SECOND AMENDMENT
STANDARDS OF REVIEW IN A
HELLER WORLD

Nelson Lund,
George Mason University School of Law

Fordham Urban Law Journal,
Forthcoming

George Mason University Law and
Economics Research Paper Series

12-32
Second Amendment Standards of Review in a 
_Heller_ World

Nelson Lund†

Introduction

For a long time, gun rights advocates have hoped that the Supreme Court would begin reviewing gun control laws under the standard of “strict scrutiny,” which requires the government to demonstrate that its regulations are narrowly tailored to served a compelling governmental interest. Gun control advocates, for their part, would prefer “rational basis” review, which requires the government only to articulate some legitimate purpose that the legislature could conceivably have sought to serve with its regulations.

In _District of Columbia v. Heller_, the seminal case involving a general ban on the possession by civilians of any handgun or other operable firearm, the United States urged the Court to adopt a standard of “intermediate scrutiny.” Relying primarily on a First

† Patrick Henry Professor of Constitutional Law and the Second Amendment, George Mason University School of Law. For helpful comments, I am grateful to Stephen G. Gilles and Mara S. Lund. Research support was provided by George Mason’s Law and Economics Center.

Amendment free speech case upholding a ban on write-in voting, the federal government urged the Court to remand the case with instructions to balance the degree of the burden on constitutionally protected conduct against the strength of the government’s regulatory interests. When the Solicitor General pressed this point at oral argument, Chief Justice Roberts expressed his skepticism:

Well, these various phrases under the different standards that are proposed, “compelling interest,” “significant interest,” “narrowly tailored,” none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn’t it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, including you can’t take the gun to the marketplace and all that, and determine how these — how this restriction and the scope of this right looks in relation to those?

I’m not sure why we have to articulate some very intricate standard. I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don’t know why when we are starting afresh, we would

---

2 Brief for the United States, at 8.
try to articulate a whole standard that would apply in every case?3

When the Court issued its opinion in *Heller*, Justice Scalia’s majority opinion rather pointedly declined “to articulate some very intricate standard.” But neither did the Court adopt the approach that Chief Justice Roberts seemed to favor at oral argument. Notwithstanding the opinion’s extended examination of the historical record before and after the ratification of the Second Amendment, it did not “determine the scope of the existing right that the amendment refers to.” The Chief Justice was clearly referring to the scope of the right to arms as it was understood in 1791, and the Court’s opinion does pay lip service to that standard.4 But this was not the basis for the decision. Instead, *Heller* rejected the handgun ban because it constituted a prohibition on an entire class of arms that is overwhelmingly chosen for self defense by American society today.5 The Court then removed any doubt about its rejection of Chief Justice Roberts’ suggestion by endorsing a wide range of gun control regulations that had no analogues in 1791.

Had the Court simply evaluated the D.C. handgun

---

3 Tr. of Oral Argument, at 44.

4 “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.” *Heller*, 554 U.S. at 634-35.

5 *Id.* at 628-29.
ban by comparing it with the various regulations that existed in 1791, it might have been a very easy case. Nothing remotely resembling a ban on handguns existed at that time, before that time, or for a long time afterward. But the same could be said about almost all of the modern forms of gun control, for there were very few restrictions of any kind on the private possession of arms during the founding era. The common law prohibited private citizens from terrifying the public by going armed in public with dangerous and unusual weapons.\(^6\) A few jurisdictions had adopted safety regulations involving the storage of highly flammable gunpowder or the irresponsible discharge of weapons.\(^7\) But that’s about it.\(^8\)

The problem with the approach suggested by the Chief Justice is that the paucity of gun control regulations in 1791 does not necessarily imply that the Second Amendment was meant to proscribe all regulations except those resembling laws that had already been adopted. The Amendment might have been

---

\(^6\) William Blackstone, 4 *Commentaries* \(^148-49.\) For a discussion of American authorities acknowledging, and in some cases qualifying, this common law rule, see Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1362-64 (2009).

\(^7\) See *Heller*, 554 U.S. at 631-34.

