HISTORY AND TRADITION AS HEIGHTENED SCRUTINY

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The Supreme Court is turning to methodologies privileging text, history, and tradition, or THT, to interpret and implement various constitutional provisions. The Court has recently endorsed historically-focused approaches to determine how the Second Amendment protects the right to keep and carry a firearm, how the First Amendment protects the rights to free speech and freedom of religion, and whether the Due Process Clause protects reproductive autonomy, among other questions.

Much scholarship and popular commentary surrounding THT portrays the methodology as sui generis*: presenting unique analytical challenges and impervious to direct comparison to existing doctrinal approaches. However, the jurist most frequently credited with deriving THT for Second Amendment cases, then-Circuit-Judge Brett Kavanaugh, offered a prediction about the test's relative burden at that time. He wrote that "governments appear to have more flexibility and power to impose gun regulations under a test based on text, history, and tradition than . . . under strict scrutiny."*

The past two-plus years of Second Amendment case law following the Court's adoption of THT in the 2022 case New York State Rifle & Pistol Ass'n v. Bruen *offer the first opportunity to test the accuracy of this prediction and weigh the strictness of THT against strict scrutiny in specific areas. By comparing pre-*Bruen *decisions that used or speculated about the application of strict scrutiny to decisions applying THT to the same gun laws, I make two major findings for the Second Amendment and other areas where historically-*

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inflected methodologies are on the rise. First, I show that results on the ground deviate from initial predictions and that courts have drifted by applying a stricter test. Second, I argue that the Court's decision this past Term in United States v. Rahimi *is best understood as attempting to slot THT into its intended place on the means-end scrutiny spectrum, demonstrating that some early decisions misapplied the doctrine and suggesting the staying power of tiered scrutiny as a judicial guide across constitutional law.*

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INTRODUCTION

In 2022, the Supreme Court transformed Second Amendment law by adopting a new history-focused test for assessing whether gun regulations comply with the Constitution.[1] Under the prior test utilized by every circuit court to reach the question, a judge would first determine whether the law at issue impinged upon protected Second Amendment conduct—understanding that certain people, places, and arms might not implicate the right to keep and bear arms

1. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

at a threshold level.[2] If the law *did* regulate protected conduct, the judge would proceed to the second step and apply a certain level of tiered scrutiny.[3] In general, this meant analyzing whether the law was sufficiently related to the government's stated objective.[4] The test looked like a sliding scale: laws that burdened core Second Amendment rights received a more probing inquiry than laws that placed only a minor burden on those rights.[5] The second step of the test drew from the tiered scrutiny developed by the Supreme Court in First Amendment and Equal Protection cases beginning in the late 1930s.[6]

In *New York State Rifle & Pistol Ass'n v. Bruen*,[7] a 6–3 majority of the Supreme Court jettisoned the tiered-scrutiny step for Second Amendment cases and instead held that when a challenged law implicates the Second Amendment, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[8] The means-end scrutiny piece of the two-part test, the Court said, was "inconsistent with *Heller*'s historical approach" and led to excessive "judicial deference to legislative interest balancing."[9] Applying the history-focused test, the Court struck down New York's discretionary permitting system for the concealed carry of handguns because it found the law inconsistent with America's historical tradition of gun regulation.[10]

The public response to *Bruen* was swift and far-reaching. On the left and among gun-violence-prevention advocates, the new test and its focus on historical tradition were pilloried. Commentators decried the history and tradition approach as "devastating," "a blank check to strike down . . . laws left and right,"[11] a "radical" methodology that

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2. JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT 110 (2018); *see also* Adam Winkler, *Is the Second Amendment Becoming Irrelevant?*, 93 IND. L.J. 253, 257 (2018) ("There simply is not that much disagreement in the federal courts of appeals about the scope of the Judicial Second Amendment.").

3. BLOCHER & MILLER, *supra* note 2, at 108, 110–11.

4. *Id.* at 109.

5. *Id.* at 108–09; *see also* United States v. Marzzarella, 614 F.3d 85, 96–97 (3d Cir. 2010).

6. Victoria F. Nourse, *A Tale of Two* Lochners, 97 CALIF. L. REV. 751, 761 (2009) ("The strong rights we know today—the rights we associate with strict scrutiny and compelling state interests—first emerged in the period from 1937 to 1943, as a response to Franklin Roosevelt's court packing plan and the Court's attempt to rehabilitate itself . . . .").

7. 142 S. Ct. 2111 (2022).

8. *Id.* at 2126.

9. *Id.* at 2129, 2131.

10. *Id.* at 2156.

11. Mark Joseph Stern, *Clarence Thomas' Maximalist Second Amendment Ruling Is a Nightmare for Gun Control*, SLATE (June 23, 2022), https://perma.cc/53BG-DMC2.

"has raised questions about what measures federal, state, and local governments can use to address the epidemic of gun violence in America,"[12] and a "catastrophic" approach that "means virtually no gun regulation is safe."[13] On the other hand, some scholars and commentators argued that emphasizing text, history, and tradition, or THT,[14] would "make[] it far more difficult for judges to base their decisions in Second Amendment cases on their own policy preferences."[15] To these supporters, THT was a welcome change that would surely curtail judicial discretion and allow more Second Amendment challenges to succeed.

By most accounts, the THT test that the Court ultimately adopted came from a dissenting opinion, authored by then-Judge Brett Kavanaugh, to a 2011 D.C. Circuit decision applying intermediate scrutiny and upholding Washington, D.C.'s ban on the possession of certain semiautomatic rifles and large-capacity magazines.[16] That dissent was subsequently cited with increasing frequency by circuit court judges across the country who dissented

12. Billy Clark, *Second Amendment Challenges Following the Supreme Court's* Bruen *Decision*, GIFFORDS L. CTR. (June 21, 2023), https://perma.cc/D4H9-LXF3.

13. Ian Millhiser, *The Supreme Court's New Gun Ruling Means Virtually No Gun Regulation Is Safe*, VOX (June 23, 2022), https://perma.cc/S3FW-X494.

14. I use "THT" throughout as shorthand for a constitutional test that asks whether modern laws are consistent with historical regulatory tradition by consulting Founding or Reconstruction Era regulatory analogues. Thus, I almost always refer to the final two elements of the test (history and tradition), while generally assuming that the constitutional *text* itself cannot resolve the relevant legal challenges.

15. Stephen P. Halbrook, *Text-and-History or Means-End Scrutiny in Second Amendment Cases? A Response to Professor Nelson Lund's Critique of* Bruen, 24 FEDERALIST SOC'Y REV. 54, 56 (2023). Wayne LaPierre, the since-disgraced NRA president, celebrated the ruling as "underscoring that these freedoms should not be left to 'unguided' discretion of state and federal officials" in a press release that also noted that "many unconstitutional gun control laws remain in America." *NRA Wins Supreme Court Case,* NYSRPA v. Bruen, NAT'L RIFLE ASS'N (2025), https://perma.cc/4AHF-5BZX. And a release from the Second Amendment Foundation quoted its founder as saying that the *Bruen* ruling "could be the beginning of court actions that eventually fully restore rights protected by the Second Amendment." *SAF Hails Supreme Court for Sending Back Gun Cases for Further Review*, SECOND AMEND. FOUND. (2025), https://perma.cc/EZ2V-6SER; *see also* United States v. Rahimi (*Rahimi II*), 144 S. Ct. 1889, 1912 (2024) (Kavanaugh, J., concurring) ("When properly applied, history helps ensure that judges do not simply create constitutional meaning 'out of whole cloth.'" (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989))).

16. Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1264 (D.C. Cir. 2011) (majority opinion); *id.* at 1269, 1275–76 (Kavanaugh, J., dissenting).

from majority opinions that applied the prevailing two-part test.[17] And numerous lawyers, judges, and scholars—whether sincerely or as a matter of shorthand or convenience—attribute the historical-analogical test *Bruen* adopted to Kavanaugh's 2011 dissent. Kavanaugh is variously said to have "championed,"[18] "elucidated,"[19] "offered,"[20] or "developed"[21] the "text, history, and tradition" methodology for deciding Second Amendment cases in his 2011 dissent in *Heller v. District of Columbia* (*Heller II*).[22]

Notably, Kavanaugh mused about the relative strictness of the test he had articulated—or, how the test would actually cash out in practice. He wrote that "governments appear to have more flexibility and power to impose gun regulations under a test based on text, history, and tradition than they would under strict scrutiny."[23] In other words, as Kavanaugh reemphasized during his contentious 2018 Supreme Court confirmation hearing, "the history and tradition test may allow some additional regulations than [the] strict scrutiny

17. *See, e.g.*, Houston v. City of New Orleans, 675 F.3d 441, 448 (5th Cir.) (Elrod, J., dissenting), *opinion withdrawn and superseded on reh'g,* 682 F.3d 361 (5th Cir. 2012); Mance v. Sessions, 896 F.3d 390, 395 (5th Cir. 2018) (Elrod, J., dissenting from denial of reh'g en banc); Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen. N.J., 974 F.3d 237, 257 (3d Cir. 2020) (Matey, J., dissenting), *cert. granted, judgment vacated sub nom.* Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Bruck, 142 S. Ct. 2894 (2022); Mai v. United States, 974 F.3d 1082, 1087 (9th Cir. 2020) (Bumatay, J., dissenting from denial of reh'g en banc).

18. Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 129 (2023) (referring to "the test of 'text, history, and tradition' championed by then-Judge Kavanaugh as an alternative to the prevailing two-part framework").

19. *Houston*, 675 F.3d at 451 ("Judge Kavanaugh has recently elucidated an alternative approach . . . .").

20. David Kopel, *Judge Kavanaugh and the Second Amendment*, VOLOKH CONSPIRACY (July 9, 2018), https://perma.cc/7ZLN-VRQJ.

21. Nelson Lund, *The Proper Role of History and Tradition in Second Amendment Jurisprudence*, 30 FLA. J.L. & PUB. POL'Y 171, 173 (2020).

22. 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). The case is often referred to as *Heller II* to avoid confusion with the Supreme Court's landmark 2008 decision—in a case also named *Heller*—establishing that the Second Amendment protects an individual right to keep arms in the home for self-defense and without any connection to service in an organized militia. *See* District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 635 (2008).

23. *Heller II*, 670 F.3d at 1274 (Kavanaugh, J., dissenting). Indeed, this was also a major theme in *Bruen* itself, with both the majority and concurring opinions repeatedly emphasizing that governments retain a large variety of tools with which to combat gun violence under a text, history, and tradition approach, properly applied. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022) ("To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check."); *id.* at 2162 (Kavanaugh, J., concurring) ("Properly interpreted, the Second Amendment allows a 'variety' of gun regulations.").

test."[24] Kavanaugh's prediction was that more gun laws will survive THT than will survive strict scrutiny in the aggregate, meaning that most gun laws meeting strict scrutiny should necessarily satisfy THT and that, if any strict-scrutiny-compliant laws do *not* pass muster under THT, they must be more than balanced out by less-tailored laws that pass muster under the historical test.[25] Seemingly recognizing this dynamic, the challengers in *Bruen* did not specifically ask the Court to adopt a test focused on historical tradition.[26] One would imagine that the challengers had a strong incentive to argue for the approach that would be most protective of Second Amendment rights, thus increasing their chances of prevailing in both *Bruen* and future cases.[27] In the challengers' view, however, THT did not cleanly fit the bill.[28]

In light of these facts, the public reaction to *Bruen* is perhaps somewhat surprising. If it is true that THT represents a middle ground between intermediate and strict scrutiny, in terms of how many gun laws survive, then perhaps commentators should not have cursed or praised the test as readily as they did by focusing on potential case outcomes. Rather, the initial reaction should have honed in on the extent to which THT will actually produce consistent outcomes or allow for judicial discretion based on ideology—recognizing that the move itself was intended as only a modest step in terms of case outcome.

This Article seeks to conceptualize the relative strictness of THT as a legal test by using strict scrutiny as a baseline. I examine how

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24. *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States Before the Comm. on the Judiciary*, 115th Cong. 474 (2018) [hereinafter *Kavanaugh Confirmation Hearing*] (statement of J. Kavanaugh).

25. *See, e.g.*, *Additional*, MERRIAM-WEBSTER, https://perma.cc/9WMJ-QXTF (defining "additional" as "more than is usual or expected").

26. Rather, they vacillated between asking the Court to strike down New York's law on the basis that it was a contemporary and historical "outlier" and suggesting that strict scrutiny should apply. *See* Transcript of Oral Argument at 47, *Bruen*, 142 S. Ct. 2111 (No. 20-843) ("And I think this case, like *Heller*, is such an outlier that the Court wouldn't have to say too much more unless it wanted to . . . . And if this Court prefers to go the level of scrutiny route . . . we would prefer strict scrutiny."); Brief for Petitioners at 47, *Bruen*, 142 S. Ct. 2111 (No. 20-843) ("At a bare minimum, restrictions on such fundamental rights necessitate the same exacting scrutiny that this Court applies to burdens on other constitutional rights in contexts where it declined to apply strict scrutiny."). In fact, neither party asked the Court to use the test it ultimately applied. New York asserted that intermediate scrutiny was appropriate, as the Second Circuit had previously ruled that New York's law was constitutional under intermediate scrutiny. Kachalsky v. County of Westchester, 701 F.3d 81, 95–96 (2d Cir. 2012).

27. The same holds true for *Heller II* and other major pre-*Bruen* gun cases, where those challenging gun laws generally asked for strict scrutiny or other non-THT standards.

28. *See* Brief for Petitioners at 24, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

THT and strict scrutiny have been applied to specific categories of gun regulation by comparing federal and state court decisions pre-*Bruen* that either used or speculated about the outcome of the case under strict scrutiny (on one hand) and post-*Bruen* decisions applying THT to the same type of gun regulation (on the other).[29] By comparing these two categories of cases, it is possible to roughly gauge how courts thus far have applied THT in comparison to strict scrutiny in terms of case outcome. I find that courts applying THT are striking down some gun laws that would have likely satisfied strict scrutiny while also invalidating overinclusive modern laws with at least superficially strong historical pedigree.

I examine why the historical test has been applied in this strict manner and argue that the Court's decision last Term in *United States v. Rahimi* (*Rahimi II*)[30]—where the Justices upheld a federal law regulating the intersection between guns and domestic violence, a law that a number of courts had previously opined would satisfy strict scrutiny—represents a recalibration of THT through the lens of tiered scrutiny.[31] Tiered scrutiny was invoked in a concurring opinion in the case,[32] and I suggest here that the continued salience of scrutiny-based approaches is important both doctrinally and normatively for the Second Amendment and other areas of constitutional law. Doctrinally, judges are likely to continue to use

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29. Some notable federal court decisions and dissenting opinions did apply strict scrutiny pre-*Bruen*, despite an overarching judicial preference for intermediate scrutiny in Second Amendment cases. 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, 1495 (2018). Especially in the uncertain initial post-*Heller-I* period, some courts included dicta regarding the predicted outcome under strict scrutiny even if they did not actually use that test. *Id.* And another fertile source of case law is state court decisions from Louisiana, Alabama, and Missouri. These three states amended their state constitutions between 2012 and 2014 to *require* that state courts apply strict scrutiny to all legal challenges under the state constitutional right to keep and bear arms. *See* LA. CONST. art. I, § 11 ("The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny."); *see also* MO. CONST. art. I, § 23; ALA. CONST. § 26.

30. 144 S. Ct. 1889 (2024).

31. *Id.* My argument here is distinct from Justice Breyer's observation in his *Bruen* dissent that "[i]ronically, . . . the Court believes that the most relevant metrics of comparison are a regulation's means (how) and ends (why)—even as it rejects the utility of means-end scrutiny." *Bruen*, 142 S. Ct. at 2179 (Breyer, J., dissenting). Breyer criticizes the majority for adopting de facto means-end scrutiny laundered through a historical framing. Here, however, I contend that the tiers of scrutiny might continue to serve a broader calibrating function by guiding courts toward a strict or flexible result in specific cases based on earlier scrutiny-based results. The claim here is about the staying power of tiered scrutiny as a guide or failsafe, not that the Court's historical analysis of specific laws necessarily mirrors tiered scrutiny.

32. *Rahimi II*, 144 S. Ct. 1889, 1906 (2024) (Sotomayor, J., concurring).

tiered scrutiny as a guide to calibrate case outcomes. Normatively, this phenomenon may allow courts to use historical evidence to reach results that are publicly intelligible (or at least acceptable) and ensure that case outcomes roughly align with ideological preferences when history alone may dictate a contrary result. My findings not only inform the development of Second Amendment law under *Bruen* but are also broadly informative for other areas of constitutional law, as the Court continues to roll back reliance on the tiers of scrutiny in favor of historical approaches.

I. THT AS INITIALLY CONCEIVED

A. The Origin Story

The modern age of federal Second Amendment jurisprudence began in 2008, when the Supreme Court held that the Amendment protects an individual right to keep a handgun in the home for self-defense—as opposed to a collective right associated with militia service.[33] Until that time, no federal court anywhere in the country had invalidated a gun law pursuant to the Second Amendment in a final ruling that was not later overturned.[34] *District of Columbia v. Heller* (*Heller I*)[35] ushered in a new era of Second Amendment litigation in federal court.[36] In the initial period of post-*Heller-I* uncertainty, courts wrestled with a "vast *terra incognita*"[37] caused in part by *Heller I*'s choice not to offer a methodology, or legal test, for determining when gun laws that implicate the Second Amendment infringe the protected right.[38] The federal appellate courts eventually coalesced around a two-part test.[39] Judges would first conduct a textual and historical inquiry into whether the regulated conduct was within the scope of the Second Amendment right.[40] If the answer was yes, or if the first step was unclear, courts would then ask "[w]hether the regulation satisfies the applicable type of means-end tailoring."[41]

At this second step, the test adapted an approach often referred to as the constitutional "tiers of scrutiny" honed by the Court over decades.[42] The tiers emerged first in cases involving race-based classifications and then seeped into the First Amendment and other

33. *Heller I*, 554 U.S. 570, 628–29 (2008).
34. Ruben & Blocher, *supra* note 29, at 1435.
35. 554 U.S. 570 (2008).
36. Ruben & Blocher, *supra* note 29, at 1434–36.
37. United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011).
38. *Heller I*, 554 U.S. at 635.
39. Ruben & Blocher, *supra* note 29, at 1451–52.
40. *Id.*
41. BLOCHER & MILLER, *supra* note 2, at 110.
42. Ruben & Blocher, *supra* note 29, at 1452, 1487.

areas.[43] Government regulation is generally subject to rational basis review, which places the burden on the challenger to rebut a strong "assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[44] Until the 1930s, the Court primarily conceived its role as "marking the conceptual boundaries that defined spheres of state and congressional power on the one hand and . . . private rights on the other," rather than articulating and implementing tests of constitutionality.[45] Yet the *Lochner* Era saw the emergence of rational basis, or reasonableness, review for statutes challenged in constitutional cases.[46] When a law implicates some special circumstance, such as regulating conduct protected by the Bill of Rights or touching on "discrete and insular minorities," it may trigger heightened judicial scrutiny of the policy justifications underlying the law, requiring more than a mere rational basis for legislation.[47]

From these overarching concepts, the Supreme Court formulated a multi-tiered system of review.[48] As Professor Richard Fallon describes, the modern strict scrutiny test "evolved simultaneously in a number of doctrinal areas" by the 1960s and quickly came to "dominat[e] numerous fields of constitutional law."[49] Strict scrutiny is a demanding test for laws that facially discriminate on the basis of race or stray directly into other constitutionally protected areas.[50] In its current formulation, strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is

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43. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1275–83 (2007).

44. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938). This is a deferential standard under which even hypothetical permissible justifications are typically sufficient. *See id.*

45. Fallon, *supra* note 43, at 1285.

46. *See* Lochner v. New York, 198 U.S. 45, 56 (1905) (courts must determine whether a state's exercise of the police power is "fair, reasonable, and appropriate").

47. *Carolene Prods.*, 304 U.S. at 152–53 n.4.

48. The tiered scrutiny approach in general, scholars argue, is tied to the idea that "[t]he political process must . . . consist instead of an effort to define and implement public values" and that the judicial branch should, to varying degrees, act as a "check" against laws that fail that basic premise. *See, e.g.*, Cass Sunstein, *Madison and Constitutional Equality*, 9 HARV. J.L. & PUB. POL'Y 11, 13–15, 20 (1986).

49. Fallon, *supra* note 43, at 1275.

50. Korematsu v. United States, 323 U.S. 214, 216 (1944); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942). For more background on the evolution of strict scrutiny, see Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 375–80 (2006); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 801 (2006).

narrowly tailored to achieve that interest."[51] The tiers of scrutiny eventually came to contain three major levels. In addition to rational basis review and strict scrutiny, the Court developed intermediate scrutiny in the context of gender-based classifications, abortion restrictions, and voting cases in the 1970s.[52] The modern incarnation of intermediate scrutiny places the burden on the government to show that the law in question "serve[s] important governmental objectives and that the . . . means employed [are] substantially related to the achievement of those objectives."[53]

The tiers themselves are arranged in a set sequence in order of increasing difficulty for the government to justify regulation, or increasing likelihood of plaintiff success: (1) rational basis, (2) intermediate scrutiny, and (3) strict scrutiny.[54] Professor Gerald Gunther famously wrote in 1972 that strict scrutiny was "'strict' in

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51. Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015) (town's signage rules were content-based restrictions invalid under First Amendment strict scrutiny).

