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*Article III — Justiciability — Mootness —*  
New York State Rifle & Pistol Ass’n v. City of New York

After the grand but doctrinally vacant pronouncements of *District of Columbia v. Heller*<sup>1</sup> and *McDonald v. City of Chicago*,<sup>2</sup> the Supreme Court rejected nearly every Second Amendment petition for certiorari for a decade and let the lower federal and state courts turn *Heller*’s theory into doctrine.<sup>3</sup> Last Term, the Court finally agreed to hear another Second Amendment case. But, in *New York State Rifle & Pistol Ass’n v. City of New York*<sup>4</sup> (*NYSRPA*), the Court held the Second Amendment dispute moot after the City and State of New York amended the challenged licensing scheme.<sup>5</sup> The concurrence and dissent suggest that at least four Justices are interested in changing the lower courts’ two-step application of *Heller* when the Court does reach the merits of a Second Amendment case. But it would be a mistake for the Court to disrupt this dominant mode of review in the lower courts. *NYSRPA* shows why the lower court test is preferable to a purely historical and textual one and that the Court can enforce the Second Amendment without treating it as a privileged right.

The *NYSRPA* petitioners challenged a unique New York City ordinance that prohibited holders of premises-licensed firearms<sup>6</sup> from transporting handguns outside of the home except “directly to and from an authorized small arms range/shooting club [within the City of New York].”<sup>7</sup> The petitioners filed a complaint in 2013 alleging that the transport restriction violated the Second Amendment because it prevented them from transporting their firearms to a second home or shooting range outside the

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<sup>1</sup> 554 U.S. 570 (2008).

<sup>2</sup> 561 U.S. 742 (2010).

<sup>3</sup> Until last Term, the only Second Amendment case the Court had heard since *Heller* and *McDonald* was *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), a per curiam decision vacating a criminal conviction for possession of a stun gun.

<sup>4</sup> 140 S. Ct. 1525 (2020).

<sup>5</sup> *Id.* at 1526; *N.Y. State Rifle & Pistol Ass’n v. City of New York (NYSRPA)*, 86 F. Supp. 3d 249, 253 (S.D.N.Y. 2015).

<sup>6</sup> New York State prohibits unlicensed firearm possession, N.Y. PENAL LAW § 265.01 (McKinney 2019); *id.* § 265.20(a)(3) (McKinney 2020), but provides two types of licenses for those who wish to legally possess a handgun: carry licenses, which allow concealed carry outside the home; and premises licenses, which allow licensees to possess a weapon at their home address, *id.* § 400.00(2) (McKinney 2019).

<sup>7</sup> *NYSRPA*, 86 F. Supp. 3d at 254 (quoting 38 N.Y.C.R.R. § 5-23(3) (amended 2019)). The rule also allowed transportation to hunting areas authorized by New York State Fish and Wildlife law. *Id.* (quoting 38 N.Y.C.R.R. § 5-23(4) (amended 2019)).

city.<sup>8</sup> They sought a preliminary injunction and a declaration that the premises-license restrictions were unconstitutional.<sup>9</sup>

The district court granted the City's motion for summary judgment.<sup>10</sup> The court declined to apply strict scrutiny to the challenged rule because it did not "impinge on the 'core' of the Second Amendment, . . . [the] right to possess a handgun in the home for self-defense."<sup>11</sup> Applying intermediate scrutiny,<sup>12</sup> the court decided that the rule passed constitutional muster because the transportation restrictions were substantially related to the City's interest in public safety and crime prevention.<sup>13</sup>

The Second Circuit affirmed.<sup>14</sup> Writing for a unanimous panel, Judge Lynch<sup>15</sup> addressed the Second Amendment claim by applying the two-step inquiry the circuit adopted after *Heller*.<sup>16</sup> At the first step, the court asks whether the Second Amendment applies.<sup>17</sup> If the amendment does apply, the court proceeds to the second step and asks whether heightened scrutiny is appropriate.<sup>18</sup> At step one, the panel assumed without deciding that the Second Amendment protected the transportation of guns to firing ranges and second homes.<sup>19</sup> At step two,<sup>20</sup> the panel determined that the second-home restriction did not merit strict scrutiny because an "adequate alternative" existed, namely purchasing

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<sup>8</sup> Amended Complaint ¶¶ 42, 46, *NYSRPA*, 86 F. Supp. 3d 249 (S.D.N.Y. 2015) (No. 13 Civ. 2115). The petitioners also alleged that the restriction violated the constitutional right to travel, the First Amendment, and the dormant commerce clause. *See id.* ¶¶ 58, 67, 79.

