Heller* on the books, cases in *Buzzard*’s flock furnish us with little instructive value.”¹⁶⁷

Other courts have relied on the line of militia-based right cases without discussing whether their inconsistency with *Heller* undermines their usefulness in the step one analysis.¹⁶⁸ That said, because those courts relied on these cases, they presumably rejected the view that they are less relevant.¹⁶⁹

While the case law on this issue is limited, Judge O’Scannlain’s opinions point in a troubling direction, which runs contrary to the original public understanding analysis adopted in *Heller*.¹⁷⁰ Original public understanding originalism instructs courts to analyze the original public understanding of the right protected by the Second Amendment.¹⁷¹ Judge O’Scannlain leaves unanswered the question of why being inconsistent with *Heller* would make a historical case any less instructive of the original public understanding of the Second Amendment and its state analogues.¹⁷² Surely a twenty-first-century case cannot change the nineteenth-century understanding of the scope of the right. And, while it is fine to reject those nineteenth-century understandings (we do not take the Sedition Acts as guidance about the scope of the First Amendment), it is *not* fine to declare fealty to a strictly historical test and then artificially narrow one’s field of vision with regard to that history—especially if history plays a singular role in constitutional decision-making. That said, how to treat cases adopting methodologies different from *Heller* is an open question, which future courts deciding Second Amendment cases will need to answer.

III. DECIDING THE LEVEL OF GENERALITY

A. The Level of Generality Courts Use to Define the Right to Bear Arms

One major question in most Second Amendment cases is at what level of generality to analyze the right to keep and bear arms. That is, should the court assess the scope of the right at a high level of generality or based on the particular circumstances of the case? For example, the results of a historical analysis in a challenge

¹⁶⁵ *Young*, 896 F.3d at 1057.

¹⁶⁶ *See State v. Buzzard*, 4 Ark. 18, 18–30 (1842).

¹⁶⁷ *Young*, 896 F.3d at 1057.

¹⁶⁸ *See, e.g., Peruta I*, 742 F.3d 1144, 1186–89 (9th Cir. 2014) (Thomas, J., dissenting), *rev’d en banc*, 824 F.3d 919 (9th Cir. 2016); *Peruta II*, 824 F.3d at 933–36; *Kachalsky v. County of Westchester*, 701 F.3d 81, 90–91 (2d Cir. 2012).

¹⁶⁹ *See, e.g., Peruta I*, 742 F.3d at 1186–89; *Peruta II*, 824 F.3d at 933–36; *Kachalsky*, 701 F.3d at 90–91.

¹⁷⁰ *See supra* text accompanying notes 11–16, 163–67.

¹⁷¹ *See supra* text accompanying notes 11–16, 163–67.

¹⁷² *See Peruta I*, 742 F.3d at 1156.

to a law regulating the carrying of firearms in public might be quite different if the question was the more general “does the Second Amendment protect some right to possess firearms outside of the home?” as opposed to the more specific “does the Second Amendment protect a right to carry firearms in public when a person has no immediate need for self-defense?” A court’s choice of whether to assess the scope of the right at a high or low level of generality could make a substantial difference in the ultimate result of the case.¹⁷³ Assessments at the higher level of generality almost always lead to a finding that a challenged regulation impinges on the right to keep and bear arms and generally lead to the application of either a categorical rejection of a challenged law or the application of a more stringent form of heightened scrutiny.¹⁷⁴ Assessments of the right at a lower degree of generality more often lead to laws being upheld at step one or after the application of intermediate scrutiny.¹⁷⁵

Like many of the other methodological issues discussed in this Article, public carry cases provide the best examples of courts taking divergent views of generality with divergent results.¹⁷⁶ Judges favoring a broad right to carry in public have generally framed the question as whether the Second Amendment protects a right to carry arms in public at all.¹⁷⁷ For example, in a dissent from denial of certiorari in a case challenging California’s requirement that those seeking licenses to carry concealed firearms must show good cause, Justice Thomas, joined by Justice Gorsuch, framed the question as, “whether [the right to keep and bear arms] protects the right to carry firearms in public for self-defense” before indicating that the law should have been found unconstitutional.¹⁷⁸ This view is most thoroughly laid out by Judge Callahan of the Ninth Circuit in her dissent from the court’s en banc decision to uphold California’s carry licensing provisions.¹⁷⁹ Judge Callahan wrote that “[d]efining the constitutional

¹⁷³ See Erwin Chemerinsky, *Prologue to ORIGINALISM AS FAITH*, *supra* note 11, at xv (“More generally, if the meaning of a constitutional provision is stated at any abstract enough level, almost any result can be justified.”); Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 487 (2017) (“The selection of the level of generality at which we ask the question essentially foreordains the answer.”); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 358 (1992) (explaining the importance of a “consistent theory of choice” because “[m]ovements in the level of constitutional generality may be used to justify almost any outcome”).

¹⁷⁴ See *infra* text accompanying notes 177–84; see also Smith, *supra* note 173, at 487; Easterbrook, *supra* note 173, at 352.

¹⁷⁵ See *infra* text accompanying notes 185–91; see also Smith, *supra* note 173, at 487; Easterbrook, *supra* note 173, at 352.

¹⁷⁶ See *infra* text accompanying notes 178–91.

¹⁷⁷ See *infra* text accompanying notes 178–84.

¹⁷⁸ *Peruta III*, 137 S. Ct. 1995, 1996, 1999–2000 (2017) (Thomas, J., dissenting from denial of certiorari); see also *Rogers v. Grewal*, 140 S. Ct. 1865, 1868 (2020) (Thomas, J., dissenting from the denial of certiorari) (“This case also presents the Court with an opportunity to clarify that the Second Amendment protects a right to public carry.”).

