CONSTITUTIONAL LAW — SECOND AMENDMENT — FOURTH CIRCUIT UPHOLDS GOOD-AND-SUBSTANTIAL-REASON REQUIREMENT FOR CONCEALED CARRY PERMITS. — *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir.), *cert. denied*, 134 S. Ct. 422 (2013).

In 2008, the Supreme Court held in *District of Columbia v. Heller*[1] that the Second Amendment guarantees individuals the right to possess and carry a firearm for self-defense in the home.[2] In 2010, the Court made clear in *McDonald v. City of Chicago*[3] that this right also applies against the states through the Fourteenth Amendment.[4] Because the Second Amendment "codified a *pre-existing* right" and "declare[d] only that it 'shall not be infringed,'"[5] these cases employed a lengthy and detailed inquiry into the historical understanding of the Second Amendment in order to define its scope. Recently, in *Woollard v. Gallagher*,[6] the Fourth Circuit held that Maryland's requirement that an applicant for a permit to carry a handgun in public demonstrate "good and substantial reason" to do so did not violate the Second Amendment.[7] Despite its recognition that historical inquiry is essential in delineating the Second Amendment's scope, the Fourth Circuit nonetheless eschewed historical analysis altogether in favor of a familiar intermediate scrutiny standard. Such an approach reflects the difficulties that judges face in attempting to parse inconclusive historical evidence for clear answers to contemporary problems.

Maryland prohibits the open or concealed carrying of a handgun outside the home without a permit.[8] The Secretary of the State Police must issue permits, but only to those who meet certain statutory conditions.[9] Of relevance to this case, the Secretary must find that the applicant "has good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger."[10]

In 2002, Raymond Woollard was at home with his family when his son-in-law, Kris Lee Abbott, broke into the house.[11] The resulting altercation ended only after Woollard's son pointed a gun at Abbott and

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1 554 U.S. 570 (2008).
2 *Id.* at 635.
3 130 S. Ct. 3020 (2010).
4 *Id.* at 3050.
5 *Heller*, 554 U.S. at 592 (quoting U.S. CONST. amend. II).
6 712 F.3d 865 (4th Cir.), *cert. denied*, 134 S. Ct. 422 (2013).
7 *Id.* at 882.
8 *See* MD. CODE ANN., CRIM. LAW § 4-203 (LexisNexis 2012 & Supp. 2013); MD. CODE ANN., PUB. SAFETY § 5-303 (LexisNexis 2011).
9 *See* MD. CODE ANN., PUB. SAFETY § 5-306 (LexisNexis 2011 & Supp. 2013).
10 *Id.* § 5-306(a)(6)(ii).
11 Woollard v. Sheridan, 863 F. Supp. 2d 462, 465 (D. Md. 2012).

Woollard's wife called the police.[12] Abbott was sentenced to probation for the incident but was later incarcerated for probation violations.[13] In 2003, Woollard applied for and was granted a handgun carry permit, and the state allowed him to renew this permit in 2006 after Abbott was released from prison.[14] However, when Woollard applied for a renewal in 2009, his application was denied due to his inability to produce evidence "to support apprehended fear (i.e. — copies of police reports for assaults, threats, harassments, stalking)."[15] Woollard appealed the decision to the Handgun Permit Review Board, which affirmed the denial, finding that Woollard "ha[d] not submitted any documentation to verify threats occurring beyond his residence, where he can already legally carry a handgun."[16] Woollard then filed suit against the Secretary and members of the Board, challenging the constitutionality of the good-and-substantial-reason requirement.[17]

As the facts of the case were not disputed, both parties moved for summary judgment.[18] The court faced "two fundamental questions": whether the Second Amendment protections outlined in *Heller* "extend beyond the home," and if so, whether the good-and-substantial-reason requirement "passes constitutional muster."[19] Despite the Fourth Circuit's reluctance in its earlier case *United States v. Masciandaro*[20] to "venture into the unmapped reaches of Second Amendment jurisprudence," the district court concluded that "the instant suit does require the Court to determine whether Maryland's broad restriction on handgun possession outside the home burdens any Second Amendment right at all."[21] Relying upon "signposts" and historical evidence from *Heller*, the court found that "the right to bear arms is not limited to the home."[22]

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12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* (quoting Letter from M. Cusimano, Supervisor, Handgun Permit Section, Licensing Div., Md. State Police, to Raymond E. Woollard (Feb. 2, 2009) (on file with court as Plaintiffs' Motion for Summary Judgment Exhibit A, *Woollard*, 863 F. Supp. 2d 462 (No. L-10-2068))) (internal quotation marks omitted).

