THE PROPER ROLE OF HISTORY AND TRADITION IN SECOND AMENDMENT JURISPRUDENCE

Nelson Lund[*]

> "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[1]

INTRODUCTION

For several decades before the Supreme Court's 2008 decision in *District of Columbia v. Heller*,[2] the original meaning of the Second Amendment was the subject of a sometimes heated academic controversy, which focused primarily on the constitutional text and the history behind it. *Heller* recapitulated that dispute in a debate between Justices Antonin Scalia and John Paul Stevens.[3] Writing for the majority of five, Justice Scalia concluded that the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defense.[4] Writing for the four dissenters, Justice Stevens maintained that the Amendment protects only "the right of the people of each of the several States to maintain a well-regulated militia."[5]

---

* University Professor, Antonin Scalia Law School, George Mason University. For helpful comments, I am grateful to Robert Leider and Jack Lund.

1. U.S. CONST. amend. II.
2. 554 U.S. 570 (2008).
3. *See generally id.*
4. *Id.* at 635.
5. *Id.* at 637 (Stevens, J., dissenting).

Having resolved the original-meaning debate in favor of the individual-right position, the Court held that a blanket ban on keeping a handgun in one's home is constitutionally forbidden.[6] That narrow holding left open a myriad of unsettled questions about the scope of the right, and thus about the nature and extent of the government's regulatory authority. Those questions became especially pressing after another 5-4 decision, *McDonald v. City of Chicago*,[7] which rendered the Second Amendment applicable to the states through Fourteenth Amendment incorporation.[8] State and local gun laws are far more numerous and often much more restrictive than federal regulations,[9] which makes them a fertile source of potential conflicts between the Constitution and politically popular policies.

In the aftermath of these decisions, the lower courts have confronted many cases raising questions about the scope of the constitutional right to bear arms.[10] There have been sharp differences in the way that various judges, and to some extent various courts, have applied the limited guidance offered by the *Heller* opinion. Notwithstanding the manifest lack of clarity about *Heller*'s implications, the Supreme Court refused for years to resolve or even address those disagreements.[11]

---

6. *Id.* at 635 (majority opinion).

7. 561 U.S. 742 (2010) (invalidating a handgun ban that was similar to the law at issue in *Heller*).

8. *Id.* at 791.

9. *See, e.g.,* William S. Hardwood, *Gun Control: State Versus Federal Regulation of Firearms*, 11 ME. POL'Y REV. 58, 65 (2002) ("Congress has shied away from taking the step of prohibiting states from going beyond the federal rules. Despite occasional calls for more consistency in our firearm regulations, Congress has never attempted to block states from adopting stricter regulations than those contained in federal law.").

10. *See* SARAH HERMAN PECK, CONG. RESEARCH SERV., R44618, POST-*HELLER* SECOND AMENDMENT JURISPRUDENCE 12–15 (2019) (analyzing the response of the federal courts post-*Heller*); David B. Kopel and Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U.L.J. 193 (2017) (same); David B. Kopel and Joseph G.S. Greenlee, Federal Circuit Second Amendment Developments 2017-2018, https://ssrn.com/abstract=322 7193 (same).

11. *See, e.g.*, Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016) (requiring a state court to reconsider its decision to uphold a ban on stun guns because that court had issued an opinion based on reasoning that flatly contradicted *Heller*. Only Justices Alito and Thomas indicated how they would have ruled on the merits). Responding to an extensive pattern of cert denials, some Justices have objected to their colleagues' passivity. *See, e.g.*, Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari); Peruta v. California, 137 S. Ct. 1995, 1996 (2017) (Thomas, J, joined by Gorsuch, J., dissenting from denial of certiorari); Sessions v. Binderup, 137 S. Ct. 2323, 2323 (2017) (denying the petition for certiorari and noting that Justices Ginsburg and Sotomayor would grant the petition); Friedman v. City of Highland Park, 136 S. Ct. 447, 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari); Jackson v. City & Cty. of San Francisco, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari).

After Justice Anthony Kennedy retired, the Court granted certiorari in *N.Y. State Rifle & Pistol Ass'n v. City of New York*,[12] which involves restrictions on transporting firearms outside one's home.[13] After certiorari was granted,[14] New York City and the state of New York made legal changes designed to render the case moot.[15] As this is written, the petitioners have vigorously argued that the case should not be treated as moot, but the Court has not ruled on that issue. If the Justices decide the case on the merits, it will provide a vehicle through which the Court could remove some of *Heller*'s obscurity about the scope of the Second Amendment right.

Whether in this case, or some other, Justice Brett Kavanaugh will have an opportunity to press a jurisprudential approach that he developed in a dissenting opinion while he was on the D.C. Circuit.[16] Then-Judge Kavanaugh contended that *Heller* requires courts to apply a history-and-tradition test to every issue that is not resolved by the constitutional text.[17] No circuit court has adopted this position. On the contrary, many have employed a version of the means-end analysis that the Supreme Court routinely uses in analogous areas of constitutional law, and no circuit court has rejected the use of such analysis.[18]

---

12. 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019). The timing may not be coincidental. After both Justices had retired, Stevens disclosed that he had persuaded Kennedy to ask for "some important changes" to the draft opinion in *Heller*. Adam Liptak, *A Former Justice, 98, Has a 'Long Story' to Tell*, N.Y. TIMES, Nov. 27, 2018, at A15. That request presumably explains the published opinion's conspicuous series of obiter dicta endorsing a wide range of gun control regulations that were not before the Court. If Kennedy was the median voter in *Heller* and *McDonald*, some Justices may hope that a new majority will take the Court in a direction that he might not have acquiesced in.

13. *N.Y. State Rifle & Pistol Ass'n*, 883 F.3d at 52–54.

14. *N.Y. State Rifle & Pistol Ass'n*, 139 S. Ct. at 939.

15. This maneuver fits a pattern in which gun-control proponents have sought to prevent the Supreme Court from ruling that the Second Amendment protects a right to carry firearms in public. After the Seventh and D.C. Circuits held that such a right exists, the government parties in both cases declined to seek certiorari. *See* Wrenn v. District of Columbia, 864 F.3d 650, 668 (D.C. Cir. 2017); Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012). After a panel of the Ninth Circuit sustained a challenge to California's public-carry restrictions, the en banc court adopted a questionable theory under which only the right to carry concealed weapons was at issue in the case, thus making the case much less certworthy. Peruta v. County of San Diego, 824 F.3d 919, 927 (9th Cir. 2016) (en banc).

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

17. *Id.*

18. Some courts have found a history-and-tradition approach sufficient to resolve specific cases, e.g., United States v. Rene E., 583 F.3d 8, 12 (1st Cir. 2009), but I do not believe any circuit court has decided that means-end analysis may never be used. Several members of the Fifth Circuit recently adopted then-Judge Kavanaugh's position, but fell one vote short of an en banc majority. *See* Mance v. Sessions, 896 F.3d 390, 394–95 (5th Cir. 2018) (Elrod, J., dissenting from denial of rehearing en banc).

This Article will show that then-Judge Kavanaugh misinterpreted *Heller*, and it will explain why neither he nor other members of the Supreme Court should adopt the approach that he mistakenly imputed to *Heller*. Other circuit judges have developed a better framework, in which text, history, and tradition are relied on when, and only when, those sources provide reasonably clear guidance. In other cases, which in practice will be much more numerous, judges should engage in a means-end analysis that is informed by what is known about the purpose of the Second Amendment from its text and history.

