

Justice Breyer's Triumph in the Third Battle over the Second Amendment

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ABSTRACT

In recent years, the Supreme Court has issued two landmark decisions about the constitutional right to keep and bear arms. District of Columbia v. Heller rejected the notion that the Second Amendment protects only organized militia activities, and McDonald v. City of Chicago found that the right to keep and bear arms applies to state and local governments via incorporation into the Fourteenth Amendment. Those decisions left important questions unanswered. In particular, the Supreme Court declined to specify what level of scrutiny or test should be used to assess the validity of gun laws. Lower courts are now wrestling with that crucial issue. Examining the decisions made so far, this Article argues that the third phase of the fight over the right to keep and bear arms is moving toward an unusual result. The lower court decisions reflect the pragmatic sentiments of Justice Breyer's dissenting opinions in Heller and McDonald. Frustrated by the predominantly historical approach and the puzzling categorizations suggested by Justice Scalia and the other members of the Heller and McDonald majorities, the lower courts have focused on contemporary public policy interests and applied a form of intermediate scrutiny that is highly deferential to legislative determinations and leads to all but the most drastic restrictions on guns being upheld. Justice Breyer thus stands poised to achieve an unexpected triumph despite having come out on the losing side of both of the Supreme Court's recent clashes over the right to keep and bear arms.

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INTRODUCTION

History shows that one can lose significant battles but still win the war. The ancient Greeks suffered devastating losses at Thermopylae and Artemisium, but one year later they drove out the invading Persian forces.¹ The Romans endured fifteen years of defeats after Hannibal lumbered across the Alps into Italy, yet they ultimately managed to force him to retreat.² George Washington lost most of the major battles as commander of the Continental Army, but the Americans' revolutionary efforts nevertheless succeeded in the end.³ World War II began badly for the British and French at Dunkirk and for the United States at Pearl Harbor and Kasserine Pass, but the Allies eventually prevailed.⁴ Defeats sometimes lay the groundwork for improbable future success.

In the realm of constitutional law, this phenomenon is now occurring in the context of the Second Amendment right to keep and bear arms.⁵ That right has been the subject of intense legal conflict in recent years. After more than two centuries without ever striking down any law as violating the Second Amendment, the Supreme Court re-

¹ PETER GREEN, *THE GRECO-PERSIAN WARS* 109–271 (1996).

² NIGEL BAGNALL, *THE PUNIC WARS: ROME, CARTHAGE, AND THE STRUGGLE FOR THE MEDITERRANEAN* 168–299 (Thomas Dunne Books 2005) (1990).

³ RON CHERNOW, *WASHINGTON: A LIFE* 457 (2010).

⁴ ANDREW ROBERTS, *THE STORM OF WAR: A NEW HISTORY OF THE SECOND WORLD WAR* 59–68, 185–93, 310–12 (2011).

⁵ U.S. CONST. amend. II.

cently made two decisions hailed as landmark victories for gun rights.⁶ In *District of Columbia v. Heller*,⁷ the Court struck down several laws that severely restricted ownership and use of guns in the Nation's capital, including a provision that essentially banned possession of handguns.⁸ Rejecting the notion that the Second Amendment applies only to activities of organized state militias, the Court concluded that the Amendment instead extends more broadly to the use of guns for other purposes, such as defending one's "hearth and home" from criminals.⁹ Two years later, in *McDonald v. City of Chicago*,¹⁰ the Court found that Chicago's handgun ban was also unconstitutional because the right to keep and bear arms applies to state and local laws through the Fourteenth Amendment.¹¹

The *Heller* and *McDonald* decisions resolved important questions about the right to keep and bear arms, and at first blush they appeared to swing momentum decisively toward gun rights and away from gun control efforts. At the same time, the Supreme Court's decisions left vital questions unanswered. In particular, the Court declined to specify exactly what test or type of analysis should be used to assess the constitutionality of the wide variety of legal restrictions imposed on guns.¹² Rather than spelling out what level of constitutional scrutiny or other standard should be used, the Court left lower courts to grapple with this difficult but enormously important issue.

Lower court judges across the country have now had several years to begin the task of assembling the "plumbing" of the right to keep and bear arms,¹³ deciding what sort of analysis should be used and applying that analysis to determine which laws can withstand con-

6 *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008); see Reva B. Siegel, *Heller & Originalism's Dead Hand—in Theory and Practice*, 56 UCLA L. REV. 1399, 1412–13 (2011) (noting that *Heller* was the first case in which the Supreme Court ever struck down a law on Second Amendment grounds).

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

8 *Id.* at 574–75, 635.

9 *Id.* at 635.

10 *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

11 *Id.* at 3050.

12 *Heller*, 554 U.S. at 634–35 (acknowledging that the Court did not specify a level of scrutiny for Second Amendment claims and left many issues unresolved regarding the application of the right).

13 See Stuart Banner, *The Second Amendment, So Far*, 117 HARV. L. REV. 898, 907 (2004) (reviewing DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* (2003)) (originating the "plumbing" metaphor).

stitutional attack.¹⁴ The work has not been quick or easy. Without clear or complete guidance from the Supreme Court, lower court judges have proposed an array of different approaches and formulations, producing a “morass of conflicting lower court opinions” regarding the proper analysis to apply.¹⁵

Although the Supreme Court’s rulings in *Heller* and *McDonald* naturally garnered enormous attention, this third battle, playing out in the lower courts, ultimately is of even greater importance. It is in the application of these rulings that “the Second Amendment rubber meets the road” and the actual impact of these constitutional issues on Americans’ lives will be determined.¹⁶

Examining the stream of decisions made thus far by the lower courts, this Article describes the problems that courts have encountered, the varying approaches that courts have taken, and the direction in which the judicial consensus seems to be heading. The courts generally have been very cautious and practical in handling the important issues facing them. While trying to follow the Supreme Court’s lead, they have not mimicked its approach. Justice Antonin Scalia’s majority opinion in *Heller* heavily emphasized historical investigation of the original meaning and traditional understandings of the right to keep and bear arms.¹⁷ Justice Scalia also viewed the right in categorical terms, suggesting that courts should try to clearly demarcate the types of guns, people, and activities protected rather than letting analysis degenerate into a more subjective and volatile “interest-balancing inquiry” that would empower judges to let their personal predilections dictate decisions.¹⁸ The lower courts, frustrated by the indeterminacy of historical inquiry and puzzled by the categorizations suggested by Justice Scalia, have steered in other directions. They have effectively

¹⁴ *Id.* (“What exactly will the doctrine look like? What kinds of regulations will be unconstitutional? Which guns? Which people? Which situations?”).

¹⁵ *United States v. Chester*, 628 F.3d 673, 688–89 (4th Cir. 2010) (Davis, J., concurring in the judgment); see also Ryan Menard, Note, *Aiming Without a Scope: How Courts Scrutinize Gun Laws After District of Columbia v. Heller*, 3 NE. U. L.J. 289, 327 (2011) (describing “inconsistency, confusion, and hesitation” in lower courts’ decisions).

¹⁶ *United States v. McCane*, 573 F.3d 1037, 1048 (10th Cir. 2009) (Tymkovich, J., concurring); see also Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1560 (2009).

¹⁷ See *Heller*, 554 U.S. at 576–619; see also Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 924 (2009) (“[T]he opinions in *Heller* represent the most important and extensive debate on the role of original meaning in constitutional interpretation among the members of the contemporary Supreme Court.”).

¹⁸ *Heller*, 554 U.S. at 626–29, 634–35; Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 405–11 (2009) (describing Justice Scalia’s categorical approach).

embraced the sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld.

Indeed, this Article contends that the Supreme Court's revival of interest in the right to keep and bear arms may ultimately have a surprising outcome. The lower courts' duty, of course, is to implement the rulings made by the majority of the Supreme Court. But in this instance, the lower courts' decisions strongly reflect the pragmatic spirit of the dissenting opinions that Justice Stephen Breyer wrote in *Heller* and *McDonald*. Justice Breyer warned that the search for historical, logical, and conceptual answers to difficult Second Amendment questions would prove to be futile, and he urged courts to read and apply the Constitution in ways that respect legislative judgments rather than obstructing the search for practical solutions to difficult problems.¹⁹ Thus far, Justice Breyer's approach appears headed for an unexpected triumph in the third battle over the Second Amendment now being waged in the courts.

Part I of this Article reviews the first major fight over the right to keep and bear arms, which the Supreme Court resolved in *Heller* by deciding that the Second Amendment's protection extends beyond militia activities. In particular, this part of the Article looks carefully at the aspects of Justice Scalia's majority opinion in *Heller* that were oddly enigmatic but would become highly important for lower courts trying to implement the Court's decision. This part of the Article also explains the alternative approach to gun rights put forward by Justice Breyer in his *Heller* dissent. Part II looks at the second skirmish in this constitutional conflict, describing the Supreme Court's resolution of the incorporation issue in *McDonald* and the aspects of that decision that supply additional clues to the lower courts. Part III turns to the lower court decisions. Reviewing each of the key issues with which the courts have been struggling, the Article argues that a consensus has begun to emerge among lower court judges about how to handle government actions allegedly infringing on the right to keep

¹⁹ See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3122 (2010) (Breyer, J., dissenting); *Heller*, 554 U.S. at 687, 719 (Breyer, J., dissenting); see also Linda Greenhouse, "Weighing Needs and Burdens: Justice Breyer's *Heller* Dissent," 59 SYRACUSE L. REV. 299 (2008) (describing how Justice Breyer's dissent in *Heller* typifies his pragmatic approach to constitutional law); Richard Schragger, *The Last Progressive: Justice Breyer, Heller, and "Judicial Judgment,"* 59 SYRACUSE L. REV. 283, 284 (2008) (describing Breyer's dissent in *Heller* as taking a "progressive" approach that is "context-specific, non-categorical, expertise-driven, and infused by a common law sensibility").

and bear arms. The courts have generally encountered difficulties with the more historically oriented and rigidly categorical modes of decisionmaking exemplified by Justice Scalia's opinion in *Heller*. They have steered away from those approaches and toward a more pragmatic consideration of contemporary public policy considerations, with a strong dose of deference to legislative determinations about complex empirical issues. That approach is much like the analysis that Justice Breyer encouraged in his *Heller* and *McDonald* dissents.

Part IV argues that the lower courts' handling of these matters has significant virtues no matter what one thinks about the ideal extent of regulation of firearms. The lower courts have essentially made judicial restraint their guiding principle. That is a prudent course of action under the circumstances, particularly given the lack of clear instructions from the Supreme Court, the dramatic variation in the roles that guns play in urban and rural environments, the tremendous political power that gun owners possess, and the perils of having judges step well beyond their expertise to undertake a dramatic revamping of the complex array of laws affecting firearms throughout the Nation.

I. THE FIRST BATTLE: *DISTRICT OF COLUMBIA v. HELLER*

For most of the twentieth century, the meaning of the Second Amendment seemed well settled. Courts consistently read it as guaranteeing a right to have and use guns only for purposes of organized state militia activity.²⁰ A trickle of law review articles began to question that view, suggesting that the right instead should apply more broadly to other uses of guns, such as self-defense and hunting.²¹ The trickle turned into a large outpouring of scholarly literature on both sides of the question.²² Courts eventually began to take notice, and a circuit split soon emerged on the issue.²³

²⁰ See Brannon P. Denning, *Can the Simple Cite Be Trusted? Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 970–72 (1996) (describing the “collective judicial assumption” that the Second Amendment protects militias and does not provide a broader individual right).

²¹ See, e.g., Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960); Robert A. Sprecher, *The Lost Amendment*, 51 A.B.A. J. 554 (1965).

²² See Banner, *supra* note 13, at 898–99 (describing how the Second Amendment became the focus of substantial academic attention).

²³ See *Silveira v. Lockyer*, 312 F.3d 1052, 1060–61 (9th Cir. 2002) (holding that the Second Amendment guarantees the people's collective right to maintain effective state militias but not an individual right to own or possess guns), *abrogated by* *United States v. Vongxay*, 594 F.3d 1111 (9th Cir.), *cert. denied*, 131 S. Ct. 294 (2010); *United States v. Emerson*, 270 F.3d 203, 260

In 2008, the Supreme Court's decision in *Heller* resolved this basic question about the Second Amendment's scope. The majority opinion, written by Justice Scalia, concluded that the Amendment's text plainly guaranteed a right to individuals and not just to state militias.²⁴ Indeed, Justice Scalia determined that individuals' lawful use of guns for self-defense was the "central component"²⁵ or "core" purpose of the right.²⁶ The Amendment's prefatory clause about a "well regulated Militia, being necessary to the security of a free State,"²⁷ did not narrow the scope of the right; instead, it merely explained a key reason for the right's inclusion in the Bill of Rights.²⁸ Justice Scalia bolstered his interpretation with historical evidence from before and after the Second Amendment's ratification supporting his broad reading of the provision's scope.²⁹ He made clear from the outset that he perceived his mission to be determining what the Second Amendment meant to ordinary Americans at the time of its adoption.³⁰ The opinion, with its intensely historical perspective, has been hailed by some as a "triumph for originalism."³¹

A voluminous amount of commentary has already been written about whether Justice Scalia correctly interpreted the Second Amendment as reaching broadly beyond organized militia activities.³² Although the purpose of this Article is not to revisit that debate,³³

(5th Cir. 2001) (holding that the Second Amendment protects an individual right to the private possession and use of guns unrelated to militia participation).

²⁴ *Heller*, 554 U.S. at 576–92.

²⁵ *Id.* at 599.

²⁶ *Id.* at 630; *see also id.* at 635 (concluding that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

²⁷ U.S. CONST. amend. II.

²⁸ *Heller*, 554 U.S. at 595–99.

²⁹ *See, e.g., id.* at 592–95, 605–19.

³⁰ *See id.* at 576–77.

³¹ Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 684 (2009) (describing this reception among some legal academics but questioning the extent of the victory); *see also* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 256 (2009) ("While *Heller* can be hailed as a triumph of originalism, it can just as easily be seen as the opposite—an exposé of original intent as a theory no less subject to judicial subjectivity and endless argumentation than any other."); Linda Greenhouse, *2,691 Decisions*, N.Y. TIMES, July 13, 2008, at WK1.

³² *See, e.g.,* Symposium, *District of Columbia v. Heller*, 59 SYRACUSE L. REV. 165 (2008); Symposium, *The Second Amendment After District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 315 (2009); Symposium, *The Second Amendment After Heller*, 60 HASTINGS L.J. 1203 (2008–2009); Symposium, *The Second Amendment and the Right to Bear Arms After D.C. v. Heller*, 56 UCLA L. REV. 1041 (2009).

³³ For my assessment of Justice Scalia's opinion, *see* Allen Rostron, *Protecting Gun Rights*

careful examination of Justice Scalia's opinion is nevertheless important because of the light it sheds on the questions that courts are still struggling to answer, including what level of scrutiny to apply to Second Amendment claims. In this respect, several features of Justice Scalia's opinion stand out.

A. *Law-Abiding, Responsible Citizens*

While construing the Second Amendment broadly in some ways, Justice Scalia's opinion in *Heller* repeatedly emphasized the existence of important limits on the right. "Of course the right was not unlimited," Justice Scalia explained, "just as the First Amendment's right of free speech was not."³⁴ Scalia went on to recognize specifically that the Second Amendment should protect a right to use guns only for lawful purposes. He explained that "we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*."³⁵ Scalia instead suggested that the right to keep and bear arms protects only the interests of "law-abiding, responsible citizens" who use guns to protect their homes and families or for other lawful, socially beneficial purposes.³⁶ In short, the Second Amendment was not meant to assist those who would use guns to commit crimes such as murders, assaults, or robberies.

B. *Arms in Common Use at the Time*

Justice Scalia also indicated that the Second Amendment's protection does not extend to all types of guns. Instead, the Amendment merely guarantees a right to have the types of weapons commonly used by Americans for lawful, nonmilitary purposes such as self-defense.³⁷ Scalia derived this limitation on the Second Amendment's reach from the Supreme Court's cryptic 1939 decision in *United States v. Miller*,³⁸ where the Court rejected a constitutional challenge to an

and *Improving Gun Control After District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 385-94 (2009).

³⁴ *Heller*, 554 U.S. at 595.

³⁵ *Id.*; see also *id.* at 626 (noting that commentators and courts before the twentieth century "routinely explained" that the right to keep and bear arms "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose").

³⁶ *Id.* at 635; see also *id.* at 625 (concluding that the Second Amendment protects only those guns commonly used "by law-abiding citizens for lawful purposes").

³⁷ *Id.* at 624-25, 627.

³⁸ *United States v. Miller*, 307 U.S. 174 (1939).

indictment charging two men with violating the federal restrictions on possession of sawed-off or other short-barreled shotguns.³⁹ Although Justice Scalia otherwise found *Miller* to be a “virtually unreasoned case,”⁴⁰ he emphasized *Miller*’s observation that militia participants ordinarily “were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”⁴¹ Scalia thus affirmed *Miller*’s conclusion that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.”⁴² Citing Blackstone and a smattering of nineteenth-century treatises, cases, and other sources, Scalia concluded that limiting the Second Amendment’s reach in this way was “fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”⁴³

Applying the “common use” requirement, Justice Scalia unequivocally found that handguns qualify for protection because they “are the most popular weapon chosen by Americans for self-defense in the home.”⁴⁴ On the other hand, Scalia hinted that short-barreled shotguns are not in common use today, just as they were not in common use at the time of the *Miller* decision in 1939.⁴⁵ Moreover, Scalia suggested that machine guns⁴⁶ are also outside the scope of the Second Amendment’s protection because they are not in common use among American civilians.⁴⁷ At the oral argument in the *Heller* case, Justice Scalia stated even more clearly that he thinks machine guns are too unusual to qualify for Second Amendment protection.⁴⁸ Even if more than one hundred thousand Americans legally own machine guns, they still represent only a small fraction of the Nation’s population, and therefore Scalia believes those weapons are “quite unusual” and too uncommon to receive the Second Amendment’s protection.⁴⁹

³⁹ *Id.* at 183.

⁴⁰ *Heller*, 554 U.S. at 624 n.24.

⁴¹ *Id.* at 624 (quoting *Miller*, 307 U.S. at 179).

⁴² *Id.* at 625.

⁴³ *Id.* at 627.

⁴⁴ *Id.* at 629.

⁴⁵ *Id.* at 625.

⁴⁶ A machine gun is any firearm capable of firing more than one shot with a single pull of the trigger. See 26 U.S.C. § 5845(b) (2006).

⁴⁷ *Heller*, 554 U.S. at 624 (stating that it would be “startling” to interpret the Second Amendment in a way that would render unconstitutional the federal statutory restrictions on machine guns).

⁴⁸ Transcript of Oral Argument at 22, *Heller*, 554 U.S. 570 (No. 07-290).

