De Minimis Doesn't Belong Here: Footnote Nine's Potential Consequences for the Future of Individual Rights*

Starting with the Second Amendment, the Supreme Court is introducing a new analytical framework for evaluating constitutional challenges: text, history, and tradition. As this new framework develops, lower courts are left to grapple with many unanswered questions. In Maryland Shall Issue v. Moore, *the Fourth Circuit refused to perform the history and tradition analysis because it reasoned that the Maryland law had not infringed plaintiffs' Second Amendment rights. While the actual outcome of the case is not particularly concerning, it introduces a "de-minimis" exception to the text, history, and tradition framework that is otherwise absent from individual rights. This Recent Development argues that if the Supreme Court embraces a similar two-step text, history, and tradition analysis beyond the Second Amendment, what is appealing in the Second Amendment context may give way to troubling implications for other fundamental rights.*

INTRODUCTION

When the Fourth Circuit issued its opinion in *Maryland Shall Issue, Inc. v. Moore*,[1] the decision to uphold Maryland's firearm licensing scheme likely seemed unproblematic to most. After all, about sixty percent of American adults believe it is too easy to legally obtain a gun in the United States and favor stricter gun laws.[2] And yet, even someone who favors stricter gun laws should be concerned by what the Fourth Circuit did in *Maryland Shall Issue*. It is imperative that we challenge the court's de minimis analysis in this context, even if the Second Amendment is not a right that everyone chooses to exercise, because there is nothing stopping this logic from extending to the First or Fourth Amendment in the future. And in those contexts, I would venture to say that most will want the courts to insist that the government justify even incidental burdens on the freedom of speech or right to be free from unreasonable searches and seizures.

Beginning with the Second Amendment, the Supreme Court is changing the analytical framework, replacing balancing tests and means-end scrutiny with text, history, and tradition. As the new history and tradition framework

1. 116 F.4th 211 (4th Cir. 2024).

2. Katherine Schaeffer, *Key Facts about Americans and Guns*, PEW RSCH. CTR. (July 24, 2024), https://www.pewresearch.org/short-reads/2024/07/24/key-facts-about-americans-and-guns/ [https://perma.cc/D69A-82K5].

develops, there are many unanswered questions that the Supreme Court has left lower courts to figure out.[3] The Fourth Circuit's recent decision shows that in undertaking that task, fundamental principles—like incidental burdens requiring justification—may be lost. A potentially unforeseen consequence of the lower courts' distortion of Second Amendment jurisprudence is that it may negatively impact the protection of other constitutional rights. Should the Supreme Court embrace a similar two-step text, history, and tradition analysis beyond the Second Amendment, what is appealing in the Second Amendment context may give way to troubling implications for other fundamental rights.

One such example of how courts may distort the history and tradition analysis is showcased in the aforementioned Fourth Circuit case, *Maryland Shall Issue, Inc. v. Moore*. The court set a new threshold for Second Amendment challenges, requiring challengers to demonstrate at the outset that their right to keep and bear arms has been infringed instead of only showing that their conduct falls within the scope of the Second Amendment.[4] By framing the analysis this way, the court flips the burden of the analytical framework announced in *New York State Rifle & Pistol Association, Inc. v. Bruen*[5] and makes it more difficult for individuals to challenge a Second Amendment regulation. Against this backdrop, this Recent Development will analyze how the Fourth Circuit conducted its analysis of Maryland's "shall-issue" licensing regime and argue that the majority opinion is inconsistent with Supreme Court precedent and presents a threat to the protection of individual rights under the text, history, and tradition framework.

This Recent Development will proceed in four parts. Part I will provide a brief overview of how Second Amendment challenges are analyzed after the Supreme Court's recent decisions. Part II will break down the Fourth Circuit's reasoning in *Maryland Shall Issue* and provide brief summaries of the separate concurring and dissenting opinions. Part III will argue that this case is inconsistent with how Second Amendment challenges are to be analyzed and that it impermissibly creates a de minimis exception to constitutional rights. Finally, Part IV will explore how the "infringement" analysis announced in this case could impact how the Fourth Circuit evaluates challenges to regulations regarding other individual rights.

3. *See infra* notes 25–26 and accompanying text.
4. *See Md. Shall Issue*, 116 F.4th at 229.
5. 142 S. Ct. 2111, 2126 (2022).

I. SECOND AMENDMENT FRAMEWORK POST-*BRUEN* & *RAHIMI*

The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[6] There was little conversation around this amendment until 2008 when the Supreme Court decided *District of Columbia v. Heller*,[7] which held that the Second Amendment grants an individual right to possess and carry weapons for the purpose of self-defense.[8] After *Heller*, circuit courts settled upon a "two-step" framework to apply when analyzing Second Amendment challenges that "combines history with means-end scrutiny."[9] This is likely because courts, including the Supreme Court, have employed means-end scrutiny in cases involving other constitutional rights for decades.[10]

In 2022, the Supreme Court rejected this two-step approach in *Bruen*, calling it "one step too many."[11] Rather, the *Bruen* Court established a new framework—the text, history, and tradition test—for courts to use when considering Second Amendment challenges.[12] First, courts must ask whether "the Second Amendment's plain text covers an individual's conduct."[13] If the individual's conduct is not covered by the plain text, the analysis ends at step one.[14] If the answer is yes, the conduct is "presumptively protect[ed]" by the

6. U.S. CONST. amend. II.

7. 554 U.S. 570 (2008).

8. *Id.* at 602; *see* Joseph Blocher & Noah Levine, *Constitutional Gun Litigation Beyond the Second Amendment*, 77 N.Y.U. ANN. SURV. AM. L. 175, 175 (2022).

9. *Bruen*, 142 S. Ct. at 2125.

