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Second Amendment Standards of Review in a Heller World

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SECOND AMENDMENT STANDARDS OF REVIEW IN A *HELLER* WORLD

*Nelson Lund**

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INTRODUCTION

In 2008, in *District of Columbia v. Heller*, the Supreme Court invoked the Second Amendment to invalidate a law that forbade almost all citizens from possessing a handgun or other operable firearm. Since that decision was announced, the lower courts have resolved a large number of Second Amendment challenges to less restrictive gun control laws. This Article reviews and evaluates the principal debates that have arisen in the federal courts, focusing primarily on a sharply divided panel decision from the D.C. Circuit and a majority opinion from the Seventh Circuit. The three opinions considered in this Article articulate the most important extant alternative interpretations of the Supreme Court’s *Heller* opinion. The Article concludes that the approach taken by the Seventh Circuit

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is superior to either of the approaches offered in the D.C. Circuit case.

I. THE SUPREME COURT'S *HELLER* DECISION

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 serve a compelling governmental interest.¹ Gun control advocates 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.²

In *District of Columbia v. Heller*,³ the seminal case involving a general ban on the possession 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 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.⁴ 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

1. See, e.g., Brief for the Nat’l Rifle Ass’n & the NRA Civil Rights Def. Fund as *Amici Curiae* in Support of Respondent, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

2. Before the *Heller* decision, advocates of gun control had long maintained that the Second Amendment protects no right to arms outside the context of militia service. See, e.g., Brief for Brady Center to Prevent Gun Violence et al. as *Amici Curiae* Supporting Petitioner, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290). Absent such protection, gun control laws would be subject to rational basis review under the Due Process and Equal Protection Clauses, as virtually all laws are.

3. 554 U.S. 570 (2008).

4. Brief for the United States at 8, *Heller*, 554 U.S. 570 (No. 07-290) [hereinafter Brief].

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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 try to articulate a whole standard that would apply in every case?⁵

When the Court issued its opinion in *Heller*, Justice Scalia's majority opinion rather pointedly declined "to articulate some very intricate standard."⁶ But neither did the Court adopt the approach that Chief Justice Roberts suggested 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."⁷ The Chief Justice clearly was referring to the scope of the right to bear arms as it was understood in 1791, and the Court's opinion does pay lip service to that standard.⁸ 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*.⁹ The Court then removed any doubt about its rejection of Chief Justice Roberts's suggestion by endorsing a wide range of gun control regulations that had no analogues in 1791:

- Bans on the possession of firearms by felons and the mentally ill.¹⁰
- Bans on carrying firearms "in sensitive places such as schools and government buildings."¹¹
- Laws imposing conditions and qualifications on the commercial sale of arms.¹²

5. Transcript of Oral Argument at 44, *Heller*, 554 U.S. 570 (No. 07-290) [hereinafter Transcript].

6. *Id.*

7. *Id.*

8. "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.

9. *Id.* at 628-29.

10. *Id.* at 626.

11. *Id.*

- Bans on carrying concealed weapons.¹³
- Bans on “those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns” and apparently machineguns.¹⁴

Had the Court simply evaluated the D.C. handgun 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 long after that time. But the same could be said about almost all of the modern forms of gun control, for there were very few restrictions on the private possession of arms during the founding era. The common law did prohibit private citizens from terrifying the public by going armed in public with dangerous and unusual weapons.¹⁵ And a few jurisdictions had adopted safety regulations involving the storage of highly flammable gunpowder or the irresponsible discharge of weapons.¹⁶ But that’s about it.¹⁷

The problem with the approach that the Chief Justice suggested at oral argument is that the paucity of gun control regulations in the framing era 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 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 permanently forbid Congress from imposing regulations in the District of Columbia and the territories

12. *Id.* at 626-27.

13. *Id.* at 626.

14. *Id.* at 625. The first three dicta in this list, and possibly the last two, might be read as establishing only a presumption of constitutionality. If so, the *Heller* opinion makes the presumption look very close to conclusive. See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1356 n.32 (2009).

15. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 148-49 (1769). For a discussion of American authorities acknowledging, and in some cases qualifying, this common law rule, see Lund, *supra* note 14, at 1362-64.

16. See *Heller*, 554 U.S. at 631-34.

17. There were, of course, also laws that *required* citizens to arm themselves in connection with their militia duties. See *id.* at 650 (Stevens, J., dissenting). These laws imply nothing about the scope of the government’s authority to *forbid* citizens to arm themselves as they choose in everyday life. There were also laws restricting the possession and use of weapons by politically disfavored segments of the population, such as slaves. *Id.* at 614-15 (majority opinion). Such precedents have little or no bearing on modern forms of gun control.

that went beyond what the states had chosen to impose on their own citizens before 1791.¹⁸

At that time, American citizens had an almost unlimited right to arms by virtue of the fact that legislatures had chosen to impose almost no regulations on them. But such inaction did not debar legislatures from altering their citizens' legal rights in the future. What Chief Justice Roberts and Justice Scalia call, respectively, the "existing" or "pre-existing" right constitutionalized by the Second Amendment¹⁹ 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* limitation on government because it had not become a matter of public controversy.

Faced with the impossibility of actually adopting the historical approach that the Chief Justice suggested at oral argument, the Court nonetheless was unwilling to adopt what he called "an all-encompassing standard" like strict or intermediate scrutiny.²⁰ *Heller* did expressly reject the rational basis test,²¹ and it held that a ban on the possession of handguns in the home was unconstitutional.²² As noted above, the opinion also endorsed several forms of gun control in dicta, but without offering any clear indication of why the Court regarded these regulations as constitutionally permissible.²³ 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."²⁴ Unfortunately, Justice Scalia's approval of various regulations not at issue in the case, combined with his lackadaisical reasoning in support of several legal conclusions, created a mist of uncertainty and ambiguity.²⁵

18. See Lund, *supra* note 14, at 1353-55, 1368-69.

19. See Transcript, *supra* note 5, at 44; *Heller*, 554 U.S. at 592.

20. Transcript, *supra* note 5, at 44.

21. *Heller*, 554 U.S. at 635.

22. *Id.* at 628 n.27, 628-29, 635.

23. *Id.* at 635. For a detailed discussion, see Lund, *supra* note 14, at 1356-67.

24. *Heller*, 554 U.S. at 630.

25. For more detail, see Lund, *supra* note 14, at 1349-67.

After *McDonald v. City of Chicago*²⁶ 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 more numerous and often more restrictive than nationally applicable regulations.²⁷ Somewhat surprisingly, perhaps, the federal courts of appeals have quickly and fairly uniformly begun to coalesce around an interpretation of *Heller* that provides such a framework. The emerging consensus can be roughly summarized as follows:

- Some regulations, primarily those that are “longstanding,” are presumed not to infringe the right protected by the Second Amendment.²⁸
- Regulations that severely restrict the core right of self-defense are subject to strict scrutiny.²⁹
- Regulations that do not severely restrict this core right are subject to intermediate scrutiny.³⁰

26. 130 S. Ct. 3020 (2010).

27. *McDonald* reviewed a handgun ban that was nearly 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 that may be. *McDonald*, 130 S. Ct. at 3050. Justice Thomas concurred in the judgment but relied instead on the Privileges or Immunities Clause. *Id.* at 3058-59 (Thomas, J., concurring). He left open the possibility that the Fourteenth Amendment right to arms might have a somewhat different scope than the Second Amendment, but made no definitive statement on that issue. *Id.* at 3059-63. For a detailed discussion, see Nelson Lund, *Two Faces of Judicial Restraint (Or Are There More?)* in *McDonald v. City of Chicago*, 63 FLA. L. REV. 487 (2011).