⁴⁹ *Id.*

Many logical objections to Justice Scalia's common use approach spring readily to mind. Although it makes good sense not to recognize a right to possess extraordinarily dangerous weapons, it is more difficult to see why a gun should fall outside the scope of the right to keep and bear arms merely because it is uncommon. If a weapon was widely used and originally understood to be within the scope of the right to keep and bear arms, why should it lose its constitutional protection merely because the number of its users dwindles over the years? In addition, Scalia's approach gives governments an incentive to ban new types of weapons as soon as they appear, so that they never become common enough to receive constitutional protection. The common use requirement also means that the Second Amendment does not cover the potent and sophisticated military weaponry that would be necessary today to counter the greatest threats to the security of a free state. Justice Scalia recognized these objections in *Heller*, but shrugged them off, saying that the Court's job is merely to read the Constitution and to apply the rights contained within it, not to rewrite the law to achieve more sensible results or to accommodate modern developments.⁵⁰

C. *The List of Presumptively Lawful Regulatory Measures*

The Supreme Court's decision in *Heller* thus imposed several important and relatively clear limitations on the Second Amendment's scope, specifying that it would protect only law-abiding citizens' rights to own and use common types of guns for lawful purposes. After that, Justice Scalia's opinion took a somewhat mysterious turn. Reiterating that Blackstone and other early commentators saw the right to keep and bear arms as having some limits, just like other constitutional rights, Scalia noted that courts in the nineteenth century generally upheld laws banning the carrying of concealed guns in public places.⁵¹ Scalia followed that observation with a sentence that has received more attention than any other part of the *Heller* opinion:

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

⁵⁰ *Heller*, 554 U.S. at 627–28.

⁵¹ *Id.* at 627.

buildings, or laws imposing conditions and qualifications on the commercial sale of arms.⁵²

The Court hastened to note that it provided this list of “presumptively lawful regulatory measures” merely to offer some examples, and that the list “does not purport to be exhaustive.”⁵³ Indeed, later in the opinion, the Court specifically mentioned another example, saying that its analysis should not be read to “suggest the invalidity of laws regulating the storage of firearms to prevent accidents.”⁵⁴

Scalia’s decision to provide a list of presumptively lawful measures is perplexing for several reasons. The list is obviously dictum because none of the types of laws on the list was at issue in the *Heller* case, and therefore the Court’s statements about them were not necessary elements for analyzing the issues before the Court.⁵⁵ Moreover, it seems quite odd that Scalia would want to offer even a tentative view about the validity of any types of laws without undertaking a historical analysis of them, given that the *Heller* opinion otherwise emphasizes so strongly the need for constitutional decisionmaking to be supported by detailed historical analysis of original understandings and traditional interpretations.

Some have speculated that the list of presumptively lawful regulations was not Justice Scalia’s idea, and that he included it in the opinion only because one of the other Justices on the majority side of the case, such as Justice Anthony Kennedy, demanded it.⁵⁶ In other words, including the list of presumptively lawful measures may have been a price that Justice Scalia had to pay in order to have his opinion speak for a united majority of five Justices rather than a mere plurality of four. Whether or not that sort of speculation is accurate, the fact remains that the list is in the opinion, and so it is something with which the lower courts must grapple as they try to decide how to implement the constitutional right addressed in *Heller*.⁵⁷

⁵² *Id.* at 626–27.

⁵³ *Id.* at 627 n.26.

⁵⁴ *Id.* at 632.

⁵⁵ Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within District of Columbia v. Heller*, 62 VAND. L. REV. 1535, 1552 n.121 (2009).

⁵⁶ See, e.g., Mark Tushnet, *Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 420 (2009) (claiming that these parts of the *Heller* opinion are “transparent add-ons” that “were clearly tacked on to the opinion to secure a fifth vote (presumably Justice Anthony Kennedy’s)”).

⁵⁷ Cf. Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1345 (2009) (“Justice Scalia’s opinion is presented as a reasoned interpretation of the law by a court, not as a political compromise, and I will leave others to speculate about logrolling and secret deals.”).

The problem, however, is that Scalia's opinion does not give lower courts any clear guidance about what to do with the list of presumptively lawful measures. The opinion does not spell out exactly why certain types of laws, and not others, make the list. As a result, "[e]xactly why these regulations are 'presumptively lawful' is obscure, as is what might be sufficient to overcome the presumption."⁵⁸

The passage containing the list could be read as intended to have no effect on future adjudication of Second Amendment claims. For example, the list might be seen as nothing more than a reminder that the Court was not deciding anything, one way or the other, about the validity of the listed measures. But if that is all the Court meant to say, it did a very poor job of making the point. The Court could have simply inserted a footnote saying something along the lines of "we of course do not decide today any issues not presented in the case before us."

At the other extreme, the Court's opinion could be read as definitively establishing the constitutionality of the listed measures. In other words, the Court refers to the list as containing "presumptively lawful regulatory measures,"⁵⁹ but some presumptions are conclusive or irrebuttable.⁶⁰ That reading of the passage draws support from the Court's statement that "nothing in [its] opinion should be taken to cast doubt" on any of the listed measures.⁶¹ After all, a Second Amendment claim would be in deep trouble if there truly was nothing to support it in the most important Second Amendment ruling ever made by the Supreme Court.

Of course, one could also read the *Heller* list of presumptively lawful regulations in a variety of ways that fall somewhere in between the weakest and strongest meanings that could be assigned to it. Perhaps the list essentially serves as a vague but helpful hint to lower courts about what to do and as a form of foreshadowing to the public about what to expect. Lower courts will need to assess the constitutionality of measures that fall within the list's parameters rather than simply taking for granted that the listed types of laws are valid. But in embarking on that task, the lower courts should bear in mind that the

⁵⁸ Tushnet, *supra* note 56, at 420 (footnote omitted).

⁵⁹ *Heller*, 554 U.S. at 627 n.26.

⁶⁰ See James J. Duane, *The Constitutionality of Irrebuttable Presumptions*, 19 REGENT U. L. REV. 149, 157 (2006) ("There is nothing unconstitutional, illegal, or even un-American about irrebuttable presumptions. They have always abounded in our law.").

⁶¹ *Heller*, 554 U.S. at 626; see, e.g., *People v. Delacy*, 122 Cal. Rptr. 3d 216, 223–24 (Ct. App. 2011) (concluding that *Heller*'s language unambiguously requires courts to uphold all types of laws on the list of presumptively valid regulations), *cert. denied*, 132 S. Ct. 1092 (2012).

types of laws on the list are the sorts of measures likely to pass constitutional muster. The Supreme Court thus might have simply felt it was wise to give the lower courts a nudge in the right direction, lest any judges get the wrong idea and rush off too rashly to invalidate a broad swath of gun laws.

If the presumption of validity is not conclusive, that leads to significant questions about what exactly the lower courts should be looking for in analyzing the constitutionality of laws that fall within the presumptively lawful categories. *Heller* does not clearly say, but it strongly hints that the analysis should be deeply historical in nature. Again, the list of presumptively lawful measures comes at the end of a paragraph describing what Blackstone and other early commentators had to say about limits on the right to keep and bear arms, as well as noting how nineteenth-century courts upheld laws banning the carrying of concealed weapons.⁶² Continuing to emphasize history, the Court uses the word “longstanding” to describe the types of laws on the list of presumptively lawful regulations.⁶³ Scalia did not specify what it takes for a law to qualify as longstanding.⁶⁴ But despite such ambiguities, the inclusion of the word “longstanding” in that passage seems deliberate and important given the opinion’s persistent focus on historical sources and traditions as primary elements of constitutional interpretation.

Perhaps the most illuminating clue that Scalia offers about all of this comes later in the opinion, when he responds to the dissenting Justices’ criticism of the puzzling nature of the list of presumptively lawful regulatory measures. Scalia promises that “there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”⁶⁵ Scalia thus seems to indicate that the types of laws on the list are not entirely immune from constitutional attack. Instead, he anticipates that there might well be plausible challenges made to them, some of which may ultimately reach the Supreme Court. And according to

⁶² See *supra* note 51 and accompanying text.

⁶³ *Heller*, 554 U.S. at 626.

⁶⁴ *Id.* The wording of Justice Scalia’s opinion in *Heller* was a little ambiguous as to whether “longstanding” described only the laws concerning felons and the mentally ill, or whether that word also applied to laws forbidding guns in sensitive places and laws regulating commercial sale of arms. But Justice Alito’s opinion in *McDonald* seems to assume that “longstanding” describes every category of laws on the list, not just prohibitions on guns for felons and the mentally ill. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (plurality opinion).

⁶⁵ *Heller*, 554 U.S. at 635.

Scalia, the Supreme Court will apply a historical analysis to determine the validity of the challenged laws in those cases.⁶⁶

*D. Declining to Specify the Level of Scrutiny or Other Test
Applicable to Second Amendment Claims*

As for gun laws falling outside the list of presumptively lawful regulations, the *Heller* opinion was equally enigmatic on the basic question of how courts should decide what restrictions on guns violate the right to keep and bear arms. The Court did make one thing clear: Second Amendment claims cannot be subject to mere rational basis scrutiny.⁶⁷ Other constitutional principles, such as equal protection and due process, already require that all government actions must have a rational basis.⁶⁸ If the Second Amendment merely required that gun laws pass the same rational basis hurdle, it would be a redundant and pointless provision.⁶⁹

The Court thus signaled that something more demanding than rational basis scrutiny should apply, but declined to specify exactly whether strict scrutiny, intermediate scrutiny, or some other standard should be used. An explanation for the Court's failure to identify a particular test for Second Amendment claims may be found in comments made by Chief Justice John Roberts during oral argument in *Heller*. When the U.S. Solicitor General suggested that the Court should apply intermediate scrutiny rather than a strict scrutiny test so as not to jeopardize too many important gun laws, Roberts questioned the need to assign the Second Amendment to any of the tiers of the conventional framework for constitutional analysis:

Well, these various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, including you can't take the gun to the marketplace and all that, and determine how these—how this restriction and the scope of this right looks in relation to those?

I'm not sure why we have to articulate some very intricate standard. I mean, these standards that apply in the First

⁶⁶ See generally *id.*

⁶⁷ *Id.* at 628 n.27.

⁶⁸ *Id.*

⁶⁹ *Id.*

Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?⁷⁰

Consistent with Chief Justice Roberts's skepticism about applying a traditional standard of review, the Supreme Court in *Heller* opted to refrain from establishing a formulaic test for Second Amendment claims. The Court first addressed the scope of the right, concluding that it extended beyond the activities of organized state militias and finding that defense of the home against criminal attackers is at the core of the right.⁷¹ The Court looked at various regulations of guns that existed at the time of the Second Amendment's adoption, such as a law that prohibited having loaded firearms within buildings in Boston and laws in other cities that restricted the storage of gunpowder in homes or prohibited the firing of guns within city limits.⁷² And in the decisive part of the analysis, the Court compared the District of Columbia's restrictions on guns to the historical evidence about the original scope of the right to keep and bear arms and traditional understandings of that right and its limitations.⁷³

Finding that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban," the Court concluded that prohibiting the "quintessential self-defense weapon" impermissibly infringed on the ability of citizens to defend themselves in their homes.⁷⁴ Likewise, the District's requirement that firearms in the home be kept unloaded and disassembled or locked would make it "impossible for citizens to use them for the core lawful purpose of self-defense."⁷⁵ Regardless of any purposes or benefits that these laws might have, they failed "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional

⁷⁰ Transcript of Oral Argument at 44, *Heller*, 554 U.S. 570 (No. 07-290).

⁷¹ See *Heller*, 554 U.S. at 628 (concluding that "the inherent right of self-defense has been central to the Second Amendment right"); *id.* at 630 (describing self-defense as the right's "core lawful purpose"); *id.* at 635 (finding that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

⁷² *Id.* at 631–34. Not strictly limiting itself to evidence predating the Second Amendment's adoption in 1791, the Court bolstered its assessment of the traditional meaning of the right to keep and bear arms with citations to nineteenth-century state court decisions striking down laws that prohibited open (i.e., nonconcealed) carrying of pistols. *Id.* at 629 (citing *Nunn v. State*, 1 Ga. 243, 251 (1846); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 187 (1871)).

⁷³ *Heller*, 554 U.S. at 628–31.

⁷⁴ *Id.* at 629.

⁷⁵ *Id.* at 630.

rights.”⁷⁶ The Court thus had no need to wade into fine distinctions among various forms of intermediate or strict scrutiny, let alone get bogged down in complex debates about the effects of and interests served by the District’s guns laws, because the provisions at issue simply infringed far too much on the basic concept of self-defense that the Court found enshrined within the Second Amendment.

E. Justice Breyer’s Dissent

The four Justices unconvinced by Scalia’s reasoning generated a pair of dissenting opinions. Squarely disagreeing with the entire premise of the majority’s position, Justice John Paul Stevens disputed the conclusion that the Second Amendment protects anything other than organized militia activities.⁷⁷ Justice Stephen Breyer’s dissent, on the other hand, focused on the application of the right to keep and bear arms rather than its scope.⁷⁸ In other words, assuming for the sake of argument that the Second Amendment does protect a right to use guns for personal self-defense, Justice Breyer argued that the District of Columbia’s laws nevertheless should be upheld as reasonable and appropriate regulations of that right.⁷⁹

In contrast to the more historical and theoretical bent of Scalia’s analysis, Breyer’s dissent took a pragmatic approach. Although Breyer talked about historical evidence, particularly gun laws that existed in Boston and other major American cities during the Founding era,⁸⁰ he emphasized that historical evidence about the scope of the right to keep and bear arms merely provided “the *beginning*, rather than the *end*, of any constitutional inquiry.”⁸¹ To decide whether a particular restriction on use of guns should be upheld “requires us to focus on practicalities, the statute’s rationale, the problems that called it into being, its relation to those objectives—in a word, the details.”⁸² In Breyer’s view, there can be “no purely logical or conceptual answers to such questions.”⁸³ Instead, the analysis inevitably must boil down to an “interest-balancing inquiry,” weighing the risks and bene-

⁷⁶ *Id.* at 628.

⁷⁷ *See id.* at 637 (Stevens, J., dissenting) (arguing that “[t]he Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia” and does not limit legislative authority to regulate private uses of firearms such as for hunting or personal self-defense).

⁷⁸ *Id.* at 681–82 (Breyer, J., dissenting).

⁷⁹ *Id.* at 681.

⁸⁰ *Id.* at 683–86.

⁸¹ *Id.* at 687.

⁸² *Id.*

⁸³ *Id.*

fits at stake on each side of the controversy.⁸⁴ A legal restriction may reduce criminal or accidental misuse of guns, but it also may interfere with beneficial use of guns for self-defense or other legitimate purposes. Do the potential benefits of a challenged regulation outweigh the potential costs?

Breyer argued that because “any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry,” the Court should simply go ahead and explicitly establish an interest-balancing test for Second Amendment claims.⁸⁵ Breyer recognized that such a test would naturally take into account the degree of the burden that a challenged law imposed on those wanting guns for lawful reasons, as well as the availability of alternative ways that the government might pursue its safety interests while interfering less with legitimate uses of guns.⁸⁶ The ultimate question would be whether a law “imposes burdens that, when viewed in light of the statute’s legitimate objectives, are disproportionate.”⁸⁷

Breyer added one crucial caveat to his proposed approach. “In applying this kind of standard,” Breyer observed, “the Court normally defers to a legislature’s empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity.”⁸⁸ In other words, Breyer would not require governments to present detailed, absolute proof that a challenged law’s benefits outweigh its detrimental effects. Instead, Breyer would have judges merely inquire as to whether the legislature’s judgments were reasonably based on substantial evidence.⁸⁹ Where different conclusions could be drawn from the statistical data and other information available, and experts disagree about the likely net effect of a gun regulation, courts should respect legislators’ “primary responsibility for drawing policy conclusions from empirical fact.”⁹⁰

Turning to the specific laws at issue in the *Heller* case, Breyer emphasized that the District of Columbia is an urban territory with high crime rates and a particularly acute problem with handgun violence.⁹¹ Although reasonable minds could certainly disagree about whether the District’s tight gun control laws alleviated or exacerbated

⁸⁴ *Id.* at 689.

⁸⁵ *Id.*

⁸⁶ *Id.* at 689–90, 693.

⁸⁷ *Id.* at 693.

⁸⁸ *Id.* at 690.

⁸⁹ *Id.* at 702, 704.

⁹⁰ *Id.* at 704.

⁹¹ *Id.* at 681–82, 714.

that problem, Breyer would defer to elected officials' choices about what to do.⁹²

Justice Scalia unequivocally denounced Breyer's interest-balancing approach as a "judge-empowering" maneuver that could rob the Second Amendment of any real meaning or effect.⁹³ In Scalia's view, laws infringing the core right established by the Second Amendment cannot be tolerated even if every legislator and judge in the country wholeheartedly agrees that such laws would have significant positive social effects.⁹⁴ The constitutional protection of a right to keep and bear arms "takes certain policy choices off the table," regardless of what virtues those policy choices might be expected to have.⁹⁵

Scalia and Breyer thus offered two fundamentally different, competing visions of how courts should look at Second Amendment claims. Breyer endorsed a highly pragmatic approach focused on assessing gun control laws from a contemporary public policy perspective, but with a potent dose of judicial restraint and a correspondingly strong tilt toward upholding legislative determinations supported by any reasonable amount of information and plausible reasoning. At one point, Breyer argued that "practical wisdom" supported his position,⁹⁶ and that phrase is a tidy encapsulation of the overall tenor of his opinion. He essentially trusts that legislators will try to make sensible policy decisions about guns, and he advises judges to be cautious, pragmatic, and open-minded about respecting those legislative decisions. By contrast, Scalia does not think that judges or politicians have any business deciding what is wise with respect to matters already resolved by the Constitution. Although Scalia's opinion in *Heller* never precisely articulates the framework for analysis that lower courts should use in future cases, Scalia makes clear that the analysis should be primarily historical in nature. For Scalia, the original meaning of the right and the traditional understandings that surrounded it in early U.S. history cannot be trumped by the whims of contemporary cost-benefit policy analysis.

As Justice William Brennan reportedly quipped, "[T]he first rule of the Supreme Court is that you have to be able to count to five."⁹⁷ Scalia, not Breyer, was able to garner five votes in *Heller*, and thus a

⁹² See *id.* at 719.

⁹³ *Id.* at 634–35 (majority opinion).

⁹⁴ *Id.*

⁹⁵ *Id.* at 636.

⁹⁶ *Id.* at 691 (Breyer, J., dissenting).