10. The first question was "whether the challenged law imposed a burden on conduct falling within the scope of the Second Amendment's guarantee." United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010). This was a historical inquiry meant to determine whether the conduct at issue was considered "within the scope of the right at the time of ratification." *Id.* If it was not found to be within the scope, then the challenged regulation was valid. *Id.* If the challenged law burdened conduct that was found to be within the scope of the Second Amendment, the second step consisted of applying the appropriate form of means-end scrutiny. *Id.* Depending on the severity of the burden, courts would apply either intermediate or strict scrutiny; rational basis was not seen as a valid option. *Id.* at 682; *see also Bruen*, 142 S. Ct. at 2176 (Breyer, J., dissenting) (explaining that the Supreme Court has used means-end scrutiny in the context of the First Amendment, Equal Protection Clause, and Fourth Amendment).

11. *Bruen*, 142 S. Ct. at 2127.

12. For a detailed discussion of *Bruen*'s approach and the challenges that it may create, see generally Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99 (2023) (discussing the challenges in Second Amendment law after *Bruen*). *See also* Bianchi v. Brown, 111 F.4th 438, 473 n.1 (4th Cir. 2024) (Diaz, J., concurring) (pointing out the irony of *Bruen*'s framework also consisting of two steps).

13. *Bruen*, 142 S. Ct. at 2129–30.

14. Blocher & Ruben, *supra* note 12, at 115.

Constitution.[15] Second, the government must show that its regulation "is consistent with the Nation's historical tradition of firearm regulation."[16] If the government is able to satisfy its burden, then the regulation is enforceable as it is consistent with the Second Amendment.[17] But if the government cannot demonstrate a sufficient historical tradition, the regulation is not permissible.[18]

In *Bruen*, the Court applied this analysis to strike down a law that gave officials discretion in issuing concealed-carry licenses.[19] The Court punted on the constitutionality of licensing regimes that do not give officials discretion to deny applicants with the following statement in footnote nine:

> To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of . . . "shall-issue" licensing regimes . . . . Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent "law-abiding, responsible citizens" from exercising their Second Amendment right to public carry. Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, "law-abiding, responsible citizens." . . . That said . . . we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry.[20]

Two years later, the Court attempted to provide further clarification of the *Bruen* analysis in *United States v. Rahimi*.[21] According to the *Rahimi* Court, at *Bruen*'s second step, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."[22] Courts are to ask whether the law "comport[s] with principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'"[23] The Court reinforced that an exact match is not required

15. *Bruen*, 142 S. Ct. at 2130.

16. *Id.*

17. *See* United States v. Rahimi, 144 S. Ct. 1889, 1902–03 (2024).

18. *Bruen*, 142 S. Ct. at 2135, 2138.

19. *Id.* at 2170–71.

20. *Id.* at 2138 n.9 (citations omitted).

21. 144 S. Ct. 1889 (2024).

22. *Id.* at 1898 (citing *Bruen*, 142 S. Ct. at 2131–34) ("Why and how the regulation burdens the right are central to this inquiry.").

23. *Id.* (citing *Bruen*, 142 S. Ct. at 2111).

by emphasizing that recent precedents were "not meant to suggest a law trapped in amber."[24]

Even after *Rahimi*, many questions regarding how to apply the text, history, and tradition framework set forth in *Bruen* remain unanswered. Some of these questions include: Who is protected by the Second Amendment? What conduct does the plain text cover? What is the relevant historical era for courts to look to for analogues? What constitutes "tradition"? How much does post-ratification evidence count?[25] Additionally, there are open questions about whether this framework may appear in the context of other constitutional rights, such as the First Amendment and how it would function to replace means-end scrutiny in those contexts.[26]

II. FACTS AND REASONING IN *MARYLAND SHALL ISSUE, INC. V MOORE*

A. *Facts of the Case*

In response to numerous mass shootings, Maryland's General Assembly passed the Firearm Safety Act of 2013.[27] Under the statute, Maryland residents are generally required to obtain a handgun qualification license ("HQL") before purchasing a handgun.[28] The state does not possess any discretion to refuse to issue a license to any applicants who satisfy the statutory requirements.[29]

To obtain a license, an individual must: (1) be at least 21 years old, (2) be a resident of Maryland, (3) complete an approved firearm safety training course,

24. *Id.* at 1897.

25. *Id.* at 1929 (Jackson, J., concurring); *see also, e.g.*, United States v. Daniels, 77 F.4th 337, 358 (5th Cir. 2023) (Higginson, J., concurring) (describing a number of "often dispositive, difficult questions" that courts are struggling to resolve); Brannon P. Denning & Glenn H. Reynolds, *Trouble's* Bruen*: The Lower Courts Respond*, 108 MINN. L. REV. 3187, 3195–3210 (2024) (listing and explaining "*Bruen*'s unanswered questions"). There is also a question of when the historical tradition is unreliable because of the possibility that the historical regulations were actually unconstitutional. Justice Alito recently raised this issue during oral argument in *Mahmoud v. Taylor*. Transcript of Oral Argument at 141–42, Mahmoud v. Taylor, 145 S.Ct. 2332 (2025) (No. 24-297) (questioning whether the history was reliable given that the historical regulations that were being raised may have been unconstitutional).

26. *See generally* Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After* Bruen, 18 DUKE J. CONST. L. & PUB. POL'Y 59 (2023) (exploring the potential impact of text, history, and tradition on the First Amendment speech clause); William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 46 HARV. J.L. & PUB. POL'Y 419 (2023) (arguing that text, history, and tradition should be the analytical framework utilized in First Amendment free exercise cases).

27. Firearm Safety Act of 2013, ch. 427, 2013 Md. Sess. Laws 4195 (codified at MD. CODE ANN., PUB. SAFETY § 5-101 to § 5-805).

