PROMISE AND PERILS IN THE NASCENT JURISPRUDENCE OF THE SECOND AMENDMENT

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Promise and Perils in the Nascent
Jurisprudence of the Second Amendment

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In *Heller v. District of Columbia,* the Supreme Court finally acknowledged that the Second Amendment protects the right of individuals to keep and bear arms. In *McDonald v. City of Chicago,* the Court held that this right is also protected from infringement by the Fourteenth Amendment. Thus, many important decisions about the reach of government’s regulatory authority will henceforth come from the federal courts. This symposium panel has been asked to address the question, “How Far Can Regulation Constrain Second Amendment Freedoms?” The short answer, of course, is that government is authorized to constrain these freedoms only so far as the Constitution permits. Figuring out what the Constitution permits, however, is a more difficult question, and one to which there is no good short answer.

I will sketch out several possible approaches, and argue that one of them is better than the others, at least for purposes of adjudication by the federal courts. But we should not forget that legislatures, as well as courts construing state constitutions, have their own obligation to respect constitutional limits, even when federal case law would allow them to overstep those limits. Nor should we forget that

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2 561 U.S. 742 (2010).

3 In my view, moreover, state courts have greater freedom than the inferior federal courts to depart from erroneous interpretations by the U.S. Supreme Court. See Nelson Lund, *Stare Decisis and Originalism: Judicial Disengagement from the*
legislatures have an independent obligation to refrain from enacting foolish laws, even when such laws are not forbidden by the Constitution.

I. Original Meaning

At the time of its adoption, the Second Amendment was understood as a federalism provision that had little to do with what we call gun control today. Many in the Founding generation believed that governments of large nations are prone to use soldiers to oppress the people. English history suggested that this risk could be controlled by permitting the government to raise armies, consisting of full-time paid troops, only when needed to fight foreign adversaries. For other purposes, such as responding to sudden invasions or other emergencies, the government could rely on a militia that consisted of ordinary civilians who supplied their own weapons and received some part-time, unpaid military training.

Wars can begin suddenly, leaving little time to raise and train an army, and the Revolutionary War showed that militia forces controlled by the state governments could not be relied on for national defense. The Constitutional Convention therefore decided that Congress should have almost unfettered authority to establish peacetime standing armies and to regulate the militia. This massive shift of power from the states to the federal government generated one of the chief objections to the proposed constitution. Anti-Federalists argued that the proposed constitution would take from the states their principal means of defense against federal usurpation. Federalists responded that fears of federal oppression were overblown, in part because the American people were armed and would be almost impossible to subdue through military force.

Implicit in the debate between Federalists and Anti-Federalists were two shared assumptions. First, it was clear that the proposed constitution gave the federal government almost total legal authority over the army and militia. Second, no one contended that the federal government should have any authority at all to disarm the citizenry.

*Supreme Court’s Errors, 19 Geo. Mason L. Rev. 1029 (2012).*
The contending parties disagreed only about whether an armed populace could adequately deter federal oppression.

The Second Amendment conceded nothing to the Anti-Federalist desire to curtail the military power of the federal government, which would have required substantial changes to the original Constitution. Although some thought the Amendment inadequate, no one opposed it. It would have been equally heretical to suggest that the federal government should be able to infringe an individual’s right to arms, to abridge the freedom of speech, or to prohibit the free exercise of religion.

The text of the Second Amendment refers to “the right of the people to keep and bear Arms.” This formulation suggests (without implying) that the Amendment protects a pre-existing right whose contours were familiar to those who adopted it. There certainly was such a pre-existing right, but history offers very little guidance about its scope. The Second Amendment, for example, could not possibly be co-extensive with the analogous provision in the English Bill of Rights, which protected only Protestants and allowed the legislature to define the scope of the right even as to them. Alternatively, Americans might have understood the pre-existing right as the one they already enjoyed. In one sense, that right was extremely broad because there were very few laws restricting people’s freedom to keep and bear arms, and everyone has a right to do anything that is not legally forbidden. But the relevant question is what limits there were on the discretion of legislatures to enact new regulations and thus reduce the scope of the legal right. Only four of the fourteen states had right-to-arms provisions in their constitutions, and the behavior of their legislatures did not differ from those in other states. The paucity of gun control regulations in all the states may well have reflected a simple lack of political demand for more restrictive laws, rather than any consensus about constitutional limits that should constrain the legislatures.