¹⁷⁹ See *Peruta II*, 824 F.3d 919, 953 (9th Cir. 2016) (Callahan, J., dissenting), *cert. denied*, 137 S. Ct. 1995.

right to bear arms narrowly is inconsistent with judicial protection of other fundamental freedoms.”¹⁸⁰ Judge Callahan argued that other constitutional rights were assessed at a high level of generality.¹⁸¹ She noted that “the question in *Obergefell* was not whether the plaintiffs have a right to same-sex marriage,” but rather, “whether the states’ limitation of marriage to a man and woman violated the right to marry.”¹⁸² Therefore, she concluded that the question in public carry cases should not be “the right to concealed carry per se, but their individual right to self-defense guaranteed by *Heller*.”¹⁸³ Judge Callahan was concerned that assessing the scope of the right at a lower level of generality would allow “states [to] obliterate [Second Amendment rights] by enacting incrementally more burdensome restrictions while arguing that a reviewing court must evaluate each restriction by itself when determining its constitutionality.”¹⁸⁴

In contrast, judges who have favored upholding public carry restrictions have done so while characterizing questions about the Second Amendment right more narrowly.¹⁸⁵ The best example of this approach comes from Chief Judge Thomas of the Ninth Circuit in a dissent from a decision striking down California’s requirement that those seeking a concealed carry permit must show a need for self-defense greater than the general public.¹⁸⁶ Judge Thomas criticized the panel majority for characterizing the question in the case as whether a citizen has a right “to carry a firearm in public for self-defense,” stating it is “an important issue, but . . . not the question we are called upon to answer.”¹⁸⁷ Instead, “the proper analytic approach is to answer the historical inquiry as to whether carrying a concealed weapon in public was understood to be within the scope of the right protected by the Second Amendment at the time of ratification.”¹⁸⁸ Judge Thomas urged a focus on the specific question presented by the case because it “delineates the proper form of relief and clarifies the particular Second Amendment restriction that is before us.”¹⁸⁹ In upholding other public carry laws, judges have focused on the specific provision challenged, *e.g.*,

¹⁸⁰ *Id.* at 953.

¹⁸¹ *Id.* (first citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015); then citing *Lawrence v. Texas*, 539 U.S. 558, 566–70 (2003); and then citing *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965)) (noting examples of the Court broadly defining constitutional rights, such as the “right to marry, not right to same-sex marriage” in *Obergefell*, the “right to privacy, not right to engage in sodomy” in *Lawrence*, and the “right to marital privacy, not the right to use birth control devices” in *Griswold*).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See *infra* text accompanying notes 186–91.

¹⁸⁶ See *Peruta I*, 742 F.3d 1144, 1179 (9th Cir. 2014) (Thomas, J., dissenting), *rev’d en banc*, 824 F.3d 919 (9th Cir. 2016).

¹⁸⁷ *Id.* at 1181; see also *Peterson v. Martinez*, 707 F.3d 1197, 1209 (10th Cir. 2013) (“[W]e first ask whether the Second Amendment provides the right to carry a concealed firearm. We conclude that it does not.”).

¹⁸⁸ *Peruta I*, 742 F.3d at 1182 (Thomas, J., dissenting).

¹⁸⁹ *Id.* (quoting *Peterson*, 707 F.3d at 1209).

“[d]oes New York’s handgun licensing scheme violate the Second Amendment by requiring an applicant to demonstrate ‘proper cause’ to obtain a license to carry a concealed handgun in public?”¹⁹⁰ Similarly, in *Gould v. Morgan*, First Circuit Judge Selya flipped the question around and asked whether “the Second Amendment guarantees . . . an unconditional right to carry firearms in public for self-defense.”¹⁹¹

This divide exists in cases covering other Second Amendment questions as well. In *Ezell v. City of Chicago (Ezell I)*, a challenge to Chicago’s prohibition on gun ranges, Judge Sykes criticized the district court for framing the constitutional question too narrowly—“whether the individual’s right to possess firearms within his residence expands to the right to train with that same firearm in a firing range located within the [c]ity’s borders”—preferring a broader question about the right to bear arms.¹⁹² This has been the consistent approach by judges who favor striking down gun laws.¹⁹³ Justice Thomas, in a dissent from denial of certiorari, joined by Justice Scalia, in a case addressing the constitutionality of a safe storage law, zoomed the case out to the maximum level of generality, determining that the relevant analysis involved the

¹⁹⁰ *Kachalsky v. County of Westchester*, 701 F.3d 81, 83 (2d Cir. 2012).

¹⁹¹ 907 F.3d 659, 668 (1st Cir. 2018).

¹⁹² 651 F.3d 684, 700 (7th Cir. 2011) (alteration in original) (quoting *Ezell v. City of Chicago*, No. 10-CV-5135, 210 WL 3998104, at *9 (N.D. Ill. Oct. 12, 2010)).