⁹⁷ Abner Mikva, *The Scope of Equal Protection*, 2002 U. CHI. LEGAL F. 1, 8.

significant initial dispute about the Second Amendment was resolved. For the first time, Supreme Court precedent clearly established that Americans have a constitutional right to own and use guns that extends broadly beyond militia activities. Not surprisingly, the Court's decision drew a mixture of responses. As one newspaper aptly summarized, "The reaction broke less along party lines than along the divide between cities wracked with gun violence and rural areas where gun ownership is embedded in daily life."⁹⁸ Gun rights advocates naturally lavished praise upon Scalia's decision. For example, Professor Randy Barnett described Scalia's opinion as "historic in its implications and exemplary in its reasoning," calling it "the clearest, most careful interpretation of the meaning of the Constitution ever to be adopted by a majority of the Supreme Court" and predicting that it would be "studied by law professors and students for years to come."⁹⁹ Texas lawyer David Schenck, who filed an amicus brief in the *Heller* case, had a similarly spirited but pithier response: "'Hallelujah. Praise the Lord and pass the ammunition.'"¹⁰⁰

II. THE SECOND BATTLE: *McDONALD V. CITY OF CHICAGO*

While putting to rest some questions about the Second Amendment, the Supreme Court's decision in *Heller* left other important issues unresolved. One of the most significant was whether state and local government actions could violate the right to keep and bear arms. The Second Amendment, like the other provisions of the Bill of Rights, applies only to the federal government.¹⁰¹ The Fourteenth Amendment, however, applies to state and local governments and prohibits them from depriving people of life, liberty, or property without due process of law.¹⁰² In a series of decisions starting in the late nineteenth century, the Supreme Court decided that most rights secured against federal infringement by the Bill of Rights are so fundamentally important that they are part of what it means to receive due process of law under the Fourteenth Amendment. The result is that

⁹⁸ Chad Livengood, *Court Affirms Gun Rights*, SPRINGFIELD NEWS-LEADER (Mo.), June 27, 2008, at 1A.

⁹⁹ See, e.g., Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13.

¹⁰⁰ Todd J. Gillman, *Rejection of Ban Triggers New Debate*, DALL. MORNING NEWS, June 27, 2008, at 1A (quoting David Schenck, who filed an amicus brief on behalf of the Texas State Rifle Association and sister groups in forty-two other states).

¹⁰¹ See *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

¹⁰² U.S. CONST. amend. XIV, § 1.

important provisions of the Bill of Rights wind up being “incorporated” through the Fourteenth Amendment’s Due Process Clause and thereby restrain the actions of state and local governments as well as the federal government.¹⁰³

Heller involved laws of the District of Columbia, which is a special federal territory and not a state, so the Court did not need to make a decision about incorporation in that case.¹⁰⁴ But lower courts would immediately face the incorporation question, as litigants around the country began to challenge state and local gun restrictions. Indeed, within fifteen minutes of the Supreme Court’s announcement of the *Heller* ruling, the Illinois Rifle Association had filed a lawsuit challenging the City of Chicago’s handgun ban,¹⁰⁵ and the National Rifle Association followed up with a similar suit of its own the next day.¹⁰⁶

The incorporation issue took a few years to wind its way through the lower courts, but it eventually reached the Supreme Court in 2010 in *McDonald v. City of Chicago*. The Court split 5–4, just as in *Heller*,¹⁰⁷ and once again the majority expanded gun rights.¹⁰⁸ The five Justices on the prevailing side could not completely agree on the rationale for their result. Never afraid to question seemingly well-settled constitutional doctrine,¹⁰⁹ Justice Clarence Thomas argued that the Court should rethink its incorporation jurisprudence, recognize that it had been using the wrong part of the Fourteenth Amendment to incorporate rights, and hold that the right to keep and bear arms enjoys

¹⁰³ See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.2 (6th ed. 2000) (explaining the controversies surrounding incorporation of the Bill of Rights into the Fourteenth Amendment).

¹⁰⁴ *District of Columbia v. Heller*, 554 U.S. 570, 620 n.23 (2008) (noting that incorporation of the right to keep and bear arms was “a question not presented by th[e] case”).

¹⁰⁵ *CBS Evening News* (CBS television broadcast June 26, 2008).

¹⁰⁶ *NRA Sues for Repeal of Bans in City, 3 Suburbs*, CHI. SUN-TIMES, June 28, 2008, at 4.

¹⁰⁷ One change in the Supreme Court’s lineup had taken place between the *Heller* and *McDonald* decisions, with Sonia Sotomayor replacing David Souter, but that switch did not affect the results because both voted with the liberal or gun control side of these issues. See *Heller*, 554 U.S. at 636 (Stevens, J., dissenting); see also *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3088 (2010) (Stevens, J., dissenting). For the story of how the incorporation issue affected Sotomayor’s journey to the Supreme Court, see Allen Rostron, *The Past and Future Role of the Second Amendment and Gun Control in Fights over Confirmation of Supreme Court Nominees*, 3 NE. U. L.J. 123, 148–63 (2011).

¹⁰⁸ *McDonald*, 130 S. Ct. at 3026 (Alito, J., opinion of the Court).

¹⁰⁹ See KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS 281–82 (2004) (quoting Antonin Scalia as saying that Clarence Thomas “does not believe in stare decisis, period. If a constitutional line of authority is wrong, he would say let’s get it right” (internal quotation marks omitted)).

protection through the Fourteenth Amendment's Privileges or Immunities Clause rather than the Due Process Clause.¹¹⁰ The other four Justices on the majority side, led by Justice Samuel Alito, preferred to stick with the conventional route of incorporating through the Due Process Clause.¹¹¹ Again undertaking an in-depth exploration of American history, this time focusing on the post-Civil War era, Alito's opinion concluded that those who wrote and ratified the Fourteenth Amendment considered the right to keep and bear arms to be fundamentally important to American liberty.¹¹² Despite their differing views about the proper mechanism of incorporation, the bottom line was that once again a slim majority of the Supreme Court had resolved a major question about the right to keep and bear arms, concluding that the right applied fully to state and local governments through the Fourteenth Amendment just as it binds the federal government through the Second Amendment.¹¹³

Indeed, the *McDonald* decision made it very clear that the right would be exactly the same whether applied directly under the Second Amendment or via incorporation through the Fourteenth Amendment. For many years, one of the controversies surrounding incorporation was whether an incorporated right must be treated exactly the same—in other words, given the same scope, the same strength, the same rules and requirements, the same exceptions, and so on—when it applies to state and local governments through the Fourteenth Amendment rather than to the federal government through the Bill of Rights. Some Justices argued that rights can be tailored in various ways and need not be applied in identical form to different levels of government,¹¹⁴ while others insisted that a right must mean the same thing in every instance regardless of whether it applies through incorporation.¹¹⁵ The Supreme Court eventually drifted toward the latter view, sometimes described as the “jot-for-jot”¹¹⁶ or “one-size-fits-all”¹¹⁷ approach, declaring that it would be “incongruous to have dif-

¹¹⁰ *McDonald*, 130 S. Ct. at 3058–59 (Thomas, J., concurring in part and concurring in the judgment).

¹¹¹ *Id.* at 3030–31 (plurality opinion).

¹¹² *Id.* at 3036–42 (Alito, J., opinion of the Court).

¹¹³ *Id.* at 3026.

¹¹⁴ See *id.* at 3032 (citing examples). For more examples, see Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1557–62 (2005).

¹¹⁵ See *McDonald*, 130 S. Ct. at 3035 (citing examples).

¹¹⁶ *Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting).

¹¹⁷ Rosen, *supra* note 114, at 1516.

ferent standards” apply depending on which level of government infringed a right.¹¹⁸ Debate about the matter nonetheless persisted.¹¹⁹

In *McDonald*, Alito took the opportunity to emphatically slam the door on any notion that analysis of the right to keep and bear arms might differ depending on whether a case involved a federal, state, or local government action. Alito read the Supreme Court’s past decisions as “decisively”¹²⁰ creating a “well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government”¹²¹ and rejecting “the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.”¹²²

The Supreme Court in *McDonald* thus made clear that a single, uniform method of analysis will apply to gun laws at the federal, state, and local levels. But once again, the Court failed to explain clearly what that method of analysis should entail. Alito’s analysis of the incorporation question was primarily historical in nature,¹²³ just like most of Scalia’s analysis in *Heller* had been. Alito also pointed back to *Heller*’s intriguing passage about specified types of longstanding regulatory measures being presumptively constitutional, saying “[w]e repeat those assurances here.”¹²⁴ Chicago’s “doomsday proclamations” were misguided, Alito promised, because “incorporation does not imperil every law regulating firearms.”¹²⁵ But the Court shed no new light on exactly how judges should go about sorting valid gun laws from invalid ones. The Court, for example, did not talk about levels of scrutiny or other forms of assessment that might be used to apply the newly invigorated right to keep and bear arms.

Justice Breyer’s dissent in *McDonald* echoed themes from his *Heller* dissent. History alone, he argued, is not a sound basis for con-

¹¹⁸ *Malloy v. Hogan*, 378 U.S. 1, 11 (1964).

¹¹⁹ See, e.g., *Crist v. Bretz*, 437 U.S. 28, 52–53 (1978) (Powell, J., dissenting); *Duncan*, 391 U.S. at 181 (Harlan, J., dissenting); see also Rosen, *supra* note 114, at 1562–80 (discussing contemporary constitutional cases, including some majority opinions, reflecting a willingness to tailor constitutional rights for application to different levels of government).

¹²⁰ *McDonald*, 130 S. Ct. at 3035.

¹²¹ *Id.* at 3035 n.14.

¹²² *Id.* at 3047 (plurality opinion) (quoting *Malloy*, 378 U.S. at 10–11) (internal quotation marks omitted).

¹²³ See *supra* note 112 and accompanying text.

¹²⁴ *McDonald*, 130 S. Ct. at 3047 (citing *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008)); see *supra* Part I.C.

¹²⁵ *McDonald*, 130 S. Ct. at 3047.

stitutional decisionmaking.¹²⁶ Judges instead must “consider the basic values that underlie a constitutional provision and their contemporary significance” as well as “the relevant consequences and practical justifications that might” warrant striking down or upholding a gun law.¹²⁷ In other words, judges inevitably must approach gun rights claims as matters of contemporary public policy, not just history, and weigh the interests in personal safety and public safety at stake on each side. Breyer suggested again that in balancing these interests, courts generally should defer greatly to legislative determinations about the risks and benefits of various approaches to regulating guns.¹²⁸ Determining the effect of any particular gun law presents complex empirical questions that legislatures are better equipped than courts to handle.¹²⁹ Again, Breyer essentially counsels pragmatism in *McDonald*, urging that judges be attentive to the real consequences of different policy choices about guns but deferential to reasonable legislative assessments.¹³⁰ And just as in *Heller*, the Justices on the prevailing side of the case flatly denied that Breyer’s brand of interest balancing should have any role in adjudication of gun rights issues.¹³¹

III. THE THIRD BATTLE: APPLYING THE RIGHT TO KEEP AND BEAR ARMS IN THE LOWER COURTS

The Supreme Court’s decisions in *Heller* and *McDonald* opened the way to a steady stream of litigation in lower courts about the right to keep and bear arms. The development and refinement of this area of law is of course likely to continue for many years, but an ample body of decisions already exists. In some areas, the lower courts have achieved strong consensus. In others, uncertainty still reigns, but strong indications have nonetheless emerged about the directions in which the courts seem likely to proceed.

A. *Law-Abiding, Responsible Citizens*

Even within a complex and evolving field like constitutional law, some questions are easy to answer. Lower courts have faced little difficulty in applying the Supreme Court’s instruction that the right to keep and bear arms should protect only those seeking to use guns for

¹²⁶ See *id.* at 3122 (Breyer, J., dissenting).

¹²⁷ *Id.*

¹²⁸ See *id.* at 3135–36 (explaining how most state courts have long taken a “highly deferential attitude towards legislative determinations” about guns).

¹²⁹ *Id.* at 3126–28.

¹³⁰ See *id.* at 3126–27.

¹³¹ *Id.* at 3047, 3050 (plurality opinion).

legitimate, lawful purposes, not those who would arm themselves to commit dangerous crimes. For example, courts have flatly rejected challenges to convictions under laws prohibiting the use of firearms in furtherance of violent crimes or drug trafficking offenses.¹³² Rejecting the argument of a defendant who claimed a right to protect himself while distributing cocaine and other illegal drugs out of his home, one opinion observed that “[t]he Constitution does not give anyone the right to be armed while committing a felony, or even to have guns in the next room for emergency use should suppliers, customers, or the police threaten a dealer’s stash.”¹³³ Courts have likewise consistently rejected challenges to statutes providing stiffer punishment for crimes committed with firearms.¹³⁴ These sentencing enhancement provisions do not in any way infringe on the rights of law-abiding citizens, and drawing this sort of categorical line to limit the scope of the Second Amendment makes good sense and has not sparked significant controversy.¹³⁵

B. *Arms in Common Use at the Time*

So far, lower courts also have had a fairly easy time implementing the Supreme Court’s determination that only guns currently in common use fall within the scope of the constitutional right to keep and bear arms.¹³⁶ Following Justice Scalia’s lead,¹³⁷ courts have briskly re-

¹³² See, e.g., *United States v. Potter*, 630 F.3d 1260, 1261 (9th Cir.), *cert. denied*, 132 S. Ct. 319 (2011); *Costigan v. Yost*, 334 F. App’x 460, 462 (3d Cir. 2009); *People v. Charles*, No. 283452, 2009 WL 608404, at *1 (Mich. Ct. App. Mar. 10, 2009).

¹³³ *United States v. Jackson*, 555 F.3d 635, 636 (7th Cir. 2009); see also *United States v. Rush*, 635 F. Supp. 2d 1301, 1302 (M.D. Ala. 2009) (rejecting the idea that the Second Amendment “allows a person to insert himself intentionally into dangerous and illegal activity” and then have his possession of a gun in conjunction with that activity treated with “kid gloves”).

¹³⁴ *United States v. Jacobson*, 406 F. App’x 91, 93 (8th Cir. 2011); *United States v. Goodlow*, 389 F. App’x 961, 969 (11th Cir. 2010); *United States v. King*, 333 F. App’x 92, 95–96 (7th Cir. 2009); *United States v. Rhodes*, 322 F. App’x 336, 343 n.3 (4th Cir. 2009).

¹³⁵ Courts have also begun to wrestle with other potential limits on the scope of the constitutional right to keep and bear arms. For example, several courts have concluded that although the Second Amendment protects those who seek to own and use guns, it does not apply to those who wish to sell guns. See *United States v. Chafin*, 423 F. App’x 342, 344 (4th Cir. 2011) (finding no authority “that remotely suggests that, at the time of its ratification, the Second Amendment was understood to protect an individual’s right to sell a firearm”); *Mont. Shooting Sports Ass’n v. Holder*, No. CV-09-147-DWM-JCL, 2010 WL 3926029, at *21–22 (D. Mont. Aug. 31) (findings and recommendation of Magistrate Judge) (finding that the Second Amendment does not protect gun manufacturers or dealers), *report and recommendation adopted*, No. CV 09-147-MDMW-JCL, 2010 WL 3909431 (D. Mont. Sept. 29, 2010). Others have ruled that the right to keep and bear arms protects only U.S. citizens. See, e.g., *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 WL 411112, at *4–5 (D. Kan. Jan. 28, 2010).

¹³⁶ *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008); see also *supra* Part I.B.

jected challenges to the laws that impose special restrictions on machine guns¹³⁸ and short-barreled shotguns.¹³⁹ The opinions generally contain no real analysis or discussion of this point, and instead they simply assert that such weapons clearly are not in common use, as though this is a self-evident fact.¹⁴⁰

Even if they are reaching the right conclusions, the courts' failure to offer at least a bit more explanation for these conclusions is puzzling. Federal data suggest, for example, that there are about 400,000 legal machine guns in the hands of American civilians today,¹⁴¹ and many people undoubtedly enjoy using them for recreational purposes.¹⁴² Again, Justice Scalia suggested during the *Heller* oral argument that "common use" means a much larger number, given the fact that America's population exceeds 300 million people,¹⁴³ but a remark by one Justice during oral argument is obviously not a particularly solid basis for resolving a legal issue. Lower court judges may eventually provide a more thorough explanation for the conclusion that machine guns fall outside the Second Amendment's scope, perhaps

¹³⁷ See *supra* notes 45–49 and accompanying text.

¹³⁸ See, e.g., *Hamblen v. United States*, 591 F.3d 471, 474 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 2426 (2010); *United States v. McCartney*, 357 F. App'x 73, 76 (9th Cir. 2009); *United States v. Ross*, 323 F. App'x 117, 119–20 (3d Cir. 2009); *United States v. Gilbert*, 286 F. App'x 383, 386 (9th Cir. 2008).

¹³⁹ See, e.g., *United States v. Hatfield*, 376 F. App'x 706, 707 (9th Cir. 2010); *United States v. Artez*, 290 F. App'x 203, 208 (10th Cir. 2008); *Gilbert*, 286 F. App'x at 386; see also *United States v. Majid*, No. 4:10cr303, 2010 WL 5129297, at *1 (N.D. Ohio Dec. 10, 2010) (finding that short-barreled AR-15 rifles are not commonly used by law-abiding citizens for lawful purposes).

¹⁴⁰ See, e.g., *McCartney*, 357 F. App'x at 76; *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008). Courts have also consistently rejected claims concerning more exotic items. See, e.g., *McCartney*, 357 F. App'x at 76 (silencers, grenades, and directional mines); *United States v. Tagg*, 572 F.3d 1320, 1326–27 (11th Cir. 2009) (pipe bombs); *People v. James*, 94 Cal. Rptr. 3d 576, 578–86 (Ct. App. 2009) (assault weapons and .50 caliber BMG rifles); *Mack v. United States*, 6 A.3d 1224, 1235–36 (D.C. 2010) (ice picks); *Wilson v. Cook Cnty.*, 943 N.E.2d 768, 780–81 (Ill. App. Ct.) (assault weapons), *appeal allowed*, 949 N.E.2d 1104 (Ill. 2011); *Lacy v. State*, 903 N.E.2d 486, 491–92 (Ind. Ct. App. 2009) (switchblade knives).

¹⁴¹ OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, NO. I-2007-006, THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES' NATIONAL FIREARMS REGISTRATION AND TRANSFER RECORD 2 (2007), available at <http://www.justice.gov/oig/reports/ATF/e0706/final.pdf>. The federal data showed registrations for 391,532 machine guns as of November 2006. *Id.* The number of registered machine guns is unlikely to increase significantly because a federal law in place since 1986 prohibits the sale of new machine guns to anyone other than the military and law enforcement agencies, while allowing machine guns already registered and possessed by civilians to remain in circulation. See Firearm Owners' Protection Act, Pub. L. No. 99-308, § 102(9), 100 Stat. 449, 452–53 (1986) (codified at 18 U.S.C. § 922(o) (2006)).

¹⁴² See, e.g., Ashley Lutz, *Machine Gun Fun? Shoot Is 'Stress Relief' for Some, Anxiety Source for Others*, COLUMBUS DISPATCH (Ohio), June 28, 2009, at B1.