<sup>9</sup> *See id.* at 19.

<sup>10</sup> *NYSRPA*, 86 F. Supp. 3d at 253.

<sup>11</sup> *Id.* at 259–60 (first citing *District of Columbia v. Heller*, 554 U.S. 570 (2008); and then citing *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011)).

<sup>12</sup> Intermediate scrutiny requires that a statute be "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Judge Sweet noted that the Second Circuit — and a majority of other lower courts — apply intermediate scrutiny to general Second Amendment challenges. *NYSRPA*, 86 F. Supp. 3d at 259.

<sup>13</sup> *NYSRPA*, 86 F. Supp. 3d at 261–63. The court also rejected the petitioners' constitutional right to travel, First Amendment, and dormant commerce clause claims. *See id.* at 263–68.

<sup>14</sup> *N.Y. State Rifle & Pistol Ass'n v. City of New York (NYSRPA)*, 883 F.3d 45, 68 (2d Cir. 2018).

<sup>15</sup> Judge Lynch was joined by Judges Pooler and Carney.

<sup>16</sup> *NYSRPA*, 883 F.3d at 55. In *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), the court rejected the argument that *Heller* requires a test based solely on the "text, history, and tradition of the Second Amendment." *Id.* at 89 n.9. Instead, it determined that "*Heller* stands for the rather unremarkable proposition that where a state regulation is entirely inconsistent with the protections afforded by an enumerated right — as understood through that right's text, history, and tradition — it is an exercise in futility to apply means-end scrutiny." *Id.*; *see also* *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 257 n.74 (2d Cir. 2015) (explaining that means-end scrutiny applies to regulations that merely impinge on Second Amendment rights).

<sup>17</sup> *NYSRPA*, 883 F.3d at 55.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Step two has two factors in the Second Circuit: "(1) 'how close the law comes to the core of the Second Amendment right' and (2) 'the severity of the law's burden on the right.'" *Id.* at 56 (quoting *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d at 258).

a second handgun that is licensed for the second home.<sup>21</sup> As for the shooting-range restriction, the panel concluded that the rule did not merit heightened scrutiny because gun owners had ample opportunity to train within the city.<sup>22</sup> Ultimately, the panel agreed with the district court that the ordinance survived intermediate scrutiny as applied to both forms of transportation in light of the substantial government interest in public safety and crime prevention.<sup>23</sup>

The New York Police Department (NYPD), which administers the City's licensing scheme, announced shortly after the Supreme Court granted certiorari that it would change the challenged ordinance.<sup>24</sup> Following notice and comment, the NYPD amended the rule to allow individuals to transport their premises-licensed handguns "directly to and from . . . [a]nother residence"<sup>25</sup> and a "lawful small arms range/shooting club or lawful shooting competition."<sup>26</sup> The revised rule specified that the residences, ranges, and clubs may be within or outside the City of New York,<sup>27</sup> but that transport within the city "shall be continuous and uninterrupted."<sup>28</sup> New York State then revised its laws to preempt local regulations and allow the transportation of licensed firearms directly to or from "any . . . location where the licensee is lawfully authorized to have and possess" their licensed handgun.<sup>29</sup> The City filed a Suggestion of Mootness.<sup>30</sup>

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<sup>21</sup> *Id.* at 57. The court reiterated that licensing-scheme expenses do not necessarily substantially burden Second Amendment rights. *Id.* at 58 (quoting *Kwong v. Bloomberg*, 723 F.3d 160, 167–68 (2d Cir. 2013)).

<sup>22</sup> *Id.* at 58–59. However, the panel acknowledged that an explicit or functional ban on firearm training or practice might trigger heightened scrutiny by substantially burdening the core right to self-defense in the home. *Id.* at 58.

