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Revisionist History? Responding to Gun Violence Under Historical Limitations

Michael R. Ulrich[†]

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At oral argument for the foundational Second Amendment case *District of Columbia v. Heller*,¹ Chief Justice John Roberts expressed skepticism at the standards of review, often referred to as the tiers of scrutiny, that developed over the last several decades. The Chief Justice stated, “Well, these various phrases under the different standards that are proposed...none of them appear in the Constitution.”² Rather, he asked, “[i]sn’t it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time...and determine... how this restriction and the scope of this right look in relation to those?”³ Here, Roberts is asking for a historical inquiry to determine what rights the Amendment protects. He is also asking for analogous laws, presumably in the Founding Era, that would provide guidance in upholding or striking down the law in question.⁴ It seems the Chief Justice thought this historical analysis might provide a more useful standard of review than “these standards that apply in the First Amendment [that] just kind of developed over the years as sort of baggage that the First Amendment picked up.”⁵

In the *Heller* majority opinion, written by Justice Scalia, this suggestion by Roberts was not explicitly adopted.⁶ Yet, the opinion makes clear that history played a central role in determining there was an individual right to keep and bear arms anchored in the preexisting right to self-defense.⁷ While there are criticisms of the opinion, both for its methodology and conclusions,⁸ it is precedent nonetheless. However, the lack of clarity provided by the majority opinion left many scholars and lower courts to wonder how to apply it to other regulations invoking Second Amendment protections.

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¹ 554 U.S. 570 (2008).

² Transcript of Oral Argument at 44, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

³ *Id.*

⁴ *See id.*

⁵ *Id.*

⁶ Nelson Lund, *Second Amendment Standards of Review in a Heller World*, 39 *FORDHAM URB. L. J.* 1617, 1619 (2012).

⁷ *See Heller*, 554 U.S. at 603 (finding issue with Justice Stevens’ dissent relying on drafting history of the Second Amendment, which implies fashioning a new right rather than codifying a pre-existing right).

⁸ *See discussion infra* Part II.

After *Heller* and the subsequent case *McDonald v. City of Chicago*,⁹ which incorporated the Second Amendment protections against the states, the Supreme Court declined to hear any other Second Amendment case until the recent grant of certiorari for *New York State Rifle & Pistol Association, Inc. v. City of New York*.¹⁰ Justice Thomas has taken great displeasure with the repeated denials of certiorari, providing frequent dissents. In Justice Thomas's opinion, the Second Amendment is a "disfavored right in this Court."¹¹ He finds this particularly troubling considering lower courts' "general failure to afford the Second Amendment the respect due an enumerated constitutional right."¹²

Interestingly, in one of his dissents Justice Thomas echoed Chief Justice Roberts's point from the *Heller* oral argument. Justice Thomas noted, "the Courts of Appeals generally evaluate Second Amendment claims under intermediate scrutiny. Several jurists disagree with this approach, suggesting that courts instead ask whether the challenged law complies with the text, history, and tradition of the Second Amendment."¹³ Then, in a footnote, Justice Thomas confesses that "I, too, have questioned this Court's tiers-of-scrutiny jurisprudence."¹⁴ In another dissent, Thomas expressed support for a Second Amendment challenge under the "relevant history . . . sources from England, the founding era, the antebellum period, and Reconstruction."¹⁵ Importantly, Justice Gorsuch joined this dissent, providing evidence of his support of a historical approach to laws implicating the Second Amendment.¹⁶

These Justices may have a new addition to their team of those who doubt scrutiny-based review under the Second Amendment and believe in the power of historical inquiry. In *Heller v. District of Columbia ("Heller II")*,¹⁷ then Judge Kavanaugh, and now Justice Kavanaugh, argued that regulations infringing on Second Amendment rights must be evaluated under "*Heller's* history- and tradition-based test."¹⁸ Judge Kavanaugh also expressed discomfort with the notion that heightened scrutiny, intermediate or strict, would be applied. Judge Kavanaugh declared these scrutiny-based review methods nothing more than "judge-empowering 'interest-balancing inquir[ies].'"¹⁹ In fact, Judge Kavanaugh echoed Scalia's *McDonald* concurrence in stating "the *Heller* test will be more determinate and 'much less subjective' because 'it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.'"²⁰ Though four does not make a Supreme Court majority, it seems unlikely Justice Alito would be hostile to

⁹ 561 U.S. 742 (2010).

¹⁰ 883 F.3d 45 (2nd Cir. 2018), cert. granted, 139 S.Ct. 939 (U.S. Jan. 22, 2019) (No. 18-280).

¹¹ *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016), cert. denied, 138 S.Ct. 945, 945 (U.S. Feb. 20, 2018) (No. 17-342) (Thomas, J., dissenting).

¹² *Id.*

¹³ *Id.* at 947.

¹⁴ *Id.* at 948 n.4.

¹⁵ *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016), cert. denied, 137 S.Ct. 1995, 1998 (U.S. June 26, 2017) (No. 16-894) (Thomas, J., dissenting).

¹⁶ *Id.* at 1996.