\(^8\) There were, of course, also many laws requiring citizens to arm themselves in connection with their militia duties. These laws imply nothing about the scope of the government’s authority to forbid citizens to arm themselves as they choose in everyday life.
meant to prevent the federal government from overriding or supplementing state decisions about gun control, but it is highly implausible that it was meant to forbid Congress from imposing regulations in the District of Columbia and the territories that went beyond what the states had chosen to impose on their own citizens.\(^9\)

In 1791, American citizens had an almost unlimited right to arms by virtue of the fact that legislatures had chosen to impose almost no regulations. Such inaction did not debar legislatures from altering their citizens’ rights in the future. What Chief Justice Roberts and Justice Scalia call, respectively, the “existing” or “pre-existing” right constitutionalized by the Second Amendment\(^10\) would therefore have to be understood as protecting whatever individual freedom legislatures were obliged to respect. But we have virtually no historical evidence about the scope of that right because it had not become a matter of public controversy.

Faced with the impossibility of actually adopting the straightforward approach suggested by the Chief Justice at oral argument, the Court was nonetheless unwilling to adopt “an all-encompassing standard” like strict or intermediate scrutiny. *Heller* did expressly reject the rational basis test, and it held a ban on the

---


\(^10\) See Tr. of Oral Argument at 44 (quoted above); *Heller*, 554 U.S. at 592.
possession of handguns in the home unconstitutional. The opinion also endorsed several forms of gun control in dicta, but without offering any very clear indication of why the Court regarded these regulations as constitutionally permissible. Beyond that, the Court provided little guidance, and virtually no clear guidance.

_Heller_ might have been regarded as an exercise in judicial restraint if it had simply invalidated the D.C. law on the ground that it severely compromised what the Court called “the core lawful purpose of self-defense.” Unfortunately, the opinion’s approval of various regulations not at issue in the case, combined with its lackadaisical reasoning in support of its various conclusions, created a mist of uncertainty and ambiguity.

After _McDonald v. City of Chicago_ applied the Second Amendment to the states, the need for a workable framework of analysis became more acute because state and local gun control laws are far more numerous and diverse than federal regulations.

---

11 554 U.S. at 628-29 & n.27, 635.

12 For a detailed discussion, see Lund, _supra_ note 6, at 1356-67.

13 554 U.S. at 630.

14 130 S. Ct. 3020 (2010).

15 _McDonald_ reviewed a handgun ban that was almost identical to the one at issue in _Heller_. The _McDonald_ plurality
opinion concluded that the Fourteenth Amendment’s Due Process Clause makes the Second Amendment applicable to the states in the same way that it applies to the federal government under *Heller*, whatever exactly that may be. Justice Thomas’ concurring opinion relied on the Privileges or Immunities Clause, and left open the possibility that the Fourteenth Amendment right to arms might have a somewhat different scope than the Second Amendment, but Thomas made no definitive statement on that issue.

---

16 See *Heller II*, slip op. at 13-14. (citing cases).
The inferior courts have not enjoyed the luxury of confining their rulings to anomalous laws aimed at disarming the civilian population, which *Heller* said would be invalid “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.”17 Faced with harder cases, and with the fogginess of the *Heller* opinion, the inferior courts have understandably reached for a framework resembling the familiar “baggage” picked up by the First Amendment. *Heller* at least encouraged this approach by its repeated references and analogies to the First Amendment and to First Amendment case law.18

We might therefore expect Second Amendment jurisprudence to continue developing through the application of this model. Maybe it will. But a strong challenge to the model was recently advanced in a dissenting opinion by Judge Brett Kavanaugh of the D.C. Circuit, who claims that a very different approach is dictated by Justice Scalia’s majority opinion in *Heller*. It is therefore worth considering the differences between Judge Kavanaugh’s approach and the one adopted by the D.C. Circuit and other courts of appeals.