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4 Bill of Rights, 1 Wm. & M., 2d Sess., c. 2 (1689) (Eng).

5 The few laws that existed applied primarily to distrusted minorities like blacks, Indians, and British loyalists. There were also laws requiring citizens to possess arms for militia service, and a few safety regulations dealing with such matters as the storage of gunpowder and the discharge of firearms in crowded places.
The reason we find little direct guidance in eighteenth century history about the issues we face today is that there was no reason for those issues to be discussed. The principal fear to which the Second Amendment responded was that the new federal government would misuse its delegated powers to disarm the citizenry. Congress might, for example, have ordered that all weapons be kept in government armories, and defended such a regulation as a necessary and proper means of “organizing, arming, and disciplining the Militia.” The Second Amendment clearly forbade such laws. The states, however, were left free to enact whatever regulatory measures they chose.

With respect to the right to arms, the Fourteenth Amendment is, if anything, less clear than the Second Amendment. There is a complex and unsettled historical debate about whether the Fourteenth Amendment was meant to apply the Bill of Rights to the states. Even assuming such incorporation, there was very little precedent (either judicial or statutory) bearing on the scope of the Second Amendment right. The Thirty-Ninth Congress was quite concerned about discriminatory state laws and practices directed at the freedmen, but there is little evidence that anyone gave much thought to the appropriate scope of generally applicable regulations. Although some states had adopted regulations that went beyond what had existed prior to 1791, such regulations were still uncommon and they had met with mixed responses in the state courts.

Only in the twentieth century did American legislatures begin adopting regulations that imposed significant restrictions on the freedom of most Americans to keep and bear arms. There are good reasons to consider some of these regulations unconstitutional. There

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6 See U.S. Const. art. I, § 8, cl. 16.

7 One might think that those who enacted the Second Amendment would have given some thought to how it would operate in the District of Columbia and other federal territories, where there would be no state governments to serve as default regulators. Oddly, however, there appears to have been no discussion of whether the Bill of Rights would even extend to these jurisdictions. So here again we find an historical dead end in our search for the original understanding of the scope of the right to arms.
are also good reasons for concluding that some of them are perfectly permissible. But there is no reason to believe that historical research will reveal the scope of a pre-existing right that was codified in 1791 or 1868.

II. “Reasonable” Regulations

Faced with the lack of specific guidance in the historical sources, it is tempting to assume that those who enacted the Second and Fourteenth Amendments were reasonable people who would have left future legislatures free to enact reasonable regulations. In fact, that is almost exactly what state courts have generally done in construing right-to-arms provisions in their state constitutions. In practice, that has meant that gun control regulations have almost always been upheld. “Reasonable” regulations have often been characterized as those that do not completely destroy the right. And almost anything short of complete disarmament, at least if it can be defended with any halfway plausible policy argument, has been treated as permissible.8

This approach has the virtue of producing a jurisprudence that is exceedingly easy to apply. It also makes the constitutional right a pretty trivial thing. Courts generally took the same “reasonableness” approach to freedom of speech until well into the twentieth century, and we should not presume that so many judges have been guilty of mindless hostility to the constitutional rights of the citizenry. But a judicial test that brings any constitutional provision to the edge of destruction, or invalidates only the most outlandish infringements of a constitutionally protected liberty, deserves to be met with the most intense skepticism.