28. MD. CODE ANN., PUB. SAFETY § 5-117.1.

29. Md. Shall Issue, Inc. v. Moore, 116 F.4th 211, 216 (4th Cir. 2024).

and (4) not be prohibited by federal or state law from purchasing or possessing a handgun.[30] The HQL statute requires an individual who wants an HQL to submit a set of fingerprints, proof of training completion, a statement that they are not prohibited by law from possessing a handgun, and a fifty-dollar application fee.[31] The Secretary of Maryland State Police reviews each application and submits the fingerprints for a background check through state and national databases.[32] Within thirty days of receiving a proper application, the Secretary "shall issue" an HQL to any applicant who has met all of the statutory requirements.[33] HQLs are valid for ten years and may be renewed for another ten-year period as long as they remain eligible and pay a fee to cover the program administration costs.[34]

In 2016, Maryland Shall Issue, Inc., Atlantic Guns, Inc., Deborah Kay Miller, and Susan Brancato Vizas (plaintiffs) sued the Governor of Maryland and the Secretary and Superintendent of the Maryland State Police, alleging that the HQL statute violates the Second Amendment.[35] The plaintiffs brought a facial challenge to the constitutionality of the "shall-issue" HQL statute, arguing that any "temporary deprivation" of the ability to purchase a handgun violates the Second Amendment.[36] Applying the pre-*Bruen* two-step means-end framework, the district court held that the HQL statute was subject to intermediate scrutiny and that the government had shown that the statute was "reasonably adapted to a substantial government interest."[37] The district court awarded summary judgment to the state, and the plaintiffs appealed to the Fourth Circuit.[38]

B. *The Fourth Circuit's Reasoning*

Rehearing the case en banc, the Fourth Circuit upheld the HQL statute as constitutional.[39] The majority relied heavily on *Bruen*'s footnote nine, reasoning that it foreclosed plaintiffs' temporary deprivation argument by

30. MD. CODE ANN., PUB. SAFETY § 5-117.1(d).
31. *Id.* § 5-117.1(f), (g).
32. *Id.* § 5-117.1(f).
33. *Id.* § 5-117.1(d), (h).
34. *Id.* § 5-117.1(j).
35. Md. Shall Issue, Inc. v. Moore, 116 F.4th 211, 217 (4th Cir. 2024).
36. *Id.* at 216.
37. Md. Shall Issue, Inc. v. Hogan, 566 F. Supp. 3d 404, 422 (D. Md. 2021) (quoting Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017)).
38. *Md. Shall Issue*, 116 F.4th at 218.
39. *Id.* at 229.

declaring "shall-issue" licensing regimes "presumptively constitutional" because they merely ensure that the individuals seeking to exercise their Second Amendment right are "law-abiding" persons.[40] The court highlighted that the Supreme Court's previous Second Amendment cases have involved regulations that banned or effectively banned possession or carry of arms; therefore, a nuanced analysis of "infringement" has been unnecessary.[41]

Further, the court claimed that footnote nine in *Bruen* provides "guideposts" for "shall-issue" regimes, and as long as they are not "put toward abusive ends," they do not *infringe* on the right to keep and bear arms.[42] The court created its own framework for "shall-issue" licensing statutes. Based on the premise that "shall-issue" regimes are "presumptively constitutional," the burden lies on the challenger to rebut that presumption by showing that their Second Amendment right has been infringed or that the law "effectively 'denies' the right to keep and bear arms."[43] If a plaintiff is able to rebut the presumption, then the burden shifts to the government to show that the regulation is "consistent with this Nation's historical tradition," otherwise it is unconstitutional.[44]

Here, the court found that Maryland's HQL statute is presumptively constitutional because the state retains no discretion in issuing licenses to individuals who satisfy the objective criteria, and the plaintiffs focused their challenges on the "same requirements the Supreme Court cited as presumptively constitutional . . . namely, background checks and firearms safety courses."[45] Given that the court did not believe that plaintiffs rebutted the presumption of constitutionality, it did not undergo any analysis of historical tradition to see if this type of regulation is supported.

C. *Concurrences*

Judge Rushing wrote separately, agreeing with the majority that Maryland's HQL statute is constitutional but resting her decision on the "principles underlying our Nation's historical tradition of firearm regulation."[46] She disagreed with the majority's conclusion that the Maryland statute does not

40. *Id.* at 216 (citing N.Y. State Pistol & Rifle Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2138 n.9 (2022)).

41. *Id.* at 221.

42. *Id.* (quoting *Bruen*, 142 S. Ct. at 2138 n.9).

43. *Id.* at 223 (quoting *Bruen*, 142 S. Ct. at 2138 n.9).

44. *Id.*

45. *Id.* at 225.

46. *Id.* at 230 (Rushing, J., concurring).

implicate the plain text of the Second Amendment.[47] Rather, Judge Rushing rejected the majority's broad reading of *Bruen*'s footnote nine and instead used the language in the footnote as "guidance" and "insight into the degree of fit necessary for a shall-issue licensing regime" to be considered "consistent with the Nation's historical tradition of firearm regulation."[48] She ultimately found Maryland's HQL statute to be constitutionally permissible because it is relevantly similar to historical analogues both in how and why it burdens an individual's Second Amendment right.[49]

Judge Niemeyer also wrote separately, concurring in the outcome and the majority's use of *Bruen*'s footnote nine but disagreeing with the majority's infringement analysis. Judge Niemeyer thought the analysis should have ended with footnote nine and dissented from much of the majority's opinion, characterizing it as "illogical dicta" that alters *Bruen*'s test by requiring plaintiffs to demonstrate infringement of the Second Amendment right as a part of step one.[50] He criticized the majority for making infringement part of the initial showing because to do so "sets the *Bruen* test on its head" and "is plainly wrong."[51]