52. *See, e.g.*, Fallon, *supra* note 43, at 1298–300; Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 1298–300 (1987); Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007); *see also* Reed v. Reed, 404 U.S. 71, 76 (1971) ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920))); Craig v. Boren, 429 U.S. 190, 210 (1976) (Powell, J., concurring) ("*Reed* and subsequent cases involving gender-based classifications make clear that the Court subjects such classifications to a more critical examination than is normally applied when 'fundamental' constitutional rights and 'suspect classes' are not present.").

53. Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980). Put somewhat differently, a regulation will be constitutional only "if it furthers an important or substantial governmental interest" without a burden on the right larger than necessary to further that interest. United States v. O'Brien, 391 U.S. 367, 377 (1968). Similar approaches were ultimately adopted in other areas of constitutional law, albeit sometimes with slight variations in language. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (holding, in the election law context, that "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions"); Sorrell v. IMS Health Inc., 564 U.S. 552, 572 (2011) (the state "must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest").

54. *See, e.g.*, Siegel, *supra* note 50, at 358 ("As is well appreciated, in addition to strict scrutiny, there are the doctrines of 'intermediate scrutiny' and 'minimal scrutiny with bite.' These doctrines increase the protection for constitutional rights by subjecting governmental action to more intense judicial examination, but do so by employing standards that are different, and more forgiving, than strict scrutiny."); *see also* R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291, 404 tbl.1 (2016).

theory and fatal in fact."[55] Professor Adam Winkler, who calls this conception of strict scrutiny a "myth," analyzed a set of nearly 500 strict scrutiny applications in federal court from 1990 to 2003 in the areas of "freedom of speech, religious liberty, suspect class discrimination, fundamental rights/substantive due process, and freedom of association" and found that the plaintiffs bringing First Amendment claims succeeded[56] in about 70% of those cases (meaning that around one-third of the time, the government was able to make the required showing to sustain the regulation).[57] One study of intermediate scrutiny applications in First Amendment cases found a 27% success rate, suggesting a much more deferential standard than strict scrutiny.[58] Rational basis is even more government-friendly, with an approximate success rate of under 10%.[59]

Some scholars argue that, over time, the Court has increasingly melded the tiers[60] or produced additional levels of intermediate

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55. Gerald Gunther, Foreword, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also* Vieth v. Jubelirer, 541 U.S. 267, 294 (2004) (referring to strict scrutiny as "imposing a strong presumption of invalidity [that] . . . almost always results in invalidation").

56. While Professor Winkler provides the "survival rate" of government regulation in his paper, this Article will refer to the plaintiffs' "success rate" throughout and convert any percentages using the inverse formulation.

57. Winkler, *supra* note 50, at 815. The success rate was marginally higher (ranging from 73% to 78%) in cases where the challenge involved a suspect class, fundamental rights, or freedom of speech, as opposed to religious liberty (41%) or freedom of association (67%). *Id.* Notably, in a very small sample size, "between 1990 and 2003, the Supreme Court only applied strict scrutiny 12 times, upholding only a single law prior to 2002" (a success rate of 92%). *Id.* at 796. Since Professor Winkler's article was published, other scholars have found higher success rates in strict scrutiny cases. *See* Caleb C. Wolanek & Heidi Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 75 MONT. L. REV. 275, 303 n.136 (2017) ("Our data tells a different story: religious claimants win much more often than Winkler reports"; noting that strict scrutiny appears to be evolving into a more regulation-fatal test).

58. Bhagwat, *supra* note 52, at 809.

59. *See, e.g.*, Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L.J. 357, 370 (1999) ("Between the end of the Supreme Court's 1971 Term . . . and the Court's 1996 decision in *Romer v. Evans*, the Court decided 110 cases in which it used minimal scrutiny. Of these 110 cases, plaintiffs prevailed in only ten cases.").

60. *E.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 301 (1997) (identifying an "an increased focus on 'government interests'" within scrutiny-based methods of analysis); Pettinga, *supra* note 52, at 802 (referencing an increased willingness to "employ searching scrutiny under the label of rational basis review"); *see also* Nyquist v. Mauclet, 432 U.S. 1, 7 (1977) (requiring narrow tailoring and a "substantial" government interest in challenge to statute that discriminated against resident aliens).

review in different areas of law.[61] Indeed, the Court has applied a heightened form of rational basis review in certain cases to strike down laws[62] and a watered-down version of strict scrutiny in other cases to uphold laws.[63] Moreover, courts are often criticized for applying the tiers of scrutiny in a manner that fails to comply with the intended order of flexibility.[64] But even the introduction of intermediate and mixed approaches and occasional doctrinal confusion has not altered the basic architecture or the principle that more constitutional claims will succeed when strict scrutiny is applied versus intermediate scrutiny, and likewise that more claims will succeed when intermediate scrutiny is applied versus rational basis review.[65]

While courts settled on a two-part test for Second Amendment cases, including means-end scrutiny at step two, the test's staying power was always somewhat uncertain. During the *Heller I* oral argument, for example, some Justices questioned whether tiers of scrutiny should be adopted wholesale into Second Amendment

61. *See, e.g.*, Maxwell Stearns, Obergefell*,* Fisher*, and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1047 (2017) ("From a predictive perspective, therefore, the tiers have been inverted, with strict scrutiny lite abutting rational basis and with both of those tests sustaining challenged laws, and with rational basis plus abutting strict scrutiny and with both of those tests striking challenged laws."). Professor Stearns provides a diagram to illustrate his conception of the "inverted" tiers:

(1) Rational Basis	(4) Strict Scrutiny Lite	(3) Intermediate	(2) Rational Basis Plus	(5) Strict Scrutiny
More Likely to Sustain				More Likely to Strike

Id.

62. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996) (holding that a law is unconstitutional when it is "inexplicable by anything but animus toward the class it affects [because] it lacks a rational relationship to legitimate state interests").

63. *See, e.g.*, Fisher v. Univ. of Tex., 579 U.S. 365, 384–85 (2016) ("[I]t is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.").

64. *See, e.g.*, Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J., 910 F.3d 106, 126 (3d Cir. 2018) (Bibas, J., dissenting) ("[T]hough the majority purports to use intermediate scrutiny, it actually recreates the rational-basis test."); Whole Woman's Health v. Lakey, 769 F.3d 285, 297 (5th Cir. 2014) ("Moreover, the district court's approach ratchets up rational basis review into a pseudo-strict-scrutiny approach by examining whether the law advances the State's asserted purpose."), *vacated in part*, 574 U.S. 931 (2014).

65. *See generally* Ruben & Blocher, *supra* note 29, at 1495.

doctrine.[66] Specifically, the fact that the Court was undertaking the construction of a "new" constitutional right suggested, at least to some, that existing approaches need not or should not automatically be imported into that area.[67] In his *Heller II* dissent, Kavanaugh took up this invitation.[68] He found fault with the panel majority's decision to apply intermediate scrutiny and ask whether D.C.'s ban on the civilian possession of certain semiautomatic rifles and large-capacity magazines was substantially related to an important government interest.[69] The two judges in the majority determined that the bans were sufficiently related to such an interest, holding that D.C. had met its burden "of showing a substantial relationship between the prohibition of both semi-automatic rifles and magazines holding more than ten rounds and the objectives of protecting police officers and controlling crime."[70] While assault weapon bans remained a highly controversial topic often leading to fractured panels, en banc rehearings, and strenuous dissents, most judges who took the opposite view and believed that such laws violated the Second Amendment pre-*Bruen* did not quibble with the underlying methodology.[71] Rather, they preferred *strict* scrutiny and generally found that bans on certain types of semiautomatic weapons were not sufficiently tailored to the relevant government objectives.[72]

Kavanaugh's *Heller II* dissent offered an alternate path. He first rejected the premise that the analysis should be filtered through means-end scrutiny, noting that "[a] key threshold question in this case concerns the constitutional test we should employ to assess the

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66. *See* Transcript of Oral Argument at 44, *Heller I*, 554 U.S. 570 (2008) (No. 07-920) ("I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?"); *see id.* at 43 ("Does it make a practical difference whether we take your standard or the strict scrutiny . . . ?").

67. *Id.* at 39–44.

68. *Heller II*, 670 F.3d 1244, 1280–82 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

69. *Id.*

70. *Id.* at 1264 (majority opinion).

71. *See* Ruben & Blocher, *supra* note 29, at 1482–83 & nn.214–21.

72. *See, e.g.*, Kolbe v. Hogan, 849 F.3d 114, 152 (4th Cir. 2017) (Traxler, J., dissenting) ("In my view, the burden imposed by the Maryland law is considerable and requires the application of strict scrutiny, as is customary when core values guaranteed by the Constitution are substantially affected."); Duncan v. Bonta, 19 F.4th 1087, 1161 (9th Cir. 2021) (VanDyke, J., dissenting) ("[T]he Supreme Court should elevate and clarify *Heller*'s 'common use' language and explain that when a firearm product or usage that a state seeks to ban is currently prevalent throughout our nation (like the magazines California has banned here), then strict scrutiny applies."), *vacated*, 142 S. Ct. 289 (2022), *vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022).

challenged provisions of the D.C. gun law."[73] Kavanaugh read *Heller I* to suggest that, rather than employ the kind of means-end analysis that courts apply with respect to many other constitutional rights, laws implicating the right to keep and bear arms must "be analyzed based on the Second Amendment's text, history, and tradition (as well as by appropriate analogues thereto when dealing with modern weapons and new circumstances)."[74] To Kavanaugh, the Supreme Court's prior pronouncements in *Heller I* and *McDonald v. City of Chicago*[75] "le[ft] little doubt" that a THT-plus-analogical-reasoning approach was required for the Second Amendment.[76] Kavanaugh conceded that the Supreme Court's past decisions were vague and at times impenetrable on the issue.[77] But he determined that the Second Amendment's protection test (separate from the initial coverage inquiry) should ask solely whether a law is consistent with historical tradition, noting that *Heller I* referred to "historical justifications" as the underlying basis for its endorsement of certain types of gun regulations such as bans on the possession of firearms by felons.[78] Observing that these prior decisions "obviously had to employ *some* test," Kavanaugh also found it significant that the Court had never explicitly applied means-end scrutiny in its past Second Amendment cases.[79]

Thus, Kavanaugh concluded that the proper test to use in evaluating Second Amendment challenges was a test that would "maintain the balance historically and traditionally struck in the United States between public safety and the individual right to keep arms" by requiring the government to demonstrate specific historical support for modern-day regulations.[80] Kavanaugh harkened back to oral argument in *Heller I*, where Chief Justice John Roberts had mused about an approach that would look to the "lineal descendants" of gun regulations from American history.[81] Kavanaugh also emphasized that this history-based test was, in his view, *more flexible* than strict scrutiny or any type of per se invalidity approach—in fact,

73. *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

74. *Id.* (citation omitted).

75. 561 U.S. 742 (2010).

76. *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

77. *See id.* ("To be sure, the Court never said something as succinct as 'Courts should not apply strict or intermediate scrutiny but should instead look to text, history, and tradition to define the scope of the right and assess gun bans and regulations.'").

78. *Id.* at 1291.

79. *Id.* at 1273 n.5 ("The Court's failure to employ strict or intermediate scrutiny appears to have been quite intentional and well-considered.").

80. *Id.* at 1271.

81. *Id.* at 1275; *see also* Transcript of Oral Argument at 77, *Heller I*, 554 U.S. 570 (2008) (No. 07-920) ("So that would be—we are talking about lineal descendants of the arms but presumably there are lineal descendants of the restrictions as well.").

in Kavanaugh's words, it was an approach that D.C. should have *preferred* over strict scrutiny.[82] This conclusion, he wrote, followed directly from Justice Breyer's dissent in *Heller I*, where Breyer had observed that the *Heller I* majority "implicitly, and appropriately, reject[ed] th[e] suggestion" to adopt a strict-scrutiny rule for Second Amendment cases "by broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales—whose constitutionality under a strict-scrutiny standard would be far from clear."[83] To Kavanaugh, then, the natural conclusion from both the majority and Breyer's dissent was that such laws indeed do *not* pass strict scrutiny but do pass muster under the historical test the majority intended to institute.[84]

After Judge Kavanaugh penned his dissent in *Heller II*, an increasing number of appellate judges began to cite that dissent approvingly and endorse the THT test—often in dissenting opinions from panel decisions applying intermediate scrutiny to uphold a gun regulation.[85] Even as late as 2017, Kavanaugh remarked during a public appearance "that most other lower-court judges ha[d] disagreed" with his preferred approach.[86] Indeed, every circuit court to decide the issue applied some form of means-end scrutiny.[87] But a growing chorus of voices—in the judiciary, the bar, and the academy—endorsed THT.[88] Although neither party in *Bruen* asked

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82. *Heller II*, 670 F.3d at 1274.

83. *Heller I*, 554 U.S. at 688 (Breyer, J., dissenting). Justice Breyer also indicated that his belief that "adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible . . . [because] any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry." *Id.* at 689. Notwithstanding Breyer's views on the workability of strict scrutiny, it remained a live issue in the lower courts post-*Heller-I*, with many judges and litigants arguing in favor of strict scrutiny for challenges to various gun laws. *See infra* note 119.

84. *See Heller II*, 670 F.3d at 1274, 1276 (Kavanaugh, J., dissenting).

85. *See, e.g.*, United States v. Jimenez-Shilon, 34 F.4th 1042, 1051–52 (11th Cir. 2022) (Newsom, J., concurring); Duncan v. Bonta, 19 F.4th 1087, 1146 (9th Cir. 2021) (Bumatay, J., dissenting), *vacated*, 142 S. Ct. 289 (2022), *vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022); Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 710–14 (6th Cir. 2016) (Sutton, J., concurring in part); Houston v. City of New Orleans, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting).

86. Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exception*, 92 NOTRE DAME L. REV. 1907, 1918 (2017).

87. *See, e.g.*, cases cited *supra* note 85; *see also* Atkinson v. Garland, 70 F.4th 1018, 1020 (7th Cir. 2023) ("Every circuit court responded to *Heller* by developing the same two-step test.").

88. *See, e.g.*, Joseph Greenlee, *Text, History, and Tradition: A Workable Test that Stays True to the Constitution*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (May 4, 2022), https://perma.cc/6UKU-8CUU. What specifically

the Court directly to apply THT to the exclusion of other possible legal tests,[89] a number of amici supporting the petitioners did.[90]

B. Clues to the Relative Flexibility of THT

Much of the initial scholarship regarding *Bruen* has focused on two major areas of uncertainty surrounding THT. First, a number of articles examine the mechanics of THT as a legal test—for example, how the Court's directive that judges reason by analogy to historical regulatory practice should function, whether that test is a subspecies of public meaning originalism or something else, and what principles and guardrails might guide the historical-analogical inquiry.[91] These

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those judges and scholars *thought* they were endorsing, however, likely varied substantially.

89. *See, e.g.*, Brief for Petitioners at 24, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843) (arguing that "[t]he constitutional infirmities here are plain whether this Court keeps the focus on text, history, and tradition or applies heightened scrutiny" and emphasizing that the New York law would fail any type of means-end scrutiny); *id.* at 46–48 (discussing in detail why the Second Circuit's application constituted improper "interest-balancing" and failed to correctly engage in intermediate scrutiny). And, in fact, some amici supporting the petitioners seemed to explicitly caution *against* adopting THT wholesale. *See, e.g.*, Brief of the National Shooting Sports Foundation at 12, *Bruen*, 142 S. Ct. 2111 (No. 20-843) ("The Court should be careful in relying on historical evidence.").

90. *See, e.g.*, Cato Institute Brief in Support of Petitioners at 28, *Bruen*, 142 S. Ct. 2111 (No. 20-843) ("[T]his Court should direct lower courts to engage in informed analyses based on constitutional text, history, and tradition."); Gun Owners of America Brief in Support of Petitioners at 5, *Bruen*, 142 S. Ct. 2111 (No. 20-843) ("Rather, this Court should employ here the test defined by then Judge Kavanaugh—'text, history, and tradition.'").

91. *See, e.g.*, Blocher & Ruben, *supra* note 18, at 99 ("explain[ing] and address[ing] several challenges of originalism-by-analogy"); Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 69 (2023); Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 462–72 (2023) (arguing "that the deployment of the historical tradition test in *Bruen* operates within an originalist framework" and "provides the content of the preexisting legal right to bear arms that is a component of the original public meaning of the Second Amendment"); Will Baude & Robert Leider, *The General Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1491 (2024) (arguing that *Bruen* implements a "general law method [that] does not require courts to find a critical mass of historical firearm regulations that look precisely (or almost precisely) like the challenged law"); Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1488, 1501 (2023) (arguing that the Court increasingly is "relying on post-ratification practices without an obvious originalist argument," including in *Bruen*); Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 52 (2022) (arguing that "*Bruen* demonstrates the Court's tendency to curate a historical record and then to treat it as an objective basis for decision"); Nelson Lund, Bruen*'s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279, 306 (2022)

scholars variously speculate that THT is likely to strike down far more gun laws,[92] or about the same number of gun laws,[93] compared to the old two-part test. Second, scholars and historians have supplemented the so-called "raw material" for the historical-analogical test by unearthing and cataloging the ways in which governments regulated guns throughout American history.[94] Many scholars characterize THT as a *sui generis* or unprecedented legal test.[95] That label is correct, as far as it goes. There is little to suggest that the THT method *Bruen* adopts is itself deeply rooted in historical judicial practice[96]—rather, the majority justified the approach as

("*Bruen*'s instruction to focus on regulatory traditions will not provide the education that judges need because that test is inherently manipulable."); Andrew Willinger, *The Territories Under Text, History, and Tradition*, 101 WASH. U. L. REV. 1, 5 (2023) (arguing that "[t]he Court's analysis of territorial history in *Bruen* is inconsistent with how it has approached the territories in other recent decisions" that adopt a heavily historical framing).

92. *See, e.g.*, Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 70 (2022) (arguing that the *Bruen* Court, "in requiring courts to strike down gun regulations even when they might be narrowly tailored to accomplish the most compelling of governmental interests, has rendered the right to bear arms the most protected of rights in the Constitution").

93. *See, e.g.*, Lund, *supra* note 91, at 300 (arguing that judges are "unlikely to protect an appropriately robust right to keep and bear arms"); George Mocsary, *Treating Young Adults as Citizens*, 27 TEX. REV. L. & POL'Y 607, 619 (2023) (arguing that "[p]ost-*Bruen* defiance has been accompanied by judicial complaining and 'uncivil obedience'").

94. *See, e.g.*, Julia Hesse & Kevin Schascheck II, *The Expansive 'Sensitive Places' Doctrine: The Limited Right to 'Keep and Bear' Arms Outside the Home*, 108 CORNELL L. REV. ONLINE 218 (2024); Kari Still et al., *The History and Tradition of Regulating Guns in Parks*, 19 HARV. L. & POL'Y REV. 201 (2024); Josh Hochman, Note, *The Second Amendment on Board: Public and Private Historical Traditions of Firearm Regulation*, 133 YALE L.J. 1676 (2024). These examples are just a subset of the scholarly literature, which predates both *Bruen* and *Heller I*.

95. *See* Charles, *supra* note 91, at 69 ("Demanding past regulatory precedent to support modern laws sets this test apart from other constitutional rights contexts that employ historical inquiry."); Timothy Zick, *Second Amendment Exceptionalism: Public Expression and Public Carry*, 102 TEX. L. REV. 65, 67 (2023) ("[T]his is an anomalous and astounding result."); *cf.* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 903 (2013) ("What is unique is that the Seventh Amendment's text drives the Court to look for historical analogues in a fashion that it can avoid when construing other constitutional provisions."). This characterization extends outside of the academy as well. *See, e.g.*, United States v. Bartucci, 658 F. Supp. 3d 794, 800 (E.D. Cal. 2023) (referring to "the *unique* test the Supreme Court announced in *Bruen*" (emphasis added)).

96. Early American judges tended to consult historical regulatory practice as part of a larger inquiry that also involved looking to text and, at times, various prudential considerations. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 162–65 (1878) ("The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately,

necessary *today* to protect Second Amendment rights in a manner that is consistent and administrable.[97] Yet few, if any, have considered whether THT can be directly compared to tiered scrutiny in terms of aggregate case outcome and—if such a comparison is possible—how strict THT will be compared to the test(s) it replaced and where THT falls on the spectrum of the traditional tiers of scrutiny. Perhaps the sheer novelty of the test makes these comparisons appear unavailing at first glance.