¹⁹³ *See Peruta I*, 742 F.3d at 1147 (“We are called upon to decide whether a responsible, law-abiding citizen has a right under the Second Amendment to carry a firearm in public for self-defense.”); *Teixeira v. County of Alameda*, 822 F.3d 1047, 1049 (9th Cir. 2016) (“We must decide whether the right to keep and to bear arms, as recognized by the Second Amendment, necessarily includes the right of law-abiding Americans to purchase and to sell firearms. In other words, we must determine whether the Second Amendment places any limits on regulating the commercial sale of firearms.”) *abrogated by reh’g en banc*, 873 F.3d 670 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1988 (2018) (mem.); *Wrenn v. District of Columbia*, 864 F.3d 650, 657 (D.C. Cir. 2017) (“Our first question is whether the Amendment’s ‘core’ extends to publicly carrying guns for self-defense.”); *Young v. Hawaii*, 896 F.3d 1044, 1048 (9th Cir. 2018) (“We must decide whether the Second Amendment encompasses the right of a responsible law-abiding citizen to carry a firearm openly for self-defense outside of the home.”), *reh’g en banc granted*, 915 F.3d 681 (9th Cir. 2019) (mem.); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015) (Manion, J., dissenting) (“By prohibiting a class of weapons commonly used throughout the country, Highland Park’s ordinance infringes upon the rights of its citizens to keep weapons in their homes for the purpose of defending themselves, their families, and their property.”); *Kolbe v. Hogan*, 813 F.3d 160, 172 (4th Cir. 2016) (“The Supreme Court has already performed an historical analysis of our traditional understanding of a citizen’s right to keep a weapon at home for self-defense, concluding that ‘the right of law-abiding, responsible citizens to use arms in defense of hearth and home’ lies at the core of the Second Amendment. Any prohibition or restriction imposed by the government on the exercise of this right in the home clearly implicates conduct protected by the Second Amendment.” (citation omitted) (quoting *Heller I*, 554 U.S. 570, 635 (2008)). *But see Wrenn*, 864 F.3d at 661 (The *Wrenn* court analyzed the question more narrowly after starting from higher level of generality. “[W]e conclude: the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment’s protections.”).

broad concept of “[s]elf-defense” as “‘the central component’ of the Second Amendment’s guarantee of an individual’s right to keep and bear arms.”¹⁹⁴ In *Heller v. District of Columbia (Heller II)*, Judges Ginsburg and Henderson and then-Judge, now Justice, Kavanaugh divided on just how narrowly to assess an assault weapon prohibition.¹⁹⁵ The Ginsburg-led majority interpreted the assault weapon prohibition as “a ban on a sub-class of rifles” and upheld the law,¹⁹⁶ while then-Judge Kavanaugh insisted on assessing it as a “ban on semi-automatic rifles” as a class in his dissenting opinion.¹⁹⁷

While in the vast majority of cases a high level of generality is used by judges to argue against the constitutionality of gun laws, this is not always the case.¹⁹⁸ In *Binderup v. Attorney General*, a Third Circuit dissenting opinion used a high level of generality to characterize the case in a manner more favorable to firearms regulation.¹⁹⁹ In *Binderup*, the plaintiffs had been convicted of arguably non-serious crimes which, while characterized as misdemeanors under state law, prohibited plaintiffs from possessing firearms.²⁰⁰ The majority struck down the statutory scheme as unconstitutional as applied to the plaintiffs.²⁰¹ Judge Fuentes, in a dissenting opinion joined by six other judges, characterized the question at a high level of generality—whether “even though [plaintiffs] were both convicted of crimes punishable by multiple years in prison, Congress may not constitutionally prevent them from owning firearms.”²⁰² A narrower reading of the question would have been whether it is constitutional to prohibit the possession of firearms by those convicted of the particular misdemeanor, in this case, corrupting a minor and illegally carrying a firearm where several years have passed since the crime.²⁰³ Similarly, in *Jackson v. City & County of San Francisco*, a challenge to a prohibition on hollow-point bullets, a panel of the Ninth Circuit assessed the historical scope of the right at a high level of generality—the “right to obtain bullets necessary to use [firearms]”—before ultimately upholding the law under intermediate scrutiny.²⁰⁴

¹⁹⁴ *Jackson v. City & County of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., dissenting from denial of certiorari) (quoting *McDonald v. Chicago*, 561 U.S. 742, 767 (2010)).

¹⁹⁵ See generally *Heller II*, 670 F.3d 1244 (D.C. Cir. 2011).

¹⁹⁶ *Id.* at 1268.

¹⁹⁷ *Id.* at 1269 (Kavanaugh, J., dissenting).

¹⁹⁸ See *Binderup v. Att’y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc). Similarly, some judges, especially in the context of as-applied challenges to laws prohibiting firearms possession by certain classes of people, have applied a lower level of generality when seeking to strike down specific applications of gun laws as unconstitutional. See, e.g., *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 775 F.3d 308, 316–17 (6th Cir. 2014).

¹⁹⁹ 836 F.3d at 380 (Fuentes, J., dissenting) (“The Second Amendment . . . does not prevent Congress from deciding that convicted criminals should not have access to firearms.”).

²⁰⁰ *Id.* at 340.

²⁰¹ *Id.* at 351.

²⁰² *Id.* at 380 (Fuentes, J., dissenting).

²⁰³ See *id.* at 375–77 (majority opinion).

²⁰⁴ 746 F.3d 953, 967 (9th Cir. 2014).

Justice Alito's dissent in *New York State Rifle & Pistol Association v. City of New York*, a case challenging New York City's rules regarding where guns can be transported, provides an example of a judge (or Justice in this case) analyzing the right at a fairly high level of specificity, while still finding the law unconstitutional.²⁰⁵ Justice Alito articulated that the "core Second Amendment right, the right to keep a handgun in the home for self-defense," necessarily included "concomitant" rights such as the specific rights "to take a gun for maintenance or repair . . . to take a gun outside the home in order to transfer ownership lawfully . . . [and] to take a gun to a range in order to gain and maintain the skill necessary to use it responsibly."²⁰⁶ While defining the right in these narrow terms, Justice Alito still found that New York City's idiosyncratic rule, which limited gun owners to their homes and gun ranges within the City, could not be justified and was unconstitutional.²⁰⁷