28. Many of these cases involve regulations that are at least arguably comprehended within the *Heller* dicta summarized above. See, e.g., *United States v. Dugan*, 657 F.3d 998, 999-1000 (9th Cir. 2011) (upholding “long-standing prohibition” against shipping and receiving firearms through interstate commerce while being a user of a controlled substance); *United States v. Hatfield*, 376 F. App’x 706, 707 (9th Cir. 2010) (upholding statute prohibiting the possession of an unregistered short-barreled shotgun); *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010) (upholding “longstanding” statute criminalizing possession of a firearm by unlawful drug users); *United States v. Dorosan*, 350 F. App’x 874, 875-76 (5th Cir. 2009) (holding that a parking lot at a post office is a “sensitive place” from which guns may be banned); *United States v. Davis*, 304 F. App’x 473, 474 (9th Cir. 2008) (upholding statute prohibiting the carrying of a concealed weapon on an aircraft).

Many judges, including both the majority and dissent in the D.C. Circuit’s *Heller II* case (discussed *infra*) have assumed that the Supreme Court approved virtually *all* longstanding regulations. This is incorrect. *Heller* approved certain longstanding regulations but said nothing about others. See *supra* notes 10-14 and accompanying text.

29. See, e.g., *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (finding strict scrutiny inapplicable because “[t]he burden imposed by the law [at issue] does not severely limit the possession of firearms”).

This framework is closely analogous to what Chief Justice Roberts called “standards that apply in the First Amendment[, which] just kind of developed over the years as sort of baggage that the First Amendment picked up.”³¹ The *Heller* Court seems to have self-consciously refrained from adopting such a framework, but neither did it specify any alternative.

The lower 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.”³² Faced with harder cases, and with the fogginess of the *Heller* opinion, these courts understandably have reached for a framework resembling the familiar “baggage” picked up by the First Amendment. And *Heller* did hint at such an approach through its repeated references and analogies to the First Amendment and to First Amendment case law.³³

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

I conclude that the analytical framework in the majority opinion is superior to the framework that Judge Kavanaugh advocated. The majority, however, misapplied that framework. A variation applied by the Seventh Circuit illustrates how the lower federal courts can best approach novel Second Amendment issues.

II. THE D.C. CIRCUIT’S *HELLER II* DECISION

Prior to 2008, the District of Columbia had sought through its laws to bring about an almost complete disarmament of the civilian

30. See, e.g., *United States v. Mahin*, 668 F.3d 119, 123 (4th Cir. 2012) (“[T]he courts of appeals have generally applied intermediate scrutiny to uphold Congress’s effort under [18 U.S.C.] § 922(g) to ban firearm possession by certain classes of non-law-abiding, non-responsible persons who fall outside the Second Amendment’s core protections.”).

31. Transcript, *supra* note 5, at 44.

32. *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008).

33. See *id.* at 582, 595, 635.

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 losing the case, 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.³⁴

The plaintiffs in *Heller II* challenged three main elements of the D.C. gun control regime:³⁵

- 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 to renew the registration every three years. Citizens are forbidden to register more than one pistol in any 30-day period.³⁶
- 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.³⁷
- D.C. also prohibited a wide range of semi-automatic firearms, as well as any magazine with a capacity of more than 10 rounds.³⁸

A. The Majority Opinion

In an opinion written by Judge Douglas Ginsburg, the court provided the following analysis and conclusions.³⁹

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 constitutional rights.⁴⁰

Some of the specific registration provisions are novel rather than longstanding, and therefore are subject to additional scrutiny. The court reached the same conclusion about the licensing requirements

34. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1247 (D.C. Cir. 2011).

35. *See id.* at 1248-49.

36. *Id.* at 1248.

37. *Id.* at 1248-49.

38. *Id.* at 1249.

39. *See id.* at 1253-64.

40. *Id.* at 1253-54.

and about all of the registration and licensing requirements for long guns.⁴¹

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.⁴² Instead, the court concluded that intermediate scrutiny should be applied, which requires the government to show that the regulations are “substantially related to an important governmental objective.”⁴³ Finding that the record was insufficient to apply this standard of scrutiny, the court remanded for further proceedings.⁴⁴

The court declined to decide whether semi-automatic rifles and large capacity magazines receive any protection at all under the Second Amendment.⁴⁵ 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.⁴⁶ The *Heller II* majority concluded that

41. *See id.* at 1255-56.