¹⁷ 670 F.3d 1244, 1295 (2011).

¹⁸ *Heller II*, 670 F.3d at 1295 (Kavanaugh, J., dissenting).

¹⁹ *Id.* at 1277.

²⁰ *Id.* at 1274 (quoting *McDonald*, 561 U.S. at 804 (2010) (Scalia, J., concurring)).

a historical-based approach given that he wrote the majority opinion in *McDonald* using historical analysis to incorporate the Second Amendment right against the states.²¹

Gun violence is a public health problem that is in desperate need for a public health solution.²² In developing gun safety measures, a question that must be explored is how much history will limit states' abilities to tackle the problem. While a public health approach to gun violence gains momentum,²³ the use of public health case law may offer some insight into the role history can, and should, play in Second Amendment doctrine. Public health law is largely ignored in Second Amendment debates, however, it provides a useful framework to determine the authority of the state to limit individual rights for the benefit of others. The police power provides the authority to pass regulations to protect public health and safety,²⁴ making it a seemingly obvious area of law to survey.

Part I of this article briefly examines the use of history in *Heller*, in both the majority and dissenting opinions. This demonstrates how history is used, what it tells us, and, importantly, what it does not. By highlighting the disagreements over the historical record and the inconsistent use of historical references, this section lays the groundwork for understanding the difficulty in determining the role of history for doctrinal guidance as well as its limitations. Part II examines some of the critiques of relying on historical analysis, attempting to decouple the notion that the debate over the role of history can be reduced simply to political or legal ideology. Finally, in Part III the article will explore the scope of authority of the state to combat gun violence. Looking to foundational public health law norms, this final section aims to illustrate the limitations of a historical focus when evaluating Second Amendment regulations. Ultimately, the scope of the right, which historical analysis may be more aptly applied to, may not matter nearly as much as many Second Amendment scholars think when determining the authority of the state to respond to gun violence. Instead, case law related to the authority of states to utilize their police powers to limit individual rights in the name of public health and safety may be a more logical excavation site than the annals of founding era history.

I. *HELLER* & HISTORY

Given the peculiar structure of the Second Amendment, there was an ongoing question of what protections the Amendment provided and to whom. By treating these as essentially questions of first impression in *District of Columbia v. Heller*, the majority ensured that history had to play a central role.²⁵ Yet, history plays an extraordinarily prominent role in both the majority and dissenting opinions, with each using originalist

²¹ Cf. *McDonald*, 561 U.S. at 786 (applying analysis of Second Amendment rights in a historical and traditional context).

²² See Scott R. Kegler et al., Ctrs. for Disease Control & Prevention, *Firearm Homicides and Suicides in Major Metropolitan Areas — United States, 2012–2013 and 2015–2016*, 67(44) MORBIDITY & MORTALITY WEEKLY REPORT 1233, 1233 (2018) (“Firearm homicides and suicides represent a continuing public health concern in the United States.”).

²³ See discussion *infra* Part III.

²⁴ See *Lewis v. BT Inventory Managers, Inc.*, 447 U.S. 27, 36 (1980) (“[T]he States retain authority under their general police powers to regulate matters of ‘legitimate local concern.’”); *Jacobson v. Mass.*, 197 U.S. 11, 25 (1905) (“the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”).

²⁵ Part of the disagreement in *Heller* is over whether *United States v. Miller*, 307 U.S. 174 (1939) addressed questions of Second Amendment protections See *infra* notes 30-37 and accompanying text.

methodologies that seem identical on the surface.²⁶ Thus, to better understand how history may be used in the future, it is worth examining some of the primary disagreements and how the justices reached such conflicting conclusions.

In the majority opinion, Justice Scalia uses history to evaluate the language of the amendment, in order to determine what the amendment protects as it was understood at the time of its passing. He utilizes sources from England,²⁷ the Founding Era,²⁸ post-ratification,²⁹ pre-civil war,³⁰ and state analogues³¹ to determine the meaning of the operative clause, the prefatory clause, and clarify their relationship to each other.³²

Justice Scalia felt examination of historical understanding of the Amendment was particularly important because “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.”³³ What is less clear is whether the majority opinion holds this to be the only inquiry of import, and whether the scope of the right, as determined by historical due diligence, then defines the rigid boundaries of allowable state action.

After his analysis, Justice Scalia found an individual right to possess and carry weapons in case of confrontation is “strongly confirmed by the historical background of the Second Amendment.”³⁴ Moreover, Justice Scalia felt examination of historical understanding of the Amendment was particularly important given the fact that it was codifying a pre-existing right, “the natural right of resistance and self-preservation.”³⁵

Yet, Justice Scalia’s historical excavation was not the only one present in *Heller*, with Justice Stevens and Justice Breyer referencing historical resources in their dissents.³⁶ Justice Stevens’ examination of the historical record was not focused on whether an individual right existed because “a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.”³⁷ Stevens’ primary question was whether the scope included the possession and use of guns for nonmilitary purposes, due to the reference to militia.³⁸

In Justice Stevens’ opinion, the protection granted by the Amendment was “the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons.”³⁹ Unlike Justice Scalia’s finding that the Amendment protects an individual right grounded in the preexisting right of self-defense, Justice Stevens’ interpretation answers the question of whether the scope of state authority is defined as well. Under Justice Stevens’ interpretation, regulation of nonmilitary use and possession are well within the state’s authority.⁴⁰

²⁶ Compare *Heller*, 554 U.S. at 573-635 (majority opinion) with *id.* at 636-80 (Stevens, J., dissenting), and *id.* at 681-722 (Breyer, J., dissenting).

