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## Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second

**ABSTRACT.** In *District of Columbia v. Heller* and *McDonald v. City of Chicago*, the Supreme Court made seemingly irreconcilable demands on lower courts: evaluate Second Amendment claims through history, avoid balancing, and retain as much regulation as possible. To date, lower courts have been unable to devise a test that satisfies all three of these conditions. Worse, the emerging default candidate, intermediate scrutiny, is a test that many jurists and scholars consider exceedingly manipulable.

This Article argues that courts could look to the Supreme Court's Seventh Amendment jurisprudence, and in particular the Seventh Amendment's "historical test," to help them devise a test for the Second. The historical test relies primarily on analogical reasoning from text, history, and tradition to determine the constitutionality of any given practice or regulation. Yet the historical test is supple enough to respond to the demands of a twenty-first-century judicial system. As such, it provides valuable insights, but also its own set of problems, for those judges and scholars struggling to implement the right to keep and bear arms.

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## INTRODUCTION

In *District of Columbia v. Heller*,<sup>1</sup> and its sequel, *McDonald v. City of Chicago*,<sup>2</sup> the Court posed a riddle. The riddle can be restated like this:

What test adheres to the Second Amendment's past, rejects balancing that right against present government interests, and preserves all but the most draconian regulations for the future?

The Court's nascent Second Amendment jurisprudence is a riddle because while the Court demands the most scrupulous investigation of history and a near-blanket prohibition on balancing, it also states that a number of modern regulations are "presumptively lawful"<sup>3</sup> despite their dubious historical provenance or their interest-balancing origins.

The Court's challenge has left many judges frustrated because, as discussed in more detail below, the Court's demands appear to be facially irreconcilable. Some judges have answered by mechanically citing broad dicta in *Heller* and *McDonald* concerning these "presumptively lawful" regulations,<sup>4</sup> rather than conducting the historical inquiry the Court ostensibly demands. Other judges have simply ignored the Court's rejection of balancing tests. Instead, they have allowed the right to keep and bear arms to be gobbled up by intermediate scrutiny or similar tests that weigh serious, important, or compelling government interests against Second Amendment commands.<sup>5</sup>

This Article argues that these lower court efforts to fashion a test simply cannot be squared with the Court's insistence on historical fidelity, its rejection of balancing, and the preservation of most reasonable firearm regulations. It assumes that the Court is serious when it instructs lower courts to avoid tests that call for any balancing at all, even if that means, as some lower court judges have said, eliminating the traditional levels-of-scrutiny analysis in Second

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1. 554 U.S. 570 (2008) (holding that the Second Amendment guarantees an individual the right to keep and bear arms for self-defense in the home).
  2. 130 S. Ct. 3020 (2010) (holding that the Second Amendment right to keep and bear arms is incorporated against the states through the Due Process Clause).
  3. *Heller*, 554 U.S. at 626 & n.26.
  4. *See id.* (identifying certain "longstanding prohibitions" as examples in a nonexhaustive list of "presumptively lawful regulatory measures"); *see also McDonald*, 130 S. Ct. at 3047 (stating that the Court's holdings in both *Heller* and *McDonald* "[do] not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms'" (quoting *Heller*, 554 U.S. at 626-27)); *infra* Section I.A.
  5. *See infra* Section I.B.

Amendment cases.<sup>6</sup> It suggests that one way of reexamining the riddle is to refer to the Seventh Amendment right to trial by jury, one of the most historically determined of constitutional provisions.<sup>7</sup>

The Seventh Amendment requires that federal courts “preserve[]”<sup>8</sup> a preexisting right to a jury in suits at common law. In much the same way, the Court has stated that the Second Amendment preserves a “pre-existing” right to keep and bear arms for the core purpose of self-defense.<sup>9</sup> Simultaneously, the Seventh Amendment does not operate with traditional levels of scrutiny or open-ended balancing; and yet, the “preserved” right to a trial by jury does not require that every detail of 1791 common law be transposed to the twenty-first century.<sup>10</sup>

Instead of levels of scrutiny or balancing, the Court has devised a “historical test” for the Seventh Amendment. The Court’s historical test places great, but not exclusive, reliance on analogical reasoning from text, common law history, or tradition to determine the constitutionality of any given practice or regulation. That process of reasoning by historical analogy drives the Seventh Amendment inquiry in a way that far surpasses the Court’s approach to other provisions in the Bill of Rights. As such, the Court’s historical test for the Seventh Amendment offers lessons, but also presents its own set of problems, for lower courts struggling to implement the Second Amendment right to keep and bear arms.<sup>11</sup>

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6. See *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir.) (Elrod, J., dissenting) (rejecting standards-of-scrutiny analysis in Second Amendment cases), *opinion withdrawn and superseded on reh’g* by 682 F.3d 361 (5th Cir. 2012); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1280-81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (citing Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939, 967 (2011)); *Gowder v. City of Chicago*, No. 11-CV-1304, 2012 WL 2325826, at \*6-7 (N.D. Ill. June 19, 2012) (arguing that *Heller* and *McDonald* require a historical approach).
  7. My argument is not intended to be particularly normative. Although I believe that any Second Amendment test will have to contend with history, I am not certain that the Court will abandon levels of scrutiny in its ultimate articulation of a test. Instead, this Article assumes that the Court is serious in its demand for a test that minimizes or eliminates balancing and explores what such a test might look like and what benefits and hazards might accompany it.
  8. U.S. CONST. amend. VII.
  9. See *Heller*, 554 U.S. at 592 (“[I]t has always been widely understood that the Second Amendment . . . codified a *pre-existing* right.”).
  10. See, e.g., *Colgrove v. Battin*, 413 U.S. 149, 156 (1973) (stating that the Seventh Amendment does not include the common law tradition of a twelve-member jury); *Galloway v. United States*, 319 U.S. 372, 390 (1943) (stating that the Seventh Amendment does not require all the “procedural incidents” of the common law jury); see also *infra* Subsection II.A.2.
  11. See *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting) (“[T]he proper interpretive approach [in Second Amendment cases involving new weapons or circumstances] is to

This Article is likely to appeal to lawyers, judges, and scholars amenable to a new approach to Second Amendment questions, one that reduces judicial reliance on hotly disputed empirical evidence surrounding the right to keep and bear arms, but one that also avoids a calcified method that is unable to address the realities of modern firearm technology and culture.<sup>12</sup> The Court's implementation of the Seventh Amendment provides a counterintuitive but important resource in this regard. The Justices appear to have reached consensus that the Seventh Amendment's text demands a level of historical engagement<sup>13</sup> that exceeds what other, more open-textured provisions of the Bill of Rights require.<sup>14</sup> They also all appear to agree that it is untenable to woodenly "preserve" the common law right to a jury trial as it existed in 1791.<sup>15</sup> As a consequence, the Court has converged on a historical test that attempts to remain true to the text, history, and tradition of the Seventh Amendment, but is supple enough to address the demands of a twenty-first-century judicial system.

The Court's effort to implement the Seventh Amendment through a historical test is instructive because *Heller* and *McDonald* appear to commit the Court to a similar history-centered approach in Second Amendment cases. All members of the Court seem wary of literal application of the text,<sup>16</sup> but the

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reason by analogy from history and tradition."); see also *Houston*, 675 F.3d at 451–52 (Elrod, J., dissenting) (discussing Judge Kavanaugh's dissent in *Heller II*); *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting) (noting that, at oral argument, Chief Justice Roberts remarked on the "lineal descendents" of constitutionally protected arms *as well as* constitutionally permissible regulations).

12. Second Amendment scholarship is currently awash in speculation about what level of scrutiny will ultimately govern Second Amendment challenges. See, e.g., Lawrence Rosenthal & Joyce Lee Malcolm, Colloquy Debate, *McDonald v. Chicago, Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 439 & n.12 (2011) (stating that commentators are "sharply divided" on the correct form of scrutiny and providing citations). Few judges or scholars, however, have been able to deviate from the traditional three-tiered standards of review, and even fewer appear to take seriously the Court's avowed rejection of tests that require the idiosyncratic weighing of government interests. See *infra* Section I.A.
13. See *infra* Section II.B.
14. See *infra* Subsection II.A.2. Compare U.S. CONST. amend. VII (requiring the jury right to be "preserved"), with U.S. CONST. amend. V (requiring "just" compensation for takings), and U.S. CONST. amend. VIII (forbidding "cruel and unusual" punishment).
15. See *infra* Subsection II.A.2 (discussing how the Court has expanded the coverage of the Seventh Amendment to causes of action that did not exist in 1791 and has permitted new forms of procedure that depart from late eighteenth-century common law traditions).
16. See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (stating that the Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"); *id.* at 681 (Breyer, J., dissenting) ("[T]he protection the Amendment provides is not absolute . . ."). For more on the strict grammatical meaning of the terms "keep," "bear," and "arms," see *infra* Subsection III.A.1.

*Heller* majority and dissents differ on the method of establishing limits. The *Heller* majority insists that the scope of the right is to be determined by history, and they categorically reject the dissenters' use of balancing tests.<sup>17</sup> But they refuse to explain how such a history-centered test may operate in litigation. To the extent that the Court is serious about rejecting balancing and embracing history, "borrowing"<sup>18</sup> from the Court's Seventh Amendment jurisprudence can provide clues about how courts may craft a history-centered test for the Second Amendment.

This Article is likely to appeal on a broader scale as well. The Seventh Amendment, the Second Amendment, and other areas of constitutional law present challenges about how one can create a jurisprudence from the reliquary of history that is both durable and principled. Those challenges include: Whose history do we consult when construing constitutional text? How much history do we consult? What do we do when history does not give us a clear answer? And, in particular, what rules govern when, and at what level of generality, to identify and examine a historical analogue for purposes of constitutional decisionmaking? These questions are as old as the Constitution itself.<sup>19</sup> But they have acquired particular salience in the last twenty years, as

17. See *Heller*, 554 U.S. at 634-35 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them . . . ."); see also *infra* Section I.A, Subsection III.A.2.

18. See Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463 (2010) (defining constitutional borrowing as "an interpretive practice characterized by a deliberate effort to bridge disparate constitutional fields for persuasive ends").

19. In 1799, for example, James Madison raised the following questions on how to construe the term "common law" as it applied to constitutional text:

Is it to be the common law with or without the British statutes?

. . . .

[W]hat period is to be fixed for limiting the British authority over our laws?

Is it to be the date of the eldest or the youngest of the Colonies?

Or are the dates to be thrown together and a medium deduced?

Or is our independence to be taken for the date?

Is . . . regard to be had to the various changes in the common law made by the local codes of America?

Is regard to be had to such changes, subsequent as well as prior to the establishment of the Constitution?

Is regard to be had to future as well as to past changes?

Is the law to be different in every State as differently modified by its code, or are the modifications of any particular State to be applied to all?

. . . .

Questions of this sort might be multiplied with as much ease as there would be difficulty in answering them.

JAMES MADISON, *Report on the Resolutions*, in 6 THE WRITINGS OF JAMES MADISON 341, 379 (Gaillard Hunt ed., 1906); see also Bernadette Meyler, *Towards a Common Law Originalism*,

scholars both inside and outside the interpretive movement known as “originalism” try to use common law traditions to give text determinate meaning, not only in Second<sup>20</sup> and Seventh Amendment cases,<sup>21</sup> but also in other areas of constitutional law<sup>22</sup> and theory.<sup>23</sup> For those engaging with these questions, this Article is also likely to be of interest.

The Article progresses as follows: Part I discusses the incompatible demands that the Court’s *Heller* and *McDonald* decisions place on lower courts. Specifically, it considers the demand that judges conduct a meticulous historical evaluation of the Second Amendment’s text and context, reject balancing tests, and yet preserve a nonexhaustive list of presumably constitutional restrictions on firearms. Part II explores how the Court has developed a Seventh Amendment doctrine designed to preserve the right to a trial by jury at common law in its essential features, but which remains sufficiently flexible to deal with the demands of the modern civil justice system. Assuming the Court is serious about a history-centered approach to the Second Amendment, Part III explains how “constitutional borrowing”<sup>24</sup>—drawing on

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59 STAN. L. REV. 551, 574 (2006) (quoting and discussing same).

20. See, e.g., Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL’Y REV. 325 (2009) (critiquing originalism as applied in *Heller*); Lawrence B. Solum, District of Columbia v. *Heller and Originalism*, 103 NW. U. L. REV. 923 (2009) (cataloguing varieties of originalism and their use in *Heller*).
21. See, e.g., Brian T. Fitzpatrick, *Originalism and Summary Judgment*, 71 OHIO ST. L.J. 919 (2010) (discussing Seventh Amendment originalism and Rule 56 of the Federal Rules of Civil Procedure); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (discussing originalist theories of the Seventh Amendment).
22. See, e.g., *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (using eighteenth-century trespass law to determine the minimum content of the word “search” in the Fourth Amendment); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000) (discussing originalist theories of the Fourth Amendment); see also Stephen A. Siegel, *The Federal Government’s Power To Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998) (conducting an originalist inquiry into color-conscious federal laws).
23. These same questions drive the debate about the nature and very identity of originalism, from “Originalism 1.0” to “Originalism 2.0” and beyond. See Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL’Y 5 (2011) (using these descriptors for originalism and discussing the different points of division between and among these theories); see also, e.g., Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011) (arguing that “New Originalism” is substantially more defensible than “Old Originalism,” but that this benefit has come at the expense of judicial restraint); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 711 (2011) (arguing that originalists’ rejection of the claims of “new new originalists’ . . . undermine[s] their claims to neutrality”).
24. See generally Tebbe & Tsai, *supra* note 18, at 463 (offering a definition of “constitutional borrowing”).



the Seventh Amendment's historical test—could help to implement the Second Amendment's right to keep and bear arms. In particular, it explains how the Court's historical test for the Seventh Amendment can help structure an analysis of three reoccurring post-*Heller* issues: (1) the kinds of behavior that trigger Second Amendment protection; (2) the kinds of regulations that qualify as an infringement of that right, assuming the behavior falls within the scope of the Second Amendment; and (3) the character of judicially cognizable material to determine (1) and (2). Part III demonstrates how holistic constitutional interpretation, the Court's stated methodological commitments, and the challenge of reasoning by analogy in Second Amendment cases can justify borrowing from Seventh Amendment doctrine, which represents one of the few history-centered methodologies available in the constitutional canon. It then explores what a historical test might look like for purposes of the Second Amendment, assuming the Court's methodological commitments hold fast. Part IV outlines the potential benefits of this approach, notes its limitations, and recognizes that while the Seventh Amendment historical test may help resolve some difficulties in implementing the Second Amendment, it may aggravate others.

## I. HELLER'S RIDDLE

In *District of Columbia v. Heller* and *McDonald v. City of Chicago*, a five-to-four majority of the Supreme Court held that the right to keep and bear arms for self-defense in the home is a fundamental individual right that applies equally to federal, state, and local governments.<sup>25</sup> These decisions marked the end of several decades of public and often acrimonious debate about the meaning of the Second Amendment. Unfortunately, having announced the right, the Court has offered little instruction as to its administration. With no clear agreement on a test, the Court's pronouncements have tended toward the sententious<sup>26</sup> or the oracular.<sup>27</sup> Lower courts, perplexed and without the luxury

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25. Although *McDonald* is a plurality decision with respect to the manner of incorporating the Second Amendment against the states, its holding that the Amendment applies to state governments commanded a five-Justice majority. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3058-59 (2010) (Thomas, J., concurring in part and concurring in the judgment) (agreeing with the incorporation of the Second Amendment, but through the Privileges or Immunities Clause rather than the Due Process Clause).

26. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (“The very enumeration of the [Second Amendment] right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”).

27. *Id.* at 636 (“The Constitution leaves the District of Columbia a variety of tools for

of a discretionary docket, have permitted Second Amendment doctrine to edge ever nearer to that least satisfactory of all tests, intermediate scrutiny. This Part explores that progression.

A. *The High Court Challenge*

The text of the Second Amendment states: “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.”<sup>28</sup> In *Heller*, the Court stated that the right to keep and bear arms predates the Constitution (reflected in the language, “the right of the people . . . shall not be *infringed*”).<sup>29</sup> According to the Court, the right is a legacy from our English forebears.<sup>30</sup> Its lineage can be traced back to the Declaration of Right in England in the seventeenth century<sup>31</sup> and to Blackstone’s *Commentaries*.<sup>32</sup> Some of the Court’s more sweeping passages suggest that it would be a pre-political and natural right, even if it had not been recognized in the text of the Second Amendment.<sup>33</sup>

Methodologically, the Court purports to require the most exacting historical inquiry into any question concerning the right to keep and bear

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combating th[e] problem [of handgun violence]. . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”); see also *McDonald*, 130 S. Ct. at 3047 (assuring municipalities that the Second Amendment “does not imperil every law regulating firearms”).

28. U.S. CONST. amend. II.

29. *Id.* (emphasis added); see *Heller*, 554 U.S. at 592 (“[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’”).

30. *Heller*, 554 U.S. at 593 (“By the time of the founding, the right to have arms had become fundamental for English subjects.”); *id.* at 599 (stating that the Second Amendment codified “a right ‘inherited from our English ancestors’” (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897))).

31. *Id.* at 593.

32. *Id.* at 593-94.

33. *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*136, \*139-40; and BOSTON UNDER MILITARY RULE (1768-1769): AS REVEALED IN A JOURNAL OF THE TIMES 79 (Oliver Morton Dickerson ed., 1936), which refer to the right as natural); Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131, 136 (2008) (arguing that Justice Scalia’s opinion suggests that the right to keep and bear arms is natural and would have restricted government even if the Framers had not specifically included it in the Constitution). For a discussion of how *Heller* uses natural law in its textual construction, see Diarmuid F. O’Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1523-26 (2011).

arms.<sup>34</sup> Commentators across the political spectrum generally acknowledge that the Court's Second Amendment jurisprudence, especially *Heller*, constitutes the apogee of originalism.<sup>35</sup> The originalist inquiry requires that lower courts evaluate constitutional terms like “keep” or “bear” or “arms” in light of historical sources and context.<sup>36</sup> The Court also appears to forbid judges from resolving any question about the scope of the Second Amendment by weighing government interests. As Justice Alito wrote in *McDonald*, “[W]e expressly reject[] the argument that the scope of the Second Amendment right should be determined by judicial interest balancing . . . .”<sup>37</sup> Justice Scalia in *Heller* insisted that no open-ended government interest analysis is permissible because the

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34. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (stating that the operative question in incorporation analysis is whether the right is “deeply rooted in this Nation’s history and tradition” (citation omitted)); *Heller*, 554 U.S. at 579-95 (examining the meaning of the Second Amendment’s operative clause in light of eighteenth-century vocabulary and usage); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (observing that “historical meaning enjoys a privileged interpretative role in the Second Amendment context” (citing *Heller*, 554 U.S. at 625-26)); *United States v. Tooley*, 717 F. Supp. 2d 580, 584 (S.D. W. Va. 2010) (discussing the Court’s historical inquiry and standard of review in *Heller*); see also *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2503 (2011) (Scalia, J., concurring in part and dissenting in part) (finding that the Petition Clause of the First Amendment was intended to codify a “pre-existing individual right, which means that we must look to historical practice to determine its scope” (citing *Heller*, 554 U.S. at 579, 592)). But see *McDonald*, 130 S. Ct. at 3030-31 (declining to use the Privileges or Immunities Clause rather than the Due Process Clause to incorporate the Second Amendment).
35. See, e.g., Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659 (2009) (calling *Heller* “the most thoroughgoing originalist opinion in the Court’s history”); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1353 (2009) (noting that one passage from *Heller* is “almost enough to make an originalist stand up and cheer”); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 249 (2008) (referring to *Heller* as a “thoroughly originalist opinion”); see also Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1558-59 (2009) (discussing reactions to *Heller*). *McDonald v. City of Chicago* may present a retreat from that originalist commitment. The Court opted for a more prudential course when presented with a chance to overturn a long-maligned construction of the Fourteenth Amendment’s Privileges or Immunities Clause. See Neil S. Siegel, *Prudentialism in McDonald v. City of Chicago*, 6 DUKE J. CONST. L. & PUB. POL’Y (SPECIAL ISSUE) 16, 18-21 (2010) (noting the Court’s disdain for deciding *McDonald* based on the Privileges or Immunities Clause); cf. Greene, *supra* note 20, at 326 (observing that “even if *Heller* is a triumph for originalism, it might also be its high water mark”).
36. See *Heller*, 554 U.S. at 635 (observing that future cases will expand (and expound) upon the “historical justifications” for exceptions to Second Amendment protection); see also *McDonald*, 130 S. Ct. at 3036-38 (relying on *Heller* and discussing the historical understanding of the right to keep and bear arms); *Heller*, 554 U.S. at 579-94 (using historical sources to discern the meaning of the Second Amendment right).
37. *McDonald*, 130 S. Ct. at 3047 (referring to the Court’s decision in *Heller*).

Second Amendment right “is the very *product* of an interest balancing” that occurred at the Founding.<sup>38</sup>

Finally, the Court cautioned that its decisions should not have any effect on a list of “presumptively lawful” regulations.<sup>39</sup> These regulations include “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>40</sup> The Court did not describe what constitutes a “sensitive place,” which “conditions and qualifications” are constitutional as opposed to an infringement on constitutional rights, or even how one determines whether a regulation is lawful or not. Furthermore, this list is not exhaustive.<sup>41</sup> Other, unidentified regulations could fall within the “presumptively lawful” category, but the Court has decided to wait for future litigation to identify them.

The Court has thus left us with a jurisprudential puzzle: What Second Amendment test is faithful to history, rejects balancing, and keeps most existing regulations intact? It appears that no test can simultaneously satisfy all three requirements.<sup>42</sup> The Court demands fidelity to history. It also demands that most existing regulations be preserved. But, as commentators observe, the specific examples of “longstanding” regulations offered by the Court are not all that longstanding. Many of them were unknown in 1791.<sup>43</sup> For example, restrictions on gun possession by felons or the mentally ill appear to be twentieth-century innovations rather than relics of historical practice.<sup>44</sup> The

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38. *Heller*, 554 U.S. at 635. In *Heller*, Justice Scalia hedged as to whether traditional standards of scrutiny analysis would suffice. *Id.* at 628-29 & n.27, 634. Justice Alito in *McDonald* appears much more resolute. *McDonald*, 130 S. Ct. at 3047. As discussed below, however, even traditional modes of scrutiny contain balancing analysis. See *infra* Section I.B.

39. *Heller*, 554 U.S. at 626-27 & n.26.

40. *Id.* at 626-27.

41. *Id.* at 627 n.26 (“We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”).

42. See Nelson Lund, *Second Amendment Standards of Review in a Heller World*, 39 *FORDHAM URB. L.J.* (forthcoming) (manuscript at 20) (describing *Heller* as “so Delphic, or muddled” that it cannot supply clear answers to what standard of review to apply), <http://ssrn.com/abstract=2022011>.

43. Lund, *supra* note 35, at 1356-58 (questioning the historical provenance of restrictions on felons’ access to guns); Winkler, *supra* note 35, at 1563 (noting the relatively recent origin of restrictions on firearm possession by felons and the mentally ill, and in certain “sensitive place[s]”).

44. Rory K. Little, *Heller and Constitutional Interpretation: Originalism’s Last Gasp*, 60 *HASTINGS L.J.* 1415, 1427 (2009) (noting that while these exceptions “draw[] on commonsense and modern-day experience,” as a matter of originalist jurisprudence, they “come[] entirely out

provenance of age requirements is similarly murky.<sup>45</sup> It remains unclear how history is to be used to determine what regulations are presumptively lawful or longstanding.<sup>46</sup>

The Court also says that the history of the right to keep and bear arms shows that the right is fundamental and not subject to interest balancing.<sup>47</sup> But traditional tests for many fundamental rights are, in fact, balancing tests.<sup>48</sup> Speech, bodily integrity, and voting are all fundamental rights. These fundamental rights are evaluated by reference to levels of scrutiny.<sup>49</sup> And all traditional levels of scrutiny<sup>50</sup> require some explicit evaluation of the government interest. Strict scrutiny, for example, requires that a regulation be “narrowly tailored to promote a *compelling [g]overnment interest.*”<sup>51</sup> Intermediate scrutiny requires that a regulation be “substantially related to an *important governmental objective.*”<sup>52</sup> As Judge Kavanaugh wrote in his recent dissent in *Heller II*, these familiar types of scrutiny “involve at least some

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of thin air”).

45. See *United States v. Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009) (exploring Founding-era attitudes toward juveniles and noting “some evidence” that, in the Founding era, children would have been restricted from gun ownership on the basis that they lacked sufficient “virtue”).
46. For example, it remains to be seen how history can help determine the constitutionality of regulations on arsenals possessed by private business corporations, see Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 934-37 (2011), or forbidding firearms on airplanes, 49 U.S.C. § 46505 (2006).
47. *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008).
48. *Heller II*, 670 F.3d 1244, 1280 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“Strict and intermediate scrutiny are balancing tests and thus are necessarily encompassed by *Heller*’s more general rejection of balancing.”); see also *Duke v. Cleland*, 5 F.3d 1399, 1405 (11th Cir. 1993) (describing the Supreme Court’s approach to ballot-access cases as “a balancing test that ranges from strict scrutiny to a rational-basis analysis”); *Competello v. LaBruno*, No. Civ.A. 02-664, 2005 WL 1637907, at \*12 (D.N.J. July 12, 2005) (calling intermediate scrutiny “essentially a balancing test”).
49. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (speech); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (voting); *Washington v. Harper*, 494 U.S. 210, 223 (1990) (bodily integrity).
50. Traditional “levels” or “tiers” of scrutiny fall into three general types: strict scrutiny, intermediate scrutiny, and rational basis. *Heller*, 554 U.S. at 634 (describing these levels as “traditional[]”).
51. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (emphasis added).
52. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (emphasis added). A third type of scrutiny, rational basis review, requires only that a regulation “be rationally related to a legitimate governmental purpose.” *Id.* The Court has flatly rejected rational basis scrutiny for core Second Amendment rights. See *Heller*, 554 U.S. at 628 n.27.

assessment of whether the law in question is sufficiently important to justify infringement . . . . That’s balancing.”<sup>53</sup>

The *Heller* and *McDonald* majorities appear reluctant to permit judges to conduct *any* balancing,<sup>54</sup> even using these traditional modes of scrutiny.<sup>55</sup> (Judge Kavanaugh takes this position in *Heller II* and other judges have echoed his conclusion.<sup>56</sup>) Given the majorities’ reluctance to apply even well-established modes of scrutiny in *Heller* and *McDonald*, it is likely they will be even *more* skeptical of exotic new balancing tests in Second Amendment cases.<sup>57</sup> Even more perplexing, the quintessential government interest, public

53. *Heller II*, 670 F.3d at 1282 (Kavanaugh, J., dissenting).

54. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (“The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” (quoting *Heller*, 554 U.S. at 634)).

55. Justice Scalia, for one, believes these tests are susceptible to judicial manipulation. See *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.”). Chief Justice Roberts, both before and after his elevation to the Court, has repeatedly criticized tests with “open-ended rough-and-tumble . . . factors’ which ‘invit[e] complex argument in a trial court and a virtually inevitable appeal.” *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.) (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995)). For a discussion of the Roberts Court’s application of this jurisprudence, see Joseph Blocher, *Roberts’ Rules: Assertiveness and Rules-Based Jurisprudence*, 46 TULSA L. REV. 431 (2011). Professor Blocher observes that Chief Justice Roberts disparaged “open-ended” tests more than half a dozen times while in appellate practice. *Id.* at 431.

56. *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting) (stating that these cases “leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny”); see also *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir.) (Elrod, J., dissenting) (same (citing *Heller II*, 670 F.3d at 1271)), *opinion withdrawn and superseded on reh’g* by 682 F.3d 361 (5th Cir. 2012); *Gowder v. City of Chicago*, No. 11-CV-1304, 2012 WL 2325826, at \*7 (N.D. Ill. June 19, 2012) (endorsing a “text, history and tradition” approach).

57. For example, in *Madsen v. Women’s Health Center, Inc.*, Justice Scalia wrote an opinion, joined by Justices Kennedy and Thomas, in which he mocked the majority’s abortion-related speech test as “intermediate-intermediate scrutiny.” 512 U.S. 753, 791 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part). Compare *Madsen* with efforts to identify new levels of scrutiny for the Second Amendment, such as Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1133 (2000), which advocates “‘semi-strict’ scrutiny”; Mark Tushnet, *Permissible Gun Regulations After Heller: Speculation About Method and Outcomes*, 56 UCLA L. REV. 1425, 1426, 1429-30 (2009), which suggests that lower courts will apply a “rational basis with bite” standard of review; and Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within District of Columbia v. Heller*, 62 VAND. L. REV. 1535, 1571-74 (2009), which opts for “deferential strict scrutiny.” Patrick Charles has contributed to this discussion by proposing

safety,<sup>58</sup> has no special bearing on the scope of the right to keep and bear arms. At least, it appears to have no more bearing on the Second Amendment's scope than it does on any other constitutional right.<sup>59</sup> So, even if a court were to analyze a certain regulation using a forbidden balancing test, it is unclear what weight, if any, public safety adds to the scale.

At first blush, there appears to be no test that can simultaneously remain faithful to history, keep judges from balancing, and justify the existing set of presumptively lawful regulations, much less maintain other regulations that have developed in the last two centuries or that will develop in the future. And, much to the consternation of the *Heller* and *McDonald* dissenters,<sup>60</sup> the Court has offered few hints as to a solution.

### B. The Lower Court Response

The Court has left lower court judges at sea. Inundated by Second Amendment litigation,<sup>61</sup> lower courts have been forced to rig what test they can from fragments of *Heller*'s and *McDonald*'s hundred-plus pages. Their product, created with little guidance and few resources, often betrays their haste.

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a combination of "historical guideposts" with conventional levels of scrutiny. Patrick J. Charles, *The Second Amendment Standard of Review After McDonald: "Historical Guideposts" and the Missing Arguments in McDonald v. City of Chicago*, 2 AKRON J. CONST. L. & POL'Y 7, 76 (2010) (arguing for a threshold historical-guideposts test, but not disputing that traditional standards of scrutiny analysis will apply).

58. See *Heller*, 554 U.S. at 689 (Breyer, J., dissenting) (calling public safety "a primary concern of every government" (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987))).
59. See *McDonald*, 130 S. Ct. at 3045 (noting that "all constitutional provisions that impose restrictions on law enforcement" can be said to have "controversial public safety implications").
60. *Id.* at 3105 (Stevens, J., dissenting) (arguing that the *McDonald* Court failed to "at least moderate the confusion [caused by *Heller*] . . . by adopting a rule that is clearly and tightly bounded in scope"); *id.* at 3126-27 (Breyer, J., dissenting) (raising a set of hypotheticals the Court has yet to resolve in Second Amendment cases).
61. *Id.* at 3105 (Stevens, J., dissenting) (warning that *Heller* "unleashed . . . a tsunami of legal uncertainty, and thus litigation"); Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1063 (2009) (referring to *Heller* as a "litigation magnet"); Robert Barnes, *Cases Lining Up To Ask Supreme Court To Clarify Second Amendment Rights*, WASH. POST, Aug. 14, 2011, [http://www.washingtonpost.com/politics/cases-lining-up-to-ask-supreme-court-to-clarify-second-amendmentrights/2011/08/11/gIQAioihFJ\\_story.html](http://www.washingtonpost.com/politics/cases-lining-up-to-ask-supreme-court-to-clarify-second-amendmentrights/2011/08/11/gIQAioihFJ_story.html) (discussing the Second Amendment litigation now percolating through the courts).

Some judges have clung to the Court's exclusionary dicta.<sup>62</sup> When convicted felons assert Second Amendment defenses, for example, judges often simply parrot *Heller's* dicta and move on.<sup>63</sup> In *United States v. Small*, for example, a court cited *Heller's* list of "presumptively lawful" regulations and concluded that the regulation at issue in the instant felon-in-possession case qualified.<sup>64</sup> Other judges have assumed the *Heller* dicta's nonexclusivity is an opportunity to add other categories to the list. In *Nordyke v. King*, for instance, a panel of the Ninth Circuit upheld laws concerning gun shows on public property by stating that certain "open public spaces" on municipal property could "fit comfortably within the same category as schools and government buildings."<sup>65</sup>

Increasingly, judges have latched onto intermediate scrutiny in Second Amendment cases.<sup>66</sup> They have done so despite the current Court's jaundiced

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62. Some courts say the exceptions are not dicta. *E.g.*, *United States v. Barton*, 633 F.3d 168, 171 (3d Cir. 2011); *United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010). Others say they are dicta, but follow them nonetheless. *E.g.*, *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010). For an argument that these exceptions are binding, 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, 1372 (2009), which suggests that "[a]lthough these exceptions are arguably dicta, they are dicta of the strongest sort" and that "[f]or all practical purposes, these [exceptions] have been decided . . . in favor of constitutionality."
63. As one court observed: "Where a challenged statute apparently falls into one of the categories signaled by the Supreme Court as constitutional, courts have relied on the 'presumptively lawful' language to uphold laws in relatively summary fashion." *Hall v. Garcia*, No. 10-CV-03799, 2011 WL 995933, at \*2 (N.D. Cal. Mar. 17, 2011) (upholding state restrictions on firearms near schools); *see also* *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (concluding that *Heller's* exceptions are not dicta and instead constitute a binding determination that "felons are categorically different" from rights-bearing individuals); *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010) (concluding that a statute prohibiting a person convicted of a misdemeanor crime of domestic violence from possessing a firearm or ammunition falls within *Heller's* "presumptively lawful" category); *United States v. Roy*, 742 F. Supp. 2d 150, 152 (D. Me. 2010) (citing language from *Heller* and *McDonald* to uphold firearm restrictions imposed on a person involuntarily committed for mental illness); *Epps v. State*, 55 So. 3d 710, 711 (Fla. Dist. Ct. App. 2011) (dismissing a challenge to a state felon-in-possession conviction based on exclusionary dicta).
64. No. CR-10-91-02, 2011 WL 379174, at \*1 (D. Mont. Feb. 3, 2011) (applying dicta from *Heller* to a felon-in-possession Second Amendment challenge).
65. 563 F.3d 439, 460 (9th Cir. 2009), *vacated*, 611 F.3d 1015 (9th Cir. 2010) (remanding for consideration in light of *McDonald*); *see also* *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011) (suggesting that persons subject to domestic relations restraining orders are categorically like the mentally ill and felons for purposes of Second Amendment analysis). *But cf.* *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734-35 (2011) (refusing to create a new harmful-to-minors category of unprotected speech).
66. *See* Lund, *supra* note 42 (manuscript at 9) (noting that courts have tended to use intermediate scrutiny for Second Amendment cases dealing with regulations that do not



view of balancing tests in general, and intermediate scrutiny in particular.<sup>67</sup> In *United States v. Skoien*,<sup>68</sup> an en banc Seventh Circuit held, without diving into the “‘levels of scrutiny’ quagmire,”<sup>69</sup> that a federal law disarming domestic violence misdemeanants had “a substantial relation” to the “important governmental objective” of “preventing armed mayhem.”<sup>70</sup> A judge in the Eastern District of New York acknowledged that “it is possible that an entirely new test [for the Second Amendment] will develop.”<sup>71</sup> But the judge felt “bound”<sup>72</sup> to apply the “existing analytical frameworks”<sup>73</sup> to the federal felon-in-possession statute, and upheld the statute as “substantially related to the important goal of promoting public safety.”<sup>74</sup> Another judge in the Northern District of California upheld state restrictions on firearms within one thousand feet of a school on the ground that the restriction was “substantially related” to the “important governmental objective” of preventing harm to children.<sup>75</sup> These judges have yet to engage with *McDonald*’s suggestion that

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severely restrict the core rights). Intermediate scrutiny and strict scrutiny appear to be the only alternatives left standing after the Court’s rejection of rational basis scrutiny for core rights in *Heller*. Professor Kathleen Sullivan has described intermediate scrutiny as “an overtly balancing mode.” Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992).

67. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (rejecting balancing tests for the Second Amendment). Elsewhere, Justice Scalia has criticized “intermediate scrutiny” as the test the Court applies “when it seems like a good idea to load the dice.” *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting); see also *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.) (criticizing tests with “open-ended rough-and-tumble” factors (quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995))); *Heller II*, 670 F.3d 1244, 1273 n.5 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (arguing that the *Heller* Court intentionally refused to employ the intermediate scrutiny test based on the First Amendment).
68. 614 F.3d 638 (7th Cir. 2010).
69. *Id.* at 642.
70. *Id.*; see also *United States v. Tooley*, 717 F. Supp. 2d 580, 592-93 (S.D. W. Va. 2010) (refusing to reconsider intermediate scrutiny as a proper test for prohibitions on misdemeanor domestic batterers in possession of firearms).
71. *United States v. Oppedisano*, No. 09-CR-0305, 2010 WL 4961663, at \*2 n.2 (E.D.N.Y. Nov. 30, 2010).
72. *Id.*
73. *Id.* at \*2.
74. *Id.*
75. *Hall v. Garcia*, No. 10-CV-03799, 2011 WL 995933, at \*5 (N.D. Cal. Mar. 17, 2011). The *Garcia* court did not expressly adopt intermediate scrutiny; it applied this test assuming that the regulation survived “[u]nder any of the potentially applicable levels of scrutiny.” See *id.* at \*4.

balancing is forbidden and that public safety plays no special role in Second Amendment suits.

Lured by more supple First Amendment analogues, some courts have fashioned a mixed category-plus-scrutiny approach.<sup>76</sup> In *United States v. Marzzarella*,<sup>77</sup> a panel of the Third Circuit created a two-tiered structure for Second Amendment challenges. Under this structure, the court first examines “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”<sup>78</sup> If it does, then the court proceeds to “some form of means-end scrutiny.”<sup>79</sup> Applying this framework, the Third Circuit held that prohibitions on firearms with obliterated serial numbers fell within the scope of the Second Amendment. However, in addressing the issue of means-end fit, the court concluded that the law was reasonably related to the important government interest of tracing guns for law-enforcement purposes.<sup>80</sup>

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76. Professor Eugene Volokh is the leading proponent of this approach. See 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 (2009) [hereinafter Volokh, *Implementing the Right*]; see also Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996); cf. Lund, *supra* note 42 (manuscript at 10) (noting that lower courts have tended to apply First Amendment scrutiny analysis when “faced with harder cases”). I have used First Amendment analogies as well, but as a way to explain how the Court might craft a more category-based approach to the Second Amendment’s scope. See generally Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009) (articulating a category-based approach to the Second Amendment based on First Amendment obscenity doctrine). The current Court does not seem to favor the more mutable forms of First Amendment scrutiny. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 580 (1991) (Scalia, J., concurring) (stating that the Court should “avoid wherever possible” constitutional tests that require judges to assess government interests); Transcript of Oral Argument at 44, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (question of Roberts, C.J.) (noting that the tiers of scrutiny are not in the Constitution and referring to them as First Amendment “baggage”), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/07-290.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-290.pdf). Even the much-vaunted “time, place, and manner” or *O’Brien* First Amendment tests are understood to be balancing tests. See Sullivan, *supra* note 66, at 297.

77. 614 F.3d 85 (3d Cir. 2010).

78. *Id.* at 89.

79. *Id.*

80. *Id.* at 98.

More often than not, the burden of “doing originalism”<sup>81</sup> collapses these two-step tests into one step: intermediate scrutiny. The Fourth Circuit, in *United States v. Chester*,<sup>82</sup> claimed to apply the two-part *Marzzarella* test to domestic violence misdemeanants. But it concluded that history provided no definitive answers as to whether the possession of firearms by misdemeanants was within the original understanding of the Second Amendment.<sup>83</sup> It therefore moved on to the second part of the test. Finding (in apparent contradiction to its earlier conclusion) that a right of misdemeanant domestic batterers to possess firearms was “not within the core right identified in *Heller*,”<sup>84</sup> it held that “intermediate scrutiny” applied to misdemeanants like Chester.<sup>85</sup> In *United States v. Reese*,<sup>86</sup> the Tenth Circuit addressed federal firearms restrictions imposed on persons subject to restraining orders.<sup>87</sup> Purporting to follow *Marzzarella*’s two-step approach, the *Reese* court performed little investigation into the history of gun bans among those subject to restraining orders.<sup>88</sup> Instead, it upheld the prohibition almost entirely on the basis of intermediate scrutiny.<sup>89</sup>

Few courts have explained how their approach complies with the Court’s insistence that no test rely on idiosyncratic evaluation of government

81. Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32 (2004). The phrase comes from Professor Monaghan, but what I mean by the term is the difficult task originalism demands of judges and litigants, untrained in history, who have to construct a legal opinion from conflicted and remote materials. This is a flaw that Justice Scalia recognizes:

[I]t is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material . . . . Even beyond that, it requires an evaluation of the reliability of that material . . . . And further still, it requires immersing oneself in the political and intellectual atmosphere of the time . . . and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.

Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856-57 (1989).

82. 628 F.3d 673 (4th Cir. 2010).

83. *Id.* at 680-81.

84. *Id.* at 683.

85. *Id.* (remanding for further proceedings applying intermediate scrutiny); see also *United States v. Lunsford*, No. 2:10-cr-00182, 2011 WL 145195, at \*5-6 (S.D. W. Va. Jan. 18, 2011) (finding the historical evidence for felon dispossession disputable and looking to intermediate scrutiny to uphold a felon-in-possession statute).

86. 627 F.3d 792 (10th Cir. 2010).

87. *Id.* at 799-800.

88. See *id.* at 800-01 (summarily finding that the prohibition falls within the scope of Second Amendment protections).

89. *Id.* at 802-04.

interests.<sup>90</sup> Even fewer have delved into the historical materials that the Court says should guide any evaluation of the Second Amendment's scope. Worse, the emerging consensus candidate—intermediate scrutiny—is a mode of analysis that many jurists and scholars disfavor and occasionally decry.<sup>91</sup> Justice Scalia, for one, has signaled that “intermediate scrutiny” is not really much of a test at all, but frequently a way for judges to “load the dice.”<sup>92</sup> And the colloquy between Justices Scalia and Breyer in *Heller* concerning the propriety of applying First Amendment-inspired balancing tests to Second Amendment cases suggests that the majority rejected intermediate scrutiny as a permissible method of analysis.<sup>93</sup> Faced with the Court's seemingly insoluble demands and the pressure of crowded dockets, some judges have responded to the challenge with the equivalent of an exasperated shrug.<sup>94</sup> This is where an examination of the right to a civil jury can help.

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90. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3045-46 (2010). Even those who urge a mixed category-and-scrutiny approach have yet to explain how their approach complies with the second element of the riddle, that is, that no test permit balancing of government interests. Compare Volokh, *Implementing the Right*, *supra* note 76, at 1470-73 (rejecting both intermediate scrutiny and different levels of burden tests, but adopting First Amendment time, place, manner, and substantial burden analogues), with *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 580 (1991) (Scalia, J., concurring in the judgment) (stating that the Court should “avoid wherever possible” tests that require assessment of the importance of government interests), and *Heller II*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (observing that the “clear message” of *Heller* and *McDonald* is that courts should not analyze Second Amendment cases using strict or intermediate scrutiny).
91. *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (objecting to the use of intermediate scrutiny); see also *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) (objecting to intermediate scrutiny as “diaphanous,” “elastic,” and an “invit[ation to] subjective judicial preferences”); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 301 (1998) (observing that “intermediate scrutiny has been consistently critiqued by judges and scholars who point to its indeterminacy and its invitation to judicial activism”).
92. *United States v. Virginia*, 518 U.S. at 568 (Scalia, J., dissenting).
93. See *Heller II*, 670 F.3d at 1282 (Kavanaugh, J., dissenting) (arguing that *Heller*'s majority rejected all balancing, and rejected in particular Justice Breyer's use of a form of First Amendment-like intermediate scrutiny).
94. See *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J., concurring in part and in the judgment) (stating that “in this instance we believe the most respectful course is to await . . . guidance from the nation's highest court” and encouraging the court to defer the issue of whether the Second Amendment protects a right to keep and bear arms outside of the home).

## II. THE SEVENTH AMENDMENT TEXT, HISTORY, AND TEST

Like the Second Amendment, the right to trial by jury in civil cases presents its own riddle. The Seventh Amendment reads:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.<sup>95</sup>

What does it mean to “preserve” a right to trial by jury? More specifically, what does it mean to “preserve” the right to trial by jury “in [s]uits at common law”? And how does this fit with a society in which “the rules of the common law” have never been either standardized or static?

This Part discusses the history of the Seventh Amendment and the Court’s efforts to implement its text. It explores how the Court has attempted to craft a Seventh Amendment test that is simultaneously faithful to text and history, avoids expressly balancing the right to a trial by jury against extraconstitutional demands, and yet is functional in a modern society. It concludes that the Court has fashioned a test that relies primarily on historical analogues to determine the kinds of suits that trigger a jury-trial right and the constitutionality of procedural innovations that control the jury. It notes that, in the end, the Court’s use of the historical test—and especially analogical reasoning from history—has stretched the Seventh Amendment’s protections to cover far more legal controversies than a strict reading of history would permit. But it has also expanded the government’s ability to alter the form and function of that jury from its historical roots. Part III will then explain how the Court may learn from its experience with the Seventh Amendment’s historical test in its effort to craft a historical approach to the Second Amendment right to keep and bear arms.

### *A. Seventh Amendment History, the Historical Test, and Some Initial Questions*

The right to a jury is enshrined in the Bill of Rights.<sup>96</sup> That has not kept some scholars and tort reformers from regarding the jury with a skepticism

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95. U.S. CONST. amend. VII.

96. *Id.* The Constitution also guarantees the right to a criminal jury trial. *See id.* amend. VI; *see also id.* art. III, § 2, cl. 3.

that occasionally borders on contempt.<sup>97</sup> As Dean Erwin Griswold sniffed: “The jury trial at best is the apotheosis of the amateur. Why should anyone think that 12 persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?”<sup>98</sup>

This curdled attitude, irrespective of its veracity,<sup>99</sup> would have surprised the Founding generation. While William Blackstone praised the right to keep arms in his *Commentaries on the Laws of England*,<sup>100</sup> he fairly gushed about the right to a trial by jury. The jury was “the glory of the English law”;<sup>101</sup> “the most transcendent privilege which any subject can enjoy”;<sup>102</sup> and “the best criterion, for investigating the truth of facts, that was ever established in any country.”<sup>103</sup>

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97. As Jerome Frank wrote, “Is it likely that twelve men, summoned from all sorts of occupations, unaccustomed to the machinery of the law, unacquainted with their own mental workings and not known to one another can, in the scant time allowed them for deliberation, do as good a job in weighing conflicting testimony as an experienced judge?” JEROME FRANK, *LAW AND THE MODERN MIND* 193 (Transaction Publishers 2009) (1930). Lisa A. Rickard, President of the U.S. Chamber Institute for Legal Reform, recently issued a press release lambasting a multi-million dollar personal injury verdict as a “runaway verdict against companies that even the plaintiff admitted did not expose him to asbestos.” Press Release, U.S. Chamber of Commerce, U.S. Chamber Reacts to Massive Illinois Asbestos Verdict (Mar. 15, 2011), <http://www.uschamber.com/press/releases/2011/march/us-chamber-reacts-massive-illinois-asbestos-verdict>; see also AM. TORT REFORM FOUND., *JUDICIAL HELLHOLES* (2010), <http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2010.pdf> (lamenting the size of jury verdicts in various jurisdictions in the United States and implying it is due to jurors’ inability to make rational, objective decisions). For an evaluation of this criticism, see NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* (2007).
98. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 5 (1966) (quoting ERWIN GRISWOLD, 1962-1963 *HARVARD LAW SCHOOL DEAN’S REPORT* 5-6 (1963)).
99. Studies of jury functions are numerous and disputed. See, e.g., *id.*; VIDMAR & HANS, *supra* note 97; Margaret Bull Kovera et al., *Jurors’ Perceptions of Eyewitness and Hearsay Evidence*, 76 *MINN. L. REV.* 703 (1992); Matthew A. Reiber & Jill D. Weinberg, *The Complexity of Complexity: An Empirical Study of Juror Competence in Civil Cases*, 78 *U. CIN. L. REV.* 929 (2010); Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 *BROOK. L. REV.* 1121 (2001). This Article takes no position on the competence of jurors to decide cases.
100. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*143 (“The fifth and last auxiliary right of the subject . . . is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by [English statute] . . . and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation . . .”).
101. 3 BLACKSTONE, *supra* note 100, at \*379.
102. *Id.*
103. *Id.* at \*385.

He traced its lineage, perhaps erroneously,<sup>104</sup> at least as far back as the Magna Carta.<sup>105</sup>

America's Founders jealously guarded this English tradition.<sup>106</sup> Thomas Jefferson, writing in 1789, regarded "trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."<sup>107</sup> Indeed, the entire American experiment nearly faltered in part because the original Constitution contained no right to trial by jury in civil matters.<sup>108</sup> As the Court noted almost a century later, "Those who emigrated to this country from England brought with them this great privilege [the jury trial] 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'"<sup>109</sup> It seems that the right to a jury, far more than the right to keep and bear arms, was originally understood to codify the ancient privileges of Englishmen and to serve as the chief bulwark against tyrannical government.<sup>110</sup>

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104. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653 n.44 (1973).

105. 3 BLACKSTONE, *supra* note 100, at \*350.

106. Wolfram, *supra* note 104, at 656 (explaining that "the nascent American nation demonstrated at virtually every important step in its development" that it was "strongly attached" to the jury).

107. VIDMAR & HANS, *supra* note 97, at 16 (quoting Letter from Thomas Jefferson to Thomas Paine, 1789, in 7 THE WRITINGS OF THOMAS JEFFERSON 408 (Albert Ellery Bergh ed., 1905)).

108. See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295 (1966) (noting that "the lack of provision for civil juries was a prominent part of" opposition to ratification of the Constitution); Wolfram, *supra* note 104, at 662, 672-73 (discussing Anti-Federalists' demands for a jury-trial right); see also THE FEDERALIST NO. 83 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting the political success of arguments against ratifying the Constitution based on its initial lack of a civil jury right).

109. *Thompson v. Utah*, 170 U.S. 343, 349-50 (1898). Although the Court was quoting here Story's comments on the criminal jury, see 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1779, at 541 (Thomas M. Cooley ed., 4th ed. 1873), Story himself noted that the civil jury's placement in the Bill of Rights "places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases," *id.* § 1768.

110. See Kenneth S. Klein, *The Myth of How To Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1008-10 (1992) (summarizing the sentiments of Patrick Henry, Thomas Paine, and Thomas Jefferson on the civil jury, and concluding that "[t]he only disagreement seems to be over whether civil jury rights were the most important of all individual rights, or simply one of the most important rights"). For more on the history of the Seventh Amendment, see generally Wolfram, *supra* note 104.