I conclude that the analytical framework in the majority opinion is superior to Judge Kavanaugh’s. The majority, however, misapplied its framework. A variation on that framework adopted and applied by the Seventh Circuit illustrates how the inferior courts should

17 554 U.S. at 628-29.

18 *See id.* at 582, 595, 635.
approach novel Second Amendment issues.

I. *Heller II*

Prior to 2008, the District of Columbia had sought through its laws to effect an almost complete disarmament of the civilian population. The *Heller* plaintiffs attacked only what they saw as the most vulnerable regulation, namely the ban on possessing a handgun or any other operable firearm in the home. After their victory, the D.C. government went back to the drawing board in an effort to restrict civilian access to guns as much as possible in light of *Heller*. In *Heller II*, the named plaintiff in that case, along with other individuals, challenged several provisions of the city’s revised gun control laws.

The plaintiffs in *Heller II* challenged three main elements of the D.C. gun control regime:

- A requirement that gun owners register each of their firearms with the government. The registrant is required to submit detailed information about himself and the weapon, and renew the registration every three years. Citizens are forbidden to register more than one pistol in any 30-day period.

- Every applicant for registration must in effect be licensed to register by passing a series of tests, attending a training course, and being fingerprinted and photographed.
D.C. also prohibits a wide range of semi-automatic firearms, as well as any magazine with a capacity of more than 10 rounds.

A. The Majority Opinion

In an opinion written by Judge Douglas Ginsburg, the court provided the following analysis and conclusions:

• The basic registration requirement, as applied to handguns but not long guns, is similar to longstanding regulations that are presumptively constitutional, and the plaintiffs failed to overcome this presumption by showing that the requirement has more than a de minimis effect on their rights.

• Some of the particular registration requirements, such as the 30-day rule for registering handguns and a requirement for ballistic testing of pistols, are novel rather than longstanding, and are therefore subject to additional scrutiny. The court reached the same conclusion about the licensing requirements and about all of the registration and licensing requirements for long guns.

Relying largely on First Amendment free speech decisions, the court concluded that none of these requirements imposes “a substantial burden upon the core right of self-defense,” and that strict
scrutiny is therefore inappropriate. Instead, the court concluded that intermediate scrutiny should be applied, requiring the government to show that the regulations are “substantially related to an important governmental objective.” Finding that the record was insufficient to apply this standard of scrutiny, the court remanded for further proceedings.

- The court declined to decide whether semi-automatic rifles and large capacity magazines receive any protection at all under the Second Amendment. The Supreme Court’s *Heller* decision had created a special rule under which the Second Amendment does not protect those weapons that are not “in common use at the [present] time” for lawful purposes like self-defense. The *Heller II* majority concluded that

---

19 Slip op. at 22 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661 (1994)).

20 Slip op. at 24 (citing Clark v. Jeter, 486 U.S. 456, 461 (1988)).

21 The court refused to consider issues involving semi-automatic pistols and shotguns on the ground that none of the plaintiffs had tried to register such weapons.

22 554 U.S. at 624, 627. This might be understood as a corollary or variation of the Court’s presumption that long-standing regulations are constitutional. It was presented, however, as an interpretation of United States v. Miller, 307 U.S. 174 (1939). As it happens, *Heller*’s interpretation of *Miller* is utter nonsense. Justice Scalia misstated the facts of the case, and interpreted its holding to
mean the opposite of what it said. For a detailed analysis, see Nelson Lund, Heller and Second Amendment Precedent, 13 Lewis & Clark L. Rev. 335 (2009).

The slip opinion in Heller said that Miller had “upheld . . . convictions” under a federal statute. That is indisputably untrue, for there were no convictions in the case. The preliminary print of the U.S. Reports attempts to correct the error by changing the word “convictions” to “an indictment.” The new statement is also untrue. Miller reviewed the dismissal of an indictment, and remanded the case for the district court to reconsider its validity in light of the appropriate legal test. The Miller opinion made it clear that it was quite possible that the proper application of this test might result in the district court again dismissing the indictment. See 307 U.S. at 178. The indictment was therefore not “upheld.” (The Heller dissenters made the same mistake as the majority in the slip opinion and have included the same attempt at a correction in the preliminary print.) It remains to be seen whether the final version of the U.S. Reports will reflect yet another effort to describe the facts in Miller accurately. Even if it does, it cannot change the fact that nobody on the Heller Court seems to have actually read the very short Miller opinion, or the fact that Heller read Miller’s holding to mean the opposite of what it says.