The Supreme Court eventually concluded that the First Amendment puts meaningful constraints on government. For almost a century now, the Court has persistently devoted enormous effort to constructing a body of case law that will protect a broad right to freedom of speech without preventing government from accomplishing legitimate and appropriate public goals. Whatever disagreements one

8 For a detailed review of the case law and a defense of this approach, see Adam Winkler, Scrutinizing the Second Amendment, 105 Mich. L. Rev. 683 (2007).
might have with particular decisions, it would be hard to find anyone who thinks today’s courts should uphold laws like the anti-sedition acts of 1798 and 1918. Nor should we assume that James Madison was mistaken in his belief that the 1798 statute violated the First Amendment.9

_Heller_ and _McDonald_ indicate that the Supreme Court has awakened to the value of the Second Amendment, just as it did to the value of the Free Speech Clause. The Court’s new approach rests on a substantial body of historical and interpretive scholarship, and perhaps also on a recognition of the public’s increased skepticism about the usefulness of many existing and proposed forms of gun control. It is too early to say how far the Court will go in confining government’s regulatory reach. At least rhetorically, however, the opinions in both these cases reject the latitudinarian “reasonableness” approach that dominated the state and lower federal courts for decades.

III. “Reasonableness” Redux

_Heller_ buried a once popular theory that the Second Amendment protects only a right of state governments to arm their militias, or at most a right of individuals to bear arms in the course of militia service.10 Nonetheless, both _Heller_ and _McDonald_ can be construed quite narrowly. They invalidated statutes that prohibited law-abiding citizens from possessing a handgun in their own homes, and future Courts might refuse to extend their reach any farther.

Justice Breyer’s dissenting opinions point out the most

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straightforward path to that result. In *Heller*, he argued that even if there is an individual right to keep and bear arms (which he denied), it should at most be applied using what he called intermediate scrutiny. He then performed a cost-benefit analysis that was extremely deferential to the policy judgments of elected officials. At least in the context of a high-crime urban area, he concluded, a handgun ban is a reasonable measure aimed at saving lives, preventing injuries, and reducing crime.

In *McDonald*, Breyer maintained that *Heller*’s recognition of an individual right to arms was so clearly wrong that the Court should refuse to extend its holding. He then argued that the Court’s incorporation doctrine should be applied by asking: “[W]ill incorporation prove consistent, or inconsistent, with the Constitution’s efforts to create governmental institutions well suited to the carrying out of its constitutional promises?”11 Briefly stated, Breyer’s answer is that incorporation of the Second Amendment will require courts to balance public and private interests in an excessively legislative manner, and that state legislatures should therefore be left to regulate firearms as they see fit.

It is not hard to see how Breyer’s approach might be followed in the future. Virtually any federal gun control law would be upheld. Even if the Court were unwilling to characterize *Heller* as a discredited precedent that should not be extended, it could apply Breyer’s form of intermediate scrutiny so as to make it indistinguishable from rational basis review.12 And even if the Court were unwilling to overrule *McDonald* on incorporation, it could similarly apply a virtually irrebuttable presumption of constitutionality to state regulations.

The appeal of such an approach is pretty obvious: almost every

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11 561 U.S. at 918 (Breyer, J., dissenting).

12 In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court purported to apply strict scrutiny but actually applied rational basis review, as one can easily see by comparing the majority opinion with the dissents. It follows a fortiorari that the Court is capable of applying rational basis review in the guise of intermediate scrutiny.
case will be an easy case because legislatures seldom enact laws that cannot possibly be characterized as a rational means of pursuing a legitimate government goal like public safety. One might defend the application of rational basis review (under that name or some other) to laws that regulate matters on which the Constitution does not speak directly. But the Court has never held that any enumerated constitutional right is subject only to rational basis review. And the reason for that is completely obvious: doing so would effectively read the right out of the Constitution.