I. SOME PUZZLES IN *HELLER*

One might think that history and tradition would easily confirm that D.C.'s handgun ban was unconstitutional. Justice Scalia seemed to point toward this conclusion when he noted the paucity of gun control laws during the founding period.[19] As far as the *Heller* Court was informed, the only regulation remotely comparable to a handgun ban from that period was a 1783 law that prohibited people from introducing loaded firearms into houses or other buildings in Boston.[20] The purpose of the prohibition, however, was to protect firefighters from the dangers posed by the highly combustible black powder in use at that time.[21] Modern gunpowder does not present the same danger, and Boston's citizens were, in any event, not forbidden to possess the weapons themselves.[22] Nor is it likely that Bostonians would have been prosecuted if they loaded a gun to protect themselves from a violent attack. Before the D.C. regulation was enacted in 1976, attempts to prevent the general population from keeping handguns in the home appear to have been extremely rare or non-existent.

But rather than rely on the venerable tradition of leaving civilians free to possess handguns, the Court held that D.C.'s regulation was unconstitutional because it banned a class of weapons that are popular with the American people *today*, and because handguns have practical advantages for self-defense beyond those provided by the rifles and shotguns that D.C. permitted its residents to possess.[23] *Heller* leaves us to wonder why the current popularity of handguns says anything at all about the original meaning of the Second Amendment. Nor did Justice Scalia explain why his comments on the usefulness of handguns constituted anything other than an unacknowledged exercise of the kind

19. *See* District of Columbia v. Heller, 554 U.S. 570, 605–10 (2008).

20. *Id.* at 631.

21. *Id.*

22. *Id.* at 631–32.

23. *Id.* at 628–30. D.C. required rifles and shotguns kept in the home to be rendered inoperable, *id.* at 575, but the Supreme Court could have disallowed that restriction without invalidating the handgun ban.

of judicial interest-balancing that he denounced Justice Stephen Breyer for employing in Breyer's *Heller* dissent.

Heller's failure to rely exclusively on text, history, and tradition comes even more sharply into focus when we examine a series of dicta in which the Court approved several modern forms of gun control.[24] The Court first approved "longstanding prohibitions on the possession of firearms by felons and the mentally ill."[25] If such prohibitions had been accepted by the generation that enacted the Second Amendment, they would undoubtedly deserve at least a strong presumption of constitutionality, just as laws against perjury and fraud are presumed not to violate the First Amendment.[26] But the first general ban on the possession of firearms by felons was apparently enacted in 1968, less than a decade before the D.C. handgun ban was adopted.[27] Even limited bans on the possession of *concealable* weapons by *violent* felons were apparently not adopted until the twentieth century.[28]

The *Heller* Court also approved laws banning "the carrying of firearms in sensitive places such as schools and government buildings" and "laws imposing conditions and qualifications on the commercial sale of arms."[29] *Heller* provided not a shred of evidence that could even suggest the existence of such regulations prior to 1791. Nor did the Court point to any constitutional tradition, or indeed any justification at all, that blesses these broad and vaguely defined categories of gun control.

Heller also reported that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."[30] This allusion to later *state* judicial decisions about *state* statutes obviously does little to establish that such prohibitions by the *federal* government were or would have been considered permissible in 1791. What is worse is that a review of the state court decisions

---

24. *Heller* characterized some of the regulations as "presumptively lawful," but a close reading of the opinion indicates that the Court treated the presumption as one that is virtually conclusive. *See* Nelson Lund, *The Second Amendment,* Heller *and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1356 n.32 (2009).

25. *Heller*, 554 U.S. at 626.

26. *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 720–21 (2012) (plurality opinion).

27. Act of June 19, 1968, Pub. L. No. 90-351, 82 Stat. 197, 233–34, 236; Act of Oct. 22, 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1220–21, 1236 (codified at 18 U.S.C. § 922(g) (2015)). A few years earlier, Congress had prohibited felons from receiving firearms in interstate commerce. Act of Oct. 3, 1961, Pub. L. No. 87-342, 75 Stat. 757. The 1968 legislation extended the prohibition to firearms that had ever traveled in interstate commerce, which effectively created a total ban.

28. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 707–08 (2009).

29. *Heller*, 554 U.S. at 626–27.

30. *Id.* at 626.

affirmatively undermines the conclusion that Justice Scalia apparently thought they supported.[31]

Justice Scalia admitted that "we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment . . . ."[32] This droll understatement confirms that the opinion's *obiter dicta* should be treated as offhand predictions that do not bind any court, let alone the Supreme Court. Unfortunately, some of the dicta were repeated in *McDonald*.[33] Neither case offers any reason to believe that an historical analysis, exhaustive or otherwise, will unearth any actual support for *Heller*'s *ipse dixits*.

Heller also says: "We therefore read [*United States v. Miller*],[34] to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the right, see Part III, *infra*."[35] *Miller* said nothing at all about the relevance of a weapon's being typically possessed for lawful civilian purposes. In fact, *Miller* implied the opposite when it held that a short-barreled shotgun would be protected by the Second Amendment only if it "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia . . . ."[36] The historical evidence referred to in Part III of the *Heller* opinion, moreover, provides zero support for Justice Scalia's claim that the original meaning of the Second Amendment only protects arms that are in common civilian use at any given time.[37]

In yet another breezy pronouncement, Justice Scalia dismissed the significance of *Miller*'s statement that a short-barreled shotgun would be protected by the Second Amendment only on a showing that the "weapon is [a] part of the ordinary military equipment or that its use could contribute to the common defense."[38] Justice Scalia rejected the plain meaning of this statement because it would have the "startling" implication that restrictions on machine guns, which obviously had military utility when *Miller* was decided, might be unconstitutional.[39] There are two significant problems with this refusal to accept that *Miller* means what it so clearly says.

---

31. For a discussion of the evidence, see Lund, *supra* note 24, at 1359–62.

32. *Heller*, 554 U.S. at 626.

33. McDonald v. City of Chicago, 561 U.S. 742, 786 (2010).

34. 307 U.S. 174 (1939).

35. 554 U.S. at 625.

36. *Miller*, 307 U.S. at 178; *see also* Nelson Lund, Heller *and Second Amendment Precedent*, 13 LEWIS & CLARK L. REV. 335 (2009) (providing a detailed discussion of *Miller* and *Heller*).

37. *See Heller*, 554 U.S. at 626–628; Lund, *supra* note 24, at 1362–64.

38. *Miller*, 307 U.S. at 178; *see Heller*, 554 U.S. at 625.

39. *Heller*, 554 U.S. at 624.

First, nowhere in the *Heller* opinion is there an analytically tenable account of the relation between the Second Amendment's prefatory reference to a well-regulated militia and its operative clause. *Miller*'s facially plausible explanation of the relation may be wrong, as I think it is, but Justice Scalia neither showed that it is wrong nor offered a better explanation.[40] Instead, he asserted that the protection of arms typically possessed by law-abiding civilians today is "precisely" how the Second Amendment's operative clause furthers the purpose set out in its preface.[41] Justice Scalia claimed that this was because militiamen in the founding period were expected to arm themselves with weapons that happened, at that time, to be commonly used for civilian and military purposes alike.[42] In order to swallow this argument, one has to believe that the Second Amendment serves a *military* purpose by protecting weapons that have little or no military utility while leaving *unprotected* the standard infantry rifles used by modern military organizations.[43] This makes little more sense than the claim—which *Heller* specifically rejected—that the Second Amendment only protects weapons that existed in the late eighteenth century.[44]

The second problem with Justice Scalia's dismissal of *Miller*'s plain language is his unexplained assumption that constitutional protection for machine guns would be "startling."[45] Is that because machine guns—like nuclear weapons and anti-aircraft missiles—are self-evidently out of place in civilian life? One could make a means-end argument for upholding a ban on machine guns,[46] but Justice Scalia did not do so.