These cases aside, in most cases in which courts upheld a law under the Second Amendment, the judges analyzed the constitutional scope question with a high level of specificity.²⁰⁸ For example, in *Teixeira v. County of Alameda*, a Second Amendment challenge to a county zoning ordinance brought by plaintiffs seeking to open a gun store, the en banc Ninth Circuit looked to the narrow question of whether there is "a freestanding right of commercial proprietors to sell firearms."²⁰⁹ The en banc majority opinion stated that "[t]he right to keep arms, necessarily involves the right to purchase them" but found that was not the narrow question at issue.²¹⁰ Rather, the plaintiffs sought a right to sell firearms, "independent of the rights of his potential customers," a view which the court said would mean "that even if there were a gun store on every square block . . . and therefore prospective gun purchasers could buy guns with exceeding ease, [the plaintiffs] would still have a right to establish [their] own gun store somewhere in the jurisdiction."²¹¹ Similarly, in a challenge to a prohibition on the possession of firearms by domestic violence misdemeanants, the Fourth Circuit assessed "whether the possession of a firearm in the home by a domestic violence

²⁰⁵ 140 S. Ct. 1525, 1527 (2020) (Alito, J., dissenting).

²⁰⁶ *Id.* at 1541 (citing *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 888 F.3d 45, 58–59 (2d Cir. 2018)).

²⁰⁷ *Id.* at 1544.

²⁰⁸ *See Heller II*, 670 F.3d 1244, 1247 (D.C. Cir. 2011) ("The plaintiffs in the present case challenge . . . the District's gun laws . . . requiring the registration of firearms and prohibiting both the registration of 'assault weapons' and the possession of magazines with a capacity of more than ten rounds of ammunition.").

²⁰⁹ 873 F.3d 670, 673 (9th Cir. 2017) (en banc) *aff'g* No. 12-CV-03288-WHO, 2013 WL 4804756 (N.D. Cal. Sept. 9, 2013), *cert. denied*, 138 S. Ct. 1988 (2018) (mem.).

²¹⁰ *Id.* at 678 (alteration in original).

²¹¹ *Id.* at 681. The dissenting judges did not necessarily disagree with this framing, *id.* at 692 (Tallman, J., dissenting), but thought that the zoning ordinance combined with California's gun laws overall, "ma[de] it very difficult for individuals who wish[ed] to exercise their Second Amendment rights to obtain, maintain, and comply with the burdensome California state and federal laws which govern acquisition, ownership, carrying, and possession of firearms protected by the Second Amendment." *Id.* at 691.

misdemeanant is protected by the Second Amendment” rather than home possession more broadly, before ultimately upholding the law under intermediate scrutiny.²¹²

It will be difficult for history to play an important role in Second Amendment litigation if courts analyze questions about the Second Amendment’s scope with a high degree of generality. If the question is something like, “is there some right to carry firearms in public,” “does the Second Amendment include a right to train with firearms,” or “does the Second Amendment include a right to ammunition,” the answer will always be yes. If that is the case, then the step one historical analysis is just a bit of throat clearing before going straight to the step two application of the tiers of constitutional review. The same is true if a court wants to apply an analysis solely focused on text, history, and tradition, as some judges have suggested.²¹³ If the at-issue regulation is a law regulating guns, then it falls within the scope of a broadly defined historical right and should be struck down.²¹⁴ An approach where history barely matters is deeply inconsistent with *Heller*, which clearly envisioned history playing an important role in the Second Amendment analysis and made clear that the recognition of the Second Amendment right did not mark the end of firearms regulation in the United States.²¹⁵ A more specific analysis of the particular regulation being challenged, intended to answer a distinct question about the scope of the right being regulated, is more consistent with the approach laid out in *Heller*.²¹⁶

B. The Level of Generality Courts Use in Defining Exceptions to the Second Amendment Based on Historical Regulatory Traditions

Courts must also establish a level of generality when determining whether a challenged gun law is consistent with a longstanding, historical tradition.²¹⁷ This analysis asks whether a challenged regulation is sufficiently analogous to historically accepted regulations to be presumptively lawful under the *Heller* framework.²¹⁸ Must a regulation be nearly identical to those with long historical pedigrees or can challenged laws be more broadly analogous?²¹⁹

²¹² See *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); see also *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (“[W]e must determine whether the possession of an unmarked firearm in the home is protected by the right to bear arms.”).

²¹³ See *Heller II*, 670 F.3d 1244, 1269, 1271, 1276, 1285 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

²¹⁴ See *id.* at 1272–73.

²¹⁵ See *Heller I*, 554 U.S. 570, 625–26 (2008).

²¹⁶ See *id.* at 576–86.

²¹⁷ See, e.g., *Marzzarella*, 614 F.3d at 89–90 (considering history and tradition of the Second Amendment as an integral process in the Third Circuit’s two-step analysis).

²¹⁸ *Id.*

²¹⁹ Justice Roberts suggested that laws that are “lineal descendants” of historically accepted gun laws are valid. Transcript of Oral Argument at 77, *Heller I*, 554 U.S. 570 (2008) (No. 07-290) (Chief Justice Roberts: “[W]e are talking about lineal descendants of the arms but presumably there are lineal descendants of the restrictions as well.”).