²⁷ *Id.* at 578 n.3, 583-84 n.7 (citing historical sources from England).

²⁸ *Id.* at 580 n.7 (citing historical sources from the Founding Era).

²⁹ *Id.* at 607 n.20 (citing post-ratification sources).

³⁰ *Id.* at 611-12 n.21 (citing pre-civil war sources).

³¹ *Heller*, 554 U.S. at 600-03 (discussing state analogues).

³² *Id.* at 576-619 (interpreting the meaning of the operative clause and prefatory clause).

³³ *Id.* at 634-35.

³⁴ *Id.* at 592.

³⁵ *Id.* at 594.

³⁶ See *Heller*, 554 U.S. at 636-80 (Stevens, J., dissenting); see also *id.* at 681-91 (Breyer, J., dissenting).

³⁷ *Id.* at 636 (Stevens, J., dissenting).

³⁸ *Id.* at 636-37.

³⁹ *Id.* at 637.

⁴⁰ *Id.* at 680 (Stevens, J., dissenting).

Justice Stevens felt this was the “most natural reading of the Amendment’s text and the interpretation most faithful to the history of its adoption.”⁴¹ Focusing on the drafting history of the Amendment, Justice Stevens found “its Framers *rejected* proposals that would have broadened its coverage,” which may have included individual rights to weaponry independent of military service.⁴² However, Justice Scalia rejects this focus on drafting history when interpreting the text because the Amendment “was widely understood to codify a pre-existing right, rather than to fashion a new one.”⁴³

In the debate over whether this case did indeed present questions of first impression, history again is critical. In distinguishing *Heller* from *United States v. Miller*,⁴⁴ which was previously regarded as foundational to Second Amendment understanding, Justice Scalia notes that there was no discussion of Second Amendment history in *Miller*.⁴⁵ Thus, he finds *Miller* unhelpful in definitively answering the key questions presented in *Heller*. Instead, Justice Scalia states *Miller* simply limits Second Amendment protections to certain types of weapons.⁴⁶ When discussing what types of arms did garner protection, Justice Scalia reviews history and determines that the “arms ‘in common use at the time’ for lawful purposes like self-defense” fall under Second Amendment protection.⁴⁷ In his view, this comports with the “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”⁴⁸

Justice Stevens, on the other hand, disagrees with this assessment of *Miller*, as well as the Amendment’s connection to self-defense. Justice Stevens notes that history was discussed in *Miller*, and that the sources the majority relies upon in *Heller* were certainly available to the Court in *Miller*.⁴⁹ In Justice Stevens’ estimation, the *Heller* majority “simply does not approve of the conclusion the *Miller* Court reached.”⁵⁰

⁴¹ *Heller*, 554 U.S. at 638. Stevens’ analysis also starts with the prefatory clause, not the operative clause as Scalia does. Thus, Stevens believes this sets the object of the Amendment, keeping and bearing arms in the context of service in state militias, and informs the remaining part of the text. *Id.* at 643. He finds the order in which Scalia reads the text contradictory to how it would’ve been read at the time the Amendment was adopted. *Id.*

⁴² *Id.* at 639 (emphasis in original). Stevens sees the Amendment as a response to a compromise that was reached to address two issues during the Founding Era. There was “widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States.” *Id.* at 653. Yet, “the Framers recognized the dangers inherent in relying on inadequately trained militia members ‘as the primary means of providing for the common defense.’” *Id.* Thus, Congress was authorized in the Constitution to raise and support a national Army and Navy, as well as organize, arm, discipline, and provide for the calling forth of “the Militia.” *Id.* at 654. According to many, this left a critical gap: the ability of Congress to disarm the militia, rendering them useless, while the federal government maintained their own standing forces. *Id.* at 655. Thus, the Second Amendment sought to protect those state militias. *Id.* at 660-61. Stevens explains the curious absence of Second Amendment jurisprudence following these Founding Era debates by the fact that they simply faded relatively quickly. *Id.* at 671.

⁴³ *Id.* at 603 (majority opinion).

⁴⁴ 307 U.S. 174 (1939).

⁴⁵ *Heller*, 552 U.S. at 624. (“As for the text of the Court’s opinion itself, that discusses *none* of the history of the Second Amendment. It assumes from the prologue that the Amendment was designed to preserve the militia (which we do not dispute), and then reviews some historical materials dealing with the nature of the militia, and in particular with the nature of the arms their members were expected to possess. Not a word (*not a word*) about the history of the Second Amendment.”).

⁴⁶ *Id.* at 623.

⁴⁷ *Id.* at 624.