The Seventh Amendment uses the word “preserved.”<sup>111</sup> “Preserve,” as defined in the eighteenth century, means much the same thing as it does today: “to save; to defend from destruction or any evil; to keep.”<sup>112</sup> The gravity of this term is difficult to escape.<sup>113</sup> Even skeptics of the jury concede that the Seventh Amendment text demands some special attention to history.<sup>114</sup> Accordingly, the Court has interpreted the Seventh Amendment’s text to command a “historical test.”<sup>115</sup> Under this historical test, questions concerning the cases that demand a

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111. U.S. CONST. amend. VII. In fact, the term appears only once in the Constitution, although “preserve” is part of the presidential oath of office. See U.S. CONST. art. II, § 1. The Seventh Amendment is, in fact, composed of two provisions: the “preserved” provision, and the Reexamination Clause. The historical test, with variation as discussed *infra*, applies to the Amendment as a whole.
112. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (Dublin, W.G. Jones, 3d ed. 1768); see also WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY 408 (Boston, Thomas & Andrews, 1800) (defining preserve as “to save, defend”); 2 THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Charles Dilly, in the Poultry 3d ed. 1790) (same); cf. OXFORD AMERICAN DICTIONARY 527 (Eugene Ehrlich et al. eds., 1980) (defining “preserve” as “to keep safe, to keep in an unchanged condition”).
113. Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 486 (1975) (noting that the “[u]se of this word has caused the seventh amendment to hold a unique position in the realm of constitutional interpretation”); Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 671 (1918) (arguing that the meaning of the Seventh Amendment right to a jury “must be ascertained by a resort to history”). In fact, some states limit their jury-trial right solely to those actions that existed at the time of its ratification. See OHIO CONST. art. 1, § 5 (stating that the right to a jury must remain “inviolable”); *State ex rel. Russo v. McDonnell*, 852 N.E.2d 145, 153 (Ohio 2006) (“There is no right to a jury trial . . . unless that right is extended by statute or existed at common law prior to the adoption of the Ohio Constitution.”); ANDERSON’S OHIO CIVIL PRACTICE § 174.02 (2010) (discussing the effect of the Ohio constitutional right to a jury, which applies to causes of action that existed before the state constitution’s adoption); see also GA. CONST. art. 1, § 1, para. XI(a) (stating that the right to a jury trial is “inviolable”); *Swails v. State*, 431 S.E.2d 101, 103 (Ga. 1993) (stating that “[t]he right to a jury trial under [Georgia’s] Constitution is not as broad as that afforded under the Federal Constitution” and noting that no state constitutional right to a jury exists for actions that did not exist in 1798); *Wertz v. Chapman Township*, 741 A.2d 1272, 1277-79 (Pa. 1999) (finding no jury right under the Pennsylvania state constitution for a cause of action that did not exist at the time of ratification). Thanks to Michael Solimine for this point.
114. David L. Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442, 449-50 (1971) (acknowledging that history must be the starting point for understanding the jury-trial right). Professor Redish makes a more subtle point, that “because jury trial is inefficient, we *should* apply a strictly historical test.” Redish, *supra* note 113, at 489. As discussed in Part III, *infra*, these problems exist in Second Amendment adjudication as well.
115. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (using this nomenclature (quoting Wolfram, *supra* note 104, at 640-43)).



jury, the composition of that jury, and what matters the jury must hear, are all answered by history.

But this historical test raises another set of questions. *Whose* history is preserved in the Seventh Amendment? *How much* history? And what does a court do with *conflicting* or *indeterminate* history?<sup>116</sup> In engaging with these questions of constitutional construction, the Court has compiled a record, one that may help frame a set of nearly identical issues regarding a historical approach to the Second Amendment.

### 1. *Whose History?*

As to the first question, *whose* common law history is preserved, the Court has held that the Constitution preserves *English* common law history, and not any particular state common law history. Justice Story articulated this aspect of the historical test while riding circuit in 1812.<sup>117</sup> At the Founding, common law practice varied from state to state and region to region.<sup>118</sup> In fact, the Federalists used the lack of uniformity of civil practice in the states as an argument against including the civil jury right in the original Constitution.<sup>119</sup>

In *United States v. Wonson*,<sup>120</sup> Justice Story concluded that “[b]eyond all question, the common law . . . alluded to [in the Seventh Amendment] is not the common law of any individual state, . . . but it is the common law of England, the grand reservoir of all our jurisprudence.”<sup>121</sup> Courts since then have largely, but not uniformly,<sup>122</sup> reaffirmed English common law as the Seventh Amendment’s touchstone.<sup>123</sup>

116. See Redish, *supra* note 113, at 486-87 (noting the difficulty of determining which legal situations required a jury trial in 1791); Shapiro & Coquillette, *supra* note 114, at 448-49 (asking “[w]hose law should one look to if such [a historical] examination is to be made”).

117. Scholars trace this aspect of the historical test to Justice Story. See, e.g., Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 588 (2003); Wolfram, *supra* note 104, at 640-41. However, there are some dissenters. E.g., Margaret L. Moses, *What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 189-90 (2000) (stating that the common understanding of the right to a civil jury trial as reliant on 1791 English common law history is a twentieth-century invention).

118. Wolfram, *supra* note 104, at 665 (“[T]he provision of a civil jury varied widely among the several states.”).

119. *Id.* at 662-63, 665.

120. 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

121. *Id.* at 750.

122. For example, although the Court uses English common law as a benchmark, it has cited state analogues as persuasive authority for its conclusions. See, e.g., *Ex parte Peterson*, 253 U.S. 300, 308-09 (1920) (looking to pre-revolutionary Maryland and Connecticut for

2. *How Much History?*

The second question is *how much* common law history the Seventh Amendment preserves. This question has two components, one temporal and one substantive. The temporal component relates to the *span* of English common law history relevant to Seventh Amendment construction.<sup>124</sup> That matter has been settled fairly definitively. The Court has stated that the Seventh Amendment preserves English common law as it existed in 1791, the date of its ratification.<sup>125</sup>

But that leaves the thornier substantive problem. Assuming the Seventh Amendment preserves the common law of England as it existed in 1791, the Court must address how much of that common law is now *constitutional* law. As Professor James wrote over forty years ago, does the Seventh Amendment “freeze[] the right abso[lu]tely as it was in England in 1791”?<sup>126</sup> Or does it have “some elasticity so as to accommodate extensions or contractions of jury trial and, if so, what [are] the limits of this elasticity”?<sup>127</sup> Put another way, when is modification of 1791 jury practice—whether an expansion or diminution, whether through legislation, executive action, or common law reasoning—a constitutional violation?

On this point, the Court is torn between its duty to the text and the reality of change. The Court frequently states that any departure from historical practice is unconstitutional. But it also tends to validate constitutional claims to

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analogues); *Walker v. N.M. & S. Pac. R.R. Co.*, 165 U.S. 593, 597 (1897) (citing to state constitutional and legislative analogues to support the proposition that federal legislation does not violate the Seventh Amendment); *see also* *Moses*, *supra* note 117, at 189 (“Nineteenth-century cases discussing the jury trial right and other constitutional issues . . . referred to the common law and practice in both [England and the United States].”).

123. *See, e.g.*, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (stating that English common law is preserved); *Peterson*, 253 U.S. at 309 n.4 (“The right to a jury trial guaranteed in the federal courts is that known to the law of England, not the jury trial as modified by local usage or statute.”); *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 377-78 (1913). *But see* *Moses*, *supra* note 117, at 189 (casting doubt on this understanding).

124. *See* 6 MADISON, *supra* note 19, at 379 (“[W]hat period is to be fixed for limiting the British authority over our laws?”).

125. *See, e.g.*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999). There still exists a smattering of opinions that cite 1789, the year in which the Amendment was proposed, but not ratified, as governing. *Compare* *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935), *with* *In re Clay*, 35 F.3d 190, 194 (5th Cir. 1994). For a discussion of Court decisions that have not adhered to the 1791 date, *see* *Moses*, *supra* note 117, at 190-92.

126. Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 657 (1963).

127. *Id.*

a jury for suits that had no existence in 1791.<sup>128</sup> Paradoxically, it also has upheld modern procedural innovations that actually *diminish* the jury, both as to its form and as to its function. As explained below, the result is a doctrine in which the Seventh Amendment covers more cases than it would have in 1791, but also permits greater government control over the jury that is ultimately empaneled. This Subsection explores that paradox.

Sometimes the Court suggests that any deviation from 1791 common law practice is impermissible. In *Dimick v. Schiedt*,<sup>129</sup> for instance, the Court addressed the question of whether the Seventh Amendment allows a federal judge to increase a jury award in lieu of granting a new trial.<sup>130</sup> Justice Sutherland wrote that the “scope and meaning of the Seventh Amendment” is determined by “the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.”<sup>131</sup> The Court concluded that, while common law practice permitted English courts to modify damage awards, those modifications had largely been to *decrease* damages.<sup>132</sup> There was no corollary historical practice of courts *increasing* them.<sup>133</sup> The Court recognized that “the common law is susceptible of growth and adaptation to new circumstances and situations.”<sup>134</sup> But the Seventh Amendment had, according to the Court, codified certain elements of the common law as it existed in the eighteenth century.<sup>135</sup> To depart from those historical common law elements, even by common law reasoning, was, in effect, “to alter the Constitution.”<sup>136</sup>

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128. This is a significant difference from some state laws, which do not extend jury-trial rights to new forms of action. See *supra* note 113.

129. 293 U.S. 474 (1935).

130. The particular Seventh Amendment right here would be the freedom from “re-examination” of a fact tried by a jury. See U.S. CONST. amend. VII. In this case, the judge and the defendant agreed to increase the award, rather than grant the plaintiff’s motion for a new trial. The plaintiff did not agree to this arrangement. *Dimick*, 293 U.S. at 476. No one doubted that the district court had the power to grant a new trial, or that as a matter of stare decisis the judge had the power to condition that decision on the plaintiff’s agreement to *reduce* (remit) a portion of the award. See *id.* at 476, 484–85.

131. *Dimick*, 293 U.S. at 476.

132. *Id.* at 482.

133. *Id.*

134. *Id.* at 487.

135. As the *Dimick* Court noted, “Here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791.” *Id.*

136. *Id.*; cf. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (suggesting that the Second Amendment text constrains case-by-case decisionmaking by the courts).

On the other hand, the Court has construed the Seventh Amendment to require a jury trial in causes of action unknown to the Framers. In *Parsons v. Bedford*, Justice Story, writing for the Court, observed that the Framers of the Seventh Amendment did not mean to restrict the jury to only those causes of action that existed in 1791.<sup>137</sup> As he wrote, “Probably there were few, if any, states in the union, in which some new legal remedies differing from the old common law forms were not in use . . . .”<sup>138</sup> Instead, the Framers used “[t]he phrase ‘common law,’ . . . in contradistinction to equity, and admiralty, and maritime jurisprudence.”<sup>139</sup> Thus, the right to a jury “in cases at common law” is implicated both as to English common law in “its old and settled proceedings,”<sup>140</sup> as well as newer causes of action “in which *legal* rights [as distinct from equitable] [are] to be ascertained and determined.”<sup>141</sup>

Twentieth-century courts cited *Parsons* to find jury-trial rights for causes of action that were unknown in 1791. *Chauffeurs Local No. 391 v. Terry*<sup>142</sup> is an excellent illustration and reveals fractures within the Court with respect to fidelity to history. In *Terry*, the Court considered whether a federal statute allowing union members to obtain back pay for breach of a union’s duty of fair representation triggered the right to a jury trial.<sup>143</sup> The statute itself was silent on the matter.<sup>144</sup> A plurality held that the Seventh Amendment commanded a jury trial.<sup>145</sup> The Court reasoned from *Parsons* that “[t]he right to a jury trial includes more than the common-law forms of action recognized in 1791.”<sup>146</sup> The jury right “extends to causes of action created by Congress,”<sup>147</sup> even when those causes of action were alien to the Framers.<sup>148</sup> The essential question was

137. 28 U.S. (3 Pet.) 433, 447 (1830). *But cf.* State *ex rel.* Russo v. McDonnell, 852 N.E.2d 145, 153 (Ohio 2006) (holding that no jury right exists unless extended by statute or unless the right existed at common law); Sward, *supra* note 117, at 590 (noting that a “purely historical analysis” would guarantee a jury “only in those precise cases where a jury would have been available in 1791 England”).

138. *Parsons*, 28 U.S. at 446.

139. *Id.* at 447.

140. *Id.*

141. *Id.*

142. 494 U.S. 558 (1990).

143. *See id.* at 562-63.

144. *See id.* at 562 (citing Labor-Management Relations Act, ch. 120 § 301, 61 Stat. 136, 156 (1947) (codified as amended at 29 U.S.C. § 185 (1982))).

145. *Id.* at 573.

146. *Id.* at 564 (citing *Parsons*, 28 U.S. at 447).

147. *Id.* at 564-65.

148. *See id.* at 565-66 (observing that an action for breach of a union’s duty of fair representation was unknown in 1791 and that collective bargaining was actually unlawful).

whether the federal suit was equitable (in which case no jury would be required) or legal.

The *Terry* plurality used a two-part mechanism for deciding Seventh Amendment cases. First, it employed an analogical process, whereby the Court “compare[d] the statutory action to 18th-century actions brought in the courts of England.”<sup>149</sup> The Court’s task here was to see if the individual issues in a cause of action are more analogous to a 1791 suit brought in equity or a suit brought in law. Second, the Court “examine[d] the remedy sought and determine[d] whether it is legal or equitable in nature.”<sup>150</sup> According to the *Terry* plurality, this second test is the most important.<sup>151</sup>

The *Terry* Court reasoned that a fair-representation cause of action was analogous to either of two eighteenth-century suits: an equitable claim against a trustee for breach of fiduciary duty<sup>152</sup> or a legal claim against a lawyer for malpractice or breach of contract.<sup>153</sup> On balance, the plurality thought the trust analogy slightly more convincing for the case as a whole, but not for individual issues within the suit.<sup>154</sup> The plurality insisted that the analogical portion of the historical test was only “preliminary.”<sup>155</sup> Finding the analogical analysis placed the case in “equipoise,” the Court then moved onto the requested relief.<sup>156</sup> It concluded that back pay, although equitable in other contexts, was, at its core in this case, a demand for legal rather than equitable relief.<sup>157</sup> Accordingly, the *Terry* plaintiffs were entitled to a jury.

Justice Kennedy, joined by Justices Scalia and O’Connor, dissented. In their view, a departure from common law history violates the Seventh Amendment, regardless of whether the jury-trial right is contracted or expanded.<sup>158</sup> For the *Terry* dissenters, the analogy to the trust was

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149. *Id.* at 565 (citing *Tull v. United States*, 481 U.S. 412, 417-18 (1987)).

150. *Id.*

151. *Id.* (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (plurality opinion)).

152. *Id.* at 567-68.

153. *Id.* at 569-70 (“When viewed in isolation, the duty of fair representation issue is analogous to a claim against a trustee for breach of fiduciary duty. The § 301 issue, however, is comparable to a breach of contract claim—a legal issue.”); *id.* at 573 (“[T]he search for an adequate 18th-century analog revealed that the claim includes both legal and equitable issues . . .”).

154. *Id.* at 569-70.

155. *Id.* at 570 (citing *Granfinanciera*, 492 U.S. at 47).

156. *Id.* at 569-71.

157. *Id.* at 570-73.

158. *See id.* at 592-93 (Kennedy, J., dissenting); *see also* *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935) (stating that the Seventh Amendment text limits what the Court can do through common law analogical reasoning).

determinative.<sup>159</sup> Justice Kennedy emphasized the Seventh Amendment’s textual command that the right be “preserved”; he warned that “[i]f we abandon the plain language of the Constitution to expand the jury right, we may expect Courts with opposing views to curtail it in the future.”<sup>160</sup> The way to avoid such judicial manipulation is scrupulous adherence to history. “We cannot preserve a right existing in 1791,” Justice Kennedy wrote, “unless we look to history to identify it.”<sup>161</sup> Echoing *Dimick*, any other result would “rewrit[e] the Constitution.”<sup>162</sup> Justice Kennedy acknowledged the difficulty of historical proofs, but offered nothing short of an originalist manifesto in response: “Our obligation to the Constitution and its Bill of Rights, no less than the compact we have with the generation that wrote them for us, do[es] not permit us to disregard provisions that some may think to be mere matters of historical form.”<sup>163</sup>

Ironically, the Court has long disregarded Justice Kennedy’s concern with historical form when it comes to the actual mechanics of adjudication. Indeed, the Court applies the historical test to procedural challenges with an extremely light touch. The Court has stated on numerous occasions that the Seventh Amendment does not bind the government to ancient procedure or practices. Instead, it prevents only those innovations that keep the jury from functioning in its most “fundamental elements.”<sup>164</sup>

As early as 1897, the Court stated that “[the Seventh Amendment’s] aim is not to preserve mere matters of form and procedure but substance of right.”<sup>165</sup> In *Walker v. New Mexico & Southern Pacific Railroad Co.*, a statute empowered a judge to enter judgment for a defendant, even though the general verdict was for the plaintiff, when the general verdict and the special findings of fact

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159. *Terry*, 494 U.S. at 584 (Kennedy, J., dissenting) (“Having made this decision in favor of an equitable action, our inquiry should end.”).

160. *Id.* at 593.

161. *Id.*

162. *Id.*

163. *Id.* at 594.

164. *Tull v. United States*, 481 U.S. 412, 426 (1987) (holding that the Seventh Amendment only preserves incidents of trial deemed fundamental to the right); *Galloway v. United States*, 319 U.S. 372, 392 (1943) (same); *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 498 (1931) (stating that the Seventh Amendment is “concerned, not with [the] form, but with [the] substance” of the jury-trial right).

165. *Walker v. N.M. & S. Pac. R.R. Co.*, 165 U.S. 593, 596 (1897); see also *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (“The aim . . . is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure . . .”).

conflicted.<sup>166</sup> The plaintiff argued that the most the judge could have done at common law in 1791 was to grant a new trial. In response, the Court asked rhetorically, “But why should the power of the court be thus limited?”<sup>167</sup> The lack of precise historical analogue was no bar for this legislation. “So long as th[e] substance of [the jury] right is preserved,” the Court held, “the procedure by which this result shall be reached is wholly within the discretion of the legislature.”<sup>168</sup> Justice Brandeis, writing for the Court in 1920, went further. In *Ex parte Peterson*, he found that a judge could refer questions to an “auditor” to “sharpen” the factual issues for the jury, even though no identical practice existed in 1791. “New devices may be used to adapt the ancient institution to present needs . . . . Indeed,” he ventured, “such changes are essential to the preservation of the right.”<sup>169</sup>

In a majority opinion in 1931, Justice Stone flatly rejected the *Terry* dissenters’ faithfulness to historical form. In *Gasoline Products Co. v. Champlin Refining Co.*,<sup>170</sup> the Court considered whether the Seventh Amendment allowed an appellate court to remand for retrial only those issues on which the jury verdict was defective, or whether the entire matter had to be retried.<sup>171</sup> The Court amassed a string of eighteenth-century citations that showed that “at common law there was no practice of setting aside a verdict in part. If the verdict was erroneous with respect to any issue, a new trial was directed as to all.”<sup>172</sup> Quoting Lord Mansfield, the Court recognized the common law belief was that “for form’s sake, [a court] must set aside the whole verdict.”<sup>173</sup> Nevertheless, the Court found no Seventh Amendment violation. The common law may be concerned with form, Justice Stone declared, but “[i]t is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance.”<sup>174</sup> The only issue of “vital significance” to the

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166. See *Walker*, 165 U.S. at 595 (citing 1889 N.M. Laws 97). The law governed the New Mexico territories before they became a state, and hence implicated the Seventh Amendment. *Id.* at 595-96.

167. *Id.* at 598.

168. *Id.* at 596.

169. *Ex parte Peterson*, 253 U.S. 300, 309-10 (1920) (footnote omitted).

170. 283 U.S. 494 (1931).

171. *Id.* at 497.

172. *Id.* (citing, among other cases, *Parker v. Godin*, (1728) 93 Eng. Rep. 866 (K.B.), 2 Strange 813; *Berrington’s Case*, (1706) 91 Eng. Rep. 874 (K.B.), 3 Salk. 362; and *Bond v. Spark*, (1704) 88 Eng. Rep. 1318 (K.B.), 12 Mod. 275).

173. *Id.* at 498 (quoting *Edie v. E. India Co.*, (1761) 96 Eng. Rep. 166, 167 (K.B.), 1 Black. W. 295, 298).

174. *Id.* But cf. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, A MATTER OF INTERPRETATION:

jury-trial right is that “issues of fact be submitted for determination” by the jury “with . . . instructions and guidance” provided by the court to “afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law.”<sup>175</sup>

The procedural revolution of the late 1930s sharpened these Seventh Amendment questions. In 1938, the Federal Rules of Civil Procedure collapsed equity and law into a single “civil action.”<sup>176</sup> The merger of procedures for law and equity made Seventh Amendment questions all the more pertinent and vexing. In *Galloway v. United States*, for example, the Court considered a challenge to a federal judge’s ability to grant a directed verdict in a civil case.<sup>177</sup> Justice Rutledge rejected the argument that empowering the judge to enter judgment for the defendant based on an examination of the facts of the case had denied the plaintiff her Seventh Amendment rights. Observing that demurrers to the evidence and motions for new trials were sufficiently analogous to the directed verdict, he upheld the judgment.<sup>178</sup> He added, “The [Seventh] Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing.”<sup>179</sup>

Hence, today, not every element of eighteenth-century common law is contained in the Seventh Amendment jury-trial right,<sup>180</sup> any more than every element of eighteenth-century common law is contained in the Sixth Amendment jury-trial right.<sup>181</sup> Only those 1791 practices that “preserve the basic institution of jury trial in . . . its most fundamental elements”<sup>182</sup> are beyond

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FEDERAL COURTS AND THE LAW 25 (Amy Gutmann ed., 1997) (“The rule of law is *about* form.”).

175. *Gasoline Prods. Co.*, 283 U.S. at 498.

176. See FED. R. CIV. P. 2 (1938) (amended 2007).

177. 319 U.S. 372 (1943).

178. *Id.* at 389-90.

179. *Id.* at 390.

180. *Colgrove v. Battin*, 413 U.S. 149, 156 (1973) (stating that “constitutional history reveals no intention on the part of the Framers ‘to equate the constitutional and common-law characteristics of the jury’” and finding that six-member juries did not violate the right to trial by jury under the Seventh Amendment).

181. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (finding that although the eighteenth-century Framers might have expected a twelve-man jury, “the [twelve]-man requirement cannot be regarded as an indispensable component of the Sixth Amendment”).

182. *Galloway*, 319 U.S. at 392 (emphasis added); see also *Tull v. United States*, 481 U.S. 412, 426 (1987) (“Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature.”)



legislative or judicial manipulation. Conversely, only those innovations in procedure that cripple these fundamental functions of the jury are unconstitutional.

### 3. *What About Conflicting or Indeterminate History?*

What does the Court do with conflicting or indeterminate history? What does the Seventh Amendment preserve when common law practice is unclear, or contradictory, or so fragmentary as to frustrate reconstruction?<sup>183</sup>

The problem is acute. Even if one limits the historical inquiry to 1791, eighteenth-century English common law itself was in flux. Justice Brennan reiterated that “[t]he line between law and equity (and therefore between jury and non-jury trial) was not a fixed and static one.”<sup>184</sup> There was “a continual process of borrowing by one jurisdiction from the other,” which eventually “led to a very large overlap between law and equity.”<sup>185</sup> Professor James wrote that this division was a historical accident, as “[a]t no time in history was the line dividing equity from law altogether—or even largely—the product of a rational choice.”<sup>186</sup> To the extent historical data from other centuries come into play, the potential for conflict increases. Modern procedures and forms of action unknown to the Framers only exacerbate the problem of obscure or indeterminate history.

The Court has attempted to resolve conflicting or indeterminate Seventh Amendment history through a combination of analogical reasoning and policy considerations. In *Ross v. Bernhard*,<sup>187</sup> for example, the Court employed a three-part framework to decide whether a claim triggered the Seventh Amendment. Within this framework, a court first considers “pre-merger custom,”<sup>188</sup> meaning the custom as it existed in 1791. Second, the court considers “the remedy sought”;<sup>189</sup> this, the Court has stated, is the more

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(quoting *Colgrove*, 413 U.S. at 156 n.11)); *Walker v. N.M. & S. Pac. R.R. Co.*, 165 U.S. 593, 596 (1897) (“So long as this substance of right is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature . . .”).

183. For variants on this theme, see MADISON, *supra* note 19, at 379.

184. *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 577 (1990) (Brennan, J., concurring in part and concurring in the judgment) (quoting James, *supra* note 126, at 658).

185. *Id.* (quoting James, *supra* note 126, at 658–59).

186. James, *supra* note 126, at 661.

187. 396 U.S. 531 (1970).

188. *Id.* at 538 n.10.

189. *Id.*

important factor.<sup>190</sup> Third, the court considers “the practical abilities and limitations of juries.”<sup>191</sup>

First, a court attempts to find historical analogues. Sometimes, the analogue is apparent;<sup>192</sup> sometimes, it is not.<sup>193</sup> One difficulty with reasoning from historical analogy is a basic matter of judicial competence. As Justice Brennan lamented in *Terry*, to require judges “with neither the training nor time necessary for reputable historical scholarship, to root through the tangle of primary and secondary sources to determine [a suitable analogy] . . . embroil[s] courts in recondite controversies better left to legal historians.”<sup>194</sup> Even if a court had the competence and leisure to investigate this history, “the most exacting historical research may not elicit a clear historical analog.”<sup>195</sup> History may be schematic or fragmentary.<sup>196</sup> In such a case, the most appropriate historical analogue simply appears to be the one that can garner five votes on the Supreme Court.<sup>197</sup>

Additionally, there is the problem of the appropriate level of generality at which to look for an analogue. To determine whether a cause of action triggers a jury-trial right, is the question whether a twenty-first-century suit is more akin to an eighteenth-century suit to obtain money simpliciter (which looks like damages), or to obtain money wrongfully withheld (which looks like equitable restitution)?<sup>198</sup> To determine whether a statutory procedural device violates the Seventh Amendment, is the question whether the judge had the ability to modify a jury verdict in 1791, or to modify a jury verdict to increase the award?<sup>199</sup> The Court has not arrived at a consistent answer to these

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190. *Tull v. United States*, 481 U.S. 412, 421 (1987).

191. *Ross*, 396 U.S. at 538 n.10.