One example of where this generality issue arises is in challenges to laws requiring background checks on firearms sales. In the present day, background checks are conducted online, through a centralized computer database.²²⁰ There is obviously not a long historical tradition of computerized background checks. However, a widely adopted and NRA-supported law from the early twentieth century combined prohibitions on firearms possession by certain criminals and those addicted to drugs, waiting periods, and a requirement to present records of imminent sales to local law enforcement in a way that looks a lot like a background check.²²¹ The NRA described the combination as allowing for a “police investigation” to show a purchaser has “a clean record as an upright citizen.”²²² If looked at from a moderate degree of generality, this historical law provides a strong analogy to modern background check laws. However, if a court demands that a historical analogue match up with a challenged law with a high degree of specificity, then this historical law—despite being aimed toward the same goal and imposing arguably greater burdens—would be insufficient to meet the longstanding test.²²³

In *Marzzarella v. United States*, the Third Circuit framed this question well in the context of a challenge to the federal prohibition on firearms possession by habitual drug users:

[D]oes 18 U.S.C. § 922(g)(3)’s prohibition of possession by substance abusers violate the Second Amendment because no restrictions on possession by substance abusers existed at the time of ratification? Or is it valid because it presumably serves the same purpose as restrictions on possession by felons—preventing possession by presumptively dangerous individuals?²²⁴

Ultimately, the court upheld the regulation without fully answering the generality question.²²⁵

²²⁰ See, e.g., *Rocky Mountain Gun Owners v. Hickenlooper*, 371 P.3d 768, 776–77 (Colo. App. 2016) (upholding Colorado law imposing mandatory background checks on private firearm sales based on findings that the law “does not infringe on individuals’ rights to keep and bear arms for a lawful purpose” and “does not implicate a fundamental right”), *aff’d*, 467 P.3d 314 (Colo. 2020); *Colo. Outfitters Ass’n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1074–75 (D. Colo. 2014) (upholding aspects of the same Colorado law against a federal constitutional challenge, and expressing “grave doubt” that such a law “implicates the Second Amendment’s guarantee at all”), *aff’d in part*, 823 F.3d 537 (10th Cir. 2016); *Peoples Rts. Org. v. Montgomery*, 756 N.E.2d 127, 173 (Ohio Ct. App. 2001) (holding that background checks for firearms sales “did not, in themselves, impermissibly infringe upon buyers’ right to bear arms”).

²²¹ See, e.g., 1923 Cal. Stat. 696; 1923 N.H. Laws 138; 1925 Or. Laws 468; 1931 Pa. Laws 497; 47 Stat. 650 (1932).

²²² *Sportsmen Fight Sullivan Law*, 23 AM. INST. CRIM. L. & CRIMINOLOGY 664 (1932).

²²³ See *United States v. Marzzarella*, 614 F.3d 85, 96 (3d Cir. 2010).

²²⁴ *Id.* at 93.

²²⁵ See *id.* at 99.

The D.C. Circuit, on the other hand, debated the generality question at length in the majority²²⁶ and dissenting opinions in *Heller II*.²²⁷ Judges Ginsburg and Henderson clashed with then-Judge Kavanaugh on the constitutionality of D.C.'s requirement that handguns be registered with the city.²²⁸ Ginsburg and Henderson, in the majority, upheld the requirement as longstanding, pointing to several early twentieth-century laws that required gun owners to register their handguns, or gun dealers to report the identity of handgun purchasers to local government officials.²²⁹ The majority believed, "the historical regulations and the District's basic registration requirement are not just generally alike, they are practically identical[] [because] [t]hey all require gun owners to give an agent of the Government basic information about themselves and their firearm."²³⁰

Judge Kavanaugh's dissenting opinion contains probably the most detailed description of the historical analysis in any Second Amendment case, including the level of generality issue, and is worth quoting at length²³¹:

[W]hen legislatures seek to address new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed, there obviously will not be a history or tradition of banning such weapons or imposing such regulations. That does not mean the Second Amendment does not apply to those weapons or in those circumstances. Nor does it mean that the government is powerless to address those new weapons or modern circumstances. Rather, in such cases, the proper interpretive approach is to reason by analogy from history and tradition.

....

The Constitution is an enduring document, and its principles were designed to, and do, apply to modern conditions and developments. The constitutional principles do not change (absent amendment), but the relevant principles must be faithfully applied not only to circumstances as they existed in 1787, 1791, and 1868, for example, but also to modern situations that were unknown to the Constitution's Framers. To be sure, applying constitutional principles to novel modern conditions can be difficult and leave close questions at the margins. But that is hardly unique to the

²²⁶ See *Heller II*, 670 F.3d 1244, 1256–58 (D.C. Cir. 2011).

²²⁷ See *id.* at 1269–96 (Kavanaugh, J., dissenting).

²²⁸ See generally *id.* at 1244.

²²⁹ *Id.* at 1254–55 (majority opinion).

²³⁰ *Id.* at 1267.

²³¹ See generally *id.* at 1269–96 (Kavanaugh, J., dissenting).

Second Amendment. It is an essential component of judicial decisionmaking under our enduring Constitution.²³²

Judge Kavanaugh compared the analogical reasoning necessary to decide gun cases to that applied in First and Fourth Amendment cases.²³³ Specifically, he cited *California v. Ciraolo*, in which the Supreme Court approved the use of airplanes to observe property for crime by relying on an analogy to the “common-law principle that police could look at property when passing by homes on public thoroughfares.”²³⁴

Judge Kavanaugh described the analogical reasoning in Second Amendment cases as occurring at a fairly high level of generality. A constable walking by a home in eighteenth-century Boston and seeing a crime occurring in the front yard²³⁵ seems quite different from a police airplane discovering marijuana growing in an inaccessible area of a farmer’s property.²³⁶ However, when analyzing the registration issue in *Heller II*, Judge Kavanaugh demanded a virtually identical historical tradition, rejecting the analogies relied on by the majority because “those state laws generally required record-keeping by gun sellers, not registration of all lawfully possessed guns by gun owners.”²³⁷ Judge Kavanaugh believed that relying on these kinds of historical laws to support the registration requirement “is to conduct the *Heller* analysis at an inappropriately high level of generality.”²³⁸

Judge Sykes of the Seventh Circuit similarly rejected a broad level of generality in *Ezell I*, a challenge to the prohibition on gun ranges within the City of Chicago.²³⁹ In *Ezell I*, Chicago’s lawyers presented extensive historical evidence that cities and states regulated and prohibited the discharge of firearms in cities.²⁴⁰ The majority decision, written by Judge Sykes, rejected this history of regulation as “merely regulatory measures, distinguishable from the City’s absolute prohibition on firing ranges.”²⁴¹ Judge Sykes also rejected historical laws that were nearly identical to the challenged law because they “had clear fire-suppression purposes and do not support the proposition that target practice at a safely sited and properly equipped firing range enjoys no Second Amendment protection whatsoever.”²⁴² Judge Sykes’s approach would

²³² *Id.* at 1275.