<sup>23</sup> *Id.* at 64. Finally, like the district court, the panel also rejected the petitioners' claims under the constitutional right to travel, the First Amendment, and the dormant commerce clause. *See id.* at 64–68.

<sup>24</sup> *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 139 S. Ct. 939 (2019) (mem.); *see* Suggestion of Mootness at 5–6, *NYSRPA*, 140 S. Ct. 1525 (2020) (No. 18-280); Adam Liptak, *Fearing Supreme Court Loss, New York Tries to Make Gun Case Vanish*, N.Y. TIMES (May 27, 2019), <https://nyti.ms/2QnNsCg> [<https://perma.cc/ZV9S-JW8Z>].

<sup>25</sup> 38 N.Y.C.R.R. § 5-23(a)(3)(i) (amended 2019) (permitting such a transport "where the licensee is authorized to possess such handgun").

<sup>26</sup> *Id.* § 5-23(a)(3)(ii).

<sup>27</sup> *Id.* § 5-23(a)(3).

<sup>28</sup> *Id.* § 5-23(a)(7).

<sup>29</sup> *See* N.Y. PENAL LAW § 400.00(6) (McKinney 2019). The change in state law was a shrewd move likely designed to avoid the voluntary cessation exception to mootness. Generally, the voluntary cessation of challenged conduct is not enough to moot a case because there is no guarantee that the defendant will not restart the conduct after the case is dismissed. *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

<sup>30</sup> *See* Suggestion of Mootness, *supra* note 24. The Court initially declined to dismiss the case but instructed the parties to discuss the issue at oral argument. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 103 (2019) (mem.).

The Supreme Court vacated. In a per curiam opinion,<sup>31</sup> the Court declared the petitioners' claims for declaratory and injunctive relief moot because the amended licensing scheme provided "the precise relief that petitioners requested."<sup>32</sup> The Court declined to address the petitioners' contested complaint that the new rule would not allow for "coffee, gas, food, or restroom breaks."<sup>33</sup> It also refused to consider petitioners' last-minute claim for damages.<sup>34</sup> It remanded the case for the lower courts to consider the scope of the new rule and whether it was too late for the petitioners to request damages.<sup>35</sup>

Justice Kavanaugh concurred to note that he agreed with the per curiam mootness determination but also with the dissent's concerns that lower courts are not properly applying the Court's Second Amendment precedent.<sup>36</sup> He added that "[t]he Court should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari" that were pending at the time.<sup>37</sup>

Justice Alito dissented.<sup>38</sup> He accused the City of manipulating the Court's merits docket and argued that the case was still live for two reasons.<sup>39</sup> First, the petitioners did not receive all of their requested relief because travel to and from authorized locations must be "continuous and uninterrupted," potentially precluding coffee and restroom stops.<sup>40</sup> Second, if the Court were to find that the restrictions violated

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<sup>31</sup> Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan joined the per curiam opinion.

<sup>32</sup> *NYSRPA*, 140 S. Ct. at 1526. The Court cited one case, *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990), to explain that "residual claim[s]" under a new legal framework that mooted an original claim should be developed in the lower courts on remand. *NYSRPA*, 140 S. Ct. at 1526 (quoting *Lewis*, 494 U.S. at 482). The majority correctly recognized what the dissent ignored: because the amended state law explicitly preempts local rules, see N.Y. PENAL LAW § 400.00(6) (McKinney 2019), disputes over residual effects of the City's new rule are beside the point. Any dispute over the scope of remaining transport restrictions (such as the meaning of "direct") would be controlled by the state statute as constructed by New York's state courts.

<sup>33</sup> *NYSRPA*, 140 S. Ct. at 1526.

<sup>34</sup> *Id.* at 1526–27.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1527 (Kavanaugh, J., concurring).

<sup>37</sup> *Id.* The Court ultimately did not grant certiorari on any of those petitions. See *infra* note 53 and accompanying text.

<sup>38</sup> Justice Alito's dissent was joined in full by Justice Gorsuch and in part by Justice Thomas. Justice Thomas did not join Part IV-B, the section discussing the application of heightened scrutiny in the lower courts. *Id.* at 1527, 1541–42 (Alito, J., dissenting).