¹⁴³ See *supra* notes 48–49 and accompanying text.

focusing on the fact that machine guns are not only unusual in a numerical sense but also unusually dangerous compared to other firearms.¹⁴⁴ Assuming that 400,000 is insufficient, the question becomes how many guns of a certain type must be owned in order to establish common use. That should be an interesting and difficult issue for courts to answer at some point in the future, but so far they have not even scratched the surface of that question.¹⁴⁵

Courts also have shown little interest in examining the potential logical flaws in the common use requirement. For example, a plaintiff seeking to enjoin enforcement of the federal ban on armor-piercing ammunition insisted that rather than asking whether that type of ammunition is currently in common use for self-defense purposes, the court instead should consider whether it would be commonly used in the absence of the federal ban.¹⁴⁶ This plaintiff had a reasonable point, for it is oddly circular reasoning to say that a law banning an item can justify itself because it prevents the item from being commonly used. The Fourth Circuit panel in that case nevertheless upheld the ban, presuming that the use of armor-piercing ammunition would not be common even without the ban “considering the great risk such ammunition poses to law enforcement officers.”¹⁴⁷

Other courts similarly have had little to say about the logic of the common use requirement because in the end, that requirement produces appealing results.¹⁴⁸ Judges know that public safety would be unduly endangered if the Constitution guaranteed easy access to machine guns, sawed-off shotguns, armor-piercing ammunition, and the like. Following Justice Scalia’s lead, they invoke the common use requirement and make what is ultimately a contemporary public policy

¹⁴⁴ Scalia referred to the historical tradition of prohibiting the carrying of “dangerous and unusual weapons.” *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

¹⁴⁵ The D.C. Circuit has pointed out that courts need appropriate evidence to make decisions about what weapons are in common use. *See Heller v. District of Columbia (Heller II)*, No. 10-7036, 2011 WL 4551558, at *13 (D.C. Cir. Oct. 4, 2011) (finding that data in the record were sufficient to establish that semiautomatic rifles and large-capacity ammunition magazines are in common use in the United States today, but not to establish whether they are commonly used for self-defense or hunting).

¹⁴⁶ *See Kodak v. Holder*, 342 F. App’x 907, 908–09 (4th Cir. 2009).

¹⁴⁷ *Id.* at 909.

¹⁴⁸ For example, the defendant in *United States v. Hatfield*, 376 F. App’x 706 (9th Cir. 2010), argued that he had a right to keep and bear a sawed-off shotgun because it “resembles a blunderbuss, a short-barreled, muzzle-loading firearm used around the time of the Second Amendment’s ratification.” *Id.* at 707. The court summarily rejected that argument because sawed-off shotguns are not typically possessed for lawful purposes today, regardless of how similar they may be to weapons popular two centuries ago. *Id.*

determination look as though it emerges from a historical limitation of the right's scope.¹⁴⁹

C. The List of Presumptively Lawful Regulatory Measures

More difficult issues have arisen over what to do about challenges to the types of gun regulations characterized as “longstanding” and “presumptively lawful” by Justice Scalia’s opinion in *Heller*.¹⁵⁰ Although it has only been a few years since the *Heller* decision, the lower courts’ attitudes toward such claims have already undergone substantial evolution. Much of the judicial discussion has concerned the federal statute that prohibits possession of guns by convicted felons.¹⁵¹ Although it still seems very likely that this law will escape constitutional attack unscathed, the issue has revealed that the lower courts simply do not really know what *Heller* instructed them to do.

As soon as the *Heller* decision was announced, the lower courts faced an onslaught of challenges to the felon-in-possession statute. Over and over, courts quickly brushed aside these claims by simply citing the passage from *Heller* listing the presumptively lawful regulations.¹⁵² The question seemed that it might never receive greater attention until a Tenth Circuit judge, Timothy Tymkovich, objected to it being so cavalierly dismissed.¹⁵³ Judge Tymkovich pointed out that it was not at all clear that banning felons from having guns was really a “longstanding” practice after all.¹⁵⁴ New scholarly research published after the *Heller* decision suggested that laws banning felons from hav-

¹⁴⁹ See Rostron, *supra* note 33, at 390–91 (arguing that Justice Scalia’s creation of the common use requirement “sacrifice[d] logical consistency and faithful reading of precedent in order to construct an interpretation of the Second Amendment more in harmony with contemporary public opinion”).

¹⁵⁰ See *supra* Part I.C.

¹⁵¹ 18 U.S.C. § 922(g)(1) (2006).

¹⁵² See, e.g., *United States v. Brye*, 318 F. App’x 878, 880 (11th Cir. 2009); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009); *United States v. Frazier*, 314 F. App’x 801, 807 (6th Cir. 2008); *United States v. Brunson*, 292 F. App’x 259, 261 (4th Cir. 2008); *United States v. Irish*, 285 F. App’x 326, 327 (8th Cir. 2008); *United States v. Gilbert*, 286 F. App’x 383, 386 (9th Cir. 2008). Courts have reached the same conclusion about state laws prohibiting possession of guns by convicted felons. See, e.g., *People v. Valdovinos*, No. F054871, 2009 WL 446122, at *6 (Cal. Ct. App. Feb. 24, 2009); *State v. Gatson*, No. 284654, 2009 WL 2767199, at *5 n.4 (Mich. Ct. App. Sept. 1, 2009). Courts have also rejected challenges to the federal law prohibiting possession of a gun by a person “who has been adjudicated as a mental defective or who has been committed to a mental institution.” 18 U.S.C. § 922(g)(4); see, e.g., *United States v. Murphy*, 681 F. Supp. 2d 95, 103 (D. Me. 2010).

¹⁵³ *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (Tymkovich, J., concurring).

¹⁵⁴ *Id.* at 1048.

ing guns were not enacted until the twentieth century, and therefore no such laws existed in America at the time of the Second Amendment's adoption.¹⁵⁵ Tymkovich rightly noted that upholding felon-in-possession convictions based on an erroneous historical understanding would be highly troubling given the overriding emphasis that Justice Scalia placed on historical analysis in *Heller*.¹⁵⁶ If history is what truly matters most in constitutional interpretation, one's historical analysis surely needs to be accurate. Despite his misgivings, Judge Tymkovich concluded that there was nothing he could do.¹⁵⁷ In his view, the *Heller* list of presumptively lawful regulations was dictum, and perhaps misguided dictum, but it nevertheless bound lower courts.¹⁵⁸ The Supreme Court had said that nothing in *Heller* cast doubt on the validity of laws disarming felons, and Tymkovich felt that he had to accept that and move on.¹⁵⁹

After Judge Tymkovich expressed his misgivings about relying on the *Heller* list of presumptively lawful regulations, other judges began to give the matter much more attention. Rather than simply assuming that the *Heller* list conclusively established the validity of laws banning felons from having guns, some courts looked more carefully at the extent of their obligation to follow dicta in Supreme Court opinions.¹⁶⁰ Rather than broadly upholding felon-in-possession laws across the board, some courts began to emphasize more heavily the factual details of the cases before them, such as the nature of the felony convictions at issue, suggesting that distinctions might be drawn among various categories of felons.¹⁶¹ As a Seventh Circuit decision ex-

¹⁵⁵ See Carlton F.W. Larson, *Four Exceptions in Search of a Theory*: District of Columbia v. Heller and Judicial Ipse Dixit, 60 HASTINGS L.J. 1371, 1374 (2009); C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698–714 (2009); Winkler, *supra* note 16, at 1561, 1563. Earlier sources suggested that barring felons from having guns is consistent with eighteenth-century understandings of the right to bear arms. See Robert Dowd, *Commentary, The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 96 (1983); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983).

¹⁵⁶ *McCane*, 573 F.3d at 1048.

¹⁵⁷ *Id.* at 1050.

¹⁵⁸ *Id.* at 1047, 1050.

¹⁵⁹ *Id.*

¹⁶⁰ See, e.g., *United States v. Barton*, 633 F.3d 168, 171–73 (3d Cir. 2011); *United States v. Rozier*, 598 F.3d 768, 771 n.6 (4th Cir.), *cert. denied*, 130 S. Ct. 3399 (2010); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir.), *cert. denied*, 131 S. Ct. 294 (2010); *United States v. Khami*, 362 F. App'x 501, 508 (6th Cir.), *cert. denied*, 130 S. Ct. 3345 (2010); *People v. Davis*, 947 N.E.2d 813, 817 (Ill. App. Ct.), *appeal denied*, 955 N.E.2d 474 (Ill. 2011).

¹⁶¹ See, e.g., *Barton*, 633 F.3d at 172–73 (finding that *Heller* requires courts to “presume” that a felon gun dispossession law is valid, but implies that the presumption is rebuttable, and therefore facial challenges to the law must be rejected but as-applied challenges may proceed);

plained, Justice Scalia's opinion in *Heller* "referred to felon disarmament bans only as 'presumptively lawful,' which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge."¹⁶² The Third Circuit hinted that perhaps a successful challenge could be brought by a felon "convicted of a minor, non-violent crime" or "whose crime of conviction is decades-old."¹⁶³

Some courts also began to explore further the historical justifications for excluding convicted felons from the Second Amendment's protection.¹⁶⁴ As soon as judges embarked on this quest to dig more deeply into history, they collided with the reality that history will not provide clear answers to these sorts of questions.¹⁶⁵ Although Justice Scalia's opinion in *Heller* characterized disarming felons as a long-standing tradition,¹⁶⁶ federal law did not disqualify any felons from possessing firearms until 1938 and did not disqualify nonviolent felons until 1961.¹⁶⁷ Of course, the power to disarm felons may have been available all along, even if Congress did not exercise it until the twentieth century. Looking back to earlier days, some researchers find that the original understanding of the Second Amendment was that only "virtuous" citizens would have the right to keep and bear arms, and felons did not qualify.¹⁶⁸ Other studies find scant support for that

United States v. Williams, 616 F.3d 685, 693 (7th Cir.) (recognizing that a federal ban on guns for felons "may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent," but that the defendant, as a violent felon, was "not the ideal candidate" to make that argument), *cert. denied*, 131 S. Ct. 805 (2010); United States v. Duckett, 406 F. App'x 185, 187 (9th Cir. 2010) (Ikuta, J., concurring) (suggesting that courts should look more carefully at whether governments have a substantial interest in categorically prohibiting possession of guns by all nonviolent felons), *cert. denied*, 131 S. Ct. 3081 (2011); *Khami*, 362 F. App'x at 508 (noting that because the defendant had two prior drug felony convictions and was on electronic tether monitoring at the time he illegally possessed a firearm, he was clearly within the category of felons for which gun possession could be prohibited without violating constitutional rights).

¹⁶² *Williams*, 616 F.3d at 692 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008)).

¹⁶³ *Barton*, 633 F.3d at 174.

¹⁶⁴ *Id.* at 173–74; *Vongxay*, 594 F.3d at 1117–18.

¹⁶⁵ *Vongxay*, 594 F.3d at 1118 (recognizing that "the historical question has not been definitively resolved").

¹⁶⁶ *Heller*, 554 U.S. at 626.

¹⁶⁷ *Barton*, 633 F.3d at 173.

¹⁶⁸ Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 146 (1986).

conclusion.¹⁶⁹ The scholarly research on the subject is therefore “inconclusive at best.”¹⁷⁰

The historical evidence simply is too easy to spin in either direction. Some judges have been impressed, for example, by the fact that Anti-Federalists at the Pennsylvania ratifying convention in December 1787 proposed a constitutional amendment that would have created a right to keep and bear arms, expressly providing that “no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.”¹⁷¹ This purportedly confirms that the Founding generation did not view the common law right to keep and bear arms as protecting those likely to commit crimes.¹⁷² But of course, one can just as easily wonder why James Madison chose not to use the Pennsylvania Anti-Federalists’ language in the Second Amendment and speculate that if those who wrote and approved the Second Amendment meant to exclude criminals from the right to keep and bear arms, they would have said so.¹⁷³

With history providing no clear answers, courts ultimately decide what to do about these issues based on assessments about sound public policy for modern-day America. Federal law seeks “to keep firearms out of the hands of violent felons, who the government believes are often those most likely to misuse firearms,” and that is an unquestionably important goal.¹⁷⁴ Statistics clearly show that convicted felons are more likely than the average person to commit violent crimes.¹⁷⁵ Moreover, felony convictions often limit a person’s rights in other respects, such as voting, so the idea that felons might be unable to have guns does not seem odd or shocking.¹⁷⁶

¹⁶⁹ See *supra* note 155 (citing other sources on both sides of this debate).

¹⁷⁰ *United States v. Skoien*, 614 F.3d 638, 650 (7th Cir. 2010) (en banc) (Sykes, J., dissenting), *cert. denied*, 131 S. Ct. 1674 (2011); *accord* *United States v. Chester*, 628 F.3d 673, 681–82 (4th Cir. 2010).

¹⁷¹ THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS (1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 237, 240 (Ralph Ketcham ed., 1986).

¹⁷² *Barton*, 633 F.3d at 173.

¹⁷³ Cf. Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267, 278–79 (2008) (discussing the peril of interpreting the Second Amendment based on proposed wording that “Madison and the First Congress clearly chose to utterly and totally ignore and reject”).

¹⁷⁴ *United States v. Williams*, 616 F.3d 685, 693 (7th Cir.), *cert. denied*, 131 S. Ct. 805 (2010).

¹⁷⁵ *Barton*, 633 F.3d at 175.

¹⁷⁶ *Id.*

The U.S. government thus remains undefeated, so far, in overcoming Second Amendment challenges to the federal ban on gun possession by felons. Nevertheless, courts will continue to face the issue,¹⁷⁷ and it is certainly conceivable that a narrow attack based on sympathetic facts could succeed, such as a claim asserted by a person who was convicted long ago for a nonviolent felony, who has become a model citizen, and who has a particularly pressing need to arm himself for self-defense.

Such an argument has already found success at the state constitutional level, albeit in a very limited way. In its 2009 decision in *Britt v. State*,¹⁷⁸ the Supreme Court of North Carolina carved out a small exception to the state law banning felons from having guns. The court relied strictly on the North Carolina Constitution rather than invoking federal constitutional rights.¹⁷⁹ The case involved Barney Britt, who pled guilty in 1979 to possessing drugs with the intent to sell.¹⁸⁰ Several years after Britt completed his time in prison and probation, state laws restored his right to have firearms, enabling him to lawfully own guns from 1987 to 2004.¹⁸¹ Britt used his guns for hunting, on his own land, and he never caused trouble of any sort.¹⁸² In 2004, however, North Carolina's legislature cracked down, enacting a new blanket prohibition of firearms possession by felons.¹⁸³ After dutifully surrendering his guns to the local sheriff, Britt filed a lawsuit challenging the amended state law that retroactively disqualified him from continuing to own and use firearms for hunting.¹⁸⁴ The Supreme Court of North Carolina concluded that the state's new law was unreasonable as applied to Britt, a person who had a single conviction for a nonviolent felony thirty years ago and who had subsequently demonstrated his responsible and law-abiding character by safely and lawfully possess-

¹⁷⁷ See, e.g., *United States v. Pruess*, 416 F. App'x 274, 275 (4th Cir. 2011) (per curiam) (remanding for the district court to analyze the constitutionality of a federal felon gun ban as applied to a nonviolent felon).

¹⁷⁸ *Britt v. State*, 681 S.E.2d 320 (N.C. 2009).

¹⁷⁹ *Id.* at 322. The North Carolina Constitution has a provision containing language identical to that of the U.S. Constitution's Second Amendment. Compare N.C. CONST. art. I, § 30, with U.S. CONST. amend. II.

¹⁸⁰ *Britt*, 681 S.E.2d at 321.

¹⁸¹ *Id.*; see also 18 U.S.C. § 921(a)(20) (2006) (providing that federal law will not bar a convicted felon from possessing guns if the felon's civil rights have been restored).

¹⁸² *Britt*, 681 S.E.2d at 322.

¹⁸³ *Id.* at 321.

¹⁸⁴ *Id.* at 322.

ing guns for seventeen years and then voluntarily turning them in to the sheriff as soon as the law changed.¹⁸⁵

The *Britt* decision is the exception that proves the rule. Far from broadly opening the door to constitutional challenges to gun regulations, the North Carolina court created a narrow crevice just big enough for an exceptionally sympathetic plaintiff to slip through.¹⁸⁶ Very few litigants challenging gun laws will ever be able to show that they are similarly situated to Barney Britt.¹⁸⁷

Far less attention has been devoted so far in the lower courts to the other items on *Heller*'s list of presumptively lawful regulations, but they too may eventually pose similarly tricky questions. For example, *Heller* referred to "laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings."¹⁸⁸ Does "schools" mean just school buildings or does it also include school grounds or a one-thousand-foot zone around school property?¹⁸⁹ Does it include public college and university campuses?¹⁹⁰ Are all government buildings "sensitive" or only some?¹⁹¹ Should the parking lot of a government building be treated the same as the building itself?¹⁹² Aside from schools and government buildings, what other places are "sensitive" enough to justify prohibitions of firearms?¹⁹³

¹⁸⁵ *Id.* at 322, 323.

¹⁸⁶ Recognizing the narrowness of the court's holding, the North Carolina legislature responded to *Britt* by revising its laws to provide a means by which a person convicted of a single nonviolent felony can petition a court to have gun rights restored after a twenty-year period of good behavior. See 2010 N.C. Sess. Laws 108 (codified at N.C. GEN. STAT. § 14-415.4 (2010)). Subsequent court decisions in North Carolina similarly confirm *Britt*'s very limited impact. See *State v. Whitaker*, 689 S.E.2d 395, 404–05 (N.C. Ct. App. 2009) (rejecting constitutional claim where convicted felon could not establish all of the factors that supported the ruling in *Britt*), *aff'd*, 700 S.E.2d 215, 219 (N.C.), *cert. denied*, 130 S. Ct. 3428 (2010).

¹⁸⁷ For example, federal law has barred possession of guns by felons—even those convicted of a single nonviolent crime—since 1961. See *supra* note 167 and accompanying text. That was fifty years ago, making it unlikely that there will be many challengers to the federal law's disqualification of nonviolent felons who can say that they lawfully and peaceably enjoyed the use of guns for a substantial period of time before the 1961 enactment.

¹⁸⁸ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

¹⁸⁹ See 18 U.S.C. §§ 921(25), 922(q) (2006) (prohibiting possession of guns in school zones); *Hall v. Garcia*, No. C 10-03799 RS, 2011 WL 995933, at *2–5 (N.D. Cal. Mar. 17, 2011) (upholding state law prohibiting firearms in school zones).

¹⁹⁰ See *Digiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 370 (Va. 2011) (upholding regulation prohibiting possession of guns in university facilities and at campus events).

¹⁹¹ See *Aderinto v. Sessions*, No. 3:08-2530-JFA-PJG, 2009 WL 2762514, at *2 (D.S.C. Aug. 26, 2009) (suggesting that a public library is a "sensitive place").