D. *Dissent*

Judge Richardson, joined by Judge Agee, dissented from the majority because he found that Maryland's law regulates conduct protected by the text of the Second Amendment and that Maryland did not sufficiently demonstrate the law's consistency with historical tradition.[52] Judge Richardson criticized the majority's reliance on footnote nine as controlling in this case.[53] In his view, footnote nine does nothing more than limit the *Bruen* Court's holding to the specific type of licensing scheme at issue in that case, and reading it more expansively would "elevate implications from dicta over the mandatory [text, history, and tradition] test established in *Bruen*."[54] Judge Richardson reads footnote nine to "merely clarif[y] that shall-issue licensing regimes are not necessarily unconstitutional just because may-issue regimes are."[55]

47. *Id.*
48. *Id.* at 232.
49. *Id.* at 233–35.
50. *Id.* at 238 (Niemeyer, J. concurring).
51. *Id.*
52. *Id.* at 240 (Richardson, J., dissenting).
53. *Id.* at 240–41.
54. *Id.* at 241.
55. *Id.* at 242.

Judge Richardson then took issue with the majority's discussion of "infringement" and found that there is no basis for "limiting the term 'infringe' to total or effectively total deprivations of the right to keep or bear arms."[56] Because he found that Maryland's statute regulates conduct implicated by the text of the Second Amendment, he proceeded to conduct a *Bruen* step-two analysis to determine whether the law is justified by history and tradition.[57] Ultimately, he would have held that the challenged statute is unconstitutional.[58]

III. ANALYSIS

The ultimate holding in *Maryland Shall Issue* finding the HQL statute constitutional is not particularly concerning given the guidance set forth in *Bruen*'s footnote nine and Judge Rushing's concurrence that reached the same conclusion after completing both steps of *Bruen*'s two-step text, history, and tradition framework. Additionally, the majority's decision is based in part on recent, on-point Supreme Court dicta, which circuit precedent almost mandates.[59] However, the Fourth Circuit went further. By interpreting footnote nine from *Bruen* as creating a loophole to avoid conducting the history and tradition analysis, the court's ruling has the potential to make it more difficult to challenge regulations that burden individual rights, both in the Second Amendment context and perhaps more broadly.

Specifically, the majority refused to undergo the analysis set forth in *Bruen* because it determined that "[t]he plaintiffs [had] not met their burden" to show that the challenged regulation "infringes" their "Second Amendment right to keep and bear arms . . . ."[60] The court explained that, if the HQL statute qualifies as a "shall-issue" regime discussed in *Bruen*, it is presumptively constitutional, and it is the burden of the plaintiffs to demonstrate infringement—that the law "effectively denies" the right to keep and bear arms.[61] Not only does the requirement that a regulation "effectively den[y]" a right set a new, much higher threshold for constitutional challenges, but it completely circumvents and rewrites step one of the *Bruen* framework in a way

56. *Id.* at 244.

57. *Id.* at 245.

58. *Id.* at 246.

59. *See* Hengle v. Treppa, 19 F.4th 324, 346–47 (4th Cir. 2021) ("Even if the Supreme Court's discussion of alternative remedies were dicta, we are obliged to afford great weight to Supreme Court dicta.") (internal quotation marks and citations omitted).

60. *Md. Shall Issue*, 116 F.4th at 229 (majority opinion).

61. *Id.* at 224–25.

that runs counter to the language of both *Bruen* itself and the Supreme Court's other decisions concerning individual rights.

Although the majority does not explicitly invoke the de minimis doctrine, its opinion follows similar logic. This is likely due in part to the fact that the government argued in its supplemental brief that Maryland's law "imposes only a de minimis burden" and therefore is constitutional.[62] This approach is problematic because, even if the Supreme Court clarifies its statements about "shall-issue" regimes and other dicta that has had a sizeable impact in the Second Amendment space, what remains of the holding erroneously declines to scrutinize in any manner a de minimis burden on individual rights. The following section will first walk through the proper analytical framework for evaluating Second Amendment claims and then provide examples of where the Supreme Court rejected the de minimis doctrine in the context of the First and Fourth Amendments. Finally, the section will explain how the Fourth Circuit's use of de minimis in this case is distinct from the way that incidental burdens have been evaluated in the context of other constitutional rights.

A. *Proper Analytical Framework*

Before addressing the potential implications of the new "infringement" analysis that the Fourth Circuit set forth, it is important to distinguish what the Fourth Circuit did from what *Bruen* actually demands. The threshold question is not whether the regulation "effectively denies" the Second Amendment right[63] but rather whether the "Second Amendment's plain text covers an individual's conduct."[64] In *Bruen*, the Supreme Court clearly stated that if the answer to that question is yes, then the conduct is presumptively protected by the Constitution.[65] The Second Circuit has interpreted this inquiry to address three distinct questions: "whether the conduct at issue is protected, whether the weapon concerned is in common use, and whether the affected individuals are ordinary, law-abiding, adult citizens and thus part of the people whom the Second Amendment protects."[66] This is dramatically different than what the

62. Supplemental Brief of Appellees at 16–21, *Md. Shall Issue,* 116 F.4th 211 (No. 21-2017), 2024 WL 963899, at *16–21.

63. *Md. Shall Issue*, 116 F.4th at 224–25.

64. N.Y. State Pistol & Rifle Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2129–30 (2022).

65. *Id.* at 2130.

66. Antonyuk v. James, 120 F.4th 941, 981 (2d. Cir. 2024) (citing *Bruen*, 142 S. Ct. at 2134) (internal quotation marks omitted).