Nor did he present a history-and-tradition analysis. Could he have done so? Not very easily. During the founding era, and apparently for many decades thereafter, civilians were free to possess military weapons that were more powerful and destructive than modern machine guns.[47] And it may have been fairly common for them to do so. For example, a 1783 Massachusetts statute discussed in *Heller* specifically prohibited

---

40. *See* Lund, *supra* note 24, at 1349–52.

41. *See Heller*, 554 U.S. at 624–25.

42. *Id.* at 624–26.

43. *Heller* ordered the D.C. government to allow the plaintiff in the case to register his single-action .22 caliber revolver. *See* Nelson Lund, *Second Amendment Standards of Review in a* Heller *World*, 39 FORDHAM URB. L.J. 1617, 1627 n.57 (2012). It is difficult to imagine that such a gun would be chosen for any military purpose.

44. *Heller,* 554 U.S. at 582.

45. *See id.* at 624.

46. For a textually-anchored means-end argument in support of upholding bans on nuclear weapons and anti-aircraft missiles, *see* Lund, *supra* note 24, at 1373–74.

47. *See, e.g.,* National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934) (first federal regulation of machine guns).

Boston residents from keeping loaded cannons indoors.[48] This pretty clearly implies that the possession of cannons was permitted, and was also sufficiently common that the legislature thought it prudent to provide for their safe storage. Moreover, at least as late as the mid-nineteenth century, an abolitionist newspaperman apparently defended his printing office with a cannon.[49]

Forbidding the new federal government to ban the private possession of cannons (and by implication machine guns as well), while leaving the state governments generally free to regulate these weapons as they saw fit, is quite consistent with the purpose of maintaining a well-regulated militia.[50] That is what the text and history of the Second Amendment actually point to. Neither the text nor the history of the Second Amendment suggests the weird rule that Justice Scalia extracted from *Miller* by twisting the language of the opinion into a pretzel.

During the Founding Era, there was virtually no political demand for what we call gun control, and for a long time that did not change very much.[51] Americans, therefore, had little or no occasion to discuss whether the federal government had any authority at all to restrict civilian access to various kinds of weapons, let alone what limits there might be on such authority if it existed. Neither do they seem to have debated the limits that might be imposed by their state constitutions. Nor do those involved with the adoption of the Fourteenth Amendment appear to have said much of anything about specific limits that this constitutional provision would impose on the state governments' discretion to regulate firearms.

In sum, *Heller* did not dictate that Second Amendment cases be decided solely, or even primarily, on the basis of text, history, and tradition. Notwithstanding a bit of historical hand-waving, the Court did not rely on those sources either in deciding the specific question posed by the D.C. handgun ban, or in its gratuitous comments about various other forms of gun control.

II. THE RIGHT TO BE ARMED IN PUBLIC

Although text, history, and tradition cannot be expected to resolve every Second Amendment issue, they can show that some popular gun

48. Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts 218. Thanks to Clayton Cramer for calling this to my attention.

49. *See* CASSIUS M. CLAY, THE LIFE OF CASSIUS MARCELLUS CLAY: MEMOIRS, WRITINGS, AND SPEECHES 482 (1886). Thanks to David Hardy for calling this to my attention.

50. Of course, the federal government is given very broad power to regulate the militia, which entails the authority to *require* citizens to keep and when appropriate to bear arms. *See* U.S. CONST. art. I, § 8, cl. 15–16; "An Act more effectually to provide for the national defense by establishing an uniform militia throughout the United States," Pub L. No. 2-33, 1 Stat. 271 (1792).

51. *See* Nelson Lund, *Promise and Perils in the Nascent Jurisprudence of the Second Amendment*, 14 GEO. J.L. & PUB. POL'Y 207 (2016).

control policies are unconstitutional. The policies with the most important practical effects today forbid most law-abiding citizens to bear arms. Illinois enacted the most extreme statute, which categorically forbade civilians to carry a loaded firearm for self-protection.[52] A number of other jurisdictions have adopted regulations that condition permits to carry on a showing that the applicant has an exceptional need to be armed.[53] Typically, these "may issue" regulations give government officials wide discretion to reject applications, and they are frequently administered in a fashion that makes only a tiny number of people eligible for permits.[54]

When it ruled on a challenge to the Illinois law, the Seventh Circuit read *Heller* to mean that the Second Amendment "confers a right to bear arms for self-defense, which is as important outside the home as inside."[55] The court invalidated the Illinois statute because the government failed to show more than a rational basis for the restriction, which *Heller* held is not enough.[56] The court was right that *Heller* indicates that the Second Amendment protects a right to carry a firearm for self-defense, a conclusion that rested on the Court's analysis of the text and history of the Amendment.[57] Because the Illinois statute on its face extinguished the right to bear arms for almost everyone in the state, the government faced a practically insurmountable burden in defending it.[58] But Judge Richard A. Posner's opinion recognized that less far-reaching restrictions on the right to carry must be analyzed in a different way.[59]

Unlike the Illinois statute, "may issue" laws leave everyone free to apply for a permit. Several of these laws have been upheld under a form of intermediate scrutiny that is very difficult to distinguish from rational

---

52. *See* 720 ILL. COMP. STAT. 5/24-1 (2010); *see also* Moore v. Madigan, 702 F.3d 933, 934 (7th Cir. 2012) ("An Illinois law forbids a person, with exceptions mainly for police and other security personnel, hunters, and members of target shooting clubs, 720 ILCS 5/24–2, to carry a gun ready to use (loaded, immediately accessible—that is, easy to reach—and uncased).").

53. *See, e.g.*, CAL. PENAL CODE § 26150(a)(2) (West 2016); MD. CODE ANN., PUB. SAFETY § 5-306(a)(6)(ii) (West 2013); N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2019).

54. *See, e.g.*, Petition for a Writ of Certiorari at 6, Drake v. Jerejian, 572 U.S. 1100 (2014) (No. 13–827) (estimating that only 0.02% of New Jersey citizens are granted public carry permits). A few states do not require a permit to carry a gun in public. Most others have "shall issue" laws that require officials to issue permits to anyone who meets objective criteria based on such factors as age and the absence of a criminal record.

55. *Moore*, 702 F.3d at 942.

56. *Id.*

57. *See* District of Columbia v. Heller, 554 U.S. 570, 584–92 (2008).

58. *Moore*, 702 F.3d at 939 ("[A] ban as broad as Illinois's can't be upheld merely on the ground that it's not irrational.").

59. *See* Moore, 702 F.3d at 942 (inviting the Illinois legislature to enact a new law with "reasonable limitations" on public carry).

basis review.[60] However, in opinions written by Judges Diarmuid O'Scannlain and Thomas Griffith, both the Ninth and D.C. Circuits invalidated such statutes.[61] The argument for invalidating "may-issue" statutes is straightforward. The text of the Second Amendment protects a right to "bear Arms,"[62] which *Heller* plausibly read to mean "carry weapons in case of confrontation."[63] *Heller* also plausibly concluded that history shows that one purpose of the Second Amendment is to protect the ability of law-abiding citizens to defend themselves against criminal violence.[64] A law that takes this right away from almost everyone must, therefore, labor under an extremely strong presumption of unconstitutionality.[65] As Judge O'Scannlain argued:

> To reason by analogy, it is as though [the government] banned all political speech, but exempted from this restriction particular people (like current or former political figures), particular places (like private property), and particular situations (like the week before an election). Although these exceptions might preserve small pockets of freedom, they would do little to prevent destruction of the right to free speech as a whole. As the [Supreme] Court has said: "The Second Amendment is no different." It too is, in effect, destroyed when exercise of the right is limited to a few people, in a few places, at a few times.[66]

This argument could conceivably be refuted by strong historical evidence that the founding generation accepted the validity of may-issue regulations, or something similar. But no such evidence has been found.[67]

---

60. *See, e.g.*, Drake v. Filko, 724 F.3d 426, 430 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012).

