SECOND AMENDMENT — WESTERN DISTRICT OF TEXAS UPHOLDS GUN REGULATION UNDER INTERMEDIATE SCRUTINY IN POST-*HELLER* DECISION. — *United States v. Bledsoe*, No. SA-08-CR-13(2), 2008 U.S. Dist. LEXIS 60522 (W.D. Tex. Aug. 8, 2008).

Though the Supreme Court held in *District of Columbia v. Heller*[1] that the Second Amendment conferred an individual right to keep and bear arms, it left the breadth of that right indefinite. The majority expressly declined to instruct lower courts on whether strict or intermediate scrutiny was appropriate for evaluating Second Amendment restrictions.[2] Recently, in *United States v. Bledsoe*,[3] a federal district court held that it would continue to apply intermediate scrutiny to laws that merely regulated, rather than proscribed, gun possession. In support of its decision, the court cited language in *Heller* indicating that a wide range of gun regulations were presumptively lawful.[4] This application of *Heller* suggests a disconnect between the Supreme Court and the district courts that will apply the decision. *Bledsoe* relied on familiar standard-of-review analysis, disregarding indications in *Heller* that gun regulations are lawful when analogous historical restrictions can be found. Its faithfulness to *Heller* is dubious, but *Bledsoe* offers a means of determining the scope of the newly-recognized right that is both more practicable and more consistent than the approach suggested by the Supreme Court.

In 2006, Cantrell Bledsoe picked out a pistol at a gun show and, because she was under twenty-one and therefore barred from purchasing firearms from a federally-licensed dealer, gave Calvin Bouldin money to buy it for her.[5] When purchasing the pistol, Bouldin represented that he was the actual buyer, but gave the gun to Bledsoe even before he left the premises of the gun show.[6] The next year, an ATF investigation led agents to Bouldin, who in turn implicated Bledsoe.[7]

Federal prosecutors charged Bledsoe with conspiring to obtain a firearm by making a false statement during a gun purchase in violation of 18 U.S.C. §§ 371 and 922(a)(6).[8] She moved to dismiss the in-

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[1] 128 S. Ct. 2783 (2008).

[2] *Id.* at 2821.

[3] No. SA-08-CR-13(2), 2008 U.S. Dist. LEXIS 60522 (W.D. Tex. Aug. 8, 2008).

[4] *Id.* at *8 (citing *Heller*, 128 S. Ct. at 2816–17).

[5] Conditional Plea Agreement at 3, United States v. Bledsoe, No. SA-08-CR-13(2) (W.D. Tex. Aug. 21, 2008). Bouldin also purchased a pistol for Bledsoe's neighbor, whose felony conviction barred him from firearm purchases. *Id.* at 2–3.

[6] *Id.* at 3.

[7] *Id.* at 2–3.

[8] United States v. Bledsoe, No. SA-08-CR-13(2), 2008 U.S. Dist. LEXIS 26268, at *1 (W.D. Tex. Mar. 20, 2008). 18 U.S.C. § 922(a)(6) states, in part, that it shall be unlawful

> for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or

dictment, claiming, inter alia, that she could not be liable for purchasing the gun through Bouldin since the Second Amendment granted her an individual right to possess the firearm.[9] District Judge Xavier Rodriguez held that while the Fifth Circuit had recognized an individual right to keep and bear arms,[10] that recognition did not preclude "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable."[11] Accordingly, the court denied the defendant's motion to dismiss, without prejudice to reargue "should *Heller* announce a new rule."[12]

That announcement came on June 26, 2008, when the Supreme Court held that the Second Amendment guarantees an individual right to keep and bear arms irrespective of service in a militia.[13] Writing for the Court, Justice Scalia affirmed the D.C. Circuit's decision to strike down a near-prohibition on handgun possession in the District of Columbia.[14] The decision employed extensive historical analysis of the circumstances in which the Second Amendment was drafted and the way it was interpreted soon after adoption.[15] The Court also repeatedly asserted that the right protected by the Second Amendment "is not unlimited," given the amendment's post-ratification history.[16] Though it declined to "undertake an exhaustive *historical* analysis . . . of the full scope of the Second Amendment," it nonetheless asserted that the decision should not cast doubt on a raft of "*longstanding*" gun restrictions.[17] The Court similarly defended prohibitions on concealed weapons by arguing that "the majority of the 19th-century courts to consider the question" held that such bans were lawful.[18]

The Court declined to establish a standard of review for evaluating gun regulations, reasoning that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us."[19] However, it rejected rational basis scrutiny[20] and Justice Breyer's suggestion in his dissent

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licensed collector, knowingly to make any false or fictitious oral or written statement . . . intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition . . . .

9 Defendant's Motion To Dismiss Superseding Indictment at 7–8, *Bledsoe*, 2008 U.S. Dist. LEXIS 26268 (No. SA-08-CR-13(2)).

10 United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

11 *Bledsoe*, 2008 U.S. Dist. LEXIS 26268, at *6 (quoting *Emerson*, 270 F.3d at 261).

12 *Id.*

13 District of Columbia v. Heller, 128 S. Ct. 2783, 2799, 2821–22 (2008).

14 *Id.* at 2822.

15 *Id.* at 2805–12.

16 *Id.* at 2816.

17 *Id.* (emphasis added).

18 *Id.*

19 *Id.* at 2821.

20 *Id.* at 2817 n.27.

of an "interest-balancing inquiry."[21] Justice Breyer's dissent also contended that the highest standard of review was inconsistent with the majority's reasoning in the case[22] and expressed "puzzle[ment]" over how the majority came to its conclusion about which gun laws were not to be disturbed by *Heller*.[23]

The day after *Heller* was announced, Bledsoe moved to reargue her motion to dismiss the indictment. Though her motion acknowledged the Court's assertion that *Heller* should not "cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms," she argued that "the majority also strongly suggested that such laws must be subjected to a strict scrutiny review standard."[24] The government urged the court to adopt intermediate scrutiny and asserted that the challenged provisions were substantially related to the important government objective of crime prevention.[25]

Judge Rodriguez once again denied the motion to dismiss the superseding indictment.[26] The court first noted that the Supreme Court did not establish the appropriate standard of review for ruling on firearm regulations.[27] The court rejected Bledsoe's claim that *Heller* hinted that lower courts should apply strict scrutiny, contending that language in the *Heller* decision concerning strict scrutiny applied only to outright "*proscriptions* of constitutional rights, not *restrictions*, as Defendant would argue."[28] It then pointed out that the Court had held that many regulations are "presumptively lawful," and that the list provided by the Court "does not purport to be exhaustive."[29]

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[21] *Id.* at 2821.

[22] *Id.* at 2851 (Breyer, J., dissenting) ("[T]he majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws — prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales — whose constitutionality under a strict scrutiny standard would be far from clear.").

[23] *Id.* at 2869–70 ("Why these? Is it that similar restrictions existed in the late 18th century? The majority fails to cite any colonial analogues.").

[24] Defendant's Motion To Reargue Motion To Dismiss Superseding Indictment in Light of Decision in *Heller* at 2, *Bledsoe*, 2008 U.S. Dist. LEXIS 60522 (quoting *Heller*, 128 S. Ct. at 2816–17). To support her argument, Bledsoe cited language from *Heller* rejecting rational-basis scrutiny and Justice Breyer's interest-balancing inquiry. *See id.* at 2–3. In further briefing on the topic of standard of review, Bledsoe argued that the Second Amendment conferred a fundamental right and demanded strict scrutiny. *See* Defendant's Motion To File Brief and Brief on Constitutional Analysis at 2–3, *Bledsoe*, 2008 U.S. Dist. LEXIS 60522. The regulation failed under either strict or intermediate scrutiny, Bledsoe argued, because it was "arbitrary" and "purposeless" to forbid those under age twenty-one from buying a handgun from a licensed dealer, but not from a nondealer. *Id.* at 4.

[25] *See* Government's Brief in Response to Court Order at 4–5, *Bledsoe*, 2008 U.S. Dist. LEXIS 60522.

[26] *Bledsoe*, 2008 U.S. Dist. LEXIS 60522, at *13–14.

[27] *Id.* at *9.

[28] *Id.*

[29] *Id.* at *8 (quoting *Heller*, 128 S. Ct. at 2817 n.26).