²³³ *Id.*

²³⁴ *Id.* (citing *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

²³⁵ *See Heller I*, 554 U.S. 570, 631–32 (2008).

²³⁶ *See Ciraolo*, 476 U.S. at 212–13 (looking to the “history and genesis of the curtilage doctrine” and finding that the officers have never been required “to shield their eyes when passing by a home on public thoroughfares”).

²³⁷ *Heller II*, 670 F.3d at 1292 (Kavanaugh, J., dissenting) (emphasis omitted).

²³⁸ *Id.* at 1294. Judge Kavanaugh compared this analysis “to saying that because the government traditionally could prohibit defamation, it can also prohibit speech criticizing government officials.” *Id.*

²³⁹ *Ezell I*, 651 F.3d 684 (7th Cir. 2011).

²⁴⁰ *See id.* at 705–06.

²⁴¹ *Id.* (emphasis omitted) (citing *Heller I*, 554 U.S. 570, 574, 632 (2008)).

²⁴² *Id.*

essentially require that historical traditions match the burden imposed by a present-day law *and* have the same motivation for enactment.²⁴³ In contrast, the dissenting opinion written by Judge Rovner criticized the majority's "curt dismissal of actual regulations of firearms discharges in urban areas."²⁴⁴ Judge Rovner would have instead looked to historical regulations as support for the application of a standard of review akin to the time, place, and manner regulations applied in the First Amendment context.²⁴⁵

When the case returned to the Seventh Circuit in *Ezell v. City of Chicago (Ezell II)*, in a challenge to regulations imposed on newly legalized gun ranges, Judge Sykes took a similar approach to a prohibition on children at ranges.²⁴⁶ She rejected the relevance of "nineteenth-century state laws prohibiting firearm possession by minors and prohibiting firearm sales to minors."²⁴⁷ Judge Sykes found these historical regulations had "little relevance to the issue at hand," because "[t]here's zero historical evidence that firearm training for this age group is categorically unprotected."²⁴⁸

Justice Alito in a dissenting opinion joined by Justices Thomas and Gorsuch, also demanded a fairly high level of specificity in a case challenging New York City's rule regulating the transport of handguns to gun ranges and second homes outside of the City.²⁴⁹ Justice Alito rejected the analogical value of historical regulations which "restricted the places within their jurisdiction where a gun could be fired," because it failed to show "municipalities during the founding era prevented gun owners from taking their guns outside city limits for practice."²⁵⁰

The Fifth Circuit took a different approach in a case challenging the federal prohibition on handgun sales to those under twenty-one.²⁵¹ The court upheld the law by looking to restrictions on young people at a higher level of generality, examining dozens of nineteenth-century laws regulating the purchase and possession of firearms by minors.²⁵² The Fifth Circuit's decision also placed prohibitions on possession by children in the context of a broader historical tradition prohibiting firearms possession by those deemed to lack "virtue" or an ability to act responsibly in society—alongside prohibitions on felons and the seriously mentally ill.²⁵³

²⁴³ *See id.*

²⁴⁴ *Id.* at 713 (Rovner, J., dissenting).

²⁴⁵ *Id.* at 713–14 ("A complete ban on live-range training in Chicago, of course, likely would not survive under the intermediate scrutiny applied to restrictions on time, place and manner, especially because the City itself concedes the importance of this training to the safe operation of firearms for self-defense in the home.").

²⁴⁶ *See generally* 846 F.3d 888 (7th Cir. 2017).

²⁴⁷ *Id.* at 896.

²⁴⁸ *Id.*

²⁴⁹ *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1527 (2020) (Alito, J., dissenting).

²⁵⁰ *Id.* at 1541.

²⁵¹ *See generally* Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185 (5th Cir. 2012).

²⁵² *Id.* at 201–03.

²⁵³ *Id.* at 200–02; *see also* Medina v. Whitaker, 913 F.3d 152, 158–59 (D.C. Cir. 2019)

Courts have also split on the appropriate level of generality in challenges to the federal prohibition on firearms possession by those convicted of domestic violence misdemeanors.²⁵⁴ The Ninth Circuit has held that because the government failed to prove that “domestic violence misdemeanants in particular have historically been restricted from bearing arms,” the law is not longstanding under the Second Amendment analysis.²⁵⁵ In the Ninth Circuit’s view, “a regulation that merely resembles [one of the longstanding regulations] listed by the Court in *Heller* will not avoid . . . constitutional scrutiny.”²⁵⁶ Instead, a regulation “must be both longstanding and closely match a listed prohibition,” or there must be “persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment.”²⁵⁷ Several circuits have disagreed with this very narrow view of the relevance of history.²⁵⁸ As the Seventh Circuit put it in upholding the domestic violence prohibitor at step one: “[S]tatutory prohibitions on the possession of weapons by some persons are proper—and . . . the legislative role did not end in 1791. That some categorical limits are proper is part of the original meaning, leaving to the people’s elected representatives the filling in of details.”²⁵⁹ The Tenth and Eleventh Circuits have also adopted this less exacting form of analogical reasoning, accepting the domestic violence misdemeanor prohibitor as analogous to the prohibition on felons deemed longstanding in *Heller*.²⁶⁰

Inversely from the scope question, it will be difficult for history to play an important role in Second Amendment litigation if courts analyze questions about

(using history of felons being stripped of rights and historical “laws disarming the unvirtuous” to uphold federal prohibition on firearms possession by felons).