⁴⁸ *Id.* at 627.

⁴⁹ *Id.* at 676-77 (Stevens, J., dissenting). Stevens explains that the government, arguing in *Miller*, used the English Bill of Rights, history leading to the English guarantee, as well as citations to Blackstone, Cooley, and Story. Thus, “[t]he Court is reduced to critiquing the number of *pages* the Government devoted to exploring the English legal sources.” *Id.* at 678.

⁵⁰ *Heller*, 554 U.S. at 679.

Stevens goes on to use an argument similar to that made by Scalia, finding there was no discussion in *Miller* regarding self-defense. Justice Stevens asks, “[i]f use for self-defense were the standard, why did the Court not inquire into the suitability of a particular weapon for self-defense purposes?”⁵¹

Finding an individual right to keep and bear arms grounded in self-defense likely would have been sufficient to strike down the D.C. law at issue in *Heller*. But this tells us little of the boundaries of where that right ends. Further defining the contours of the right, Justice Scalia felt the need to illustrate, rather than simply state, the “right secured by the Second Amendment is not unlimited.”⁵² Again, Scalia takes us on a trip back in time, stating the exceptions to the right were those prohibitions that were found to be “longstanding.”⁵³ These traditional limitations on Second Amendment rights included “laws forbidding the carrying 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.”⁵⁴ Though a reference to any historical text or data is curiously absent, Justice Scalia deemed them “presumptively lawful.”⁵⁵

Justice Stevens criticizes the historical finding that the Amendment only protects “law-abiding, responsible citizens,”⁵⁶ which Justice Scalia used to justify the exception noted for felons and the mentally ill. Justice Stevens emphasizes that this is a stark departure from other areas of constitutional analysis because throughout history the protections from other constitutional amendments, such as the First and Fourth, have applied to all citizens.⁵⁷ Typically, citizens receive constitutional protection, although they may lose aspects of the protection under certain circumstances. Without justification, especially from archival documentation, Justice Scalia glosses over this fact in such a way that makes it difficult to understand the precedential guidance of these exceptions to Second Amendment protections.

One particularly interesting point of departure from the historical record worth noting comes when Scalia considers the handgun ban in question. In rejecting the authority of the District to ban handguns, Scalia places particular importance on handguns being “the most popular weapon chosen by Americans for self-defense in the home.”⁵⁸ Here, Justice Scalia makes no reference or citation to history, instead he supports his argument with justifications for why many might choose a handgun for defense in the home.⁵⁹ In this debate, Scalia’s primary adversary is Justice Breyer. Justice Breyer turns to historical regulations in his dissent to argue that even if there is an individual right, that does not necessarily prevent the regulation in question from being upheld.⁶⁰ Again, the dissent focuses more on the authority of the state than Justice Scalia does in the majority opinion. Justice Breyer attempts to analogize historical laws that restrict the use of firearms to determine not simply what the Amendment protects, but what the Amendment allows in terms of restricting the right. Yet, Justice Scalia finds

⁵¹ *Id.* at 677.

⁵² *Id.* at 626-27 (majority opinion).

⁵³ *Id.*

⁵⁴ *Id.* at 626-27.

⁵⁵ *Heller*, 554 U.S. at 627 n.26.

⁵⁶ *Id.* at 644 (Stevens, J., dissenting).

⁵⁷ *Id.* at 644-45.

⁵⁸ *Id.* at 628-29 (majority opinion).

⁵⁹ *Id.*

⁶⁰ *Heller*, 554 U.S. at 687 (Breyer, J., dissenting).

this unpersuasive, distinguishing those laws based on their content as well as their punishment.⁶¹

This brief discussion lays the groundwork for the importance of history in determining who the Second Amendment right belongs to (individuals), the grounding for that right (self-defense), and some key exceptions to that right (longstanding prohibitions that are presumptively lawful). However, the majority opinion largely ignores the scope of state authority in their discussion. Given the significance the historical record plays in each key determination emanating from *Heller*, lower courts were left to ascertain how to use history when evaluating state regulations that implicated this individual Second Amendment right.

II. UNDERSTANDING HISTORICAL LIMITATIONS

The battle over historical analysis was reignited in the follow-up case to *Heller*, *McDonald v. Chicago*,⁶² which determined the right was incorporated against the states through the Fourteenth Amendment's Due Process Clause. Given that the standard for incorporation is a question of whether the right is "deeply rooted in this Nation's history and tradition," it is not surprising that historical resources would be of central importance.⁶³ In holding the individual right to keep and bear arms was "fundamental to our scheme of ordered liberty," the majority opinion in *McDonald* makes use of the historical inquiry in *Heller* in large part to come to its conclusion: "*Heller* makes it clear that this right is 'deeply rooted in this Nation's history and tradition.'"⁶⁴

But in his concurrence, Justice Scalia makes a concession: "Historical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it. I will stipulate to that."⁶⁵ Here, Justice Scalia admits that historical investigations by the judiciary, presumably including those that have played such a vital part in identifying the individual right to firearms, require judgment calls about what resources to include and what to reject, as well as how to interpret those that are ultimately kept. Justice Scalia demonstrated a clear disdain for Justice Breyer's suggested interest-balancing inquiry in *Heller*, calling it "judge-empowering."⁶⁶ Yet, in *McDonald* Justice Scalia admits that even in using history, judges are empowered to make determinations that can have a significant impact on constitutional determinations.⁶⁷ This is important when considering another factor: judges are not historians.