Assuming arguendo that such weapons are protected by the Second Amendment, the court then concluded that it was “reasonably certain” that the prohibition does not substantially burden the right. Accordingly, it applied intermediate scrutiny.

23 Slip op. at 32.
The court upheld the ban on certain semi-automatic rifles, primarily because of evidence suggesting that they are nearly as dangerous or prone to criminal misuse as the fully automatic rifles that *Heller* had excluded from constitutional protection. The ban on high-capacity magazines was upheld on the basis of evidence that they are useful to criminals and that they encourage an excessive number of shots to be fired by those engaged in legitimate self defense.

B. *The Kavanaugh Dissent*

Judge Kavanaugh thought that the majority’s approach to the case was based on a complete misinterpretation of *Heller*. In his view, the Supreme Court has rejected the tiers-of-scrutiny approach. Instead, *Heller* teaches that courts are to assess gun regulations by looking to the Constitution’s text and to history and tradition, and by drawing analogies from these sources when dealing with modern weapons and new circumstances. For the importance of the difference between his approach and the majority’s, Judge Kavanaugh cited Justice Scalia’s concurrence in *McDonald*, which argued that text, history, and tradition are less subjective and more susceptible of reasoned analysis than the interest-balancing approach that Judge Kavanaugh believes are exemplified in tests like *...

---

24 *Id.* at 33-34.

25 *Id.* at 35.
Judge Kavanaugh analyzed the new case as follows:

- He argued that D.C.’s entire registration and licensing scheme is unconstitutional because it does not meet *Heller*’s test approving of “longstanding” regulations. He conceded that registration requirements imposed on gun *sellers* meet *Heller*’s test, but pointed out that there is no tradition of imposing such requirements on gun *owners*. The city’s licensing requirements, which are inseparable from the registration requirement, are similarly novel and therefore also invalid.

Judge Kavanaugh’s analysis was based on a misreading of *Heller*. The Supreme Court announced that certain longstanding regulations are presumptively constitutional, and Judge Kavanaugh is right that registration requirements on gun owners do not meet that test. But *Heller* nowhere said that novel regulations are always unconstitutional. The relative novelty of the handgun ban at issue in *Heller* may have affected the attitude of some Justices, but the Court actually rested its decision on a perception that many Americans today have good reasons for making handguns their preferred weapon for defense of the home. The Court did not say that

---

26 *Id.* at 11.
the novelty of the ban rendered it unconstitutional.

- Judge Kavanaugh also concluded that D.C.’s ban on semi-automatic rifles is unconstitutional because (1) they are not meaningfully different from semi-automatic handguns, which *Heller* had already decided may not be banned,27 and (2) they have not traditionally been banned and are in common use today.28

This reading of *Heller* is also technically flawed. The Supreme Court’s holding involved only a particular handgun, which was a revolver, not a semi-automatic.29 *Heller* did not say, one way or

27 *Id.* at 32-33.
28 *Id.* at 34-37.
29 Dick Heller, the only plaintiff whose constitutional challenge was considered by the Supreme Court, was found to have standing because his application for a license to possess a specific single-action .22 caliber revolver was rejected by the D.C. government. Parker v. District of Columbia, 478 F.3d 370, 375-78 (D.C. Cir. 2007). A copy of the application, which identified the particular gun at issue, was filed in the trial court as Exhibit A accompanying the plaintiffs’ brief in support of summary judgment, and thus was part of the record in the case. Whether or not any of the Justices examined the record, the Court had to be referring to this specific revolver when it said: “Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.” *Heller*, 554 U.S. at 635 (emphasis added).
the other, whether a ban on semi-automatic pistols would be unconstitutional.