42. *Id.* at 1257 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661 (1994)).

43. *Id.* at 1257-58 (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

44. *Id.* at 1258, 1260.

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

46. *District of Columbia v. Heller*, 554 U.S. 570, 624, 627 (2008). This might be understood as a corollary of the Court’s presumption that many 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. *District of Columbia v. Heller*, No. 07-290, slip op. at 49 (June 26, 2008). That is indisputably false, for there were no convictions in the case and the *Miller* Court clearly noted this fact. The preliminary print of the U.S. Reports attempts to correct the error by changing the word “convictions” to “an indictment.” *Heller*, 554 U.S. at 621. The new statement is also false. *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. *See Miller*, 307 U.S. at 183. 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 Miller*, 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 failed attempt at a correction in the preliminary print.) *Compare* *District of Columbia v. Heller*, No. 07-290, slip op. at 2 (U.S. June 26, 2008) (Stevens, J., dissenting), available at <http://www.scotusblog.com/wp-content/uploads/2008/06/07->

semi-automatic rifles are commonly owned, but was unsure whether they are in common use for either of the lawful purposes specifically mentioned in *Heller*, namely hunting and self-defense.⁴⁷

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.⁴⁸ Accordingly, it applied intermediate rather than strict scrutiny.

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.⁴⁹ The court also upheld the ban on high-capacity magazines on the basis of testimony 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.⁵⁰

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, he believes *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.⁵¹ Judge Kavanaugh analyzed the new case as follows.⁵²

290.pdf, *with Heller*, 554 U.S. at 636. 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.

47. *Heller II*, 670 F.3d at 1261. Contrary to the court’s assumption, *Heller* did not say or imply that these are the only lawful purposes relevant to the constitutional analysis.

48. *Id.* at 1262.

49. *Id.* at 1262-63.

50. *Id.* at 1263-64.

51. To highlight 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 to reasoned analysis than the interest-balancing approach that Judge Kavanaugh believes is exemplified in tests like strict and intermediate scrutiny. *Id.* at 1274

He argued first that D.C.'s entire registration and licensing scheme is unconstitutional because it does not meet *Heller's* test approving of "longstanding" regulations.⁵³ 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*.⁵⁴ The city's licensing requirements, which are inseparable from the registration requirement, are similarly novel and therefore also invalid.

Judge Kavanaugh's analysis of this issue resulted from a misreading of *Heller*. The Supreme Court said that certain longstanding regulations are at least presumptively constitutional, and Judge Kavanaugh is right that registration requirements imposed on gun owners are not longstanding. But *Heller* did not say that novel regulations are always unconstitutional. It is possible that 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 the novelty of the ban *ipso facto* rendered it unconstitutional, or that a longstanding ban on handguns would necessarily have been upheld.

Judge Kavanaugh also concluded that D.C.'s ban on certain 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,⁵⁵ and (2) they have not traditionally been banned and are in common use today.⁵⁶

This reading of *Heller* is also technically flawed. The case involved a revolver, not a semi-automatic.⁵⁷ *Heller* did not say one way or the

(Kavanaugh, J., dissenting) (citing *McDonald v. Chicago*, 130 S. Ct. 3020, 3058 (2010) (Scalia, J., concurring)).

52. *Id.* at 1269-96.

53. *Id.* at 1291.

54. *Id.* at 1292.

55. *Id.* at 1286.

56. *Id.* at 1286-88.

57. Dick Heller, the only plaintiff whose constitutional challenge the Supreme Court considered, 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. See *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. Plaintiffs' Brief in Support of Summary Judgment at Exhibit A, *Parker v. District of Columbia*, 311 F.

other whether a ban on semi-automatic pistols would be unconstitutional.

Judge Kavanaugh also misread *Heller*'s statement that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."⁵⁸ The awkward double negative in this sentence strongly indicates that the Court was careful to avoid saying that all weapons typically possessed for lawful purposes *are* 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. Their debate is fairly elaborate, and I will just give a couple of illustrative examples.