IV. “Reasonableness” Reframed

Justice Scalia’s majority opinion in Heller is framed as an exercise in originalism. It offers a detailed textual analysis, supplemented by considerable historical evidence that establishes two crucial propositions. First, the Second Amendment protects a private right of individuals, not just a right belonging to state governments or to those who happen to be performing official militia duties. Second, the purpose of the right is to protect the individual’s inherent or natural right to self-defense.

So far, so good. Whatever defects there may be in some of Scalia’s reasoning, the weight of the evidence overwhelmingly supports both conclusions. As we’ve seen, however, the text and the historical record provide little guidance about the scope of the individual’s right to keep and bear arms for self-defense. How does Heller propose to define that scope?

Unfortunately, Scalia’s opinion addresses the scope of the right with little more than a series of ipse dixits. Take, for example, the actual holding in the case. D.C.’s handgun ban was invalidated because it “amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for [the] lawful purpose [of

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14 For a discussion of some shortcomings in Scalia’s effort to resolve these issues through an originalist analysis, see Nelson Lund, The Second Amendment, Heller, and Originalist Jurisprudence, 56 UCLA L. Rev. 1343, 1349-55 (2009).
self-defense]."¹⁵ Scalia goes on to give several reasons why this choice seems reasonable, and concludes that “[w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”¹⁶ This holding might mean that the Constitution protects whatever happens to be a popular choice at the time of the Court’s decision (and perhaps nothing else), even when the people’s elected representatives have made a different choice. Or it might mean that the Court will not uphold a regulation that a majority of the Justices think is unreasonable. In practice, the alternative readings are likely to collapse into the second, leaving the scope of the right to arms at the mercy of the policy views of five Supreme Court Justices. Because *Heller* and *McDonald* were 5-4 decisions, that may leave the Court just one new appointment away from effectively adopting the approach advocated by Justice Breyer in his dissenting opinions.

To see how this might work, consider some conspicuous dicta in the *Heller* opinion. Scalia endorses several forms of gun control that were not at issue in the case, without providing any relevant evidence about the original meaning of the Constitution and without even giving a reasoned explanation for his conclusions.

The Court first approves “longstanding prohibitions on the possession of firearms by felons and the mentally ill.”¹⁷ If such prohibitions had been familiar to the generation that enacted the Second Amendment, they would deserve at least a presumption of constitutionality. Unfortunately, the first general ban on the possession of firearms by felons was apparently enacted in 1968, less than a decade before the D.C. handgun ban was adopted.¹⁸

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¹⁵ *Heller*, 554 U.S. at 628 (emphasis added).

¹⁶ Id. at 629 (emphasis added).

¹⁷ Id. at 626.

The Court then endorses laws banning “the carrying of firearms in sensitive places such as schools and government buildings” and laws “imposing conditions and qualifications on the commercial sale of arms.” Scalia’s opinion provides not a shred of evidence that could even suggest the existence of such regulations prior to 1791. Nor does he explain why they should be permitted by the Second Amendment.

The *Heller* opinion also mentions that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.” This allusion to later state judicial decisions obviously does little or nothing to establish that such prohibitions would have been considered permissible in 1791. What’s worse, a review of the state decisions affirmatively undermines the conclusion that Scalia apparently thinks they support.

Scalia does acknowledge that “we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment.” This confirms that the opinion’s obiter dicta should be treated as prophecies that do not bind any court. Unfortunately, some of the dicta were reaffirmed in *McDonald*, and it is extremely unlikely that an “exhaustive historical analysis” will throw any significant new light on the issues.