Fourth Circuit did in this case, as pointed out by Judges Rushing and Richardson.[67]

Both Judge Rushing's concurrence and Judge Richardson's dissent highlight not only the discrepancy between *Bruen* and the *Maryland Shall Issue* majority's analysis, but also the fact that the *Bruen* framework can and should be applied here in its entirety. Both opinions find that the conduct being regulated is covered by the text of the Second Amendment and accordingly is subject to a historical analysis to determine whether the statute is permissible.[68] To interpret step one of *Bruen*'s framework narrowly, as done by the majority, undermines the right and shifts much of the government's burden to the individuals challenging the regulation.[69] The potential ramifications that this framework poses on the ability to challenge regulations that burden individual rights is ripe for concern.[70]

If a law does not burden a particular right, then it is not subject to review under the relevant constitutional provision, nor should it be. But if it does burden the right in some way, then its constitutionality must be reviewed. Part of what constitutional review is meant to accomplish is analysis of the degree of the burden on the constitutionally protected right. *Bruen*'s framework accounts for this by asking both why historical laws existed and *how* those laws regulated the right. The question of how the historical analogue regulated the right is really asking what kind of burden was being imposed. This analysis cannot take place if judicial review stops at or before step one by determining prematurely that the burden is insignificant. Therefore, it follows that any infringement analysis must come at step two, and the only inquiry at step one is whether the conduct is covered by the plain text—no matter how insignificantly that conduct is being affected. Here, Maryland's fifty-dollar fee may be a minor financial cost, and the training may not require a large time investment, but both burden textually covered conduct. Thus, the Second Amendment is implicated.

It is not surprising that the Fourth Circuit relied so heavily on footnote nine of *Bruen* to avoid the history and tradition analysis that occurs at step two. Many lower courts, including the Fourth Circuit, have signaled how difficult

67. *Md. Shall Issue*, 116 F.4th at 230 (Rushing, J., concurring) (quoting U.S. CONST. amend. II) ("Maryland's law applies to 'the people,' handguns are 'Arms,' and the law regulates acquisition, which is a prerequisite to 'keep[ing] and bear[ing]' those arms.").

68. *See id.* at 232–36 (Rushing, J., concurring), 245–52 (Richardson, J., dissenting).

69. *See id.* at 238 (Niemeyer, J., concurring).

70. *See infra* Part IV.

and unworkable this historical analysis has proven to be.[71] While some judges have said that this kind of historical analysis is within courts' "institutional competence,"[72] other judges and scholars disagree.[73] A brief survey of the current Second Amendment landscape in the lower courts makes it quite easy to conclude that the text, history, and tradition test has become somewhat of a nightmare to apply or, at the very least, is creating lots of confusion for judges deciding Second Amendment challenges.[74] Further, the challenges that history and tradition pose are not the only issue. Part of originalism's allure (as opposed to means-end scrutiny) is that it is supposed to constrain judges in their decision-making,[75] rather than allowing them to "make free-wheeling policy judgments."[76] However, it is unclear whether this is really true as scholars have pointed out many flaws that exist within this method of constitutional

71. *See* Bianchi v. Brown, 111 F.4th 438, 473–74 (4th Cir. 2024) (Diaz, J., concurring) ("*Bruen* has proven to be a labyrinth for lower courts . . . ."); United States v. Price, 111 F.4th 392, 415 (4th Cir. 2024) (Quattlebaum, J., concurring); Samantha Latson, *The Supreme Court Expanded Gun Rights. That Could Complicate the Trump Assassination Attempt Case*, POLITICO (Sept. 21, 2024, 7:00 AM), https://www.politico.com/news/2024/09/21/supreme-court-gun-rights-trump-assassination-attempt-00180350 [https://perma.cc/55MP-EK3E (staff-uploaded archive)] ("The new history-focused legal test for gun restrictions left lower courts nationally in disarray as judges and attorneys navigate how to apply the new mandate."); *see generally* Denning & Reynolds, *supra* note 25 (highlighting the questions regarding history and tradition that have been left open and the confusion among lower courts in applying the test).

72. *See* Nat'l Republican Senatorial Comm. v. Fed. Election Comm'n, 117 F.4th 389, 400 (6th Cir. 2024) (Thapar, J., concurring).

73. Lydia Wheeler & Kimberly Strawbridge Robinson, *Justices' History Focus Tests Lawyers, Judges, and Law Schools*, BLOOMBERG L. (Oct. 12, 2024, 7:00 AM), https://news.bloomberglaw.com [https://perma.cc/X7R8-8YLS] ("Historical research isn't a skill that law students traditionally learn.").

74. *See Bianchi*, 111 F.4th at 473–75 (Diaz, J., concurring) (calling *Bruen* a "labyrinth for lower courts"); United States v. Daniels, 77 F.4th 337, 358 (5th Cir. 2023) (Higginson, J., concurring) ("[C]ourts [] operating in good faith[] are struggling at every stage of the *Bruen* inquiry."); United States v. Jackson, 661 F.Supp.3d 392, 400–05 (D. Md. 2023) (trying to determine who is included as part of "the people" covered by the Second Amendment); Transcript of Proceedings at 9–10, Miller v. Bonta, 699 F.Supp.3d 956 (S.D. Cal. 2022) (No. 19-cv-1537) (statement by the district court, at a hearing, that it does not have the staff nor the resources to create a historical survey of relevant laws and statutes in a timely fashion). *Compare* United States v. Rowson, 652 F.Supp.3d 436, 463–72 (S.D.N.Y. 2023) (upholding § 922(n) after finding it is consistent with this nation's historical tradition of firearms regulations on the basis of colonial laws disarming groups of persons perceived as dangerous and historical surety laws), *with* United States v. Hicks, 649 F.Supp.3d 357, 360–66 (W.D. Tex. 2023) (finding these same historical analogies to be insufficient and holding § 922(n) to be unconstitutional).

75. Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 446 (2023).

76. *See Nat'l Republican Senatorial Comm.*, 117 F.4th at 400 (Thapar, J., concurring).

interpretation.[77] Even so, text, history, and tradition is the mode of analysis that the Supreme Court has mandated, and until that is no longer true, the Fourth Circuit—along with every other lower court—has the obligation to apply the test as faithfully as possible, which it arguably did not do here.

B. *No De Minimis Exception for Constitutionally Protected Individual Rights*

One of the biggest issues with the majority's opinion is that it conjures up a de minimis exception to regulating constitutionally protected individual rights. The doctrine of "*de minimis non curat lex*" (de minimis) means "the law does not concern itself with trifles."[78] It functions to place "outside the scope of legal relief the sorts of intangible injuries, normally small and invariably difficult to measure, that must be accepted as the price of living in society."[79] Courts frequently apply the de minimis doctrine in many legal contexts, such as contract, tort, civil, and criminal matters.[80] It is often justified with policy considerations such as saving judicial resources and preventing the system from being bogged down by inconsequential matters.[81] However, one area where it is consistently rejected is in the protection of an individual's constitutional rights.[82]

The rationale for refusing to extend this doctrine into the area of constitutional rights is that these rights are "so sacred in our system of justice that they can never be compromised, regardless of how small the deprivation."[83] This makes sense because the de minimis doctrine would undermine the Constitution's guarantees if the courts could summarily determine that someone's rights were violated in some way but not enough for us to take seriously. While, as discussed below, the de minimis doctrine has been largely rejected in the First and Fourth Amendment contexts, the expansion of text,

77. *See generally* ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2022) (explaining that originalist interpretation often disappears when the results don't conform to modern conservative ideology); Rebecca L. Brown, Lee Epstein & Mitu Gulati, *The Constraining Effect of "History and Tradition": A Test*, 713 ANNALS AM. ACAD. POL. SOC. SCI. 200 (2025) (explaining empirical results that tend to show more, not less, discretion among judges when using a historical approach).

78. 27A AM. JUR. 2D *Equity* § 12 (2025) (citations omitted).

79. *Id.*

80. Jeff Nemerofsky, *What is a "Trifle" Anyway?*, 37 GONZ. L. REV. 315, 324 (2002).

81. *Id.*

82. Lewis v. Woods, 848 F.2d 649, 651 (5th Cir. 1988) ("A violation of constitutional rights is never *de minimis* . . . ."); Pullman Co. v. Dudley, 77 S.W.2d 592, 595 (Tex. Civ. App. 1934); Hessel v. O'Hearn, 977 F.2d 299, 302–04 (7th Cir. 1992).

83. Nemerofsky, *supra* note 80, at 331–32.

history, and tradition into other constitutional rights could result in the introduction of a de minimis exception to those rights as well. The risk of that materializing increases substantially if the majority's reasoning in this case gains traction.

1. First Amendment Context

The application of de minimis has been rejected in the First Amendment context. For example, in *Lorillard Tobacco Co. v. Reilly*,[84] the Court announced that "[t]here is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification."[85] At issue in *Lorillard* were Massachusetts regulations on tobacco advertisements, including one that prohibited indoor, point-of-sale advertising for smokeless tobacco and cigars from being "placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of" any school or playground.[86] The Supreme Court explicitly rejected the First Circuit's reasoning that even if the efficacy of the regulation was questionable, it did not matter because "the burden on speech imposed by the provision is very limited . . . ."[87]

Additionally, in *Lamont v. Postmaster General*,[88] the government defended a statute that required the postal service to "detain" mail containing "communist political propaganda" and send a postcard in its place.[89] Thereafter, the addressee could affirmatively request that the mail be delivered to them.[90] The government argued that requiring someone to return a postcard indicating that they wished to receive communist propaganda was not an "abridgment" of First Amendment rights but only an inconvenience to the individual in question.[91] The Supreme Court rejected that argument and the premise that a regulation imposing a mere inconvenience should not be subject to any scrutiny.[92] More recently, in a Free Exercise Clause case, the Court held that individuals are

84. 533 U.S. 525 (2001).

85. *Id.* at 567.

86. *Id.* at 535 (citing 940 MASS. CODE REGS. §§ 21.04(5)(b), 22.06(5)(b) (2000)).

87. *Id.* at 567 (citing Consol. Cigar Corp. v. Reilly, 218 F.3d 30, 51 (1st Cir. 2000)).

88. 381 U.S. 301 (1965).

89. *Id.* at 302.

90. *Id*.

91. *Id.* at 309 (Brennan, J., concurring).

92. *Id.* at 307 (majority opinion); *see also id.* at 309 (Brennan, J., concurring) ("In any event, we cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one.").

"irreparably harmed by the loss of free exercise rights 'for even minimal periods of time.'"[93]

The discussion above, however, does not lead to the conclusion that all regulations concerning individual rights should be subject to the same scrutiny or treatment. One scholar, while discussing First Amendment regulations, noted that manner restrictions are often incidental and thus appropriately subject to intermediate scrutiny.[94] He further argued that we can extrapolate the way that we analyze time, place, and manner restrictions in the First Amendment context to Second Amendment cases.[95] Thus, only when a regulation "become[s] so broad . . . that [it] no longer represent[s] a mere incidental burden on the core Second Amendment right . . . should the government bear the burden of strict scrutiny."[96] Importantly, he does not argue that a regulation that places only an incidental burden on a right is free from review. Professor Geoff Stone makes a similar argument in the context of content-neutral restrictions where he posits that even laws "having only an incidental effect on free speech should [not] be beyond the scope of [F]irst [A]mendment review."[97] This is because "[t]he potential restrictive effect of such laws is simply too great to disregard them entirely."[98] Stone goes on to evaluate how to analyze incidental effects, but for the purpose of this Recent Development, the key takeaway is that, in the First Amendment Context, even incidental burdens are subject to *some* level of review and not dismissed altogether.[99]

These arguments highlight the error in the Fourth Circuit opinion because it is difficult to see how a licensure law could be categorized as "incidental" when the purpose of the law is to regulate the exercise of one's Second Amendment right. Thus, Maryland's licensing law is not like newspapers being forced to "comply with the antitrust laws" and "generally applicable labor laws,"

93. Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) (quoting Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020)).