Judge Kavanaugh argued that Justice Breyer's dissent in *Heller* advocated the use of intermediate scrutiny, and that the majority's express rejection of Breyer's approach implies a rejection of that standard of review.⁵⁹ 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 actual case law.⁶⁰

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, the *Heller* opinion nowhere endorses the use of strict or intermediate scrutiny.⁶¹ He was also right

Supp. 2d 103 (D.D.C. 2004) (No. 03-0213 EGS). 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." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (emphasis added).

58. *Heller*, 554 U.S. at 625.

59. *Heller II*, 670 F.3d at 1276-82 (Kavanaugh, J., dissenting).

60. *Id.* at 1264-65 (majority opinion).

61. *See, e.g., id.* at 1273 (Kavanaugh, J., dissenting).

to point out that Judge Ginsburg ignored or discounted numerous passages in *Heller* that rely on history and tradition, and condemn the use of interest-balancing tests.⁶² The application of tests like strict and intermediate scrutiny necessarily entails a balancing of the government's interest against those of the aggrieved citizen, and *Heller* certainly does denounce interest-balancing, at least when there is a better alternative available.

The real problem is that *Heller* is so muddled that the kind of methodological debate found in *Heller II* cannot be resolved. That said, Judge Ginsburg's approach seems to me to be clearly preferable.

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 purported to condemn. At crucial points, he simply issued *ipse dixit*s unsupported by any historical evidence, and at other points, he misrepresented historical facts.⁶³ He could hardly have avoided doing so, given the paucity of relevant historical evidence about the original meaning of the Second Amendment. That problem becomes more acute in cases dealing with less restrictive regulations than those at issue in *Heller*. 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 the majority was far too deferential to the government in reviewing them.

Judge Kavanaugh is right that D.C.'s registration and licensing scheme is quite different from the limited registration requirements that have been widely imposed for many decades. The important point, however, is not their novelty, but their lack of an adequate justification. Whether under strict or intermediate scrutiny, they should not be upheld without a showing by the government, at an

62. See, e.g., *id.* at 1275-82.

63. For a detailed proof of these claims, see Lund, *supra* note 14, at 1356-67.

absolute minimum, that they can make a significant contribution to public safety.

The government 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.⁶⁴ This rationale is woefully inadequate. The greenest rookie officer in D.C. would know that many residents possess unregistered guns.⁶⁵ The regulation therefore cannot accomplish the purpose advanced to justify it, and the justification cannot satisfy any form of heightened scrutiny.

Apart from the government's failure to show a substantial relation between public safety and its registration and licensing requirements, such requirements have traditionally been resisted in America for a reason closely bound up with an important purpose of the Second Amendment.⁶⁶ 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.⁶⁷ Even a narrow reading of the Second Amendment would have to acknowledge that its purpose includes the prevention of such illegalities. For that reason, D.C. 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 government came nowhere close to meeting that burden.⁶⁸

64. See *Heller II*, 670 F.3d at 1294-95 (Kavanaugh, J., dissenting).

65. One would think that anyone who lives or works anywhere near D.C. would know this. Why the court failed to take judicial notice of this notorious fact is something of a mystery.

66. 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. David B. Kopel, *The Great Gun Control War of the 20th Century—and Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527 (2012).

67. 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 during the breakdown of civil order after Hurricane Katrina).

68. To its credit, the majority recognized that the government had failed to meet its burden with respect to some of the registration and licensing requirements. In calling for further development of the record on remand, however, the court merely required the government "to present some meaningful evidence" to justify its predictions about public safety. *Heller II*, 670 F.3d at 1259. That does not sound like much of a hurdle.