*Heller* also says: “[W]e read [*United States v. Miller*, 307 U.S. 174 (1939)] to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the right, see Part III, *infra*.“
said no such thing, and in fact said just the opposite, namely that a short-barreled shotgun would be protected by the Second Amendment only if it “at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia.”\textsuperscript{25} The historical evidence referred to in Part III of the\textit{ Heller} opinion, moreover, provides zero support for Scalia’s claim that the original meaning of the Second Amendment covers only those arms that are in common civilian use at any given time.\textsuperscript{26}

In sum, \textit{Heller} illustrates the perils of imagining that the Constitution’s text and historical background alone can supply answers to all of the important questions that will arise in litigation today. The Court did not rely on those sources in deciding the specific question posed by the D.C. handgun ban. Nor did the use of these sources generate anything more than a bogus aura of originalism around the Court’s unsupported dicta. The \textit{Heller} decision itself may still be correct, as I think it is, and at least some of the dicta may reflect reasonable policy views. But pretending to find guidance in the text and history that is not there, however reasonable that guidance may seem to some, is apt to discredit originalism. Future Courts with different policy views will see through \textit{Heller’s} pretenses, and that recognition may threaten even the important conclusions in \textit{Heller} that rest on solid originalist foundations.

\textbf{V. Normal Jurisprudence}

Fortunately, the \textit{Heller} opinion contains seeds from which a more stable and responsible jurisprudence might grow. Now that the Supreme Court has held that the Second Amendment protects the right of individuals to keep and bear arms, and that the Fourteenth Amendment protects the same right from infringement by the states, courts should begin treating the right like they treat other enumerated rights. The closest analog is the Free Speech Clause, and the Court’s well developed jurisprudence in that area provides a useful model for


\textsuperscript{26} See Lund, \textit{Heller and Originalism}, supra note 14, at 1362-64.
adjudicating cases that involve the right to arms.

Obviously, there are significant differences between the two constitutional provisions, and the jurisprudence of one will not map neatly onto the other. In both cases, however, we have a text of great generality and a sparse historical record from which to seek specific guidance. For many decades after these provisions were enacted, moreover, courts tended to construe them very narrowly. Until the twentieth century, for example, the right of free speech was widely thought to protect little more than freedom from prior restraints, and was at best subject to any abridgements that a court thought were reasonable. We all know how dramatically that has changed, and the Supreme Court has now signaled that the Second Amendment requires a similar change of direction.

Heller’s key contribution is its recognition that the purpose of the Second Amendment right is to allow Americans to effectively exercise the inherent or natural right of self-defense. If courts fully accept and appreciate that purpose, developing appropriate doctrine will be a much more feasible undertaking than one might expect from reading the Heller opinion itself. Heller, moreover, repeatedly analogizes the First Amendment to the Second,27 thus suggesting that free speech case law will provide useful guidance in addressing issues that cannot be resolved through the use of historical research alone.

In order to illustrate how courts should, and should not, approach future Second Amendment cases, I will briefly describe four post-Heller circuit court decisions. Circuit courts are more constrained in dealing with precedent than the Supreme Court is,28 but these

27 See 554 U.S. at 582, 591, 594, 625-26, 635.

28 That, at least, has been the traditional understanding. See, e.g., Agostini v. Felten, 521 U.S. 203, 237 (“[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”) (quoting Rodriguez de Quijas, 490 U.S. 477, 484 (1989)); Mandel v. Bradley, 432 U.S. 173, 176 (1977) (“Summary affirmances and dismissals for want of a substantial federal question . . . prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.”)). But perhaps that understanding has changed. Recently, several courts refused to apply Baker v. Nelson, 409 U.S. 810 (1972), even though the
examples do not differ greatly from alternatives that the Court itself might adopt in the future.

Many courts have used an approach that presumes the validity of “longstanding” regulations, and applies “intermediate scrutiny” to any other regulation that does not severely restrict the core right of self-defense. In practice, this approach often amounts to rational basis review, which the Supreme Court expressed rejected in *Heller*.

In *Drake v. Filco*, for example, the Third Circuit considered a challenge to a New Jersey law that forbade almost all adults from carrying handguns in public without a license. In order to obtain a license, applicants were required to demonstrate a “justifiable need,” defined as “urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant’s life that cannot be avoided by means other than by issuance of a permit to carry a handgun.”