Saul Cornell, a professor of history, states that *Heller* is a collision of two competing theories of originalism: Justice Scalia's public meaning originalism and

⁶¹ *Id.* at 633-34 (majority opinion) ("A broader point about the laws that JUSTICE BREYER cites: All of them punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties. They are akin to modern penalties for minor public-safety infractions... The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place.").

⁶² 561 U.S. 742 (2010).

⁶³ *Id.* at 767 (quoting *Wash. v. Glucksberg*, 521 U.S. 702, 721 (1997)).

⁶⁴ *Id.* at 764, 768 (emphasis in original).

⁶⁵ *Id.* at 803-04 (Scalia, J., concurring)

⁶⁶ *Heller*, 554 U.S. at 634.

⁶⁷ See *McDonald*, 561 U.S. at 791-804 (Scalia, J., concurring) (distinguishing his historical analysis with that of Stevens, J., dissenting).

Justice Stevens' originalism focused on the intent of the Founders.⁶⁸ Yet, Cornell finds that "[b]oth forms of originalism employed in *Heller* fall short of the standards historical scholarship demands."⁶⁹ Judges are regularly required to delve into fields they may not have expertise, and this does not necessarily make their rulings inadequate, uninformed, or subjective. But given the growing issue of gun violence, it is essential to question the judiciary's use of historical resources to determine the scope of Second Amendment rights and, perhaps more importantly, the scope of the state's authority to regulate that right.

To be sure, this is not simply a dispute between "conservative" and "liberal" legal thinkers. As Justice Stevens' *Heller* dissent demonstrates, originalism has become a method utilized by judges regardless of the political label they are ascribed. And Judge Richard Posner has been particularly critical of *Heller* and its use of history, both in the majority and dissenting opinions:

[I]t leaves the impression that all that divided the two wings of the Court was a disagreement over the historical record. ... The majority (and the dissent as well) was engaged in what is derisively referred to—the derision is richly deserved—as “law office history.” ... The judge sends his law clerks scurrying to the library and to the Web for bits and pieces of historical documentation. When the clerks are the numerous and able clerks of Supreme Court justices, enjoying the assistance of capable staffs of the Supreme Court library and the Library of Congress, and when dozens and sometimes hundreds of amicus curiae briefs have been filed, many bulked out with the fruits of their authors' own law-office historiography, it is a simple matter, especially for a skillful rhetorician such as Scalia, to write a plausible historical defense of his position.⁷⁰

Posner's critique brings clarity to a particularly troubling issue with this historical methodology. With hundreds of years of documents and texts, combined with capable staff and resources, a wide array of conclusions could be reached with at least some credibility. But, as Posner points out, the historical evidence is rarely as one-sided as a judicial opinion may suggest.⁷¹ The “mystique of ‘objective’ interpretation” rarely leads to “disinterested historical inquiry.”⁷²

Here, Posner and Cornell share similar concerns. *Heller* contains a vast array of historical resources, yet, it almost certainly is not every relevant document available. Judges by necessity, if not preference as well, must pick and choose what documents to review and include in their analysis. In this way, history can become “result-oriented law office history.”⁷³ Whether this perception is accurate or not, this can leave many with the belief that the Court “exercises a freewheeling discretion strongly flavored with ideology.”⁷⁴

⁶⁸ Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L. J. 625, 625 (2008).

⁶⁹ *Id.* at 627.

⁷⁰ Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC (Aug. 27, 2008), <https://newrepublic.com/article/62124/defense-looseness>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Cornell, *supra* note 68, at 625.

⁷⁴ Posner, *supra* note 70.

For example, Richard Epstein criticizes the *Heller* majority for its passing reference to the Militia Clauses when determining the original meaning of the Second Amendment.⁷⁵ In his opinion, Epstein finds it “necessary to read the Second Amendment in light of the Militia Clauses in the body of the Constitution.”⁷⁶ Epstein’s historical analysis attempts to contextualize the Militia clauses to elucidate the meaning of the prefatory clause “well regulated Militia,” which Scalia “easily dismissed.”⁷⁷ While Epstein comes to a different conclusion than *Heller*, perhaps his most insightful point is this:

In the best of circumstances, the reliability and efficiency of ordinary language is dependent on a large set of tacit assumptions that make every word count in order to foster the efficient exchange of information. But the ability to execute this program is no better than the constitutional text with which the Justices have to work. The ideal interpretation of a flawed provision inherits its flaw. And few texts seem as flawed as the Second Amendment.⁷⁸

Whether it be the extensive historical resources or the flawed original text, it should be acknowledged that divining the original meaning of a textual provision written centuries ago is no simple task. Moreover, the ability of a judge to divine the meaning of the text without making decisions that align with certain underlying values is nearly impossible.