16 *Id.* at 466 (alteration in original) (quoting Plaintiffs' Motion for Summary Judgment Exhibit D, *Woollard*, 863 F. Supp. 2d 462 (No. L-10-2068)) (internal quotation marks omitted); *see id.* at 465–66.

17 *Woollard*, 712 F.3d at 870.

18 *Woollard*, 863 F. Supp. 2d at 464.

19 *Id.* at 467.

20 638 F.3d 458 (4th Cir. 2011).

21 *Woollard*, 863 F. Supp. 2d at 469.

22 *Id.* at 471; *see id.* at 469–71 (finding, for example, that the historical understanding of the right to keep and bear arms included "an individual right protecting against both public and private violence," *id.* at 469 (quoting District of Columbia v. Heller, 554 U.S. 570, 594 (2008)) (internal quotation marks omitted)).

To determine the appropriate level of scrutiny to apply, the court looked to *Masciandaro* for the proposition that assertions of Second Amendment rights outside the "core right of self-defense in the home"[23] are "properly viewed through the lens of intermediate scrutiny," placing the burden on the State to show "a reasonable fit between the statute and a substantial governmental interest."[24] Applying intermediate scrutiny, the court found that although public safety is a substantial government interest, Maryland's permitting scheme is "a rationing system" that uses "overly broad means . . . to advance this undoubtedly legitimate end."[25] Finding the statute unconstitutional, the court granted summary judgment to Woollard,[26] concluding that "[a] law that burdens the exercise of an enumerated constitutional right by simply making that right more difficult to exercise cannot be considered 'reasonably adapted' to a government interest, no matter how substantial that interest may be."[27]

The Fourth Circuit reversed. Writing for the panel, Judge King[28] began by noting that "a considerable degree of uncertainty remains as to the scope of [the *Heller*] right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation."[29] In light of this uncertainty, the court invoked the two-part approach it had developed in *United States v. Chester*,[30] under which the court first performs a "historical inquiry" to determine "whether the challenged law imposes a burden on conduct" that was understood to fall within the scope of the Second Amendment's guarantee "at the time of ratification."[31] Then, if the challenged law burdens such conduct, the court applies "an appropriate form of means-end scrutiny."[32] However, the court recognized that it was "not obliged to impart a definitive ruling at the first step of the *Chester* inquiry," noting that it and other courts of appeals had "sometimes deemed it prudent to instead resolve post-*Heller* challenges to firearm prohibitions at the second step."[33] The Fourth Circuit not only refrained from assessing whether the good-and-substantial-reason requirement implicated the Second Amendment, instead "merely assum[ing] that the

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[23] *Id.* at 468 (quoting *Masciandaro*, 638 F.3d at 470).
[24] *Id.*
[25] *Id.* at 474; *see id.* at 473–74.
[26] *Id.* at 464.
[27] *Id.* at 475.
[28] Judge King was joined by Judges Davis and Diaz.
[29] *Woollard*, 712 F.3d at 874 (alteration in original) (quoting United States v. Masciandaro, 638 F.3d 458, 467 (4th Cir. 2011)).
[30] 628 F.3d 673 (4th Cir. 2010).
[31] *Woollard*, 712 F.3d at 875 (quoting *Chester*, 628 F.3d at 680).
[32] *Id.* (quoting *Chester*, 628 F.3d at 680).
[33] *Id.*

Heller right exists outside the home" and that it had been infringed,[34] but also faulted the district court for "needlessly demarcating the reach of the Second Amendment" with its "trailblazing pronouncement."[35]