The court first concluded that the regulation was “longstanding” because it could be traced back to a 1924 statute requiring a showing of “need” for a concealed carry permit, and because several other jurisdictions imposed similar regulations. This conclusion was based on a misreading of *Heller*’s dictum approving a short list of regulations. *Heller* merely characterized two specific regulations as longstanding, and provisionally approved them, without so much as suggesting that all longstanding regulations are ipso facto valid. Relatively longstanding restrictions on concealed carry, moreover, can

Supreme Court had never said anything inconsistent with that decision. See, e.g., Latta v. Otter, 771 F.3d 456, 466-67 (9th Cir. 2014); Baskin v. Bogan, 766 F.3d 648, 659-60 (7th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193, 1204-08 (2014); Bostic v. Schaefer, 760 F.3d 352, 373-75 (4th Cir. 2014). The Supreme Court did not review any of these cases. Instead, it reversed a circuit court decision that had respected the rules of *Agostini* and *Mandel*. Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015) (expressly overruling *Baker*).

29 See 554 U.S. at 628 n.27.

30 724 F.3d 426 (3d Cir. 2013).

31 Id. at 428.
hardly justify a nearly total ban on all forms of carry. If it could, the effect would be to abolish the Second Amendment’s guarantee of the right “to keep and bear Arms.” If the Supreme Court were to treat the *Heller* dictum as a green light for any regulation that is not utterly novel, it would magnify the dictum far beyond what it actually says. But if the Third Circuit can misread *Heller* this way, the Supreme Court itself could certainly do so as well.

In an alternative holding, the Third Circuit found that the New Jersey regulation survived what it called intermediate scrutiny. The court’s entire analysis was comprehended in this sentence: “The predictive judgment of New Jersey’s legislators is that limiting the issuance of permits to carry a handgun in public to only those who can show a ‘justifiable need’ will further its substantial interest in public safety.”32 Of course, this is not actually an analysis. Nowhere in the opinion did the court make the slightest effort to show the required fit between the important goal of public safety and the restriction imposed by the challenged regulation.33 Instead, it offered a vague allusion to “history, consensus, and simple common sense.”34 This is not intermediate scrutiny as the Supreme Court has described it, but rational basis review under a different name. The Supreme Court could follow a similar path, though presumably it would provide a somewhat more elaborate analysis, perhaps along the line taken by Justice Breyer in his *Heller* dissent.

A better way to proceed is suggested by the Ninth Circuit’s opinion in *Peruta v. County of San Diego*.35 This case dealt with a

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32 *Id.* at 437.

33 *See*, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989) (intermediate scrutiny requires that the means chosen must not be “substantially broader than necessary to achieve the government’s interest”); *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480-81 (1989) (“[S]ince the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require.” (citation omitted)).

34 724 F.3d at 438 (quoting *IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008)).

regulation, similar to New Jersey’s, under which an applicant for a license to carry a gun must demonstrate “good cause,” defined as a “set of circumstances [not including a concern for one’s personal safety alone] that distinguish the applicant from the mainstream and causes him or her to be placed in harm’s way.”

Rather than employ the tiers-of-scrutiny approach favored by many other courts, Judge Diarmuid O'Scannlain carried out a detailed textual and historical inquiry. The court’s scholarly analysis cannot be adequately summarized here, but the key insight is captured in this formulation:

To reason by analogy, it is as though San Diego County banned all speech, but exempted from this restriction particular people (like current or former political figures), particular places (like private property), and particular situations (like the week before an election). Although these exceptions might preserve small pockets of freedom, they would do little to prevent destruction of the right to free speech as a whole. As the [Supreme] Court has said: ‘The Second Amendment is no different.’ It too is, in effect, destroyed when exercise of the right is limited to a few people, in a few places, at a few times.