<sup>39</sup> *Id.* at 1527–28.

<sup>40</sup> *Id.* at 1534 (quoting 38 N.Y.C.R.R. § 5-23(a)(7)). The City argued that such stops would "not render a route indirect." Reply in Support of Suggestion of Mootness at 2, *NYSRPA*, 140 S. Ct. 1525 (2020) (No. 18-280). And at oral argument, the City represented that there would be no collateral consequences for violations of the prior ban. Transcript of Oral Argument at 42, *NYSRPA*, 140 S. Ct. 1525 (2020) (No. 18-280), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-280\\_snka.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-280_snka.pdf) [<https://perma.cc/FF9N-ZENC>].

the Second Amendment, the district court could award damages on remand even though petitioners did not include a damages claim in their pleadings.<sup>41</sup> Justice Alito reasoned that a merits win would at least entitle the petitioners to nominal damages, which are “widely recognized” as precluding mootness,<sup>42</sup> and perhaps even compensatory damages based on potential injuries suffered.<sup>43</sup> Justice Alito also contended that it was not too late to permit a claim for damages because the City suffered no apparent prejudice and “would [not] have litigated the case any differently if it had been on express notice that petitioners” wanted damages.<sup>44</sup> He then rejected the majority’s reasoning, arguing that the petitioners did not actually receive the full relief they requested because they were not granted “unrestricted access” to ranges and homes outside the City.<sup>45</sup> In Justice Alito’s view, the new law did not replace the original injury with a new one: it simply reduced the existing injury.<sup>46</sup>

Finally, Justice Alito addressed the merits, explaining that the Second Amendment challenge was “not a close question.”<sup>47</sup> He reasoned that the City’s rule impinged on the same core right at issue in *Heller* since the “right to keep a handgun in the home for self-defense” comes with an associated right to learn and practice with the handgun.<sup>48</sup>

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<sup>41</sup> *NYSRPA*, 140 S. Ct. at 1535 (Alito, J., dissenting). The petitioners sued under 42 U.S.C. § 1983, *see id.*, which permits recoveries against municipalities, *see Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978).

<sup>42</sup> *NYSRPA*, 140 S. Ct. at 1536 (Alito, J., dissenting). At least one court of appeals has taken the opposite view. *See Flanigan’s Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1263–64 (11th Cir. 2017) (en banc).

<sup>43</sup> *NYSRPA*, 140 S. Ct. at 1536 (Alito, J., dissenting).

<sup>44</sup> *Id.* at 1538 n.9. Justice Alito noted that the Federal Rules of Civil Procedure allow the award of “the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” *Id.* at 1535 (emphasis omitted) (quoting FED. R. CIV. P. 54(c)). However, Justice Alito did not consider the implications of treating Rule 54(c) as an independent source of Article III standing. First, if an appellate court reached the merits of a claim and remanded, only for the lower court to find that damages were unavailable, the merits decision would have been reached without Article III standing. Second, the current rule prevents potential prejudice against defendants. Contrary to Justice Alito’s assertion that the prayer for relief did not influence the City’s litigation strategy, the City represented that it did not seek discovery on the understanding that the petitioners sought only prospective relief. Letter Response Brief of Respondents at 3, *NYSRPA*, 140 S. Ct. 1525 (2020) (No. 18-280).

<sup>45</sup> *NYSRPA*, 140 S. Ct. at 1539 (Alito, J., dissenting).

<sup>46</sup> *See id.* at 1540.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1541. This move endorses an idea the Court introduced in *Heller*: that the right to bear arms “implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use.” *District of Columbia v. Heller*, 554 U.S. 570, 617–18 (2008) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 271 (1868)). The petitioners had suggested a more expansive justification — a holding that the Second Amendment’s right to bear arms protects the carrying of firearms outside the home “for the core lawful purpose of self-defense.” Brief for Petitioners at 20, *NYSRPA*, 140 S. Ct. 1525 (2020) (No. 18-280) (quoting *Heller*, 554 U.S. at 630).