Appreciating that THT presents unique challenges, however, does not automatically preclude such direct comparisons in terms of case outcome.[98] Judge Kavanaugh clearly envisioned some form of comparison between his approach and the various tiers of scrutiny. And in *Vidal v. Elster*,[99] a trademark case decided in the October 2023 Term in which the Justices sparred over the proper role of history in constitutional adjudication, Justice Barrett emphasized her view that THT is not unique or immune to comparison against other methodologies.[100] Criticizing what she viewed as the majority's "laser-like focus on . . . history," she wrote that "a rule rendering tradition dispositive is *itself* a judge-made test."[101] It should be possible, then, to compare judge-made tests along the metric of case outcome. Here, I examine only the questions of how demanding the tests will be on the government and how many cases the government will lose (or, from the other perspective, how "easy" the test will be for plaintiffs challenging government regulation in a specific area). There are a number of other potentially relevant metrics by which to compare these doctrinal approaches, including how administrable the approaches are within the judiciary,[102] how well the approaches

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we think, than to the history of the times in the midst of which the provision was adopted."); United States v. Wong Kim Ark, 169 U.S. 649, 676 (1898) (consulting text, history, and precedent); United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 320–21 (1897) (consulting canon of statutory construction, legislative history, "the contemporaneous industrial history of the country, [and] the legal situation in regard to railroad properties at the time of the enactment of this statute").

97. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022).

98. For example, it is relatively common for legal scholars to use the number of invalidated federal laws as a rough shortcut to glean the level of judicial activism across time—even when those courts were applying different standards or forms of judicial review. *See, e.g.*, THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 39–41 (2004) (comparing the number of Supreme Court decisions invalidating statutes on constitutional grounds from 1789 through 2003).

99. 144 S. Ct. 1507 (2024).

100. *Id.* at 1531–32 (Barret, J., concurring).

101. *Id.* at 1532 (emphasis added).

102. *Compare Bruen*, 142 S. Ct. at 1230 (asserting that THT is "more administrable[] than asking judges to 'make difficult empirical judgments about the costs and benefits of firearms restrictions'" (quoting McDonald v. City of

constrain judicial discretion,[103] which approach is more historically rooted or supported,[104] and so on. This Article makes no attempt to compare along these other metrics and focuses instead on strictness or case outcome. This Article also does not attempt a quantitative analysis. Rather, the analysis is purely conceptual and qualitative, seeking to offer a glimpse of how challenges to specific kinds of regulations may come out differently under strict scrutiny versus THT.[105]

Chicago, 561 U.S. 742, 925 (2010) (Breyer, J., dissenting)), *with* United States v. Bullock, 679 F. Supp. 3d 501, 507–08 (S.D. Miss. 2023) ("Judges are not historians. We were not trained as historians. We practiced law, not history. And we do not have historians on staff. Yet the standard articulated in *Bruen* expects us 'to play historian in the name of constitutional adjudication.'"), *rev'd*, No. 23-60408, 2024 WL 4879467 (5th Cir. Dec. 12, 2024).

103. This is a closely related, but ultimately distinct, question from administrability because a legal test might be both highly difficult for judges to administer yet also constraining of judicial policy preferences if administered correctly. *Compare Rahimi II*, 144 S. Ct. 1889, 1912 (2024) (Kavanaugh, J., concurring) ("History is far less subjective than policy. And reliance on history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people."), *with* Blocher & Miller, *supra* note 91, at 52 (arguing, by contrast, that *Bruen* "engages in and encourages forms of judicial intuitionism and discretion that, if left unguided, are likely to disrupt Second Amendment law significantly"), *and infra* Section III.A.2 (summarizing argument that *Bruen* has actually *amplified* the influence of ideology in Second Amendment cases).

104. *Compare* Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 60 NAT'L AFFS. 72, 77 (2019) (arguing that tiers of scrutiny are a "mode of analysis was not applied at the founding" and "are not consistent with the original meaning of the text . . . [because they] purport[] to find . . . rights 'outweighed' by the government's interest in violating them"), *with* Stephanie Barclay, *Replacing* Smith, 133 YALE L.J.F. 436, 438, 465 (2023) (arguing "that setting up a scrutiny test as the foil to a historically and textually grounded test creates a false dichotomy" and that "historical evidence . . . supports a judicial inquiry into whether the government's action is, as an evidentiary matter, necessary to advance the government's stated interest"), *and* Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 111 (2020) ("This historical perspective tracks the approach the Court employed in modern First Amendment jurisprudence that predated *Smith*.").

105. This Article also focuses primarily on criminal cases by necessity because the vast majority of Second Amendment claims both pre- and post-*Bruen* have been raised in criminal rather than civil cases and because almost all pre-*Bruen* strict scrutiny speculation occurred in the criminal context. *See, e.g.*, Charles, *supra* note 91, at 125–26; Ruben & Blocher, *supra* note 29, at 1478. That said, this Article's observation that THT as applied has often been stricter than even strict scrutiny applies to other subject-matter areas as well, including locational restrictions which are typically challenged in civil proceedings. For example, courts applying the two-part test occasionally found that bans on carrying firearms in specific sensitive locations were narrowly tailored to a compelling

Current scholarship has not attempted to gauge the relative strictness of THT versus tiered scrutiny. Professor Jacob Charles, who conducted a comprehensive analysis of the first year of post-*Bruen* district court decisions, found forty-four successful Second Amendment challenges during that time: an 11.73% overall success rate.[106] He observed that this number was "staggering in comparison" to post-*Heller-I* outcomes because only *eleven* Second Amendment challenges succeeded in the first *two-and-a-half* years post-*Heller-I*.[107] Another study that included federal appellate decisions and "separated claims more granularly" found a 21% success rate for Second Amendment plaintiffs post-*Bruen*.[108] Appellate courts may be relatively more likely to grant relief in Second Amendment cases,[109] in part because of the uncertain status of pre-*Bruen* circuit precedent that lower-court judges may consider themselves bound to follow and because appellate judges are more likely to be "auditioning" for inclusion on future Supreme Court shortlists.[110] Therefore, the increasing number of appellate decisions as Second Amendment

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government interest in protecting the safety of individuals present in those locations, including children and other vulnerable populations. *See, e.g.*, Christopher v. Ramsey County, 621 F. Supp. 3d 972, 980–81 (D. Minn. 2022) (fairgrounds); DiGiacinto v. Rector & Visitors of George Mason Univ., 704 S.E.2d 365, 370 (Va. 2011) (campus buildings, events, and areas where people congregate); Miller v. Smith, No. 18-CV-3085, 2022 WL 782735, at *10 (C.D. Ill. Mar. 14, 2022) (in-home daycare facilities), *vacated and remanded*, No. 22-1482, 2023 WL 334788 (7th Cir. Jan. 20, 2023). Courts applying THT, by contrast, have invalidated locational bans in the same or similar locations. *See, e.g.*, May v. Bonta, 709 F. Supp. 3d 940, 950, 960–61, 970–71, (C.D. Cal. 2023) (playgrounds and youth centers), *aff'd in part*, *rev'd in part sub nom.* Wolford v. Lopez, 116 F.4th 959 (9th Cir. 2024); State v. Radomski, 901 S.E.2d 908, 911, 913–14 (N.C. Ct. App. 2024) (areas within university campus); *see also* Wade v. Univ. of Mich., 981 N.W.2d 56, 58 (2022) (Viviano, J., concurring) (suggesting that THT may render campus gun bans unconstitutional in many applications).

106. Charles, *supra* note 91, at 126.

107. *Id.* at 128.

108. Eric Ruben et al., *One Year Post-*Bruen*: An Empirical Assessment*, 110 VA. L. REV. ONLINE 20, 23 n.12, 29 tbl.1 (2024). Neither study included state court decisions, and post-*Bruen* Second Amendment litigation at the state court level is likely to be a fruitful area for future scholarly research. *See, e.g.*, Eric Ruben, *SCOTUS's 2nd Amendment Decision Leaves Open Questions for State Courts*, ST. CT. REP. (June 26, 2024), https://perma.cc/GKU3-46EM ("Second Amendment cases in federal courts tend to attract the most attention, yet two times as many Second Amendment claims are litigated in the state courts.").

109. *See* Ruben & Blocher, *supra* note 29, at 1473 (finding a 13% success rate in federal appellate court, as compared to an 8% success rate in federal district court).

110. *See, e.g.*, Ryan C. Black & Ryan J. Owens, *Courting the President: How Circuit Court Judges Alter Their Behavior for Promotion to the Supreme Court*, 60 AM. J. POL. SCI. 30, 40 (2016) ("Circuit court judges behave differently when auditioning for promotion.").

challenges make their way through the federal system may well have pushed the current success rate higher than even 21%. By contrast, the leading empirical review of Second Amendment decisions in the *Heller I* to *Bruen* period, using case data up to 2016, found that most courts used intermediate scrutiny and that claims were successful about 10% of the time after reaching the means-end scrutiny step.[111] Potentially due to the weakness of claims in the first place, this pre-*Bruen* success rate is likely lower than the success rate for courts applying heightened scrutiny in other areas of constitutional law and closer to the expected success rate for rational basis review.[112]

The jump in success rates found by initial post-*Bruen* empirical work is not all that surprising. It stands to reason that more Second Amendment claims *should* succeed under THT than succeeded during the period between *Heller I* and *Bruen*.[113] That is because the vast majority of lower courts pre-*Bruen* to reach the second step of the old test chose to apply intermediate scrutiny,[114] and *Bruen* characterized many of those decisions as improperly deferring to legislative interest

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111. *See* Ruben & Blocher, *supra* note 29, at 1495. A small subset of courts, though likely not enough from which to extract a statistically significant percentage, applied strict scrutiny. *See id.* (referencing twenty-seven cases).

112. *See id.* at 1481 (noting 273 challenges to felon-in-possession statutes that "were rejected 99 percent of [the] time"). This conclusion comes from comparing the plaintiffs' success rate of 11% in Second Amendment cases to studies suggesting that plaintiffs challenging speech- or religion-based restrictions under First Amendment strict scrutiny succeed around 70% of the time (or perhaps more often). *See, e.g.*, Winkler, *supra* note 50, at 796; Bhagwat, *supra* note 52, at 809 (finding a 27% success rate in certain First Amendment intermediate scrutiny applications). There is substantial scholarly debate about the reason for low pre-*Bruen* success rates. *See, e.g.*, George Mocsary, *A Close Reading of an Excellent Distant Reading of* Heller *in the Courts*, 68 DUKE L.J. ONLINE 41, 53 (2018) (noting that Second Amendment success rates in the pre-*Bruen* era were "generally lower than the success rates found in other studies and . . . in accord with the intuition of the market for information on judicial treatment of the Second Amendment").

113. Of course, "disputes selected for litigation . . . will constitute neither a random nor a representative sample of the set of all disputes"—and it is almost certain that the adoption of a new test itself and subsequent legislative responses at the state level have skewed the nature of claims brought since *Bruen*. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984).

114. Ruben & Blocher, *supra* note 29, at 1496 ("Intermediate scrutiny has been the most prevalent form of scrutiny, no matter which category of court one considers."). Some courts, of course, decided cases at the initial textual "coverage" inquiry—I carve out those cases from the analysis here and instead seek to compare means-end scrutiny application pre-*Bruen* directly to THT application post-*Bruen*. As many post-*Bruen* courts have observed, the Court's test breaks down into an initial coverage step followed, if necessary, by historical analogizing. *E.g.*, Range v. Att'y Gen., 124 F.4th 218, 225 (3d Cir. 2024).

balancing: upholding a law that should have been struck down.[115] To be sure, it is possible that courts pre-*Bruen* were applying a bastardized version of intermediate scrutiny in Second Amendment cases and that a correct application is on par with the THT approach.[116] But if cases like *Heller II* are any indication, the upshot of a THT approach was that it would invalidate certain gun laws that courts were upholding under intermediate scrutiny—in other words, that THT was a stricter approach than intermediate scrutiny rather than one that cashed out at about the same level of flexibility. It is no coincidence that, notwithstanding Kavanaugh's prediction, federal judges to advocate THT pre-*Bruen* universally either took no position on the outcome or would have struck down the law being challenged despite the majority in the case voting to uphold that law under intermediate scrutiny.[117] These judges also tended to be quite ideologically conservative, suggesting that they were driven to THT in part because they believed that more gun laws would fall.[118] Only a desire to see more Second Amendment challenges succeed can explain the phenomenon of judges initially endorsing strict scrutiny while later advocating the wholesale replacement of the tiers of scrutiny with THT.[119] THT as envisioned, then, should likely be

115. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022) ("If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of 'intermediate scrutiny' often defer to the determinations of legislatures.").

116. *See, e.g.*, Silvester v. Becerra, 138 S. Ct. 945, 948 (2018) (Thomas, J., dissenting from denial of certiorari) ("The Ninth Circuit claimed to be applying intermediate scrutiny, but its analysis did not resemble anything approaching that standard."); Duncan v. Bonta, 19 F.4th 1087, 1143 (9th Cir. 2021) (Bumatay, J., dissenting) ("[W]e often employ a toothless 'intermediate scrutiny.'"), *vacated*, 142 S. Ct. 289 (2022), *vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022).

117. *See, e.g.*, *Duncan*, 19 F.4th at 1146 (Bumatay, J., dissenting) (large-capacity magazine ban); Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 710–14 (6th Cir. 2016) (Sutton, J., concurring in part) (lifetime possession ban based on past mental illness).

118. *See, e.g.*, Rebecca L. Brown et al., *Guns, Judges, and Trump*, 74 DUKE L.J. ONLINE 81, 102 (2025) ("Trump appointees are the most supportive of gun rights.").

119. *Compare* Mance v. Sessions, 896 F.3d 390, 405 (5th Cir. 2018) (Ho, J., joined by Duncan, J., concurring) ("The ban on interstate handgun sales fails strict scrutiny. After all, a categorical ban is precisely the opposite of a narrowly tailored regulation."), *with* United States v. McGinnis, 956 F.3d 747, 761 (5th Cir. 2020) (Duncan, J., concurring) ("I write separately to reiterate the view that we should retire this framework in favor of an approach focused on the Second Amendment's text and history."), *and* United States v. Rahimi (*Rahimi I*), 61 F.4th 443, 461 (5th Cir. 2023) (Ho, J., concurring) (favorably referring to *Bruen* as a directive that "lower courts to be more forceful guardians of the right to keep and bear arms").

stricter than intermediate scrutiny, in terms of the aggregate number of gun laws invalidated.

Absolute post-*Bruen* success rate numbers are also of dubious value because some states responded to *Bruen* by enacting new gun-related restrictions—including bans on carrying firearms in enumerated sensitive locations where carrying was permitted prior to *Bruen*.[120] These laws make an empirical strictness comparison between the two methodologies across all Second Amendment cases exceedingly difficult. It could be, for example, that more laws are being struck down under THT in large part simply because there are more laws *to* strike down. And, indeed, in the first year after *Bruen*, the success rate in Second Amendment challenges to locational restrictions was exceptionally high: 53.3%.[121] It is also possible, and perhaps likely, that plaintiffs have been more aggressive in challenging laws—such as those related to domestic violence or carrying on modern forms of transportation like buses and subways—where historical support appears thin, and this would further skew the success rate numbers. A qualitative comparison limited to categories of gun regulation that did not change substantially around the time *Bruen* was decided largely avoids these pitfalls and begins to reveal an accurate picture of relative doctrinal strictness.

What other clues exist about the relative strictness of THT compared to the tiers of scrutiny? For one, Judge Kavanaugh's prediction in *Heller II*—reaffirmed in subsequent public statements—that text, history, and tradition will allow "more flexibility and power to impose gun regulations"[122] or "some additional regulations" as compared to strict scrutiny[123]—provides a guide to where the new test might fall on the spectrum of tiered-scrutiny approaches. While Kavanaugh's prediction is not necessarily a blanket statement that all strict-scrutiny-compliant laws also pass muster under THT, it reads as a prediction of aggregate impact. Thus, if any strict-scrutiny-compliant laws *fail* to satisfy THT, then there must be a greater aggregate set of laws that are permissible under THT but fail strict scrutiny for the prediction to hold. Kavanaugh hedged this prediction slightly by writing that "the major difference between applying the . . . history- and tradition-based approach and applying one of the forms of scrutiny is not necessarily the number of gun regulations

120. *See, e.g.*, CAL. PENAL CODE § 26230 (2025); N.Y. PENAL LAW § 265.01-e(2) (2024).

121. Charles, *supra* note 91, at 127 tbl.3. If sensitive places challenges are broken into individual claims, the distorting effect is even larger because plaintiffs often challenge a large number of individual locational bans in the same case.

122. *Heller II*, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

123. *Kavanaugh Confirmation Hearing*, *supra* note 24, at 474.

that will pass muster."[124] But he offered his prediction about relative flexibility all the same. In Kavanaugh's view, then, (1) it would be at least highly aberrant for a gun law to satisfy strict scrutiny but *not* THT, and (2) some gun laws will survive constitutional challenges under THT even though they do not pass strict scrutiny.

The actions of parties and amici in *Heller I*, *Heller II*, and *Bruen* all further suggest that THT should permit more gun regulation, in the aggregate, than strict scrutiny. It would make little sense for those challenging gun laws in each case to have asked the court to apply an approach that was, on balance, less protective of Second Amendment rights than a viable alternative—especially one which was gaining judicial acceptance (as was certainly the case when *Bruen* was litigated). The single amicus brief filed in *Heller II* in support of the challenger, by a group of gun-rights advocacy groups, illustrates this point.[125] The amici gun-rights organizations argued in relevant part that "[t]he Second Amendment right is subject to a constitutional test *more strict* than strict scrutiny."[126] The proposed test, which D.C. referred to at oral argument as a "rule of per se invalidity," included only a textual analysis where, if the conduct at issue was within the textual ambit of the Second Amendment, the law would then automatically fall because that right shall not be infringed.[127] Dick Heller, by contrast, argued in *Heller II* that "[t]he Second Amendment recognizes an explicitly-protected, fundamental right, restrictions on which are subject to strict scrutiny."[128]

Generally speaking, gun-rights litigators have transitioned from working within the tiers of scrutiny, especially as the two-step test proliferated, to advocating strict scrutiny, to endorsing narrow applications of THT.[129] And THT, as initially conceived, appears to be only the third- or fourth-best outcome from the gun-rights point of view, behind a "textual invalidity" rule, strict scrutiny, and the narrow version of THT advanced by some lower courts post-*Bruen* and by Justice Thomas in *Rahimi II*.[130] Portions of the Supreme Court's

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124. *See Heller II*, 670 F.3d at 1274 (Kavanaugh, J., dissenting).

125. Brief Amicus Curiae of Gun Owners of America, Inc. et al. in Support of Appellants and Reversal, *Heller II*, 670 F.3d 1244 (No. 10-7036).

126. *Id.* at 12 (emphasis added).

127. *Id.* at 12–14.

128. Brief for Appellants at 19, *Heller II*, 670 F.3d 1244 (No. 10-7036). Interestingly, Heller cited predominantly substantive due process precedent for this proposition—suggesting perhaps that the standard for judging a right "fundamental" when determining whether the Constitution protects *unenumerated* rights might also be used to sort *enumerated* rights by their relative importance. *See id*. at 19 n.8 (first citing Washington v. Glucksberg, 521 U.S. 702, 766–67 (1997) (Souter, J., concurring in judgment); and then citing Poe v. Ullman, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting)).

129. *See supra* Section I.A.

130. *See, e.g.*, *Rahimi II*, 144 S. Ct. 1889, 1937–38 (2024) (Thomas, J., dissenting) (emphasizing the "careful parsing of regulatory burdens" and arguing

still-limited Second Amendment jurisprudence also suggest that THT was intended as a kind of middle ground that would permit various forms of gun regulation not necessarily satisfying the strictest form of judicial review.[131] If THT was intended to be stricter than strict scrutiny in the aggregate, it would be somewhat unusual for Justices to continually reference a belief that the test will *permit* many different forms of gun regulation.[132]

Bruen arguably represents the Supreme Court's first embrace of a test rooted solely in text, history, and tradition across an entire area of constitutional law where a means-end approach previously held sway. While courts have long used a historically-focused test to construe both scope and substantive constitutionality under the Seventh Amendment, means-end scrutiny never dominated in that area.[133] There is simply no alternative universe against which to compare a historical approach in the Seventh Amendment context—no control group against which to judge the relative harshness or flexibility of the historical test. And comparing Seventh Amendment cases to other non-historical areas of constitutional law would be likely to implicate too many confounding variables. Such a before-and-after analysis is possible only under the Second Amendment as a result of *Bruen* and the circuit courts' prior ruminations about strict scrutiny.

Increasingly, historically inflected methodologies are not unique to the Second Amendment. Therefore, this Article's summary and analysis of THT with regard to case outcome is broadly instructive and predictive. Indeed, around the time Kavanaugh penned his *Heller II* dissent, the Supreme Court handed down a pair of decisions rejecting the expansion of balancing tests to determine coverage in

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against "stray[ing] too far from [history] by eliding material differences between historical and modern laws").