¹⁹² See *United States v. Dorosan*, 350 F. App'x 874, 875–76 (5th Cir. 2009) (affirming conviction for possession of a handgun in parking lot of a U.S. Postal Service facility).

¹⁹³ See *United States v. Davis*, 304 F. App'x 473, 474 (9th Cir. 2008) (affirming conviction

For example, trying to decide whether churches are sensitive places, a federal court in Georgia admitted that it was simply impossible to know the answers to these types of questions because the Supreme Court did not explain what it meant by using the phrase “sensitive places.”¹⁹⁴

Even once courts get past those line-drawing issues, they face the same fundamental mystery that pervades the decisions about felon-in-possession laws. What was the Supreme Court trying to say with its list of longstanding, presumptively lawful types of gun regulations?¹⁹⁵ In other words, what are courts supposed to do when someone challenges the constitutionality of a law on the list? The Fourth Circuit confronted this puzzling question in *United States v. Masciandaro*,¹⁹⁶ where the defendant was convicted for having a loaded pistol while sleeping in his car in a parking lot on national park property.¹⁹⁷ In response to Masciandaro's assertion that he was exercising his right to keep and bear arms, the government argued that a parking lot on national park property fits within *Heller*'s reference to “sensitive places.”¹⁹⁸ The Fourth Circuit panel in the case recognized that even if it agreed that the parking lot in question was a sensitive place within *Heller*'s meaning, that would simply “raise the question whether the ‘sensitive places’ doctrine limits the scope of the Second Amendment or, instead, alters the analysis for its application to such places.”¹⁹⁹ *Heller* thus could be read to mean that the Second Amendment does not even apply to sensitive places, so any regulation of guns in those places should be upheld automatically. But of course that would be just one of many possible ways of reading the Supreme Court's enigmatic listing of the presumptively lawful regulatory measures.²⁰⁰ After describing this quandary in which *Heller* had put the lower courts, the Fourth Circuit panel essentially ducked the question by concluding that it was unnecessary to figure out what to make of *Heller*'s reference to “sensitive places” because Masciandaro's conviction should be upheld regardless of whether he possessed a gun in a sensitive place.²⁰¹

for possession of handgun on airplane); *People v. Ferguson*, No. 2008QN036911, 2008 WL 4694552, at *4 (N.Y. Crim. Ct. Oct. 24, 2008) (finding that an airport is a “sensitive place”).

¹⁹⁴ *Georgiacarry.org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1317, 1319 (M.D. Ga. 2011).

¹⁹⁵ See *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

¹⁹⁶ *United States v. Masciandaro*, 638 F.3d 458 (4th Cir.), cert. denied, 132 S. Ct. 756 (2011).

¹⁹⁷ *Id.* at 460.

¹⁹⁸ *Id.* at 471.

¹⁹⁹ *Id.* at 472.

²⁰⁰ See *supra* notes 58–61 and accompanying text.

²⁰¹ *Masciandaro*, 638 F.3d at 473.

The bottom line, according to the court, was that the government had sound reasons for regulating guns in “a national park area where large numbers of people, including children, congregate for recreation.”²⁰² Although lawyers and judges could carry on an endless and abstract game of dissecting and speculating about the meaning of Justice Scalia’s opinion in *Heller*, the concrete conclusion at the end of it all must be that courts should uphold “reasonable measures to secure public safety.”²⁰³

That attitude runs throughout the decisions that lower courts have been making since *Heller*. As a theoretical matter, judges remain baffled by the Supreme Court’s inscrutable declaration that some longstanding types of gun laws are presumptively constitutional. But when it comes to actually resolving cases, judges consistently have been making sensible choices based on practical considerations.

D. *Beyond the List of Presumptively Lawful Regulatory Measures*

While struggling to figure out what to make of the Supreme Court’s list of presumptively valid regulatory measures, lower courts have also faced a flood of constitutional challenges to gun laws not included on that list. *Heller* mentioned longstanding prohibitions of gun possession for felons and the mentally ill,²⁰⁴ but federal laws impose a variety of other restrictions. Illegal aliens are not allowed to possess guns.²⁰⁵ The same goes for people who unlawfully use or are addicted to drugs.²⁰⁶ Federal laws also prohibit possession of a gun by a person who has been convicted of a misdemeanor crime of domestic violence²⁰⁷ or who is the subject of a domestic violence restraining order.²⁰⁸ Although federal law sets no minimum age for possession of rifles and shotguns, it generally prohibits handgun possession until the

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

²⁰⁵ 18 U.S.C. § 922(g)(5) (2006). With some exceptions, federal law also prohibits possession of guns by legal aliens with nonimmigrant visas, such as tourists, students, and temporary workers. *Id.* § 922(g)(5)(B). Some states have historically imposed special restrictions that apply even to legal aliens who are permanent U.S. residents. *See, e.g.,* *Washington v. Ibrahim*, No. 28756-4-III, 2011 WL 5084790, at *4–5 (Wash. Ct. App. Oct. 27, 2011) (concluding that a Washington statute, which was repealed several months after the defendant’s arrest, violated equal protection rights by requiring lawful permanent resident aliens to register all firearms).

²⁰⁶ 18 U.S.C. § 922(g)(3).

²⁰⁷ *Id.* § 922(g)(9).

²⁰⁸ *Id.* § 922(g)(8).

age of eighteen.²⁰⁹ Many other restrictions on guns can be found in various federal, state, and local laws.²¹⁰

The Supreme Court's decisions in *Heller* and *McDonald* invited constitutional challenges to these laws but did not provide a clear framework for lower courts to use in evaluating those challenges. Again, Justice Scalia's opinion in *Heller* emphasized the importance of historical analysis but did not explain in greater detail how lower courts should proceed.²¹¹ In particular, *Heller* did not identify a particular level of scrutiny or standard that should be used, other than to rule out rational basis scrutiny and Justice Breyer's proposed interest-balancing approach.²¹² Chief Justice Roberts's comments during oral argument suggested that he thought that the conventional formulas for applying constitutional rights, like intermediate scrutiny and strict scrutiny, would be unnecessary in the Second Amendment setting because a more historically oriented approach would be used.²¹³ The *Heller* opinion seemed to reflect Roberts's suggestion,²¹⁴ but it also briefly mentioned that the District of Columbia's gun laws could not withstand any form of intermediate or strict scrutiny.²¹⁵ The Court thus avoided making any commitments about use of the familiar formulas of heightened scrutiny but also did not entirely disavow them. In short, the Supreme Court provided an intriguing stew of different signals, rather than a single clear recipe, for lower courts taking on the work of implementing the right to keep and bear arms. Not surprisingly, lower courts have found this task to be quite a challenge, and they have taken a number of different approaches to handling it.

Many state courts have simplified matters by essentially declaring that they will not strike down any law that is not clearly rendered invalid by *Heller* and *McDonald*. In other words, these courts strictly construe the Supreme Court's decisions as having established only that the right to keep and bear arms can be violated by severe restric-

²⁰⁹ *Id.* § 922(x)(2). Selling a handgun to a person under the age of eighteen is also a federal crime. *Id.* § 922(x)(1). Sellers who are federally licensed gun dealers are subject to additional restrictions: they cannot sell rifles and shotguns to customers under the age of eighteen and they cannot sell handguns to those under the age of twenty-one. *Id.* § 922(b)(1).

²¹⁰ See, e.g., LEGAL CMTY. AGAINST VIOLENCE, REGULATING GUNS IN AMERICA: AN EVALUATION AND COMPARATIVE ANALYSIS OF FEDERAL, STATE AND SELECTED LOCAL GUN LAWS (2008), available at http://www.lcav.org/publications-briefs/reports_analyses/RegGuns.entire.report.pdf.

²¹¹ See *supra* notes 65, 71–73 and accompanying text.

²¹² See *supra* notes 67–69, 93–95 and accompanying text.

²¹³ See *supra* note 70 and accompanying text.

²¹⁴ See *supra* notes 71–73 and accompanying text.

²¹⁵ See *supra* note 76 and accompanying text.

tions on law-abiding citizens' use of guns for self-defense in the home.²¹⁶ If the Supreme Court wants to go beyond that, the state courts insist, "it will need to say so more plainly."²¹⁷ The states²¹⁸ where courts have adopted this approach include California,²¹⁹ Illinois,²²⁰ Kansas,²²¹ Maryland,²²² Massachusetts,²²³ New Jersey,²²⁴ and

²¹⁶ See *infra* notes 218–25 (citing cases).

²¹⁷ *Williams v. State*, 10 A.3d 1167, 1177 (Md.), *cert denied*, 132 S. Ct. 93 (2011); see also *Crespo v. Crespo*, 972 A.2d 1169, 1179 (N.J. Super. Ct. App. Div. 2009) (concluding that a state law prohibiting possession of a gun by a person subject to a domestic violence restraining order would be upheld as a "valid, appropriate and sensible" limitation on gun rights "[a]bsent a clear and binding announcement from the Supreme Court of the United States to the contrary"), *aff'd*, 989 A.2d 827 (N.J. 2010).

²¹⁸ In addition to the state court decisions, District of Columbia courts have adopted this narrow interpretation of the principle established by *Heller*. See, e.g., *Wooden v. United States*, 6 A.3d 833, 840 (D.C. 2010) (rejecting a Second Amendment challenge where use of a weapon was "not at all the home-defense scenario contemplated in *Heller*"); *Daniels v. United States*, 2 A.3d 250, 253 n.2 (D.C.) ("[I]t is not obvious that *Heller's* reach extends beyond cases of handgun possession in the home."), *cert. denied*, 131 S. Ct. 806 (2010).

²¹⁹ See, e.g., *People v. Flores*, 86 Cal. Rptr. 3d 804, 808 (Ct. App. 2008) (upholding state ban on carrying a loaded firearm in public because the statute contains exceptions for self-defense, and therefore "there can be no claim that [the statute] in any way precludes the use 'of handguns held and used for self-defense in the home'" (quoting *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008))); *People v. Yarbrough*, 86 Cal. Rptr. 3d 674, 682 (Ct. App. 2008) (upholding state ban on carrying a concealed firearm without a permit because this law "does not broadly prohibit or even regulate the possession of a gun in the home for lawful purposes of confrontation or self-defense, as did the law declared constitutionally infirmed in *Heller*").

²²⁰ See, e.g., *People v. Williams*, No. 1-09-1667, 2011 WL 6351861, at *3 (Ill. App. Ct. Dec. 15, 2011) (upholding state ban on carrying a loaded gun outside one's residence or business because "both *Heller* and *McDonald* made clear that the only type of firearms possession they were declaring to be protected under the second amendment was the right to possess handguns in the home for self-defense purposes"); *People v. Ross*, 947 N.E.2d 776, 784 (Ill. App. Ct.), *appeal denied*, 949 N.E.2d 1102 (Ill. 2011).

²²¹ See *State v. Knight*, 241 P.3d 120, 133 (Kan. Ct. App. 2010) (upholding a state law forbidding unlicensed possession of a concealed firearm because the Supreme Court in *Heller* clearly "was drawing a narrow line regarding the violations related solely to use of a handgun in the home for self-defense purposes").

²²² See *Williams*, 10 A.3d at 1177 (upholding state law requiring a permit to carry a handgun in public because the gravamen of *Heller* and *McDonald* was possession of firearms in the home).

²²³ See *Commonwealth v. McCollum*, 945 N.E.2d 937, 954 (Mass. App. Ct.) (upholding state law banning possession of ammunition without a license because defendant had the ammunition in a place other than his home), *review denied*, 953 N.E.2d 720 (Mass. 2011).

²²⁴ See *State ex rel. J.M.K.*, No. FJ-18-984-09, 2011 WL 2412600, at *2 (N.J. Super. Ct. App. Div. May 25, 2011) (upholding laws prohibiting possession of defaced firearm and possession of handgun by person under twenty-one years of age because neither of these statutes "has the absolutist impact that led to the [Supreme] Court striking down the District of Columbia law" in *Heller*); *In re Downing*, 2011 WL 1532541, at *1 (N.J. Super. Ct. App. Div. Apr. 25, 2011) (*per curiam*) (upholding a law requiring applicants to show "justifiable need" for a permit to carry a handgun in public because the law "does not ban or restrict in any way the use of handguns or

New York.²²⁵ It is surely no coincidence that, with the exception of Kansas, these are deeply “blue” (i.e., liberal) states that rank in the top ten on lists of states with the strictest gun laws and the lowest rates of firearm ownership.²²⁶

Federal courts generally have not assumed that *Heller* and *McDonald* may be read so narrowly, and therefore they have been forced to struggle with the difficult question of how to apply the right to keep and bear arms to the many types of gun laws not mentioned in the Supreme Court’s decisions. One of the first strategies that emerged was to analyze challenged gun laws by way of comparison or analogy to the *Heller* list of presumptively valid regulatory measures. For example, the federal district court in Maine pioneered this approach in *United States v. Booker*,²²⁷ where the defendant challenged a federal statute banning a person with a misdemeanor domestic violence conviction from possessing a gun.²²⁸ Rather than tackling the broader “complex and unanswered question” of whether strict scrutiny or intermediate scrutiny should apply, the court decided that a more “useful approach” would be to look at how the law in question stacks up against *Heller*’s list of presumptively valid measures.²²⁹ In other words, is a law that prohibits people who have committed misdemeanor crimes of domestic violence from possessing guns sufficiently similar to a law that prohibits convicted felons from possessing guns, such that the former deserves the same presumption of validity given to the latter in *Heller*? The judge in *Booker* found that the ban for domestic violence misdemeanants is, if anything, even more precisely tailored to reducing risks of gun violence than the felon disqualification provision.²³⁰ Although some felonies are nonviolent, every crime of domestic violence involves the use, attempted use, or threatened

firearms within the home such as those statutes deemed unconstitutional” in *Heller* and *McDonald*).

²²⁵ See, e.g., *People v. Perkins*, 880 N.Y.S.2d 209, 210 (App. Div. 2009) (upholding state ban on possession of a handgun without a license because the defendant was not in his home at the time of the crime and this law “does not effect a complete ban on handguns”).

²²⁶ See BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, 2010 STATE RANKINGS, BRADY CAMPAIGN 2010 SCORECARDS (2010), available at http://www.bradycampaign.org/xshare/stateleg/scorecard/2010/2010_Brady_Campaign_State_Scorecard_Rankings.pdf; LEGAL CMTY. AGAINST VIOLENCE, GUN LAWS MATTER: A COMPARISON OF STATE FIREARMS LAWS AND STATISTICS 3 (2010), available at http://www.lcav.org/Gun_Laws_Matter/Gun_Laws_Matter_Brochure.pdf.

²²⁷ *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008), *aff’d*, 644 F.3d 12, 14 (1st Cir. 2011).

²²⁸ 18 U.S.C. § 922(g)(9) (2006); *Booker*, 570 F. Supp. 2d at 162.

²²⁹ *Booker*, 570 F. Supp. 2d at 163.

²³⁰ *Id.* at 164.

use of violence.²³¹ If the Second Amendment will tolerate a gun ban for felons, the *Booker* court reasoned, then surely the same conclusion must apply to the ban for domestic violence misdemeanants because that category of offenders squarely implicates the government's goal of reducing risks of firearm misuse.²³²

That reasoning makes perfect sense if one assumes that the *Heller* list of presumptively valid laws is essentially based on judgments about what would be good public policy. In other words, if the underlying logic of the list is that certain types of gun laws are constitutional because they promote public safety, then banning guns for domestic violence misdemeanants seems just as prudent as prohibiting guns for all felons. Indeed, Congress enacted the prohibition on gun possession for domestic violence misdemeanants to close a loophole in and better achieve the policy goals of the felon dispossession law. Congress observed that, in some instances, the difficulties of prosecuting domestic violence cases led to serious abusers being convicted of only misdemeanor assault charges rather than felonies, and Congress wanted the prohibition of firearms to extend to such cases.²³³ Seen in that light, the federal ban on guns for domestic violence misdemeanants is really a closely connected component of the felon gun ban, like a patch stitched in to close a hole in fabric.

That is not, of course, the only plausible way to view the *Heller* list of presumptively valid types of laws. If qualifying for that list has more to do with a law's historical pedigree than its public policy implications, the basis for analogizing domestic violence misdemeanants to felons might be much weaker. The statutory provision disqualifying people with domestic violence misdemeanors from having guns is a relatively new development, having been enacted by Congress in 1996.²³⁴ The federal gun ban for felons is substantially older,²³⁵ and

²³¹ See *id.* (citing 18 U.S.C. § 921(33)(A)(ii) (defining "misdemeanor crime of domestic violence")).

²³² *Id.* For examples of other cases using a similar approach of drawing analogies or comparisons to the *Heller* list of presumptively lawful regulations, see *United States v. White*, 593 F.3d 1199, 1205–06 (11th Cir. 2010); *United States v. Smith*, 742 F. Supp. 2d 855, 862–63 (S.D. W. Va. 2010); *People v. Villa*, 100 Cal. Rptr. 3d 463, 467–68 (Ct. App. 2009); and *People v. Flores*, 86 Cal. Rptr. 3d 804, 807 (Ct. App. 2008). For a particularly far-reaching example of this approach, see *People v. Hughes*, 921 N.Y.S.2d 300, 301–02 (App. Div. 2011) (upholding state law banning gun possession by person with any misdemeanor conviction).

²³³ See *United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009); *United States v. Booker*, 644 F.3d 12, 15–16 (1st Cir. 2011); *United States v. Skoien*, 614 F.3d 638, 643 (7th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1674 (2011).

²³⁴ Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 (1996).

the notion of excluding felons from the right to keep and bear arms at least arguably might date back centuries to before the Constitution came into existence.²³⁶ If longstanding tradition is the key common characteristic of the items on the *Heller* list, modern legal innovations like the ban on guns for domestic violence misdemeanants, however much they may reduce risks and benefit society, do not qualify.

The lower courts have thus faced fundamental questions about whether analysis of Second Amendment claims should be driven more by historical inquiries or contemporary public policy considerations. Some judges opted to head down the historical path. A quintessential example was the First Circuit's decision in *United States v. Rene E.*,²³⁷ which upheld the constitutionality of the federal ban on juvenile possession of handguns.²³⁸ Rather than trying to evaluate the importance of the government's reasons for restricting juvenile access to handguns, the court undertook a strictly historical analysis and found a longstanding tradition supporting the challenged enactment.²³⁹ While noting that federal law did not impose any age restrictions on access to firearms until 1968 and did not prohibit juvenile possession of handguns until 1994,²⁴⁰ the court found evidence of a longer tradition, stretching back to the latter half of the nineteenth century, of state laws restricting minors' possession of guns and other weapons such as knives.²⁴¹

As for the era in which the Constitution was written and adopted, the available evidence was far less specific or enlightening. The court in *Rene E.* cited no primary sources from the eighteenth century or even the first half of the nineteenth century, such as laws, judicial decisions, treatises, or other writings, addressing the issue of juvenile access to guns. The closest that the court came to offering evidence about the Founders' attitudes was to quote a modern law review article suggesting that the Founding generation saw the right to keep and bear arms as extending only to "virtuous" citizens and regarded children as being "incapable of virtue."²⁴²

²³⁵ See *supra* note 167 and accompanying text.