61. *See* Young v. Hawaii, 896 F.3d 1044, 1071–74 (9th Cir. 2018), *rehearing en banc ordered*, 915 F.3d 681 (2019); Wrenn v. District of Columbia, 864 F.3d 650, 667–68 (D.C. Cir. 2017).

62. U.S. CONST. amend. II.

63. District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

64. *See id.* at 598–99.

65. *See generally* Peruta v. County of San Diego, 742 F.3d 1144 (9th Cir. 2014), *vacated*, 824 F.3d 919 (9th Cir. 2016) (en banc).

66. *Id.* at 1169–70 (citations omitted).

67. Two historical red herrings have been used to defend these statutes. During the nineteenth century, many states required those who were accused of disrupting the peace by the way in which they displayed their weapons to post a bond or find a surety for a period of time in order to discourage a repetition of the disruption. Because the requirement was waived for those who could show that they had a reasonable fear of assault, these laws have been analogized to the exceptional-circumstances criterion in modern may-issue statutes. But the analogy fails because nobody had to find a surety except when someone made a credible complaint of misconduct, and even then the accused person could continue to carry weapons without being subject to criminal

On the contrary, legislatures rarely attempted to deny their citizens the right to carry a gun during the nineteenth century, and courts frequently said that such denials were or would be unconstitutional.[68]

The circuit courts have upheld may-issue statutes that are even more clearly unconstitutional than the handgun bans struck down in *Heller* and *McDonald*. Unless supplemented with additional regulations, a handgun ban does not prevent one from keeping a loaded rifle or shotgun for self-defense. Laws that forbid almost everyone to carry a loaded weapon in public, however, effectively eliminate the constitutional right to bear arms. Applying means-end scrutiny to such regulations is an unnecessary exercise, for in this case, text and history are sufficient to resolve the question.[69]

Many other restrictions on the freedom to bear arms, however, do require means-end scrutiny. Licensing requirements like those adopted in many "shall issue" jurisdictions, for example, are not so clearly unconstitutional, but they may not be defensible if they put onerous and unnecessary conditions on qualifying for a carry permit.[70] In deciding which restrictions are constitutionally permissible, courts will get little or no useful assistance from history.

III. Felon Disarmament Statutes

Heller's approving reference to "longstanding prohibitions on the possession of firearms by felons," along with the Court's unsubstantiated allusion to "the historical justifications" for such exceptions to the right to arms,[71] has created a kind of testing ground in the lower courts for the use of history and tradition.

In 1968, Congress enacted the first general prohibition on the possession of firearms by convicted felons.[72] The federal courts of appeals have unanimously rejected facial challenges to this statute,

---

penalties. *See* Young v. Hawaii, 896 F.3d 1044, 1061–63 (9th Cir. 2018), *rehearing en banc ordered*, 915 F.3d 681 (2019); Wrenn v. District of Columbia, 864 F.3d 650, 661 (D.C. Cir. 2017). Equally irrelevant is the 1328 Statute of Northampton, which provided in part that Englishmen were forbidden to "bring . . . force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere[.]" Statute of Northampton 2 Edw. 3, c. 3 (1328) (Eng.). Whatever this meant in the fourteenth century, it was apparently understood in eighteenth-century England to mean only that one may not go about armed in a manner that would terrify the population. In any event, American law consistently included this qualification. *See Young*, 896 F.3d at 1063–68; *Wrenn*, 864 F.3d at 659–61; Lund, *supra* note 24, at 1362–64.

68. *See, e.g.*, *Young*, 896 F.3d at 1055–61; Lund, *supra* note 24, at 1359–62.

69. *See Wrenn*, 864 F.3d at 666; *see also Young*, 896 F.3d at 1070–71.

70. *See, e.g.*, CH. 430 ILL. COMP. STATS. 66/75 (2013) (requiring extensive training as a prerequisite for the issuance of a concealed-carry permit).

71. District of Columbia v. Heller, 554 U.S. 570, 626, 635 (2008).

72. *See* 18 U.S.C. § 922(g) (2015).

relying primarily on *Heller*'s dictum, and some have held that as-applied challenges are also categorically foreclosed.[73] One court, however, has sustained an as-applied challenge. In *Binderup v. Attorney General, United States of America*,[74] the Third Circuit refused to apply the prohibition to two individuals who had been convicted of non-violent crimes.[75]

Writing for seven members of the court, Judge Julio Fuentes would have rejected both challenges on the ground that the 1968 federal statute fits comfortably within a long tradition of preventing criminals from owning guns; alternatively, these judges would have upheld the statute under intermediate scrutiny.[76] Judge Thomas Hardiman wrote for five members who voted to sustain the challenges on the ground that our constitutional tradition allows the government to disarm only those "dangerous persons likely to use firearms for illicit purposes."[77] Judge Thomas Ambro's opinion for the remaining three judges relied on historical evidence to conclude that those who commit "serious crimes" lose their Second Amendment rights; his opinion contended that the crimes at issue in this case were not sufficiently serious to meet either this historical test or to justify dispossession under intermediate scrutiny.[78]

Thus, all fifteen members of the court rested their conclusions, entirely or in part, on history and tradition. In each case, however, the evidence supporting their reading of the Second Amendment's original meaning was remarkably weak.

Judge Ambro, for example, leaned heavily on a putative academic consensus according to which those who commit any serious crime lose their Second Amendment rights.[79] As Judge Hardiman convincingly argued, the academic proponents of this theory have assumed, rather than shown, that the founding generation shared an ideology of civic republicanism that restricted the right to bear arms to the "virtuous

---

73. *See* Kanter v. Barr, 919 F.3d 437, 442–43 (7th Cir. 2019) (collecting cases).

74. 836 F.3d 336 (3d Cir. 2016) (en banc).

75. *Id.* at 356–57. One challenger had a consensual sexual relationship with one of his employees, who was seventeen years old at the time; he pleaded guilty in state court to corrupting a minor. The other challenger was convicted in state court of carrying a firearm without a license. Both individuals received light sentences for the predicate offenses, but federal law imposed a permanent firearms disability because the offenses could be punished under state law by more than two years of imprisonment. *See* 18 U.S.C. § 922(g) (2015).

76. *Binderup*, 836 F.3d at 381 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments).

77. *Id.* at 357 (Hardiman, J., concurring in part and concurring in the judgments).

78. *Id.* at 349, 356–57 (Ambro, J.).

79. *Id.* at 348–49. Judge Fuentes's even narrower view of the Second Amendment's protection was based on a few conclusory remarks about history and tradition, which he acknowledged were disputable. *Id.* at 389–91 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments).

citizenry."[80] He concluded that there appears to be "no historical evidence on the public meaning of the right to keep and bear arms indicating that 'virtuousness' was a limitation on one's qualification for the right—contemporary insistence to the contrary falls somewhere between guesswork and *ipse dixit*."[81]

Hardiman believed there is historical support for a different rule, under which individuals who have exhibited a propensity for violence may be deprived of their Second Amendment rights.[82] He admitted, however, that the founding generation had "no laws denying the right to keep and bear arms to people convicted of crimes."[83] He rightly said that this does not settle the matter because "novelty does not mean unconstitutionality,"[84] but the indirect evidence he offered for his own conclusion is both thin and equivocal.