Importantly, Justice Alito indicated that he would have used history as his primary guide in determining the constitutionality of the challenged rule. Because the City failed to provide evidence that “laws in force around the time of the adoption of the Second Amendment . . . prevented gun owners from practicing outside city limits,” the ordinance violated the Second Amendment.<sup>49</sup> Justice Alito continued by arguing that “there was nothing heightened about” the lower courts’ application of heightened scrutiny.<sup>50</sup> He dismissed the City’s public safety justification as spurious and suggested that the scant support of an NYPD officer’s affidavit was insufficient to satisfy even intermediate scrutiny.<sup>51</sup> He concluded by noting that if “this case is representative of the way *Heller* has been treated in the lower courts . . . there is cause for concern.”<sup>52</sup>

Although the four concurring and dissenting Justices in *NYSRPA* seemed inclined to grant certiorari in another Second Amendment case, and four votes are enough to grant a petition for certiorari, the Court denied ten Second Amendment petitions less than two months later.<sup>53</sup> These denials might indicate that the Justices lack consensus over the scope of the individual right to bear arms;<sup>54</sup> or that five Justices believe the lower courts are getting it right, and the other four do not want the Court to endorse the two-part test.<sup>55</sup> That five Justices might prefer the

<sup>49</sup> *NYSRPA*, 140 S. Ct. at 1541 (Alito, J., dissenting).

<sup>50</sup> *Id.* at 1541–42.

<sup>51</sup> *Id.* at 1542–43; *see also infra* note 81.

<sup>52</sup> *Id.* at 1544.

<sup>53</sup> *See* *Rogers v. Grewal*, 140 S. Ct. 1865 (2020) (Thomas, J., dissenting from the denial of certiorari); *Mance v. Barr*, No. 18-663, 2020 WL 3146838 (U.S. June 15, 2020) (mem.); *Pena v. Horan*, No. 18-843, 2020 WL 3146680 (U.S. June 15, 2020) (mem.); *Gould v. Lipson*, No. 18-1272, 2020 WL 3146683 (U.S. June 15, 2020) (mem.); *Cheeseman v. Polillo*, No. 19-27, 2020 WL 3146843 (U.S. June 15, 2020) (mem.); *Ciolek v. New Jersey*, No. 19-114, 2020 WL 3146684 (U.S. June 15, 2020) (mem.); *Worman v. Healey*, No. 19-404, 2020 WL 3146687 (U.S. June 15, 2020) (mem.); *Malpasso v. Palozzi*, No. 19-423, 2020 WL 3146688 (U.S. June 15, 2020) (mem.); *Culp v. Raoul*, No. 19-487, 2020 WL 3146689 (U.S. June 15, 2020) (mem.); *Wilson v. Cook County*, No. 19-704, 2020 WL 3146694 (U.S. June 15, 2020) (mem.).

<sup>54</sup> *See* Jake Charles, *A Court in Denial*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (June 19, 2020), <https://firearmslaw.duke.edu/2020/06/a-court-in-denial> [https://perma.cc/F55G-2EUA]. Chief Justice Roberts reportedly indicated to his colleagues that he would not soon provide the fifth vote to overturn gun control regulations. *See* Joan Biskupic, *Behind Closed Doors During One of John Roberts’ Most Surprising Years on the Supreme Court*, CNN (July 27, 2020, 4:28 PM), <https://www.cnn.com/2020/07/27/politics/john-roberts-supreme-court-liberals-daca-second-amendment/index.html> [https://perma.cc/K5LT-RB4Q].

<sup>55</sup> Justice Alito surprised some commentators by not explicitly rejecting the two-step test. *See* Darrell Miller, *The Narrowness of the Supreme Court’s Decision in NYSRPA*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Apr. 30, 2020), <https://sites.law.duke.edu/secondthoughts/2020/04/30/the-narrowness-of-the-supreme-courts-decision-in-nysrpa> [https://perma.cc/42HV-3Y64]. Justice Alito could have stopped after determining that the City failed to present historical evidence sufficient to justify its restrictions on the core of the Second Amendment, *see NYSRPA*, 140 S. Ct. at 1540–41 (Alito, J., dissenting) — but he did not. He went on to discuss the application of heightened scrutiny in a section that lost the support of Justice Thomas. *Id.* at 1541–43. Does this approach indicate reluctant acceptance of the application of means-end

current framework to Justice Alito's proposed historical analysis should comfort those who care about principled judicial decisionmaking and (at the very least) not disconcert those who want rigorous enforcement of the Second Amendment. Indeed, the two-step framework is amenable to Second Amendment enforcement so long as courts require the government to provide sufficient evidence to justify its "important governmental objective."<sup>56</sup>