192. *See id.* at 533 (noting that “some proceedings were unmistakably actions at law triable to a jury” and listing as examples “actions for damages to a person or property, for libel and slander, for recovery of land, and for conversion of personal property”).

193. *See id.* at 538 n.10 (regarding this part of the test as “the most difficult to apply”).

194. *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 576 (1990) (Brennan, J., concurring in part and concurring in the judgment).

195. *Id.* at 577.

196. *See, e.g., Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 660 (1935) (noting “[f]ragmentary references” to a particular procedural practice at common law).

197. *See Terry*, 494 U.S. at 565 (plurality opinion) (disagreeing with the concurrences on the proper eighteenth-century analogue).

198. *See Curtis v. Loether*, 415 U.S. 189, 196 (1974) (cautioning that not all demands for money are necessarily demands for “legal” relief).

199. In *Dimick*, for instance, the Court acknowledged that judges had the ability to modify a jury verdict in exchange for an agreement not to hold a new trial. But the majority considered that analogue pitched at too high a level of abstraction. The issue was whether a court had

questions, although, as discussed below, the Court has sent some signals as to how to frame the appropriate level of generality.

Where history is not dispositive or an analogy not apparent, the Court has used policy considerations to resolve these problems. But only rarely has it done so in an explicitly interest-balancing manner. The Court later<sup>200</sup> repudiated the fleeting footnote in *Ross* that counseled express consideration of “the practical abilities and limitations of juries,”<sup>201</sup> although that admonition appears to have been partially resurrected.<sup>202</sup> Instead of an open-ended balancing of jury rights on the one hand and government interests on the other, an unstated preference for erring on the side of jury trials appears to hover over the Seventh Amendment, at least where Congress has not spoken.<sup>203</sup> It serves as a type of judicial tiebreaker when historical questions of Seventh Amendment coverage are inconclusive. In hard cases, the Court’s approach, at least in the twentieth century, seems to “reflect[] . . . an unarticulated but apparently overpowering bias in favor of jury trials in civil actions.”<sup>204</sup>

However, this bias is less prevalent in cases concerning jury form and function, rather than whether a jury is constitutionally required in the first instance. As discussed below, in practice, the Court’s receptivity to historical analogues acts in two, slightly contradictory ways: it expands the number of matters that trigger the civil-jury right far beyond those that existed in 1791, and simultaneously empowers rulemakers to restrain that jury to a far greater degree than they could in 1791.

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the ability to *increase* rather than *reduce* a jury award. At that level of specificity, the Court held that there was no nineteenth-century analogue. *Dimick v. Schiedt*, 293 U.S. 474 (1935). *But see* *Walker v. N.M. & S. Pac. R.R. Co.*, 165 U.S. 593 (1897) (concluding that, because the judge was empowered in 1791 to grant a new trial based on conflicting juror answers, the court was empowered not only to grant a new trial based on those conflicting answers, but also to overturn the general verdict and return judgment for the other side).

200. *See* *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987); *see also* Redish, *supra* note 113, at 524 (speculating that the *Ross* footnote may have adopted a “balancing” approach to Seventh Amendment claims).

201. *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970).

202. *See* *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996). For more discussion of *Markman*, *see infra* Section II.B.

203. Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 408 (1995) (noting that “the Court has been more than vigorous in its protection of the jury trial right in the absence of a congressional directive to the contrary,” but also observing the Court’s deference to Congress when the latter expressly limits jury-trial rights).

204. *Ross*, 396 U.S. at 551 (Stewart, J., dissenting).

*B. The Seventh Amendment Historical Test Restated:  
Boundary Setting and Tailoring*

Despite its complications, the Seventh Amendment historical test endures. Further, the historical test performs functions that are familiar in scrutiny analysis: it defines the coverage of a constitutional provision and helps to gauge whether regulations that fall within that covered area are appropriately tailored. First, history serves as a familiar boundary-setting device. It guides judicial discretion as to which cases fall within the scope of the Seventh Amendment and which cases do not. Second, history serves a tailoring function. It dictates the extent to which legislatures or courts may alter both the form and the function of the jury that the Seventh Amendment guarantees. Procedural innovations that preserve the fundamentals of the jury-trial right are constitutional; procedural innovations that destroy the fundamentals are not.

I do not want to minimize the criticisms surrounding the Seventh Amendment historical test. As Ellen Sward has written, “[T]he use of the word ‘preserved’ and the reference to the common law [in the Seventh Amendment] invoke[] history, but the precise role of history has been the subject of considerable controversy and inconsistency over the last two centuries.”<sup>205</sup> Some writers argue that the historical test itself is not required by the Amendment: the test is nothing more than a tottering doctrinal structure built upon a faulty interpretive premise.<sup>206</sup> Others agree that the historical test is required, but that its current formulation is so baroque as to be nearly useless.<sup>207</sup>

These are powerful criticisms, but they tend to discount the Seventh Amendment historical test’s value as a remarkably complete instance of history-centered constitutional implementation. For, despite its detractors, the Seventh Amendment historical test represents one of the few areas in which a constitutional decision rule based on history and common law has been most fully realized.<sup>208</sup> In fact, the historical test represents a rare instance in which the modern Court has come to almost complete agreement on methodology, if

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205. Sward, *supra* note 117, at 573.

206. See, e.g., Klein, *supra* note 110, at 1021-22 (stating that Justice Story misread the Seventh Amendment in *Wonson* and that the mistake has been compounded ever since).

207. See *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 576-78 (1990) (Brennan, J., concurring in part and concurring in the judgment) (urging a more simplified historical approach); see also Shapiro & Coquillette, *supra* note 114, at 448-49.

208. Meyler, *supra* note 19, at 596 (noting the value of Seventh Amendment doctrine to methodologies that try to integrate history and common law).

not actual outcomes.<sup>209</sup> As such, the Seventh Amendment test may serve as a model from which to construct a durable but flexible Second Amendment test reliant on text, history, tradition, and the common law.

This Section discusses how the Court's Seventh Amendment jurisprudence performs these scope and tailoring functions, and how it represents a fragile agreement among all members of the Court on how to craft a doctrinal test from history. Part III will then discuss how these lessons could apply to the Second Amendment.

The Court issued what amounts to a restatement of the historical test in *Markman v. Westview Instruments, Inc.*<sup>210</sup> and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*<sup>211</sup> *Markman* concerned whether the claim-construction portion of a patent infringement suit—the portion dealing with the scope of the patentee's rights—required a jury trial under the Seventh Amendment.<sup>212</sup> In *Markman*, a unanimous Supreme Court endorsed a two-part historical test. First, a court must decide whether it is “dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was.”<sup>213</sup> If the action falls within Seventh Amendment protection, the court must then ask “whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.”<sup>214</sup>

The first part of *Markman* performs what may be described as the scope- or boundary-setting function. The *Markman* Court had little difficulty with the first part of the test. The infringement suit did not present a “conflict between actual English common-law practice and American assumptions about [that practice], or between English and American practices at the relevant time.”<sup>215</sup> The correct application of historical boundaries was undisputed. “[C]ompar[ing] the statutory action to 18th-century actions brought in the courts of England” led to a clear conclusion that infringement actions are jury actions.<sup>216</sup>

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209. See *id.* (noting the agreement on methodology across a wide range of ideological opinions on the Court).

210. 517 U.S. 370 (1996).

211. 526 U.S. 687 (1999).

212. *Markman*, 517 U.S. at 372.

213. *Id.* at 376.

214. *Id.*; see also *Del Monte Dunes*, 526 U.S. at 708 (restating *Markman* as “[c]onsistent with the textual mandate [of the Seventh Amendment]”).

215. *Markman*, 517 U.S. at 376 n.3.

216. *Id.* at 377 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989)).

However, the conclusion that infringement actions are jury actions did not mean that every question in the infringement suit went to the jury. Admitting that the Seventh Amendment guaranteed a jury-trial right did not answer the question whether the particular *issue* of claim construction had to be tried to a jury.<sup>217</sup> In other words, the fact that the Constitution requires a jury says little about what the jury must hear or, more broadly, what form the jury must take.

In addressing what the jury must hear, the Court adopted what may be described as the tailoring portion of the historical test, that is, “whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.”<sup>218</sup> Essentially, the Court asked whether allowing judges to construe claims actually deprived litigants of the jury right that the Seventh Amendment guarantees. According to the *Markman* Court, the Seventh Amendment text preserves only “those incidents which are regarded as fundamental” – in particular, those incidents “inherent in and of the essence of the system of trial by jury.”<sup>219</sup>

What are those fundamental incidents? Elsewhere, the Court has stated the purpose of any jury-trial right in criminal and civil cases is to provide “fair and equitable resolution of factual issues” and to “prevent government oppression.”<sup>220</sup> It does not require, in the words of commentators, a “photographic reproduction of historical procedures.”<sup>221</sup> So, for instance, a jury reduced from twelve to six members does not impair the fundamental role of the jury, even though the English common law tradition was to empanel twelve jurors.<sup>222</sup> Nor are procedural innovations such as the directed verdict, the limited remand for retrial, summary judgment, and judgment on special answers considered so disruptive as to impair the jury in its most fundamental elements.<sup>223</sup>

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217. *Id.*

218. *Id.* at 376.

219. *Id.* at 377 (citation omitted).

220. *Colgrove v. Battin*, 413 U.S. 149, 157 (1973) (citation omitted).

221. *Redish & La Fave*, *supra* note 203, at 415.

222. *See Colgrove*, 413 U.S. at 160.

223. Conversely, unanimity of the jury verdict was a feature of the common law civil jury that is part of the Seventh Amendment. In *American Publishing Co. v. Fisher*, 166 U.S. 464, 468 (1897), the Court called unanimity “one of the peculiar and essential features of trial by jury at the common law.” The matter was so obvious to the Court that “[n]o authorities are needed to sustain this proposition.” *Id.* Strangely enough, unanimity is not so fundamental as to be applicable to the states through the Due Process Clause in criminal cases. *See Apodaca v. Oregon*, 406 U.S. 404, 412-13 (1972) (finding that unanimity is not required in state criminal proceedings); *Johnson v. Louisiana*, 406 U.S. 356, 359-60 (1972) (holding that the Due Process Clause does not require unanimity in state criminal trials); *see also*

The *Markman* Court conceded that “[t]he ‘substance of the common-law right’ is . . . a pretty blunt instrument for drawing distinctions.”<sup>224</sup> While some tailoring questions will be historically clear, courts will often be “forced to make a judgment . . . without the benefit of any foolproof test.”<sup>225</sup> In the absence of unequivocal historical practice, a court decides whether a process preserves the Seventh Amendment in its fundamentals by (1) “seeking the best analogy . . . between an old [practice] and the new”;<sup>226</sup> failing that, by reference to (2) “existing precedent”;<sup>227</sup> and, failing that, as a last resort, to (3) “functional considerations” of the respective capacities of judges or juries.<sup>228</sup> Using these tests, the unanimous *Markman* Court ultimately found that the judge and not the jury should perform the claim construction portion of an infringement suit. First, the Court found no consistent practice in England during the relevant time period that put the matter of claim construction, or any analogous practice, in the hands of the jury.<sup>229</sup> Second, the limited precedent on point tended to reflect the view that analogues to claim constructions were legal issues for a judge to decide.<sup>230</sup> Third, the Court concluded that the issue of claim construction was better suited to the judge’s role as expositor of the law, rather than the jury’s role as a finder of fact.<sup>231</sup> Finally, allocating this function to the judge advanced the general policy of uniformity in patent litigation.<sup>232</sup>

In *Del Monte Dunes*, the Court reaffirmed *Markman*’s method of implementing the Seventh Amendment through a historical test.<sup>233</sup> But the Court fractured as to its application. *Del Monte Dunes* addressed whether certain liability and compensation issues in an inverse condemnation proceeding brought under 42 U.S.C. § 1983 require a jury trial.<sup>234</sup> Every

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McDonald v. City of Chicago, 130 S. Ct. 3020, 3035 n.14 (2010) (discussing *Apodaca* and *Johnson*).

224. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 378 (1996).

225. *Id.* at 377.

226. *Id.* at 378 (citing *Tull v. United States*, 481 U.S. 412, 420-21 (1987)).

227. *Id.* at 384.

228. *Id.* at 388.

229. *Id.* at 379-81, 384.

230. *Id.* at 384-88.

231. *Id.* at 388-89.

232. *Id.* at 390-91.

233. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999).

234. An “inverse condemnation” proceeding is “a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been

member of the Court agreed that the historical test applies to the Seventh Amendment. Every member of the Court agreed that the first question is whether the cause of action was tried at law at the Founding or analogous to such a cause of action.<sup>235</sup> And every member of the Court also agreed that, if a jury is required, the next part of the test uses “history to determine whether the particular issues, or analogous ones, were decided by judge or by jury . . . at the time the Seventh Amendment was adopted.”<sup>236</sup> Finally, “[w]here history does not provide a clear answer, [the Court] look[s] to precedent and functional considerations.”<sup>237</sup>

Only a plurality, however, concluded that a jury was required. The threshold point of disagreement was whether a § 1983 inverse condemnation proceeding was more like a tort suit, which requires a jury, or more like an eminent domain proceeding, which does not. In Justice Kennedy’s plurality opinion, this specific type of § 1983 inverse condemnation proceeding was sufficiently analogous to a tort suit to fall within the boundaries of the Seventh Amendment.<sup>238</sup> As to the second part of the historical test—whether the factual issues raised by the proceeding must go to a jury to preserve the right in its fundamentals—the plurality admitted that there was neither a clear historical analogue nor direct precedent. But it held that the traditional factfinding function of the jury justified a jury trial in this case.<sup>239</sup>

Justice Scalia believed that the appropriate level of analogy was a common law action similar to a § 1983 suit simpliciter, not a § 1983 suit for inverse condemnation, as argued by Kennedy’s plurality decision,<sup>240</sup> and not “some generic . . . Fifth Amendment taking” as advanced by the dissent.<sup>241</sup> Justice Souter, too, found the plurality’s reasoning wanting. The most logical analogue for an inverse condemnation proceeding was the same as that for an ordinary condemnation proceeding: eminent domain.<sup>242</sup> Because there was no

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attempted by the taking agency.” *United States v. Clarke*, 445 U.S. 253, 257 (1980) (quoting DONALD G. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 328 (1971)) (emphasis omitted).

235. *See Del Monte Dunes*, 526 U.S. at 708.

236. *Id.* at 718.

237. *Id.*; *see also id.* at 731 (Scalia, J., concurring in part and concurring in the judgment) (agreeing that “history is our guide” with respect to both portions of the test and in adopting the *Markman* formulation); *id.* at 733 (Souter, J., concurring in part and dissenting in part) (agreeing with the *Markman* formulation of the Seventh Amendment test).

238. *Id.* at 711-15 (plurality opinion).

239. *Id.* at 719-22 (plurality opinion).

240. *Id.* at 710-13 (plurality opinion).

241. *Id.* at 724 (Scalia, J., concurring in part and concurring in the judgment).

242. *Id.* at 736-40 (Souter, J., concurring in part and dissenting in part).



right to a jury in an eminent domain proceeding in 1791, the fact that the suit was presented as a § 1983 tort claim was irrelevant. Condemnation proceedings “carried ‘no uniform and established right to a common law jury trial’” at English common law in 1791.<sup>243</sup> In Justice Souter’s view, the Seventh Amendment “preserve[s]” the common law right but “does not create a right where none existed.”<sup>244</sup>

Together, *Markman* and *Del Monte Dunes* restate the historical approach to Seventh Amendment questions. First, as to the question of Seventh Amendment coverage, the issue is whether the party claiming the right can establish a clear historical source or analogue for the right to a trial by jury. A court must search for an analogue at the appropriate level of generality. If history shows that the analogue does not display a “uniform and established right,” or if it shows that there was, in fact, no jury right, that is normally the end of the inquiry. Second, even if the Seventh Amendment is implicated because an analogue exists, the court must address whether the challenged procedure has violated the Seventh Amendment right in its fundamentals. In this portion of the test, the court first looks to history to examine whether there are analogues to the type of procedural innovation at issue in the case. If not, the court looks to precedent. If precedent is unclear, the court may resolve the matter based upon “functional considerations” so long as none of those factors impairs the function of the jury in its fundamentals. What are those fundamentals? The fundamentals of the jury are to act as a factfinder and to serve as a buffer against government oppression.<sup>245</sup> Rulemakers have a fairly free hand in creating new procedures, as long as they retain these essential jury functions.

*Markman* and *Del Monte Dunes* are also important as a matter of constitutional theory. In some respects, these two cases represent a détente of sorts between the originalist and non-originalist wings of the Court.<sup>246</sup> For

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243. *Id.* at 738 (Souter, J., concurring in part and dissenting in part) (quoting 5 JAMES WILLIAM MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 38.82[1], at 38-268 (2d ed. 1996)).

244. *Id.*

245. *Colgrove v. Battin*, 413 U.S. 149, 157 (1973) (identifying these two purposes of the jury right); see *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (“A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.”); Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 *GEO. WASH. L. REV.* 723, 751 (1993) (“The value of a jury buffer in civil cases was demonstrated by the English experience, where juries had awarded substantial damages against officials who had committed unreasonable searches and seizures.”).

246. Meyler, *supra* note 19, at 596 (observing that Seventh Amendment doctrine is valuable in analyzing how and when to incorporate the common law in interpreting the Constitution “precisely because Justices from Brennan and Marshall to Kennedy and Scalia generally concur that, in the Seventh Amendment context . . . history is relevant to constitutional

years, originalists and non-originalists have struggled over how much discretion is to be left to judges in construing the Constitution. In the last decade or so, the battle has become internecine among originalists themselves.<sup>247</sup> In each case, the fundamental question has been how much judges should allow constitutional norms to be constrained by the history that surrounds that text.<sup>248</sup>

*Markman* and *Del Monte Dunes* establish that it is possible to have every member of the Court—right, left, and center—subscribe to the following propositions: (1) history should drive constitutional interpretation; (2) history frequently does not itself provide sufficient guidance for constitutional implementation; and (3) some reference point outside the text, but not hostile to it, is required to successfully translate a piece of eighteenth-century script into a workable legal norm. The fact that the Court has reached some level of methodological agreement over the relatively sleepy issue of the right to a civil jury offers hope, however faint, that something similar may be possible with the far more charged issue of the right to keep and bear arms.

### III. A SECOND AMENDMENT HISTORICAL TEST: THE SEVENTH AMENDMENT'S (PARTIAL) ANSWER TO *HELLER*'S RIDDLE

With its Seventh Amendment jurisprudence, the Court has drafted a schematic, if not quite a blueprint, for how to construct a historical test. This schematic shows that a historical test can address some familiar problems of constitutional implementation, problems that have been resolved by other doctrinal tests in other areas. In particular, the Seventh Amendment historical test provides a structure for deciding (1) which activities or prohibitions fall within the scope of the constitutional guarantee; (2) which activities or prohibitions transgress that constitutional guarantee; and (3) what kinds of proof or arguments may be deployed in evaluating both (1) and (2). Furthermore, it does so in a way that minimizes (though it can never completely eliminate) recourse to judicial evaluations of government interests, including those that appear in the traditional tiers-of-scrutiny formulation.

Applying a history-centered methodology shaped by the Seventh Amendment, however, requires an additional layer of justification. The Seventh Amendment uses the terms “preserve” and “common law”; the Second

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adjudication”).

247. See *supra* notes 20-23 for literature on divisions amongst originalists.

248. For a more thorough discussion of the ways in which originalism has migrated from “original intent” to “original meaning” to “objective original public understanding,” as well as the concessions that migration has required, see Colby, *supra* note 23, at 713-44.

Amendment does not. Critics of this Article will say that I expect a doctrinal tail to wag a textual dog; they will insist that doctrine should sprout organically from the constitutional provision itself, rather than be transplanted from some far-off corner of the Bill of Rights. While that criticism may ring true for those who subscribe to a clause-bound approach to constitutional interpretation, as I explain below, more holistic methodologies support the approach discussed here.<sup>249</sup> Borrowing is a common feature of constitutional construction, as Nelson Tebbe and Robert Tsai have recently explored.<sup>250</sup> As these authors note, judges borrow a range of material, including text, frameworks, doctrine, rationales, and principles, from both within and without the Constitution.<sup>251</sup> Borrowing can be driven by the text, context, and history of a particular constitutional provision,<sup>252</sup> by prudential concerns about stability and predictability in the law,<sup>253</sup> by the incremental nature of common law reasoning itself,<sup>254</sup> and often by all three.<sup>255</sup>

This Part aims to justify why anyone should borrow from the Seventh Amendment to resolve problems with the Second. I reiterate, however, that the

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249. A working definition of holistic legal reasoning is that methodology which assumes that a provision of constitutional text should be interpreted in light of other portions of the text and in light of the structure, purpose, and values of the Constitution as a whole. For some definitions, see Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1267 (2001), which argues for a “holistic form of constitutional interpretation in which parts of the Constitution adopted at different time periods are read together to create a principle with respect to the former parts that differs from the reading those parts previously had”; and Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 940 (2003), which defines “constitutional holism” as “a commitment to attempting, if fairly possible, to read the Constitution . . . [including its underlying principles] as a coherent, integrated whole.” See also Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 795-802 (1999) (discussing the benefits and risks of holistic constitutional interpretation). But see Adrian Vermeule & Ernest A. Young, *Hercules, Herbert and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730 (2000) (challenging holistic legal reasoning).

250. See Tebbe & Tsai, *supra* note 18.

251. See *id.* at 467.

252. For example, the Seventh Amendment speaks of *preserving* the right to trial by jury, which points to some repository of law outside the Constitution itself. Both Article IV and the Fourteenth Amendment use the terms “privileges” and “immunities.” See U.S. CONST. art. IV; *id.* amend. XIV. The Court in *Heller* looked to see how “people” was used elsewhere in the Constitution to determine how it should be interpreted in the Second Amendment. See *District of Columbia v. Heller*, 554 U.S. 570, 579-81 (2008). For more on holistic readings of the Constitution, see *supra* note 249.

253. See Tebbe & Tsai, *supra* note 18, at 521 (identifying these advantages to borrowing).

254. See *id.* at 516-17 (discussing borrowing and judicial minimalism).

255. Cf. *id.* at 511-22 (discussing borrowing’s applicability to various forms of constitutional theory).

necessity of borrowing a historical test—indeed the need to adopt *any* historical test, borrowed or not—flows from some contestable postulates: First, that the Court’s rhetorical commitments in *Heller* and *McDonald* reflect genuine methodological convictions, as opposed to transient judicial politics; second, that the Court expects the lower courts to produce and apply a test that satisfies these rhetorical commitments; and third, that the various flavors of scrutiny (intermediate, intermediate-intermediate, strict, semi-strict, rational basis with bite, etc.) are unpalatable to the majorities that decided both *Heller* and *McDonald*.<sup>256</sup>

The postulates having been restated, Section III.A briefly summarizes the reasons for borrowing and explains why the Seventh Amendment historical test is suitable for borrowing. Section III.B will demonstrate how the Second Amendment right to keep and bear arms raises the same questions about the use of history that have challenged the Court in Seventh Amendment cases. In particular, Section III.B will showcase how the Court’s *Heller* and *McDonald* decisions raise familiar questions of whose history counts for Second Amendment construction, how much history counts, and what a court must do about conflicting and indeterminate history. Section III.C will then explain how a Second Amendment historical test, patterned from the Seventh, can supply the familiar boundary-setting and tailoring functions normally provided by tiers-of-scrutiny or mixed-category-and-tiers-of-scrutiny approaches. Section III.C ends by demonstrating how a historical test for the Second Amendment might operate in practice.

*A. Borrowing from the Seventh Amendment for the Second:  
A Justification in Four Parts*

Courts often borrow from other areas of constitutional law to interpret text and to create decision rules.<sup>257</sup> Justice Scalia borrowed liberally from First Amendment doctrine in *Heller* to support the personal and preconstitutional nature of the Second Amendment and to urge a categorical approach to its limitations.<sup>258</sup> But once we move beyond the proposition that the Second Amendment, like the First, contemplates categories, we are set adrift. The

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256. The more exotic the label, the more it appears to create a “de facto if not official intermediate scrutiny.” Sullivan, *supra* note 66, at 299. For a list of the various approaches, see Rosenthal & Malcolm, *supra* note 12, at 439 n.12; and sources cited *supra* note 57.

257. See generally Tebbe & Tsai, *supra* note 18, at 460-84 (describing how judges and litigants appropriate legal materials associated with other areas of the law). For more on the concept of decision rules, see Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

258. See Tebbe & Tsai, *supra* note 18, at 473-74.

flexible levels-of-scrutiny analysis that encumbers the First Amendment is “baggage”<sup>259</sup> the *Heller* majority seems eager to shed when it comes to the Second Amendment.<sup>260</sup> The question, then, is what sources courts may use to implement the Second Amendment once we accept the notion that it is to be implemented primarily through categories rather than balancing. The Seventh Amendment historical test provides some guidance.

First, the Seventh Amendment offers intratextual clues as to what it means to “not infringe” or to “preserve” rights when those rights are understood to come from some prior, extratextual source. Second, even if one rejected the usefulness of understanding the word “infringe” by reference to the word “preserve,” the Court insists that the Second Amendment simply reflects a preconstitutional right whose scope is determined by extratextual historical sources. It makes sense, then, for the Court to borrow doctrine that it has used to implement another right that shares the same features. Third, Seventh Amendment jurisprudence, for the most part, rejects balancing tests and forces the Court to depend primarily on analogical reasoning from history and common law in order to determine its applicability and scope. As such, the Court’s implementation of the Seventh Amendment through analogical reasoning supplies a set of framing devices that may be transplanted to the Second Amendment. Finally, borrowing from the Seventh Amendment to develop a historical test is apolitical, in the sense that a historical test does not lead to predetermined outcomes. Borrowing could reinforce the argument that history-centered doctrinal tests are largely neutral and trans-substantive, rather than rationalizations for conservative policy preferences.<sup>261</sup>

1. *The Textual Necessity for Second Amendment Construction and Holistic Justifications for Borrowing from the Seventh Amendment*

The Second Amendment does not mean what it says.<sup>262</sup> We know this because applying the strict lexical meaning of the Second Amendment words

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259. Transcript of Oral Argument at 44, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (question of Roberts, C.J.); see also Lund, *supra* note 42 (manuscript at 1-3).