First, he pointed to statements at three of the conventions that ratified the Constitution. A minority at the Pennsylvania convention sought a constitutional provision prohibiting the federal government from disarming anyone "unless for crimes committed, or real danger of public injury from individuals."[85] At the Massachusetts convention, Samuel Adams proposed that the convention demand that Congress be forbidden to disarm "peaceable citizens."[86] And a majority of the New Hampshire convention proposed that Congress be permitted to disarm only those citizens who engage in "Actual Rebellion."[87]

On its face, the Pennsylvania proposal is very broad, allowing disarmament for both violent and non-violent crimes, as well as other indications that an individual is dangerous.[88] The New Hampshire proposal, on the other hand, appears to cover only a very narrow set of crimes involving insurrection against the government.[89] Samuel Adams's reference to "peaceable citizens" comes closest to supporting Judge

---

80. *Id.* at 372 (Hardiman, J., concurring in part and concurring in the judgments).

81. *Id.*

82. *Id.* at 374–76.

83. *Id.* at 368 (internal alterations and citations omitted).

84. *Id.* at 368.

85. *Id.* at 367.

86. *Id.*

87. *Id.*

88. *See* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 665 (1971) (discussing the Pennsylvania proposal 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[]"); *see also Binderup*, 836 F.3d at 367 (Hardiman, J., concurring in part and concurring in the judgments).

89. SCHWARTZ, *supra* note 88, at 761 (discussing the New Hampshire proposal that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."); *see also Binderup*, 836 F.3d at 367 (Hardiman, J., concurring in part and concurring in the judgments).

Hardiman's position.[90] But this failed proposal at one ratifying convention does not come close to establishing that those responsible for the Second Amendment would have assumed that the federal government is, or should be, authorized to intrude in this specific way, and only in this specific way, on the regulatory powers of the states.

Judge Hardiman next pointed to bans on the possession of firearms imposed by state governments during the founding era. All of these bans applied to classes of people without regard to any crimes committed by individual members of the class. Groups that were singled out included blacks and mixed-race people (both slave and free), American Indians, and whites who refused to sign loyalty oaths.[91] It is not clear how or to what extent this history says anything at all about the original understanding of the Second Amendment. First, any genuine national consensus on the propriety of such measures may not have survived very long after the emergency conditions created by the Revolutionary War.[92] More important, the Second Amendment applied only to the federal government, and it is difficult even to imagine a consensus that Congress should have as much discretion as the state governments were free to exercise.[93] If the state disarmament laws throw any light at all on the meaning of the Second Amendment, they suggest that governments should have broad discretion to disarm classes of people whom the legislature believes are untrustworthy. This would obviously point *away* from a categorical rule forbidding the government to disarm non-violent criminals.

Judge Hardiman concluded that "a common thread running through the words and actions of the Founders gives us a distinct principle to inform our understanding of the original public meaning of the text of the Second Amendment."[94] This principle, he said, is that "the Constitution permitted the dispossession of persons who demonstrated that they would present a danger to the public if armed."[95] In support, he cited two law

---

90. *See* DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788 86 (1856) [hereinafter MASSACHUSETTS DEBATES] (discussing Samuel Adams's proposal at the Massachusetts convention that the "Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms[]"); *see also Binderup*, 836 F.3d at 367 (Hardiman, J., concurring in part and concurring in the judgments).

91. *Binderup*, 836 F.3d at 368 (Hardiman, J., concurring in part and concurring in the judgments).

92. *See* Marshall, *supra* note 28, at 726–28.

93. Oddly, there seems to have been no discussion of the way in which the Second Amendment might apply to regulation of the territories and the federal seat of government. This is another reason to be very careful in drawing inferences from the historical records that we possess.

94. *Binderup*, 836 F.3d at 369 (Hardiman, J., concurring in part and concurring in the judgments).

95. *Id.*

review articles, neither of which offers any evidence from the founding period beyond what he had already summarized.[96] One of those articles, C. Kevin Marshall's careful study of felon dispossession statutes, identifies a tradition of legislative restraint in this area, but not much more.[97] Marshall was unable to identify a single statute forbidding *any* class of criminals to possess firearms prior to World War I, well over a century after the Second Amendment was adopted and half a century after the ratification of the Fourteenth Amendment.[98] When dispossession statutes first began to be adopted in the 1920's and 1930's, they were predicated on crimes of violence and confined to concealable weapons, but Marshall found no evidence that these limitations were motivated by constitutional concerns.[99]

It is, of course, extremely easy to imagine that most Americans, during most of our history, would have said, if asked, that non-violent criminals should retain the right to possess firearms. The apparently complete absence of general felon-dispossession statutes before 1968 certainly suggests as much. And the proliferation of very limited dispossession laws in the early twentieth century is consistent with the principle that Judge Hardiman attributed to the original public meaning of the Second Amendment.[100] But was that principle followed because the Constitution was understood to include it by those in the founding generation? The scanty evidence that can be invoked in support of this theory can just as easily be explained by assuming that legislators never thought there was any good reason to disarm non-violent convicts, at least until 1968. But if legislators all along have been basing their decisions on policy considerations, or on what they thought their constituents wanted, it's hard to see how their inaction could create a *constitutional* tradition that binds subsequent legislatures whose members hold different policy views. As Judge Hardiman expressly recognized, novelty alone cannot imply unconstitutionality.[101]

The historical evidence, moreover, is consistent with an interpretation of the Second Amendment that prohibits *any* dispossession laws, whether applied to violent or non-violent criminals. In contrast to isolated proposals for limited restrictions on federal power in the three ratifying

96. *See id.* (quoting Marshall, *supra* note 28, at 698, 727–28; Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 LAW & CONTEMP. PROBS. 151, 161 (1986)).

97. Marshall, *supra* note 28, at 698–99.

98. *Id.* at 707–08.

99. *Id.* at 708–09.

100. *Binderup*, 836 F.3d at 369 (Hardiman, J., concurring in part and concurring in the judgments).

101. *Id.* at 368.

conventions,[102] there were many statements by proponents of the Constitution implying that such a provision was not needed because the new federal government was not being given any authority that could be used to infringe on the right to keep and bear arms.[103] The Second Amendment could have been regarded as a confirmation of that interpretation of the original Constitution, which would help explain why the ratification of the Amendment was completely noncontroversial.

Needless to say, the courts are not going to rule, post-*McDonald*, that the Second Amendment protects the right of violent criminals to possess dangerous weapons. But that impossibility is largely an artifact of the Supreme Court's doctrine of substantive due process, which makes every jot and tittle of the Second Amendment's restrictions on the federal government equally applicable to the states. That doctrine imperiously demands an interpretation of the constitutional right to arms that resolves questions that did not arise until long after the adoption of either the Second or the Fourteenth Amendment.

Notwithstanding the paucity of historical support for the categorical rule that Judge Hardiman proposed, the Supreme Court could of course choose to adopt an analysis like the one on which he relied. But in doing so, would the Justices really be attempting to interpret the constitutional text in the light of its history? I think not. Rather, the Court would be devising a history-and-tradition rationale for an intuitively appealing rule that could more appropriately be justified by a means-end analysis tied to the text and purpose of the Second Amendment. Judge Hardiman apparently believed that the approach he took was implied by *Heller*.[104] I am confident that he was mistaken, and I am even more confident that the Supreme Court would not be bound by this debatable interpretation of *Heller*, even if it were a more plausible interpretation than it is.