Therefore, how should history play a role in Second Amendment jurisprudence? Or, phrased another way, how does, or should, history limit the ability of states to combat the threat of gun violence? The theoretical too often can get separated from the pragmatic. The devastating impact that gun violence can have on communities, especially vulnerable, underserved communities should not be lost in a battle over interpreting 18th-century documents. With this in mind, public health law may provide a useful lens to help determine the role of history for the Second Amendment.

III. HISTORY, POLICE POWER, AND PUBLIC HEALTH RESPONSIVENESS

Gun violence is increasingly recognized as a public health crisis that needs a public health approach.⁷⁹ Due to the doctrinal ambiguity left after *Heller* and *McDonald*, an unanswered question is how the law, specifically regulations that may infringe on the Second Amendment, fits into this public health methodology. Though the justification for firearms regulations is nearly always public safety, if not universally so, the

⁷⁵ See Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why Heller is (Probably) Wrong on Originalist Grounds*, 59 SYRACUSE L. REV. 171, 183 (2008) (“Nor does his brief structural analysis of the Article I provisions deal with the federalism concerns.”).

⁷⁶ *Id.* at 174.

⁷⁷ *Id.* at 177.

⁷⁸ *Id.* at 172.

⁷⁹ See, e.g., Colleen L. Barry et al., *Public Support for Gun Violence Prevention Policies Among Gun Owners and Non-Gun Owners in 2017*, 108 AM. J. PUB. HEALTH 878, 878 (2018) (finding support for 23 of 24 gun policies examined that restrict or regulate gun ownership); Renee Butkus et al., *Reducing Firearm Injuries and Deaths in the United States: A Position Paper from the American College of Physicians*, 169 ANNALS INTERNAL MED. 704, 705-05 (2018) (calling gun violence a public health crisis that requires immediate attention and offers recommendations to update American College of Physicians’ policies); David Hemenway & Matthew Miller, *Public Health Approach to the Prevention of Gun Violence*, 368 NEW ENG. J. MED. 2033, 2033 (2013) (analogizing the public health approach to reducing motor vehicle fatalities).

discussion of public health and the scope of police power authority is largely absent in the Second Amendment debate.

One of the central tenants of public health law is determining the appropriate balance between what actions the state is authorized to take in order to protect public health and safety, and what limitations are placed on state authority due to individual rights.⁸⁰ The police power is “the inherent authority of the state (and, through delegation, local government) to enact laws and promulgate regulations to protect, preserve, and promote the health, safety, morals, and general welfare of the people.”⁸¹ Thus, the foundation of police power authority, at least in terms of public health, is the ability of the state to respond to ongoing and emerging issues that place public health and safety at risk. This may be in stark contrast to the historical approach taken by the majority opinion in *Heller*. Indeed, some judges have insisted that *Heller* and *McDonald* only allow regulations that have historical analogues that closely align.⁸² This could place a significant hindrance on the ability of states and localities to utilize their police powers to begin a public health approach to stem the tide of rising gun violence.

Any discussion of police power and public health law must start with the case *Jacobson v. Massachusetts*.⁸³ Here, the Supreme Court stated as settled principle that “the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”⁸⁴ The Court made clear that while individual rights do limit police power authority, “the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint.”⁸⁵ Scalia even made this point in his *Heller* majority opinion.⁸⁶

Thus, while the Second Amendment right was declared fundamental in *McDonald*, this does not necessarily prevent state action. Indeed, regulations passed for public health and safety frequently infringe on fundamental rights. For example, as in *Jacobson*, compulsory vaccination concerns bodily integrity, autonomy, and the right to determine what medical interventions you undergo.⁸⁷ Yet, the Court found the vaccine requirement constitutional.⁸⁸ Religion, a fundamental, enumerated right, has not necessarily prevented police power authority. In *Prince v. Massachusetts*,⁸⁹ the Supreme Court held “the right to practice religion freely does not include the liberty to expose the community or the child to communicable disease or the latter to ill health or death.”⁹⁰

As the Court saw it in *Jacobson*, this was not simply a matter of constitutionality, but foundational to functioning societies. The Court believed there were “manifold restraints to which every person is necessarily subject for the common

⁸⁰ LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 4-5 (2008).

⁸¹ *Id.* at 92.

⁸² See, e.g., *Heller II*, 670 F.3d at 1295 (Kavanaugh, J., dissenting) (applying history- and tradition-based test instead of majority’s balancing test); Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1518-22 (2014).

⁸³ 197 U.S. 11 (1905).

⁸⁴ *Id.* at 25.

⁸⁵ *Id.* at 26.

⁸⁶ *Heller*, 554 U.S. at 626.

⁸⁷ *Jacobson*, 197 U.S. at 26. (“Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will.”).

⁸⁸ *Id.* at 31.

⁸⁹ 321 U.S. 158 (1944).