Tiers-of-scrutiny review is consistent with the way courts approach analogous constitutional rights.<sup>57</sup> The First Amendment contains a categorical command<sup>58</sup> that is not enforced categorically<sup>59</sup> — it does not protect all speech.<sup>60</sup> And the level of First Amendment protection of covered speech is modulated based on the content of the speech and the identity of the speaker.<sup>61</sup> Likewise, the Second Amendment contains a categorical command that does not protect all weapons and allows some regulation of the core right to bear arms in the home: the *Heller* Court preserved longstanding restrictions on "the possession of firearms by felons and the mentally ill," bans on firearms in "sensitive places,"<sup>62</sup> laws

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scrutiny? Perhaps Justice Alito simply could not resist criticizing the lower court's application of step two. Regardless, Justice Alito's conclusion that he would strike down the restriction because it was not justified by historical evidence indicates that he would embrace a test based primarily on history.

<sup>56</sup> See *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

<sup>57</sup> In terms of application, the Second Amendment's closest cousin is the First. The *Heller* Court looked to the First, Fourth, and Ninth Amendments in interpreting the Second Amendment's scope, but it relied on the First when discussing (and rejecting) the use of interest balancing to analyze burdens on core rights. See Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. (forthcoming 2021) (manuscript at 4, 10–11), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3539883](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3539883) [<https://perma.cc/5SM4-6FMZ>].

<sup>58</sup> U.S. CONST. amend. I ("Congress shall make no law . . ."). Likewise, the Second Amendment provides that "the right of the people to keep and bear Arms[] shall not be infringed." U.S. CONST. amend. II.

<sup>59</sup> See Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 401–02 (2009).

<sup>60</sup> See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (explaining that "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" do not enjoy First Amendment protection, *id.* at 572).

<sup>61</sup> See *United States v. Marzzarella*, 614 F.3d 85, 96 (3d Cir. 2010) ("The right to free speech, an undeniably enumerated fundamental right, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue." (citation omitted)). To give just three examples: Regulations of the content of speech are subject to strict scrutiny. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Commercial speech is protected by a form of intermediate scrutiny. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770–73 (1976). And content-neutral time, place, and manner restrictions receive a form of intermediate scrutiny that asks whether restrictions are narrowly tailored, serve an important governmental objective, and preserve alternative means of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>62</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

regulating the commercial sale of firearms, and prohibitions on “dangerous and unusual weapons.”<sup>63</sup> Given these similarities, it is no wonder that lower courts look to First Amendment doctrine when faced with challenges to firearm regulations that incidentally implicate the core right to possess a handgun for defense of hearth and home, such as the criminalization of firearms with obliterated serial numbers.<sup>64</sup>

The two-part test requires that courts apply means-end scrutiny to challenged laws that impinge on the Second Amendment — that is, they must evaluate (under a particular tier of scrutiny) whether the regulation is appropriately tailored to a sufficiently strong governmental interest. Because means-end scrutiny is used to evaluate other constitutional claims, courts are far more capable of performing the two-step inquiry than they are of performing an originalist historical analysis.<sup>65</sup> As Professor Darrell Miller has explained, “originalism is a game with nine players” — in other words, lower courts lack the institutional competence to measure rights solely on the basis of history, text, and tradition.<sup>66</sup> At least one circuit court, for instance, has “face[d] institutional challenges in conducting a definitive review of the relevant historical record” in a case challenging the federal prohibition on licensed dealers from selling firearms to anyone under the age of twenty-one.<sup>67</sup> Decisionmaking in the lower courts also looks very different from decisionmaking at the Supreme Court. The Supreme Court can disregard, narrow, or overrule its prior cases, but lower courts, bound by vertical precedent, do not have such freedom.<sup>68</sup> Moreover, the *Heller* majority did not actually reject means-end scrutiny — in fact, it dismissed Justice Breyer’s proposed interest-balancing approach in part because it did not involve “the traditionally expressed levels” of scrutiny.<sup>69</sup>

<sup>63</sup> *Id.* at 627.

