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## THE FIRST AMENDMENT GUIDE TO THE SECOND AMENDMENT

David B. Kopel

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# THE FIRST AMENDMENT GUIDE TO THE SECOND AMENDMENT

DAVID B. KOPEL\*

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## INTRODUCTION

First Amendment law has been well developed by the Supreme Court in many decisions over the past eight decades;<sup>1</sup> this rich body of case law has provided analogies and tools that have been used for analysis of many other parts of the Constitution. The First Amendment is an especially helpful tool for Second Amendment analysis.

To begin with, the First and Second Amendments both protect fundamental aspects of individual autonomy against government suppression.<sup>2</sup> In contrast, much of the rest of the Bill of Rights concerns controls on government procedures, such as when a person can be arrested, how criminal trials are to be conducted, and what punishments may be imposed.<sup>3</sup>

1. See L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1397 (1997) (describing First Amendment free speech doctrine as “a mature area of the law” compared to the Second Amendment).

2. *Silvester v. Harris*, No. 1:11-CV-2137AWISAB, 2013 WL 6415670, at \*7 (E.D. Cal. Dec. 9, 2013).

3. See U.S. CONST. amend. III–VIII.

As the Supreme Court has affirmed, the First and Second Amendments safeguard inherent human rights, which predate government itself.<sup>4</sup> Like the right to assemble, the right to keep and bear arms was not invented in 1789 or in 1689. The right is “found wherever civilization exists.”<sup>5</sup> While in America the right is guaranteed by the Constitution, the right is not “in any manner dependent upon that instrument for its existence.”<sup>6</sup> Such rights are, according to the Declaration of Independence, far more ancient than government itself; the very reason that governments are created is to protect such rights.<sup>7</sup> What the Second Amendment protects is older than the Twelve Tables,<sup>8</sup> older than Confucius, older than recorded history. The right is as old as Natural Law, which is to say that it is among the first of the “Laws of Nature and of Nature’s God.”<sup>9</sup>

As described in Part I of this article, the Supreme Court has strongly indicated that First Amendment tools should be employed to help resolve Second Amendment issues. Before *District of Columbia v. Heller*,<sup>10</sup> several Supreme Court cases suggested that the First and Second Amendments should be interpreted in the same manner. *Heller* and *McDonald v. City of Chicago*<sup>11</sup> applied this approach, using First Amendment analogies to resolve many Second Amendment questions.

Part II of this Article details how influential lower court decisions have followed—or misapplied—the Supreme Court’s teaching. Of course, precise First Amendment rules cannot necessarily be applied verbatim to the Second Amendment. Part III outlines some general First Amendment principles that are also valid for the Second Amendment. Finally, Part IV looks at how several First Amendment doctrines can be used in Second

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4. *United States v. Cruikshank*, 92 U.S. 542, 551–53 (1875).

5. *Id.* at 551.

6. *Id.* at 553 (The right to bear arms “is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.”).

7. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“[T]o secure these rights, Governments are instituted among Men . . .”).

8. See M. Stuart Madden, *The Graeco-Roman Antecedents of Modern Tort Law*, 44 *BRANDEIS L.J.* 865, 889 (2006) (citing WOLFGANG KUNKEL, AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY 23–31 (J.M. Kelly trans., 1966)) (“The Twelve Tables, dated at approximately 450 B.C., represent the Romans’ first recorded effort at a comprehensive recitation of existing customary and nascent statutory law.”).

9. THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776).

10. 554 U.S. 570 (2008).

11. 130 S. Ct. 3020 (2010).

Amendment cases, showing that some, but not all, First Amendment doctrines can readily fit into Second Amendment jurisprudence.

## I. THE SUPREME COURT

### A. *Early Cases*

In United States Supreme Court cases that have discussed the First and Second Amendments together, the discussion typically treats those two Amendments as concerning the same thing: an important individual right for which some limited restrictions are allowed. The two rights are to be construed *in pari materia*.<sup>12</sup>

#### 1. *Dred Scott v. Sandford*<sup>13</sup>

To justify the holding that free blacks were not citizens of the United States, Chief Justice Taney's opinion offered a parade of alleged horrors about the consequences of such citizenship: black citizens would have the right to travel to any state; to remain in that state permanently if they wished; and to travel within that state wherever they wanted, at any time of day or night.<sup>14</sup> In addition, black citizens would have the right to "full liberty of speech in public and in private upon all subjects which [a state's] own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went."<sup>15</sup>

According to the Court, the "right to 'keep and carry arms,' the right to 'full liberty of speech,' and the right to 'hold public meetings on political affairs' were all individual rights of American citizenship."<sup>16</sup>

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12. BLACK'S LAW DICTIONARY 862 (9th ed. 2009) (A canon of construction: statutes "on the same subject . . . may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.").