²³⁶ See *supra* notes 155, 168 and accompanying text.

²³⁷ *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009).

²³⁸ 18 U.S.C. § 922(x)(2) (2006); see *supra* note 209 and accompanying text. The court in *Rene E.* emphasized that the federal statutes contain several exceptions allowing juvenile use of handguns, for example, for self-defense in the home or for hunting or target practice with a parent's consent. *Rene E.*, 583 F.3d at 12, 13–14 (citing 18 U.S.C. § 922(x)(3)(D)).

²³⁹ *Rene E.*, 583 F.3d at 13–16.

²⁴⁰ *Id.* at 13.

²⁴¹ *Id.* at 14–15.

²⁴² *Id.* at 15 (citing Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62

When one digs underneath that article to examine its sources, the historical evidence is limited but interesting and ambiguous. Juveniles had no right to have guns in the Founding era, the historical argument goes, until they were eligible for militia service.²⁴³ But the obligation to serve in a militia, including the duty to possess arms, began at the age of fifteen, sixteen, or eighteen, depending on the colony.²⁴⁴ Indeed, half a million soldiers in the Civil War were sixteen or younger, and even today seventeen-year-olds can join the military with their parents' permission.²⁴⁵

One could therefore argue that the historical evidence actually cuts sharply against the First Circuit's conclusion in *Rene E.* that the Founding generation would have approved a law preventing people from possessing handguns until the age of twenty-one. As often happens, the answers that one derives from this sort of historical inquiry depends greatly on the level of generality of the questions asked.²⁴⁶ If history proves that the Founding Fathers accepted the general idea of age restrictions on access to guns, perhaps that is all that should really matter, and the Founders' more specific beliefs about an appropriate age limit should be ignored because times have changed since the eighteenth century. Although the Founders may have drawn a line at fifteen or sixteen in contrast to the line that exists today at eighteen or twenty-one, the crucial point is simply that the Founders approved of drawing lines based on age. On the other hand, once judges have a license to overlook aspects of original or longstanding traditional understandings that do not square well with modern realities and needs, the historical approach to defining constitutional rights starts to look suspiciously inconsistent and susceptible to manipulation. Although the First Circuit's opinion in *Rene E.* thus purports to employ the his-

TENN. L. REV. 461, 480 (1995)). The *Rene E.* opinion offered quotations from several other law review articles discussing the Founding-era tradition of prohibiting gun possession by categories of people posing a particular danger to the public, but none specifically addressed age restrictions. See *id.* at 15–16. The court also acknowledged that historians disagree about the extent to which the Founders actually saw “virtue” as a limit on gun rights. *Id.* at 16.

²⁴³ See Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 265 n.258 (1983).

²⁴⁴ *Id.* at 215 n.46.

²⁴⁵ 10 U.S.C. § 505(a) (2006); see *State v. Sieyes*, 225 P.3d 995, 1006–08 (Wash. 2010) (Johnson, J., concurring and dissenting in part) (arguing that strict scrutiny should apply to age restrictions on gun possession because “[i]f a soldier is old enough to fight for the nation, he is old enough to enjoy the fundamental right to keep and bear arms”).

²⁴⁶ The importance and difficulty of selecting the right level of generality in drawing conclusions about constitutional provisions and historical evidence has been extensively discussed in the literature on originalism. See, e.g., Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 950–54 (1998).

torical methodology endorsed by the Supreme Court in *Heller* and *McDonald*, it ultimately winds up illustrating how historical evidence is often indeterminate. It can be readily spun in various directions, depending on what conclusion a court ultimately wants to reach.²⁴⁷

Courts attempting to imitate the Supreme Court's historical approach have encountered problems even on basic points like what time period is most relevant for determining the original meaning of the right to keep and bear arms when it applies to state and local laws through the Fourteenth Amendment. At least one court opinion, issued by a Seventh Circuit panel in *Ezell v. City of Chicago*,²⁴⁸ has proposed that the relevant time frame depends on the level of government involved. To determine the scope of the right to keep and bear arms for challenges to federal government action, judges should look to the time of the Second Amendment's ratification (i.e., around 1789 to 1791).²⁴⁹ But for challenges to state or local laws, "the focus of the original-meaning inquiry is carried forward" to the time of the Fourteenth Amendment's adoption (i.e., circa 1866 to 1868).²⁵⁰ That seems logical if one believes that the goal of constitutional interpretation is to determine what the relevant constitutional provision meant at the time of its adoption, but it flies directly in the face of the Supreme Court's very clear rejection of such a "two-track approach" to rights protected by the Bill of Rights and the Fourteenth Amendment.²⁵¹ The Supreme Court strongly emphasized in *McDonald* that the right to keep and bear arms must be enforced against state and local governments according to exactly the same standards that protect the right against federal infringement.²⁵² And yet, the scope and strength of the right cannot be exactly the same for all levels of government, as *McDonald* demands, if courts assess federal actions based on the right's meaning in the late eighteenth century when the Second Amendment was born, but evaluate state and local actions based on

²⁴⁷ Litigation concerning New York City's ban on possessing air pistols provides another example. A judge in *People v. Nivar*, 915 N.Y.S.2d 801, 809–11 (Sup. Ct. 2011), concluded that air-powered guns are not arms within the Second Amendment's meaning, even though the defendant presented historical evidence that Meriwether Lewis, during his famed expedition westward with William Clark, used an air rifle "for hunting and to astonish native Americans." *Id.* at 811 (internal quotation marks omitted). The judge deemed that evidence insufficient because it did not mention the use of air guns for self-defense. *Id.*

²⁴⁸ *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

²⁴⁹ *Id.* at 701–02.

²⁵⁰ *Id.* at 702.

²⁵¹ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3048 (2010) (plurality opinion).

²⁵² *Id.* at 3035 (Alito, J., opinion of the Court); see also *id.* at 3048 (plurality opinion); see *supra* notes 114–22 and accompanying text.

what the right meant several generations later when the Fourteenth Amendment arrived on the scene.

Rather than deal with these sorts of problems and stick with an exclusively or even predominantly historical approach, most courts have gravitated in a direction that brings them onto very familiar terrain. Courts have essentially returned to the three tiers of scrutiny used to analyze laws allegedly infringing equal protection and some other constitutional rights. Judge Frank Easterbrook's opinion for the en banc Seventh Circuit in *United States v. Skoien*²⁵³ has quickly emerged as one of the most influential explications and applications of this approach.

Like many of the other Second Amendment cases decided in recent years,²⁵⁴ *Skoien* involved a conviction under the federal law prohibiting people convicted of misdemeanor crimes of domestic violence from possessing firearms.²⁵⁵ Chief Judge Easterbrook's opinion began by deftly cutting through much of the tangle of confusion generated in the lower courts by *Heller*'s more ambiguous pronouncements, particularly its listing of longstanding and presumptively valid regulations.²⁵⁶ "We do not think it profitable," Chief Judge Easterbrook observed, "to parse these passages of *Heller* as if they contained an answer" to questions like the validity of the ban on domestic violence misdemeanants having firearms.²⁵⁷ The lower courts, in Easterbrook's view, had been trying to read too much into the Supreme Court's "cautionary language" intended merely to warn readers not to treat *Heller* as deciding more than it really did.²⁵⁸

Chief Judge Easterbrook's opinion likewise swiftly shot down the idea that Second Amendment cases should turn on crude historical assessments of what legal restrictions on guns are sufficiently "long-standing" or traditional.²⁵⁹ As an example, Easterbrook noted that federal law did not disqualify violent felons from having guns until 1938 and did not expand that prohibition to nonviolent felons until

²⁵³ *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1674 (2011).

²⁵⁴ *See, e.g.*, *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United States v. White*, 593 F.3d 1199 (11th Cir. 2010).

²⁵⁵ *Skoien*, 614 F.3d at 639; *see* 18 U.S.C. § 922(g)(9) (2006).

²⁵⁶ *See* Richard A. Epstein, *NRA v. City of Chicago: Does the Second Amendment Bind Frank Easterbrook?*, 77 U. CHI. L. REV. 997, 997 (2010) (describing Chief Judge Easterbrook's opinions as "always a pleasure to read—short and incisive, without pointless verbiage").

²⁵⁷ *Skoien*, 614 F.3d at 640.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 640–41.

1961.²⁶⁰ Is a law enacted in 1938 longstanding? Easterbrook said it depends on how one looks at it: “A 1938 law may be ‘longstanding’ from the perspective of 2008, when *Heller* was decided, but 1938 is 147 years after the states ratified the Second Amendment.”²⁶¹ More important, a law’s constitutionality should not depend on whether it is longstanding. It would be “weird,” Chief Judge Easterbrook bluntly noted, to suggest that the federal law disarming domestic violence misdemeanants is unconstitutional now, but will become constitutional when it has been around long enough to qualify as longstanding.²⁶²

Chief Judge Easterbrook argued that *Heller*’s list of presumptively valid measures teaches an important lesson, but the lesson is not that gun laws must be old to be constitutional.²⁶³ The *Heller* list instead simply demonstrates that legislatures can impose categorical limitations on gun possession without violating any constitutional rights.²⁶⁴ Specified categories of individuals can be prohibited from having guns without the government being required to present evidence on a case-by-case basis proving that each member of the affected class really deserves to be disarmed.²⁶⁵ Moreover, the categories of individuals prohibited from having guns today “need not mirror limits that were on the books in 1791.”²⁶⁶ Rather than locking in whatever specific beliefs about sound gun policy were prevalent in 1791, the Second Amendment wisely “leav[es] to the people’s elected representatives the filling in of details.”²⁶⁷

After explaining how *not* to decide Second Amendment cases, Chief Judge Easterbrook concluded that courts simply should require some form of “strong showing” that a law is substantially related to an important governmental objective.²⁶⁸ This is, Easterbrook noted, what many opinions call “intermediate scrutiny,” although Easterbrook expressed reluctance to unnecessarily wade “more deeply into the ‘levels of scrutiny’ quagmire.”²⁶⁹ Applying this standard, Easterbrook concluded that the federal ban on guns for domestic violence

²⁶⁰ *Id.* at 640; see *supra* note 167 and accompanying text.

²⁶¹ *Skoien*, 614 F.3d at 640.

²⁶² *Id.* at 641.

²⁶³ *Id.* at 640–41.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 641.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 640.

²⁶⁸ *Id.* at 641.

²⁶⁹ *Id.* at 641–42.

misdemeanants easily passes constitutional muster because of the simple fact that people who have been violent in the past are more likely to be violent again in the future.²⁷⁰ Easterbrook cited a variety of social science sources to support his conclusions, including data showing that a domestic assault is more likely to be lethal if the attacker uses a firearm²⁷¹ and that domestic abusers have high rates of recidivism.²⁷² In short, someone convicted for a domestic violence crime—regardless of whether the crime is a felony or a misdemeanor—is apt to act violently again, and that violence is more likely to be deadly if the attacker wields a gun.

Chief Judge Easterbrook's version of intermediate scrutiny is not a particularly demanding one. Although courts sometimes refer to intermediate scrutiny as though it is a single or unitary standard,²⁷³ a judge purporting to apply intermediate scrutiny actually has a variety of options for how to proceed.²⁷⁴ Professor Eugene Volokh noted this in his influential article on implementing the right to keep and bear arms, explaining how the consequences of courts applying heightened scrutiny to gun laws will depend greatly on how judges evaluate empirical claims about the likely effects those laws have on public safety.²⁷⁵ The most demanding judge might require "substantial scientific proof that a law will indeed substantially reduce crime and injury."²⁷⁶ A less exacting approach would be "to simply require a logically plausible theory of danger reduction."²⁷⁷ In Volokh's view, the former approach would lead courts to strike down virtually every gun law, because scientific studies have never absolutely proven (or

²⁷⁰ *Id.* at 642–44.

²⁷¹ *Id.* at 643–44.

²⁷² *Id.* at 644.

²⁷³ *Cf.* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 802 (describing how courts tend to synthesize various distinct doctrines into a "single, overarching standard" of intermediate scrutiny for First Amendment purposes).

²⁷⁴ *See, e.g.,* United States v. Marzzarella, 614 F.3d 85, 97–98 (3d Cir. 2010) (quoting various articulations of the intermediate scrutiny standard in freedom of speech cases), *cert. denied*, 131 S. Ct. 958 (2011); Kimberly J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953, 1997 (2006) (observing that, in equal protection cases, "intermediate scrutiny currently is sufficiently indeterminate that the only thing consistent about it is that it is inconsistently interpreted and applied"); David A. Herman, Note, *Juvenile Curfews and the Breakdown of the Tiered Approach to Equal Protection*, 82 N.Y.U. L. REV. 1857, 1883 (2007) ("There is a lot of space between strict and rational review, and 'intermediate scrutiny' does not mean the same thing in all contexts.").

²⁷⁵ Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1467–70 (2009).

²⁷⁶ *Id.* at 1467.

²⁷⁷ *Id.* at 1468.

disproven) the effectiveness of these laws, while the latter attitude would lead to everything being upheld because there is a plausible argument to be made on behalf of virtually any gun control measure.²⁷⁸

Chief Judge Easterbrook's approach in *Skoien* falls somewhere between the possibilities that Volokh described, but closer to the less demanding end of the spectrum. Chief Judge Easterbrook certainly cites social science studies and data, and those sources provide strong reasons to think that the ban on gun possession for domestic violence misdemeanants may be a very valuable law.²⁷⁹ But do they conclusively prove that America is a safer place because of this law? The research that exists simply is not capable of proving that one way or the other.²⁸⁰ The missing key piece of information is the extent to which the gun ban actually has its intended effect of reducing the odds that a domestic abuser will have and use a gun. Chief Judge Easterbrook logically assumes that the ban reduces, at least to some significant extent, the number of guns that are used in domestic assaults.²⁸¹ And under Chief Judge Easterbrook's version of intermediate scrutiny, that logically plausible theory about how the law will work is enough to sustain the law.²⁸²

One member of the Seventh Circuit, Judge Diane Sykes, dissented from Easterbrook's opinion, and her views offer a glimpse of what a somewhat more demanding form of judicial scrutiny of gun laws might entail.²⁸³ Judge Sykes complained that most of the empirical data mentioned in Chief Judge Easterbrook's opinion came from

²⁷⁸ *Id.* at 1468, 1470.

²⁷⁹ *United States v. Skoien*, 614 F.3d 638, 643–44 (7th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1674 (2011). Chief Judge Easterbrook's approach is thus consistent with that of courts emphasizing that a challenged law must be supported by "sufficient *evidence*" that the law has a substantial relationship to an important government objective, not just "plausible *reasons*" why the law may have beneficial effects. *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010).

²⁸⁰ Professor Mark Tushnet has extensively discussed the difficulty of proving the effectiveness of gun control laws through social science evidence. See MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS* 85–102 (2007).

²⁸¹ See *Skoien*, 614 F.3d at 643.

²⁸² For a later example of the Seventh Circuit's approach, see *United States v. Yancey*, 621 F.3d 681, 683, 686 (7th Cir. 2010) (upholding the federal ban on gun possession by habitual drug users and citing evidence that showed a general link between drug use and violent crime but did not conclusively establish the challenged law's effectiveness).

²⁸³ See *Skoien*, 614 F.3d at 645 (Sykes, J., dissenting). Judge Sykes wrote the initial appellate decision in *Skoien* for a unanimous three judge panel. That opinion was vacated when the Seventh Circuit granted rehearing en banc. See *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), *reh'g en banc granted and vacated*, No. 08-3770, 2010 WL 1267262 (7th Cir. Feb. 22), *aff'd on reh'g en banc*, 614 F.3d 638 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1674 (2011).

the court's own research, rather than from the government.²⁸⁴ "This is an odd way," Judge Sykes jabbed, "to put the government to its burden of justifying a law that prohibits the exercise of a constitutional right,"²⁸⁵ and it "deprives *Skoien* of the opportunity to review the outcome-determinative evidence, let alone subject it to normal adversarial testing."²⁸⁶ Worried that the court's understanding of the social science research might be mistaken,²⁸⁷ Judge Sykes argued that the court should have remanded the case to the district court and put the onus on the government to "shoulder its burden" of proving how the challenged law actually advances important interests.²⁸⁸

Other courts have begun to adopt approaches quite similar to that of Chief Judge Easterbrook's en banc opinion for the Seventh Circuit, albeit with some refinements and variations. These courts apply intermediate scrutiny, requiring that the challenged law have some substantial relation to an important government interest.²⁸⁹ They emphasize that this test merely requires the fit between the government's objective and the challenged law to be "reasonable, not perfect,"²⁹⁰ so that the government can "paint with a broader brush."²⁹¹ The government need not utilize the best or least restrictive means of achieving its goal.²⁹²

The principal gloss that other courts have added to the Seventh Circuit's approach is that the degree of scrutiny applied should vary depending on the magnitude of the burden that the challenged law imposes on individuals' legitimate interests in use of firearms.²⁹³ In

²⁸⁴ *Skoien*, 614 F.3d at 646–47, 651–52 (Sykes, J., dissenting).

²⁸⁵ *Id.* at 647.

²⁸⁶ *Id.* at 652.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 653. Judge Sykes again expressed her preference for more vigorous protection of the right to keep and bear arms in *Ezell v. City of Chicago*, 651 F.3d 684, 694–711 (7th Cir. 2011); see *infra* notes 324–33 and accompanying text.

²⁸⁹ *Heller v. District of Columbia (Heller II)*, No. 10-7036, 2011 WL 4551558, at *8–10 (D.C. Cir. Oct. 4, 2011); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2476 (2011); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011); *Kachalsky v. Cacace*, No. 10-CV-5413 (CS), 2011 WL 3962550, at *25–30 (S.D.N.Y. Sept. 2, 2011); *Osterweil v. Bartlett*, No. 1:09-cv-825 (MAD/DRH), 2011 WL 1983340, at *10 (N.D.N.Y. May 20, 2011); *People v. Aguilar*, 944 N.E.2d 816, 825 (Ill. App. Ct.), *appeal granted*, 949 N.E.2d 1099 (Ill. 2011).

²⁹⁰ *Marzzarella*, 614 F.3d at 98.

²⁹¹ *United States v. Miller*, 604 F. Supp. 2d 1162, 1172 (W.D. Tenn. 2009).

²⁹² *Marzzarella*, 614 F.3d at 98.