260. See Tebbe & Tsai, *supra* note 18, at 474, 513 (noting that *Heller* borrowed a First Amendment category-and-exception approach, but declined to borrow balancing approaches). A rejection of balancing would also seem to encompass rejection of the time, place, and manner restrictions that the First Amendment has developed. See Sullivan, *supra* note 66, at 297 (describing the evaluation of time, place, and manner regulations as a type of intermediate scrutiny).

261. See Fallon, *supra* note 23, at 5-6.

262. This is contrary to what Senator James McClure and Michael Barone may believe. See 132 CONG. REC. 9,603 (1986) (statement of Sen. McClure); Michael Barone, *The Supreme Court*

“keep,” “bear,” and “arm” would be cataclysmic. “Keep” means “have.”<sup>263</sup> “Bear” means “carry.”<sup>264</sup> “Arm” means “weapon.”<sup>265</sup> A man strolling along Pennsylvania Avenue with a tactical nuclear warhead under his arm satisfies the dictionary sense of all these words.<sup>266</sup>

Constitutional construction<sup>267</sup> is necessary when the meaning of the text “runs out.”<sup>268</sup> With the Second Amendment, however, the problem is not that the text has run out;<sup>269</sup> it is that a literal reading of the text leads to absurd results.<sup>270</sup> Consequently, these quotidian terms, “keep,” “bear,” “arm,” are bracketed by two other terms: “right” and “infringed.” These two words

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*Rules that the Second Amendment Means What It Says*, U.S. NEWS & WORLD REP. (June 27, 2008), <http://www.usnews.com/opinion/blogs/barone/2008/06/27/the-supreme-court-rules-that-the-second-amendment-means-what-it-says>.

263. *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (“[T]he most natural reading of ‘keep Arms’ in the Second Amendment is to ‘have weapons.’”).
264. *Id.* at 584 (“At the time of the founding, as now, to ‘bear’ meant to ‘carry.’”) (citing various Founding-era dictionaries).
265. *Id.* at 581.
266. This normatively unacceptable level of risk also challenges champions of what has been described as “semantic originalism,” in which the meaning of constitutional text is “stated at the level of generality found in the text.” Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1210 (2012). See generally Richard A. Allen, *What Arms? A Textualist’s View of the Second Amendment*, 18 GEO. MASON U. CIV. RTS. J. 191 (2008) (discussing the textual challenges of construing the Second Amendment).
267. Modern originalist theory recognizes a distinction between constitutional interpretation and constitutional construction. Constitutional construction recognizes that interpreting the historical meaning of a constitutional phrase may not be sufficient to produce a workable rule of law, and that judges may have to fashion a workable doctrine “consistent with . . . original meaning but not deducible from it.” See Colby, *supra* note 23, at 731-33 (quoting RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 121 (2004)). *Heller* exemplifies this turn. See Solum, *supra* note 20, at 975-80.
268. Colby, *supra* note 23, at 733 (internal quotation marks omitted).
269. The word “bear,” meaning “carry,” is not ambiguous or vague, unlike the word “equality” or “due.” If you asked an eighteenth-century time traveler to bear a letter for you, he would know exactly what you meant.
270. *Cf. Tennessee v. Garner*, 471 U.S. 1, 5 (1985) (“[T]hough the common-law pedigree of Tennessee’s rule [permitting deadly force against any fleeing felon] is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied.”); *Gravel v. United States*, 408 U.S. 606, 617-18 (1972) (rejecting a “literalistic” approach to the Speech or Debate Clause, U.S. CONST. art I, § 6, cl. 1, in favor of a purposivist approach). As Professor Eskridge points out, Justice Scalia’s opinion effectively rewrites the text to read: “The right of law-abiding people to keep Arms in their homes, for self-defense purposes, shall not be subjected to unreasonable regulation.” William N. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 193, 209 (2009). This reading of the text may be plausible in light of tradition, but it is not a plain reading. See *id.*

transform plain meaning into idiomatic meaning.<sup>271</sup> And idiomatic meanings require construction.

Holistic legal reasoning from the Seventh Amendment provides some clues as to how to construe this phrase. Reading the constitutional text as a whole allows interpretations of one section of text to shed light on the meaning of others.<sup>272</sup> The Court's *Heller* and *McDonald* opinions are saturated with such "intratextual" reasoning.<sup>273</sup> As just one example, Justice Scalia observed that the right of the "people" to assemble and the right of the "people" to keep and bear arms must be interpreted identically to allow for individual rather than solely collective rights.<sup>274</sup> Although the Seventh Amendment uses the terms "preserved" and "common law," which do not appear in the Second Amendment,<sup>275</sup> the textual implications can be overdrawn. As a matter of holistic legal reasoning, the Court's construction of the term "preserved" can help us understand how it could construe the word "infringed" in the Second Amendment.

The *Heller* Court said that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them."<sup>276</sup> Whatever the truth of this assertion with respect to other constitutional rights, this language signals that the *Heller* majority understands the scope of the right to keep and bear arms to be fixed at some definitive period of adoption, and that fixation insulates it from legislative, executive, or judicial alteration.<sup>277</sup> Moreover, the scope of the right does not appear on the face of the text itself:

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271. See *Heller*, 554 U.S. at 576-600 (discussing idiomatic use of common terminology in the Second Amendment).

272. Sunstein & Vermeule, *supra* note 249, at 940. Steven Calabresi and Julia Rickert have argued, for instance, that the Fourteenth Amendment's Equal Protection Clause extends to sex-based discrimination when read in light of the Nineteenth Amendment's extension of voting rights to women. Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

273. For an assessment of holistic legal reasoning applied to the Second Amendment, see Akhil Reed Amar, *Heller*, HLR, and *Holistic Legal Reasoning*, 122 HARV. L. REV. 145 (2008) (discussing the use of holistic legal reasoning in both the majority opinion and the dissent in *Heller*). See generally Amar, *supra* note 249 (discussing the benefits and risks of holistic constitutional interpretation).

274. See *Heller*, 554 U.S. at 579-81.

275. Cf. Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 84 (2009) ("[T]he Second Amendment's text does not 'preserve' a preexisting right or regulatory scheme, but rather contemplates more generally that the militia be 'well-regulated.'").

276. *Heller*, 554 U.S. at 634-35.

277. See *id.* at 635 (explaining that the Second Amendment is "the very product of an interest balancing by the people" at the time of its adoption).

arm, bear, and keep have the same meanings now as they did in 1791, but “longstanding” regulations are “presumptively” constitutional.<sup>278</sup> The sources used to define the scope of the right, and the nature of an infringement, must be extratextual and roughly contemporaneous with the relevant dates of ratification or, as I will discuss below, incorporation.

This is where the idea of “preservation” in the Seventh Amendment helps. What does it mean to “infringe” a “right,” given that both the right and its scope are fixed by some extraconstitutional sources in the past? “Infringe,” according to eighteenth-century lexicographers, means “to violate; to break laws or contracts” or “to destroy; to hinder.”<sup>279</sup> By comparison, the civil jury right must be “preserved.” “Preserve,” as defined in the eighteenth century, means “[t]o save, to defend from destruction or any evil, to keep.”<sup>280</sup>

Taking these sources at face value and examining them intratextually, “preserve[]”<sup>281</sup> connotes restraints on government activity at least equivalent to those implied by “not infringe[].”<sup>282</sup> That is, as a matter of raw text, government regulations that result in departures from the jury-trial right as understood by Englishmen in 1791 are an infringement because they cannot be said to preserve, save, or keep the right as it existed in 1791.<sup>283</sup> And, at least according to classical logic, if all infringements are failures to preserve, then if something has been preserved, it has not been infringed.<sup>284</sup>

278. See *id.* at 626-27 & n.26.

279. JOHNSON, *supra* note 112; see also 1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Edward & Charles Dilly in the Poultry 1775) (defining “infringed” as “[v]iolated, broken, destroyed”); 1 SHERIDAN, *supra* note 112 (defining “infringe” as “to violate, to break laws or contracts; to destroy, to hinder”). Evidence of eighteenth-century usage suggests it was sometimes used as an absolute, connoting a binary. So, for example, in the case of *Harwood v. Goodright*, the litigants spoke of the “infringe[ment]” of a testament, by which they meant its “revocation.” 98 E.R. 981, 982 (1774); see also *Atkinson v. Baker*, 100 E.R. 989, 990 (1791) (stating that the court “must take care not to infringe one of [the] first rules” of estate law). But all usages of the term do not convey this sense. See *Jones v. Kitchen*, 126 E.R. 787, 790 (1797) (discussing “rules of pleading, which if we infringe here, we may destroy altogether”).

280. 1 JOHNSON, *supra* note 112; 1 SHERIDAN, *supra* note 112; see also PERRY, *supra* note 112, at 408 (defining preserve as “to save, defend”).

281. U.S. CONST. amend. VII.

282. *Id.* amend. II.

283. This is a position taken by some states, to the extent that they forbid the application of a jury-trial right to any action that did not exist prior to the adoption of that state’s constitution. See *supra* note 113 (citing the Ohio and Georgia state constitutional rights to a jury).

284. As Professor Ernest Young pointed out, one could also argue that the most reasonable source for borrowing definitions is the First Amendment, which uses the term “abridging.” E-mail from Ernest A. Young, Alston & Bird Professor of Law, Duke University School of



But the Court has had little trouble dispensing with ancient forms of common law practice,<sup>285</sup> expanding coverage of the right to novel types of actions,<sup>286</sup> or condoning numerous procedural innovations<sup>287</sup> when construing the Seventh Amendment's text. And yet, despite these departures, the Court maintains that the Seventh Amendment right to a civil jury has been "preserved." It is possible that this method of implementing the Seventh Amendment is wrong.<sup>288</sup> But let us assume that the requirement to "preserve" the jury-trial right permits some latitude for common law development and legislative innovation, so long as the fundamentals are kept intact. *A fortiori*, then, modern deviations from eighteenth-century practice in the Second Amendment context cannot be said to "infringe" upon the right, if such modern deviations from eighteenth-century practice in the Seventh Amendment context "preserve" that right. If preserving the fundamentals of the jury-trial right is all that is required to remain faithful to the Seventh Amendment constitutional text, then any regulation that does not affect the fundamentals of the right to keep and bear arms cannot be said to infringe upon the Second.<sup>289</sup> Thus, by examining dictionary definitions of a key term,

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Law, to Darrell A.H. Miller, Professor of Law, University of Cincinnati College of Law (Mar. 20, 2012) (on file with author); see U.S. CONST. amend. I. While this is undoubtedly appealing, there are two responses. First, "abridge," as defined by Samuel Johnson, not only means "to deprive" but also means "[t]o contract, to diminish, to cut short." 1 JOHNSON, *supra* note 112. This latter meaning suggests that a regulation may run afoul of the First Amendment even if the regulation falls short of the complete violation, break, or destruction connoted by the term "infringe." See *id.* Second, the Court has used various levels of scrutiny analysis, including overbreadth, to implement this concept of "abridge," in the sense of diminution or contraction of the right. This is a mode of implementation the Court seems reluctant to apply in Second Amendment cases. So, from a purely descriptive and predictive point of view, such reluctance limits the usefulness of the intratextual links between "abridge[]" and "infringe[]."

285. See *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931) (permitting a court to set aside a verdict in part, despite the common law tradition of setting aside the entire verdict).
286. See *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558 (1990) (plurality opinion) (extending the jury-trial right to a union fair representation suit).
287. See *Galloway v. United States*, 319 U.S. 372, 392 (1943) (permitting a directed verdict despite there being no exact equivalent in common law procedure).
288. Thomas, *supra* note 21, at 139-60 (arguing that the procedural innovation of Federal Rule of Civil Procedure 56 violates the Seventh Amendment). It is equally possible that the Court's prior Seventh Amendment decisions are a type of "super precedent" that requires an unusual amount of effort to overturn. See Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205-06 (2006) (describing super precedents as those constitutional decisions so embedded in American institutions and norms that they are effectively insulated from reconsideration).
289. One objection, of course, is that the Court has set the bar far too low for preserving the Seventh Amendment right, and that the Court needs to protect Seventh Amendment rights

“preserved” in the Seventh Amendment, and recognizing how that term has been construed through time, we get a better sense of what the term “infringed” may mean in the Second Amendment.

2. *Constitutional Construction and the Second and Seventh Amendments as Preconstitutional, Preexisting Rights*

Skeptics of holistic legal reasoning may argue that interpreting “infringe” in light of “preserve” is “too clever by half.”<sup>290</sup> The Seventh Amendment textual command to “preserve” drives the historical test, not the other way around. But even skeptics must admit that a majority of the Court has apparently dedicated itself to a construction of the Second Amendment that replicates methodologically the focus on history that the Seventh Amendment demands textually.

First, as I have stated previously, not one member of the Court has suggested the meaning of the words “keep,” “bear,” or “arm” is exhausted by consulting Dr. Johnson’s Dictionary. Some construction is required. The Court has stated more than once that the right to keep and bear arms is, in some yet undefined sense, a product of preconstitutional history, rather than an eighteenth-century textual invention.<sup>291</sup> The clues, according to the Court, are in the text itself: “The very text of the Second Amendment implicitly recognizes the pre-existence of the right [to keep and bear arms] and declares only that it ‘shall not be infringed.’”<sup>292</sup> Therefore, according to the Court, the Second Amendment does not create the right to keep and bear arms; it merely

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far more vigorously. This Article takes no position on that point, but assumes the legitimacy of the Court’s Seventh Amendment jurisprudence.

290. See Amar, *supra* note 249, at 799 (“Carried to extremes, intratextualism may lead to readings that are too clever by half—cabalistic overreadings conjuring up patterns that were not specifically intended and that are upon deep reflection not truly sound but merely cute . . . or mystical.”). For a similar caution, see Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 *FORDHAM L. REV.* 1611, 1617 (1997), which describes the “[a]esthetic [f]allacy” of constitutional interpretation as a supposition “that the Constitution is like a poem, a symphony, or a great work of political philosophy. Each word and every phrase must come together to form a harmonious and pleasing composition.”

291. See *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (“[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.”); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (“This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.”); see also *infra* Subsection III.B.1 for a fuller discussion of the implications of this pre-textual right.

292. *Heller*, 554 U.S. at 592.

recognizes, through the word “infringe,” a right that the Framers believed they possessed as free Englishmen.<sup>293</sup>

The Court has construed the Seventh Amendment in much the same way. One of the defenses of borrowing is the notion that it “foster[s] a sense of fairness . . . a perception that comparable cases are being treated comparably, even though they may fall into different doctrinal categories.”<sup>294</sup> As the Court has said, the Seventh Amendment does not create a trial by jury at common law, but simply acknowledges a preexisting right of Englishmen.<sup>295</sup> Therefore, even putting aside holistic legal reasoning, since the Court indicates that both Amendments share the same features—both are considered preconstitutional, and the scope of each is determined in large part by common law history—an investigation into the Seventh Amendment’s implementation through a historical test can be illuminating.

Furthermore, in areas of constitutional law far more open-textured than the Second Amendment, the Court has appealed to history to give the text meaning. For example, the Court’s originalists consider the rights the Fourth Amendment protects to be preconstitutional.<sup>296</sup> Hence, in Fourth Amendment jurisprudence, Justice Scalia looks to common law practice in 1791 to determine when a “search” or “seizure” is “unreasonable.”<sup>297</sup> Justice Scalia recently observed that a “search” for purposes of the Fourth Amendment must at the very least mean a physical invasion that would have constituted a trespass in 1791.<sup>298</sup> Similarly, originalists have looked to 1791 practice to determine what is meant by the Eighth Amendment’s prohibition on “cruel” or “unusual”

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293. *Id.* at 593.

294. Tebbe & Tsai, *supra* note 18, at 485.

295. *See, e.g.,* *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 738 (1999) (characterizing the “trial decision” as “preserv[ing] the substance of the common law right as it existed in 1791”); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (affirming that the right is that “which existed under English common law when the Amendment was adopted”); *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (“The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.”); *see also* *Township of Haddon v. Royal Ins. Co. of Am.*, 929 F. Supp. 774, 777 (D. N.J. 1996) (“[T]he Seventh Amendment merely preserved preexisting rights . . .”).

296. *Heller*, 554 U.S. at 592 (citing the Fourth Amendment as an example of a “pre-existing” right).

297. *See* *Virginia v. Moore*, 553 U.S. 164, 168 (2008) (Scalia, J.) (“In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve.”). *See generally* Sklansky, *supra* note 22 (discussing and criticizing the historical approach to Fourth Amendment jurisprudence).

298. *See* *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

punishment.<sup>299</sup> And the Court has construed the Eleventh Amendment to acknowledge a common law tradition of sovereign immunity that the text itself does not disclose.<sup>300</sup>

The Court's process of borrowing doctrine from other areas of constitutional law is well documented. Given that the Second Amendment is still largely unknown territory, the Court may wish to seize the opportunity to select vehicles that have not been "spoilt" by non-originalist precedent,<sup>301</sup> or that are laden with less "baggage."<sup>302</sup> Using lessons from the Seventh Amendment's analytical framework to answer Second Amendment questions fits within the Court's current project of constitutional construction grounded in historical methods.

### *3. History, Common Law, and Reasoning by Analogy in Constitutional Construction*

The Seventh Amendment has forced the Court to address second-order questions about the use of analogical reasoning itself. Of course, analogical reasoning is not unique to the Seventh Amendment. What is unique is that the Seventh Amendment's text drives the Court to look for historical analogues in a fashion that it can avoid when construing other constitutional provisions.<sup>303</sup> The Amendment says "preserve" and "rules of the common law," and the Court must remain faithful to the literal meaning of those terms. But it cannot

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299. See *Harmelin v. Michigan*, 501 U.S. 957, 960-96 (1991) (Scalia, J.) (plurality opinion) (conducting a historical analysis to determine whether the Eighth Amendment prohibits disproportionate punishment).

300. See *Alden v. Maine*, 527 U.S. 706, 727 (1999) (recognizing that the common law tradition of sovereign immunity is part of the Eleventh Amendment, even though the concept "fall[s] outside the literal text of the Eleventh Amendment"); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991))).

301. I take no position on the wisdom of distinguishing "originalist" from "non-originalist" precedent, or on the relative weights of either. For more on this distinction, see Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729.

302. Transcript of Oral Argument at 44, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (question of Roberts, C.J.), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/07-290.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-290.pdf).

303. With other constitutional rights, the tug of intermediate scrutiny is irresistible because of what Sullivan identifies as "a crisis in analogical reasoning" – when some issue arises that does not fit in any of the boxes the Court has already created. See Sullivan, *supra* note 66, at 297. The text of the Seventh Amendment tends to keep judges from dispensing with analogues altogether.

consign the republic to the absurdity of a federal judiciary operating exactly as it did in 1791, wigs and all. The Seventh Amendment text tends to cut off other avenues of construction except analogical reasoning. Something is constitutional now—the Seventh Amendment right is “preserved”—because something similar to it existed in 1791.

Second Amendment originalism, at least as it has been articulated thus far, puts the Court in the same box methodologically that the Seventh Amendment does textually. According to the Court, the Second Amendment is the textual expression of a preexisting natural right the Founding generation understood. But a right to what? As stated previously, few people seriously argue that the right extends to tactical nuclear weapons, no matter what the dictionary says. Also, few people believe that the Second Amendment only guarantees a right to a flintlock. But the fact that Justice Scalia can only say the latter argument “border[s] on the frivolous”<sup>304</sup> betrays an anxiety that needles all champions of originalism. Specifically, what criterion, other than the judge’s own taste or will, justifies his conclusion that *x* is “bearing” or “keeping” or an “arm” because something *like* it existed in 1791?

A full explanation of the role of analogical reasoning in general, and among originalists in particular, is beyond the scope of this particular Article. However, the Court’s development of a historical test for the Seventh Amendment provides some guidance.<sup>305</sup> First, a historical investigation is required. Second, the litigants must produce a sufficient data set of historical practices or meanings in order to accurately construe what the text demands. Third, the Court must acknowledge when consensus about textual meaning or historical practice forms a baseline for a constitutional norm, if such a consensus is forthcoming.<sup>306</sup> Fourth, as Professor Lee Strang has written, “[W]here the Constitution’s original meaning is under- or indeterminate,”

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304. See *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (emphasis added).

305. In articulating these lessons from the Seventh Amendment, I am indebted to Professor Strang’s articulation of “abduced-principle originalism.” See Lee J. Strang, *Originalism and the “Challenge of Change”: Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927 (2009). Abduced-principle originalism is a method by which a court identifies a constitutional norm either from the semantic “uses of the constitutional term or phrase” or identifies the norm from “the discrete practices that the Framers and Ratifiers understood the constitutional text in question to prohibit, require, or permit.” *Id.* at 930 (emphasis omitted). Professor Strang does not mention the Seventh Amendment, but it appears that the Court has engaged in a type of abduced-principle originalism in its implementation of the Seventh Amendment historical test.

306. See *id.* at 957 (stating that, with abduced-principle originalism, “first, a judge must identify the data, the archetypal practices regarding which there was a consensus” and then “put forward possible norms to explain the data”).

legislative judgments are owed some special deference.<sup>307</sup> This deference is especially justified when the Constitution itself contemplates that the political branches will help shape a constitutional norm or institution.<sup>308</sup> Fifth, the norm that is abstracted from this analogical process<sup>309</sup> must be tested to ensure that it does not eliminate the reason for the constitutional provision itself<sup>310</sup> and to check that it does not “generate disturbing or even calamitous results.”<sup>311</sup>

However the Court engages with the analogical abstraction issue in the Second Amendment, it has already done so in the Seventh Amendment. As such, the Seventh Amendment historical test offers “a general repertoire of doctrinal moves”<sup>312</sup> that is “sufficiently developed”<sup>313</sup> to be useful. Further, these moves, while contested in their outcomes, enjoy support from Justices representing a range of ideological inclinations.<sup>314</sup>

#### 4. A Word on Good Faith Borrowing

Finally, one objection to using the Seventh Amendment as a model for the Second is that such borrowing is solely “instrumental”<sup>315</sup> or is otherwise

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307. *Id.* at 981 (“When Congress is working within the underdeterminate constitutional text, it may not violate the determinate original meaning that exists but, within those strictures, Congress can be creative.”); *see also* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 758 (1993) (“Analogical reasoning is often silent or unhelpful on the question of social consequences.”).

308. *See, e.g.*, U.S. CONST. amend XIII, § 2 (giving Congress the power to enforce the Thirteenth Amendment through “appropriate legislation”); *id.* amend. XIV, § 5 (giving Congress the power to enforce the Fourteenth Amendment through “appropriate legislation”); *id.* amend. XV, § 2 (giving Congress the power to enforce the Fifteenth Amendment through “appropriate legislation”); *see also id.* art. I, § 8 (giving Congress the power to “organiz[e], arm[], and disciplin[e] the Militia”). For more on this point, *see infra* note 446 and accompanying text.

309. *See* Strang, *supra* note 305, at 957.

310. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1075-77 (1990) (noting that constitutional rights must be construed so as not to contradict the rationale for their inclusion in the Constitution).

311. Fallon, *supra* note 23, at 20 (identifying originalist historical arguments against the constitutionality of paper money or Social Security).

312. Tebbe & Tsai, *supra* note 18, at 484.

313. *Id.* at 468 (discussing the elements of a “plausible act of borrowing”).

314. *See id.* at 472 (arguing that transplanted from one area to another is tempting when one idea “possesses a track record of success in the sense that it seems defensible, has proven useful, or . . . enjoys support among specialists or the public”).

315. Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 98 (2009), [http://www.columbialawreview.org/wp-content/uploads/2009/10/97\\_Volokh.pdf](http://www.columbialawreview.org/wp-content/uploads/2009/10/97_Volokh.pdf) (“It’s hard to see any justification for such an analogy [of the right to keep and bear arms

pursued in bad faith.<sup>316</sup> At its most mild, the argument would be that the Seventh Amendment's text and structure offer slim support for appropriation of its doctrinal apparatus to implement a fundamental right, such as the right to keep and bear arms, and thus such borrowing is badly misguided. At its most biting, the argument would be that this exercise is simply a way of getting at a preconceived end.

As for the first, milder criticism, I have already stated that the Seventh Amendment's appeal lies in its schematic for how to construct a historical test that can accomplish the practical task of turning constitutional script into rules of decision. The Second Amendment text is insufficiently precise to work as law, and the lower courts need guidance. Furthermore, they need guidance in a way that respects the categorical and historical approach of the *Heller* and *McDonald* majorities, but that is cognizant that twenty-first-century society is far different than eighteenth. In this limited sense, a decision to borrow from the Seventh Amendment can be instrumental. But so can a decision *not* to borrow.<sup>317</sup> Conservative stalwarts have spent the last half-century urging the Court to be more respectful of text and history in construing constitutional provisions and have vetted potential judges and Justices specifically for their fidelity to that program. One would have to ask why, when the opportunity arises to rely upon a well-developed corpus of frameworks, arguments, and doctrine that advances that very program, they should opt for some other, more malleable test, drawn from some other area of law.

As to the second, more cutting criticism, a historical test built upon the example of the Seventh Amendment does not necessarily lead to predictable pro-gun or pro-regulation positions.<sup>318</sup> Depending on how the Court describes the relevant analogy, a right to keep and bear arms in a house, for example, could be broad or narrow.<sup>319</sup> One of the appeals of borrowing from the Seventh

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with obscenity], other than a purely instrumental one.”).