13. 60 U.S. 393 (1856).

14. *Id.* at 416-17.

15. *Id.* at 417 (1856). The cases in part I.A. are discussed in more detail in David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999).

16. *Dred Scott*, 60 U.S. at 416-17.

2. *United States v. Cruikshank*<sup>17</sup>

This case recognized that Chief Justice Taney's nightmare had come true. Because Section 1 of the Fourteenth Amendment declared that all persons born in the United States and owing allegiance thereto<sup>18</sup> are citizens of the United States, people of all races have the right to assemble and the right to keep and bear arms.<sup>19</sup>

*Cruikshank* involved a federal prosecution of men who had conspired to deprive black citizens of their First Amendment right to assemble and Second Amendment right to arms.<sup>20</sup> The Court ruled that Congress did not have power under Section 5 of the Fourteenth Amendment to create criminal laws against purely private actors who interfered with the exercise of constitutional rights.<sup>21</sup> Part of the Court's rationale was that the right to assemble and the right to arms were not "privileges or immunities" that were granted to American citizens by the Constitution.<sup>22</sup> Rather, those rights are "found wherever civilization exists."<sup>23</sup> Protected—but not created—by the Constitution, the right to assemble, like the right to arms, is not "in any manner dependent upon that instrument for its existence."<sup>24</sup>

In 2010, the Supreme Court quoted these passages in *McDonald v. City of Chicago*.<sup>25</sup> The Court adhered to its longstanding reading of the Privileges or Immunities Clause, while also finding that the *Cruikshank* language supported incorporation of the right to arms (and the right to assemble) under the Due Process Clause because these inherent human rights are "of such a nature that they are included in the conception of due process of law."<sup>26</sup>

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17. 92 U.S. 542 (1875).

18. This means that the children of foreign diplomats or invading foreign soldiers are not citizens. See *United States v. Wong Kim Ark*, 169 U.S. 649, 654–58 (1898) (stating that the children of foreign ministers born in the United States are not citizens because they are not "subject to the jurisdiction" of the United States).

19. See *Cruikshank*, 92 U.S. at 554.

20. *Id.* at 551–53; see CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2009).

21. *Cruikshank*, 92 U.S. at 551–53.

22. *Id.* at 553.

23. *Id.* at 551.

24. *Id.* at 553.

25. 130 S. Ct. 3020, 3060 (2010).

26. *Id.* at 3030–31.

3. *Robertson v. Baldwin*<sup>27</sup>

In this 1897 case on the meaning of the Thirteenth Amendment, the unanimous Court explained that all constitutional rights have exceptions derived from common law and tradition.<sup>28</sup> For the First Amendment, there are libel and obscenity.<sup>29</sup> For the Second Amendment, there are restrictions on carrying *concealed* handguns.<sup>30</sup>

The *Heller* Court quoted *Robertson* for the understanding that “the Second Amendment was not intended to lay down a ‘novel principl[e]’ but rather codified a right ‘inherited from our English ancestors . . . .’”<sup>31</sup>

4. *Johnson v. Eisentrager*<sup>32</sup>

In this 1950 case, some German soldiers in China had been arrested and tried for spying, having done so after Germany’s unconditional surrender in May 1945.<sup>33</sup> They filed a petition for a writ of habeas corpus, arguing that their imprisonment violated the U.S. Constitution.<sup>34</sup> Justice Jackson’s opinion for the unanimous Court rejected the notion that illegal enemy combatants could have U.S. constitutional rights.<sup>35</sup> He noted the absurdity of granting enemy combatants “freedoms of speech, press and assembly as in the First Amendment, [and the] right to bear arms as in the Second.”<sup>36</sup>

5. *Konigsberg v. State Bar of California*<sup>37</sup>

This case makes essentially the same point as *Robertson*, that constitutional rights in general are not absolute.<sup>38</sup> Justice Hugo

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27. 165 U.S. 275 (1897).