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.⁶⁹ The regulation therefore is arbitrary and lacks 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 Government's] important interests in protecting police officers and controlling crime."⁷⁰ That failure alone should have sufficed to invalidate the ban.⁷¹

Heller assumed that fully automatic rifles are outside the protection of the Second Amendment.⁷² 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.⁷³ This argument is fallacious. *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.⁷⁴

Even assuming, *arguendo*, that such a penumbral rule could be inferred from *Heller*, D.C. allows other semi-automatic rifles that can fire just as quickly as those that are banned.⁷⁵ The under-inclusiveness of the regulation confirms it was not based on a functional similarity between automatic and semi-automatic weapons.⁷⁶ The putative similarity therefore cannot justify the regulation under any level of heightened scrutiny.

69. *See id.* at 1285, 1296 n.10 (Kavanaugh, J., dissenting).

70. *Id.* at 1262 (majority opinion).

71. *See id.* at 1290-91 (Kavanaugh, J., dissenting).

72. *See* *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008) (asserting that it would be "startling" to conclude that restrictions on machineguns might be unconstitutional).

73. *See* 670 F.3d at 1263.

74. *See Heller*, 554 U.S. at 624-25.

75. *See Heller II*, 670 F.3d at 1285 n.10, 1290 (Kavanaugh, J., dissenting).

76. Judge Kavanaugh also says 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." *Id.* at 1289. He rightly rejects this kind of argument, as *Heller* itself had already done. *Id.* (citing *Heller*, 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. Or

The majority offered two justifications for the ban on large-capacity magazines. First, it accepted testimony that such magazines give an advantage to “mass shooters.”⁷⁷ Maybe they do. But how could the District’s regulation possibly reduce this problem? Large capacity magazines are freely available by mail order and at stores in nearby Virginia. The government apparently assumed that criminals bent on mass shootings will refrain from obtaining such magazines out of respect for D.C.’s regulation. Rather than accept this far-fetched assumption, the court might well have taken judicial notice of the opposite. Or at least required the government to prove such a counterintuitive notion.

The majority also credited testimony that large-capacity magazines can tempt legitimate self-defense shooters to fire more rounds than necessary.⁷⁸ This testimony shows at most that banning such magazines could conceivably have some good effects on some occasions. But the same could be said about D.C.’s original and unconstitutional ban on all handguns, which illustrates why the argument is fatally flawed. Banning medical books containing photos of half-dissected cadavers might save some children from psychological trauma, which would 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 D.C. had responded to *Heller*: by adopting a sweeping and burdensome new regulatory regime to replace the handgun ban that the Supreme

perhaps he detected such a contention in the majority’s statement that D.C. does not “prevent a person from keeping a suitable and commonly used weapon for protection in the home or for hunting.” *Id.* at 1262 (majority opinion).

77. *Id.* at 1263.

78. *Id.* at 1263-64.

Court had invalidated. In *Ezell v. City of Chicago*,⁷⁹ the Seventh Circuit reviewed Chicago's decision to require one hour of range training as a prerequisite to lawful gun ownership, while simultaneously banning from the city any range at which this training could take place.⁸⁰

Judge Diane Sykes began by offering a more detailed and somewhat different interpretation of *Heller* and *McDonald* than that of the D.C. Circuit.⁸¹ Briefly stated, she interpreted the Supreme Court's opinions as follows.

First, 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.⁸² 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.⁸³

Second, if an activity is within a protected 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

79. 651 F.3d 684 (7th Cir. 2011).

80. *Id.* at 689-90.

81. *See id.* at 700-04. After the district court denied the plaintiffs' motion 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.

82. *Id.* at 702.

83. *Id.* at 702-03. The anchor for this conclusion in the Supreme Court's jurisprudence is weak, especially because the only example of such categorically unprotected activities 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. *See* *District of Columbia v. Heller*, 554 U.S. 570, 624-25 (2008). Nonetheless, Judge Sykes's interpretation of *Heller* does have the merit of making some sense out of *Heller's* rhetoric about original meaning, which is probably about the most that an inferior federal court can be expected to accomplish.

Judge Sykes's distinction between the original meaning of the Second Amendment itself and its meaning as understood in 1868 also makes considerable sense, though there is no apparent support in *Heller* or *McDonald* for her use of the distinction here.