316. Tebbe and Tsai describe good faith borrowing as “an honest desire to arrive at a defensible position and enhance general understanding of the law,” as opposed to bad faith borrowing, which is motivated not by a desire to understand, explain, or improve the law, but rather is “for the purpose of confusing observers, insulating a matter from accountability, or rendering a doctrine unusable by practitioners.” Tebbe & Tsai, *supra* note 18, at 468, 482.
317. *See id.* at 471 (“[D]ecisions to borrow (or refusals to borrow) are [sometimes] so strained they seem outcome determinative.”).
318. *Cf. Heller II*, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (remarking that “just because gun regulations are assessed by reference to history and tradition” does not mean the government does not have latitude, and perhaps even more latitude, to craft regulations).
319. *See, e.g., Miller*, *supra* note 46, at 926, 934-35 (suggesting that an armed corporate compound could be analogized to a large arms-bearing family).

Amendment historical test is that constitutional borrowing “is agnostic to political ideology.”<sup>320</sup>

Finally, there are better and worse arguments about what the text and context of the Second Amendment might mean, as well as the consequences that flow from such meaning. But the historical test proposed in this Article is concerned primarily with articulating a workable framework within the parameters the Court itself has set. These parameters are simply stated: Be faithful to history; don’t balance; preserve as much regulation as possible. This Article assumes that the Court is serious about these conditions, and that it expects a test that complies with all three to percolate up from the lower courts. That a test can be bent or twisted to reach a predetermined outcome is not a problem unique to historically defined ones. And, if anything, to bend a historical test may require more mental exertion than to twist a more malleable intermediate scrutiny or undue burden analysis.<sup>321</sup>

### *B. A Historical Test for the Second Amendment: Some Familiar Questions*

The Second Amendment right to keep and bear arms could be implemented through a historical test based on historical materials and common law reasoning and sources, just as the Seventh Amendment right has been. This approach would comply with the Court’s stated desire to avoid balancing and yet be flexible enough to address twenty-first-century concerns. However, the Court’s focus on defining the Second Amendment by history triggers a number of problems similar to those posed by the Seventh Amendment historical test. First, there is the problem of whose history. Second, there is the problem of how much history. And third, there is the problem of conflicting or indeterminate history. As I explain in this Section, those problems are still being worked out and are not completely resolvable. Nevertheless, the Court’s efforts to work through those problems in Seventh Amendment cases offer some useful guidance.

#### *1. Whose History?*

Whose history counts for the purpose of the Second Amendment historical test? The Seventh Amendment jury-trial right is at least textually helpful. It

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320. Tebbe & Tsai, *supra* note 18, at 489.

321. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 985-87 (Scalia, J., concurring in the judgment in part and dissenting in part) (referring to the undue burden test as “unprincipled,” “standardless,” and “inherently manipulable”).



says “common law” and “preserved.”<sup>322</sup> The courts agree, due in part to variations in colonial practice, that English common law history is the touchstone. The Second Amendment text is not as clear. It says the right to keep and bear arms shall not be “infringed.”<sup>323</sup> Nevertheless, both Justice Scalia and Justice Alito have reiterated that the history that counts for purposes of the right comes from both English and American traditions.

English history clearly counts for purposes of Second Amendment construction. *Heller* and *McDonald* both construed the right to keep and bear arms for self-defense as a preexisting right, one that the Constitution codifies but does not create.<sup>324</sup> As Justice Scalia insisted, the Second Amendment “was not intended to lay down a ‘novel principl[e]’ but rather codified a right ‘inherited from our English ancestors’”<sup>325</sup>: “By the time of the founding the right to have arms had become fundamental for English subjects.”<sup>326</sup> The Court in both *Heller* and *McDonald* referred to English sources to determine what precisely is the substance of the right that must not be “infringed.” The Court cited, among other sources,<sup>327</sup> Blackstone’s *Commentaries*,<sup>328</sup> Hawkins’s *Treatise on the Pleas of the Crown*,<sup>329</sup> and the seventeenth-century English Bill of Rights<sup>330</sup> – which *Heller* identified as “the predecessor to our Second

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322. U.S. CONST. amend. VII.

323. *Id.* amend. II.

324. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036–38 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 593, 628 (2008).

325. *Heller*, 554 U.S. at 599 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)). Compare *id.* (stating that self-defense was a preexisting right), with *Thompson v. Utah*, 170 U.S. 343, 349–50 (1898) (stating that the Founders considered the jury trial “their birthright and inheritance, as a part of that admirable common law which had fenced []round and interposed barriers on every side against the approaches of arbitrary power” (quoting 2 STORY, *supra* note 109, § 1779, at 541)).

326. *Heller*, 554 U.S. at 593; see also *McDonald*, 130 S. Ct. at 3036 (noting that *Heller* recognizes this right’s key role in the American notion of liberty and its incorporation as part of the concept of due process); *id.* at 3066 (Thomas, J., concurring in part and concurring in the judgment) (referring to the rights contained in the Bill of Rights as “inalienable rights” that are merely “codifi[ed]” in the Constitution).

327. For other English sources, see, for example, *Heller*, 554 U.S. at 583 n.7, 587–88 n.10.

328. See *McDonald*, 130 S. Ct. at 3036 n.15 (citing Blackstone for the proposition that self-defense was a fundamental right); see also *Heller*, 554 U.S. at 593–94 (citing Blackstone for the proposition that “the arms provision of the Bill of Rights [was] one of the fundamental rights of Englishmen”).

329. See *Heller*, 554 U.S. at 582.

330. See *McDonald*, 130 S. Ct. at 3036; *Heller*, 554 U.S. at 593; see also *McDonald*, 130 S. Ct. at 3064 (Thomas, J., concurring in part and concurring in the judgment) (referring to the English Bill of Rights for the antecedents of fundamental rights such as the right to bear arms).

Amendment.”<sup>331</sup> According to the Court, English history must inform how the Second Amendment right is to be construed.<sup>332</sup>

But American history counts as well. Justice Alito in *McDonald* concluded that the right to keep and bear arms applies to the states through the Fourteenth Amendment because it is “fundamental to *our* scheme of ordered liberty”<sup>333</sup>—it is a right “deeply rooted in *this Nation’s* history and tradition.”<sup>334</sup> *Heller* cited “Postratification Commentary” by the likes of St. George Tucker<sup>335</sup> and Joseph Story,<sup>336</sup> “Pre-Civil War Case Law”<sup>337</sup> (including from states that did not exist in 1791),<sup>338</sup> “Post-Civil War Legislation”<sup>339</sup> and “Post-Civil War Commentators,”<sup>340</sup> in support of its construction of the Second Amendment as protecting an individual right. *McDonald* cited legislation and cases and other materials from the Reconstruction period. As one lower court has stated, “[W]hen state- or local-government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the Second Amendment’s scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified [in 1868].”<sup>341</sup>

Consequently, the history that matters for Second Amendment purposes appears to be not just English history, as it is in the Seventh Amendment, but rather a particular Anglo-American mix of history.

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331. *Heller*, 554 U.S. at 593. For a similar proposition, see *McDonald*, 130 S. Ct. at 3064 (Thomas, J., concurring in part and concurring in the judgment).

332. See *Heller*, 554 U.S. at 593; cf. Patrick Charles, *Scribble Scramble, The Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NW. U. L. REV. COLLOQUY 227 (2010) (using English historical sources to understand the bounds of permissible firearm regulation).

333. *McDonald*, 130 S. Ct. at 3036.

334. *Id.* (emphasis added) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

335. *Heller*, 554 U.S. at 606.

336. *Id.* at 608.

337. *Id.* at 610-14.

338. *Id.* at 613 (citing *State v. Chandler*, 5 La. Ann. 489, 490 (1850); *Aymette v. State*, 21 Tenn. 154 (1840)).

339. *Id.* at 614-16.

340. *Id.* at 616-19.

341. *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011). As I have mentioned elsewhere, using Reconstruction understandings of Founding-era rights is deeply problematic. See Miller, *supra* note 76, at 1327-36, 1347-49 (discussing problems with claiming natural rights to rebellion and self-defense in the Reconstruction era); Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 940-74 (2011) [hereinafter, Miller, *Retail Rebellion*] (discussing the problems that arise when the English common law right to resist unlawful arrest is interpreted in light of the reality of Reconstruction violence).

## 2. *How Much History?*

Although Anglo-American history is relevant to the construction of the Second Amendment, that still leaves the question: How much history? As with the Seventh Amendment, this raises two issues. The first is temporal: The Second Amendment concerns history *over what period of time?* The second, more substantive question, mirrors that posed by the Seventh Amendment: How much of that history is now *constitutional law?* In particular, how much of the Anglo-American common law of self-defense, or tort, or criminal law, did the Second Amendment put beyond the powers of legislatures, executives, and courts, and, conversely, how much was left to these institutions?

As to the first question, the Court in *Heller* and *McDonald* did not feel confined to the history of the right to keep and bear arms in 1791, but drew upon sources dating as late as a century later. The historical sweep of the Second Amendment's construction clusters, very roughly, around three eras: English and preconstitutional American history, American antebellum history, and Reconstruction and its close contemporaries.

The second question—how much of that history is now constitutional law—is far more difficult to answer. *Heller* and *McDonald* both describe self-defense as the “central component” of the Second Amendment right.<sup>342</sup> They also both declare that the right to have firearms for “the core lawful purpose of self defense”<sup>343</sup> is a right “deeply rooted in this Nation’s history and tradition.”<sup>344</sup> But neither *Heller* nor *McDonald* explains how deep those roots penetrate. It is apparent that the common law right to self-defense is constitutionalized to some degree.<sup>345</sup> But how much? Is all of self-defense common law as it existed in 1791, or 1868, or somewhere in between now constitutional law?<sup>346</sup> The *McDonald* Court cited Blackstone for the proposition that if one kills an attacker, “the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and

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342. *Heller*, 554 U.S. at 599 (emphasis omitted); see also *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (citing *Heller*, 554 U.S. at 599).

343. *McDonald*, 130 S. Ct. at 3036 (quoting *Heller*, 554 U.S. at 571).

344. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

345. See, e.g., David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 SYRACUSE L. REV. 235, 247-49 (2008) (arguing that *Heller* made self-defense law part of the Second Amendment rather than the Ninth Amendment or common law). As Laurence Tribe and Michael Dorf wrote with respect to “a right to be left alone,” the right to self-defense “cannot serve as a constitutional rule of decision”; some “less abstract formulation of the right” is necessary to be constitutionally meaningful. Tribe & Dorf, *supra* note 310, at 1067.

346. See *infra* Subsection III.B.3 for conflicting common law.

discharged, with commendation rather than blame.”<sup>347</sup> If the Second Amendment merely reflects a preexisting right inherited from the English, is Blackstone’s commentary now part of that right? Just the part about acquittal? What do we do with the fact that in 1791 there was a common law right to resist an illegal arrest with force?<sup>348</sup> Is that now part of the Second Amendment? At common law, private or quasi-private parties could enforce criminal law, for example, through the “hue and cry” and the *posse comitatus*.<sup>349</sup> These types of collective arms bearing for self-defense stretched over three hundred years of Anglo-American history. Are they now constitutional rights?<sup>350</sup>

Common law customs have been “constitutionalized” in other areas.<sup>351</sup> But there has not been a coherent system to decide what common law is constitutional law and what is not. Further, the history of the Court’s constitutionalization of the common law is a decidedly mixed bag.<sup>352</sup> The Court has, in the past, constitutionalized the common law defense of truth to an allegation of libel,<sup>353</sup> common law liberty-of-contract values to an allegation of

347. See *McDonald*, 130 S. Ct. at 3036 n.15 (citing 4 BLACKSTONE, *supra* note 100, at \*182).

348. See Miller, *Retail Rebellion*, *supra* note 341, at 945-59 (discussing the Second Amendment’s effect on the right to resist arrest).

349. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 29 (1993) (noting the hazy distinction in colonial America between public and private law enforcement and between mob violence and common law tradition); *cf.* *Rehberg v. Paulk*, 132 S. Ct. 1497, 1503 (2012) (observing that in 1871 “it was common for criminal cases to be prosecuted by private parties”).

350. For more on the problems associated with the constitutionalization of self-defense law, see Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205 (2009).

351. See Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 477 n.60 (2005) (referring to *Bram v. United States*, 168 U.S. 532 (1897), as the “constitutionaliz[ation]” of the voluntariness doctrine in self-incrimination cases); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 802 (2004) (referring to the *Lochner* era as “constitutionaliz[ing] . . . common law rules [of property, contract, and tort] as the baseline from which to identify public regulation”); Sklansky, *supra* note 22, at 1808 (describing Justice Scalia’s search-and-seizure jurisprudence as “constitutionalized common law”).

352. For more on the “checkered history” of constitutionalized common law and a taxonomy, see Samuel C. Kaplan, *“Grab Bag of Principles” or Principled Grab Bag?: The Constitutionalization of Common Law*, 49 S.C. L. REV. 463, 464-72 (1998).

353. See *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964) (stating that the First Amendment rule in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), “absolutely prohibits punishment of truthful criticism”); *Gottschalk v. State*, 575 P.2d 289, 296 (Alaska 1978) (stating that “the First Amendment to the United States Constitution requires that truth be an absolute defense” to defamation where public officials, figures, or issues are involved).

racial discrimination,<sup>354</sup> and the common law right to recover humans as chattel.<sup>355</sup>

The problem that the Court faces today with the Second Amendment is the same one it faced with the Seventh Amendment in *Dimick*: When does “adaptation to new circumstances and situations” by courts or legislatures cease, and an “alter[ation] [of] the Constitution” begin?<sup>356</sup> Beyond a poorly delineated right to self-defense in the home, the Court has not stated how much common law, of any source, is now Second Amendment law. Section III.C, *infra*, will offer at least some guidance on how to approach this question of how deep the common law may reach into constitutional law.

### 3. What About Conflicting or Indeterminate History?

Assuming that the history that counts for Second Amendment purposes is Anglo-American history up to and including 1791, and *solely* American history up to and including 1868, *and* assuming that some unknown quantity of that history is now constitutionalized, we still have a problem of conflicting and indeterminate history.<sup>357</sup> Indeed, it is hard to imagine periods more fraught with conflict and indeterminacy than those surrounding the nation’s Founding and the Civil War.

Consider this minor sampling of historical conflicts<sup>358</sup>:

At the time of the Founding, a group of persons could attack a law enforcement officer if those persons correctly determined that the officer was

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354. See Peller & Tushnet, *supra* note 351, at 802 (“[T]he protection of private liberty to choose contractual partners entailed the constitutional nullification of anti-discrimination laws that would take this choice out of private hands.”); see also *The Civil Rights Cases*, 109 U.S. 3, 15, 25 (1883) (holding that private discrimination is not the proper target of Reconstruction legislation and exceeds the Tenth Amendment).

355. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 613 (1842) (holding that the common law right of “recaption” applies to human property as recognized in the Fugitive Slave Clause). For more on the constitutionalization of common law customs with respect to slavery, see Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV. 1811 (2012). For more on the constitutionalization of the common law in general, see Kaplan, *supra* note 352, at 464-72.

356. *Dimick v. Scheidt*, 293 U.S. 474, 487 (1935). In this sense, I understand “constitutionalization” of common law slightly differently from Kaplan, who suggests that the Court is doing so as an alternative to “assess[ing] the meaning of the [Constitution’s] text, history and structure.” Kaplan, *supra* note 352, at 467.

357. See Eskridge, *supra* note 270, at 194 (“Tradition is rarely simple and univocal; it is multifarious, evolving, and complicated.”).

358. For additional examples of historical conflict, see Massey, *supra* note 57, at 1095-1125.

behaving against the Magna Carta.<sup>359</sup> During the same period, a select militia of Massachusetts business elites put down an incipient guerilla campaign of fellow Massachusetts citizens who opposed taxes and marched in defense of their “first principles [of] natural self-preservation.”<sup>360</sup>

In 1788, James Madison suggested that the American right to arms is “a barrier against the enterprises of ambition.”<sup>361</sup> Six years later, President George Washington crushed an uprising of Pennsylvania frontiersmen who had used those constitutionally guaranteed arms to attack federal officers on the ground that they had subverted the Constitution.<sup>362</sup>

During Reconstruction, both black freedmen and white Klan members claimed to be a repressed minority, disarmed and threatened by lawless militia forces and criminals, and possessed of a right to keep and carry arms for self-defense against those hostile forces.<sup>363</sup>

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359. See *Queen v. Tooley*, (1709) 92 Eng. Rep. 349, 353 (K.B.), 2 Ld. Raym. 1296.

360. *Luke Day's Demands to William Shepard*, Jan. 25, 1787, reprinted in HAMPSHIRE GAZETTE, Feb. 7, 1787, [http://shaysrebellion.stcc.edu/shaysapp/artifact.do?shortName=gazette\\_id7feb87](http://shaysrebellion.stcc.edu/shaysapp/artifact.do?shortName=gazette_id7feb87).

361. THE FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

362. See PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 214 (1997); see also Massey, *supra* note 57, at 1102, 1105 (discussing Madison and the Whiskey Rebellion).

363. Compare ORGANIZATION AND PRINCIPLES OF THE KU KLUX KLAN (1868), reprinted in 1 DOCUMENTS OF AMERICAN HISTORY 499, 500 (Henry Steele Commager & Milton Cantor eds., 10th ed. 1988) (identifying one principle as “the inalienable right of self-preservation of the people against the exercise of arbitrary and unlicensed power”), PROCEEDINGS IN THE KU KLUX TRIALS AT COLUMBIA, S.C. IN THE UNITED STATES—CIRCUIT COURT, NOVEMBER TERM, 1871, at 150-51, 425-26 (Benn Pitman & Louis Freeland Post eds., Columbia, S.C., Republican Printing Co. 1872) (defending Klan members’ gun rights on the basis that whites needed to protect themselves from better-armed blacks), and *Hearing Before the Select Committee To Inquire into the Condition of Affairs in the Late Insurrectionary States* (1871) (statement of John B. Gordon), reprinted in RECONSTRUCTION (1865-1877), at 98, 99 (Richard N. Current ed., 1965) (calling the Klan “nothing more and nothing less . . . [than] an organization . . . [of] the peaceable, law-abiding citizens of the State, for self-protection”), with STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 60 (1998) (quoting a letter from a group of freedmen to a Freedmen’s Bureau official complaining of a seizure of arms by local law enforcement), LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 290 (1979) (quoting a letter from a black woman who complained to the Freedmen’s Bureau of the fact that blacks were not allowed to have arms to defend themselves), *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3039 (2010) (“Throughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves.”), and *id.* at 3088 (Thomas, J., concurring in part and concurring in the judgment) (“The use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence.”). For more on this conflict, see Saul Cornell & Justin Florence, *The Right To Bear Arms in the Era of the Fourteenth Amendment: Gun Rights or Gun Regulation?*, 50 SANTA CLARA L. REV. 1043,

Conflict exists even at the fine-grained level of common law doctrine and historical regulation. At English common law, a man was permitted to assemble an armed retinue in his house,<sup>364</sup> but if he left home with the same retinue, the entire party could be charged with a crime.<sup>365</sup> In *Woodroe v. State*, a Texas court stated that “[a] party may act in self-defense in a difficulty, and at the same time violate the law against carrying a pistol.”<sup>366</sup> But in *State v. Huntley*, a North Carolina court stated that “the carrying of a gun *per se* constitutes no offence.”<sup>367</sup> In Texas in 1871, a pistol was not an “arm” as that term is used in the Second Amendment.<sup>368</sup> In Georgia in 1846, it was.<sup>369</sup>

Even assuming one could artfully construct a seamless narrative *within* a historical era—for example, the Founding or Reconstruction respectively—there is undeniable tension *between* these historical periods. The private use of firearms in the seventeenth and eighteenth centuries in service of crime fighting was considered part of one’s civic duty and a public good.<sup>370</sup> The

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1063 (2010), which discusses Klan defenses during South Carolina trials; and Miller, *supra* note 76, at 1329-36 (discussing the irony that the logic and historic appeals used to support freedmen’s right to bear arms were just as likely to be used by Confederates and Klan members).

364. 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 158 (Garland Publ’g 1978) (1716) (“[A]n assembly of a man’s friends in his own house, for the defence of the possession thereof . . . is indulged by law . . . .” (spelling modernized)).
365. See *Queen v. Soley*, (1701) 88 Eng. Rep. 935, 937 (Q.B.) (“Though a man may ride with arms, yet he cannot take two with him to defend himself even though his life is threatened; for he is in protection of the law, which is sufficient for his defence.” (footnote omitted)); see also *Green v. State*, 35 S.E. 97, 100-01 (Ga. 1900) (finding that an assembly of persons “by intimidation resulting from possession of arms” is a riot “though no specific act of violence is committed” (citing *Soley*, 88 Eng. Rep. at 936-37)); A Friend to Freedom from Sentiment, *Cyder-Act Subversive of Civil Liberty*, 33 GENTLEMEN’S MAG. & HIST. CHRON. 446, 447 (1763) (“If a man be in his house and hears that others are coming there to beat him, it is lawful for him to assemble his friends, in his house, for the safety of his person; but if a man be threatened to be beaten out of his house, it is not lawful for him to make such assembly; for he hath another remedy by surety of the peace.” (spelling modernized)).
366. 96 S.W. 30, 31 (Tex. Crim. App. 1906).
367. 25 N.C. (3 Ired.) 418, 422-23 (1843).
368. See *English v. State*, 35 Tex. 473 (1871).
369. *Nunn v. State*, 1 Ga. 243, 251 (1846) (holding that the carrying of an unconcealed pistol is protected); see also *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 93 (1822) (holding that a concealed cane sword falls within the state constitutional guarantee of the right to keep and bear arms).
370. See, e.g., JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGIN OF AN ANGLO-AMERICAN RIGHT 2-4 (1994) (discussing private duties to protect oneself and others at English common law).

private use of firearms during Reconstruction, in sharp contrast, was part of a campaign of racial and political terrorism.<sup>371</sup>

Finally, as with the Seventh Amendment, the Second Amendment presents the problems of judicial competence, analogical abstraction, and policy choice. Judges are no more equipped to make judgments about the reliability of historical evidence during Reconstruction than they are to determine which writ would have been brought in the Court of Exchequer in 1791.<sup>372</sup> For example, Texas passed a law during Reconstruction that targeted public arms bearing as a way to reduce the risk of confrontations between pro- and anti-Union forces.<sup>373</sup> Some commentators have discounted this law on the theory that the Texas government was—to conservative Southerners, at least—an unpopular Republican puppet.<sup>374</sup> Does the mere fact that ex-Confederates hated Reconstruction government make Reconstruction history unreliable? If it does, what does that say about the Fourteenth Amendment itself, as that Amendment exists as a result of military compulsion?<sup>375</sup>

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371. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3039 (2010) (noting the predations of the unreconstructed Southern militia); see also *Hearing Before the Select Committee To Inquire into the Condition of Affairs in the Late Insurrectionary States*, *supra* note 363, at 101 (calling the Klan “a peace police—a law-abiding concern”).
372. Compare *McDonald*, 130 S. Ct. at 3117 (Stevens, J., dissenting) (“No mechanical yardstick can measure which of us [the *Heller* majority or dissent] was correct, either with respect to the [historical] materials we chose to privilege or the insights we gleaned from them.”), with *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 576 (1990) (Brennan, J., concurring in part and concurring in the judgment) (disparaging judges’ ability to distinguish between historical writs).
373. See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1430 (identifying Texas at that time as “under a Reconstruction government very much concerned with Confederate sympathizers”); see also Editorial, *A Question for Arkansas*, N.Y. TIMES, May 11, 1874, <http://query.nytimes.com/mem/archive-free/pdf?res=9406E5DF143BEF34BC4952DFB366838F669FDE> (lamenting the gun violence in Arkansas and advocating Texas-model restrictions on the right to carry firearms).
374. E.g., Stephen P. Halbrook, *The Right To Bear Arms in Texas: The Intent of the Framers of the Bills of Rights*, 41 BAYLOR L. REV. 629, 661 (1989) (referring to the Texas court at the time as “a product of military occupation”); James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279, 292 (1959) (remarking upon, without directly endorsing, “[a] Texas law tradition . . . whereby we disregard as precedents the decisions of our Reconstruction courts”).
375. Professor Kent Greenawalt, for instance, has observed that “serious questions can be raised about the original validity of the thirteenth and fourteenth amendments,” including the fact that the latter was proposed by a Congress without former Confederate representation and that ex-Confederate states had to ratify it to be readmitted to the Union. Kent Greenawalt, *Hart’s Rule of Recognition and the United States*, 1 *RATIO JURIS* 40, 45 (1988). For similar ruminations on an even broader level, see Vasana Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291 (2002), which discusses the implications of the fact that West Virginia broke away from Virginia as a result of the Civil War. One could



Even if judges had the time and resources to amass the historical sources, the looming issue of analogical abstraction remains. As Judge Sutton recently observed, “[l]evel of generality is destiny in interpretive disputes.”<sup>376</sup> In interpreting the word “bear” in the Second Amendment, do the eighteenth-century restrictions on “riding or going armed with dangerous or unusual weapons”<sup>377</sup> encompass all forms of “riding” (as on a train, or airplane, or coach) or only those forms of “riding” that can be done individually (as on a horse or a motorcycle)? Does the historic restriction on carrying arms in fairs, markets, and in the presence of the King’s ministers<sup>378</sup> apply today anywhere people congregate, any place the state controls, or just where people buy things or where police officers or other government agents are stationed?<sup>379</sup>

These are just some of the multiple crosscurrents, complexities, and ambiguities that the history of Anglo-American arms bearing presents. One nineteenth-century legal scholar sums up the frustration:

On the one hand, as long as the machinery which society has afforded for the *prevention* of private injuries remains in its present ineffective state, society cannot justly require the individual to surrender . . . the means of self-protection in seasons of personal danger . . . . On the other hand, the peace of society and the safety of peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons, and the

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pursue the question of legitimacy to its logical end, questioning the authority of a constitution that was neither proposed nor ratified by women, African Americans, or the unpropertied. See Tribe & Dorf, *supra* note 310, at 1074.

376. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 560 (6th Cir. 2011) (Sutton, J., concurring in part and in the judgment), *cert. denied*, 80 U.S.L.W. 3713 (U.S. June 29, 2012) (No. 11-117), *abrogated by* *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

377. 4 BLACKSTONE, *supra* note 100, at \*148.

378. See Statute of Northampton, 1328, 2 Edw. 3, c. 3, § 3 (Eng.) (prohibiting persons from going or riding “armed by Night [or] by Day, in Fairs, Markets, [or] in the Presence of the Justices or other Ministers”).

379. A number of gun-rights scholars interpret this statute as only prohibiting arms in public when accompanied by circumstances that would tend to cause terror or fear in the populace. See, e.g., C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 716-17 (2009) (making this point); Volokh, *supra* note 315 (same). Other scholars take a different view. See, e.g., Charles, *supra* note 332, at 237-40 (challenging this interpretation and providing historical sources). The debate over what to make of this historical fact only reinforces my contention that the Court must come up with a methodology that explains how much of the common law, including its exceptions, is now constitutional law.

utmost that the law can hope to do is to strike some sort of balance between these apparently conflicting rights.<sup>380</sup>

One may quibble with the extent of the disagreement, but one cannot maintain that there is historical certainty in this area.<sup>381</sup> The question, of course, is what to do with this history.

As discussed in Part II, the Court has created a historical test for the Seventh Amendment that attempts to implement the text, notwithstanding these historical problems of Seventh Amendment construction, and avoids, as much as possible, overt use of interest balancing or levels of scrutiny. Given that the Second Amendment presents a similar set of problems, an analogous test might be structured for the Second Amendment.

### *C. A Second Amendment Historical Test: Boundary Setting and Tailoring*

To restate the riddle from the Introduction: What test adheres to the Second Amendment's past, rejects "balancing" the right against present government interests, and preserves all but the most draconian regulations for the future?

A historical test modeled on the Seventh Amendment may be a partial solution. Such a test might take the following form: First, does the asserted right to "keep" or "bear" or to a particular "arm" have a clear or arguable historical analogue? If it does, then it can be said to implicate the Second Amendment.<sup>382</sup> If it does not, there is no Second Amendment right. Assuming

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380. *The Right To Keep and Bear Arms for Private and Public Defence*, 1 CENT. L.J. 259, 287 (1874).

381. Professor Volokh has, I think, misread my prior work as standing for the proposition that history points in one indubitable position with regard to arms bearing, and public arms bearing in particular. See Volokh, *supra* note 315. I reiterate here that "while the text and history are not definitive, there are better and worse interpretations of the record, and there are zones of greater and less agreement as to textual and historical scope." Miller, *supra* note 76, at 1311. Professor Volokh and others may disagree with me about the extent, or the jurisprudential relevance, of this historical conflict and indeterminacy, but they cannot reasonably claim that this conflict and ambivalence do not exist.

382. In this sense, Nelson Lund's focus on the analogue for the *restriction* jumps the gun. In a short aside in a longer piece, Professor Lund suggested:

Modern gun control regulations would then be upheld only if they had close analogues in identifiable common law or statutory restrictions in place at that time, just as modern causes of action are covered by the Seventh Amendment only if they are more like cases that in 1791 would have been tried at law rather than in equity.

Lund, *supra* note 35, at 1354-55 (2009). But the first question must be whether the asserted "keeping" or "bearing" or "arm" is even within the contemplation of the Second

the right asserted has a clear or colorable historical analogue, the second part of the test asks whether the regulation “infringes” upon the right to keep and bear arms. Here, infringement means something similar to a failure to preserve in the Seventh Amendment context, i.e., a law that regulates keeping or bearing an arm so thoroughly as to destroy the fundamental nature of the right. Regulations that have precise common law or historical antecedents or analogues do not infringe upon the right; newer regulations grounded in precedent or functional considerations do not infringe upon the right so long as they retain the Second Amendment right in its essential features.

The following Subsection discusses both elements of the test.

### 1. *Boundary Setting*

The first part of the historical test asks whether the asserted type of keeping, bearing, or arm falls within the ambit of the Second Amendment text. Keeping, bearing, or arms that are directly supported by history or have a colorable historical analogue fall within the protections of the Second Amendment text. Keeping, bearing, or arms that have no historical or colorable historical analogue do not. This portion of the test recognizes that to determine whether a certain keeping, bearing, or arm falls within the ambit of the text, one must go beyond the text to examine the history, statutes, and customs surrounding that text.<sup>383</sup>

At this point, the problem of choosing an appropriate analogue becomes critical. If the boundaries for Second Amendment analogues are set at too high a level of abstraction, they become unmoored from both history and reason. For example, if the historical analogue to “keeping” and “bearing” is simply any historical example of “possessing” or “carrying” a weapon, then the Second Amendment right devours all.<sup>384</sup> Restrictions on the possession of firearms by criminals, children, the mentally ill, or potential terrorists, as well as on the carrying of firearms in prisons, kindergarten classes, insane asylums, and the

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Amendment, not whether the regulation is.

383. *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008) (explaining that the scope of Second Amendment is not in its text but in its history); see also *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2503 (2011) (Scalia, J., concurring in part and dissenting in part) (referring to the Petition Clause of the First Amendment as a “pre-existing individual right, which means that we must look to historical practice to determine its scope” (citing *Heller*, 554 U.S. at 579, 592)).

384. See *Heller*, 554 U.S. at 626 (“[T]he [Second Amendment] right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”); see also *Miller*, *supra* note 76, at 1287 (noting that the Court “stopped short of careening off the textualist precipice”).

White House, fall within the scope of the Second Amendment and cannot be infringed in their fundamentals. If the historical analogue to an “arm” is “anything that can be carried in the hand for defense,” then hand grenades and anthrax fall within the boundaries of Second Amendment protection, and no amount of tailoring can keep them out of private armories.

Conversely, pitching the abstraction too narrowly risks the near-“frivolous”<sup>385</sup> argument that only muskets and black powder count as “arms,” or that hanging a gun above the mantle is the only type of “keep[ing]” that counts. Or, equally pernicious, too narrow an abstraction produces a “radical reductionism”<sup>386</sup> in which the Second Amendment splinters. What results is that the knife, the pistol, the rifle, the city, the suburb, the highway, and the sidewalk each becomes “a law unto itself.”<sup>387</sup>

One way to address the analogy abstraction problem is to look for historical consensus at the narrowest level of specificity that is functional as a rule of decision. As Judge Frank Easterbrook has written, “The need to produce a theory of meaning that is also adequate to justify the judicial role constrains the level of abstraction”;<sup>388</sup> judges must “enforce . . . only the portion of the text or rule sufficiently complete and general to count as law.”<sup>389</sup> The roots of this approach come from none other than the author of *Heller* himself. In *Michael H. v. Gerald D.*, Justice Scalia stated that the level of generality at which to assess a constitutional right is “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”<sup>390</sup>

The Court has stated that the Second Amendment protects a preexisting right to keep and bear arms for self-defense. It has also stated that “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them.”<sup>391</sup> But that right has been subject to numerous types of regulation by statute and common law throughout

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

386. Tribe & Dorf, *supra* note 310, at 1071.

387. See *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (observing that each of “[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator” is “a law unto itself” when it comes to First Amendment protection); see also Tribe & Dorf, *supra* note 310, at 1070 (discussing *Kovacs*).

388. Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 376 (1992).

389. *Id.*

390. 491 U.S. 110, 127 n.6 (1989). Only Chief Justice Rehnquist joined this portion of the opinion.

391. *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008).

history,<sup>392</sup> including outright bans on the public bearing of weapons.<sup>393</sup> Since balancing is not permitted,<sup>394</sup> one must look to historical consensus for a limit. Is there an indisputable place where, for example, “keeping” and “bearing” an “arm” was permitted as a matter of historical practice? As I have written elsewhere, there appears to be a strong historical consensus—from ancient history to the modern era—that the one indisputable place one could keep and bear arms was in the home, for the purpose of self-defense.<sup>395</sup>

But the framework outlined here does not require a court to articulate the right at that particular level of specificity. The right could be articulated at higher levels of abstraction. For instance, it could be described as a right to bear arms for self-defense in any circumstance in which one is threatened with imminent injury or death.<sup>396</sup> Imminence as a method of construing the scope of the right to self-defense has a long pedigree.<sup>397</sup> More broadly, the right could

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392. For a listing of such regulations, see Charles, *supra* note 57, at 23-26 & nn.77-85.

393. See, e.g., WYO. COMP. LAWS ch. 52 § 1 (1876), codified in WYO. STAT. § 980 (1887) (“Hereafter it shall be unlawful for any resident of any city, town or village, or for any one not a resident of any city, town or village, in said territory, but a sojourner therein, to bear upon his person, concealed or openly, any fire-arm or other deadly weapon, within the limits of any city, town or village.”); Statute of Northampton, 1328, 2 Edw. 3, c. 3 (Eng.) (“[N]o Man great nor small, of what Condition soever he be, except the King’s Servants in his Presence, and his Ministers in executing of the King’s Precepts . . . be so hardy 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, upon Pain to forfeit their Armour to the King, and their Bodies to Prison at the King’s Pleasure.”); ROBERT R. DYKSTRA, THE CATTLE TOWNS 121 (1968) (noting that local statutes in Kansas prohibited “the carrying of dangerous weapons of any type, concealed or otherwise, by persons other than law enforcement officers”). Some argue that these laws prohibited the carrying of arms only when carried “in terrorem populi” (that is to the terror of the people) or argue that laws like the Statute of Northampton were seldom enforced, or that they are outliers, and therefore should not be considered constitutionalized historical limits on the right to keep and bear arms. See Marshall, *supra* note 379, 716-17. But those arguments are question begging, and only underscore the need for a theory of which historical or common law limitations count as part of the constitutional law and which limitations do not. See 6 MADISON, *supra* note 19, at 379 (“Is it to be the common law with or without the British statutes?”).

394. See *Heller*, 554 U.S. at 634.

395. See Miller, *supra* note 76, at 1350.

396. Cf. 1879 Tex. Crim. Stat. 319 (providing an exception to the prohibition on carrying arms for “persons traveling” or “one who has reasonable ground for fearing an unlawful attack upon his person” when the danger is “imminent and threatening”).

397. See, e.g., *id.*; Pierson v. State, 12 Ala. 149, 153 (1847) (stating that Alabama law “is derived from, and the same as, the common law of England,” which provides that there is no claim of self-defense “unless the assault . . . is such as to produce a well-grounded apprehension of im[m]inent danger to life or limb”); cf. U.S. CONST. art. I, § 10, cl. 3 (forbidding a state from “engag[ing] in War, unless actually invaded, or in such imminent Danger as will not admit of delay”).

be articulated as a right to keep and bear arms for self-defense anywhere one has a reasonable apprehension of violence. Or, even more broadly, as the right to keep and bear arms for self-defense anywhere one has a right to be. Of course, specifying the right at these higher levels of generality “portend[s] all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities,”<sup>398</sup> as well as litigation over use of firearms against law enforcement.<sup>399</sup>

The object of this Article is not to state definitively at what level of generality the right to keep and bear arms should be specified, but to help frame how the question should be asked. A number of issues could guide a court’s judgment in specifying whether a type of keeping, bearing, or arm has a common law analogue. The first is to recognize that some value judgments are inescapable.<sup>400</sup> But just because they are inescapable does not mean the choice of level of abstraction must be untethered from text or consequence.<sup>401</sup> Any decision about any one of these essential terms—keep, bear, arm—must fall within certain “widely shared beliefs of what makes sense”<sup>402</sup> with regard to the text and history. The decision must also be functional,<sup>403</sup> in that it must “provide stable meaning that can be used to resolve a legal issue,”<sup>404</sup> and must interact with other constitutional text and norms, such as equal protection, due process,<sup>405</sup> federalism,<sup>406</sup> and participatory democracy. And, as discussed above,

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398. *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J., concurring in part and concurring in the judgment) (citing Volokh, *Implementing the Right*, *supra* note 76, at 1515).

399. See Miller, *Retail Rebellion*, *supra* note 341, at 939 (discussing the implications of Second Amendment history with respect to self-defense against the police).

400. See Tribe & Dorf, *supra* note 310, at 1087 (“Judges must *choose* among competing traditions those which will receive legal protection—and [that] choice . . . requires value judgments.”).

401. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 16 (2005) (“[I]nstitutions and methods of interpretation must be designed . . . [to be] sustainable . . . and capable of translating the people’s will into sound policies.”).

402. Tribe & Dorf, *supra* note 310, at 1076.

403. See *id.* at 1099 (“Abstraction pushes us constantly to check practice against principle.”).

404. Eskridge, *supra* note 270, at 194.

405. See *Donofrio v. City of New York*, No. 04-CV-3336, 2009 WL 6388381, at \*3-4 (E.D.N.Y. Sept. 24, 2009) (discussing due process rights in handgun licenses). For more on these implications, see Miller, *Retail Rebellion*, *supra* note 341, at 971-74.

406. The concern with federalism has two components, the first being how much of state law to displace through the Second Amendment, and the other being the issue of “lateral federalism” between states. Courts should be cautious of too heavy a reliance on constitutional construction that “privilege[s] the traditions of a great number of states over those of the few.” Kaplan, *supra* note 352, at 475 (discussing lateral federalism in constitutional cases).

courts should avoid choosing a level of abstraction that is “prone to generat[ing] disturbing or calamitous results,”<sup>407</sup> as opposed to an analogy that “leave[s] more room for discretionary judgment.”<sup>408</sup> As Judge Easterbrook has written, the ability to choose a level of abstraction is itself a type of power. At least with regard to the Second Amendment, it seems that the level of generality ought to be one that is “capable of justifying a *judicial* role. Unless it is possible to find an answer that adequately differentiates judicial from political action, the judge should allow political and private actors to proceed on their way . . . .”<sup>409</sup> This point is apt when textual features of the Constitution, as well as history and tradition, contemplate that the political branches and the states will retain authority to regulate arms and to discipline arms bearers,<sup>410</sup> especially when those arms are borne publicly for purposes of confrontation.

Finally, it should be noted that, as with the Seventh Amendment, the Second Amendment is a floor, not a ceiling. States, through their own constitutions, and Congress, through its commerce or Fourteenth Amendment enforcement powers, have the ability to grant greater rights through positive law, as they have done on many occasions.<sup>411</sup>

## 2. Tailoring

Once the court has concluded that the Second Amendment’s text covers keeping, or bearing, or arm, the second part of the test asks whether the restriction amounts to an infringement. In this circumstance, an infringement means something similar to what it means in the Seventh Amendment: a

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407. Fallon, *supra* note 23, at 20 (identifying originalist historical arguments against the constitutionality of paper money or Social Security).

408. *Id.* at 6.

409. Easterbrook, *supra* note 388, at 372.

410. See U.S. CONST. art. I, § 8 (giving Congress power to “organiz[e], arm[], and disciplin[e]” the militia, and giving states authority to designate the leaders of such militias); *id.* amend. II (providing that arms are protected because of the need for a “well regulated” militia).

411. See, e.g., Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734, § 512 (2009) (codified at 16 U.S.C. §§ 1a-7b (2006)) (protecting gun owners in national parks); Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (protecting the gun industry from some state tort suits); *Britt v. State*, 681 S.E.2d 320, 321-22 (N.C. 2009) (holding that a state felon-in-possession statute violates the state constitutional right to keep and bear arms when applied to a nonviolent felon with a superannuated record); Stephen R. McAllister, *Individual Rights Under a System of Dual Sovereignty: The Right To Keep and Bear Arms*, 59 U. KAN. L. REV. 867, 881-82 (2011) (observing the change in the Kansas Constitution expanding the right to keep and bear arms (citing KAN. CONST., BILL OF RIGHTS § 4 (2010))).

regulation that destroys the right in its fundamentals. If the regulation does not destroy the right in its fundamentals, then it simply regulates an incident of the right, much as changes to the number of jurors or procedural innovations like the directed verdict do not fail to preserve the Seventh Amendment right to trial by jury.<sup>412</sup>

Admittedly, history is no keener an instrument for making Second Amendment distinctions than it is for making the Seventh Amendment distinctions.<sup>413</sup> Courts will often have to decide cases “without the benefit of any foolproof test.”<sup>414</sup> Nevertheless, the Court’s framework for the jury-trial right is instructive here as well. The tailoring function begins with historical analogues. As Chief Justice Roberts suggested in *Heller*, just as there are modern arms that are “lineal descendents” of those arms referred to in the Second Amendment, “presumably there are lineal descendents of the restrictions [on firearms] as well.”<sup>415</sup> A well-established historical restriction, or its modern analogue, demonstrates that that right has not been infringed in its fundamentals. In much the same way, a rule restricting the number of jurors to twelve adults could not be a Seventh Amendment violation because twelve jurors was a well-established limitation on jury size in 1791.<sup>416</sup> Where history is unclear, the court moves to precedent.<sup>417</sup> For example, although there may be no historical analogue to police officers temporarily sequestering weapons from persons during the course of a temporary stop, a storehouse of precedent upholding such limited sequesters may answer the Second Amendment question.<sup>418</sup> Where precedent is unclear, the court resorts to functional

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412. See, e.g., *Colgrove v. Battin*, 413 U.S. 149, 156 (1973) (holding that a jury of six members rather than twelve does not violate the right to trial by jury under the Seventh Amendment).

413. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377-78 (1996) (stating that history is a “pretty blunt instrument for drawing distinctions”).

414. *Id.* at 377.

415. *Heller II*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (quoting Transcript of Oral Argument at 77, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (question of Roberts, C.J.)).

416. *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899) (stating that the English common law understanding is that a jury shall be of twelve men). *But see Colgrove*, 413 U.S. at 156 (holding that a six-member jury satisfies the Seventh Amendment).

417. *Cf. Markman*, 517 U.S. at 384 (consulting precedent “since evidence of common-law practice at the time of the framing” did not answer the question of the meaning of the Seventh Amendment’s jury guarantee).

418. See *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (holding that the Fourth Amendment permits “a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime”).



considerations.<sup>419</sup> Functional considerations, however, are not completely open-ended. They are measured against the fundamentals of the right as assessed by the historical nature of the right. That is, in the Seventh Amendment context, the key functional consideration is the traditional distinction between the judge's role to decide matters of law and the jury's role to decide matters of fact.<sup>420</sup> Procedural innovations that eliminate this basic division of labor between the judge and the jury destroy the right in its fundamentals.

This focus on fundamentals, of course, begs the question: what are the Second Amendment's fundamentals? One way of identifying those "fundamentals" is to examine "whether the practices mandated or proscribed by the [Second Amendment] presuppose some view without which the textual requirements are incoherent."<sup>421</sup> The Second Amendment, like the Seventh Amendment, is a right designed to "prevent government oppression."<sup>422</sup> But this fundamental right is, and must be, inchoate.<sup>423</sup> Clearly, widespread confiscation of all firearms makes the textual language incoherent: there is no reason to guarantee the right if regulations that are the equivalent to confiscation are legitimate. But short of confiscation, it is difficult to say that historical analogues to prohibitions on taking arms into schools or police stations make the text incoherent.<sup>424</sup> So long as there is an arguable analogue to

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419. Cf. *Markman*, 517 U.S. at 388 ("Where history and precedent provide no clear answers, functional considerations also play their part in the choice between judge and jury to define terms of art.").

420. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999) (noting the predominant role of the jury in deciding matters of fact); *Markman*, 517 U.S. at 377 (same).

421. Tribe & Dorf, *supra* note 310, at 1063.

422. *Colgrove v. Battin*, 413 U.S. 149, 156 (1973) (applying this reasoning to the Seventh Amendment); cf. *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008) ("[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny."). For more on the link between the right to arms and the right to a jury, see AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 324-25 (2005).

423. The Constitution's text contemplates the suppression of rebellions and the punishment of traitors. See, e.g., U.S. CONST. art. I, § 9 (providing for the suspension of the writ of habeas corpus during rebellion); *id.* art. III, § 3 (defining treason); *id.* art. IV, § 4 (providing for the protection of states in case of domestic violence); *id.* amend. XIV, § 4 (voiding any debt "incurred in aid of insurrection or rebellion"). Consequently, the Second Amendment cannot be construed to guarantee a right to armed rebellion. See Miller, *supra* note 76, at 1319-20; see also *Dennis v. United States*, 341 U.S. 494, 501 (1951) ("Whatever theoretical merit there may be to the argument that there is a 'right' to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change.").

424. Patrick Charles has listed some types of restrictions that existed historically on the right to

a given regulation, or absent that, some precedent or functional reason for the regulation, and so long as the regulation does not destroy the right in its fundamentals, then it would seem to be constitutional.<sup>425</sup>

At its core, the right to keep and bear arms is also related to individual self-defense.<sup>426</sup> Therefore, regulations that render a person unable in all circumstances to defend himself would destroy the right in its fundamentals.<sup>427</sup> However, regulations that stop short of destroying the fundamental right in this way would be constitutional. So, for instance, a regulation that forbade firearms from travelling out of doors but permitted less lethal defensive weapons, such as pepper spray or tasers, could potentially pass constitutional muster. Alternatively, a regulation that permitted the removal of firearms from one's premises only in circumstances of imminent physical injury or death would not destroy the right in its fundamentals. But, of course, the fundamentals of the Second Amendment right need not be articulated in this fashion. Again, the question is one of abstraction: a fundamental right to "self defense," like the right to "the pursuit of happiness" or "the right to be let alone," may be adequate moral propositions, but operate at too high a level of abstraction to be useful as law.<sup>428</sup> The level of abstraction must be tethered to the text of the Second Amendment itself,<sup>429</sup> but it also must be informed by the Amendment's relationship with other textual provisions, history, and the structure of the Constitution as a whole. Finally, the analysis must justify judicial as opposed to legislative involvement.<sup>430</sup>

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keep and bear arms. See Charles, *supra* note 57, at 26.

425. See *Heller*, 554 U.S. at 636 (assuring legislatures that they possess "a variety of tools for combating th[e] problem [of handgun violence], including some measures regulating handguns" short of "absolute prohibition of handguns held and used for self-defense in the home").
426. *Id.* at 599 (referring to self-defense as the "central component" of the Second Amendment); see also *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (citing *Heller*, 554 U.S. at 599) (same).
427. Cf. *Nunn v. State*, 1 Ga. 243, 249 (1846) (finding that a law that renders the right to keep and bear arms nugatory under the pretense of regulation is unconstitutional).
428. See Easterbrook, *supra* note 388, at 364.
429. Cf. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 494 (2007) ("The proper level of generality for the constitutional principles in the text is the one we find in the text itself."). Neither I nor a majority of the Court think the level of generality for the right to "bear" arms is determined by the strict lexical meaning of the word "bear."
430. See *supra* text accompanying notes 402-410.

### 3. *The Test in Action: High Capacity Magazines*

Federal law formerly prohibited magazines that held more than ten rounds of ammunition.<sup>431</sup> Some states and localities still prohibit similar large-capacity magazines or weapons.<sup>432</sup> With respect to a firearm that can hold more than ten rounds of ammunition, for example, the analysis might work as follows. First, the plaintiff bears the burden of overcoming the presumption of constitutionality.<sup>433</sup> She must demonstrate that a firearm with a capacity of more than ten rounds of ammunition even counts as an “arm” for purposes of the Second Amendment.<sup>434</sup> Just as new causes of action can trigger the Seventh Amendment right to a trial by jury, or new forms of surveillance can implicate the Fourth Amendment right against unreasonable searches,<sup>435</sup> modern technology can implicate the Second Amendment, even if the precise weapon under consideration did not exist in 1791. Beginning broadly, the plaintiff could argue that the term “arm” in 1791 meant “any thing that a man . . . takes into his hands, or useth in wrath to cast at or strike another,”<sup>436</sup> and that this definition has not changed since that time. This textual definition, however, would likely be too broad, as it would encompass high explosive rounds,

431. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110103(b), 108 Stat. 1796, 1999 (codified at 18 U.S.C. § 921(a)(31) (1994)) (repealed 1994); *id.* § 110103(a), 108 Stat. at 1999 (codified at 18 U.S.C. § 922(w)) (repealed 1994).

432. See MD. CODE ANN., CRIM. LAW § 4-305; N.J. STAT. ANN. § 2C:39-3j (West 2012); N.Y. PENAL LAW § 265.00(23) (McKinney 2008).

433. The need for the plaintiff to overcome the presumption of constitutionality is generally less onerous for allegations of a violation of an enumerated right. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). However, the presumption of constitutionality is strengthened by other textual and historical features that repose regulatory authority in other branches of government over the militia—even an unorganized one. See U.S. CONST. art. I, § 8 (giving Congress power to “organiz[e], arm[], and disciplin[e]” the militia, and giving states authority to designate the leaders of such militias); *id.* amend. II (providing that arms are protected because of the need for a “well regulated” militia); *cf.* *United States v. Harris*, 106 U.S. 629, 635 (1883) (articulating a presumption of constitutionality for congressional legislation). The historical framework in this Article attempts to respect the extent to which firearms implicate *both* the Second Amendment individual right *and* the authority of federal and state officials to regulate weapons, especially when borne in public for the purpose of self-defense and crime control.

434. This first inquiry is a critical step that many gun-rights advocates overlook. See *supra* note 382.

435. See *Kyllo v. United States*, 553 U.S. 27, 33-36 (2001) (recognizing that changes in technology, as through thermal imaging devices, can affect the well-established and historical Fourth Amendment protections of the home).