Like the district court, the Fourth Circuit followed *Masciandaro* in applying intermediate scrutiny and found that "protecting public safety and preventing crime . . . are substantial governmental interests."[36] However, unlike the district court, the Fourth Circuit agreed with the State that "the good-and-substantial-reason requirement advances [these] objectives . . . because it reduces the number of handguns carried in public."[37] As the requirement properly balanced the need to ensure access to permits with the goal of preventing an unnecessary proliferation of handguns in public, the court concluded that there was a "reasonable fit" between the requirement and Maryland's objectives.[38]

After *Heller* and *McDonald*, the Fourth Circuit signaled its recognition of the centrality of historical inquiries to resolving Second Amendment challenges,[39] even going so far as to establish a test that demanded such an inquiry as the first step.[40] Despite this recognition, the court avoided historical analysis altogether in *Masciandaro* and *Woollard*, instead simply assuming that the right at issue existed before analyzing it under intermediate scrutiny. The Fourth Circuit has defended this approach on constitutional avoidance grounds, declining to enter the "vast *terra incognita*" of the Second Amendment's scope when the case "could be resolved on narrower grounds."[41] Beyond these constitutional avoidance concerns, the court's decision to forgo historical analysis in *Woollard* likely reflects a recognition of the difficulties lower courts face in attempting to replicate the type of exhaustive historical inquiry conducted in *Heller* and *McDonald*.

Commentators have "acknowledge[d] that the Court's Second Amendment jurisprudence, especially *Heller*, constitutes the apogee of originalism."[42] Justice Scalia's opinion in *Heller* devotes nearly fifty pages to a meticulous assessment of sources dating back to the seven-

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[34] *Id.* at 876.

[35] *Id.* at 868.

[36] *Id.* at 877.

[37] *Id.* at 879.

[38] *Id.* at 880.

[39] *See, e.g.*, United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011) ("[H]istorical meaning enjoys a privileged interpretative role in the Second Amendment context . . . ."); United States v. Chester, 628 F.3d 673, 678 (4th Cir. 2010) ("[D]etermining the limits on the scope of the [Second Amendment] right is necessarily a matter of historical inquiry . . . .").

[40] *See Chester*, 628 F.3d at 680–82.

[41] *Masciandaro*, 638 F.3d at 475. For arguments against applying constitutional avoidance in the Second Amendment context, see Recent Case, 125 HARV. L. REV. 843 (2012).

[42] Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 862 (2013).

teenth century,[43] and Justice Stevens's dissent counters with almost forty pages of his own historical analysis.[44] Many have questioned the ability of judges, particularly those on lower courts, to conduct as detailed a historical inquiry. In his *McDonald* dissent, Justice Breyer warned of the "reefs and shoals that lie in wait for those nonexpert judges who place virtually determinative weight upon historical considerations."[45] Even Justice Scalia has acknowledged that "it is often exceedingly difficult to plumb the original understanding of an ancient text"[46] and that this task is "sometimes better suited to the historian than the lawyer."[47] Furthermore, this task may be particularly difficult for lower court judges who face crowded dockets, unlike the smaller discretionary docket of the Supreme Court.[48] Inundated with a "flood of constitutional challenges to gun laws" in the wake of *Heller*,[49] lower courts likely do not have the time or ability to locate and scrutinize the vast and obscure materials relied upon in *Heller*.[50]

Courts that attempt to conduct a historical inquiry in Second Amendment challenges often find the evidence insufficient and the analysis inconclusive, "collid[ing] with the reality that history will not provide clear answers to these sorts of questions."[51] The Fourth Circuit in *Chester* faced a challenge to a statute prohibiting firearm possession by domestic violence misdemeanants.[52] After briefly assessing the history of felon firearm possession, the court concluded that the historical evidence before it was "inconclusive" and found itself "not able to say that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors."[53] Similarly, the Third Circuit in *United States v. Marzzarella*[54] undertook a historical analysis in assessing whether Second Amendment protection extended to possession of a firearm with an erased serial number.[55] Ultimately, faced with insufficient historical evidence, the court stated that it "cannot be certain that the possession of unmarked firearms in the home is excluded from the right to bear arms."[56] Even