28. *Id.* at 281.

29. *Id.* at 281–82.

30. *Id.*

31. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008).

32. 339 U.S. 763 (1950).

33. *Id.* at 765–66.

34. *Id.* at 767.

35. *Id.* at 785.

36. *Id.* at 784. *Eisentrager* was later limited in *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (holding that sometimes even “enemy combatants” may have habeas corpus rights).

37. 366 U.S. 36 (1961).

38. *Id.* at 49 n.10.

Black, who considered many constitutional rights to be absolute, penned a vigorous dissent.<sup>39</sup>

Justice Harlan's majority opinion rejected a First Amendment challenge to a California bar admission requirement that applicants disclose membership in the Communist Party.<sup>40</sup> The Court held that the petitioner's First Amendment rights were not violated.<sup>41</sup> Justice Harlan pointed out that despite the absolute language of the First Amendment, there were exceptions for libel, slander, perjury, and so on.<sup>42</sup> "In this connection also compare the equally unqualified command of the Second Amendment: 'the right of the people to keep and bear arms shall not be infringed.'"<sup>43</sup>

#### 6. *United States v. Verdugo-Urquidez*<sup>44</sup>

When American drug enforcement agents captured a Mexican drug cartel leader in Mexico, did they violate his Fourth Amendment rights? Chief Justice Rehnquist's opinion for the Court answered this question in the negative.<sup>45</sup> The phrase "the people" in Bill of Rights was a term of art that meant people who had some connection to the American national community.<sup>46</sup> The Court cited and quoted the use of "the people" in the First, Second, Fourth, and Ninth Amendments.<sup>47</sup>

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39. *Id.* at 56–81 (Black, J., dissenting). Justice Black countered that there are absolute rights. As an example, a newspaper can editorialize against a political candidate. *Id.* His argument about absolute rights was elaborated in a pair of lectures at New York University Law School. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960) (stating that the Second Amendment is absolute, within the zone of Second Amendment rights construed by *Miller*).

40. *Konigsberg*, 366 U.S. at 49–56.

41. *Id.* at 56.

42. *Id.* at 49 n.10.

43. *Id.* at 51 (citing *United States v. Miller*, 307 U.S. 174 (1939)).

44. 494 U.S. 259 (1990).

45. *Id.* at 274–75.

46. *Id.* at 265.

47.

While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. See *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (Excludable alien is not entitled to First Amendment rights, because "[h]e does not become



7. *Printz v. United States*<sup>48</sup>

Finally, the Court held in *Printz* that the Tenth Amendment forbade Congress from ordering state and local law enforcement officials to carry out a congressionally created background check on handgun buyers.<sup>49</sup> Justice Thomas joined the majority opinion, and in a concurrence, he asked whether the federal gun control bill might also violate the Second Amendment by invading an area of personal freedom that is outside of congressional power:

I question whether Congress can regulate the particular transactions at issue here. The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority. The First Amendment, for example, is fittingly celebrated for preventing Congress from "prohibiting the free exercise" of religion or "abridging the freedom of speech." The Second Amendment similarly appears to contain an express limitation on the government's authority.<sup>50</sup>

## 8. The Similar Legal Histories of the First and Second Amendments

The First and Second Amendments have broadly similar histories in the Supreme Court. Until the twentieth century, the Supreme Court had little to say about either of them. The particular content of the right got very little attention.

When the Court finally did begin to engage with the freedom of speech and of the press in the early twentieth century, its first major opinion was disappointingly brusque. In the 1907 case of *Patterson v. Colorado*,<sup>51</sup> a terse and dismissive opinion by Justice Holmes upheld the Colorado Supreme Court's punishment of the publisher of the

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one of the people to whom these things are secured by our Constitution by an attempt to enter, forbidden by law"). The language of these Amendments contrasts with the words "person" and "accused" used in the Fifth and Sixth Amendments regulating procedure in criminal cases.

*Id.* at 265-66.

48. 521 U.S. 898 (1997).

49. *Id.* at 935.

50. *Id.* at 937-938 (Thomas, J., concurring).