⁹⁰ *Id.* at 166.

good,” otherwise “organized society could not exist with safety to its members.”⁹¹ Echoing social contract theory, the Court here maintains that sacrificing individual liberty to some extent, or in certain circumstances, is required for our democracy to flourish.⁹² Some scholars have argued this requirement is the reason the government is not only authorized to act in the name of public health and safety, but in fact obligated to do so.⁹³ Because a government is only legitimate if it provides security for the common good.⁹⁴ Additionally, and importantly, protecting public health and safety would not be possible without some government intrusion into individual rights and private action.⁹⁵

Therefore, it would be legitimate for the citizenry of a state to call upon its elected representatives to enact legislation to address gun violence if it were a problem in their community. Limiting their means to address the issue to what analogues were available in the 18th-century seems problematic, in both law and policy. It also appears to contradict the way the Court has assessed the police power, an inherent authority, in the past.

The Supreme Court has repeatedly found the police power confers “broad discretion required for the protection of the public health,”⁹⁶ but there are certainly limitations beyond individual rights that can prevent arbitrary state action. In *Jacobson*, the Court states that rights are subject to “reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.”⁹⁷ Thus, the government action must be reasonable and actually have some connection to health and safety by responding to a public health problem. In *Jacobson*, the Court found it critical that the state only mandated vaccination when smallpox was prevalent in the community and increasing in incidence, meaning the mandate was “necessary for the public health or the public safety.”⁹⁸

This means there must be some public health or safety threat that the state is in fact responding to. The Court would have been unlikely to uphold the mandate were there no threat of smallpox.⁹⁹ This prevents arbitrary action that is untethered to risk mitigation, such as where the government merely uses the concept of public health and safety for coercive, but unnecessary, measures.¹⁰⁰ The growing gun violence crisis would likely prevent state action from seeming arbitrary.

The state action must also have a reasonable chance to mitigate the public health threat or risk to safety. The *Jacobson* Court, though limited by the medical and scientific information available in 1905, made a point of evaluating the measure to the best of their ability. If vaccinations could not reasonably be expected to prevent the spread of smallpox, the Court would have struck down the requirement.¹⁰¹ But the Court

⁹¹ *Jacobson*, 197 U.S. at 26.

⁹² *Id.*

⁹³ See Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L. Q. 267, 314 (1993); Suzanna Sherry, *The Founder's Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1151-77 (1987).

⁹⁴ See *id.* at 270.

⁹⁵ GOSTIN, *supra* note 80, at 10.

⁹⁶ *Zucht v. King*, 260 U.S. 174, 177 (1922).

⁹⁷ *Jacobson*, 197 U.S. at 26.

⁹⁸ *Id.* at 27.

⁹⁹ Wendy E. Parmet, *J.S. Mill and the American Law of Quarantine*, 1 PUB. HEALTH ETHICS 210, 213 (2008).

¹⁰⁰ See *Jacobson*, 197 U.S. at 27-28 (discussing whether investing the Massachusetts legislature with the authority to regulate vaccinations was an “unreasonable or arbitrary requirement.”).

¹⁰¹ Parmet, *supra* note 99, at 213.

found vaccinations to be the “method most usually employed to eradicate the disease,” and accepted by “most members of the medical profession.”¹⁰² If the state action “has no real or substantial relation” to public health and safety, there is a “plain, palpable invasion of rights secured by the fundamental law, [and] it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.”¹⁰³ Here, the question would be whether the state action had a reasonable chance to mitigate or prevent the growth of gun violence. This differs significantly from examining whether there was a historical analogue that deemed the regulation constitutional.

Finally, the steps taken by the state to mitigate a public health or safety issue must generate benefits that justify the burdens placed upon the rights in question.¹⁰⁴ The regulations cannot be “beyond what was reasonably required for the safety of the public.”¹⁰⁵ For example, in *Jacobson*, while a smallpox vaccination mandate was constitutional generally, it would have been unreasonable and overly burdensome, and therefore unconstitutional, for it to be mandated against someone with medical contraindications.

An additional protective layer, is that the initial burden of proof lies with the state. The state must demonstrate that there is a public health or safety issue that its regulation has a reasonable chance to mitigate, and that the expected benefits outweigh the burdens on constitutional rights.¹⁰⁶ But if the state meets this burden, it is the individual’s obligation to prove why the regulation should be struck down or is at least inapplicable to him.¹⁰⁷ In *Jacobson*, the Court was critical of the plaintiff’s refusal to cooperate with the immunization mandate because the plaintiff offered little evidence that it placed him at risk and only offered his opinion on his lack of faith in vaccinations as justification for an exemption.¹⁰⁸

In thinking about gun violence and the role of history, the Court in *Jacobson* envisions police power authority as one that enables responsiveness to current crises. It seems readily apparent that *Jacobson* stands for the notion that the scope of an individual right, as defined by historical understanding at the time of ratification, simply cannot be the end of an evaluation of gun control measures. The current state of gun violence, as well as firearm and ammunition technological advancements, must be relevant to a constitutional analysis of firearm regulations. The scope of police powers cannot, and should not, be relegated to the interpretation of historical records from centuries ago

¹⁰² *Jacobson*, 197 U.S. at 28, 34.

¹⁰³ *Id.* at 31.