Judge Kavanaugh also misread *Heller* on the common use test. In that case, the Supreme Court concluded that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.” The awkward double negative in this statement strongly suggests that the Court was careful to avoid saying that all weapons typically possessed for lawful purposes are *ipso facto* protected. Whatever the Court may decide in the future, it has not yet said that all weapons in common use for lawful purposes are *ipso facto* protected by the Second Amendment.

### III. Applying *Heller*

#### A. The Rights and Wrongs of the Majority Approach in *Heller II*

Judges Ginsburg and Kavanaugh engaged in a detailed debate about the appropriate framework for analysis. Neither judge made a plausible case that his preferred framework can be derived from the *Heller* opinion. The debate is fairly elaborate, and I will just give a couple of illustrative examples.

---

30 554 U.S. at 625.
Judge Kavanaugh claimed that Justice Breyer’s dissent in *Heller* advocated the use of intermediate scrutiny, and that the majority’s express rejection of Breyer’s approach therefore implies a rejection of that standard of review.31 Judge Ginsburg correctly responded that *Heller* rejected only Breyer’s arguably idiosyncratic version of intermediate scrutiny rather than a more exacting version suggested by the Supreme Court’s case law.32

Judge Ginsburg, for his part, drew his approach largely from post-*Heller* decisions of other circuit courts, not from *Heller* itself. As Judge Kavanaugh appropriately noted, this required Ginsburg to ignore or discount numerous passages in *Heller* that rely on history and tradition, and condemn the use of interest-balancing tests. Judge Kavanaugh is right that the application of tests like strict and intermediate scrutiny necessarily entail a balancing of the government’s interest against those of the aggrieved citizen. And it is certainly true that the *Heller* opinion nowhere endorses the use of strict or intermediate scrutiny.

The real problem is that *Heller* is so Delphic, or muddled, that the kind of methodological debate found in *Heller II* is unresolvable. That said, Judge Ginsburg’s approach seems to me to be clearly preferable.

---

31 Slip op. at 14-26.

32 Id. at 36-38.
First, as I explained above, Judge Kavanaugh’s approach required him to misread *Heller* in order to find guidance precise or clear enough to provide rules of decision in *Heller II*.

Second, and perhaps more important, Justice Scalia’s *Heller* opinion itself shows that his use of history and tradition is little more than a disguised version of the kind of interest balancing that he purports to condemn. At crucial points, he simply issued *ipse dixit* unsupported by any historical evidence, and at other points, he misrepresented historical facts. He could hardly have avoided doing so, given the paucity of relevant historical evidence, and that problem will be even more acute in future cases dealing with relatively novel regulations. Covert interest-balancing dressed up as an analysis of history and tradition is no better than more straightforward interest-balancing in the form of strict or intermediate scrutiny, and almost certainly worse.

This is not to say that *Heller II* was correctly decided. Judge Kavanaugh’s most powerful arguments are directed against the majority’s application of its framework to the challenged regulations. Those regulations were manifestly meant to suppress the legitimate exercise of constitutional rights, and Judge Kavanaugh was right to conclude that they should be invalidated.

---

32 For a detailed proof of these claims, see Lund, *supra* note 6, at 1356-67.
Judge Kavanaugh is right that D.C.’s registration and licensing scheme is quite different from the very limited registration requirements that have been traditional in America. The important point, however, is not their novelty, but their onerous character and their lack of an adequate rationale. Whether under strict or intermediate scrutiny, they should not be upheld without a showing by the government, at a minimum, that they can make a significant contribution to public safety. The City had tried to do so by arguing that a registration system enables police officers who are executing warrants to determine whether residents in the dwelling have guns. This rationale is grossly inadequate. No sane police officer in the District of Columbia would assume that the residents of a dwelling are unarmed just because they have not registered a gun. The regulation cannot accomplish the purpose advanced to justify it, and the justification cannot satisfy heightened scrutiny.