The court looked to pre-*Heller* Fifth Circuit precedent holding that a lower standard of review was appropriate,[30] and held that, "[u]ntil the Supreme Court indicates otherwise," the court would apply intermediate scrutiny to gun restrictions.[31] Looking to whether the age restrictions on gun purchases were "substantially related to an important governmental objective"[32] and reflected "a reasoned judgment consistent with the ideal of equal protection,"[33] the court concluded that the public safety concerns that motivated the age restrictions were important objectives, and that the provisions under which Bledsoe was prosecuted were substantially related to those objectives.[34] Following the denial of her motion to dismiss, Bledsoe entered into a contingent plea agreement with the government that permitted her to appeal the Second Amendment issues raised in the motions to dismiss.[35]

The court's overall decision to deny the motion to dismiss is sound — as the court noted, *Heller* expressly stated that it did not undermine "laws imposing conditions and qualifications on the commercial sale of arms," which presumably includes age restrictions. Its choice of intermediate scrutiny is likewise reasonable, given Fifth Circuit precedent. More problematic are *Bledsoe*'s citations to *Heller*, which the court used to justify its application of intermediate scrutiny, but which at least as plausibly argue for a historical review of gun regulations. Immediately after pointing out that "the Supreme Court did not provide the appropriate standard of review," Judge Rodriguez noted that the right to bear arms is limited, and added:

> The Court noted that there are many "presumptively lawful regulatory measures" of the Second Amendment right, such as "[prohibitions on 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." While the Supreme Court notes that these areas all fall within the regulatory powers of Congress, the Court also admits the "list does not purport to be exhaustive," implying that there are other areas in which Congress could be within its power in regulating.[36]

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[30] United States v. Darrington, 351 F.3d 632, 635 (5th Cir. 2003).

[31] *Bledsoe*, 2008 U.S. Dist. LEXIS 60522, at *10–11.

[32] *Id.* at *11 (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)).

[33] *Id.* (quoting Plyler v. Doe, 457 U.S. 202, 217–18 (1982)).

[34] *Id.* at *12 ("To assert, as Defendant's contentions suggest, that regulations governing the sale of handguns for the 18–20 year-old age group do not further a substantial governmental interest is meritless, given the statistics suggesting that the vast majority of guns confiscated from 18–20 year old criminal defendants are handguns.").

[35] Conditional Plea Agreement at 6, United States v. Bledsoe, No. SA-08-CR-13(2) (W.D. Tex. Aug. 21, 2008).

[36] *Bledsoe*, 2008 U.S. Dist. LEXIS 60522, at *8–9 (quoting District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 & n.26) (citations omitted).

The court evidently used the quoted language to bolster its decision that intermediate scrutiny, rather than strict scrutiny, is the proper standard of review. The court seemed to note the same ostensible incongruity that Justice Breyer highlighted in his dissent in *Heller*: asserting that some gun laws are presumptively lawful seems at odds with the exacting level of justification required by strict scrutiny.[37]

The reasoning has undeniable intuitive appeal, since it is questionable whether the regulations the Supreme Court declared acceptable in *Heller* were "narrowly tailored to achieve a compelling governmental interest,"[38] as strict scrutiny requires.[39] However, it is not clear from Justice Scalia's opinion that a traditional standard-of-review analysis is the proper, or at least primary, lens by which Second Amendment regulations should be judged. Indeed, the Court's only mentions of standard of review came in rejoinders to Justice Breyer's dissent.[40] Instead, the decision repeatedly suggested that firearm regulations are presumptively constitutional when they have a historical analogue in Founding-era restrictions.[41] *Bledsoe*'s citations to *Heller*, meanwhile, consistently omitted the Court's repeated push for regulations to be analyzed historically. Judge Rodriguez quoted *Heller* for the proposition that the Second Amendment should not disturb "[prohibitions on possession] of firearms by felons and the mentally ill, or laws forbid-

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[37] *See Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting). The same reasoning is even more explicit in *United States v. Booker*, No. CR-08-19-B, 2008 U.S. Dist. LEXIS 61464 (D. Me. Aug. 11, 2008), another case offering an early glimpse of *Heller*'s application. There, the court suggested that *Heller* "left some hints" about the correct standard. *Id.* at *3. After finding some support for strict scrutiny, the court noted that "*Heller* expressly approves some statutory restrictions . . . 'whose constitutionality under a strict scrutiny standard would be far from clear.'" *Id.* at *4 (quoting *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting)). The court in *Booker* ultimately demurred on the question of standard of review. *See id.* at *5.

[38] Abrams v. Johnson, 521 U.S. 74, 82 (1997).

[39] For example, felon possession bans, the most common type of gun regulation and one listed as presumptively lawful in *Heller*, often proscribe possession by those convicted of "[p]erjury, securities law violations, embezzlement, obstruction of justice, and a host of other felonies [that] do not indicate a propensity for dangerousness." Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 721 (2007).

[40] *Heller*, 128 S. Ct. at 2817 n.27, 2821.