94. Reid Golden, *Loaded Questions*: *A Suggested Constitutional Framework for the Right to Keep and Bear Arms*, 96 MINN. L. REV. 2182, 2209–10 (2012); *see* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (explaining that "the government may impose reasonable restrictions on the time, place, or manner of protected speech . . . ." so long as the restrictions are content-neutral and satisfy intermediate scrutiny).

95. Golden, *supra* note 94, at 2212.

96. *Id.*

97. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 UNIV. CHI. L. REV. 46, 107 (1987).

98. *Id.*

99. *Id.* at 107–08.

or to pay taxes "under a generally applicable tax scheme."[100] It looks much more like a direct burden, which makes review all the more appropriate.

2. Fourth Amendment Context

The concept of de minimis shows up in the Fourth Amendment context as well, yet in an arguably different manner. In *Pennsylvania v. Mimms*,[101] the Court found that the "additional intrusion" of asking a driver to step out of the car during a justified vehicle stop was "de minimis."[102] However, this is not where the analysis ended. Rather, the Court reasoned that the government's legitimate and weighty interest in officer safety outweighed the "de minimis" intrusion of requiring a driver, lawfully stopped, to exit a vehicle.[103] Therefore, it is not that the intrusion, which potentially violated the Fourth Amendment, was de minimis and thus not worthy of further review. Rather, the Court still engaged in interest-balancing and simply determined that there was a weighty government interest that outweighed a very minor intrusion.

This demonstrates yet another reason why the Fourth Circuit's analysis cannot be correct. Although the *Mimms* Court found the intrusion was found to be "de minimis," the government still had to justify its actions because it infringed upon the individual's Fourth Amendment right. Asking someone to step out of their car is almost certainly less burdensome than requiring training, a background check, and the payment of a fee, so if the government must justify its actions in the former scenario, then the same should be true of the latter as well.

3. Distinguishing the Fourth Circuit's De Minimis Approach

Each of these instances where the Supreme Court considered "minimal burdens" to constitutional rights is fundamentally different than what occurred in *Maryland Shall Issue*. In cases where de minimis is brought up, it is not at the outset to summarily dispose of the plaintiff's challenge. Rather, the Supreme Court typically determines that in the broader context the intrusion on the fundamental right was so minimal and the government interest weighty enough as to render it permissible to allow the regulation to stand. This approach by the Court demonstrates that in the context of other individual rights, even a

100. *See* Michael C. Dorf, *Incidental Burdens of Fundamental Rights*, 109 HARV. L. REV. 1175, 1201 (1996).

101. 434 U.S. 106 (1977).

102. *Id.* at 111.

103. *Id.* at 110–11.

slight burden on the right must be justified by the government in some meaningful way, generally under rational basis review.[104]

There may be some tension between the Supreme Court's recent reliance on originalism and this Recent Development's use of First and Fourth Amendment cases that employ means-end balancing to argue that there should not be a de minimis exception for individual rights, including the Second Amendment. Perhaps it would be more faithful to the text, history, and tradition approach to query the original meaning of "infringe" at the Founding as some scholars have begun to do.[105] However, the reasoning in these cases still holds value.[106] Given the Court's emphatic statement that the Second Amendment is not "'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees,'"[107] it *should* logically follow that, regardless of what type of analysis is being employed in Second Amendment cases, the de minimis doctrine does not have a place.

Overall, as this section has demonstrated, the proper approach for courts to take when analyzing a Second Amendment question is to first ask whether the burdened conduct is protected by the Second Amendment. If so, then a historical analysis is required.[108] While it may be relevant at some point in the analysis that the burden is minimal or incidental, that is not meant to be a "get-out-of-jail-free card" for the government, relieving them of the duty to justify their regulation. This is consistent with the way that other constitutional rights are treated, specifically the First and Fourth Amendments.[109] In *Maryland Shall Issue*, the Fourth Circuit did not follow this approach. Instead, it accepted the

104. Under rational basis review, "a [regulation] will be upheld if it is *rationally related to any legitimate government purpose*." Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 402 (2016).

105. Daniel Slate, *"Shall Not Be Infringed*," DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Aug. 2, 2024), https://firearmslaw.duke.edu/2024/08/shall-not-be-infringed [https://perma.cc/AQ2P-ZEYL].

106. Clay Calvert, *Is Everything a Full-Blown First Amendment Case After* Becerra *and* Janus*? Sorting Out Standards of Scrutiny and Untangling "Speech as Speech" Cases from Disputes Incidentally Affecting Expression*, 2019 MICH. ST. L. REV. 73, 75 ("Specifically, rational basis review applies when a law imposes only 'incidental burdens on speech . . . .'") (quoting Christina E. Wells, *Beyond Campaign Finance: The First Amendment Implications of* Nixon v. Shrink Missouri Government PAC, 66 MO. L. REV. 141, 156 n.101 (2001)).

107. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2156 (2022) (quoting McDonald v. City of Chicago, 561 U.S. 742, 780 (2010)).