<sup>64</sup> See *Marzzarella*, 614 F.3d at 96.

<sup>65</sup> Means-end scrutiny is also used to evaluate equal protection claims. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235–36 (1995) (applying strict scrutiny to racial classifications); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to gender classifications).

<sup>66</sup> Darrell A.H. Miller, *Romanticism Meets Realism in Second Amendment Adjudication*, 68 DUKE L.J. ONLINE 33, 34 (2018); see also Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 888–89 (2014) (“Originalism . . . is especially difficult in resource-constrained lower courts.” *Id.* at 889.). *Heller* likely requires some form of historical and textual inquiry at step one. See *United States v. Torres*, 911 F.3d 1253, 1258 (9th Cir. 2019) (“A law does not burden Second Amendment rights, if it . . . regulates conduct that historically has fallen outside the scope of the Second Amendment.” (emphasis omitted)). But the step-one analysis should be dispositive only when the Second Amendment does not apply to the challenged regulation. Historical evidence is often inconclusive, and not all regulations of categorically protected activity, such as premises licenses, are presumptively unconstitutional.

<sup>67</sup> *NRA v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 204 (5th Cir. 2012).

<sup>68</sup> Bruhl, *supra* note 66, at 888–89.

<sup>69</sup> *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008); see also *NRA*, 700 F.3d at 197 (“In rejecting Justice Breyer’s proposed interest-balancing inquiry, . . . we do not understand the Court to have rejected all heightened scrutiny analysis.”). Means-end scrutiny is not the same as interest



Justice Alito's dissent also demonstrates that there is little reason to believe that *Heller's* originalist methodology is more principled than the familiar tiers of scrutiny. In *McDonald*, Justice Scalia defended *Heller's* historical test as "much less subjective" than a balancing test.<sup>70</sup> But Justice Scalia also conceded that "[h]istorical analysis can be difficult" because it "sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it."<sup>71</sup> In *NYSRPA*, Justice Alito resolved all such threshold questions and nuanced judgments in favor of the petitioners. At the outset, Justice Alito decided that the transportation of arms to gun ranges and second homes fell within the core of the Second Amendment, a significant expansion of the right beyond the home.<sup>72</sup> Justice Alito's next move was similarly important: he explained that he would not uphold the restriction in the absence of evidence that "municipalities during the founding era prevented gun owners from taking their guns outside city limits for practice."<sup>73</sup> The City did present evidence that states and municipalities have long regulated the place and manner of firearm training,<sup>74</sup> and the *Heller* majority acknowledged that certain stringent restrictions on firearm transportation are presumptively constitutional.<sup>75</sup> But Justice Alito guaranteed the answer by framing the question at a high level of specificity. Legal history is hardly an objective endeavor.<sup>76</sup> Though the application of heightened scrutiny requires judges to use their judgment, the application of law to competing interests at least "limits the judge's choices" and "lays bare the judge's reasoning for all to see and to criticize."<sup>77</sup>

Indeed, there is much to see and criticize in the lower courts' application of heightened scrutiny in *NYSRPA*. Assuming the Second

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balancing — it "is not a comparative judgment." *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1265 (D.C. Cir. 2010).

<sup>70</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 804 (2010) (Scalia, J., concurring).

<sup>71</sup> *Id.* at 803–04. Indeed, recent corpus linguistics research calls into question Justice Scalia's reliance on a narrow group of sources and resulting conclusions. See Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, HARV. L. REV. BLOG (Aug. 7, 2018), <https://blog.harvardlawreview.org/corpus-linguistics-and-the-second-amendment> [<https://perma.cc/F0EQ-VQ5T>].