[41] *See* Nelson Lund, The Federalist Society Online Debate Series — *District of Columbia v. Heller* (June 26, 2008), http://www.fed-soc.org/debates/dbtid.21/default.asp ("[*Heller* suggests that] arguments about the costs and benefits of modern gun control regulations should be almost entirely irrelevant to the constitutional analysis. It is not entirely clear how this historical analysis will be conducted, but Scalia's opinion suggests that modern gun control statutes will not be upheld unless they have some reasonably close analogue in regulations that were widely accepted in eighteenth century common law or statutory law, or perhaps in regulations that have been widely adopted and accepted in modern times."). Such a reading makes sense, given Justice Scalia's particular commitment to basing current constitutional interpretations on the original public meaning of constitutional provisions. *See* Cass R. Sunstein, *The Supreme Court, 2007 Term—Comment: Second Amendment Minimalism:* Heller *As* Griswold, 122 HARV. L. REV. 246, 249 (2008) (further noting that *Heller* "is unique" in the extent to which Justice Scalia was "able to embed originalism so explicitly and directly in a majority opinion").

ding 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,"[42] but ignored the fact that the word immediately preceding this quote is "longstanding."[43] *Bledsoe* likewise did not confront *Heller*'s assertion in the same sentence that it would not "undertake an exhaustive *historical* analysis . . . of the scope of the Second Amendment,"[44] or its references earlier in the paragraph to restrictions on the right to bear arms acceptable to "Blackstone" and "19th-century courts."[45] No mention was made of the Court's argument that *Heller* did not conflict with *United States v. Miller*,[46] which upheld a bar on short-barreled shotguns, because the "limitation is fairly supported by the *historical tradition* of prohibiting the carrying of dangerous and unusual weapons."[47] Judge Rodriguez pointed out that the Court deferred providing "justification for those regulations of the right [the Court] describe[d] as permissible,"[48] without noting that it would have been a "*historical* justification."[49]

*Bledsoe*'s close cropping of lines from *Heller* suggests that the court may have intentionally avoided historical analysis as an alternative explanation for why some gun regulations in *Heller* were presumptively lawful — a decision that allowed it to follow its prior reasoning in the case and to interpret circuit precedent as perfectly in line with *Heller*. It is also plausible that the *Bledsoe* court simply upheld intermediate scrutiny heedlessly, missing the Court's historical emphasis in *Heller*. The Supreme Court did not expressly reject standard-of-review analysis and left ambiguous at what point, if ever, a court should use standard of review analysis in evaluating a gun regulation.[50] But if the court's analysis in *Bledsoe* was an accident, it was a lucky one: *Bledsoe*'s choice of intermediate scrutiny is more likely than historical analysis to develop a coherent post-*Heller* Second Amend-

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[42] *Heller*, 128 S. Ct. at 2816–17, *quoted in Bledsoe*, 2008 U.S. Dist. LEXIS 60522, at *8.

[43] *Id.* at 2816.

[44] *Id.* (emphasis added).

[45] *Id.*

[46] 307 U.S. 174 (1939).

[47] *Heller*, 128 S. Ct. at 2817 (emphasis added) (internal quotation marks omitted).

[48] *Bledsoe*, 2008 U.S. Dist. LEXIS 60522, at *9 (quoting *Heller*, 128 S. Ct. at 2821) (internal quotation marks omitted).

[49] *Heller*, 128 S. Ct. at 2821 (emphasis added). The Court's declaration that many gun regulations are lawful also makes more sense if the Court was judging the regulations by historical analogy, not by a previously established doctrinal standard of review, since it would not necessarily require detailed statute-specific analysis to find that all laws barring gun ownership by felons, for example, have analogues at the time of the drafting of the Bill of Rights.

[50] The Court's lack of clarity on the question of why some gun regulations are permissible is almost certainly because the phrasing was part of a compromise. *See* Mark Tushnet, *Two Essays on* District of Columbia v. Heller 27–28 (Harvard Pub. Law Working Paper No. 08-17), *available at* http://ssrn.com/abstract=1189494.

ment right,[51] and is likely to be mirrored by other courts facing similar issues.