131. *E.g.*, *Heller I*, 554 U.S. 570, 636 (2008) ("The Constitution leaves the District of Columbia a variety of tools for combating [gun violence], including some measures regulating handguns."); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2157 (2022) (Alito, J., concurring) ("Nor have we disturbed anything that we said in *Heller* or *McDonald* about restrictions that may be imposed on the possession or carrying of guns." (citation omitted)).

132. It also possible that THT and strict scrutiny arrive at basically the same level of strictness in the aggregate—in terms of the number of gun laws that would be invalidated under each approach—but that THT is more permissive of regulation in only certain areas (and vice versa). But Kavanaugh's *Heller II* dissent suggests an *aggregate* comparison in which the two approaches are not equivalent.

133. *See, e.g.*, Miller, *supra* note 95, at 880–86; *see also* Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (describing and applying the historical test); United States v. Wonson, 28 F. Cas. 745, 748 (1812) (C.C.D. Mass. 1812) (consulting English practice to construe the right); Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657–61 (1935) (analogizing to historical practices at common law to determine whether the right applied).

major First Amendment cases and emphasizing the importance of the historical scope of regulatory power.[134] In recent years, the Court and lower federal courts have increasingly adopted legal tests similar to THT in other areas of law and rolled back reliance on the tiers of scrutiny in the process[135]—at times specifically invoking *Bruen*'s approach as the proper method that courts should ultimately adopt across a variety of different jurisprudential areas.[136] If this Article is

134. *See* United States v. Stevens, 559 U.S. 460, 469–70 (2010) (rejecting the claim "that categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation" under a "balancing test"); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011) (similar holding).

135. For a comprehensive recent overview of this phenomenon, see Francesca Procaccini, *The End of Means-End Scrutiny*, 75 DUKE L.J. (forthcoming 2025) (manuscript at 11–16) (on file with author). For specific evidence from recent Supreme Court decisions, see, for example, *SEC v. Jarkesy*, 144 S. Ct. 2117, 2132–34 (2024) (construing the public-rights exception to the Seventh Amendment's jury trial guarantee in all traditional legal actions by reference to "historic categories of adjudications" and noting that "[w]e have never embraced the proposition that 'practical' considerations alone can justify extending the scope of the public rights exception"); *Vidal v. Elster*, 144 S. Ct. 1507, 1522 (2024) (holding that the restriction against trademarks including the name of a living individual "reflects [a] common-law tradition"); *Consumer Financial Protection Bureau v. Community Financial Services Ass'n of America*, 144 S. Ct. 1474, 1481 (2024) (holding that "the Constitution's text, the history against which that text was enacted, and congressional practice immediately following ratification" support the constitutionality of CFPB's funding under the Appropriations Clause); *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2253 (2022) ("The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and tradition."); *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2428 (2022) (confirming abandonment of *Lemon* test in Establishment Clause cases in favor of a historical approach); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1402 (2020) ("When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses."); and *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014) ("*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.").

136. *See, e.g.*, Littlejohn v. Sch. Bd. of Leon Cnty., 132 F.4th 1232, 1247–48 (11th Cir. 2025) (Rosenbaum, J., concurring) ("[T]he second step of analysis could follow the historical approach the Court has employed in some recent constitutional cases—think the Second Amendment, for instance."); Nat'l Republican Senatorial Comm'n v. FEC, 117 F.4th 389, 399 (6th Cir. 2024) (Thapar, J., concurring) ("History should therefore guide our First Amendment jurisprudence. Specifically, courts should engage in the two-step inquiry that our Second Amendment jurisprudence uses."); Do No Harm v. Nat'l Ass'n of Emergency Med. Technicians, No. 3:24-CV-11, 2025 WL 973614, at *5–6 (S.D. Miss. Mar. 31, 2025) ("Under the 'text, history, and tradition test' that the Court has embraced rigidly in Second Amendment cases, NAEMT will likely succeed"

correct that THT can be compared to the traditional tiers in specific areas, its findings are all the more valuable given the ascendance of historical methodologies generally.

II. COMPARING THT TO STRICT SCRUTINY

To determine how THT is being applied vis-à-vis strict scrutiny, I compare pre-*Bruen* rulings and judicial speculation about how strict scrutiny might apply to certain types of gun laws[137] with how legal challenges to those same laws under THT have actually fared. I find that courts have applied THT in a manner that is, at times, *more* demanding than strict scrutiny. Kavanaugh's *Heller II* prediction can be illustrated as follows:[138]

(1) Rational Basis	(2) Intermediate Scrutiny	***(3) THT***	(4) Strict Scrutiny
(10% success rate)	*(10%–30% success rate)*	*(?)*	*(70% success rate)*
More Likely to Sustain			More Likely to Strike

in showing that a white plaintiff cannot sustain a § 1981 civil rights claim); United States *ex rel.* Zafirov v. Fla. Med. Assocs., 751 F. Supp. 3d 1293, 1317–22 (M.D. Fla. 2024) (relying in part on *Rahimi*'s concurring opinions to hold that the qui tam provision in the False Claims Act is unconstitutional because, "[w]hen the Constitution is clear, no amount of countervailing history overcomes what the States ratified"); *Ex parte* Jackson Hosp. & Clinic, Inc., No. SC-2023-0601, 2024 WL 4401995, at *18 (Ala. Oct. 4, 2024) (Parker, C.J., dissenting) (citing *Bruen* for the proposition that a governor's power to suspend laws during a public health emergency should be determined "in light of the historical sources that informed the [relevant state constitutional provisions'] meaning"); *cf.* L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 471 (6th Cir. 2023) (chiding the plaintiffs in an equal protection and due process challenge to Tennessee's ban on certain sex-transition treatments for minors for failing to "argue that the original fixed meaning of the due process or equal protection guarantees covers these claims[,] . . . prompt[ing] the question whether the people of this country ever agreed to remove debates of this sort . . . [from] the democratic process").

137. Because most courts applied intermediate scrutiny before *Bruen*, there is not a large universe of actual decisions to draw from—and speculation (for example, a decision applying intermediate scrutiny but positing that the challenged law would *also* satisfy strict scrutiny) and dissenting and concurring opinions are likely the best indications of how judges might have applied the approach to specific types of laws.

138. For citations to support the approximate success rate for the various forms of scrutiny, see sources cited *supra* notes 54–59.

By contrast, some initial post-*Bruen* case outcomes grade as follows:

(1) Rational Basis	(2) Intermediate Scrutiny	(3) Strict Scrutiny	***(4) THT***
More Likely to Sustain			More Likely to Strike

On one hand, courts have in some cases applied THT to invalidate even those gun regulations that likely satisfy strict scrutiny, at least according to pre-*Bruen* pronouncements. In some such instances, courts even explicitly signal that they would likely have upheld the law in question, had they been able to apply strict scrutiny or similar approaches. Second, courts have invalidated certain overinclusive laws whose constitutionality seems more clearly established under THT than under strict scrutiny.

A. THT Has Invalidated Laws That Meet Strict Scrutiny.

1. Domestic Violence Restraining Orders

Federal law bars individuals who are subject to certain state-issued domestic violence restraining orders (DVROs) from possessing firearms.[139] The prohibition applies only to orders, "issued after a hearing of which such person received actual notice," that either find the respondent "a credible threat to the physical safety of [an] intimate partner or child" or "explicitly prohibit[] the use, attempted use, or threatened use of physical force."[140] The prohibition is rarely charged, at least compared to the federal ban on possessing a gun as a convicted felon,[141] but it has played an outsized role in Second Amendment litigation.

In February 2023, the Fifth Circuit Court of Appeals struck down the federal law in *United States v. Rahimi* (*Rahimi I*).[142] The circuit had issued a per curiam decision in the case just weeks before *Bruen* was decided, relying on a 2020 decision upholding the law under intermediate scrutiny.[143] In *Rahimi I*, the circuit applied THT and, finding that the defendant was among the "people" with Second

139. 18 U.S.C. § 922 (g)(8).

140. *Id.*

141. *See* U.S. SENTENCING COMM'N, WHAT DO FEDERAL FIREARM OFFENSES REALLY LOOK LIKE? 24 (2022), https://perma.cc/HP3G-WD7J (noting that felons accounted for 79% of prohibited person firearm offenses in 2021, compared to the 0.5% of offenses that were from offenders who were subject to a restraining order).

142. 61 F.4th 443 (5th Cir. 2023).

143. United States v. Rahimi, No. 21-11001, 2022 WL 2070392, at *1 n.1 (5th Cir. June 8, 2022) (citing United States v. McGinnis, 956 F.3d 747, 756–59 (5th Cir. 2020)).

Amendment rights, determined that "[18 U.S.C.] § 922(g)(8)'s ban on possession of firearms is an "outlier[] that our ancestors would never have accepted."[144] The panel held that historical gun regulations offered by the government either were not motivated by the same objectives or did not burden Second Amendment rights in the same way.[145] For example, laws disarming those considered to be dangerous around the time of the Founding were motivated by concern about "the preservation of political and social order, not the protection of an identified person from the threat of 'domestic gun abuse.'"[146] And historical surety laws, which required an individual to post bond upon complaint from another person who reasonably feared that individual would commit violence with a firearm, "did not prohibit public carry, much less possession of weapons, so long as the offender posted surety."[147]

Much popular coverage of the Fifth Circuit's decision in *Rahimi I* portrayed the outcome as a natural consequence of the Supreme Court's history-focused test. For example, commentators asserted that all of Rahimi's arguments "flow[] directly from *Bruen*"[148] and that the case "highlight[ed] how the U.S. Supreme Court's adherence to originalism will fail survivors of domestic violence."[149] So too with academic commentary. Professor Nelson Lund, for example, argued that, "[u]nder *Bruen*'s originalist test, [*Rahimi I*] should be an easy case [because t]he government has not informed the Supreme Court of a single pre-20th-century law that punished American citizens, even those who had been convicted of a violent crime, for possessing a gun in their own homes."[150] In some instances, both those who supported the government and those who supported Rahimi seemed to assume that the proper outcome under THT, correctly applied, was for the law to fall despite narrow tailoring to compelling objectives.[151]

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144. *Rahimi I*, 61 F.4th at 451–52, 460–61 (alteration in original).

145. *Id.* at 457, 460.

146. *Id.* at 457.

147. *Id.* at 459–60.

148. Jay Willis, *The Supreme Court's Big Gun Case Was Humiliating for the Justices*, SLATE (Nov. 7, 2023), https://perma.cc/9GGR-EFCS.

149. Sabrina Talukder, *The Supreme Court Case* United States v. Rahimi *Underscores the Ugly Truth About Originalism and Women*, CTR. FOR AM. PROGRESS (Oct. 17, 2023), https://perma.cc/5SU4-5R9U.

150. Nelson Lund, *The Fidelity of 'Originalist' Justices Is About to Be Tested*, N.Y. TIMES (Apr. 9, 2024), https://www.nytimes.com/2024/04/09/opinion/guns-supreme-court.html.

151. *See id.*; Kelly Roskam, *Opinion: The Fifth Circuit's* Rahimi *Decision Protects Abusers' Access to Guns. The Supreme Court Must Act to Protect Survivors of Domestic Violence.*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (Mar. 1, 2023), https://perma.cc/CH5F-M3GU ("Though it may not have been the intended outcome of *Bruen*, the 5th Circuit's ruling is an awful but foreseeable consequence of a test of constitutionality."). The Fifth Circuit gestured in this direction in its opinion in *Rahimi I*, observing that "18 U.S.C. § 922(g)(8)

In June 2024, however, the Supreme Court reversed and upheld the law in an 8–1 decision.[152] The majority in *Rahimi II* adopted a slightly higher-generality view of *Bruen*'s test than that taken by the Fifth Circuit below and asked "whether the challenged regulation is consistent with the principles that underpin the Nation's regulatory tradition."[153] The majority found that § 922(g)(8) fit "comfortably within" a regulatory tradition of prohibiting those found to pose a threat of physical violence to others from possessing firearms.[154] As discussed further in Section III.B, *Rahimi II* can be viewed as recalibrating THT through the lens of means-end scrutiny. In a concurring opinion, Justice Sotomayor drove home this point when she observed that, in her view, "Section 922(g)(8) should easily pass constitutional muster under any level of scrutiny" because the provision is "tailored to the vital objective of keeping guns out of the hands of domestic abusers."[155]

Indeed, in the uncertain period immediately following *Heller I*—after the Supreme Court had just constituted an individual right to keep arms in the home while providing little guidance to courts tasked with assessing whether laws violated that right—a number of courts considered challenges to § 922(g)(8) brought by criminal defendants under the Second Amendment. While courts eventually coalesced around applying intermediate scrutiny in these cases, some courts initially used strict scrutiny or observed that the law would, in their estimation, meet both standards of review. In fact, the Fifth Circuit itself had previously held (even before *Heller I*) that the Second Amendment protected an individual right but that § 922(g)(8) was the type of "limited, narrowly tailored specific exception[] or restriction[] for particular cases that [is] reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country."[156] In that decision, the panel used the language of strict scrutiny.[157]

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embodies salutary policy goals meant to protect vulnerable people in our society"—an approach that the circuit itself had previously endorsed. *Rahimi I*, 61 F.4th at 461.

152. *Rahimi II*, 144 S. Ct. 1889 (2024).

153. *Id.* at 1898, 1903.

154. *Id.* at 1896–97.

155. *Id.* at 1906 (Sotomayor, J., concurring).

156. United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001).

157. *See* United States v. McGinnis, 956 F.3d 747, 758–59 (5th Cir. 2020) ("At a minimum, *Emerson* applied heightened—i.e., intermediate—scrutiny, and some have suggested it applied strict scrutiny."); United States v. Elkins, 780 F. Supp. 2d 473, 478 (W.D. Va. 2011) (describing *Emerson* as using a "strict scrutiny" approach).

In the years following *Heller I*, a near-unanimous consensus[158] emerged that § 922(g)(8) was a valid, constitutional restriction when subjected to strict scrutiny.[159] Courts found, for example, that "[t]hese are narrowly crafted limits on when a citizen may possess a firearm and well tuned to the legitimate concerns of avoiding serious physical injury to a partner or child."[160] Judges did not treat the issue as a particularly close call and, indeed, the consensus that § 922(g)(8) comports with strict scrutiny in fact stretches back to well before *Heller I* was decided.[161] These courts often emphasized the law's narrow tailoring, including the fact that it applies only to a limited subset of individuals subject to DVROs and works only a temporary deprivation of the Second Amendment right.[162] And courts evaluating § 922(g)(9)—which bans possession for those convicted of certain domestic violence misdemeanor offenses—universally upheld that provision under strict scrutiny using a similar analysis.[163] During the initial post-*Bruen* period, however, a federal court of appeals and at least two district courts applied THT to invalidate the federal ban on

158. Perhaps the *only* dissenting voice was the district court in *Emerson* in a decision that did not purport to apply any specific level of scrutiny but merely held that "[t]here must be a limit to government regulation on lawful firearm possession" and that the statute exceeded that limit. United States v. Emerson, 46 F. Supp. 2d 598, 611 (N.D. Tex. 1999).

159. *E.g.*, United States v. Reese, 627 F.3d 792, 804 n.4 (10th Cir. 2010) ("Even if we were to apply a strict scrutiny test requiring the government to prove that § 922(g)(8) is narrowly tailored to further a compelling interest, we are persuaded . . . that the government could satisfy these requirements."); *see also* United States v. Sanchez, No. CR-09-1125, 2009 WL 4898122, at *3 (D. Ariz. Dec. 11, 2009); United States v. Knight, 574 F. Supp. 2d 224, 226 (D. Me. 2008); United States v. Erwin, No. 07-CR-556, 2008 WL 4534058, at *2–3 (N.D.N.Y. Oct. 6, 2008); United States v. Luedtke, 589 F. Supp. 2d 1018, 1025 (E.D. Wis. 2008); United States v. Grote, No. CR-08-6057, 2009 WL 853974, at *7 (E.D. Wash. Mar. 26, 2009); United States v. Bena, No. 10-CR-07, 2010 WL 1418389, at *3, *4 (N.D. Iowa Apr. 6, 2010), *aff'd*, 664 F.3d 1180 (8th Cir. 2011).

160. *Knight*, 574 F. Supp. 2d at 226.

161. *Emerson* was the first circuit decision to endorse an individual-rights view of the Second Amendment. *See Emerson*, 270 F.3d at 220–21. In 2004, the Eighth Circuit declined to reverse precedent that the Second Amendment right was limited to the militia but nonetheless held that, assuming *arguendo* the Amendment did protect an individual right to possess a firearm, § 922(g)(8) was "narrowly tailored to restrict . . . firearm possession for a limited duration and to protect the individual applicant and that Congress had a compelling government interest in . . . decreas[ing] domestic violence." United States v. Lippman, 369 F.3d 1039, 1044 (8th Cir. 2004). Thus, both the Fifth and Eighth Circuits had offered this pronouncement prior to *Heller I*.

162. *Lippman*, 369 F.3d at 1043.

163. *E.g.*, United States v. Engstrum, 609 F. Supp. 2d 1227, 1232 (D. Utah 2009).

possessing guns while subject to a DVRO.[164] As to this specific law, then, these courts applied THT in an exceedingly strict manner less flexible for the government than even strict scrutiny.

2. Receipt of Guns While Under Felony Indictment

Federal law prohibits the receipt of new firearms while under indictment for a felony-level criminal offense.[165] For example, while President Donald Trump is now prohibited from possessing guns following his New York conviction for the felony-level offense of falsifying business records, Trump was also previously subject to the federal ban on receiving guns—by purchase or transfer—while under multiple felony indictments in both federal and state court.[166] Trump nevertheless visited a gun store in South Carolina during his Republican primary campaign in September 2023, and his campaign posted on X that he had purchased a Glock handgun.[167] After commentators clarified that Trump was subject to the felony-indictment ban,[168] his campaign backtracked and claimed that no such purchase occurred.[169] Yet the post-*Bruen* constitutionality of 18 U.S.C. § 922(n), the firearm receipt ban for those under indictment, is an open question, notwithstanding the law's narrow scope.

As some courts observed prior to *Bruen*, § 922(n) is likely narrowly tailored because it does not impose a blanket ban on gun possession by individuals under felony indictment but rather only bars those individuals from receiving new guns in recognition of the criminal charges against them and for a limited duration. For example, one court noted that the law works a mere temporary deprivation designed to "maintain[] the status quo during the pendency of the indictment, a volatile period during which the stakes and stresses of pending criminal charges often motivate defendants to do violence to themselves or others."[170] Another observed that "Section 922(n) is less restrictive than [other provisions in § 922],

164. United States v. Combs, 654 F. Supp. 3d 612, 617–20 (E.D. Ky. 2023); United States v. Perez-Gallan, 640 F. Supp. 3d 697, 705–16 (W.D. Tex. 2022).

165. 18 U.S.C. § 922(n).

166. Alison Durkee, *Trump Campaign Backtracks After Claiming Ex-President Bought a Gun—Which Could Be Illegal*, FORBES (Sept. 26, 2023), https://perma.cc/BJ8S-B53F.

167. *Id.*; Maggie Haberman & Alan Feuer, *Trump Tells Gun Store He'd Like to Buy a Glock, Raising Legal Questions*, N.Y. TIMES (Sept. 25, 2023), https://www.nytimes.com/2023/09/25/us/politics/trump-glock-gun-south-carolina.html.

168. *See, e.g.*, Stephen Gutowski (@StephenGutowski), X (Sept. 25, 2023), https://perma.cc/FY88-FY88 ("It would be a crime for him to actually buy this gun because he's under felony indictment.").

169. Kevin Breuninger, *Trump Doesn't Buy Gun After Saying He Wants to in South Carolina*, CNBC POL. (Sept. 25, 2023), https://perma.cc/7AV8-TGDT.

170. United States v. Khatib, No. 12-CR-190, 2012 WL 6086862, at *4 (E.D. Wis. Dec. 6, 2012).

since it only criminalizes shipping, transportation, or receipt of a firearm, not possession."[171] In fact, that court specifically opined that the indictment receipt ban was "substantially similar" to, but *less* restrictive than, the federal DVRO gun ban in § 922(g)(8)—a law that courts almost universally viewed as constitutional under strict scrutiny.[172] Section 922(n) is narrowly tailored, not only in the universe of persons to whom it applies but also in the nature of the restriction.[173] One might suspect that courts applying THT after *Bruen* would continue to uphold this narrowly tailored limitation.