¹⁰⁴ Though it is not worth a lengthy description for purposes of this paper, I have described elsewhere that the discussion above, and what emanates from *Jacobson*, amounts essentially to a three-prong test: (1) there is a risk of harm, or threat to public health and safety; (2) the government action has a reasonable chance to mitigate that threat; and (3) the burdens placed on individual rights by the government action are sufficiently outweighed by the benefits generated. See Michael R. Ulrich, *Law and Politics, An Emerging Epidemic: A Call for Evidence-Based Public Health Law*, 42 AM. J. L. & MED. 256, 261-62 (2016). The government carries the burden of proof to demonstrate the three prongs are met. This last prong is similar, though not discussed specifically in terms of police power and past public health cases, to analysis found in the majority opinion in *Whole Women’s Health v. Hellerstedt*, 136 S.Ct. 2292, 2310 (2016) (“It then weighed the asserted benefits against the burdens. We hold that, in so doing, the District Court applied the correct legal standard.”).

¹⁰⁵ *Jacobson*, 197 U.S. at 28.

¹⁰⁶ Ulrich, *supra* note 104, at 261-62.

¹⁰⁷ *Id.* at 262.

¹⁰⁸ *Jacobson*, 197 U.S. at 35-36.

when firearms, ammunition, and population density were drastically different than they are today.¹⁰⁹

Thus, this discussion raises the question of how much history does and should matter? Not necessarily in terms of determining the scope of Second Amendment rights, but in determining what regulations the state is authorized to pass that infringe on such a right. For example, suppose the Second Amendment does protect a right of self-defense generally, which would presumably confer a right to keep and bear arms outside of the home. Can this truly be the end of an analysis as to whether a city riddled with gun violence is authorized to limit, in some reasonable manner, the ability of individuals to carry firearms wherever they so choose?

The principles of federalism, in concert with the inherent police power, enable duly elected officials in states and localities to be responsive to the public health concerns of their citizens.¹¹⁰ If the Second Amendment is ultimately going to be held to protect semiautomatic rifles, hollow point bullets that explode upon impact, large-capacity ammunition magazines, and the right to arm yourself in any place that was not listed in the *Heller* majority opinion, it is going to be extremely difficult for any state to address issues of gun violence. That these protections may arise from a subjective interpretation of centuries-old documents, while firearms are becoming increasingly lethal,¹¹¹ should be troubling to legal scholars, policymakers, and citizens alike.

Using a public health lens to address gun violence should expand from the medical community and policymakers to include the legal academy as well. A careful examination into the police power in public health law limits the merits of any Second Amendment discussion that focuses solely, or perhaps even primarily, on history. While history may play a role in Second Amendment jurisprudence given the centrality of its role in the *Heller* opinions, it cannot determine the full scope of police power authority to address gun violence. As Justice Breyer states in his *Heller* dissent, “[t]he historical evidence demonstrates that a self-defense assumption is the *beginning*, rather than the *end*, of any constitutional inquiry.”¹¹² While it may not seem prudent to find guidance in a dissent, many of the lower courts have coalesced around a standard that ties closely to Justice Breyer’s statement.¹¹³ Though public health and police power jurisprudence are rarely discussed as justification, they clearly provide doctrinal support for eschewing the limitations that historical firearm regulations would place on state authority.

IV. CONCLUSION

Heller lays out a foundation for establishing an individual constitutional right to firearms. But, by the majority opinion’s own admission, it did not seek to establish the full scope of the right or the full range of regulatory options available to states to

¹⁰⁹ See Posner, *supra* note 70 (questioning the methodology of using history in *Heller* when “interpreting a constitutional provision ratified more than two centuries ago, dealing with a subject that has been transformed in the intervening period by social and technological change, including urbanization and a revolution in warfare and weaponry.”).

¹¹⁰ See *id.* (“*Heller* gives short shrift to the values of federalism.”).

¹¹¹ See Anthony A. Braga & Philip J. Cook, *The Association of Firearm Caliber with Likelihood of Death from Gun-shot Injury in Criminal Assaults*, 1 J. AM. MED. ASS’N. NETWORK OPEN 1, 7 (2018) (finding that if the same shooting studied had occurred but with smaller-caliber weapons there would have been a 39.5 percent reduction in the probability of death).

¹¹² *Heller*, 554 U.S. at 687 (Breyer, J., dissenting).

¹¹³ See Allen Rostron, *Justice Breyer’s Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 756-57 (2012).

infringe on that right. Many courts that aim to follow *Heller's* precedent admit it lacks clarity and provides little guidance for future determinations. Thus, it seems essential to recognize and, in essence minimize, what it does in fact state. Ultimately, *Heller* should be the beginning of Second Amendment doctrine, but not the end. So too, history, the prominent player in *Heller*, should remain as the beginning of the inquiry rather than the end.

As gun violence is increasingly recognized as a public health problem, public health law should be an increasingly examined area to find the boundaries of state authority. It may even prove a more useful mechanism than searches through documents from hundreds of years ago. Limiting Second Amendment doctrinal development to historical analogues has drastic consequences not only for constitutional theory, but for the health and wellbeing of communities across the country.