²⁹³ See, e.g., *Chester*, 628 F.3d at 682; *Marzzarella*, 614 F.3d at 96–97; see also *Ezell*, 651 F.3d at 708 (determining that the Seventh Circuit's decision in *Skoien* permits this sliding scale

other words, a court would require stronger justifications for a law that severely limits the use of firearms for the core purpose of defending one's home and family, like the District of Columbia laws struck down in *Heller*, but require a weaker showing where the impact on gun owners' legitimate interests is modest.²⁹⁴ Most cases do not involve restrictions as severe as those in *Heller*, of course, and so making the intensity of judicial scrutiny vary according to the degree of burden imposed is likely to help the government's side in most instances. In other words, factoring the degree of burden on gun rights into the intermediate scrutiny calculus is likely to be a useful mechanism for judges "rightly worried about gun crime and gun injury" who "want to leave legislatures with some latitude in trying to fight crime in ways that interfere little with lawful self-defense."²⁹⁵

The Ninth Circuit's panel decision in *Nordyke v. King*²⁹⁶ provides a useful example. The case involved an ordinance in Alameda County, California, which prohibited possession of firearms on county property and thus had the effect of preventing gun shows from being held at the county fairgrounds.²⁹⁷ Emphasizing the severity of the legal restrictions on guns struck down in *Heller*, the Ninth Circuit concluded that only laws which "substantially burden" the right to keep and bear arms should receive heightened scrutiny.²⁹⁸ The court gave the plaintiffs a chance to amend their complaint to allege facts showing a substantial burden on their rights,²⁹⁹ but the decision strongly hinted that this would be a futile endeavor. In the court's view, the ultimate question would be whether the county's action left reasonable alternative ways for law-abiding citizens to obtain firearms with which to defend themselves.³⁰⁰ And in the end, there are places in Alameda County, other than gun shows at the county fairgrounds, where guns can be purchased.³⁰¹

approach, with the level of scrutiny applied to the government's action varying with the degree of burden that action imposes on the right to keep and bear arms).

²⁹⁴ *Marzzarella*, 614 F.3d at 97.

²⁹⁵ Volokh, *supra* note 275, at 1461.

²⁹⁶ *Nordyke v. King*, 644 F.3d 776 (9th Cir.), *reh'g en banc granted*, 664 F.3d 774 (9th Cir. 2011).

²⁹⁷ *Id.* at 780.

²⁹⁸ *Id.* at 782–86. The court did not decide what type of heightened scrutiny, such as strict or intermediate scrutiny, would apply to laws that do substantially burden the right to keep and bear arms. *See id.* at 786 n.9.

²⁹⁹ *Id.* at 789.

³⁰⁰ *Id.* at 787.

³⁰¹ The *Nordyke* plaintiffs pointed out that there are only three licensed gun dealers in Alameda County, and so the ban on gun shows at the county fairgrounds "ma[de] it more diffi-

By requiring a threshold showing of a significant burden on the exercise of the right to keep and bear arms, courts reduce the number of constitutional claims that even reach the intermediate scrutiny stage where some showing of the challenged law's probable effects is required.³⁰² The sorting achieved by the substantial burden framework thus sensibly pushes more of the job of evaluating gun control laws away from judges and back to legislators.³⁰³

Reflecting the same pragmatic and cautious attitudes, courts' decisions consistently downplay the usefulness of historical inquiries, recognizing the difficulty of making comparisons across centuries during which so many vast technological, legal, social, and other changes have occurred. Even where courts insist initially on undertaking a historical inquiry to determine whether an issue falls within the scope of the right to keep and bear arms as that right was originally understood, the results are generally inconclusive, and the courts wind up applying intermediate scrutiny.³⁰⁴ For example, the Founding Fathers' firearms did not have serial numbers; the practice of putting such numbers on guns did not begin until many decades after the Second Amendment was adopted.³⁰⁵ Does this imply that the original understanding of the right to keep and bear arms clearly protects unnumbered guns? And if so, should courts strike down the federal law that today prohibits possession of firearms with removed or altered serial numbers?³⁰⁶ Courts have recognized that this sort of argument overstates the extent to which historical analysis can provide answers to the specific issues that arise in contemporary constitutional adjudication. Concluding that the Founding generation wanted to protect a right to possess firearms without serial numbers "would make little sense" given that people in that era "had no concept of that characteristic or how it fit within the right to bear arms."³⁰⁷

The lively debate over original understandings about felonies, misdemeanors, and guns has an equally anachronistic flair. As noted

cult to go out and shop for guns." Bob Egelko, *Gun Show Promoters Suffer Legal Setback*, S.F. CHRON., May 3, 2011, at C4 (quoting the plaintiffs' lawyer, Donald Kilmer). The Ninth Circuit declared, however, that "regulations of gun sales do not substantially burden Second Amendment rights merely because they make it more difficult to obtain a gun." *Nordyke*, 644 F.3d at 788.

³⁰² See *supra* notes 268–72 and accompanying text.

³⁰³ *Nordyke*, 644 F.3d at 785.

³⁰⁴ See, e.g., *United States v. Chester*, 628 F.3d 673, 680–82 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 91–95, 97 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011).

³⁰⁵ See *Marzzarella*, 614 F.3d at 93 n.11.

³⁰⁶ See 18 U.S.C. § 922(k) (2006).

³⁰⁷ *Marzzarella*, 614 F.3d at 94.

earlier, scholars do not agree on whether eighteenth century minds considered felons outside the scope of the right to keep and bear arms.³⁰⁸ Historical research often fails to generate clear answers but the problem is compounded here because basic matters regarding criminal offense categories like felonies and misdemeanors have changed so much over time. In the Founding era, felonies “were typically punishable by death and imprisonment for such offenses was rare,” and “many serious crimes, such as kidnapping and assault with intent to murder or rape, were classified as misdemeanors.”³⁰⁹ In a time when a felony conviction was essentially a death sentence, the issue of whether a felon should have the right to keep and bear arms was nonsensical. The Founding Fathers surely did not devote time to pondering whether prisoners awaiting execution, let alone those already put to death, should have access to firearms. On top of this, even if historical research could conclusively establish that felons were never disarmed in colonial America, that would still prove little, because firearm possession by felons may have been left unregulated “as a matter of public policy, not right.”³¹⁰ For example, early American legislators may have simply thought that disarming convicted criminals would be “highly impractical in a frontier society, in which isolated communities struggled to survive in rugged conditions.”³¹¹ Given these difficulties in comparing the eighteenth-century world to our times, the effort to decide Second Amendment cases through historical analysis becomes a “virtually meaningless” exercise.³¹²

In cases involving the federal law that prohibits individuals with domestic violence misdemeanor convictions from possessing guns, the historical picture becomes even murkier. For example, a defendant in federal court in Wisconsin tried to use the historical route to challenge that law by arguing “that there is a modern stigma attached to crimes of domestic violence which was not extant in the 18th century” and that “the Founding Fathers would not have viewed domestic violence as seriously as we do today.”³¹³ Exploring how American society viewed domestic violence in the Founding era might be a fascinating topic for a doctoral dissertation, but it would undoubtedly be a challenging undertaking for judges, and ultimately a pointless one because

³⁰⁸ See *supra* notes 164–70 and accompanying text.

³⁰⁹ *United States v. Walker*, 709 F. Supp. 2d 460, 466 (E.D. Va. 2010).

³¹⁰ *United States v. Brown*, 715 F. Supp. 2d 688, 696 (E.D. Va. 2010) (internal quotation marks omitted).

³¹¹ *Id.*

³¹² *Walker*, 709 F. Supp. 2d at 466.

³¹³ *United States v. Li*, No. 08-CR-212, 2008 WL 4610318, at *3–4 (E.D. Wis. Oct. 15, 2008).

the historical record on an issue of such complexity undoubtedly contains much to support many different views.³¹⁴ Judges simply will be disappointed if they hope to find specific and clear historical evidence about the Founding generation's attitude toward the rights of domestic abusers.³¹⁵ And even if such evidence could be found, "mapping colonial analogues onto the Constitution as it exists today would produce incongruous results—while men who beat their wives would remain free to own guns, Catholics and African Americans, among others, would have no Second Amendment rights."³¹⁶

A consensus among the lower courts on how to handle Second Amendment claims thus seems to be emerging from the confusion and uncertainty that followed in *Heller's* wake. An intermediate scrutiny analysis, applied in a way that is very deferential to legislative determinations and requires merely some logical and plausible showing of the basis for the law's reasonably expected benefits, is the heart of the emerging standard approach. Historical analysis has taken a backseat. And over and over, courts have concluded that the gun laws being challenged should be upheld as constitutional.³¹⁷

³¹⁴ See generally OVER THE THRESHOLD: INTIMATE VIOLENCE IN EARLY AMERICA (Christine Daniels & Michael V. Kennedy eds., 1999).

³¹⁵ For example, the court in *United States v. Tooley*, 717 F. Supp. 2d 580 (S.D. W. Va. 2010), *aff'd*, No. 10-4936, 2012 WL 698885 (4th Cir. Mar. 6, 2012), acknowledged that "[h]owever regrettable it may seem today, domestic violence was not a separate criminal offense and was probably not even viewed as especially problematic in most circles during the Founding Era." *Id.* at 588. The court nevertheless undertook an extensive historical analysis and found that that the Founders generally would have been comfortable with substantial restrictions on guns in the interests of public safety, including bans on possession for types of people considered dangerous. *Id.* at 588–92. Another judge looking at the same sort of historical evidence found it thoroughly unhelpful. See *United States v. Elkins*, 780 F. Supp. 2d 473, 478 (W.D. Va. 2011) ("No facts have been produced to show that the drafters of the Second Amendment contemplated that domestic violence restraining orders would exist, let alone cause an individual to lose his rights.").

³¹⁶ *Brown*, 715 F. Supp. 2d at 698.

³¹⁷ See Anna Stolley Persky, *An Unsteady Finger on Gun Control Laws: Despite 2nd Amendment Cases, Firearms Codes Are Moving Targets*, A.B.A. J., Dec. 2010, at 14 (observing that the Supreme Court's decisions in *Heller* and *McDonald* have not had a significant practical impact on gun policy throughout the country because so few challenges to federal, state, or local laws have been successful). In addition to the many examples discussed already in this Article, a wide variety of other gun laws and regulations have been sustained by the courts. See, e.g., *Justice v. Town of Cicero*, 577 F.3d 768, 774 (7th Cir. 2009) (upholding municipal ordinance requiring registration of all firearms), *cert. denied*, 130 S. Ct. 3410 (2010); *Peterson v. LaCabe*, 783 F. Supp. 2d 1167, 1176–78 (D. Colo. 2011) (upholding a law preventing nonresidents of state from obtaining permits to carry concealed handguns); *United States v. Hart*, 726 F. Supp. 2d 56, 60 (D. Mass. 2010) (finding that the Second Amendment does not provide a right to carry a concealed weapon); *Dorr v. Weber*, 741 F. Supp. 2d 993, 1004–05 (N.D. Iowa 2010) (same); *Commonwealth v. Runyan*, 922 N.E.2d 794, 799–800 (Mass. 2010) (upholding a state law requir-

Although most courts have gravitated in the same general direction, some decisions have suggested other paths. The courts nevertheless have been remarkably unanimous in rejecting the strict scrutiny standard of review.³¹⁸ But one ruling by the federal district court in Utah in *United States v. Engstrum*³¹⁹ seemed for a time to be the first spark in what could grow to be a line of decisions employing a strict scrutiny standard. Considering a challenge to the federal ban on guns for domestic violence misdemeanants, *Engstrum* concluded that strict scrutiny should apply based on the simple syllogism that all fundamental rights receive strict scrutiny and that the right to keep and bear arms is a fundamental right.³²⁰ The court held that the defendant essentially could use the Second Amendment as an affirmative defense at trial, with the jury being instructed that they should acquit if they found that the defendant posed no risk of prospective or future violence despite his past domestic violence misdemeanor conviction.³²¹ The case thus seemed to be a significant departure from the general trend in the lower courts, not only because it applied strict scrutiny, but also because it found that a federal gun law was unconstitutional at least as applied to some individuals.³²² The Court of Appeals for the Tenth Circuit, however, quickly stepped in and issued a writ of mandamus rejecting the district court's reading of *Heller* and directing the district court not to instruct the jury about a Second Amendment defense.³²³ As a result, the cupboard remains bare for those hoping courts might apply strict scrutiny and be more aggressive about finding constitutional defects in gun laws beyond the type struck down in *Heller*.

ing guns to be stored securely when not being carried or otherwise under the owner's immediate control).

³¹⁸ The courts' rejection of strict scrutiny is particularly striking given that before *Heller*, it was widely assumed that strict scrutiny would apply if the Supreme Court ever interpreted the Second Amendment as protecting an individual right to have guns for nonmilitia purposes. See, e.g., Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 *FORDHAM L. REV.* 477, 484 (2004) (challenging the assumption that strict scrutiny would apply). Much of the credit for dissuading courts from applying strict scrutiny under the Second Amendment surely goes to Professor Adam Winkler, whose work undercut the premise that fundamental constitutional rights always or even usually receive strict scrutiny. See Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 *CONST. COMMENT.* 227, 227 (2006) (finding that "only a small subset of fundamental rights triggers strict scrutiny").

³¹⁹ *United States v. Engstrum*, 609 F. Supp. 2d 1227 (D. Utah), *mandamus granted sub nom. In re United States*, 578 F.3d 1195 app. (10th Cir. 2009).

³²⁰ *Id.* at 1231–32.

³²¹ *Id.* at 1235.

³²² *Id.*

³²³ *In re United States*, 578 F.3d at 1199–200.

Of course, proponents of a more robust version of the right to keep and bear arms may yet have a breakthrough in the lower courts. For example, they saw reason for hope in *Ezell v. City of Chicago*,³²⁴ a decision concerning new ordinances enacted by Chicago to replace those invalidated by the *McDonald* decision.³²⁵ Chicago's new laws require all gun owners to have firearm permits, and one of the requirements for such a permit is completing at least one hour of training at a shooting range.³²⁶ At the same time, Chicago did not permit the operation of any shooting ranges within city limits.³²⁷ Although the district court had found that this placed no significant burden on anyone's rights because there are plenty of firing ranges open to the public within just a few miles of the city,³²⁸ Judge Rovner of the Seventh Circuit admonished Chicago for being "too clever by half" and essentially "thumbing [its] nose at the Supreme Court."³²⁹ The court remanded the case to give the city a chance to present evidence justifying its ban on firing ranges, but hinted that it seemed "quite unlikely" that the city could succeed in doing so.³³⁰ The opinion suggested that the Seventh Circuit, despite taking a very deferential attitude toward the type and amount of evidence needed to justify a gun regulation in Chief Judge Easterbrook's en banc opinion in *Skoien*,³³¹ might take a much more aggressive attitude, one that almost rises to the level of strict scrutiny, in situations involving severe burdens on the core right of armed self-defense.³³² Gun rights advocates

³²⁴ *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

³²⁵ CHI. MUN. CODE § 8-20-10 to -300 (2011).

³²⁶ *Id.* § 8-20-120(a)(7).

³²⁷ See *Ezell*, 651 F.3d at 695 (noting that CHI. MUN. CODE § 8-20-10, subsequently repealed, prohibited shooting ranges within city limits).

³²⁸ *Id.* at 693.

³²⁹ *Id.* at 711–12 (Rovner, J., concurring in the judgment).

³³⁰ *Id.* at 710 (majority opinion). While awaiting the Seventh Circuit's ruling, city attorneys predicted that the case might produce a decision that would be unfavorable to the city and imperil other local gun restrictions, and so Chicago officials tried to render the case moot by quickly doing away with the ban on firing ranges. John Byrne & Hal Dardick, *City Council OKs Gun Ranges as Federal Court Reverses Ban*, CHI. TRIB., July 7, 2011, at C11. The Seventh Circuit, however, beat Chicago to the punch. Just an hour before the city council's vote to repeal the challenged ban, the Seventh Circuit released its decision, issuing it in typescript form, "a practice ordinarily reserved for emergency action." *Ezell v. City of Chicago*, No. 10 C 5135, 2011 WL 4501546, at *1 (N.D. Ill. Sept. 28, 2011). Despite the ban's repeal, the litigation continues because the defendant contends that the new ordinance imposes an unduly burdensome "thicket of regulations" on firing ranges. *Id.* at *2.

³³¹ *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1674 (2011); see *supra* notes 253–82 and accompanying text.

³³² *Ezell*, 651 F.3d at 708.

hailed the ruling as a “major win,”³³³ and the opinion certainly leans in the direction of giving the right to keep and bear arms somewhat stronger protection than most judges have thus far been willing to offer.³³⁴ Nevertheless, it is remarkable to think that this decision, a ruling that enables Chicagoans to travel a slightly shorter distance to firing ranges,³³⁵ is the most dramatic advance for gun rights made by the lower courts in the years since *Heller*.

Perhaps the most revealing discussion of the controversy surrounding the interpretation of the Second Amendment appears in opinions issued by members of the Court of Appeals for the D.C. Circuit in the ongoing litigation concerning the District of Columbia's gun laws.³³⁶ After the Supreme Court invalidated portions of those laws in *Heller* in 2008, the District revised the laws in an attempt to comply with the Supreme Court's demands while maintaining unusually tight restrictions on access to firearms.³³⁷ Several residents of the District quickly filed suit, claiming that many provisions of the revised statutes violated the Second Amendment.³³⁸ By a 2–1 vote, the D.C. Circuit upheld some of the challenged measures and remanded the case for development of a more complete evidentiary record concerning other provisions under attack.³³⁹ Judge Douglas Ginsburg's majority opinion and Judge Brett Kavanaugh's dissent laid out starkly different ways of reading the Supreme Court's rulings in *Heller* and *McDonald*. Judge Ginsburg explained that, although gun regulations with longstanding roots may enjoy a special presumption of validity, history and tradition should not constitute the only elements of Second Amendment analysis.³⁴⁰ Rather, courts should apply intermediate scrutiny, look at the public policy objectives that the challenged regulation purportedly serves in modern society, and defer to legislative judgments supported by some “meaningful evidence.”³⁴¹

³³³ David Hardy, *Ezell v. Chicago—Major Win!*, ARMS & L. (July 6, 2011, 10:44 AM), http://armsandthelaw.com/archives/2011/07/ezell_v_chicago.php.

³³⁴ Judge Sykes, the author of the *Ezell* panel's opinion, was the sole member of the Seventh Circuit who dissented from Chief Judge Easterbrook's en banc opinion in *Skoien*. See *supra* notes 283–88 and accompanying text.

³³⁵ See *Ezell*, 651 F.3d at 699.

³³⁶ *Heller v. District of Columbia (Heller II)*, No. 10-7036, 2011 WL 4551558 (D.C. Cir. Oct. 4, 2011).

³³⁷ See Rostron, *supra* note 33, at 394–403.

³³⁸ *Heller II*, 2011 WL 4551558, at *1–2. Dick Heller, the named respondent in the case decided by the Supreme Court, is among the plaintiffs in the new litigation.