IV. A BETTER WAY

Judges Diane Sykes and Amy Coney Barrett of the Seventh Circuit have developed an analytical framework that is superior to any of the approaches taken in *Binderup*, including Judge Hardiman's.[105]

---

102. *See* MASSACHUSETTS DEBATES, *supra* note 90, at 86; SCHWARTZ, *supra* note 88, at 665, 761.

103. *See, e.g.*, THE FEDERALIST NO. 46 (James Madison), NO. 84 (Alexander Hamilton).

104. *See Binderup*, 836 F. 3d at 358 (Hardiman, J., concurring in part and concurring in the judgments) ("By contrast, we would hold—consistent with *Heller*—that non-dangerous persons convicted of offenses unassociated with violence may rebut the presumed constitutionality of [the challenged statute] on an as-applied basis, and that when a law eviscerates the core of the Second Amendment right to keep and bear arms (as [the challenged statute] does by criminalizing exercise of the right entirely), it is categorically unconstitutional.").

105. My focus on opinions by Sykes and Barrett is meant to be illustrative, not to suggest that they are the only circuit judges who have issued well thought out analyses. *See, e.g.*, Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J., 910 F.3d 106, 126 (3d Cir. 2018) (Bibas, J.,

In *United States v. Skoien*,[106] the Seventh Circuit upheld a conviction under a federal statute that imposes a lifetime firearms disability on individuals who have been convicted of a "misdemeanor crime of domestic violence."[107] After suggesting that persons convicted of any crime whatsoever are outside the scope of the Second Amendment, the majority purported to rest its decision on something like intermediate scrutiny.[108] In dissent, Judge Sykes briefly reviewed the relevant academic literature and found that the inconclusive historical evidence does not establish that domestic-violence misdemeanants are wholly excluded from the protection of the Second Amendment as originally understood.[109] Accordingly, she suggested, courts have little choice but to apply means-end scrutiny, and she read *Heller* to point toward choosing from among "the Court's 'intermediate' standards of judicial review."[110]

Writing for the court in *Ezell v. City of Chicago*,[111] a case involving a ban on firing ranges, Judge Sykes presented a detailed discussion of how courts should employ a means–end analysis in cases where the historical evidence does not support a categorical rule of the kind that Judge Hardiman would later adopt in *Binderup*.[112] Her conclusion, briefly summarized, was as follows:

> [I]f the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected—then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights. . . . Deciding whether the government has transgressed the limits imposed by the Second Amendment—that is, whether it has "infringed" the right to keep and bear arms—requires the court to evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve. Borrowing from the Court's First Amendment doctrine, the rigor of this judicial review will depend on how close the law

---

dissenting) (insisting that the government should be required to produce real evidence that a challenged law furthers an important government aim and is tailored to that aim).

106. 614 F.3d 638 (7th Cir. 2010) (en banc).

107. *Id.* at 645 (upholding the constitutionality of 18 U.S.C. § 922(g)(9)).

108. *Id.* at 640–42.

109. *Id.* at 650–51 (Sykes, J., dissenting).

110. *Id.* at 651 n.12. Because she did not believe that the government had carried its burden of proof under heightened scrutiny, she would not have upheld the conviction. Judge Frank Easterbrook's majority opinion had relied on extra-record evidence, which the defendant had not had an opportunity to contest, and Judge Sykes refrained from opining on whether the government *could* meet its burden under the applicable standard of review. *Id.* at 650–51.

111. 651 F.3d 684 (7th Cir. 2011).

112. *Id.* at 703.

> comes to the core of the Second Amendment right and the severity of the law's burden on the right.[113]

In *Kanter v. Barr*,[114] a felon whose predicate crime was mail fraud brought an as-applied challenge to the federal felon-dispossession statute.[115] A majority of the panel declined to decide whether the founders were concerned with dangerousness or with lack of virtue, and rejected the challenge after applying means-end scrutiny.[116] Judge Barrett's careful analysis in dissent extended Judge Sykes's analysis in *Skoien*.[117]

Barrett began with a thorough refutation of the "virtuous citizenry" theory, which holds that the founding generation regarded the right to keep and bear arms as one that is relinquished on conviction for any felony.[118] She concluded that the available historical evidence shows that legislatures at the time sought to disarm classes of people who were considered dangerous in one way or another.[119] That general proposition is broadly consistent with the proposals from three state ratifying conventions and with many examples involving blacks, Indians, and suspected British sympathizers who refused to sign loyalty oaths.[120]

Implicitly recognizing that this history settles almost nothing about the issue that was before the court, Judge Barrett turned immediately to the kind of means-end scrutiny developed by Judge Sykes in *Skoien* and *Ezell*.[121] Rather than mechanically reciting the standard tiers-of-scrutiny formulas, she suggested that a total and permanent deprivation of the right to possess arms would require, at a minimum, that it be "substantially related" to the government's manifestly strong interest in preventing future gun violence, and that it be "closely tailored" to that goal.[122] She then rejected the adequacy of the government's effort to show that mail fraud is a reliable predictor of future violence, and noted that the government presented no evidence that this particular defendant had shown a proclivity for violence.[123]

The *Heller* opinion was no doubt meant to signal that the first places to look for the meaning of the Second Amendment are the text of the Constitution and the historical evidence that bears on how it was, or

---

113. *Id.*
114. 919 F.3d 437 (7th Cir. 2019).
115. *Id.* at 440.
116. *Id.* at 447, 451.
117. *See id.* at 451–69 (Barrett, J., dissenting).
118. *Id.* at 462–64.
119. *Id.* at 464–65.
120. *Id.* at 454–58.
121. *Id.* at 465–66 (citing Ezell v. City of Chicago, 651 F.3d 684, 892 (7th Cir. 2011); United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010)).
122. *See id.* at 467–68.
123. *Id.* at 468–69.

would have been, understood by those who enacted it. Judges Sykes and Barrett have been faithful to that sensible teaching. Their opinions are also consistent with the principle that reasonably definitive answers supplied by those sources are binding on judicial interpreters. But rather than read more into the sources than they contain, as I believe Judge Hardiman did, Judges Sykes and Barrett performed means-end analyses that conscientiously sought to respect what Justice Scalia called the "interest-balancing by the people" that is reflected in the Second Amendment.[124]

V. JUDGE KAVANAUGH'S REJECTION OF MEANS-END ANALYSIS

After *Heller*, the District of Columbia enacted a complicated new law designed to restrict civilian access to guns as much as possible in light of that decision. In *Heller v. District of Columbia* (*Heller II*),[125] the named plaintiff in the Supreme Court case, along with other individuals, challenged three elements of the new scheme: (1) a requirement that gun owners register each of their firearms with the government, and that they meet numerous conditions in order to register the gun; (2) a ban on a wide range of semi-automatic firearms; and (3) a ban on any magazine with a capacity of more than ten rounds.[126]

The D.C. Circuit majority held that the basic registration requirement was valid because it was similar to longstanding regulations that *Heller* had approved, and had no more than a de minimis effect on the plaintiffs' constitutional rights.[127] Finding that the other provisions of the law were subject at most to intermediate scrutiny, the majority upheld some and remanded others for further consideration by the court below.[128]

In dissent, then-Judge Kavanaugh contended that *Heller* had rejected any use of a tiers-of-scrutiny approach.[129] Instead, he argued, all cases must be decided by the Constitution's "text, history, and tradition (as well as by appropriate analogues thereto when dealing with modern weapons and new circumstances . . .)."[130] Justice Scalia's opinion does contain a number of passages endorsing judicial recourse to history and tradition, and no passages expressly endorsing the tiers-of-scrutiny approach.[131] There are also passages denouncing Justice Breyer's use, in his *Heller* dissent, of a kind of intermediate-scrutiny analysis that Justice Scalia

124. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).
125. 670 F.3d 1244 (D.C. Cir. 2011).
126. *Id.* at 1248–49.
127. *Id.* at 1254–55.
128. *Id.* at 1257, 1259–60.
129. *Id.* at 1271 (Kavanaugh, J., dissenting).
130. *Id.*
131. *See* District of Columbia v. Heller, 554 U.S. 570, 584, 598, 605 (2008).

characterized as "freestanding" interest–balancing.[132] Justice Samuel Alito's plurality opinion in *McDonald* reiterated *Heller*'s rejection of Justice Breyer's proposed interest-balancing test, and denied his claim that incorporation will require judges "to make difficult empirical judgments in an area in which they lack expertise."[133]

Heller emphatically rejected Justice Breyer's "judge-empowering" form of interest-balancing,[134] but the Court did not condemn the tiers-of-scrutiny scheme specifically or means-end analysis more generally. Justice Scalia expressly ruled out the use of rational-basis review, but remained inscrutably vague about the applicability of traditional strict and intermediate scrutiny.[135] Unlike Justice Breyer's unconstrained cost-benefit analysis, however, means-end analysis (whether or not conducted under the rubric of intermediate and strict scrutiny) does not inherently lead judges to misuse their power by deciding "on a case-by-case basis whether the [constitutional] right is *really worth* insisting upon."[136] Notwithstanding the impression that might be created by Justice Scalia's characteristically colorful rhetoric, *Heller* did not expressly or by implication forbid the use of means-end scrutiny. Whatever label one puts on such scrutiny, it is undeniably true that it entails some form of interest-balancing. However, it need not conflict with what Justice Scalia rightly characterized as the interest-balancing conducted by the people when they adopted the Second Amendment. On the contrary, a conscientious judge can seek to discover how competing legitimate interests should be balanced in light of the constitutional text and what is known about the purposes of the provision. Judges Sykes and Barrett have shown how this can be done.

Why would then-Judge Kavanaugh have thought that means-end scrutiny should be shunned? Probably because it can so easily be perverted into free-wheeling judicial policymaking, as it was in the hands of Justice Breyer.[137] Elsewhere, the Supreme Court has gone so far as to apply rational basis review while purporting to apply strict scrutiny.[138] So the labels that judges put on their interest-balancing obviously do not have much constraining effect, if any. But does history-and-tradition truly offer a superior alternative? If that approach were always a reliable

---

132. *Id.* at 634–35.

133. McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2015).

134. *Heller*, 554 U.S. at 634.

135. *See id.* at 628–29 (asserting without explanation that the handgun ban would fail constitutional muster "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights . . . ."); *see also id.* at 628 n.27 (rational-basis review is inapplicable to enumerated rights).

136. *Id.* at 634.

137. *See id.* at 704 (Breyer, J., dissenting).

138. *See* Nelson Lund, *The Rehnquist Court's Pragmatic Approach to Civil Rights*, 99 NW. U.L. REV. 249 (2004) (discussing Grutter v. Bollinger, 539 U.S. 306, 380 (2003)).

method of discovering and preserving the balance that the people struck when they ratified the Second Amendment, as it no doubt sometimes is, there might never be a good reason to resort to means-end analysis. Means-end scrutiny is certainly prone to result-oriented manipulation, but so is the interpretation of history and tradition (as in the adoption by some judges of the "virtuous citizenry" myth).

The *Heller* opinion itself failed to subject D.C.'s handgun ban (or other modern gun control laws it discussed) to a genuine history-and-tradition analysis. Whereas that opinion illustrates the limited usefulness of history and tradition, Kavanaugh's dissent in *Heller II* illustrates the acrobatics required to treat *Heller* as a precedent that requires the avoidance of means-end analysis.

He began by arguing that D.C.'s entire registration and licensing scheme is unconstitutional because it is not a "longstanding" regulation.[139] While conceding that registration requirements imposed on gun *sellers* are longstanding, he pointed out that there is no tradition of imposing such requirements on gun *owners*.[140] He added that the city's licensing requirements, which are inseparable from the registration requirement, are similarly novel and therefore also invalid.[141] This entire analysis rests on a misreading of the dictum in *Heller* that approved a short list of existing regulations. *Heller* merely *characterized* certain specific regulations as longstanding, and provisionally approved them. The Court did not so much as suggest either that all longstanding regulations are ipso facto valid or that all novel regulations are ipso facto invalid.

Nor would it make any sense to say that recently adopted regulations are always unconstitutional. How "longstanding" must a regulation be in order to survive under such a test? Because there were virtually no restrictions on firearms during the founding period, and very few before the twentieth century, no practicable definition of this vague term could have any real relation to the original understanding of the Second Amendment. In addition, once a "longstandingness" criterion was established, it would prevent the adoption of new regulations that are perfectly compatible with the text and purpose of the Second Amendment.[142]

---

139. Heller v. District of Columbia, 670 F.3d 1244, 1291 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("The fundamental problem with D.C.'s gun registration law is that registration of lawfully possessed guns is not 'longstanding.' Registration of all guns lawfully possessed by citizens in the relevant jurisdiction has not been traditionally required in the United States and, indeed, remains highly unusual today.").

140. *Id.* at 1292.

141. *Id.* at 1291, 1293.

142. *Cf.* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2085, 2102 (2019) (Gorsuch, J., concurring) (wondering how a longstandingness criterion could be compatible, in the

Judge Kavanaugh further concluded that D.C.'s ban on certain semi-automatic rifles is unconstitutional because (1) they are not meaningfully different from semi-automatic handguns, which *Heller* had already decided may not be banned, and (2) they have not traditionally been banned and are in common use today.[143] This reading of *Heller* is also technically flawed. The case involved a revolver, not a semi-automatic pistol,[144] and *Heller* did not say or imply that a ban that was limited to semi-automatic pistols would be unconstitutional. Moreover, with respect to "common use," Kavanaugh misread *Heller*'s statement that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[145] The awkward double negative in this sentence undoubtedly reflects the extreme care that Justice Scalia famously took with his use of the English language. He could easily have said that the Second Amendment protects all traditionally allowed weapons that are in common use today. But that is not what the quoted statement says or means. No one would think that a statement made by God that non–human animals will not be granted entrance to Heaven implies or even suggests that all human beings *will* be admitted. Nor does a rule that felons will not be admitted to the bar imply that all non–felons *will* be admitted. Whatever the Court may decide in the future, it has not yet said or implied that weapons in common use for lawful civilian purposes are ipso facto protected by the Second Amendment.

VI. *NEW YORK STATE RIFLE & PISTOL ASSOCIATION V. CITY OF NEW YORK*

New York City forbids its residents to keep a handgun at home without a permit.[146] The City also adopted a rule under which those who have a permit may generally not remove their weapon from the premises, except that they may carry an unloaded gun, in a locked container and separated from any ammunition, to one of seven licensed shooting ranges that currently exist in the city.[147] According to the complaint in this case, the plaintiffs want to take their guns to shooting ranges and competitions outside the city, and one of them wants to take his gun to a second home in upstate New York.[148] In response to their Second Amendment

---

Establishment Clause context, with the proposition that "[t]he Constitution's meaning is fixed, not some good-for-this-day-only coupon[]").

143. *Heller*, 670 F.3d at 1286–88 (Kavanaugh, J., dissenting).