To the contrary, criminal defendants challenging the felony-indictment ban under THT have been among the most successful post-*Bruen* litigants. In the first year following *Bruen*, four out of twenty-two Second Amendment challenges to § 922(n) succeeded (or 18.2%).[174] One scholar observed that the law "has generated more dissensus in the lower federal courts post-*Bruen* than any other."[175] These decisions, some of which were reversed on appeal, emphasized that § 922(n) is unlike potential historical comparators in that the process of a grand jury indictment that gives rise to the receipt ban is not adversarial (the defendant has no right to appear or submit evidence) and the burden on the right exceeds those imposed by historical restrictions.[176] Courts upholding the provision, on the other hand, rely upon historical pretrial detention procedures and laws that restricted arms access by dangerous persons or required the posting of surety; these courts conclude that such historical practices are sufficiently analogous.[177] At times, this analysis veers into territory that appears to preserve a role for aspects of means-end scrutiny.[178]

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171. United States v. Laurent, 861 F. Supp. 2d 71, 104 (E.D.N.Y. 2011).

172. *Id.*; *see supra* Section II.A.1.

173. *See, e.g.*, United States v. Now, No. 22-CR-150, 2023 WL 2717517, at *9 (E.D. Wis. Mar. 15, 2023) ("Distinguishing between possessing and acquiring a firearm can be seen as an effort to narrowly tailor the statute."), *report and recommendation adopted*, No. 22-CR-150, 2023 WL 2710340 (E.D. Wis. Mar. 30, 2023).

174. Charles, *supra* note 91, at 127.

175. Jacob Charles, *The Most Disputed Federal Law Post*-Bruen, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (May 3, 2023), https://perma.cc/5LEM-MKS8.

176. *See, e.g.*, United States v. Quiroz, 629 F. Supp. 3d 511, 521 (W.D. Tex. 2022), *rev'd*, 125 F.4th 713 (5th Cir. 2025); *see also* United States v. McDaniel, No. 22-CR-0176, 2024 WL 3964339, at *5–7 (E.D. Wis. Aug. 28, 2024) (finding § 922(n) insufficiently tailored in its application to those indicted for felony offenses that are not inherently dangerous).

177. *See, e.g.*, *Quiroz*, 125 F.4th at 719; United States v. Gore, 118 F.4th 808, 815 (6th Cir. 2024); United States v. Rowson, 652 F. Supp. 3d 436, 465–72 (S.D.N.Y. 2023).

178. *See, e.g.*, United States v. Kelly, No. 3:22-CR-00037, 2022 WL 17336578, at *6 (M.D. Tenn. Nov. 16, 2022) (suggesting that *Bruen* does not "wholly forbid[] courts from engaging in . . . supplemental common sense reasoning—that, for

The more important point, however, is that judicial disagreement over § 922(n)'s post-*Bruen* constitutionality again shows how courts are applying THT in some cases to strike down even narrowly tailored regulations that likely meet strict scrutiny—including restrictions that are targeted in prohibiting only the receipt of new guns and do not broadly ban possession.

3. Serial Numbers

Since the Gun Control Act of 1968, all firearms manufactured in the United States have been required to include a serial number: a marking that enables law enforcement to trace a gun to its original purchaser.[179] Federal law prohibits possessing or receiving "any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered."[180]

Courts prior to *Bruen* universally ruled that the serial-number ban was constitutional.[181] In *United States v. Marzzarella*,[182] a seminal case of the initial post-*Heller-I* period often credited with introducing the two-part test, the Third Circuit held that the statute "protects the compelling interest of tracing firearms by discouraging the possession and use of firearms that are harder or impossible to trace . . . [and] is narrowly tailored."[183] While *Marzzarella* applied intermediate scrutiny to uphold the law, the court said in dicta that 18 U.S.C. § 922(k) passed muster under both intermediate *and* strict scrutiny.[184] The court found the law narrowly tailored to the compelling interest of firearm tracing because it "restricts possession only of weapons which have been made less susceptible to tracing."[185] As with § 922(g)(8), other courts in the post-*Heller-I* period relied on *Marzzarella* and its strict-scrutiny prediction to uphold the serial number law.[186]

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example, heavy restrictions are typically more problematic than light ones, temporary restrictions are typically less problematic than permanent ones, and so forth").

179. Gun Control Act of 1968, Pub. L. No. 90-618, § 923(i), 82 Stat. 1213, 1223.

180. 18 U.S.C. § 922(k).

181. United States v. Price (*Price I*), 635 F. Supp. 3d 455, 461 (S.D. W. Va. 2022), *rev'd*, 111 F.4th 392 (4th Cir. 2024), *cert. denied*, No. 24-5937, 2021 WL 951173 (Mar. 31, 2025).

182. 614 F.3d 85 (3d Cir. 2010).

183. *Id.* at 101.

184. *Id.* at 99 ("Although we apply intermediate scrutiny, we conclude that even if strict scrutiny were to apply to § 922(k), the statute still would pass muster.").

185. *Id.* at 100.

186. *E.g.*, United States v. Colon-Quiles, 859 F. Supp. 2d 229, 235 (D.P.R. 2012); United States v. Bacon, 884 F.3d 605, 612 n.3 (6th Cir. 2018).

In a post-*Bruen* challenge to this ban by a criminal defendant in *United States v. Price* (*Price I*),[187] a judge in the Southern District of West Virginia invalidated the law.[188] The judge first concluded that the law's possession ban implicates protected conduct and that the Supreme Court's exclusion of "dangerous and unusual" weapons from the Amendment's scope refers only to functional characteristics of a gun and not superficial markings like a serial number.[189] He then found that § 922(k) seeks to address "crime involving stolen firearms," a societal problem that has persisted since the Founding but that earlier governments did not address by requiring any kind of marking.[190] The court found no analogous historical laws and rejected efforts to categorize the ban as a "commercial regulation."[191] The judge in *Price I* pointedly observed that "the usefulness of serial numbers in solving gun crimes makes Section 922(k) desirable for our society"—but wrote that he was precluded from weighing such evidence under *Bruen*.[192] The government appealed the decision to the Fourth Circuit, where the en banc court reversed in a split decision (*Price II*).[193]

Price I was the first judicial opinion to suggest that § 922(k) might be unconstitutional and—despite the Fourth Circuit's subsequent reversal—holds important clues for gauging the strictness of THT in this initial post-*Bruen* period. *Marzzarella* was one of the most noteworthy circuit decisions employing the two-part test that Judge Kavanaugh argued against in *Heller II*, and it is fair to presume that Kavanaugh had read *Marzzarella* and was aware of that court's scrutiny-based assessment of § 922(k) when he wrote in *Heller II* that a historically focused test would permit more gun regulation than strict scrutiny. Thus, *Price I* represents an application of THT perhaps most clearly at odds with Kavanaugh's prediction. And the fact that two dissenting Fourth Circuit judges in

187. 635 F. Supp. 3d 455, 459 (S.D. W. Va. 2022), *rev'd*, 111 F.4th 392 (4th Cir. 2024), *cert. denied*, No. 24-5937, 2021 WL 951173 (Mar. 31, 2025).

188. *Id.* at 459, 467.

189. *Id.* at 459–61, 463–64.

190. *Id.* at 463.

191. *Id.* at 459.

192. *Id.* at 461. Some have argued that lower court decisions such as *Price I* are instances of lower court judges trolling the Supreme Court by applying *Bruen* in an absurdly rigorous manner. *See* Brannon P. Denning & Glenn H. Reynolds, *Retconning* Heller*: Five Takes on* New York Rifle & Pistol Association, Inc. v. Bruen, 65 WM. & MARY L. REV. 79, 124 (2023) (characterizing similar opinions as instances of "uncivil obedience" and "legally provocative because the result . . . likely strikes 'others as jarring or subversive at least in part because of its very attentiveness to law'").

193. United States v. Price (*Price II*), 111 F.4th 392, 408 (4th Cir. 2024), *cert. denied*, No. 24-5937, 2021 WL 951173 (Mar. 31, 2025).

Price II supported that result further indicates that a stricter version of THT has taken hold within segments of the federal judiciary.[194]

B. THT Has Invalidated Overinclusive Laws with Historical Pedigree.

My analysis so far indicates that THT has at times been applied as a more probing judicial inquiry than even strict scrutiny. A further indication that the test has been strict in practice is that courts continue to strike down laws that seem to have a better chance of surviving under a historical approach than under a means-end tailoring inquiry.[195] When governments historically regulated with a broad brush, some courts have nevertheless curtailed modern regulatory measures. This is the flip side of the prediction that laws meeting strict scrutiny should generally survive THT. If THT permits *more* gun regulation than strict scrutiny,[196] those additional regulations are most likely overinclusive (non-tailored) laws that nevertheless have historical pedigree.

1. Knife and Impact-Weapon Bans

Perhaps the most obvious location in which to start looking for historically-supported laws with means-end scrutiny deficiencies is regulation to address the threat posed by weapons that have been surpassed by firearms in terms of the ease and speed with which they can be used to inflict physical harm.[197] As Professor Eric Ruben

194. *See id.* at 422–26 (Gregory, J., dissenting); *id.* at 426–38 (Richardson, J., dissenting).

195. Interestingly, assault weapon bans could present a close question in this area. In *Heller II*, Judge Kavanaugh ultimately concluded that D.C.'s assault weapon ban was unconstitutional under his test because "[s]emi-automatic rifles . . . have not traditionally been banned and are in common use [today]." 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). He also would have found the law wanting under strict scrutiny as "D.C. cannot show a compelling interest in banning semi-automatic rifles because the necessary implication of the decision in *Heller* is that D.C. could not show a sufficiently compelling interest to justify its banning semi-automatic handguns." *Id.* at 1288. Four appellate courts have upheld similar laws under THT post-*Bruen*, for reasons not necessarily contrary to Kavanaugh's prediction. *See* Ocean State Tactical, LLC v. Rhode Island, 95 F.4th 38, 41 (1st Cir. 2024); Bianchi v. Brown, 111 F.4th 438, 473 (4th Cir. 2024); Bevis v. City of Naperville, 85 F.4th 1175, 1182 (7th Cir. 2023); Duncan v. Bonta, No. 23-55805, 2025 WL 867583, at *10 (9th Cir. Mar. 20, 2025). But the area remains in flux pending potential Supreme Court involvement, and these appellate decisions may not be representative because such laws only exist in certain circuits due to state-level political dynamics.

196. *Kavanaugh Confirmation Hearing*, *supra* note 24, at 474.

197. *See, e.g.*, PRIYA SATIA, EMPIRE OF GUNS: THE VIOLENT MAKING OF THE INDUSTRIAL REVOLUTION 229 (2018) ("The very nature of the slow, mechanical process for loading and triggering [a gun] made it a weapon of cool threat rather than hot-blooded violence."); RANDOLPH ROTH, AMERICAN HOMICIDE 294 (2009)

observes, "non-gun cases make up only a tiny fraction of Second Amendment litigation" despite the fact that the Second Amendment indisputably protects a wide variety of "arms" including knives, stun guns, nunchaku, batons, and so on.[198] This is because modern guns are far more lethal than knives or other non-firearm weapons.[199] Crimes such as robbery and armed assault are also more likely to be committed with guns today; thus, to the extent Americans seek weapons for self-defense, they are understandably likely to prefer firearms.[200]

The relatively low lethality of non-firearm weapons presents a challenge for modern governments seeking to regulate these weapons under tiered scrutiny because there will necessarily be less of a fit to public safety objectives than there is for a gun-specific law. For example, in 1995, an Ohio state appellate court struck down an Akron law restricting the possession of knives with a blade of two-and-a-half inches or more in length because the court found that the ban "clearly prohibit[ed] a substantial amount of inherently innocent activity . . . [and] had no rational connection to protecting the public from the violent use of knives."[201] So too with other non-firearm weapons such as nunchaku. A New York district court invalidated the state's nunchaku possession ban under the pre-*Bruen* two-step test after determining that the state "ha[d] offered virtually no evidence supporting a public safety rationale for a total ban (as opposed to lesser restrictions)."[202] And some scholars have argued that, "[b]ecause knives are less dangerous than handguns, which may legally be carried, any law that regulates the possession or carrying of knives . . . is indefensible under intermediate scrutiny."[203]

("Before the late 1840s and 1850s, adult relatives rarely killed one another with guns . . . .").

198. Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173, 192, 195 (2021).

199. David B. Kopel et al., *Knives and the Second Amendment*, 47 U. MICH. J.L. REFORM 167, 182–83 (2013) (stating that, as of 2010, firearms were used in 67.5% of homicides compared to only 13.1% for knives; citing a study showing that "firearm injuries were 5.5 times more likely to result in death than were knife injuries").

200. *Id.* at 182.

201. Akron v. Rasdan, 663 N.E.2d 947, 954 (Ohio Ct. App. 1995). The Supreme Court of Ohio struck the Akron knife law despite applying only rational basis review, in accordance with the view that the Ohio constitution's right-to-arms provision must only be "a reasonable exercise of the municipality's police power." Arnold v. City of Cleveland, 616 N.E.2d 163, 173 (Ohio 1993).

202. Maloney v. Singas, 351 F. Supp. 3d 222, 239 (E.D.N.Y. 2018). *But see* Teter v. Connors, 460 F. Supp. 3d 989, 1006 (D. Haw. 2020) ("An independent examination of the record shows reliable evidence that butterfly knives are closely associated with crime and popular with minors and gang members."), *rev'd and remanded sub nom.* Teter v. Lopez, 76 F.4th 938 (9th Cir. 2023).

203. Kopel et al., *supra* note 199, at 203.

By contrast, THT brings the long history of American knife and impact-weapon regulation to the fore. Following an infamous knife fight involving Colonel Jim Bowie in 1827 and ensuing societal panic over so-called "Bowie knives" and "Arkansas toothpicks," or long, bladed knives,[204] a number of Southern states restricted Bowie knives and similar weapons, including by banning sale and possession and enacting prohibitive personal property taxes.[205] Other states, territories, and municipalities banned or restricted the manufacture, sale, or public carry of billy clubs, or police batons, later in the nineteenth century.[206] One might naturally expect, given this historical evidence, that modern knife and impact-weapon restrictions are on surer footing under THT than they are under means-end scrutiny.

Yet courts have remained suspicious of bans on specific categories of weapons that were historically subject to state and local regulation. Considering a Second Amendment challenge to a California billy-club ban under THT, for example, a federal judge determined that evidence of historical regulation was too little, too late.[207] Because billy clubs existed and went mostly unregulated before the Civil War, the court said, California's modern law was not consistent with historical tradition.[208] A Ninth Circuit panel decision (since vacated as moot due to legislative amendment) similarly de-emphasized this aspect of the historical tradition while striking down Hawaii's butterfly knife ban.[209] The original panel found it important, for example, that "the butterfly knife is clearly more analogous to an ordinary pocketknife than to an Arkansas Toothpick or a bowie knife" that was historically regulated.[210] Courts seem determined to strike down non-gun restrictions perhaps not clearly tailored to public safety objectives, notwithstanding the rich historical tradition of

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204. David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEGIS. 223, 295 (2024).

205. *Id.* at 370, 372 (listing Georgia, Tennessee, Arkansas, Alabama, Florida, Mississippi, and North Carolina; observing that the Georgia ban was later held to violate the state constitution and other laws were later repealed or appeared to be targeted to restrict possession only by low-income individuals).

206. *See id.* at 358–59; *see also* Search Results for "billy," DUKE CTR. FOR FIREARMS L.: REPOSITORY OF HIST. GUN L. (2025), https://perma.cc/L7HY-APA4 (listing fifty state, municipal, and territorial billy-club restrictions enacted from 1790 to 1900).

207. Fouts v. Bonta, 718 F. Supp. 3d 1276, 1280–86 (S.D. Cal. 2024).

208. *Id.* at 1283–84.

209. Teter v. Lopez, 76 F.4th 938, 954 (9th Cir. 2023), *vacated on reh'g en banc*, 93 F.4th 1150 (9th Cir. 2024), and *vacated as moot*, 125 F.4th 1301 (9th Cir. 2025).

210. *Id.* at 953; *see also* Commonwealth v. Canjura, 240 N.E.3d 213, 220 (Mass. 2024) ("[T]he Commonwealth has not met its burden of demonstrating a historical tradition justifying the regulation of switchblade knives.").

knife and impact-weapon regulation—a history that would appear to require a broad view of regulatory power under THT.

2. Concealed Carry Bans

Justice Breyer observed in his *Heller I* dissent that the majority had endorsed the constitutionality of gun laws "whose constitutionality under a strict-scrutiny standard would be far from clear."[211] Presumably, these are also among the laws most likely to demonstrate whether THT is being applied in a manner more forgiving to the government than strict scrutiny: Have lower courts upheld these laws across the board, or have they narrowed the scope of permissible regulation in these areas? Breyer identified "prohibitions on concealed weapons" as one such category.[212] Up until the 1980s, many states banned the concealed carry of firearms outright.[213] Some of these laws dated from the early 1800s.[214] A number of state constitutional protections of the right to bear arms explicitly permitted state legislatures to regulate concealed carry or the manner of carrying weapons, and some of those provisions remain in force to this day.[215] In 1980, "more than a dozen states still banned concealed carry outright, and only a small handful generally allowed any qualified adult to carry a concealed weapon."[216]

As David Kopel has observed, "[i]n the nineteenth century, concealed carry was often considered outside the scope of the right to bear arms[, but t]oday, it is the most common way in which people exercise their right to bear arms."[217] State concealed carry bans were almost universally upheld against legal challenge,[218] and the Supreme Court itself has observed that "the majority of the 19th-century courts to consider the question held that prohibitions on

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211. *Heller I*, 554 U.S. 570, 688 (2008) (Breyer, J., dissenting).

212. *Id.*

213. Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581, 596 (2022).

214. *See, e.g.*, Act of 1813, ch. 89, 1813 Ky. Acts 100; *see also* Act of 1813, 1813 La. Acts 172.

215. *E.g.*, MONT. CONST. of 1889, art. II, § 13 ("The right of any person to keep or bear arms . . . shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.").

216. Charles, *supra* note 213, at 596.

217. David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 126 (2010).

218. *E.g.*, Aymette v. State, 21 Tenn. (2 Hum.) 154, 159 (1840) ("To hold that the Legislature could pass no law upon this subject by which to preserve the public peace, and protect . . . lives from being endangered by desperadoes with concealed arms, would be to pervert a great political right to the worst of purposes . . . .").

carrying concealed weapons were lawful under the Second Amendment or state analogues."[219]

Given this historical support, one might expect that courts applying THT to concealed carry restrictions have generally ruled in favor of the government. To the contrary, courts have recently held that various forms of strict concealed-carry regulation are unconstitutional. Most notably, the Supreme Court in *Bruen* struck down a requirement to show proper cause, or some special justification, to obtain a concealed-carry license.[220] And since *Bruen*, lower courts have continued to carve back concealed-carry licensing requirements in certain cases.[221] The explanation for why a legislature cannot impose strict concealed-carry qualification requirements but *can* prohibit concealed carry altogether is that concealed carry was banned historically only where open carry was permitted.[222] That said, this is not an entirely satisfying theory, and it seems likely that courts applying THT will be tempted to find ways to strike down concealed carry restrictions even if open carry remains legal in the relevant state.[223] Thus, very strict regulation of concealed carry appears to be the type of statutory restriction that passes muster under a historical approach but may fail to meet strict, or even intermediate, scrutiny. After all, a concealed carry ban is vastly overinclusive because only a very small number of concealed carriers will misuse guns, perhaps a lower percentage than the population at large.[224]

Lower court opinions from the pre-*Bruen* era largely confirm the view that the legal deficiency with a concealed carry ban is not its lack of historical support but rather its lack of tailoring. In a decision that

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219. *Heller I*, 554 U.S. 570, 626 (2008).

220. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022).

221. *See, e.g.*, Antonyuk v. Hochul, 639 F. Supp. 3d 232, 303 (N.D.N.Y. 2022) ("The 'good moral character' requirement is just a dressed-up version of the State's improper 'special need for self-protection' requirement."), *aff'd in part, vacated in part, remanded sub nom.* Antonyuk v. Chiumento, 89 F.4th 271 (2d Cir. 2023), *judgment vacated sub nom.* Antonyuk v. James, 144 S. Ct. 2709 (2024), *reinstated in part*, 120 F.4th 941 (2d Cir. 2024); *James*, 120 F.4th at 1004 (finding requirement that license applicant submit list of social media accounts to evaluating officer likely unconstitutional).

222. *See Bruen*, 142 S. Ct. at 2146 ("[C]oncealed-carry prohibitions were constitutional only if they did not similarly prohibit open carry.").

223. Only seven states currently prohibit open carry, *see Guns in Public—Open Carry*, GIFFORDS L. CTR. (2025), https://perma.cc/B9KP-KHVP, and Florida seems poised to permit the practice after declining to defend its ban in court, *see* Gary Fineout, *Florida Attorney General Skips Defending Law Banning Open Carry*, POLITICO (Sept. 23, 2024), https://perma.cc/VZ5N-YQFA.

224. *See* Brief of Amicus Curiae Crime Prevention Research Center in Support of Petitioner at 5–11, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

was subsequently upheld on different grounds by the D.C. Circuit,[225] a judge found D.C.'s requirement that concealed carry applicants demonstrate a reason to fear for their own safety failed to meet strict scrutiny.[226] Under the tailoring inquiry, the court determined that D.C. was required to show that limiting concealed carry in that way "achieves significant public safety gains and that those gains would not be achieved by a more inclusive licensing policy."[227] Because the strict D.C. concealed carry law indisputably prevented certain law-abiding citizens not likely to misuse guns from carrying concealed firearms, it was not the least-restrictive means of serving the government's objectives.[228] In other words, the law was supported by history but did not actually attempt to balance the interest in armed self-defense with potential public safety benefits.