Apart from the government’s failure to show a substantial relation between public safety and its registration and licensing requirements, and apart from the onerous nature of some of those requirements, this kind of registration system has traditionally been resisted in America history for a reason closely bound up with an important purpose of the Second Amendment.

34 For a useful discussion of the long and unsuccessful effort to impose national registration requirements on gun owners, see David Kopel’s contribution to this symposium.

35 Kavanaugh dissent, slip op. at 49.
When the government collects this kind of detailed information about individuals and the guns they own, it gives itself a powerful tool that it could use for the unconstitutional confiscation of guns or the unconstitutional harassment of gun owners. Even a narrow reading of the Second Amendment would have to acknowledge that its purpose includes the prevention of such illegalities. For that reason, the District of Columbia should have an especially heavy burden to bear in justifying regulations that would help it to do what it has already demonstrated that it wants to do, namely disarm the civilian population. The District came nowhere close to meeting that burden.

The majority’s decision to uphold D.C.’s ban on a wide range of semi-automatic rifles is also inconsistent with heightened scrutiny. The banned rifles are defined primarily in terms of cosmetic features, and they are functionally indistinguishable from other semi-automatic rifles that are not banned. The regulation is therefore arbitrary and without any real relation to public safety. It certainly fails the majority’s own test, under which “the Government has the burden of showing there is a substantial relationship or reasonable “fit” between, on the one hand, the prohibition . . . and, on the other, [the

36 This is not a paranoid fantasy. See, e.g., Stephen P. Halbrook, “Only Law Enforcement Will Be Allowed to Have Guns”: Hurricane Katrina and the New Orleans Firearm Confiscations, 18 Geo. Mason U. C.R. L.J. 339 (2008) (discussing the aftermath of a police decision that only law enforcement officers would be allowed to possess guns in New Orleans after Hurricane Katrina struck the area).
Government’s] important interests in protecting police officers and controlling crime.”37 That alone should have sufficed to invalidate the ban.38

_Heller_ assumed that fully automatic rifles are outside the protection of the Second Amendment.39 The _Heller II_ majority analogized semi-automatic rifles to these unprotected weapons on the ground that semi-automatics can fire almost as rapidly as those that are fully automatic. This argument is mistaken. _Heller_ treated fully automatic weapons as a special case, apparently on the basis of history and tradition, without saying anything at all to suggest some kind of penumbral rule that protected weapons must have a significantly slower rate of fire than those that are fully automatic. Even asssuming, _arguendo_, that such a penumbral rule was implied by _Heller_, D.C. allows other semi-automatic rifles that can fire just as quickly as those that are banned. The underinclusiveness of the regulation confirms it was not based on a similarity between automatic and semi-automatic weapons.40 The

37 Slip op. at 33.

38 See Kavanaugh dissent, slip op. at 41.

39 554 U.S. at 624 (asserting that it would be “startling” to conclude that restrictions on machineguns might be unconstitutional).

40 Judge Kavanaugh also said that the majority “contends that semi-automatic handguns are good enough to meet people’s needs for self-defense and that they shouldn’t need semi-automatic rifles.” Slip op. at 39. He rightly rejected this kind of argument, as
similarity therefore cannot justify the regulation under heightening scrutiny.

The majority offered two justifications for the ban on large-capacity magazines. First, it accepted testimony that such magazines give an advantage to criminals bent on “mass shootings.”\(^{41}\) Maybe they do. But how could the District’s regulation possibly reduce this problem? Large capacity magazines are freely available by mail order and in stores a short distance away in Virginia. The court seems to be assuming that criminals bent on mass shootings will refrain from obtaining such magazines out of respect for D.C.’s regulation. Rather than thoughtlessly accept this preposterous assumption, the court should have taken judicial notice of the opposite.

The majority also credited testimony that large-capacity magazines can tempt legitimate self-defense shooters to fire more rounds than necessary. This analysis shows at most that banning such magazines could conceivably have some good effects on some occasions. But the same could be said of D.C.’s original and unconstitutional ban on all handguns, which illustrates why the argument is fatally flawed. Banning medical books containing photos of corpses might save some children from psychological trauma, which would

\(^{41}\) Slip op. at 35.