436. *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (quoting TIMOTHY CUNNINGHAM, 1 A NEW AND COMPLETE LAW DICTIONARY (London, W. Flexney, 2d ed. 1771)).

grenade launchers, and Stinger missiles.<sup>437</sup> Simply put, there are some weapons that, despite their superficial similarity to a weapon that existed in 1791 or 1868, are simply too hazardous to fall within the category of “arm” as that term would have been commonly understood.<sup>438</sup> Hence, she would likely need to marshal historical evidence that a firearm with more than ten rounds bears some resemblance to—or is a “lineal descendent[.]”<sup>439</sup> of—arms in “common use”<sup>440</sup> during the relevant time period. Such a claim might focus on whether weapons capable of rapid reloading, multiple firing, or excess capacity, were understood to qualify as a personal “arm” in common use for purposes of the individual right to keep and bear arms. Her argument would be that a firearm with more than a ten-round capacity is sufficiently analogous to such a weapon that a reasonable person would have understood it to be an “arm.”

Once the plaintiff has met the threshold scope issue, the burden would shift to the defendant to establish that the regulation is not an infringement. An infringement here means roughly what a failure to preserve means in the Seventh Amendment: a regulation that destroys the right in its fundamentals.<sup>441</sup> A defendant would show that the right has not been

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437. In the same sense, a plaintiff would need to establish that “keep” and “bear” support meanings similar to what is understood by those terms at the historically relevant periods for purposes of arms, rather than engage in a simple semantic exercise of demonstrating they mean the same thing now as they did in the years from 1791 to 1868. *See supra* text accompanying note 266; *see also* Allen, *supra* note 266, at 202-08 (making similar points concerning a literalist approach to the Second Amendment).

438. *See* Allen, *supra* note 266, at 202 (observing that “the Second Amendment is fundamentally different, for interpretative purposes, from other constitutional provisions that have been applied to changing technologies”). Inevitably, whether something falls within or without that definition will require some consequentialist investigation. But that only shows that construction of categories in open-textured sections of the Constitution cannot be completely insulated from consequentialist reasoning. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 388 (2009) (recognizing that categories are often constructed by balancing various conflicting policies). The analysis in this Article suggests that the construction of the categories can be informed and restrained by historical data and analogical reasoning, rather than through a purely policy-oriented investigation.

439. *Heller II*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (quoting Transcript of Oral Argument at 77, *Heller*, 554 U.S. 570 (No. 07-290) (question of Roberts, C.J.)).

440. *Heller*, 554 U.S. at 624. In this sense, Judge Kavanaugh’s statement that weapons “are in common use *today*” is slightly off the mark. *Heller II*, 670 F.3d at 1287 (emphasis added). The question is whether the weapon at issue is one analogous to one in common use during the relevant ratification period, not in common use today. *See* Transcript of Oral Argument at 77, *Heller*, 554 U.S. 570 (No. 07-290) (question of Roberts, C.J.) (speaking of “lineal descendants” of older firearms).

441. *See* Tribe & Dorf, *supra* note 310, at 1063.

destroyed in its fundamentals by showing that the regulation is analogous to a historical restriction on the right, is supported by relevant precedent, or is justified by functional considerations, so long as those considerations do not destroy the reason for the Second Amendment's codification.<sup>442</sup>

For example, the defendant might point to historical regulations that restricted private access to certain especially lethal or dangerous weapons, or that restricted the private possession of quantities of powder or ammunition.<sup>443</sup> The defendant could then argue that regulations restricting these weapons or quantities of ammunition are sufficiently analogous to a restriction on the amount of ammunition in a firearm to meet constitutional muster. Alternatively, the defendant may show precedent for this type of regulation. Absent clearly analogous historical restrictions, the defendant may point to precedent from the states on the amount, size, or capacities of weapons that a person could keep. For example, the defendant could point to the fact that there is precedent for regulations on access to weapons that are particularly obnoxious, or whose use is primarily criminal or military, rather than recreational.

Finally, if these considerations are not dispositive, one might then as a last resort consider the functional considerations of the regulation. These considerations would not be completely open-ended, but, as Patrick Charles has suggested, would be shaped by reference to ideological commitments concerning the right of self-defense, public safety, and the distribution of coercive power between private and public parties.<sup>444</sup> If the Second Amendment is about access to the tools of private self-defense in the home, would allowing only magazines with fewer than eleven rounds preclude

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442. In other words, functional considerations cannot be used to argue for interpretations that flatly contradict the text itself. Cf. Rosenthal, *supra* note 266, at 1207 (“[A] changed reading of constitutional text cannot be based on a fact or belief that would have produced a different text in the first instance . . .” (citing and describing the “fidelity in translation” theory of Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1251-63 (1993))).

443. For example, both King Henry VII and Henry VIII placed restrictions on the private ownership of new lethal technologies such as the crossbow and what they called “hand-guns.” These restrictions were apparently “rigidly enforced” in England at least until 1539. See RALPH PAYNE-GALLWEY, *THE CROSSBOW: ITS MILITARY AND SPORTING HISTORY, CONSTRUCTION AND USE* 32-33 (2007). They were apparently subsequently abandoned. See *id.* at 34. Whether such regulations should be considered part of the historical and common law understanding of permissible restrictions on the right to keep and bear arms is contested. See Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 239 n.235 (1983) (raising such doubts).

444. See Charles, *supra* note 332, at 229 (stating that the matter of permissible gun control regulation is resolved “by examining the ideological and philosophical origins of gun control, not by finding an exact eighteenth-century parallel”).

effective exercise of that prerogative? This latter inquiry, as in the Seventh Amendment context, might focus on institutional arrangements more broadly. Who is in a better position to determine how many rounds are necessary to defend a person's home? Have legislatures already protected a particular type of weapon?<sup>445</sup> What is more likely: the harm caused because a person did not have the eleventh bullet, or the harm caused by the person who did? The question, of course, is where to leave the discretion, and it appears that in the Second Amendment—unlike, perhaps, in other areas of constitutional rights—discretion is left with the political branches.<sup>446</sup> In any event, so long as such a regulation does not destroy the fundamental aspects of the right (at whatever level of abstraction those fundamentals are defined),<sup>447</sup> the regulation is legitimate.

#### IV. REWARDS AND RISKS OF A HISTORICAL TEST FOR THE SECOND AMENDMENT

##### A. Rewards

Attempting to implement the Second Amendment by reference to what the Court has done with the right to trial by jury could produce some tangible rewards. First, this approach would hold the Court to its current stated desire to avoid balancing tests in Second Amendment cases. To the extent that originalists in particular desire that their history-centered methodology be more than a mere rhetorical weapon,<sup>448</sup> it makes sense to show how the

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445. Cf. *Lowe v. SEC*, 472 U.S. 181, 213 (1985) (White, J., concurring in the result) (stating that the statutory canon of constitutional avoidance recognizes that “[t]he task of defining the objectives of public policy and weighing the relative merits of alternative means of reaching those objectives belongs to the legislature”). *But see Heller*, 554 U.S. at 636 (recognizing that the constitutional text “takes certain policy choices off the table”).

446. For support for this proposition, see Miller, *supra* note 76, at 1318-21. Consider also Bernadette Meyler’s summary of Keith Whittington’s originalism, which she explains as follows: “Once indeterminacy is located, the task of constitutional construction begins, a task that should be allocated to the political branches rather than the judiciary.” Meyler, *supra* note 19, at 594 (citing, but disagreeing with, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 205 (1999)).

447. The idea of a core purpose of self-defense, of course, leads to the debate as to whether the right to keep and bear arms for self-defense extends outside the home. This is a position I have already discussed and do not need to revisit here. See Miller, *supra* note 76, at 1350; Miller, *Retail Rebellion*, *supra* note 341, at 972-74.

448. See David A. Strauss, *Why Conservatives Shouldn’t Be Originalists*, 31 HARV. J.L. & PUB. POL’Y 969, 975 (2008) (describing originalism as a “rhetorical weapon”).

methodology can actually help decide numerous discrete, factually disparate cases.<sup>449</sup> Second, it would minimize the problem that has befallen Fourth Amendment jurisprudence: a proliferation of categories that provide little guidance at all. Third, it would recognize the residual institutional parameters of the right to keep and bear arms.

### 1. Reducing Judicial Empiricism

The Roberts Court is wary of empowering judges with an open-ended ability to balance government interests against constitutional rights. Kathleen Sullivan has noted that courts take a big risk when they engage in overt balancing, and even more so when the test actually requires some express evaluation of the government interest. As Professor Sullivan observes, intermediate scrutiny in particular exposes the Court “to the charge of ‘legislating from the bench’”<sup>450</sup>—a charge that “[n]o amount of bureaucratic lingo in the formulas of intermediate scrutiny (‘substantial, significant, important interest,’ ‘directly, sub[s]tancially, closely served,’ ‘no more extensive than necessary’) can wholly dispel . . . .”<sup>451</sup> The lessons of the Court’s Seventh Amendment jurisprudence, however, could temper this fear that judges, as opposed to the political branches, become empowered by balancing tests with loose policymaking authority.

Second, few rights seem *less* conducive to levels of scrutiny than the right to keep and bear arms. Levels of scrutiny require courts to make difficult empirical judgments in areas in which they have limited ability and resources, as Justice Breyer noted in his *McDonald* dissent.<sup>452</sup> How frequently does a person use a firearm to protect himself rather than to kill his neighbor? How effective is law enforcement at policing a particular neighborhood?<sup>453</sup> Which is

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449. See Rosenthal, *supra* note 266, at 1188 (stating that originalism is only “genuinely distinctive and useful . . . if, in practice, it provides a genuinely originalist vehicle for deciding real cases”). I defer to others as to whether the approach outlined in this Article satisfies that condition, or whether it is indistinguishable from nonoriginalist methods. See *id.*

450. Sullivan, *supra* note 66, at 301.

451. *Id.* (footnote omitted).

452. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3128 (2010) (Breyer, J., dissenting) (“[J]udges do not know the answers to the kinds of empirically based questions that will often determine the need for particular forms of gun regulation. Nor do they have readily available ‘tools’ for finding and evaluating the technical material submitted by others.”); see also Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1660 (2005) (noting a general consensus that courts are “less able [than other institutions] to resolve complicated factual questions”).

453. *McDonald*, 130 S. Ct. at 3126 (Breyer, J., dissenting) (asking rhetorically about budget cuts

more common: the kindergarten teacher who fights off a stalker, or the kindergarten teacher's pupil who accidentally injures herself with a misplaced firearm?<sup>454</sup> And how does the Court evaluate the methodological soundness of this kind of evidence?<sup>455</sup>

Second Amendment scrutiny also makes little practical sense. The government's central goal is the welfare and safety of its citizens.<sup>456</sup> The very purpose of government is to monopolize legitimate violence.<sup>457</sup> But the *McDonald* Court forcefully argued that the welfare and safety of the populace has no special meaning when it comes to firearm restrictions. If that is the case, then what exactly is the court balancing? If public safety cannot be weighed as a compelling or even an important interest, what is left to put on the scale? Perhaps one answer is that scrutiny is designed to "smoke out" otherwise impermissible motives.<sup>458</sup> Scrutiny puts governments to the proof that their motives are pure and not designed to curtail fundamental liberties. But that begs the question of impermissible motive. Wholesale disarmament of the entire citizenry is clearly an impermissible motive; otherwise there would be no Second Amendment at all. But constitutional protection of firearms in the home, which *Heller* recognizes, already prevents that. What then, short of

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on police and "[h]ow effective . . . that police force [was] to begin with").

454. *Id.* at 3126-29 (raising similar hypotheticals).

455. *Gowder v. City of Chicago*, No. 11-CV-1304, 2012 WL 2325826, at \*7 (N.D. Ill. June 19, 2012) (observing that "pointing to certain studies as . . . justification" creates the very same empirically driven inquiry Justice Scalia says should be avoided in Second Amendment cases because "for every study, there can be a credible or convincing rebuttal study"). Of course, *Gowder* minimizes the fact that historical evidence itself can generate similar disagreement.

456. *See McDonald*, 130 S. Ct. at 3114 (citing *United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power . . .").

457. "[T]he state is the form of human community that (successfully) lays claim to the *monopoly of legitimate physical violence* within a particular territory . . ." Max Weber, *Politics as a Vocation* (Jan. 28, 1919), in *THE VOCATION LECTURES* 33 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004).

458. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality decision) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."); *see also* Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 365 (1995) (suggesting that scrutiny can "smoke out" bad motives in economic liberty matters).



universal citizen disarmament, is an impermissible motive?<sup>459</sup> Is the safety of law enforcement an impermissible motive? Is keeping guns out of the hands of persons who plan to overthrow the state or federal government an impermissible motive? Is advancing a moral preference for dialogue, orderly dispute resolution, or the political process (rather than threats of violence) an impermissible motive?<sup>460</sup>

Levels-of-scrutiny analysis also depends on the judicial capacity to make empirical judgments about what regulations actually relate to a legitimate motive and what regulations are pretext. For example, if it is permissible to protect the health and welfare of police officers, does a regulation that keeps guns out of automobiles bear a substantial relation to that purpose, or is it a pretext? Does the matter of “fit” between the regulation and its purpose change if the regulation is in New York City rather than Dubuque?<sup>461</sup> Even if the scrutiny question is not about smoking out impermissible motives, but is, instead, about not inhibiting activity that Americans consider wholesome and beneficial, this raises again the question of the operative constitutional proposition of the right to keep and bear arms, and how much incursion is too much incursion.<sup>462</sup>

Not all individual rights need to be balanced. As Adam Winkler has observed, there is a common misperception that fundamental rights in the Bill of Rights cannot be impaired unless narrowly tailored to serve a compelling government interest. Professor Winkler notes:

The Court has never purported to apply strict scrutiny in every provision of the Bill of Rights. . . . Laws invading on First Amendment rights of speech, association, and religious liberty are often subject to strict scrutiny, as are laws that restrict the due process and (invisible) equal protection guarantees of the Fifth Amendment. But strict scrutiny

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459. Put another way, and to use the terminology of Mitchell Berman and Kermit Roosevelt, what, precisely is the “constitutional[ly] operative proposition” of the Second Amendment? Self-defense? Self-defense at home? Self-defense from tyranny? Autonomy? Maintenance of an unorganized militia? Maintenance of an unorganized militia capable of defeating a standing army? See Roosevelt, *supra* note 452, at 1681; see also Berman, *supra* note 256, at 1 (discussing the idea of operative propositions as opposed to decision rules).

460. Cf. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567-68 (1991) (finding that moral disapproval of nude dancing justified restrictions on that activity); Sullivan, *supra* note 66, at 305.

461. Cf. *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937) (stating that the Court will not search for “hidden motives” behind a tax on firearms dealers).

462. See Roosevelt, *supra* note 452, at 1684 (discussing how scrutiny “ensur[es] that the government has not intruded on highly important interests needlessly or without adequate justification”).

is nowhere to be found in the jurisprudence of the Second Amendment, the Third Amendment, the Fourth Amendment, the Sixth Amendment, the Seventh Amendment, the Eighth Amendment, the Ninth Amendment, or the Tenth Amendment. Two amendments trigger strict scrutiny; eight do not.<sup>463</sup>

Winkler wrote those lines before *Heller*, but his critique remains sound. The Second Amendment does not require express balancing or levels of scrutiny analysis. And the Court's stated preference for originalist, or at least historically grounded, arguments about the Second Amendment's scope means that any test that hints at interest balancing is not likely to garner support among more than a plurality of the existing *Heller* and *McDonald* majorities. This Article's framework respects that reality.

## 2. Reducing the Potential of Categorical Creep

There is also a risk that Second Amendment jurisprudence will suffer the fate of Fourth Amendment jurisprudence. It will begin with a categorical test, but undergo categorical creep, as the various occasions involving "self-defense," "carrying," and "keeping" arise.<sup>464</sup> As one scholar put it with respect to the Fourth Amendment, the

application of different principles to seizures of persons than to seizures of things [and] the development of differ[ent] rules for arrests in restaurants than for arrests in houses . . . have rendered the [F]ourth [A]mendment a Ptolemaic system. Only a police officer who studies Professor LaFave's three-volume treatise . . . can master the epicycles.<sup>465</sup>

One can imagine lower courts forced to navigate a similar set of interlocking epicycles for gun-rights claims. There could be the felon-in-possession category, not to be confused with the misdemeanor-in-possession category, not to be confused with the domestic-batterer-misdemeanant-in-possession category, not to be confused with the domestic-batterer-

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463. Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 229 (2006); see also *Heller II*, 670 F.3d 1244, 1283 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (listing rights not subject to strict or intermediate scrutiny analysis).

464. Cf. Blocher, *supra* note 55, at 435-36 (noting that the Fourth Amendment exclusionary rule began with a "flat ban" on evidence but "beg[a]t" so many exceptions that the doctrine became "so dotted with holes and sub-rules" as to be unrecognizable).

465. Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 287 (1984).

misdemeanant-in-possession-at-home category, and so on. In its desire to rely upon rules and avoid balancing, the Court could offer no rule at all.

The analysis in this Article would reduce, but cannot eliminate, this risk. It invites courts to frame historical analogues so that they function at a high enough level of generality to encompass both the scope of the right *and* the scope of permissible regulation or protection under the Second Amendment. Just as Seventh Amendment analogues enable the Seventh Amendment to cover new causes of action *and* allow for new forms of procedural regulation, courts could identify a level of generality in Second Amendment analogues that expands *both* the number of technologies and practices that implicate the Second Amendment *and* the scope of permissible limits. In this way, while more types of phenomena will implicate the Second Amendment, the actual content of the categories of permissible keeping, bearing, and arms will be left to more politically responsive branches.

### 3. *Acknowledging the Institutional Aspects of the Right To Keep and Bear Arms*

Both *Heller* and *McDonald* disparaged the organized militia as an institution that structures the meaning of the Second Amendment right. *Heller* in particular treated the militia portion of the Second Amendment as little more than a throat-clearing exercise. Some of the majority's skepticism is justifiable, but largely on historical rather than strictly textual grounds. During Reconstruction, the militia that the Framers conceived of as a virtuous group of citizen-soldiers became a tool of racist oppression.<sup>466</sup> Nonetheless, the clause "[a] well regulated Militia"<sup>467</sup> has not been purged from the text. This clause, even if prefatory, must still be integrated into an understanding of the Second Amendment in particular, as well as into the Constitution as a whole.<sup>468</sup>

Accordingly, the tailoring portion of the historical test grants the politically responsive branches of government latitude to regulate the militia—both

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466. For treatments of the change and doctrinal relevance of the militia from the Founding to Reconstruction, see AMAR, *supra* note 422, at 325-27, 390-91; Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 341-49 (1991) (discussing the disarmament of African-Americans during antebellum and Reconstruction periods); Miller, *Retail Rebellion*, *supra* note 341, at 959-67 (discussing the violence of law enforcement during Reconstruction).

467. U.S. CONST. amend II.

468. See David C. Williams, *The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822, 829 (1998) ("[Judges] should seek to give both [the prefatory 'militia' and the operative 'keep and bear arms' clauses] as much meaning as possible, and they should prefer those interpretations that make the two clauses as consistent as possible.").

organized and unorganized—so long as the regulations do not destroy the right to keep and bear arms for personal defense in its fundamentals. In doing so, this test best integrates the term “militia” as it is used throughout the Constitution,<sup>469</sup> and guarantees that *Heller* and *McDonald* have not rendered that portion of the Second Amendment “extinct.”<sup>470</sup>

*B. Risks*

*1. The Reek of Law-Office History*

As much as the Seventh Amendment provides positive instruction for how the courts may implement the Second Amendment, it also serves as a cautionary tale. Irrespective of outcomes, a Second Amendment test driven by too rigid an application of history could lead to the same problem that has afflicted the Seventh Amendment: a test that demands “intricate examination of historical detail which . . . ‘reek[s] unduly of the study.’”<sup>471</sup>

There is already an undeniable fustiness about *Heller*. How many federal district court judges, not to mention city municipal court officers,<sup>472</sup> have the time or ability to consult and consider John Ayliffe’s 1734 treatise *A New Pandect of Roman Civil Law*, or John Brydall’s 1704 work *Privilegia Magnatud apud Anglos*, both of which were cited and quoted in *Heller*?<sup>473</sup> Judges are not historians, and so, in addition to the risk that they will not understand the materials they are charged to consult, there is the additional risk that they will not conduct a dispassionate examination of the historical evidence and will simply marshal historical anecdotes to achieve what they have already decided is the preferred outcome.<sup>474</sup>

Certainly, these are challenges to developing a historical test for the Second Amendment. But whatever the challenges, the written nature of our Constitution commands some engagement with history, no matter the

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469. See U.S. CONST. art. I, § 8 (providing for divided responsibility between Congress and the states for discipline and training of the militia); *id.* art. II, § 2 (designating the President Commander-in-Chief of the militia when called into service).

470. Cf. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (“[I]t is not the role of this Court to pronounce the Second Amendment extinct.”).

471. Redish, *supra* note 113, at 486-87 (quoting *Damsky v. Zavatt*, 289 F.2d 46, 48 (2d Cir. 1961)).

472. Bound, as they are, by *McDonald*. See U.S. CONST. art. VI.

473. See *Heller*, 554 U.S. at 583 n.7, 587 n.10 (2008) (citing and quoting same).

474. Charles, *supra* note 57, at 11 (noting the difference between the role of historians and that of advocates or jurists).

difficulty.<sup>475</sup> The important caveat for the historical test for the Second Amendment is that engagement with history is the beginning point. It sets the terms of the process of analogical reasoning, a task at which lawyers and judges consider themselves relatively adept.<sup>476</sup> Historical analogues, as Seventh Amendment jurisprudence shows, can be understood to govern both the scope of the Second Amendment right *and* the scope of permissible regulations of that right. To the extent that a historical test for the Second Amendment permits discretion, and especially discretion reposed in those bodies most responsible for policymaking, perhaps this approach will make the smell of law-office history less noisome.

## 2. *The Persistence of the Collapse Problem*

Neither will this suggested framework eliminate the problem of analytical collapse. The second part of the test, whether a regulation interferes with the right in its “fundamentals,” is an easier step than is the first, which requires more historical heavy lifting in terms of defining the right or finding the appropriate historical analogue. But that problem is already present in the existing standards of review used by intermediate courts.

Again, the answer is that forcing the judge to engage at some level with the historical materials, even at the level of analogical reasoning, controls discretion to a degree that is absent without such a process. Judgment cannot be taken out of the process of judging. The fact that some originalists oversold their methodology as a way to take discretion out of constitutional law is not a good reason to reject history and tradition altogether.<sup>477</sup> The historical test for the Second Amendment, and especially its requirement of linking either the right itself or a regulation to a historical analogue, forces judges at least to pause before they launch into a policy prescription that may not be consonant with the text, history, or structure of the document.<sup>478</sup> Furthermore, it imposes

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475. Cf. *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 594 (1990) (Kennedy, J., dissenting) (observing that “[o]ur obligation to the Constitution and its Bill of Rights” requires such historical investigations); Shapiro & Coquillette, *supra* note 114, at 450 (noting that history must be the place to begin in Seventh Amendment adjudication).

476. See EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1-8 (1949) (discussing the centrality of analogical reasoning to legal reasoning).

477. See Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 617 (2008) (“The new originalism, like the old, fails to deliver on its claim about eliminating judicial subjectivity, judgment, and choice.”). For more on originalism’s failure to deliver on its promises, see Smith, *supra* note 23, at 710-11, 733, which discusses originalism’s inability to consistently defend its claim to political neutrality.

478. See Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1194

a type of Burkean humility by obliging the judiciary to attempt to link its current judgments to the accumulated judgments of the past.<sup>479</sup>

### 3. *Popular, but Not Constitutionally Popular*

A final problem with this approach is that, although it may result in decisions that have broad popular support, if originalism is now the people's methodology of choice,<sup>480</sup> it may create friction between outcomes and reasoning, at least among those people who are watching.

Without a doubt, citizens want some voice in how and which firearms are kept and where they are borne. Even after *Heller* and *McDonald*, public opinion polling shows strong support for reasonable regulation in those areas.<sup>481</sup> As a matter of brute politics, then, judgments taking those decisions away from legislatures or local officials will encounter some hostility. So, preserving regulation is popular. But this popular outcome is not so easily squared with originalism as an accessible form of popular constitutionalism. There is a type of popular originalism, often vocal, in which nonlawyers assert that they know what the Constitution says, and understand what the words “keep,” “bear,” “arm,” and “infringe” mean. Citizens may resent doctrinal embellishments that pull the text away from its plain, but contemporary, meaning. In all likelihood, whatever decision the Court makes, whether through the test articulated in this Article or some other test, a successful doctrinal apparatus will maximize popular will at the expense of originalism as a form of popular constitutionalism.

## CONCLUSION

This Article has argued that the Roberts Court has issued seemingly irreconcilable demands to lower courts: Be faithful to Second Amendment history, do not balance Second Amendment rights, and preserve reasonable

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(1999) (justifying analogical reasoning by its tendency to create only “incremental, evolutionary” change).

479. See *id.*; Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 368-72 (2006) (discussing how minimalist decisions based on tradition may reduce the likelihood of catastrophic error).

480. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

481. See *Guns*, POLLINGREPORT.COM, <http://www.pollingreport.com/guns.htm> (last visited Oct. 24, 2012) (showing strong support for firearm ownership, as well as bans on assault rifles and high-capacity magazines).

firearm regulations. It argues that a Second Amendment historical test patterned on the Seventh Amendment may provide a pathway to a solution.

The Court's jurisprudence could be wrong on both fronts, of course. That is, it is perfectly plausible to argue that the Second Amendment's emerging doctrine should not replicate the mistakes of its Seventh Amendment ancestor, and that a strict historical test should apply to both provisions—or to neither.

But if what we expect from our judges is to apply history in ways that are not only faithful but *useful*, then the answer is not to permit judges to manipulate historical sources in any manner they prefer, but to create an analytical structure in which history can be integrated into adjudication despite the fact that history will be at times deeply contested or unknowable. This Article has attempted to set the discussion on that course. The hope is familiar: that history can be a guiding hand, rather than a dead one.<sup>482</sup>

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482. See Colby, *supra* note 23, at 740 (noting that the “New Originalism” means that “we are not so much ruled by the dead hand of the past as gently guided by it”).