Amendment right and the severity of the law's burden on the right."⁸⁴ Broadly prohibitory laws restricting the core Second Amendment right—like those at issue in *Heller* and *McDonald*—are categorically unconstitutional.⁸⁵ All other laws must be judged by one of the standards of means-end scrutiny used in evaluating other enumerated constitutional rights, and the government always has the burden of justifying its regulations.

The court concluded that firing ranges are not categorically outside the protection of the Second Amendment.⁸⁶ Historical evidence approvingly cited in *Heller* (albeit not on this issue) supported the conclusion,⁸⁷ 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.”⁸⁸

The more difficult question for the court involved which standard of review to apply. Judge Sykes plausibly interpreted *Heller* to permit the use of First Amendment analogies, and she summarized the rather intricate set of tests generated by the Supreme Court in that area.⁸⁹ From those cases, she distilled an approach to the Second Amendment.⁹⁰ Severe burdens on the core right to self-defense will require an extremely strong public-interest goal and a close means-ends fit.⁹¹ 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.⁹²

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.⁹³ This requires a rigorous review of the government's justifications, “if

84. *Ezell*, 651 F.3d at 703. Here again, Judge Sykes adopted a questionable interpretation of *Heller*, which did not say or imply that First Amendment analogies are so generally applicable. Still, her interpretation of *Heller* is not foreclosed by Justice Scalia's opinion, and it has the merit of making sense.

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

86. *Id.* at 706.

87. *See id.* at 704.

88. *Id.* at 706.

89. *Id.* at 708.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

not quite ‘strict scrutiny.’”⁹⁴ The City did not come close to satisfying this standard.⁹⁵ It produced no evidence establishing that firing ranges necessarily pose any significant threat to public safety,⁹⁶ and at least one of its arguments was so transparently a makeweight that “[t]o raise it at all suggests pretext.”⁹⁷

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

First, *Heller II* adopted a view reflecting a somewhat loose consensus of other circuit courts. Judge Sykes, however, relied almost entirely on *Heller*, *McDonald*, and other Supreme Court decisions, and she exhibited a detailed and thoughtful familiarity with the Court’s opinions. It is true that *Heller* and *McDonald* can be read differently, as Judge Kavanaugh showed in *Heller II*, but Judge Sykes’s analysis has better support in the text of the opinions. Inferior federal courts are required to follow the Supreme Court, but they are not required to follow other circuits.⁹⁸ It is therefore 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 other courts have read them correctly.

Second, and of greater significance, Judge Sykes took the importance of the Second Amendment far more seriously than the *Heller II* majority did. Whereas *Heller II* casually applied intermediate scrutiny in a way that too often accepted flimsy or even fatuous 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 in *McDonald*, that the Second Amendment should not “be singled out for special—and

94. *Id.*

95. *Id.* at 709. One member of the panel 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).

96. *Id.* at 709 (majority opinion).

97. *Id.* at 710.

98. State courts may have more latitude than federal courts in dealing with guidance from the Supreme Court. *See* Nelson Lund, *Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court’s Errors*, 19 *GEO. MASON L. REV.* 1029, 1039-41 (2012).

specially unfavorable—treatment.”⁹⁹ If enough other judges follow her lead, perhaps the Second Amendment will not return to its pre-*Heller* status as a kind of constitutional pariah.

CONCLUSION

The Supreme Court’s *Heller* opinion disapproved a governmental ban on keeping a handgun in the home, while endorsing 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, along with the text of the Constitution. Other parts of the opinion can be read to 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.¹⁰⁰

The federal courts of appeals have declined to follow the history-and-tradition approach. Judge Brett Kavanaugh’s effort 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 Second Amendment jurisprudence and without adequate regard for the value of Second Amendment rights. Judge Diane Sykes’s 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. Judge Sykes deserves to be emulated by other judges who take their office seriously.

99. *McDonald v. Chicago*, 130 S. Ct. 3020, 3043 (2010); *cf.* *United States v. Skoien*, 614 F.3d 638, 651–54 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (criticizing Judge Frank Easterbrook’s majority opinion 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 majority relied).

100. Transcript, *supra* note 5, at 44.