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[43] *See* District of Columbia v. Heller, 554 U.S. 570, 579–627 (2008).
[44] *See id.* at 640–79 (Stevens, J., dissenting).
[45] McDonald v. City of Chicago, 130 S. Ct. 3020, 3122 (2010) (Breyer, J., dissenting).
[46] Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989).
[47] *Id.* at 857.
[48] *See* Miller, *supra* note 42, at 860–61.
[49] Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 736 (2012).
[50] Miller, *supra* note 42, at 935.
[51] Rostron, *supra* note 49, at 731.
[52] United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).
[53] *Id.* at 681.
[54] 614 F.3d 85 (3d Cir. 2010).
[55] *Id.* at 95.
[56] *Id.*

the *Heller* majority's dictum that prohibitions on the possession of firearms by felons were "longstanding," which the Court took for granted without historical analysis,[57] has been called into question. Judges digging for historical justification have found the evidence "inconclusive at best,"[58] suggesting that the prohibition may in fact "lack the 'longstanding' historical basis that *Heller* ascribes to it."[59]

Furthermore, courts often "downplay the usefulness of historical inquiries" due to "the difficulty of making comparisons across centuries during which so many vast technological, legal, social, and other changes have occurred."[60] The serial numbers at issue in *Marzzarella* did not exist at the time of ratification, meaning that "citizens had no concept of that characteristic or how it fit within the right to bear arms."[61] Attempting to discern the original understandings of felon and misdemeanant firearm possession has an "equally anachronistic flair," as these types of criminal offense categories have changed so much over time.[62] Moreover, because felonies in the founding era were usually punishable by death, the question of whether felons had the right to keep and bear arms is "nonsensical"[63] and historical analysis is "render[ed] virtually meaningless."[64] These examples and others highlight the limited extent to which historical inquiries can answer specific issues that arise in today's constitutional adjudication[65] and explain why the courts that conduct them are often forced to analogize to similar yet crucially different issues.[66]

Even when sufficient historical evidence exists from which to draw a conclusion, the evidence is often conflicting, allowing judges to pick and choose sources that support their views.[67] As Justices Scalia and Stevens squared off in *Heller* over the Second Amendment's meaning, "[e]ach, not surprisingly, found the history to support [his] own view of

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

58 Rostron, *supra* note 49, at 732 (quoting United States v. Skoien, 614 F.3d 638, 650 (7th Cir. 2010) (en banc) (Sykes, J., dissenting)) (internal quotation marks omitted).

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

60 Rostron, *supra* note 49, at 750.

61 *Marzzarella*, 614 F.3d at 94; *see id.* at 93–94.

62 Rostron, *supra* note 49, at 750; *see id.* at 750–51.

63 *Id.* at 751.

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

65 Rostron, *supra* note 49, at 750.

66 *See, e.g.*, United States v. Chester, 628 F.3d 673, 680–81 (4th Cir. 2010) (comparing a ban on firearm possession by domestic violence misdemeanants to a ban on possession by felons); United States v. Skoien, 614 F.3d 638, 640–41 (7th Cir. 2010) (en banc) (same); *Marzzarella*, 614 F.3d at 95 (comparing "a handgun with an obliterated serial number" to "a weapon like a short-barreled shotgun").

67 For examples of conflicting history in the Second Amendment context, see Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1100–25 (2000); and Miller, *supra* note 42, at 912–17.

the text."[68] The historical evidence "can be readily spun in various directions, depending on what conclusion a court ultimately wants to reach."[69] Even "the very range of sources consulted by the majority carries with it the danger of selectivity, that is, picking and choosing from a vast array of materials those that appear to support the preferred result."[70] Ultimately, each of the debated points "ends inconclusively," leaving it "hard to look at all [the] evidence and come away thinking that one side is clearly right on the law."[71]

The Fourth Circuit in *Woollard* avoided historical analysis entirely, but had it ventured into the "terra incognita" of the Second Amendment's scope outside the home, it would have run headlong into many of these difficulties. The earliest cases to consider whether state constitutional analogues to the Second Amendment allowed restrictions on concealed carry reached different conclusions,[72] and many of the cases that upheld such restrictions did not claim to adopt precodification understandings of the Second Amendment, relying instead on interpretations that *Heller* explicitly rejected.[73]

Moreover, examining the historical understanding of concealed carry does not fully answer the question, as early American law still permitted citizens to carry weapons openly,[74] and many cases that upheld prohibitions on concealed carry explicitly rejected similar bans on open carry as unconstitutional.[75] This combination of rules arose from the social conventions of the time; since open carry was "common and socially accepted," concealed carry was viewed with a "presumption of criminal intent."[76] Today, however, circumstances have changed, and now open carry, perhaps more than concealed, is viewed with concern.[77] Furthermore, no laws akin to Maryland's licensing scheme requiring a permit to carry a concealed weapon outside the home existed

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[68] J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 269 (2009).