Whereas the Third Circuit and several other courts have had little difficulty in upholding bans on public carry, O'Scannlain shows that this is actually an easy case in the opposite way: such bans cannot survive even the extremely lax “reasonableness” standard widely adopted by state courts. And the reason is the same reason that analogous restrictions on free speech would be laughed out of any court today.

This is not to say that every case will be an easy case. There are many regulations that do not amount to a complete destruction of the right either to keep or bear arms. In those cases, something like a

36 Id. at 1148.

37 Id. at 1169-70 (citation to Heller omitted).
tiers-of-scrutiny analysis will probably have to be adopted, as it has been by many courts already.

To see how this approach can be misapplied, consider the D.C. Circuit’s decision in *Heller v. District of Columbia (Heller II)*. After the Supreme Court struck down its handgun ban, the District adopted an elaborate new gun control statute, several provisions of which were challenged in *Heller II*. Among the challenged provisions were a ban on certain semi-automatic rifles and a ban on magazines with a capacity of more than ten rounds of ammunition. The court upheld both regulations, using what it called intermediate scrutiny.

The banned rifles were defined primarily in terms of cosmetic features, making them functionally indistinguishable from other rifles that were not banned. That alone rendered the ban arbitrary and without any real relation to public safety. The ban is analogous to a law forbidding the use of words with a French etymology, or a law requiring that French fries be called Freedom fries.

*Heller II* also analogized these semi-automatic rifles to fully automatic weapons (which the Supreme Court assumed are outside the protection of the Second Amendment), on the ground that they can fire almost as rapidly. The analogy is false because the Supreme Court treated fully automatic rifles as an unexplained special case, without suggesting a penumbral rule about relative rates of fire. And even if the analogy were valid, a regulation so patently underinclusive must fail any form of heightened scrutiny.

The court’s analysis of the magazine ban is similarly defective. First, the court accepted testimony that high-capacity magazines give an advantage to “mass shooters.” Maybe so, but such magazines are freely available by mail order and at stores in nearby Virginia. Did the court really believe that criminals bent on mass shootings will somehow be deterred from obtaining these magazines by respect for D.C.’s regulation? It would have been more plausible to take judicial notice of the opposite.

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38 670 F.3d 1244 (D.C. Cir. 2011).
But perhaps one might think that obvious avenues for evading a law should not suffice to invalidate the law. Even so, intermediate scrutiny requires more than mere speculation that the challenged law might have some effect on someone in some circumstances. Accordingly, the court also credited testimony that high-capacity magazines can tempt legitimate self-defense shooters to fire more rounds than necessary. Once again, this might be true, and there might be some cases in which the magazine ban could prevent an unfortunate accident. But exactly the same thing could be said about D.C.’s unconstitutional handgun ban. The same kind of argument could also be used to defend a ban on medical books containing photographs that might traumatize children who came across them. The *Heller II* court cited no evidence that the magazine ban would actually save any lives, and it did not even consider the possibility that innocent citizens would lose their lives because they ran out of ammunition while trying to defend themselves against criminals. Once again we see rational basis review masquerading as intermediate scrutiny.39

Rather than apply intermediate scrutiny in a way that is indistinguishable from rational basis review, courts should follow an approach more like the one used by the Seventh Circuit in *Ezell v. City of Chicago*.40 Like D.C., Chicago enacted an elaborate new set of regulations after its handgun ban was invalidated by the Supreme Court. *Ezell* was a challenge to the city’s requirement that gun owners receive one hour of range training, while banning any range at which

39 The court remanded the case for further factual development in connection with several regulations involving the registration of firearms. On remand, the district court upheld all of the regulations. In *Heller v. District of Columbia*, — F.3d — (D.C. Cir. 2015), the court affirmed in part and reversed in part. Applying intermediate scrutiny, the court held that the District had not provided sufficient evidence in support of its requirements that a registrant show a bureaucrat the firearm to be registered; re-register the firearm every three years; pass a test on D.C.’s firearms laws; and not register more than one pistol per month. Dissenting in part, Judge Karen LeCraft Henderson criticized the Supreme Court for “inviting litigants to draw [courts] into this political thicket.” *Id.* at —. She would have upheld all of the challenged provisions, using a highly deferential version of intermediate scrutiny that could hardly be distinguished from rational basis review.