51. 205 U.S. 454, 463 (1907); see also David B. Kopel, *Epic Battle for Press Freedom: In 1905, News Owner Took on a Compromised Supreme Court*, DAVE KOPEL (July 1, 2006), <http://www.davekopel.org/Media/RMN/2006/epic-battle-for-press-freedom.htm>.

*Rocky Mountain News* for contempt of court because the newspaper denounced the Colorado court's central role in helping Republicans steal the recent gubernatorial election.<sup>52</sup> The *Patterson* opinion announced, with no citations or analysis, that the First Amendment freedom of the press had no effect other than to prohibit prior restraints.<sup>53</sup>

*Patterson* provided a foundation for the widespread punishment and intimidation of anti-war dissent during World War I.<sup>54</sup> The years of Woodrow Wilson's presidency (1913–21) were among the very worst First Amendment years in American history; they perhaps rank as low as 1798–1800, the period of the Sedition Act.<sup>55</sup> Decades later, during the 1930s, a majority of the Court finally started taking the First Amendment seriously. *Patterson* was never formally over-ruled, but it is plainly no longer good law.

In the 1939 case of *United States v. Miller*,<sup>56</sup> the Court upheld a strict tax and registration law for narrow classes of unusually dangerous firearms: sawed-off shotguns and machine guns.<sup>57</sup> The result was not surprising, but the opinion itself lacked clarity. This opaqueness stems in part from the *Miller* case's collusive nature; the

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52. *Patterson*, 205 U.S. 454.

53. *Id.* at 462. Justice Harlan, in dissent, said, "I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done." *Id.* at 465 (Harlan, J., dissenting). Justice Brewer dissented on procedural grounds and pointed out that *Patterson*'s "claim cannot be regarded as a frivolous one." *Id.* at 465 (Brewer, J., dissenting).

54. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."); *Hickson v. United States*, 258 F. 867, 869 (4th Cir. 1919) (stating that the defendant's statement about the President was "an unwarranted and reckless statement, and one that should never be indulged in by a citizen of this government."); *Masses Publ'g Co. v. Patten*, 246 F. 24, 38–39 (2d Cir. 1919) (holding that although the publication "contains no matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States," the Post Office did not err in refusing to mail it because it "was intended willfully to obstruct recruiting"); *State v. Holm*, 166 N.W. 181, 183 (Minn. 1918) ("The United States is at war and we think the legislature did not exceed its power in making it a criminal offense to advocate that men should not enlist in the military forces or aid in prosecuting the war."); DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1870–1920* 130–31 (1997) (discussing the Supreme Court's persistent rejection of First Amendment claims during World War I).

55. 1 Stat. 596 (1798).

56. 307 U.S. 174 (1939).

57. *Id.* at 178.

U.S. Attorney for Arkansas had teamed up with a recently appointed federal judge to create a vehicle for the Supreme Court to uphold the ban.<sup>58</sup> In addition, the defense attorney essentially dropped out of the case and submitted no brief.<sup>59</sup> To make matters worse, the *Miller* opinion was written by the notoriously indolent James McReynolds.<sup>60</sup> It is not exactly a gem of jurisprudential synthesis and restatement on par with New Deal cornerstone cases such as *NLRB v. Jones & Laughlin Steel*.<sup>61</sup>

As Justice Kennedy pointed out in the 2008 oral argument in *Heller*, the opinion “kind of ends abruptly.”<sup>62</sup> It reads as if a student were writing an assignment with a minimum required word length, and the student stopped as soon as the requisite number of words were on paper.

For decades afterward, people debated what *Miller* had actually held. Was it that bans on narrow categories of unusual weapons were compliant with the Second Amendment (this is how the *Heller* majority construes *Miller*);<sup>63</sup> that only individuals in active National Guard service have Second Amendment rights (the dissent’s view in *Heller*);<sup>64</sup> or that no individuals have Second Amendment rights because the Second Amendment is a “collective right” that belongs only to state governments (a view that was popular in the 1970s and 1980s, and which was propounded in a *Heller* amicus brief from former Attorney General Janet Reno and future Attorney General Eric Holder)?<sup>65</sup>

The good news is that today, courts and scholars are construing the First and Second Amendments much more rigorously than the Court did in its flippant *Patterson* and *Miller* opinions. The modern cases tell us to use First Amendment doctrine as a guide to the Second Amendment.