108. *See supra* notes 63–70 and accompanying text.

109. *See supra* Section III.B.

argument that the licensing law is a "de minimis" burden[110] and never forced the government to justify its regulation.[111]

IV. LOOKING AHEAD: THE FUTURE OF INDIVIDUAL RIGHTS IN THE FOURTH CIRCUIT

The text, history, and tradition framework announced in *Bruen* is going to be taking shape in the context of Second Amendment cases in the coming years. Lower courts, including the Fourth Circuit, are busy trying to figure out how to apply this test.[112] The doctrines and analytical frameworks that are developed in the Second Amendment context have the potential to become a part of how text, history, and tradition is applied more generally, at least in the Fourth Circuit itself.

Currently text, history, and tradition is formally applied in Second Amendment cases only; however, there is some indication that this may not remain the case. The Supreme Court has moved away from means-end scrutiny and toward originalism and a focus on history in recent terms.[113] Therefore, the expectation of a growing emphasis on historical analysis in areas like the First and Fourth Amendments is not without foundation.[114] Some have noted that it may be speculative to assume that history will emerge as the dominant methodology in First Amendment speech cases because originalism has not played a large role in that context to date.[115] However, if the Court has the desire to increase the role of history, they will have the opportunity over the next decade with a solid conservative majority.[116] Justice Kavanaugh has certainly made clear his disfavor for means-end scrutiny and desire to limit its reach as much as possible, opening the door for text, history, and tradition to enter.[117]

110. *See* Supplemental Brief of Appellees, *supra* note 62, at 16–21.

111. *See supra* text accompanying notes 60–61; Md. Shall Issue v. Moore, 116 F.4th 211, 227 (4th Cir. 2024); *see also* Supplemental Brief of Appellees, *supra* note 62, at 16–21.

112. In August 2024, the Fourth Circuit decided three Second Amendment challenges en banc within a three-week period. Bianchi v. Brown, 111 F.4th 438 (4th Cir. 2024) (decided August 6, 2024); United States v. Price, 111 F.4th 392 (4th Cir. 2024) (decided August 6, 2024); Md. Shall Issue, Inc. v. Moore, 116 F.4th 211 (4th Cir. 2024) (decided August 23, 2024).

113. *See* Barnett & Solum, *supra* note 75, at 435.

114. *But see* Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 657–58 (2019).

115. Calvert & Papandrea, *supra* note 26, at 102–03.

116. *Id.*

117. United States v. Rahimi, 144 S. Ct. 1889, 1920–22 (2024) (Kavanaugh, J., concurring) (arguing that means-end scrutiny is judicial policymaking and should not be "extend[ed] . . . to new areas . . . .").

Additionally, some lower courts have suggested that there is a role for text, history, and tradition to play outside the context of the Second Amendment, especially in First Amendment cases.[118] Overall, it is not clear what the future of text, history, and tradition holds; however, there is opportunity for it to become more relevant outside the context of the Second Amendment. If that happens, the way that it develops now will be determinative of how it functions in other contexts.

The potential implications of the majority's decision in *Maryland Shall Issue* are troubling. Although not all regulations implicating individual rights receive the same level of scrutiny, it is generally understood that they receive *some* level of scrutiny.[119] As one scholar wrote nearly thirty years ago, "The move from absolute to qualified rights does not undermine the case for taking incidental burdens seriously. The shift merely reduces the degree of protection that rights receive."[120] It is unclear how calibrating levels of scrutiny based on the type of burden might translate into the text, history, and tradition analysis. Perhaps the government would not need to show as many historical comparators when justifying a regulation. Or maybe the fit between the historical analogues and challenged regulation would not need to be as close of a match, like the shift that occurred between *Bruen* and *Rahimi*.[121] The Supreme Court will need to clarify at some point whether and how lower courts should treat direct and indirect/incidental burdens differently in the context of text, history, and tradition. Whatever manner they choose needs to be one that "treats incidental burdens seriously without crippling government."[122]

118. *See* Nat'l Republican Senatorial Comm. v. Fed. Election Comm'n, 117 F.4th 389, 399 (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."); NetChoice, LLC v. Paxton, 49 F.4th 439, 452–53 (5th Cir. 2022) ("As always, we start with the original public meaning of the Constitution's text.").

119. *See* Stone, *supra* note 97, at 107–08.

120. Dorf, *supra* note 100, at 1196.

121. To be clear, the differences between *Bruen* and *Rahimi* were not a result of the Court applying different "levels of scrutiny" in order to distinguish between a direct and indirect burden. Some say that *Rahimi* actually creates a completely different test. *See The Supreme Court, 2023 Term—Leading Cases*, 138 HARV. L. REV. 325, 331 (2024). However, these two cases may help demonstrate one way that courts could grapple with the issue of incidental burdens by adjusting how close a fit is required with historical laws.

122. Dorf, *supra* note 100, at 1200. Dorf offers a variety of approaches to incidental burdens that the Court may consider but ultimately settles on two as real possibilities because they both give incidental burdens some attention without elevating them to an impracticable role in the scheme of constitutional review. *Id* at 1199–1200.

CONCLUSION

In *Maryland Shall Issue*, the Fourth Circuit completely circumvents any level of judicial review because it deems the *direct* regulation of the Second Amendment right to be so insubstantial as to not warrant any close look. This approach is not only inconsistent with current Supreme Court precedent, but it is also normatively wrong. If the reasoning of the majority of the Fourth Circuit in this case stands, individual rights are at risk of becoming swallowed up by this infringement analysis. By placing a higher burden on plaintiffs asserting their rights than previously required, not only are those liberties protected by the Second Amendment at stake, but potentially many more are left vulnerable.

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