When the Ohio Supreme Court upheld that state's concealed carry ban in 2003, a dissenting justice similarly noted that "[t]he regulation of concealed weapons falls within th[e] public-safety interest; however, a regulation may limit a fundamental right only as much as absolutely necessary to promote public safety."[229] That justice would have held that a complete ban on the right to concealed carry, even if open carry remained permissible, would be insufficiently tailored to the legislature's compelling interest because the law would prohibit those for whom concealed carry furthers a legitimate interest in self-defense, without potential adverse consequences, from carrying in that manner.[230] The majority, by contrast, emphasized the law's historical pedigree as mitigating its overinclusiveness.[231] In theory, the Supreme Court's Second Amendment jurisprudence would authorize a state to ban concealed carry entirely if open carry were permitted. Practically, however, it is difficult to imagine that a court would sanction such an outcome even under THT. Concealed carry is by far the preferred manner of carry in modern times,[232] and courts have continued to pare back restrictions on concealed carry under THT despite the historical pedigree of these restrictions.

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225. The circuit court applied a categorical rule, rather than any form of means-end scrutiny.

226. Grace v. District of Columbia, 187 F. Supp. 3d 124, 152 (D.D.C. 2016), *vacated and remanded sub nom.* Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017).

227. *Id.* at 148.

228. *Id.*

229. Klein v. Leis, 795 N.E.2d 633, 641 (Ohio 2003) (O'Connor, J., dissenting).

230. *Id.* at 640–41.

231. *Id.* at 637 (majority opinion) (observing that the ban was enacted in 1859 and not challenged until 1920).

232. Kopel, *supra* note 217, at 126.

3. Felon Possession Bans

In his *Heller I* dissent, Justice Breyer also identified "forfeiture by criminals of the Second Amendment right" as laws endorsed by the majority that would not necessarily survive heightened scrutiny.[233] Federal law[234] and laws in most states[235] prohibit individuals convicted of certain felony-level offenses from possessing firearms. States often permit felons to recover their firearm-possession rights once they are released from prison or after a certain amount of time has elapsed.[236] Federal law provides a process by which ATF might receive and evaluate restoration applications, but a lack of funding has rendered that program moot since 1992, and there is currently no way for a convicted felon to recover federal gun possession rights outside of a legal challenge or full restoration of all core civic rights at the state level.[237]

As courts observed prior to *Bruen*, a ban on gun possession by *all* convicted felons is not tailored to address the risks posed by felon gun misuse. Then-Judge Amy Coney Barrett argued that the provision is "wildly overinclusive" and noted that qualifying underlying offenses "include[] everything from . . . mail fraud, to selling pigs without a license in Massachusetts, redeeming large quantities of out-of-state bottle deposits in Michigan, and countless other state and federal offenses."[238] To be sure, courts generally upheld felon bans prior to *Bruen*, noting that "[i]ntermediate scrutiny tolerates laws that are somewhat overinclusive" and often relying on *Heller*'s explicit endorsement of such laws as presumptively lawful.[239] But some

233. *Heller I*, 554 U.S. 570, 681 (2008) (Breyer, J., dissenting).

234. 18 U.S.C. § 922(g)(1).

235. *See, e.g.*, N.C. GEN. STAT. § 14-415.1 (2011).

236. *See, e.g.*, TEX. PENAL CODE § 46.04(a)(1) (2021); S.D. CODIFIED LAWS § 22-14-15 (2005).

237. *See* 18 U.S.C. § 925(c); 27 C.F.R. § 478.144 (2023); *Is There a Way for a Prohibited Person to Restore Their Right to Receive or Possess Firearms and Ammunition?*, ATF (Aug. 21, 2019), https://perma.cc/YNQ9-HGM5. *But see* Withdrawing the Attorney General's Delegation of Authority, 90 Fed. Reg. 13,080, 13,083 (Mar. 20, 2025) (to be codified at 27 C.F.R. pt. 478) (transferring authority to implement a restoration program back to the DOJ to provide "a clean slate on which to build a new approach to implementing 18 U.S.C. 925(c)").

238. Kanter v. Barr, 919 F.3d 437, 466 (7th Cir. 2019) (Barrett, J., dissenting) (quoting Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 721 (2007)). Convicted felons are also among the most likely categories of people to be victims of violent crime and have a corresponding need for self-defense. *See, e.g.*, Wesley G. Jennings et al., *On the Overlap Between Victimization and Offending: A Review of the Literature*, 17 AGGRESSION & VIOLENT BEHAV. 16, 16–26 (2012).

239. United States v. Skoien, 587 F.3d 803, 815 (7th Cir. 2009), *aff'd en banc*, 614 F.3d 638 (7th Cir. 2010); *see also* United States v. Yancey, 621 F.3d 681, 685 (7th Cir. 2010) ("[M]ost felons are nonviolent, but someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and

courts did emphasize the lack of tailoring to grant as-applied challenges brought by non-violent felons. In one notable decision, the Third Circuit recognized the tailoring problem and held that the federal ban on felon gun possession failed even intermediate scrutiny when applied to individuals convicted of "isolated, decades-old, non-violent misdemeanors" under state law.[240] In his *Bruen* concurrence, Justice Kavanaugh reiterated his belief that such a law passes constitutional muster,[241] making it clear that he does not find sheer overinclusiveness to be fatal under THT.

After *Bruen*, one might expect the constitutionality of overinclusive group-based prohibitions such as felon bans to be even better established because tailoring is no longer explicitly part of the judicial inquiry. As the Eighth Circuit recently observed, "the historical understanding that legislatures have discretion to prohibit possession of firearms by a category of persons such as felons who pose an unacceptable risk of dangerousness may allow greater regulation than would an approach that employs means-end scrutiny with respect to each individual person who is regulated."[242] A number of courts pre-*Bruen* seemed to confirm that the strongest support for a felon possession ban *across the board* was historical, rather than scrutiny-based, and relied on historical evidence to conclude that tailoring deficiencies did not require rearmament in any instance.[243]

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violent gun use."); United States v. Williams, 616 F.3d 685, 693 (7th Cir. 2010) ("The fact that Williams was convicted of a violent felony defeats any claim he has that § 922(g)(1) is not substantially related to preventing him from committing further violence."); United States v. Loveland, No. 11-CR-13, 2011 WL 4857980, at *5 (W.D.N.C. Sept. 7, 2011) ("The Government has demonstrated that there is a reasonable fit between keeping guns out of the hand of convicted felons and the Government's substantial objective of preventing crime and protecting the safety and lives of its citizens."), *report and recommendation adopted*, 2011 WL 4857943 (W.D.N.C. Oct. 13, 2011). The laws were also upheld under even strict judicial scrutiny in those states that adopted strict scrutiny amendments, though these decisions may be subject to some criticism for conducting the tailoring analysis in an excessively lenient fashion. *See, e.g.*, State v. Merritt, 467 S.W.3d 808, 814 (Mo. 2015); Abigail E. Williams, *Missed the Mark: The Supreme Court of Missouri's Faulty Application of Strict Scrutiny to the Right to Bear Arms*, 82 MO. L. REV. 595, 612 (2017) ("[I]t is also true that both men and individuals aged fifteen to twenty-four are, in general, more likely than the general population to commit violent crimes. But, this does not justify restricting these classes' right to bear arms, especially when the restriction is evaluated under strict scrutiny.").

240. Binderup v. Att'y Gen., 836 F.3d 336, 356 (3d Cir. 2016).

241. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162 (2022) (Kavanaugh, J., concurring) (reproducing *Heller I*'s characterization of felon possession bans as a "presumptively lawful regulatory measure[]").

242. United States v. Jackson, 110 F.4th 1120, 1129 (8th Cir. 2024).

243. *E.g.*, United States v. Chovan, 735 F.3d 1127, 1145 (9th Cir. 2013) (Bea, J., concurring) ("[F]elon disqualification from the scope of the Second Amendment makes sense from an historical perspective."); United States v. Vongxay, 594 F.3d

Yet courts have struggled to apply THT in a manner that parts ways, once and for all, with judicial analysis of how tailored a modern law is to its stated objective. Since *Bruen*, courts have generally treated felon bans in the same manner as they did before that case was decided: rejecting most, if not all, facial challenges while granting as-applied challenges by non-violent felons in certain instances.[244] This is seemingly contrary to initial predictions about THT's relative strictness. THT provides less opportunity for explicit consideration of legislative tailoring or the types of modern judgments about the severity of past criminal conduct that seem to underlie many decisions vindicating non-violent felons' challenges.[245] Yet courts

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1111, 1118 (9th Cir. 2010) ("Finally, we observe that most scholars of the Second Amendment agree that the right to bear arms was 'inextricably . . . tied to' the concept of a 'virtuous citizen[ry]' that would protect society through 'defensive use of arms against criminals, oppressive officials, and foreign enemies alike,' and that 'the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals) . . . .' We recognize, however, that the historical question has not been definitively resolved." (alterations in original) (citations omitted) (quoting Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 146 (1986))); United States v. Emerson, 270 F.3d 203, 226 n.21 (5th Cir. 2001) (speculating that felon possession bans are constitutional due to their historical pedigree).

244. *See, e.g.*, Range v. Att'y Gen., 69 F.4th 96, 106 (3d Cir. 2023); United States v. Bullock, 679 F. Supp. 3d 501, 537 (S.D. Miss. 2023), *rev'd*, No. 23-60408, 2024 WL 4879467 (5th Cir. Dec. 12, 2024); *cf.* United States v. Williams, 113 F.4th 637, 663 (6th Cir. 2024) ("[D]istrict courts should make fact-specific dangerousness determinations after taking account of the unique circumstances of the individual, including details of his specific conviction.").

245. *See, e.g.*, *Range*, 69 F.4th at 106 ("[T]he Government has not shown that our Republic has a longstanding history and tradition of depriving *people like Range* of their firearms . . . ." (emphasis added)). It is possible, as Justice Barrett has argued, that the violent/non-violent distinction is itself drawn from history. *See* Kanter v. Barr, 919 F.3d 437, 464–65 (7th Cir. 2019) (Barrett, J., dissenting). However, the historical lack of any specific laws banning felon gun possession suggest that the history may not directly support an over- and under-inclusivity analysis. *See, e.g.*, C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 708 (2009) ("Though recognizing the hazard of trying to prove a negative, one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I."). There is also reason to believe that Judge Kavanaugh was specifically thinking about felon possession bans—and suggesting that such laws were constitutional in all applications—when he made his prediction that THT would provide more flexibility than strict scrutiny in some cases. *See Heller II*, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[G]overnments appear to have *more* flexibility and power to impose gun regulations under [THT] than they would under strict scrutiny. After all, history and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right, as the Court said in *Heller*.").

have continued to suggest that relief is warranted in some such cases after *Bruen*.[246]

III. THT THROUGH THE LENS OF TIERED SCRUTINY

A. Why the Disconnect Between Theory and Practice?

Part II shows that THT as applied has at times been more demanding of the government than even strict scrutiny.[247] On one hand, courts have invalidated certain gun regulations that most agreed prior to *Bruen* would satisfy strict scrutiny due to narrow tailoring to a compelling government interest. On the other hand, courts have remained skeptical of overinclusive laws that seem to be on surer footing historically.

What accounts for the discrepancy between how THT has been applied and how some of its proponents—namely Justice Kavanaugh—predicted it would be applied? Here, I set forth two possible explanations for the discrepancy: (1) the test was always intended as a regulation-fatal standard but was presented differently to make it more palatable, and (2) the test has proven indeterminate in practice, allowing certain judges to apply it in an exceedingly strict manner. I ultimately argue that *Rahimi II* suggests some initial THT case outcomes were an anomaly in which the test became unmoored from its intended level of strictness. *Rahimi II* represents the first step toward returning the test to the place it was originally intended to occupy in the tiered-scrutiny ranking system, and the decision is best viewed as maintaining a background role for means-end scrutiny in terms of calibrating case outcomes. In both the Second Amendment and other areas of law, moreover, judges applying THT are likely to continue to look to means-end scrutiny as a way of ensuring that case outcomes are publicly intelligible and align with normative preferences.

1. Politics as Usual

First, it might be that Justice Kavanaugh's prediction, and his affirmation of that prediction in public statements after *Heller II* and during his elevation to the Supreme Court, obscured the test's true nature. Perhaps these statements were an effort to make his test seem more palatable to those concerned that it would strike down any number of well-established gun regulations—just as he originally

246. *See, e.g.*, United States v. Duarte, 101 F.4th 657, 691 (9th Cir.) (granting as-applied challenge while endorsing policy rationale for felon bans), *vacated en banc*, 108 F.4th 786 (9th Cir. 2024); *Williams*, 113 F.4th at 660 (endorsing a case-by-case "dangerousness determination [that is] fact-specific, depending on the unique circumstances of the individual defendant").

247. It is important to reemphasize here that the analysis in Part II is qualitative, rather than empirical, and focused only on certain types of Second Amendment challenges.

intended. The idea is that framing THT as only a modest departure from intermediate scrutiny and a small step on the well-worn tiers in terms of case outcome might normalize the approach, even though it was actually intended as a radical departure in favor of gun rights.

This line of argument goes back to Kavanaugh's contentious 2018 Supreme Court confirmation hearings,[248] when he was asked repeatedly about his *Heller II* dissent.[249] Kavanaugh emphasized his belief that THT was designed to allow not only the laws explicitly endorsed in *Heller I* but also other forms of gun regulation,[250] and he doubled down on his *Heller II* prediction by noting that he had "said specifically in [his] opinion that the history and tradition test may allow some additional regulations [compared to a] strict scrutiny test."[251] But commentators at the time were not convinced, and many continued to argue after *Bruen* that Kavanaugh's brief concurrence in the case[252] ignored the potentially devastating real-world consequences of the Court adopting THT.[253] In this telling, THT was always known and intended to be a much stricter test than Kavanaugh publicly predicted it would be.

The underlying theme of these arguments is the idea that Supreme Court Justices are really "doing politics" more than they are seeking to correctly apply a certain underlying theory of judging.[254]

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248. *See, e.g.*, Max Boot, *Let's Be Honest About Why Kavanaugh Was Chosen*, WASH. POST, Sept. 2, 2018 (arguing that "few people, including the president himself, are interested in judicial philosophy. They're interested in political outcomes."); Hannah Shearer, *Brett Kavanaugh's Extreme Beliefs on Gun Control Ignore the Concerns of Most Americans*, NBC NEWS (Sept. 4, 2018), https://perma.cc/JW2U-Q2J2 ("Kavanaugh's consideration of only the Second Amendment's text and history, ignoring all public safety justifications, is straight out of the gun lobby's playbook.").

249. *See Kavanaugh Confirmation Hearing*, *supra* note 24, at 124–27 (statement of Sen. Feinstein); *id.* at 248–49 (statement of Sen. Blumenthal); *id.* at 474–75 (statement of Sen. Durbin).

250. *Id.* at 249.

251. *Id.* at 474.

252. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2161–62 (2022) (Kavanaugh, J., concurring).

253. *See, e.g.*, Amy Davidson Sorkin, *The Supreme Court's Reckless Ruling on Guns*, NEW YORKER (June 24, 2022), https://www.newyorker.com/news/daily-comment/the-supreme-courts-reckless-ruling-on-guns (arguing that Kavanaugh's concurrence was "disingenuous" and that he "undoubtedly knows[] the effect of the decision—which he joined in full, without reservation—will go well beyond concealed carry").

254. *See, e.g.*, Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 46 (2005) ("The evidence of the influence of policy judgments, and hence of politics, on constitutional adjudication in the Supreme Court lies everywhere at hand."); Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 804 (2023) (arguing that "the Roberts Court's originalism focuses narrowly on certain founding moments while ignoring

As Professor Reva Siegel argues with regard to *Heller I*, "[t]wentieth-century [political] conflict helped tutor intuitions about the Second Amendment's core and periphery."[255] Thus, Siegel contends, *Heller I*'s originalist holding was rooted in conceptions of the Second Amendment right that were "populist and popular, but clearly partisan," and the decision "illustrates how constitutional politics can guide and discipline judicial review."[256] President Trump's statements surrounding the Supreme Court confirmations of Justices Kavanaugh, Gorsuch, and Barrett potentially lend further credence to this view, as do studies indicating the Court has grown increasingly partisan in the past ten to fifteen years since *Heller I* was decided.[257] Trump has consistently vowed to appoint Justices who will uphold and protect a certain vision of the Second Amendment, suggesting a results-oriented jurisprudence without the nuance of Kavanaugh's prediction.[258] And, generally speaking, Supreme Court voting patterns—and, perhaps, the choice to adopt certain legal tests—increasingly align with outcomes that might be predicted merely by the ideology of the Justice's appointing president.[259]

Moreover, there may be an innate association between THT in the Second Amendment context and the Court's use of historically-inflected methodologies in other areas of law associated with the culture wars. For example, the Court's test for whether a new, unenumerated right is protected under substantive due process asks whether that right is "objectively, deeply rooted in this Nation's history and tradition."[260] Justice Kavanaugh has professed his

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the histories that undermine—or challenge entirely—a particular vision of constitutional rights").

255. Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 239 (2008).

256. *Id.* at 241–43.

257. *See, e.g.*, Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 267 (2019) ("Today, each justice's ideology is better defined and aligned with the political party of the appointing president. Justices are more likely to be ideologically in line with the interests of their nominating president's party and less likely to drift ideologically . . . .").

258. *See, e.g.*, Remarks on the Nomination of Amy Coney Barrett to be a United States Supreme Court Associate Justice, 2020 DAILY COMP. PRES. DOC. 728 (Sept. 26, 2020), https://perma.cc/6R7T-HLYK ("Rulings that the Supreme Court will issue in the coming years will decide the survival of our Second Amendment . . . ."); Lesley Stahl, *President-Elect Trump Speaks to a Divided Country*, CBS NEWS (Nov. 13, 2016), https://perma.cc/8R24-SJAG ("[I]n terms of the whole gun situation . . . they're going to be very pro-Second Amendment.").

259. *See* Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 79 (2020) ("[T]he Court's recent new tools promoting partisanship in these election law cases stand to exacerbate the problem."); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 153 (2019) (referencing "the seemingly undeniable fact that the Court will be more polarized along *party* lines than at any point in recent history").

260. Washington v. Glucksberg, 521 U.S. 702, 703 (1997).

admiration for the *Glucksberg* test as a means of "limiting the Court's role in the realm of social policy"—an argument similar to those he has made in favor of THT in the Second Amendment context.[261] And, in recent years, the Court has applied this test to reach outcomes in contentious cases that many argue are really driven by ideology. The foremost example is the Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*[262] (overturning *Roe v. Wade*[263]), in which a conservative majority found that there was no substantive due process right to obtain an abortion because, "[u]ntil the latter part of the 20th century, such a right was entirely unknown in American law."[264] Here, the historical test has produced outcomes that are *less* rights-protective and countenance greater government intrusion into the private sphere. But there may be an intuitive fear that historical approaches are always likely to lead to outcomes that align with the conservative ideological checklist. Leading legal commentators have sharply criticized the *Dobbs* decision as harnessing history to advance a nakedly partisan agenda[265]—and that same claim might apply in the Second Amendment context.

The perspective has some merit, but it cannot fully explain the deviation in practice from Kavanaugh's prediction. For one, the result in *Rahimi II* and the fact that eight Justices joined the majority in that case suggest they believe that at least some of the early post-*Bruen* cases striking down strict-scrutiny-compliant laws were wrongly decided under THT. The more THT is brought back into line with initial predictions, the less plausible it is to say the approach is simply a regulation-fatal test in disguise. Kavanaugh remains a key swing vote in Second Amendment cases,[266] and his opinions do not indicate any intent to walk back his 2011 prediction about the relative flexibility of THT. Until or unless Kavanaugh supports a THT application clearly at odds with his 2011 prediction, it seems more productive to take him at his word.

It is also dubious that THT was always intended to strike down a larger swath of modern gun regulations than a strict-scrutiny approach. If so, why did the gun-rights movement not embrace THT sooner? If THT were as, or more, demanding than strict scrutiny, then

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261. BRETT M. KAVANAUGH, FROM THE BENCH: THE CONSTITUTIONAL STATESMANSHIP OF CHIEF JUSTICE WILLIAM REHNQUIST 13 (2017), https://perma.cc/3YGV-CU2R.

262. 142 S. Ct. 2228 (2022).

263. 410 U.S. 113 (1973).

264. *Dobbs*, 142 S. Ct. at 2235.

265. *See, e.g.*, Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 806 (2024) ("*Dobbs* may represent an intermediate step that aims to shift political dynamics and desensitize the populace to the deprivation of access to legal abortion.").