²⁵⁴ See *United States v. Chovan*, 735 F.3d 1127, 1133–36 (9th Cir. 2013).

²⁵⁵ See *id.* at 1137 (emphasis omitted); see also *United States v. Chester*, 628 F.3d 673, 678 (4th Cir. 2010) (declining “to find § 922(g)(9) valid by analogy based on *Heller*’s ‘presumptively lawful’ language” (quoting *United States v. Chester*, 367 F. App’x 392, 398 (4th Cir. 2010))).

²⁵⁶ *Teixeira v. County of Alameda*, 822 F.3d 1047, 1057 (9th Cir. 2016) *abrogated by reh’g en banc*, 873 F.3d 670 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1988 (2018) (mem.).

²⁵⁷ *Id.* at 1057–58 (first citing *Chovan*, 735 F.3d at 1137; and then citing *Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014)).

²⁵⁸ See, e.g., *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); *In re United States*, 578 F.3d 1195 (10th Cir. 2009) (Murphy, J., dissenting); *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010).

²⁵⁹ *Skoien*, 614 F.3d at 640 (emphasis omitted). Then-Judge Barrett of the Seventh Circuit would look at the question with an even higher level of generality, considering the prohibition on firearms possession by “categories of people whose possession of firearms would endanger the public safety,” even if those precise restrictions did not exist during the founding period. *Kanter v. Barr*, 919 F.3d 437, 464–65 (7th Cir. 2019) (Barrett, J., dissenting).

²⁶⁰ See *In re United States*, 578 F.3d at 1195, 1195 n.1 (Murphy, J., dissenting) (“The majority seems to take comfort from *Heller*’s non-exhaustive recitation of categories of prohibited persons This, however, does not catapult the government’s mandamus petition into the ‘clear and indisputable’ classification.”); *White*, 593 F.3d at 1206 (upholding 18 U.S.C. § 922(g)(9)).

what types of regulations are longstanding with a very high degree of specificity. Analyzing historical traditions with a high degree of specificity results in courts either skipping over the historical analysis to get directly to the tiers of scrutiny or, in a text, history, and tradition framework, simply striking down any law that does not precisely match a historical tradition.²⁶¹ The first approach is inconsistent with *Heller*, which clearly placed an emphasis on history, and the second is belied by Justice Alito's assurance in *McDonald* that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment."²⁶² An approach more consistent with the Supreme Court's decisions is that advocated for (although not applied) by then-Judge Kavanaugh in his dissenting opinion in *Heller II*.²⁶³ This approach assesses historical tradition in a way that allows the federal, state, and local governments, "to address new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed."²⁶⁴ This approach allows courts to remain true to the originalist approach of *Heller* without limiting states to the precise legislative frameworks of the past, which may not be effective or suitable to current conditions.

IV. USING HISTORY AT STEP TWO TO DETERMINE THE APPROPRIATE TIER OF CONSTITUTIONAL SCRUTINY

As discussed above, most courts have applied a two-step analysis in Second Amendment cases, with the first step assessing whether a challenged regulation falls within the scope of the Second Amendment right as historically understood, and the second step applying one of the tiers of constitutional scrutiny.²⁶⁵ The role of history is not necessarily limited to step one of this analysis. The historical scope of the right assessed at step one is oftentimes used to determine the appropriate tier of constitutional scrutiny to apply in a case.²⁶⁶

²⁶¹ See *Heller II*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (discussing how "traditional restrictions go to show the scope of the right").

²⁶² *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010) (quoting Brief of the States of Texas, Ohio, Arkansas, Georgia, Alabama, Alaska, Arizona, Colorado, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, & Wyoming as Amici Curiae in Support of Petitioners at 23, *id.* (No. 08-1521) (alteration in original)).

²⁶³ See *Heller II*, 670 F.3d at 1269–96 (Kavanaugh, J., dissenting).

²⁶⁴ *Id.* at 1275.

²⁶⁵ For an excellent summary of, and argument for, the current framework, see generally Brief of Second Amendment Law Professors as Amici Curiae in Support of Neither Party, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280).

²⁶⁶ See *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012).

This is often characterized as a question about whether a challenged regulation falls within the “core” of the right protected by the Second Amendment or a more periphery portion of the right.²⁶⁷ Generally, laws regulating the “core” right protected by the Second Amendment—which at least covers the right to possess a handgun in the home for purposes of self-defense recognized in *Heller*—are subject to strict scrutiny, while laws impacting the periphery of the right are subject to intermediate scrutiny.²⁶⁸ In the words of Fifth Circuit Judge Prado, “the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family[]—triggers strict scrutiny,” while a less burdensome regulation “requires a less demanding means-ends showing.”²⁶⁹ Going further, Judge Prado stated that if a law “is not a salient outlier in the historical landscape of gun control,” it does not trigger strict scrutiny.²⁷⁰

Judge Clifton of the Ninth Circuit argued for the use of history at step two, arguing that even if history is insufficient to show a challenged law falls outside the scope of the right or is a presumptively lawful longstanding regulation, the widespread and longstanding adaptation of similar laws at least shows that a regulation does not fall within the “core of the Second Amendment” and should be subject to “intermediate scrutiny.”²⁷¹ The Second Circuit took a similar approach, finding that history showed “states have long recognized a countervailing and competing set of concerns with regard to handgun ownership and use in public” and recognized a “substantial role for state regulation,” meaning that intermediate scrutiny was the proper standard to apply.²⁷²

This use of history to guide the step-two analysis is not without its critics. The most notable is then-Seventh Circuit Judge, now Justice, Barrett, who argued that applying intermediate scrutiny to a prohibition on firearms possession by felons

²⁶⁷ *Id.* (“[O]bserving that a ‘severe burden on the core Second Amendment right of armed self-defense should require a strong justification,’ but ‘less severe burdens on the right’ and ‘laws that do not implicate the central self-defense concern of the Second Amendment[] may be more easily justified’ . . .” (alteration in original) (quoting *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010))).