<sup>72</sup> See *NYSRPA*, 140 S. Ct. at 1541 (Alito, J., dissenting). Given *Heller's* explanation that the right to keep guns for self-defense "implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use," this answer was not entirely surprising. *Heller*, 554 U.S. at 617–18.

<sup>73</sup> *NYSRPA*, 140 S. Ct. at 1541 (Alito, J., dissenting).

<sup>74</sup> See Brief of Respondents at 20–24, *NYSRPA*, 140 S. Ct. 1525 (2020) (No. 18–280).

<sup>75</sup> *Heller*, 554 U.S. at 626 (recognizing the validity of concealed-carry bans based on nineteenth-century court consensus).

<sup>76</sup> See generally Michael Grossberg, *Social History Update: "Fighting Faiths" and the Challenges of Legal History*, 25 J. SOC. HIST. 191 (1991) (discussing debates over legal historiography and the meaning of legal history).

<sup>77</sup> *Heller*, 554 U.S. at 719 (Breyer, J., dissenting).

Amendment applied to the City's licensing scheme,<sup>78</sup> the ordinance should have been struck down at step two because the City did not support its regulation with the "reasonable inferences based on substantial evidence" that intermediate scrutiny requires.<sup>79</sup> Few would argue that public safety and crime prevention are not important governmental objectives.<sup>80</sup> Yet the City did not marshal substantial evidence showing that its narrow regulation promoted either.<sup>81</sup> And when the City sought to moot the case, it quickly conceded that the amended rule posed no public safety risk.<sup>82</sup> Firearms present unique public safety threats, and cities face significant challenges in regulating them.<sup>83</sup> But that threat should not relieve the government of the burden of justifying restrictions on constitutional rights, nor should it lead courts to give blind deference to the government and its experts.<sup>84</sup> At the same time, the Court's perception that lower courts are hostile to the Second Amendment<sup>85</sup> should not lead it to adopt a malleable and impractical historical test. Courts can and should enforce the Second Amendment under the current two-part test.

<sup>78</sup> The substantive reach of the Second Amendment is beyond the scope of this comment.

<sup>79</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994).

<sup>80</sup> Public safety and crime prevention are not the only possible rationales for firearm regulation, see Joseph Blocher & Reva Siegel, *Why Regulate Guns?*, 48 J.L. MED. & ETHICS (forthcoming 2020) (manuscript at 1–2), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3599603](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599603) [<https://perma.cc/R2XG-XRFE>], but they were the justifications offered by the City in this case, see Brief of Respondents, *supra* note 74, at 39–40.

<sup>81</sup> A former NYPD License Division commander testified to the dangers of road rage and the difficulty of preventing abuses of the travel restrictions if out-of-city ranges were involved. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 63 (2d Cir. 2018). But the City offered no evidence to support the claim that firearm premises licensees were ever involved in road rage incidents or were as likely to be involved in them as nonlicensees, and it provided an unconvincing explanation for why officers could not effectively prevent unlawful transportation of firearms to and from out-of-state ranges. Indeed, the City suggested that the ordinance was rarely enforced. See *NYSRPA*, 140 S. Ct. at 1542 (Alito, J., dissenting).

<sup>82</sup> Transcript of Oral Argument, *supra* note 40, at 52 ("We made a judgment expressed by our police commissioner that — that it was consistent with public safety to repeal the prior rule and to move forward without it.")

<sup>83</sup> But such regulation is not without its costs — possessory gun crimes contribute to overcriminalization and mass incarceration. See generally Benjamin Levin, *Guns and Drugs*, 84 *FORDHAM L. REV.* 2173 (2016) (arguing that critiques of the war on drugs apply to the war on gun possession).

<sup>84</sup> An earlier Second Circuit case provides a good example of a government showing that satisfies intermediate scrutiny. To defend a challenge to its carry license scheme, New York "submitted studies and data demonstrating that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces." *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012).

<sup>85</sup> A recent empirical study concluded that while the success rate of Second Amendment challenges is low, it "probably has more to do with the claims being asserted," such as challenges to felon-in-possession laws in criminal cases, nearly all of which are doomed to fail, "than with judicial hostility to the right." Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 *DUKE L.J.* 1433, 1507 (2018).