266. Kelsey Reichmann, *Kavanaugh Makes a Play for the High Court's Swing Vote*, COURTHOUSE NEWS SERV. (July 7, 2022), https://perma.cc/7KX2-6B83.

plaintiffs challenging gun laws would presumably have argued vociferously for judges to adopt the test and states would have amended their own constitutions to adopt historically-focused approaches before the Supreme Court did so. Instead, nearly up to the moment *Bruen* was decided, the gun-rights movement consistently argued that strict scrutiny or textual-per-se invalidity were better approaches.[267] This may have been a strategic decision. It is possible that plaintiffs in gun cases asked for strict scrutiny because they thought it best to work within the accepted two-part test endorsed by almost every federal court of appeals before *Bruen*. However, the lack of enthusiasm for THT in the *Bruen* briefing—well after THT rose to prominence across the federal judiciary—suggests otherwise.[268]

Gun-rights advocates have continued to push strict scrutiny even in the post-*Bruen* world and even after the initial wave of strict THT applications in federal court. Oklahoma—a state often at the vanguard of gun deregulation—recently passed a resolution for a ballot initiative to limit permissible regulation of firearms to "narrowly tailored time, place, and manner regulations . . . [that] serve a compelling state interest."[269] The measure, which passed with a large majority in the state house of representatives but failed to make it through the state senate, was characterized as "strengthen[ing] gun rights" and "add[ing] more specific, protective language to Oklahoma's constitution" by demanding strict scrutiny for all state-analogue challenges.[270] A similar strict-scrutiny amendment was introduced and debated in the Kansas state house of representatives in January 2024 but ultimately died in committee before receiving a vote.[271] Supporters of the proposed amendment, including Kansas attorney general Kris Kobach, argued—in line with

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267. Iowa became the fourth state (after Louisiana, Alabama, and Missouri) to enact a strict-scrutiny provision via constitutional ballot initiative in the fall of 2022. *See* Michaela Ramm, *Iowans Approve Right 'to Keep and Bear Arms' in State's Constitution*, DES MOINES REG. (Nov. 8, 2022), https://perma.cc/E2Y6-3DQ4. The decision to continue to push for such amendments even as *Bruen* embraced text, history, and tradition is a clear signal that gun-rights proponents believe strict scrutiny will place a higher burden on the government to justify gun regulations than THT. *See, e.g.*, Stephen Gruber-Miller, *Iowans Are Voting on a Gun Rights Amendment This Election. Here's What You Need to Know*, DES MOINES REG. (Sept. 1, 2022), https://perma.cc/D67E-Q8BB (quoting an advocate for the Iowa proposal as saying that "courts in Second Amendment cases have not been protective enough of the right to keep and bear arms over the years").

268. *See* sources cited *supra* note 89 and accompanying text.

269. H.R.J. Res. No. 1034, 59th Leg., 2d Sess. (Okla. 2024).

270. Brodie Myers, *Oklahoma Lawmakers Attempt to Strengthen Gun Rights*, 2NEWS OKLA. (Mar. 11, 2024), https://www.kjrh.com/news/local-news/oklahoma-lawmakers-attempt-to-strengthen-gun-rights.

271. H.R. Con. Res. No. 5020 (Kan. 2024) ("Any restriction of [the right to keep and bear arms] shall be subject to the strict scrutiny standard.").

how some courts have applied THT since *Bruen* was decided—that the Supreme Court's approach "elevated the Second Amendment above other constitutional rights by holding that the typical balancing test in which governmental interests are weighed against the asserted right [does not] apply" and instead made "[a]ny law restricting the right to keep and bear arms . . . presumptively unconstitutional."[272] Nevertheless, Kobach asserted, strict scrutiny was necessary at the state level to "complement" THT because, in future challenges to Kansas gun laws under the proposed amendment, a court would have to apply both tests.[273] The NRA filed a letter in support of the amendment, referring to strict scrutiny as "the highest standard of judicial review, or test, used by courts when the constitutionality of laws, regulations, or other governmental policies is challenged."[274]

In November 2024, the Iowa Supreme Court applied that state's constitutional strict-scrutiny requirement for gun cases for the first time and found that the state's procedures for restoring firearm rights to those previously committed to an institute due to mental illness were "narrowly tailored to serve a compelling state interest in preventing gun violence and suicides."[275] The separate writings in that case underscore the confusion that this Article seeks to address. While the majority emphasized that a strict-scrutiny requirement does not eliminate the generally-accepted view that certain types of gun restrictions are valid, it also noted that the Supreme Court's movement away from tiered scrutiny limited the persuasive value of decisions applying THT.[276] A dissenting justice, by contrast, argued that the majority failed to apply a sufficient level of scrutiny and use a stricter test than THT, as the Iowa constitution requires.[277] Such disputes lend further credence to the view that strict scrutiny is the higher bar for gun regulation and the approach that more expansively protects gun rights, as both the majority and dissent in the Iowa case emphasize.[278] THT, then, is unlikely to be simply a regulation-fatal test in disguise, adopted purely for partisan reasons. Had the

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272. *See Testimony of Att'y Gen. Kris Kobach*, 2024 Leg., 1st Sess. (Kan. 2024) (statement of Kris Kobach, Att'y Gen. of Kan., H. Comm. of HCR 5020).

273. *Id.*

274. *See Testimony of Travis Couture-Lovelady*, 2024 Leg., 1st Sess. (Kan. 2024) (statement of Travis Couture-Lovelady, State Dir., NRA-ILA, H. Comm. of HCR 5020), https://perma.cc/429M-LXBM.

275. *In re* N.S., 13 N.W.3d 811, 833 (Iowa 2024).

276. *Id.* at 828.

277. *Id.* at 842 (McDermott, J., dissenting).

278. *See id.* at 828 (majority opinion) (referring to strict scrutiny as the "most rigorous and exacting standard of constitutional review" (quoting Dotson v. Kander, 464 S.W.3d 190, 197 (Mo. 2015))); *id.* at 838 (McDermott, J., dissenting) (referring to strict scrutiny as "the most exacting standard of constitutional review").

Supreme Court been inclined to move in that direction, it should have preferred strict scrutiny.

2. Doctrinal Drift

Another possibility is that THT was not necessarily intended as an overly-strict legal test, but that it has proven indeterminate in that it allows judges to graft their own preferences onto the test. Under this telling, the judges applying THT similarly to or more strictly than strict scrutiny are the judges with the most pro-gun views—who are now empowered by the test's inherent malleability to reach such outcomes or who earnestly believe that the test does require them to reach those outcomes, even if it was not initially intended as a strict or demanding standard or one that would countenance judicial discretion.

Several aspects of the historical test may make it inherently indeterminate, or capable of producing outcomes that deviate from its expected relative strictness. First, there is uncertainty regarding the threshold question of what types of historical evidence courts may even consider in the first instance. For example, should courts look primarily to evidence around the time of the Founding or the Reconstruction Era, or consider all evidence between those two periods?[279] And may courts consider laws enacted by territorial governments[280] or private, non-governmental entities?[281] Second, there is substantial debate over the proper level of generality to use when consulting historical evidence—a persistent frustration with historical approaches that is exacerbated when consistency with historical tradition becomes the sole test for constitutionality.[282] At the second step of *Bruen*, the level of generality at which a judge views the "principle" extracted from historical regulations is often outcome-determinative. Third, courts have taken different approaches to

279. *Compare* Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1322–24 (11th Cir. 2023) ("Historical sources from the Reconstruction Era are more probative of the Second Amendment's scope than those from the Founding Era."), *aff'd en banc*, 72 F.4th 1346 (11th Cir. 2025), *with* Worth v. Jacobson, 108 F.4th 677, 692 (8th Cir. 2024) ("*Bruen* strongly suggests that we should prioritize Founding-era history."). *See also Rahimi II*, 144 S. Ct. 1889, 1898 n.1 (2024) (declining to decide the time-period issue).

280. *See, e.g.*, Willinger, *supra* note 91, at 25.

281. *See, e.g.*, Hochman, *supra* note 94, at 1684.

282. *See, e.g.*, Blocher & Ruben, *supra* note 18, at 160 (broadening the level of generality "can alter the risk of anachronism but can also be outcome-determinative"); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2181 (2022) (Breyer, J., dissenting) ("Even seemingly straightforward historical restrictions on firearm use may prove surprisingly difficult to apply to modern circumstances."); Michael H. v. Gerald D., 491 U.S. 110, 132 (1989) (O'Connor, J., concurring) ("On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available.").

historical fact-finding—in some cases conducting their own historical research, and in others relying on party presentation even while noting that the parties may not have compiled a full record.[283] A judge might essentially pre-determine the outcome in the case through his or her decision on how heavily to rely on party presentation. This is by no means an exhaustive list, and other scholarship has discussed these issues and others at length.[284]

Due to this menu of judge-empowering choices, there is early empirical support for the notion that—contrary to the views of a number of sitting Justices[285]—THT in fact exacerbates the problem of judicial discretion. For example, one study found that post-*Bruen* results are generally consistent with a growing alignment between case outcome and ideology in Second Amendment cases that began prior to *Bruen*.[286] In federal district court cases post-*Bruen*, "[a] 31-percentage-point gap separated Republican and Democratic court appointees across combined civil and criminal challenges," with the Republican-appointed judges more likely to grant relief.[287] Another group of scholars is even more direct in arguing that, by adopting THT, the Court "left sufficient discretion to lower court judges such that the Democratic judges were able to uphold gun rights less often while Republicans were able to champion gun rights."[288] These authors assert that *Bruen* has amplified judicial discretion and identify a "surge of pro-gun-rights voting among the Trump appointees" that might be due to "auditioning" for higher-level positions within the federal judiciary.[289]

Under this view, THT was in fact intended to fall somewhere between intermediate and strict scrutiny, but certain judges have applied the test more strictly in practice because it continues to allow for a substantial degree of judicial discretion.[290] One possible

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283. *See, e.g.*, Dru Stevenson, *Is It Unethical for Judges to Conduct Independent Historical Research?*, DUKE CTR. FOR FIREARMS L. (Jan. 25, 2023), https://perma.cc/4RPB-TFBA; *Bruen*, 142 S. Ct. at 2130 n.6 ("Courts are thus entitled to decide a case based on the historical record compiled by the parties.").

284. *See, e.g.*, Blocher & Ruben, *supra* note 18; Charles, *supra* note 91.

285. *E.g.*, *Rahimi II*, 144 S. Ct. 1889, 1912 (2024) (Kavanaugh, J., concurring) ("History is far less subjective than policy. And reliance on history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people.").

286. Ruben et al., *supra* note 108, at 43–46.

287. *Id.* at 44.

288. Brown et al., *supra* note 118, at 101.

289. *Id.* at 104–05.

290. Judges may have been especially likely to do so in the early days post-*Bruen*, when judicial uncertainty about the test was at its height. For example, after initial district court decisions on the felony-indictment ban discussed in Section II.A.2 split somewhat evenly, courts then began to uphold the law almost unanimously. As of January 9, 2023, four district courts had invalidated the law under THT while two had upheld it. From January 9, 2023 through May 1, 2023,

objection is that the judges applying *Bruen* in such a strict manner do not all come from one side of the political spectrum. To be sure, some noted liberal judges have issued decisions applying *Bruen* in an expansive manner[291]—but those judges might be characterized as engaging in "uncivil obedience" to draw attention to what they view as problems with the test.[292] Overall, however, the partisan and even presidential-appointment breakdown is striking: For example, "Trump judges are getting close to casting 50 percent of their votes in favor of gun rights, when the average for other Republicans is 28 percent."[293] It seems, then, that THT's indeterminacy and the outstanding doctrinal questions surrounding the test at least temporarily authorized judges with pro-gun views to drift toward applying the test in a near-regulation-fatal manner in some cases.[294]

B. Course Correction

1. Rahimi *and the Path Forward*

The Court's decision in *Rahimi II* arguably ushers in a corrective process of ensuring that THT case outcomes fall roughly between intermediate and strict scrutiny rather than to the far-right end of the strictness spectrum. As Professors Randall and Charles Kelso have described, "[i]f a prior case is perceived to be 'out-of-sync' with related law, judges are more likely to overrule [or narrow] it."[295] For example, the Court's 1995 decision to overrule its earlier holding in

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eight courts ruled on challenges to the law and all of those courts upheld it against Second Amendment challenge. *See* Charles, *supra* note 175.

291. *See, e.g.*, United States v. Benito, 739 F. Supp. 3d 486, 496 (N.D. Miss. 2024) (invalidating federal ban on gun possession by unauthorized immigrants because the government did "not demonstrate[], at least in Mr. Benito's case, that immigrant disarmament is a principle consistent with American history and tradition at the founding"); United States v. Bullock, 679 F. Supp. 3d 501, 537 (S.D. Miss. 2023) (granting motion to dismiss indictment for felon-in-possession charge based on underlying violent felonies), *rev'd*, No. 23-60408, 2024 WL 4879467 (5th Cir. Dec. 12, 2024).

292. Denning & Reynolds, *supra* note 192, at 110.

293. Brown et al., *supra* note 118, at 103.

294. For example, three out of the four district court decisions striking down the felony indictment gun receipt ban addressed in Section II.A.2 were issued by judges appointed by Donald Trump, and two out of the three Fifth Circuit panel members in *Rahimi I* were similarly Trump appointees. *See* United States v. Quiroz, 629 F. Supp. 3d 511 (W.D. Tex. 2022), *rev'd*, 125 F.4th 713 (5th Cir. 2025); United States v. Stambaugh, 641 F. Supp. 3d 1185 (W.D. Okla. 2022); United States v. Hicks, 649 F. Supp. 3d 357 (W.D. Tex. 2023) (decided by Trump-appointed judges); *see also Rahimi I*, 61 F.4th 443 (5th Cir. 2023) (decided by Trump-appointed judges Cory T. Wilson and James C. Ho, along with Reagan-appointed judge Edith H. Jones), *rev'd*, 144 S. Ct. 1889 (2024).

295. R. Randall Kelso & Charles D. Kelso, *How the Supreme Court Is Dealing with Precedents in Constitutional Cases*, 62 BROOK. L. REV. 973, 1001 (1996).

Metro Broadcasting, Inc. v. FCC[296] that intermediate scrutiny applied to challenges to "benign" racial classifications[297] was based largely on concerns that *Metro Broadcasting* had "turned its back on *Croson*'s explanation of why strict scrutiny of all governmental racial classifications is essential."[298] The Court thus concluded in *Adarand Constructors, Inc. v. Pena*[299] that *Metro Broadcasting* had articulated a rule that placed an improperly low burden on the government to justify certain race-based restrictions and threw off the balance of tiers of scrutiny in the equal protection context.[300]

Rahimi II appears to perform a similar process of adjusting lower-court implementation by ensuring that case outcomes align with intended placement among existing methodologies in terms of strictness. In other words, the Court's decision might be viewed in part as appreciating what Judge Kavanaugh wrote in 2011—namely, the idea that gun regulations that pass muster under strict scrutiny should rarely, if ever, be struck down under THT. The Court did this by construing historical evidence at a slightly higher level of generality to avoid a result that would throw off what are perceived to be the correct levels of strictness.[301] Justice Thomas's dissent, by contrast, espoused the stricter view of THT that has prevailed among some lower court judges in the initial post-*Bruen* period and might invalidate a host of other gun laws that likely meet strict scrutiny.[302]

Justice Sotomayor's *Rahimi II* concurrence emphasized that "the constitutionality of § 922(g)(8) is even more readily apparent" under *any* form of tiered scrutiny.[303] Sotomayor was relatively clear about her view that the Court should overrule *Bruen* in a future case and return to the two-step test that prevailed in the lower courts prior to that decision,[304] and there is little doubt that the Court's liberal wing would be on board with that approach. But a more nuanced reading of the Sotomayor concurrence is that even when tiers of scrutiny are gone, they are not *really* gone. In his dissenting opinion, Justice

296. 497 U.S. 547 (1990).

297. *Id.* at 563–65.

298. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) (discussing City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)).

299. 515 U.S. 200 (1995).

300. *Id.* at 227; Kelso & Kelso, *supra* note 295, at 1002–03. Similarly, in its Takings Clause jurisprudence, the Court began in the late 1980s and early 1990s, "by incremental steps, to restore a higher level of review" to an area where prior decisions had been very deferential to the government. *Id.* at 1005–06.

301. *Compare Rahimi II*, 144 S. Ct. 1889, 1902 (2024) ("Our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others."), *with id.* at 1941 (Thomas, J., dissenting) ("[T]he historical evidence shows that those laws [relied upon by the majority] are worlds—not degrees—apart from § 922(g)(8).").

302. *See id.* at 1930–32 (Thomas, J., dissenting).

303. *Id.* at 1906 (Sotomayor, J., concurring).

304. *See id.* at 1904–06.

Thomas criticized the Justices in the majority for "mixing and matching historical laws—relying on one law's burden and another law's justification—[and thus] defeat[ing] the purpose of a historical inquiry altogether."[305] Thomas's point seems to be that this incarnation of THT is indistinguishable from tiered scrutiny because it provides a seemingly endless set of options for legislative justifications and burdens rather than actually limiting modern legislatures to only those justification-burden combinations that existed historically.[306] The outcome in *Rahimi II*, then, indicates that the tiers of scrutiny and legislative tailoring will continue to play some role in terms of calibrating case outcomes, to Thomas's chagrin.[307] Because § 922(g)(8) is narrowly tailored to a compelling interest, as courts recognized pre-*Bruen*, applying THT to strike down the law would throw the hierarchy of judge-made tests—of which THT is one—into chaos.

2. A Continuing Role for Scrutiny-Based Approaches

There are at least two important conclusions to draw from viewing *Rahimi II* through the lens of tiered scrutiny. *First*, because of decisions like then-Judge Kavanaugh's *Heller II* dissent that use tiered scrutiny as a map to explain why approaches based on text, history, and tradition would not unduly disrupt the status quo, it is not quite so easy as some argue to simply jettison the tiers.[308] Even if the Court *officially* does so—as a majority of the Justices held in *Bruen*—the tiers of scrutiny will continue to impact constitutional jurisprudence behind the scenes for quite some time. Judges,

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305. *Id.* at 1944 (Thomas, J., dissenting). Or, as Justice Jackson put it during oral argument, "what's the point of going to the Founding Era . . . if we're still applying modern sensibilities[?]" Transcript of Oral Argument at 18–19, United States v. Rahimi, 143 S. Ct. 2688 (2023) (No. 22-915).

306. Thank you to Luke Morgan for discussions that helped clarify this possibility.

307. Alternatively, Justice Sotomayor's reference to strict scrutiny could mean that the Court will always consider policy judgments in some form, even when applying non-scrutiny-based methodologies. To the extent the policy judgment involves some form of tailoring analysis, however, the outcome in terms of calibrating strictness is likely the same.

308. *See, e.g.*, J. Joel Alicea, Bruen *Was Right*, 174 U. PA. L. REV. (forthcoming 2025) (manuscript at 68), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5122492 ("The alternative future is one in which *Bruen* marks the end of one era of constitutional law and the advent of another, one in which history-based methodologies increasingly displace those created before the rise of modern originalism."); Alicea & Ohlendorf, *supra* note 104, at 85 (arguing that the Court should simply "eliminat[e] the scrutiny tests from constitutional jurisprudence for good"); William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 46 HARV. J.L. & PUB. POL'Y 419, 421 (2023) (arguing for adoption of the *Bruen* approach in the context of the Free Exercise Clause).

including those who forcefully advocate for abandoning tiers of scrutiny across most or all areas of law,[309] are steeped in the methods and parlance of tiered scrutiny. That is what they learned in law school and how they practiced as lawyers, and they are most likely to frame alternative approaches by comparison to scrutiny-based tests. This is a form of judicial "anchoring"—the phenomenon by which "people make estimates by starting from an initial value that is adjusted to yield the final answer."[310] The two-step approach including means-end scrutiny that courts applied prior to *Bruen* serves as a powerful anchor for judicial intuitions about THT, one that is not easily displaced by the mere promulgation of the new test or the Supreme Court's admonition that means-end tests are a thing of the past. Kavanaugh's prediction itself is a powerful example of this phenomenon—by tying the new approach directly to the tiers of scrutiny, he recognized that judges would indeed continue to use those tests to inform their intuitions under his new approach.

Second Amendment law is thus likely to revert back to a version of THT closer to that originally envisioned by Judge Kavanaugh when he wrote his *Heller II* dissent. As a practical matter, the vast majority of Republican-appointed federal judges—especially those appointed by President Trump—identify as originalists, and many have specifically professed admiration for Kavanaugh and his approach to judging (including support for his *Heller II* dissent specifically).[311] The judges who are applying THT in what appears to be an excessively strict manner often come from this group.[312] It would be

309. *See, e.g.*, *Rahimi II*, 144 S. Ct. at 1923–24 (Kavanaugh, J., concurring) ("Deciding constitutional cases in a still-developing area of this Court's jurisprudence can sometimes be difficult. But that is not a permission slip for a judge to let constitutional analysis morph into policy preferences under the guise of a balancing test that churns out the judge's own policy beliefs."); Tex. Dep't of Ins. v. Stonewater Roofing Co., 696 S.W.3d 646, 671 (Tex. 2024) (Young, J., concurring) ("I am hardly alone in wondering if the tiers of scrutiny are moored in the Constitution's text and original meaning. Jurists from every perspective have expressed concern.").

310. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128 (1975). A famous example is that respondents who first spin a wheel and receive a random number go on to provide vastly different estimates of the percentage of countries in the United Nations that are from Africa, tied to the value of the number initially selected. *Id.*

311. *See, e.g.*, *Nomination of Justin Walker to the United States Court of Appeals for the D.C. Circuit Before the S. Comm. on the Judiciary*, 116th Cong. 7–8 (2020) (interrogatory of Sen. Blumenthal) (observing that now-Judge Walker had, in an earlier television interview, "praised Judge Kavanaugh for declining to balance gun rights against public safety" and specifically invoked the *Heller II* dissent).

312. *See, e.g.*, United States v. Jimenez-Shilon, 34 F.4th 1042, 1052 (11th Cir. 2022) (Newsom, J., concurring); Duncan v. Bonta, 19 F.4th 1087, 1146–47 (9th Cir. 2021) (Bumatay, J., dissenting); *cf.* Nat'l Rifle Ass'n v. Bondi, 122 F.4th 1108, 1126 (11th Cir. 2025) ("In a real sense, Judge Brasher's dissent erroneously

somewhat odd, then, for those same judges to continue to apply THT in a manner that is contrary to how Kavanaugh predicted it would apply in 2011. Increasingly, THT under the Second Amendment is likely to invoke "principles" behind historical laws to uphold both narrowly tailored modern regulations and—in some instances—"laws whose constitutionality under a strict-scrutiny standard would be far from clear."[313] The higher the level of generality, however, the more such analysis in fact resembles means-end scrutiny.[314]

Tiered scrutiny is also likely to serve this calibrating function in other areas where the Court's jurisprudence may increasingly emphasize history and tradition, such as Free Exercise cases. In recent years, the Court has held that aspects of First Amendment law are governed by THT-like tests.[315] It may be only a matter of time until the current Court adopts a similar test for the Free Exercise Clause, as some scholars have advocated.[316] The Court's Free Exercise precedents generally hold "that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[317] If, however, a facially neutral restriction "targets religious conduct for distinctive treatment," then the court conducts a tailoring inquiry, asking whether the law "proscribe[s] more religious conduct than is necessary to achieve [its] stated ends."[318]

While current Free Exercise doctrine does not map exactly onto tiered scrutiny, it similarly operates as a sliding scale: The more evidence of discriminatory religious targeting there is, the more closely a court will inquire into proper legislative tailoring.[319] The

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reviews the Florida law under an equal-protection standard masquerading as an analysis under the Second Amendment" and thus imposes higher scrutiny of a challenged firearm age restriction than is warranted under THT).

313. *Heller I*, 554 U.S. 570, 688 (2008) (Breyer, J., dissenting).

314. *See, e.g.*, Sherif Girgis, *Unfinished Liberties, Inevitable Balancing*, 125 COLUM. L. REV. 531, 534 (2025) ("With general liberties especially, the framers cannot do the needed balancing and adjusting of scope. So the rights' implementers must balance on a rolling basis.").

315. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2414 (2022) ("[T]he Establishment Clause must be interpreted by 'reference to historical practices and understandings'" (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014))); Vidal v. Elster, 144 S. Ct. 1507, 1522 (2024) ("[A] tradition of restricting the trademarking of names has coexisted with the First Amendment, and the names clause fits within that tradition."); *see also* Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1659–60 (2020).

316. *See, e.g.*, Haun, *supra* note 308, at 421.

317. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah., 508 U.S. 520, 531 (1993); *see also* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 881 (1990).

318. *Church of Lukumi Babalu Aye*, 508 U.S. at 534, 538.

319. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) ("The First Amendment traditionally requires a State

Supreme Court applied that test in a series of emergency applications dealing with COVID-19 restrictions covering places of worship and religious gatherings in 2020.[320] The Court concluded that at least some such restrictions violated the Free Exercise Clause because they were not generally applicable and "far more severe than . . . required to prevent the spread of the virus at the applicants' services."[321] In other cases, members of the Court's conservative wing argued that even narrower restrictions failed the tailoring test.[322] Imagine, for a moment, that the Court more fully embraces THT in the Free Exercise context, the United States experiences a future infectious disease outbreak, and state and municipal governments again implement policies that restrict in-person religious gatherings, among other activities. This Article's findings suggest that courts will ultimately continue to calibrate case outcomes according to expected results under scrutiny-based approaches by evaluating whether a law sweeps too broadly into protected areas of religious expression.[323] Courts will likely decline to uphold non-tailored laws burdening religion even when those laws are consistent with historical practices,[324] while endorsing narrow restrictions whose historical

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to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest.").

320. *See, e.g.*, *id.* at 65–67 (majority opinion); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020).

321. *Roman Cath. Diocese*, 141 S. Ct. at 67.

322. *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting) ("California has ample options that would allow it to combat the spread of COVID–19 without discriminating against religion."); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting) ("[T]he State has not shown that public safety could not be protected at least as well by measures such as those Calvary Chapel proposes to implement.").

323. Another potentially instructive area here is abortion regulation, where the viability standard that the current Court has now declared "makes no sense" in fact continues to have substantial staying power, influence how Americans think about abortion, and serve as a guidepost for state courts and legislators. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261 (2022); Planned Parenthood S. Atl. v. State, 882 S.E.2d 770, 796–97 (S.C. 2023); Hannah Demissie & Adam Carlson, *Florida Voters Will Get to Consider Abortion Rights Ballot Measure in November, Court Rules*, ABC NEWS (Apr. 1, 2024), https://abcnews.go.com/Politics/florida-voters-ballot-measure-enshrine-abortion-rights-court/story?id=108721012.

324. *See, e.g.*, Caleb Morell, *How DC Churches Responded When the Government Banned Public Gatherings During the Spanish Flu of 1918*, 9MARKS (Mar. 12, 2020), https://perma.cc/3EQU-KA5Q (describing Washington, D.C. church closures during the 1918 Spanish Flu pandemic); Jon Hale, *One Pastor Was So Outraged by Church Ban During Spanish Flu That He Went to Jail*, LOUISVILLE COURIER J. (Mar. 20, 2020), https://perma.cc/5SQL-E59B; Nancy Tomes, *"Destroyer and Teacher": Managing the Masses During the 1918–1919*

pedigree is far from certain. At the least, the *Bruen-Rahimi* experience indicates that the movement toward THT in new areas could be slower and more gradual than currently expected.

Second, as the COVID-19 example illustrates, fully jettisoning tiered scrutiny is not only nearly impossible in the current moment—without the decades it will take for history-focused approaches to seep into the next generation of lawyers, judges, and scholars, filtered through legal academia—but also may be undesirable in terms of public intelligibility and real-world results. As scholars and judges have consistently identified, a primary aspect of the judicial role is to provide reasons supporting the decision reached in a given case.[325] This is because "[a] judgment expressing no reasons presents the appearance of arbitrariness" by failing to explain to the parties—and to the general public—why they should accept the decision as well-reasoned.[326] The reasons should also be intelligible: "those subject to them [should be able to] understand and accept" the rationale provided.[327] Professor Darrell Miller notes that THT presents special challenges with regard to judicial reason-giving and intelligibility because judges can easily "lapse into an analogical process driven by surface rather than structural similarities . . . [and] so unmoored from public intuition and experience that [the analysis] appear[s] unreasonable or contrived."[328] In other words, relying solely on historical analogies can easily lead to outcomes that depart radically from public inclinations about what results make intuitive sense.

This is perhaps easiest to appreciate when imagining laws of the sort described in Section II.A that are narrowly tailored to a compelling government interest. A court's use of history to invalidate such laws often "drift[s] too far from [the] public intuition" that governmental regulation is generally permissible when a law is drawn narrowly to respond to a serious, quantifiable, public safety concern.[329] Means-end scrutiny calibration can thus be understood in part as an effort to guard against unintelligible outcomes. Consider, for example, a hypothetical law that bans the carrying of a portable nuclear weapon in the area surrounding an elementary school.[330] The law's narrow scope and tailoring to address the risk of catastrophic

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Influenza Pandemic, 125 PUB. HEALTH REP. 48, 54 (2010) (describing church closures in New Orleans).

325. Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 FLA. L. REV. 205, 221 (1985).

326. *Id.*

327. Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1004 (2008).

328. Darrell A.H. Miller, *Historical Analogy and the Role Morality of Reason-Giving*, 73 DUKE L.J. ONLINE 233, 243–44 (2024).

329. *Id.* at 247.

330. *See, e.g.*, Bevis v. City of Naperville, 85 F.4th 1175, 1182 (7th Cir. 2023) (offering this example to explain the necessity of limiting the definition of "Arms" in the Second Amendment).

harm mean that it would almost certainly pass muster under strict scrutiny. That the law should also survive THT is a necessary nod to both judicial anchoring and public intelligibility built into initial predictions about THT's relative strictness—regardless of the analogical route a court might ultimately take to uphold the law. Or, to return to infectious-disease restrictions, changes in our understanding of overarching public-health concepts may well render judicial results reached solely by reference to history and tradition incomprehensible.[331]

Some of the outcomes of a properly-applied THT test identified in this Article are not only unintelligible but also normatively undesirable from a gun-rights point of view.[332] In other words, it is wrong to reflexively conclude that an approach focused on historical comparisons will automatically be as or more rights-protective when compared to scrutiny-based tests. As Professor Francesca Procaccini observes about the Supreme Court's movement away from tiered scrutiny writ large, rejecting means-end scrutiny does not necessarily "transform[] judicial review into a political conservative power," nor is "[e]mbracing means-end scrutiny . . . necessarily likely to imbue rights with progressive political values."[333] Rather, the move away from scrutiny is best understood "as a loss for popular constitutionalism" because it "permits political values [no matter what those may be] to more directly and transparently color judicial review."[334] The case studies presented in Section II.B suggest why it is that gun-rights advocates latched onto THT only belatedly and half-heartedly. Properly applied, the test can produce odd outcomes that are not always neatly aligned with the objectives of the gun-rights movement and that will not necessarily reflect increases in popular support for expanding gun rights in certain ways.[335]

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331. *Cf.* Darrell Miller, *Gunpowder, Plague, and Tradition*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Apr. 2, 2020), https://perma.cc/8RJD-XPHV (raising the question of how traditional practices such as "shooting cannon and firing guns to cleanse the air of 'miasma'" should fit within a history-focused jurisprudence).

332. Similarly, application of a history-focused approach to the Free Exercise Clause (as suggested above) might require courts to both provide *less* protection to religious exercise in emergency circumstances and uphold laws that entangle religion and politics. *See, e.g.*, Berta Esperanza Hernández-Truyo, *Awakening the Law: Unmasking Free Exercise Exceptionalism*, 72 EMORY L.J. 1061, 1070 (2023) (noting that "some states [in the Founding Era] . . . had official churches that were supported by the state" or required religious oaths to be sworn by all state officeholders).

333. Procaccini, *supra* note 135, at 51.

334. *Id.* at 51–52.

335. *See, e.g.*, Elizabeth M. Stone et. al., *National Support for Gun Policies Among U.S. Adults in 2019 and 2021*, PREVENTATIVE MED., Dec. 2022, at 1, 3, https://doi.org/10.1016/j.ypmed.2022.107314 (noting statistically significant declines in public support between 2019 and 2021 for gun regulations such as

State regulation of concealed carry is perhaps the clearest example of this phenomenon. Consider here that legal scholars who have vocally advocated repudiation of the tiers of scrutiny across the board also filed briefs in support of the challengers in *Bruen*.[336] Professor Joel Alicea's brief, for example, urged the Court to reverse the Second Circuit's decision upholding New York's proper-cause permitting rule and argued that the Court should "stop the spread of . . . ahistorical and unmoored analysis to new constitutional contexts" by rejecting the tiers of scrutiny and adopting THT.[337] Professor Alicea cited *Heller I*, a case in which the Supreme Court appeared to recognize that New York could *ban* concealed carry and that such a ban would be consistent with historical tradition if the state allowed individuals to carry guns openly, no less than fifteen times in his brief.[338]

When push comes to shove, however, it is difficult to imagine that scholars and judges who oppose the tiers of scrutiny and support gun rights would agree that an outright concealed carry ban—a vastly overinclusive law[339] that would be extremely unpopular with gunowners (and possibly with the American public)[340]—is constitutional. Rather, means-end calibration ensures that conceptions of historical regulatory power some judges today consider overly broad do not permit modern legislatures to encroach too far into constitutionally protected areas. The concealed carry example underscores a broader point about THT that may become increasingly relevant as courts expand the methodology into new areas: in terms

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"requiring a safety test for a concealed carry (81% vs. 73%), law enforcement-initiated extreme risk protection orders (76% vs. 70%), banning military-style, semi-automatic assault weapons (64% vs. 59%), . . . and requiring licensure for purchase of a handgun (77% vs. 72%)").

336. *See, e.g.*, Brief of Amicus Curiae J. Joel Alicea in Support of Petitioners and Reversal at 32, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843).

337. *Id.*

338. *Heller I*, 554 U.S. 570, 625–26 (2008).

339. For example, an amicus brief in *Bruen* cited state-level data from Florida and Texas showing that a much lower percentage of concealed carry permit holders in those states had their permits revoked (for violence or gun misuse) than the percentage of police officers nationwide convicted of gun crimes. *See* Brief of Amicus Curiae Crime Prevention Research Center in Support of Petitioner at 5–11, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

340. 2017 Pew polling found that 67% of gunowners and 46% of all adults favored "[a]llowing concealed carry in more places." KIM PARKER ET AL., PEW RSCH. CTR., AMERICA'S COMPLEX RELATIONSHIP WITH GUNS (2017), https://www.pewresearch.org/wp-content/uploads/sites/20/2017/06/Guns-Report-FOR-WEBSITE-PDF-6-21.pdf. It is relatively safe to presume those numbers would be higher today, given the passage of time and the relaxation of concealed carry laws post-*Bruen*, and it is also almost certain that the numbers would be substantially higher in response to the question of whether concealed carry should be allowed *at all*.

of individual rights, it is a mistake to reflexively think that historical approaches will lead to rights-maximalist outcomes, especially as the judiciary applies these approaches over time. For example, states appear to have disproportionate power to regulate knives—as opposed to guns—given the historical regulatory concern surrounding bladed weapons. A large-scale embrace of THT in First Amendment law, and in other areas, might similarly put certain regulatory choices that are limited by means-end scrutiny back *on* the table.

Consider the Court's jurisprudence surrounding expressive speech—specifically, the Court's categorical protection of symbolic speech like flag burning[341] and the Court's 2010 decision that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[342] As Professor Jud Campbell notes, historically "there was little basis for recognizing an inalienable natural right of expressive conduct" as opposed to spoken or written words.[343] Presumably, then, governments are freer to strictly regulate certain types of expressive conduct under an approach that privileges historical tradition. On a broader level, scholars have similarly argued persuasively that the Constitution's place within the legal landscape—and the extent to which the written Constitution trumped other sources of law—was hotly debated at and after the Founding.[344] And early American judges were often profoundly influenced by the view (perhaps unusual today) that "liberty was not synonymous with non-interference . . . [and that] one could be heavily coerced and free" if the *means* of that coercion passed through legitimate democratic safeguards consistent with social contract theory.[345] Thus, the distinct turn to history and tradition in

341. Texas v. Johnson, 491 U.S. 397, 420 (1989) ("Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify [Johnson's] criminal conviction for engaging in political expression.").

342. Citizens United v. FEC, 558 U.S. 310, 365 (2010).

343. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 286 (2017).

344. *See, e.g.*, JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE 120–25 (2024).

345. *Id.* at 50; *see also* Daniel Slate, *Infringed*, 3 J. AM. CONST. HIST. (forthcoming 2025) (manuscript at 56), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5109344 (marshaling Founding Era evidence to argue that "[a]n imperative that a right 'shall not be infringed' can . . . signify both (1) that a right shall not be violated so completely as to be destroyed and (2) that a right shall not be partially restricted through illegitimate process"); State v. Buzzard, 4 Ark. 18, 21 (1842) (suggesting that the exercise of rights "guarded against infringement by the government, . . . if subject to no legal regulation or limitation whatever, would tend to unhinge society, and most probably soon cause it either to fall back to its natural state, or seek refuge and security from the disorders and suffering incident to such licensed invasion of the rights of others, in some arbitrary or despotic form of government; while

Bruen and *Rahimi*, and the use of regulatory analogues from the Founding Era, might well be viewed as a return to such modes of legal reasoning. Under these approaches, rights are not "trumps" and legislatures have substantial power to regulate even textually enumerated rights through legitimate regulation, tailored to the public good, that does not destroy the right in question.

Other examples abound of how THT may ultimately look more like the middle ground that Justice Kavanaugh envisioned. For example, in 2024, the Supreme Court held that the Seventh Amendment requires SEC enforcement actions mirroring common-law fraud claims be tried to a jury rather than before an in-house enforcement body.[346] The Court divided 6-to-3 along partisan lines, with the majority emphasizing a strictly textual-historical analysis rather than a more flexible approach weighing "practical considerations" for cases involving "public rights" that could historically be adjudicated outside of the judicial branch.[347] Yet the analysis above suggests that historical practice might in fact have countenanced intrusions on the right to a jury trial under just such a context-specific analysis, when those intrusions were enacted through a legitimate process.[348] The broader point is that some balancing of rights against regulatory interests is necessarily baked in, as are value judgments about the importance of a proceeding that might be exempt from the jury-trial right. As with the Second Amendment, it is inevitable that tiered scrutiny, balancing, and functional considerations will retain some influence because such considerations were an integral part of historical adjudication and the Founding Era conception of textually-vague rights. This holds true across many areas of constitutional law.[349]

CONCLUSION

This Article is the first effort to conceptualize THT's relative flexibility compared to strict scrutiny on the metric of case outcome. Some courts seem to have applied THT in a manner that is stricter than strict scrutiny in terms of the impact on gun regulation. In a

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their unrestrained exercise, so far from promoting, would surely defeat every object for which the government was formed").

346. SEC v. Jarkesy, 144 S. Ct. 2117 (2024).

347. *See id.* at 2134, 2146 ("The public rights exception is, after all, an *exception*. It has no textual basis in the Constitution and must therefore derive instead from background legal principles.").

348. *See, e.g.*, Miller, *supra* note 95, at 892–93 (explaining that even a history-focused test must allow some resort to "functional considerations . . . [i]f precedent is unclear" and that "some reference point outside the text, but not hostile to it, is required to successfully translate a piece of eighteenth-century script into a workable legal norm").

349. *Cf.* Girgis, *supra* note 314, at 1042–47, 1053–60 (making this point as to Free Exercise and Free Speech).

number of instances, courts have struck down laws that were universally upheld under strict scrutiny, or where courts universally opined the laws would meet that exacting standard prior to *Bruen*. Some courts have also invalidated overinclusive laws under THT, even when the historical support for those laws appears solid. In short, THT in practice has often been a demanding test approaching the "fatal" end of the spectrum. This outcome accords with most popular and scholarly predictions about *Bruen*, especially from the left. But THT in practice deviates from the outcome predicted by the test's primary initial champion, then-Judge Brett Kavanaugh. Kavanaugh wrote that governments would "have more flexibility and power to impose gun regulations under a test based on text, history, and tradition than they would under strict scrutiny."[350]

In its 2024 decision in *United States v. Rahimi*, the Supreme Court took the first steps toward bringing THT back into line with initial predictions by upholding a law targeting domestic violence offenders that courts pre-*Bruen* often opined would pass muster under strict scrutiny. *Rahimi II* is both a return toward THT as originally envisioned and a sign that breaking from established modalities of constitutional adjudication is a long and painful process. The Justices' opinions indicate that they continue to use tiered scrutiny to calibrate THT. And judicial and public forces may combine to ensure that tiered scrutiny informs THT for decades to come. For one, judges are steeped in the language of the tiers and will use them to adjust case outcomes under alternative tests such as THT. Further, THT unmoored from tiered scrutiny will not necessarily produce intelligible outcomes that gun-rights advocates desire in important cases.

What does this mean for other areas of law where the Court has adopted, or is poised to adopt, history-focused tests to determine constitutional protection? The past two-plus years of Second Amendment jurisprudence suggest this move is easy in theory and difficult in practice. Taking a broader view of historical burdens and justifications can produce a flexible test of the kind Kavanaugh initially described. And that course seems the most likely in other areas of law, even if initial returns under history-focused approaches give the illusion of dramatic change. The Justices will continue to think about case outcomes in terms of means-end scrutiny and use the tiers as a de facto guide across all areas of law where historically-focused approaches are on the rise.

350. *Heller II*, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).