\(\text{Heller itself had already done. Id. (citing 554 U.S. at 629). I could not find this contention in the majority opinion, so perhaps it was removed after Judge Kavanaugh circulated his dissent to the other members of the panel.}\)
be a good thing, too. But nobody would consider such a book ban constitutional.

Assuming that intermediate scrutiny is appropriate, the government is required at a minimum to show a substantial relation between the regulation and public safety. The *Heller II* majority cited no evidence showing that the magazine ban would save any significant number of lives, or any lives at all. Nor did it even consider the possibility that innocent civilians might lose their lives because they ran out of ammunition while trying to defend themselves. The government failed to meet its burden of showing that the magazine ban satisfies even intermediate scrutiny, and the ban should therefore not have been upheld.

**B. A Better Approach: Ezell v. City of Chicago**

Chicago responded to *McDonald* in much the same fashion as the District of Columbia had responded to *Heller*: by adopting a sweeping and burdensome new regulatory regime to replace the handgun ban that the Supreme Court had invalidated. In *Ezell v. City of Chicago*, the Seventh Circuit reviewed Chicago’s decision to require one hour of range training as a prerequisite to lawful for gun ownership, while simultaneously banning from the city any range at which this training could take place.

After the district court denied the plaintiffs’ motion

---

42 651 F.3d 684 (7th Cir. 2011).
for a preliminary injunction, the Seventh Circuit reversed and remanded with orders to grant the motion. Because of the procedural posture of the case, the court of appeals did not issue a decision on the merits. In explaining why the plaintiffs had demonstrated a strong likelihood of success on the merits, however, the court provided a detailed analysis that I will treat for simplicity of exposition as though it were a merits decision.

Judge Diane Sykes began by offering a more detailed and somewhat different interpretation of *Heller* and *McDonald* than Judge Ginsburg did in *Heller II*. Briefly stated, she interpreted the Supreme Court’s opinions as follows:

- Just as some categories of speech are unprotected by the First Amendment as a matter of history and tradition, some activities involving arms are categorically unprotected by the Constitution. To identify those categories, courts should look to the original public meaning of the right to arms (as of 1791 with respect to the Second Amendment and as of 1868 with respect to the Fourteenth Amendment).  

---

43 The anchor for this conclusion in the Supreme Court’s jurisprudence is weak, especially because the only example of such unprotected rights clearly identified in *Heller* was the possession of short-barreled shotguns (and apparently also machineguns). That example was based on the Court’s interpretation of a 1939 precedent, which had not concluded that such weapons were outside the scope of the right to arms in 1791. Nonetheless, Judge Sykes’ interpretation of *Heller* does have the merit of making some sense out of *Heller’s* rhetoric about original meaning, which is
• If an activity is not within an unprotected category, courts should evaluate the regulatory means chosen by the government and the public benefits at which the regulation aims. “Borrowing from the Court’s First Amendment doctrine, the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on the right.”

  
  
  44  651 F.3d at 703. Here again, Judge Sykes adopted a questionable interpretation of *Heller*, which declined to specify that First Amendment analogies are so generally applicable. Again, however, her interpretation of *Heller* is not foreclosed by Justice Scalia’s opinion, and it has the merit of making sense.

  
  
  45  Judge Sykes said that the Supreme Court opinions “suggest” this conclusion. *Id.* at 703. She is right that the suggestion is there, and I believe that she is also right that no better interpretation is apparent.

The court concluded that firing ranges are not categorically outside the protection of the Second
Amendment. Historical evidence approvingly cited in *Heller* (albeit not on this issue) supported the conclusion, and a variety of other evidence cited by the City fell “far short of establishing that target practice is wholly outside the Second Amendment as it was understood when incorporated as a limitation on the States.”