The historical approach suggested by *Heller* is fraught with pitfalls. The judiciary as a whole lacks the expertise and the time to determine whether a gun regulation has a sufficiently analogous historical precedent.[52] The *Heller* Court spent pages poring over archival documents, only to produce a decision whose historical faithfulness remains highly contested.[53] The decisions of lower courts are likely to be similarly questionable.[54] Making matters worse, the *Heller* decision gave little guidance on how to determine when a Founding-era gun regulation is sufficiently analogous, or in what time period to look for analogies.[55] Even if lower courts could accurately determine that there was no analogous gun regulation to the one challenged in a case, that would only establish, as Justice Breyer pointed out, that such a regulation *had not* been implemented, not that it *could not* have been implemented consistent with the Constitution.[56]

Consistently applying historical analysis would also likely produce an individual Second Amendment right that is seemingly illogical and inconsistent — allowing fairly invasive government regulation into areas for which a historical analogue can be found, while more aggressively curtailing regulations lacking historical precedent. Applying strict scrutiny without looking for historical analogues does not avoid this problem, since a few types of regulation — those explicitly mentioned by the Court — would be presumptively lawful,[57] while the rest would be judged under strict scrutiny's exacting standard. Intermedi-

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[51] This comment will not attempt the elaborate work necessary to justify intermediate scrutiny as logically or philosophically consistent with constitutional jurisprudence. For in-depth exploration of this issue, see Winkler, *supra* note 39.

[52] *See* Velasquez v. Frapwell, 160 F.3d 389, 393 (7th Cir. 1998) ("[J]udges do not have either the leisure or the training to conduct responsible historical research or competently umpire historical controversies." (emphasis omitted)).

[53] *See* SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 212 (2006) (arguing that both the collective rights approach and the individual rights approach to the Second Amendment "do great violence to the text"); Posting of Jack Rakove to Balkinization, http://balkin.blogspot.com/2008/06/thoughts-on-heller-from-real-historian.html (June 27, 2008, 20:02).

[54] In *Heller*, Justice Scalia noted that the briefing in *United States v. Miller* provided "scant discussion of the history of the Second Amendment" as a justification for not being overly deferential to the decision. *Heller*, 128 S. Ct. at 2815. It is unlikely, however, that the briefing in lower courts adjudicating post-*Heller* Second Amendment cases will be more thorough or illuminating.

[55] Judging by *Heller*, such a search could be quite wide-ranging. The majority opinion includes citations extending all the way to the post–Civil War era, though it concedes that, "[s]ince those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources." *Id.* at 2810.

[56] *See id.* at 2868 (Breyer, J., dissenting).

[57] Nelson Lund attempts to minimize the importance of these enumerated regulations by noting that they are "dicta." *See* Lund, *supra* note 41. Nevertheless, lower courts are unlikely to resist an explicit statement from the Court that a regulation passes constitutional muster.

ate scrutiny has been repeatedly characterized as unpredictable,[58] but it is likely to lead to more consistency in this context, where large swaths of permissible regulations have already been carved out — largely without explanation — by the Court. Courts consistently asking if a regulation is substantially related to an important government objective will likely be more successful than those applying a historical approach at striking down laws that seem to be more harmful to an individual right to keep and bear arms, while upholding less invasive restrictions.

*Bledsoe*'s application of *Heller* is shaky at best, but its choice of intermediate scrutiny will likely make Second Amendment cases more administrable and consistent. And while it avoids *Heller*'s emphasis on finding specific historical analogues, *Bledsoe*'s analysis includes a more manageable — if more modest — role for history in Second Amendment jurisprudence. As Professors Barry Friedman and Scott B. Smith argue:

> When returning to the Founding era[,] . . . it is important to understand why we look there. The impetus should be to locate the most general of constitutive ideas, not to embark on an acontextual hunt for an answer to a particular contemporary problem. The latter is precisely the endeavor that earns the justifiable scorn of historians. The proper focus of a return to times long past is to locate some germinal idea — "a decision, idea, value, belief, whatever" — that we can use as a starting point to cabin the search for later, more specific understandings and commitments.[59]

Looking at history for this "most general of constitutive ideas" reveals a Second Amendment that has always tolerated broad restrictions related to the government's interest in maintaining safety and preventing violence — a tolerance that seems inconsistent with strict scrutiny. *Bledsoe* was probably wrong to suggest that the Supreme Court recognized this inconsistency, but the district court's task of interpreting the scope of the Second Amendment was more manageable because it did so.

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[58] *See, e.g.*, Meloon v. Helgemoe, 564 F.2d 602, 604 (1st Cir. 1977) (calling intermediate scrutiny "hardly a precise standard"); Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975, 1036 (2004) ("[I]ntermediate scrutiny seems to preserve a greater role for the kind of judicial balancing that could cause cases to come out either way."); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 298 (1992) ("Where intermediate scrutiny governs, the outcome is no longer foreordained at the threshold.").

[59] Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 61–62 (1998) (quoting Larry Kramer, *Fidelity to History — And Through It*, 65 FORDHAM L. REV. 1627, 1651 (1997)) (footnotes omitted).