40 651 F.3d 684 (7th Cir. 2011).
the training could take place.

The court rejected Chicago’s arguments in defense of this regulation,41 relying heavily on analogies to First Amendment case law. Judge Diane Sykes first concluded that broadly prohibitory laws like those at issue in *Heller* and *McDonald* are categorically unconstitutional. At the other extreme, some laws may not be subject to scrutiny under the Second Amendment because of historical evidence about the original meaning of the provision, just as perjury and fraud are outside the protection of the Free Speech Clause. All other laws must be subjected to means-end scrutiny in which the government bears the burden of justifying its regulation. Severe burdens on the core right to self-defense require an extremely strong public-interest goal and a close means-end fit. As a restriction gets farther away from this core, it may be more easily justified, depending on the relative severity of the burden and its proximity to the core of the right.

Applying this approach to the ban on firing ranges, the court held that the freedom to maintain proficiency in the use of weapons is a close corollary to the core right of self-defense. This requires a rigorous review of the government’s justifications, “if not quite ‘strict scrutiny.’”42 Chicago came nowhere close to meeting this standard, and at least one of its arguments appeared to be pretextual.

The approach adopted by Judge Sykes has two features that should recommend it to the Supreme Court. First, her framework does not invite courts to casually cast almost all regulations under the hazy rubric of intermediate scrutiny. *Drake, Heller II*, and many other circuit court decisions assume that most regulations on which the Supreme Court has not already spoken must be subjected either to strict scrutiny or to intermediate scrutiny. Strict scrutiny, however, appears to be reserved for only the most extreme kinds of disarmament

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41 The Seventh Circuit reversed the district court’s denial of the plaintiffs’ motion for a preliminary injunction, and remanded with instructions to grant the motion. Thus, the court found that the plaintiffs had demonstrated a strong likelihood of success on the merits.

42 651 F.3d. at 708.
laws. As we have seen, intermediate scrutiny can easily be applied in a way that is virtually indistinguishable from rational basis review. By requiring courts to carefully articulate how and how much a restriction burdens the core right of self-defense, the Sykes approach makes it more difficult to hide a lack of careful analysis behind the intermediate-scrutiny label. Ezell itself illustrates the value of this approach: the Drake and Heller II courts, for example, would almost certainly have reviewed the ban on firing ranges (which did not directly and immediately frustrate the core right of self-defense) under intermediate scrutiny and then upheld it.

A more fundamental way in which Ezell is superior to Drake and Heller II lies in its recognition of the value of the right to keep and bear arms. The Supreme Court itself has said that the Second Amendment should not “be singled out for special—and specially unfavorable—treatment.” By taking the right to arms as seriously as the Supreme Court takes the right to freedom of speech, and by showing how the principles of First Amendment jurisprudence can be adapted to this emerging area of law, Ezell provides a model that the Supreme Court itself should adopt. That model is far superior to the faux originalism on display in Heller’s statements about the scope of the right to keep and bear arms.

Conclusion

Heller and McDonald offer the promise of a robust Second Amendment jurisprudence that will finally give real meaning to the Constitution’s protection of the right to keep and bear arms. The Supreme Court, however, has not yet delivered on that promise. The opinions in both cases leave future Courts a way to perform a kind of partial-birth abortion of the right before it has a chance to emerge from the judicial womb. Several lower courts have begun to do just that. Fortunately, some judges, such as Diarmuid O’Scannlain and Diane Sykes, have shown how to keep the right alive. The Supreme Court should follow their lead, and insist that other courts do so as well.

43 McDonald, 561 U.S. at 778-79.