The more difficult question for the court involved the choice of a standard review. Judge Sykes plausibly interpreted *Heller* to point toward the use of First Amendment analogies, and she summarized the rather intricate set of tests generated by the Supreme Court in that area. From those cases, she distilled an approach to the Second Amendment. Severe burdens on the core right to self-defense will require an extremely strong public-interest goal and a close means-ends 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 test to the gun-range ban, the court concluded that the right to maintain proficiency in the use of weapons is an important corollary to the meaningful exercise of the core right. This requires a rigorous review of the government’s justifications, “if not quite ‘strict scrutiny.’” The City did not come close to

---

46 *Id.* at 704-06.

47 *Id.* at 708.

48 *Id.* at 708.
satisfying this standard. It produced no evidence establishing that firing ranges necessarily pose any significant threat to public safety, and at least one of its arguments was so transparently a makeweight that “[t]o raise it at all suggests pretext.”

The analytical framework adopted by Judge Sykes in this case is broadly similar to the one adopted by the 
Heller II majority. Her approach, however, is superior in at least two important respects.

First, whereas 
Heller II adopted a view reflecting a somewhat loose consensus of other circuit courts, Judge Sykes relied almost entirely on 
Heller, 
McDonald, and other Supreme Court decisions, and she exhibited a detailed and thoughtful familiarity with those opinions. It is true that 
Heller and 
McDonald can be read differently, as Judge Kavanaugh showed in 
Heller II, but Judge Sykes’ analysis of them has better support in the text of the opinions. Because subordinate courts are required to follow the Supreme Court, but not to follow the lead of other circuits, it is generally a better practice to focus on what the Supreme Court itself has said — to look, so to speak, for the Court’s “original meaning” — than to play a kind of telephone game by interpreting Supreme Court opinions on the assumption that some

49 
Id. at 708. Judge Rovner favored a less stringent standard of review, and would have given more credit to the City’s public-safety concerns. See id. at 713-15 (Rovner, J., concurring in the judgment).

50 Id. at 709-10 (majority opinion).
other courts read them correctly.

Second, and this is more important, Judge Sykes took the importance of the Second Amendment as a constitutional right more seriously than the Heller II majority. Whereas Heller II casually applied intermediate scrutiny in a way that too often accepted flimsy justifications for the regulations, Judge Sykes insisted on the kind of rigor that courts routinely demand in First Amendment cases. Unlike the Heller II majority, she gave appropriate attention to the fundamental principle, expressly adopted by the Supreme Court, that the Second Amendment should not “be singled out forspecial — and specially unfavorable treatment.”

Conclusion

The Supreme Court’s Heller opinion disapproved a governmental ban on keeping a handgun in the home, while announcing its approval of a number of other gun control regulations. The Court refused to adopt any clear analytical framework for resolving the countless issues about which Heller said nothing. Some of its reasoning, or rhetoric, suggests that such issues should be resolved solely by consulting American history and tradition,

51 McDonald, 130 U.S. at 3044. Cf. United States v. Skoien, 614 F.3d 638, 651-54 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (criticizing the majority for relieving the government of its burden of justifying its disarmament regulation and for depriving a criminal defendant of an opportunity to contest the dubious non-record evidence on which the court of appeals relied).
along with the text of the Constitution. Other parts of the opinion suggest that courts should develop a framework more akin to what Chief Justice Roberts called the “baggage” that the First Amendment has picked up from the judiciary.

The federal courts of appeals have refused to follow the history-and-tradition approach. The effort by Judge Kavanaugh to take that approach in his *Heller II* dissent illustrates why this approach is not likely to prove fruitful, or even workable. Other circuit courts have tried to adapt the First Amendment “baggage” to this new area, with mixed results. The D.C. Circuit’s majority opinion in *Heller II* illustrates the perils of adapting this body of case law without attending with sufficient care to the Supreme Court’s existing jurisprudence and without adequate regard for the value of Second Amendment rights. Judge Sykes’ opinion for the Seventh Circuit in *Ezell* shows that circuit judges who are so inclined can show appropriate respect both to the Supreme Court and to the Second Amendment. She deserves to be widely imitated.