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58. Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J. L. & LIBERTY 48, 63–65 (2008).

59. See *id.* at 66–67.

60. See Barry Cushman, *Clerking for Scrooge*, 70 U. CHI. L. REV. 721 (2003).

61. 301 U.S. 1 (1937).

62. Transcript of Oral Argument at 30, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

63. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

64. *Id.* at 637–38 (Stevens, J., dissenting).

65. Brief for Former Department of Justice Officials as Amici Curiae Supporting Petitioners at 12, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290). For a history of the “collective right,” see David B. Kopel, *The Great Gun Control War of the Twentieth Century—and its Lessons for Today*, 39 FORDHAM URB. L.J. 1527, 1547–50 (2012).

*B. Modern Cases*1. *District of Columbia v. Heller**a. The Majority Opinion*

In *Heller*, the Court repeatedly returns to the First Amendment to elucidate the Second Amendment. The Court points to the phrase “the people,” as used in the First Amendment, the Second Amendment, and elsewhere in the Constitution, as evidence that the Second Amendment applies to American citizens in general, not just to militiamen.<sup>66</sup>

The Court rejects the argument that the Second Amendment protects only eighteenth century muskets, rather than modern firearms.<sup>67</sup> As proof, the Court points out that the First Amendment protects modern means of communication, including those that were invented long after the First Amendment’s adoption.<sup>68</sup>

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66.

The unamended Constitution and the Bill of Rights use the phrase “right of the people” two other times, in the First Amendment’s Assembly-and-Petition Clause and in the Fourth Amendment’s Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology . . . . All three of these instances unambiguously refer to individual rights, not “collective” rights, or rights that may be exercised only through participation in some corporate body.

. . . . Nowhere else in the Constitution does a “right” attributed to “the people” refer to anything other than an individual right.

What is more, in all six other provisions of the Constitution that mention “the people,” the term unambiguously refers to all members of the political community, not an unspecified subset. As we said in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990):

‘[T]he people’ seems to have been a term of art employed in select parts of the Constitution . . . . [Its uses] sugges[t] that ‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

*Heller*, 554 U.S. at 579–80.

67. *Id.* at 582.

68.

The Second Amendment protects the right to “keep” and the right to “bear” arms. The *Heller* majority points to the First Amendment’s list of multiple rights as reason to reject Justice Stevens’ dissenting argument that the “the right to keep and bear arms” is only a single, unitary right.<sup>69</sup>

Most importantly, the Second Amendment right, like the First Amendment rights, is not unlimited:

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment’s right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.<sup>70</sup>

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Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, *e.g.*, *Kyllo v. United States*, 533 U.S. 27, 35–36 (2001), the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

*Id.* at 582.

69.

Finally, Justice Stevens suggests that “keep and bear Arms” was some sort of term of art, presumably akin to “hue and cry” or “cease and desist.” (This suggestion usefully evades the problem that there is no evidence whatsoever to support a military reading of “keep arms.”) Justice Stevens believes that the unitary meaning of “keep and bear Arms” is established by the Second Amendment’s calling it a “right” (singular) rather than “rights” (plural). There is nothing to this. State constitutions of the founding period routinely grouped multiple (related) guarantees under a singular “right,” and the First Amendment protects the “right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

*Id.* at 591 (citation omitted).

70. *Id.* at 595 (citation omitted).

Judicial review of infringements of the Second Amendment is a duty for the same reason that judges must review First Amendment cases. The *Heller* Court cited St. George Tucker, author of the first major treatise on the U.S. Constitution:

St. George Tucker's version of Blackstone's Commentaries, as we explained . . . grouped the right [to keep and bear arms] with some of the individual rights included in the First Amendment and said that if "a law be passed by congress, prohibiting" any of those rights, it would "be the province of the judiciary to pronounce whether any such act were constitutional, or not; and if not, to acquit the accused . . ."<sup>71</sup>

*b. Justice Breyer's Dissent*

Like the majority, Justice Breyer turned to the First Amendment for analytical guidance regarding the D.C. handgun ban.<sup>72</sup> Justice Breyer's preferred approach was a weak form of intermediate scrutiny.<sup>73</sup> He methodically cited from many of the amicus briefs, and demonstrated that there was pro/con social science evidence about the handgun ban.<sup>74</sup> Given the mixed social science evidence, he wrote that the proper approach should be deference to the D.C. Council's judgment because there was *some* evidence in support of the handgun ban.<sup>75</sup>