³³⁹ *Id.* at *1.

³⁴⁰ *Id.* at *6.

³⁴¹ *Id.* at *8–11.

Judge Kavanaugh's dissent regards the Supreme Court's decisions as instead requiring courts to analyze gun laws "based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."³⁴² Indeed, he pointed out that the deferential form of intermediate scrutiny applied by Judge Ginsburg and most other lower court judges resembles the flexible policy-oriented analysis proposed in Justice Breyer's *Heller* dissent more than it resembles the rigidly categorical and deeply historical approach favored by Justice Scalia and the other four Justices who joined his majority opinion in *Heller*.³⁴³ Judge Kavanaugh is correct, but he is a lone voice in a sea of lower court judges preferring to give public policy considerations a preeminent role in Second Amendment analysis.

IV. CELEBRATING JUSTICE BREYER'S TRIUMPH

A great irony thus runs throughout the lower court cases. The *Heller* decision was undoubtedly a monumental step in Second Amendment jurisprudence, a crowning achievement for Justice Scalia, and a masterful showcase for the originalist methodology of constitutional interpretation. The *McDonald* decision followed through on the crucial step of extending the right to keep and bear arms to reach state and local government actions. And yet, the lower court decisions and the analytical approach that has begun to crystallize in them reflect Justice Breyer's sentiments about Second Amendment claims far more than those of Justice Scalia or the other members of the Court who formed the majorities in *Heller* and *McDonald*.

This is not to say that judges have improperly set out to follow dissenting views rather than those of the Supreme Court's majority. Instead, while conscientiously trying to implement the Supreme Court's instructions, judges have ineluctably followed an analysis that fulfills Justice Breyer's forecast.³⁴⁴ Trying to follow Justice Scalia's lead by making Second Amendment analysis an intensely historical enterprise, lower court judges have run into the reality that historical inquiries are extremely difficult and do not produce determinate answers to the types of detailed questions that must be resolved concern-

³⁴² *Id.* at *23 (Kavanaugh, J., dissenting).

³⁴³ *Id.* at *26–32.

³⁴⁴ In a recent debate with Professor Joyce Lee Malcolm, Professor Lawrence Rosenthal suggested that the sort of interest balancing that Justice Breyer favored may be inescapable even though the *Heller* majority denounced such an approach. See Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun-Control Laws?*, 105 NW. U. L. REV. COLLOQUY 85, 94 (2010), <http://www.law.northwestern.edu/lawreview/colloquy/2010/24/LRColl2010n24Rosenthal&Malcolm.pdf>.

ing the wide range of gun laws and regulations in effect in various places throughout the country. Puzzled by Justice Scalia's curious list of longstanding and presumptively lawful regulatory measures and the Supreme Court's conspicuous refusal to identify a level of scrutiny or some other specific standard to be applied, lower court judges have pulled toward an intermediate scrutiny approach that gives them the comfort of applying familiar formulas and enables them to show due respect for the right to keep and bear arms while rarely ever actually using it to strike down a law. Struggling to work within the more categorical framework of decisionmaking favored by Justice Scalia, the lower courts have essentially wound up embracing the sort of interest balancing that Justice Breyer recommended and that Scalia vociferously denounced.³⁴⁵ And like Justice Breyer, the lower courts have looked at the conflicting tangle of complex empirical and other research surrounding gun laws and essentially decided that legislatures are better suited than judges for the task of deciding what conclusions to draw from it.

Of course, the lower court decisions cannot cite Breyer's dissents as their inspiration. But there are passages in Breyer's *Heller* and *McDonald* dissents that capture quite well the flavor of the already enormous and quickly growing volume of precedent being generated by the lower courts, and so it is worth reviewing them. According to Breyer, Second Amendment questions that confront courts do not have "purely logical or conceptual answers."³⁴⁶ Treacherous "reefs and shoals" also "lie in wait for those nonexpert judges who place virtually determinative weight upon historical considerations."³⁴⁷ The judges' task instead requires them "to focus on practicalities, the statute's rationale, the problems that called it into being, its relation to those objectives—in a word, the details."³⁴⁸ And in the end, judges cannot avoid essentially weighing the advantages and disadvantages of sustaining the government actions being challenged. However one describes the level of scrutiny involved or articulates the standard used, the decisionmaking "will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly

³⁴⁵ Compare *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), with *id.* at 689 (Breyer, J., dissenting).

³⁴⁶ *Id.* at 687 (Breyer, J., dissenting).

³⁴⁷ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3122 (2010) (Breyer, J., dissenting).

³⁴⁸ *Heller*, 554 U.S. at 687.

burdens the former in the course of advancing the latter.”³⁴⁹ Justice Breyer saw “practical wisdom” in this approach,³⁵⁰ and the lower court decisions have admirably fulfilled that promise.

Any appraisal of the lower courts’ approach will depend greatly on one’s views about gun control and gun rights and what outcomes one ultimately prefers. But there are some reasons to appreciate what the lower courts have done regardless of which side one supports in the greater debate about guns. Most important, the courts essentially have adopted a posture of judicial restraint, upholding legislative determinations where ample room for debate exists about their constitutionality. Courts are routinely criticized for purported sins of judicial activism,³⁵¹ and so they certainly deserve some understanding where they proceed cautiously. Judge J. Harvie Wilkinson III eloquently and candidly described how this factor influenced the Fourth Circuit’s treatment of the right to keep and bear arms:

To the degree that we push the right beyond what the Supreme Court in *Heller* declared to be its origin, we circumscribe the scope of popular governance, move the action into court, and encourage litigation in contexts we cannot foresee. This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights. . . .

If ever there was an occasion for restraint, this would seem to be it. There is much to be said for a course of simple caution.³⁵²

Treading carefully is particularly appropriate with respect to an issue for which the need for judicial intervention to protect rights is not at its zenith. Gun owners are a perennially potent political force. The most prominent organization representing their interests, the National Rifle Association, is among the Nation’s most powerful lobbying organizations.³⁵³ The political tide has been moving against gun

³⁴⁹ *Id.* at 689.

³⁵⁰ *Id.* at 691.

³⁵¹ See Stefanie A. Lindquist et al., *The Rhetoric of Restraint and the Ideology of Activism*, 24 CONST. COMMENT. 103, 103 (2007) (describing how criticism of judicial activism has become common). Justice Scalia has always been a vocal critic of judicial activism and proponent of judicial restraint. See, e.g., James Edward Wyszynski, Jr., Comment, *In Praise of Judicial Restraint: The Jurisprudence of Justice Antonin Scalia*, 1989 DETROIT C. L. REV. 117, 120 (1989).

³⁵² *United States v. Masciandaro*, 638 F.3d 458, 475–76 (4th Cir. 2011).

³⁵³ See Dan Eggen, *Another Victory for the Bulletproof NRA*, WASH. POST, June 17, 2010, at A19; Eric Lichtblau, *Beyond Guns: N.R.A. Expands Political Agenda*, N.Y. TIMES, July 13, 2010, at A1.

control in recent years, with the conventional wisdom being that gun issues hurt Democratic candidates in key elections in the past.³⁵⁴ Despite some gun enthusiasts' fears that President Barack Obama's election posed a significant threat to firearm rights, the Obama Administration has been very quiet on gun issues.³⁵⁵ Considering the many problems facing this country (wars, terrorism, climate change, a struggling economy, budget deficits, illegal immigration, and health-care, just to name a few), insufficient access to firearms hardly seems to be a pressing concern. Judges' reluctance to be more aggressive in expanding gun rights and overriding political and legislative processes seems defensible. Justice John Paul Stevens's dissent in *Heller* made this very point, arguing that "no one has suggested that the political process is not working exactly as it should in mediating the debate between the advocates and opponents of gun control," and so "adherence to a policy of judicial restraint would be far wiser" than unnecessarily bold action to invalidate gun laws and regulations.³⁵⁶

The courts' cautious approach also serves the interests of federalism and respects the wide variation in the roles that guns play in different parts of the country, particularly differences between rural and urban areas. City dwellers are "less likely to own guns and more likely to support gun control initiatives."³⁵⁷ Rates of gun violence obviously vary dramatically from place to place,³⁵⁸ as do cultural traditions concerning firearms and the extent to which state and local laws regulate them.³⁵⁹ Justice Breyer's dissents in *Heller* and *McDonald* specifically argued for recognition of these differences, repeatedly emphasizing that the District of Columbia and Chicago are highly urban areas with crime problems unknown in rural areas.³⁶⁰

³⁵⁴ See Dick Polman, *Gun-Shy Dems Abandon Debate on Gun Control*, RECORD (Bergen County, N.J.), May 21, 2009, at A21.

³⁵⁵ See BRADY CTR. TO PREVENT GUN VIOLENCE, PRESIDENT OBAMA'S FIRST YEAR: FAILED LEADERSHIP, LOST LIVES 2 (2010) (giving President Obama failing grades for his handling of gun issues). For my advice about how the Obama Administration should address the topic of guns, see Allen Rostron, *Cease Fire: A "Win-Win" Strategy on Gun Policy for the Obama Administration*, 3 HARV. L. & POL'Y REV. 347 (2009).

³⁵⁶ District of Columbia v. Heller, 554 U.S. 570, 680 n.39 (2008) (Stevens, J., dissenting).

³⁵⁷ Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 89–90 (2002) (footnote omitted).

³⁵⁸ See Richard Florida, *The Geography of Gun Deaths*, ATLANTIC (Jan. 13, 2011, 10:38 AM), <http://www.theatlantic.com/national/archive/2011/01/the-geography-of-gun-deaths/69354>.

³⁵⁹ President Barack Obama has emphasized these different experiences and perspectives on the few occasions when he has addressed the topic of gun control. See Rostron, *supra* note 355, at 357–58.

³⁶⁰ McDonald v. City of Chicago, 130 S. Ct. 3020, 3128–29 (2010) (Breyer, J., dissenting); Heller, 554 U.S. at 681–82, 696, 698–99, 722 (Breyer, J., dissenting).

After *Heller*, Professor Michael O'Shea made a scholarly plea for implementing the right to keep and bear arms in ways attuned to federalism values, arguing that a "bifurcated standard of review" should apply so that national gun laws would be subject to greater scrutiny than state and local ones.³⁶¹ The Supreme Court, however, rejected the possibility of tailoring the right in that manner when it ruled in *McDonald* that incorporation of the right to keep and bear arms through the Fourteenth Amendment demands that exactly the same standards apply to state and local laws as to federal ones.³⁶²

Justice Stevens's dissent in *McDonald* warned that this insistence on perfect symmetry as applied to all levels of government created a "real risk" that the right would wind up being diluted.³⁶³ "When one legal standard must prevail across dozens of jurisdictions with disparate needs and customs," Stevens predicted, "courts will often settle on a relaxed standard."³⁶⁴ If a tailor decided to adopt a one-size-fits-all policy, it would have to make suits big enough to accommodate its largest customers. Stevens specifically warned gun rights proponents to temper their celebrations, for when forced by the *McDonald* decision to settle on a single standard for analyzing gun rights claims, lower courts would face tremendous pressure to adopt a very deferential standard in order to avoid trampling excessively on "the diverse interests of the States and their long history of regulating in this sensitive area."³⁶⁵

The lower court decisions implementing *Heller* and *McDonald* seem to bear out these prophecies. Judges know that they cannot tailor different degrees of scrutiny for local laws versus state or national ones. They cannot say that the strength of the right to keep and bear arms is different in urban and rural settings. The lower courts therefore may be understandably reluctant to find violations of this constitutional right when doing so would mean stifling the ability of various governments to try new and different ways of dealing with gun issues. As Justice Louis Brandeis noted in his much-quoted ode to the benefits of letting states serve as laboratories testing new and different policies, "To stay experimentation in things social and economic is a

³⁶¹ Michael P. O'Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201, 215–17 (2008).

³⁶² See *supra* notes 114–22 and accompanying text.

³⁶³ *McDonald*, 130 S. Ct. at 3095 (Stevens, J., dissenting); see also O'Shea, *supra* note 361, at 217–20 (warning about the risk of constitutional "dilution" if the Second Amendment right must be incorporated and applied to state and local laws in a "jot-for-jot" manner).

³⁶⁴ *McDonald*, 130 S. Ct. at 3095.

³⁶⁵ *Id.* at 3095 n.13.

grave responsibility.”³⁶⁶ By adopting a deferential and restrained approach to gun rights claims, the lower courts properly respect the importance of that responsibility.

The lower courts’ deferential approach to firearm legislation has the additional virtue of synchronizing constitutional law and public opinion about these matters. Most Americans believe that they should have the right to own and use guns.³⁶⁷ About two-thirds of Americans agree with the Supreme Court’s decisions striking down handgun bans.³⁶⁸ At the same time, the vast majority of Americans believe that gun control laws should either be made stricter or kept just as they are now.³⁶⁹ For example, most Americans support a nationwide ban on assault weapons and high-capacity ammunition magazines.³⁷⁰ In short, by striking down only the most severe restrictions on guns like handgun bans and upholding other regulations and restrictions, courts have been achieving the results that most Americans want.³⁷¹

Finally, the lower courts’ approach to the right to keep and bear arms also has the simple virtue of being candid. Justice Breyer argued that no matter what results they reach about the right to keep and bear arms, courts should be honest about the weighing of interests that inevitably underlies their decisionmaking.³⁷² His approach’s

³⁶⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

³⁶⁷ See Rostron, *supra* note 33, at 413 & n.163 (citing poll data).

³⁶⁸ See, e.g., CBS NEWS, CBS NEWS/NEW YORK TIMES POLL: THE ECONOMY, THE BUDGET DEFICIT, AND GUN CONTROL (2011), http://www.cbsnews.com/htdocs/pdf/Jan11_Econ.pdf (finding that sixty-five percent of respondents oppose and thirty-two percent favor a ban on the sale of all handguns).

³⁶⁹ See, e.g., ABT SRBI, TIME MAGAZINE/ABT SRBI—JUNE 20–21, 2011 SURVEY (2011), <http://www.srbi.com/TimePoll5380-Final%20Report-2011-06-22.pdf> (finding that fifty-one percent of respondents want gun laws to be more strict, thirty-nine percent prefer no change, and only seven percent want gun laws to be less strict); CBS News, *supra* note 368 (finding that forty-six percent of respondents want gun laws to be more strict, thirty-eight percent prefer no change, and only thirteen percent want gun laws to be less strict); HART/MCINTURFF, STUDY NO. 11023: NBC NEWS/WALL STREET JOURNAL SURVEY 19 (2011), http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/A_Politics/___Politics_Today_Stories_Teases/11023%20Jan%20NBC-WSJ%20Filled%20in%20beta.pdf (finding that fifty-two percent of respondents want gun laws to be more strict, thirty-seven percent prefer no change, and only ten percent want gun laws to be less strict).

³⁷⁰ See, e.g., ABT SRBI, *supra* note 369 (finding that sixty-two percent of respondents support a ban on sale of semiautomatic assault weapons); CBS News, *supra* note 368 (finding that sixty-three percent of respondents support a ban on sale of assault weapons and sixty-three percent support a ban on sale of high-capacity magazines).

³⁷¹ See Rostron, *supra* note 33, at 412–13 & nn.161–62 (discussing courts’ tendency to gravitate toward the predominant view of the American public on controversial issues like gun control, affirmative action, and abortion).

³⁷² *District of Columbia v. Heller*, 554 U.S. 570, 719 (2008) (Breyer, J., dissenting).

“necessary transparency lays bare the judge’s reasoning for all to see and to criticize.”³⁷³ Justice Breyer found it much more difficult to discern the reasoning behind the Supreme Court majority’s conclusions.³⁷⁴ The lower courts have felt the same way, repeatedly expressing frustration about the Supreme Court’s failure to explain why, for example, it emphasized the crucial role of historical inquiry and yet presented a list of presumptively lawful regulatory measures supported by no such analysis.³⁷⁵ Determining the proper limits on the right to keep and bear arms requires courts to make a profusion of difficult choices with significant consequences for society, and judges should strive to be as straightforward as possible with themselves and the public about the factors that drive their decisionmaking.

CONCLUSION

Two major battles over the right to keep and bear arms have already produced important victories for gun rights, but the third battle is still underway. This third battle will ultimately determine the real impact of this entire constitutional conflict. The cases decided so far by the lower courts suggest that the result will be a right that is broad but not particularly deep. In other words, although the right now extends to nonmilitia activities like defending one’s home and family against criminal attackers, the courts apply the right in ways that result in the vast majority of gun laws surviving constitutional scrutiny and the invalidation of only the most extraordinarily severe restrictions. Near the end of his dissenting opinion in *Heller*, Justice Stevens warned that the District of Columbia’s laws struck down in that case might be “just the first of an unknown number of dominoes to be knocked off the table,”³⁷⁶ but the lower courts’ cautious and pragmatic approach to implementation of the *Heller* and *McDonald* decisions suggests that the practical impact of the Supreme Court’s reinvigoration of the right to keep and bear arms ultimately will be quite limited.

Of course, the lower courts may change directions and steer away from the course they appear to be charting. Alternatively, the Supreme Court may decide to take another gun case and address more clearly what sort of scrutiny or other analysis should be applied to

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ See, e.g., *United States v. McCane*, 573 F.3d 1037, 1047–49 (10th Cir. 2009) (Tymkovich, J., concurring) (describing the tension between the Supreme Court’s dictum in *Heller* about presumptively valid regulations and the detailed textual and historical analysis that the Supreme Court otherwise employed).

³⁷⁶ *Heller*, 554 U.S. at 680 (Stevens, J., dissenting).

laws challenged as violations of the right to keep and bear arms. Both *Heller* and *McDonald* were 5–4 decisions and could someday be overruled if a single vote shifts.³⁷⁷ But the better strategy for Justice Breyer and his allies on the Court is not to undertake a direct assault aimed at overturning *Heller* and *McDonald*. Instead, Breyer and his allies should accept those decisions, celebrate the importance of the right to keep and bear arms, and focus on ensuring that the right is implemented so as to give legislatures wide leeway to craft laws that reasonably seek to reduce risks of the misuse of firearms. As one federal judge recently put it, “Prudent, measured arms restrictions for public safety are not inconsistent with a strong and thriving Second Amendment.”³⁷⁸ If Justice Breyer can bring together a majority of the Supreme Court under that banner, he will have won a decisive victory in the third and ultimately most important phase of the legal fight over the right to keep and bear arms.

³⁷⁷ Rostron, *supra* note 107, at 159, 167 (describing how U.S. Senators expressed concerns during the hearings on the Supreme Court nominations of Sonia Sotomayor and Elena Kagan that the margin of victory for gun rights in *Heller* and *McDonald* was a single vote).

³⁷⁸ *Nordyke v. King*, 644 F.3d 776, 799 (9th Cir.) (Gould, J., concurring in part and in the judgment), *reh'g en banc granted*, 664 F.3d 774 (9th Cir. 2011).