[69] Rostron, *supra* note 49, at 743.

[70] Wilkinson, *supra* note 68, at 270.

[71] *Id.* at 271.

[72] *Compare, e.g.*, Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 93 (1822) (finding restrictions on concealed carry unconstitutional), *with* State v. Mitchell, 3 Blackf. 229, 229 (Ind. 1833) (finding such a restriction constitutional).

[73] *See* Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1360 & n.45 (2009).

[74] James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 CORNELL L. REV. 907, 910 (2012).

[75] Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1570 & n.105 (2009). Even the cases cited in *Heller* for the proposition that concealed carry prohibitions were longstanding held that open carry was a "right guaranteed by the Constitution of the United States." State v. Chandler, 5 La. Ann. 489, 490 (1850); *see also* District of Columbia v. Heller, 554 U.S. 570, 585 n.9 (2008) (citing several state cases).

[76] Lund, *supra* note 73, at 1361.

[77] *See id.*

at the time of ratification.[78] This led the Second Circuit in a case similar to *Woollard* to conclude that history "do[es] not directly address the specific question" and that "[a]nalogizing New York's licensing scheme (or any other gun regulation for that matter) to the array of statutes enacted or construed over one hundred years ago has its limits."[79]

The district court's attempt at historical analysis in *Woollard* appears free from these difficulties only because it contained no independent inquiry and instead relied exclusively on *Heller*, despite the fact that the Court's analysis in that case was directed to the very different question of possession in the home. Selectively citing passages that at best only *implied* some application of the Second Amendment outside the home,[80] the district court overlooked a wealth of evidence pointing in the other direction.[81] Conducting a full historical inquiry into the Second Amendment's scope outside the home would have required resolution of the same ambiguous and conflicting evidence that has led to a circuit split on this very question.[82]

Faced with the task of parsing troves of centuries-old sources for ambiguous and inconclusive evidence, it is no wonder that the Fourth Circuit endeavored to avoid historical analysis altogether in *Woollard*. *Woollard* reflects an "emerging standard approach" in which lower courts eschew historical inquiry in favor of a more familiar intermediate scrutiny analysis.[83] Ironically, this approach has led them to "embrac[e] the sort of interest balancing that Justice Breyer recommended and that Scalia vociferously denounced."[84] Despite this widespread departure from *Heller*'s originalist mandate and the decision of the Fourth Circuit and others to "await . . . guidance from the nation's highest court,"[85] the Supreme Court denied certiorari in *Woollard*,[86] meaning that lower courts will need to wait even longer for a solution to the "jurisprudential puzzle"[87] left by *Heller*.

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[78] *See* Winkler, *supra* note 75, at 1569.

[79] Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 91 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013).

[80] *See* Woollard v. Sheridan, 863 F. Supp. 2d 462, 469–70 (D. Md. 2012) (noting that the reasons underlying the *Heller* Court's holding "suggest[] that the right also applies in some form" outside the home, *id.* at 469).

[81] *See, e.g.*, *Kachalsky*, 701 F.3d at 90–91, 94–96 (citing extensive evidence of the "historical prevalence of the regulation of firearms in public," *id.* at 96).

[82] *Compare* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (concluding that the Second Amendment confers a right to bear arms for self-defense outside the home), *reh'g denied*, 708 F.3d 901 (7th Cir. 2013), *with* Peterson v. Martinez, 707 F.3d 1197, 1211 (10th Cir. 2013) (concluding that "the Second Amendment does not confer a right to carry concealed weapons").

[83] *See* Rostron, *supra* note 49, at 752.

[84] *Id.* at 757.

[85] United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011); *accord Kachalsky*, 701 F.3d at 89.

[86] Woollard v. Gallagher, 134 S. Ct. 422 (2013) (mem.).

[87] Miller, *supra* note 42, at 863.