144. Lund, *supra* note 43, at 1627 n.57.

145. District of Columbia v. Heller, 554 U.S. 570, 625 (2008).

146. N.Y. PENAL LAW § 265.01-b (McKinney 2019).

147. N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45, 51–52 (2d Cir. 2018). For purposes of this discussion, I will ignore the legal changes that were made in New York after certiorari was granted.

148. *Id.* at 52.

challenge, the government produced an affidavit from a local bureaucrat who speculated, without evidence, that the regulation reduces risks to public safety arising in "stressful situations."[149] The affidavit also maintained, without supporting evidence, that the regulation inhibits license holders from pretending to go to a firing range while taking their guns out of the city for some other purpose.[150] The Second Circuit upheld this unique regulation after purporting to apply intermediate scrutiny.[151]

If the Supreme Court reaches the merits, it should find this to be an even easier case than *Heller*, though not quite as easy as then-Judge Kavanaugh's D.C. Circuit dissent would suggest. New York's ban on carrying (i.e., "bearing") an inoperable weapon to almost all of the places where it may lawfully be possessed has no known historical precedent. Under Kavanaugh's interpretation of *Heller*, the novelty of the regulation should be enough to make it unconstitutional, just as he thought D.C.'s registration and licensing rules were invalid because they were not part of a longstanding tradition. Contrary to his interpretation, however, *Heller* neither declared nor implied that mere novelty is a sufficient reason to invalidate a statute, and it would be surprising if five members of the Supreme Court were to adopt that position.

Although the New York case is not as easy as Kavanaugh's D.C. Circuit dissent would suggest, it is significantly easier than *Heller*. In *Heller*, residents of the District of Columbia were forbidden to keep a handgun in their home, but they were permitted to possess unloaded rifles and shotguns, so long as the weapons were disassembled or secured with a trigger lock.[152] Given the Court's conclusion that the Second Amendment protects an individual right to keep firearms for self-defense, it could have upheld the handgun ban while disapproving the rule that prevented residents from keeping their long guns in a loaded and operable condition. The rationale for such a holding (misguided though it might have been) would essentially have been that the purpose of the right to keep arms is satisfied if citizens are permitted to possess a weapon that is adequate to defend against reasonably foreseeable threats.

The Court did not take that path in *Heller*, but neither did it explain why not. Just as the *Heller* Court apparently thought that civilians do not have a reasonable need for machineguns, it could have concluded that they do not have a reasonable need to possess handguns for the defense of their homes. Machineguns and handguns both create negative externalities that are not created by ordinary rifles and shotguns. Machineguns are prone to be fired indiscriminately, both by criminals intent on creating mass mayhem and by legitimate shooters who may

149. *Id.* at 63.

150. *Id.*

151. *Id.* at 64.

152. District of Columbia v. Heller, 554 U.S. 570, 574–76 (2008).

panic when confronted with a threat to their lives. Because of their concealability, handguns are especially useful to criminals and are tempting targets for thieves who help to supply the black market. *Heller* described some advantages of handguns over long guns for home defense,[153] but it could have concluded that these are more than offset by the negative externalities. The Court implicitly rejected this conclusion, but it did so without a supporting argument, based either on a means-end analysis of the kind associated with heightened scrutiny or on history and tradition.[154]

The Court could conclude that the New York regulation is invalid because it effectively destroys the right to bear arms, using reasoning like that advanced by Judges O'Scannlain and Griffith. Or, it could conclude that this regulation, unlike D.C.'s handgun ban, is so patently unjustified by any legitimate government interest that it cannot plausibly be thought to have any purpose other than to suppress the exercise of Second Amendment rights. An unloaded handgun in a locked container is manifestly less threatening to public safety than a myriad of everyday items that New Yorkers are permitted to carry in public, including chain saws, blow torches, baseball bats, and tire irons. Any of these could be used as a deadly weapon in "stressful situations," and all of them could be deployed for that purpose more quickly than an unloaded handgun in a locked container.

New York produced no evidence that its regulation could have any detectable effect on public safety. It does, however, have the perverse effect of requiring gun owners to leave their weapons unattended while they are away from home. That raises the risk that their weapons will be stolen by burglars who supply the black market. The New York regulation might not survive even rational basis review, and it certainly could not be upheld under any form of means-end scrutiny that treated the Second Amendment as a meaningful part of the Constitution.

Alternatively, or in addition, the Court could find that New York has infringed the right to keep a weapon at home for self–defense. In *Ezell*, the Seventh Circuit read *Heller* to imply that the Second Amendment includes within its protection the right to become proficient in using one's weapon, which was violated by a ban on firing ranges within the city limits.[155] Although Chicago left its residents free to use firing ranges in nearby jurisdictions, the court held that the Second Amendment was violated because the city failed to show that firing ranges create any serious risk to public safety.[156] The New York transport regulation puts

153. *Heller*, 554 U.S. at 629.

154. Lund, *supra* note 24, at 1374–76.

155. Ezell v. City of Chicago, 651 F.3d 684, 704 (7th Cir. 2011).

156. *Id.* at 709.

similarly unjustified restrictions on access to firing ranges outside the City, and the Supreme Court could invalidate it using a similar rationale.

The *Ezell* Court reached its conclusion using a means-end analysis that Judge Sykes characterized as something close to strict scrutiny.[157] Supplementing a history-and-tradition argument in the New York case with such a means-end analysis could be done in a way that preserves *Heller*'s ambiguity about the proper mode of adjudication for Second Amendment cases. The Court could, for example, just repeat *Heller*'s declaration that the challenged regulation would fail constitutional muster "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights . . . ."[158] But it would be somewhat surprising for the Justices to invest their carefully husbanded resources in an opinion that does no more than correct the Second Circuit's error in upholding a regulation that is both extreme and unique.[159] If they were to announce that means-end scrutiny is categorically foreclosed in Second Amendment cases, they would set the Court's nascent Second Amendment jurisprudence on a path that will inevitably lead to misuse of the historical sources. A Court that is only beginning to revive the now-controversial practice of taking the original meaning of the Constitution seriously should be especially careful to avoid such abuses.

CONCLUSION

Then-Judge Kavanaugh's rejection of any role for means-end analysis in Second Amendment cases was misguided. To be sure, the approach he favored can and should resolve important foundational questions. Textual analysis and historical sources are sufficient, for example, to support *Heller*'s conclusion that the Second Amendment protects an individual right to have weapons for self-defense, rather than a collective right to maintain a militia. The same is true of the threshold issue in public-carry cases, which is whether the Second Amendment protects a right to bear a gun outside one's home. Once these threshold questions are appropriately resolved, some regulations will come so close to eliminating the protected right that their invalidity will follow almost inexorably. That is how the *Heller* Court seemed to regard D.C.'s handgun ban, and the Court could easily follow Judges Griffith and O'Scannlain in taking the same view of regulations that prohibit almost all civilians from carrying a loaded firearm in public. But the vast majority of regulations sweep less broadly, and litigated cases will typically involve questions about the manner in which government may restrict the freedom to keep or bear arms in the interest of promoting public safety. There is virtually no relevant

157. *Id.* at 708–09.

158. *Heller*, 554 U.S. at 628.

159. *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45, 64 (2d Cir. 2018).

constitutional history bearing directly on most of these questions. Pretending to find the answers in history and tradition will encourage either covert judicial policymaking, which is just what reliance on history and tradition is supposed to prevent, or ill-supported historical stories in defense of results that could honestly and responsibly be justified through normal means-end scrutiny. Judges Sykes and Barrett are among the judges who have shown how means-end scrutiny can be deployed in a way that is respectful of both the supremacy of the Constitution and of the modest role given to judges by the Constitution. The Supreme Court should follow their lead.