²⁶⁸ *See id.*

²⁶⁹ *Nat’l Rifle Ass’n*, 700 F.3d at 195 (citations omitted); *see also Heller II*, 670 F.3d at 1257 (“[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify.”); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (observing that the analysis turns on “the character of the Second Amendment question presented”—that is, “the nature of a person’s Second Amendment interest, [and] the extent to which those interests are burdened by government regulation”).

²⁷⁰ *Nat’l Rifle Ass’n*, 700 F.3d at 205.

²⁷¹ *Young v. Hawaii*, 896 F.3d 1044, 1076 (9th Cir. 2018) (Clifton, J., dissenting), *reh’g en banc granted*, 915 F.3d 681 (9th Cir. 2019) (mem.).

²⁷² *Kachalsky v. County of Westchester*, 701 F.3d 81, 93–96 (2d Cir. 2012).

because felons are further from the core right protected by the Second Amendment was “circular” because it assumes weakened protection of the right before demanding a weaker review of the government’s justification.²⁷³

This application of history to determine the appropriate tier of constitutional scrutiny is consistent with both the way the Supreme Court treats other rights and the originalist methodology demanded by *Heller*.²⁷⁴ As an initial matter, applying a different standard to a Second Amendment right in different contexts is no different than how other constitutional rights are treated. In the First Amendment context, courts apply various tiers of scrutiny and tests depending on the precise type of speech regulated.²⁷⁵ Similarly, different standards apply under the Fourth Amendment, depending on where and how a search occurs.²⁷⁶ Tying the decision about the appropriate tier of scrutiny to the historical analysis also brings the two-part test more in line with the originalist methodology in *Heller* and helps to avoid applying a scrutiny analysis at step two that varies too significantly from the historical analysis at step one.²⁷⁷

CONCLUSION

In 2010, Justice Scalia defended originalist methodology in a concurring opinion in *McDonald v. City of Chicago*, stating:

I think it beyond all serious dispute that it is much less subjective, and intrudes much less upon the democratic process. It 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.²⁷⁸

The proceeding sections have shown that an originalist methodology, even if the history is examined in an evenhanded manner, retains enormous opportunity for a judge’s “ethico-political First Principles” to influence the result of a case.²⁷⁹ What

²⁷³ See *Kanter v. Barr*, 919 F.3d 437, 465 n.13 (7th Cir. 2019) (Barrett, J., dissenting).

²⁷⁴ Compare *id.* at 465 (Barrett, J., dissenting), with *Heller I*, 554 U.S. 570 (2008).

²⁷⁵ See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 936–1153 (3d ed. 2006) (discussing various First Amendment doctrines).

²⁷⁶ See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968) (allowing police to stop and frisk when they reasonably believe a suspect is armed and poses a threat to officers’ safety); *Mapp v. Ohio*, 367 U.S. 643 (1961) (requiring the exclusion of evidence seized during the warrantless search of a home).

²⁷⁷ See Barnett & Bernick, *supra* note 38, at 33–36 (discussing the need for “good faith” applications of constitutional tests that are consistent with historical understanding).

²⁷⁸ 561 U.S. 742, 804 (2010) (Scalia, J., concurring).

²⁷⁹ See *id.*

history is considered and at what level of generality it is analyzed very often proves decisive in cases. This kind of judicial policymaking is especially invidious because it is hidden behind the veneer of neutral methodological decisions. This is particularly true in the Second Amendment context, where the body of historical regulation, case law, and scholarly and popular commentary is so large and spread over such a broad period of time that radically different conclusions can be reached based on barely visible changes in methodology.²⁸⁰

History matters in Second Amendment litigation, and the decisions courts make as to what history to look at should be made in a conscious and transparent manner.²⁸¹ In deciding Second Amendment cases, courts should be cognizant of the methodological decisions they are making. They should make them explicitly and openly address the broader implications. As to what methodological decisions should be made, courts should not strike down the reasoned judgment of state legislatures and Congress when there are plausible historical arguments for a challenged law's constitutionality. To that effect, methodological decisions should be made allowing state and local governments to draw from as broad a range of historical sources as necessary to make these arguments. This is important because of the judicial role and the need for deference to legislative decision-making. It is also important because originalism does not function as a methodology to coherently decide cases when history is analyzed too restrictively. If courts look to a narrow band of history, ignore regulatory traditions supporting challenged gun laws, and demand historical traditions precisely match a challenged gun law, then there really will not be much of a historical analysis to do at all. Originalism needs historical source material to function, and a too-narrow view denies it that.

Guns have been regulated throughout American history,²⁸² and gun laws have always evolved to meet changing public needs. The courts should not end that tradition by applying an excessively restrictive form of originalism.

²⁸⁰ See *supra* Part II.

²⁸¹ See *supra* Part III.

²⁸² See generally Repository of Historical Gun Laws, *supra* note 99.