The foundational case for Breyer's approach was *Turner Broadcasting Systems v. FCC*,<sup>76</sup> which had used a weak version of intermediate scrutiny to uphold certain regulations of cable television systems:

In particular this Court, in First Amendment cases applying intermediate scrutiny, has said that our "sole obligation" in reviewing a legislature's "predictive judgments" is "to assure that, in formulating its judgments," the legislature "has drawn reasonable inferences based on substantial evidence." And judges, looking at the evidence before us, should agree that the District legislature's predictive judgments satisfy that legal standard. That is to say, the District's judgment,

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71. *Id.* at 606.

72. *Id.* at 704–05 (Breyer, J., dissenting).

73. *Id.* at 689.

74. *Id.* at 699–704.

75. *Id.* at 704–05.

76. 520 U.S. 180 (1997).

while open to question, is nevertheless supported by “substantial evidence.”<sup>77</sup>

The majority strongly disagreed. While Justice Breyer had thoroughly catalogued the pro/con social science data cited in briefs, the majority cited no social science studies at all. The majority’s approach was categorical: because handguns are in “common use”<sup>78</sup> and “typically possessed by law-abiding citizens for lawful purposes,”<sup>79</sup> handgun prohibition is unconstitutional.<sup>80</sup> Period. The Second Amendment itself had removed the prohibition of common arms from the realm in which legislatures could make social science judgments and courts could defer to such judgments.

Almost as an afterthought, the majority added that the D.C. handgun ban failed any standard of review that it had applied to fundamental rights.<sup>81</sup> In other words, the D.C. handgun ban failed under both strict and intermediate scrutiny in all the ways the Court has articulated those standards.

The dialogue between Justice Breyer and the majority provides one more First Amendment guidepost for the Second Amendment: for lower courts that aim to follow the Supreme Court’s teaching, it is wrong to use the *Turner Broadcast* version of intermediate scrutiny to uphold prohibitions on common arms. Surprisingly, some lower courts have done the opposite of what *Heller* requires. They have upheld restrictions or prohibitions on arms by using the *Turner Broadcasting* methodology.<sup>82</sup> It is bizarre for lower courts, which are controlled by binding precedent from a higher court, to structure their opinions around the rejected method of the dissent rather than the controlling reason of the majority. The issue is explored *infra*, in Part II.B.

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77. *Heller*, 554 U.S. at 704–05 (quoting *Turner Broadcasting*, 520 U.S. at 195).

78. *Id.* at 624–25 (majority opinion).

79. *Id.*

80. *Id.* at 635.

81. *Id.* at 628–29 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)) (“Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,’ would fail constitutional muster.”).

82. See Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012) (discussing how many lower courts have followed Justice Breyer’s approach to assessing the constitutionality of gun control laws).

## 2. *McDonald v. City of Chicago*<sup>83</sup>

*McDonald* decided that the Second Amendment, like almost all of the Bill of Rights, applies to the states via the Fourteenth Amendment.<sup>84</sup> The Court enthusiastically quoted *Cruikshank*'s 1876 language, which stated that the Second Amendment right to bear arms is neither "granted by the Constitution," nor "dependent upon that instrument for its existence."<sup>85</sup> These rights are protected by the Constitution, not created by it.<sup>86</sup>

*Cruikshank* had held that criminal acts by a private citizen against other private citizens could not be considered violations of the Fourteenth Amendment's Privileges or Immunities Clause, which applies only to state action.<sup>87</sup> The *McDonald* Court noted that the *Cruikshank* holding had not prevented the Court from incorporating the First Amendment assembly rights via the Due Process Clause, so *Cruikshank* did not prevent the same for the Second Amendment.<sup>88</sup>

83. 130 S. Ct. 3020 (2010).

84. *Id.* at 3050.

85. *Id.* at 3030 (quoting *United States v. Cruikshank*, 92 U.S. 542 (1875)).

86. In *Cruikshank*:

[The Court held that] members of a white militia who had brutally murdered as many as 165 black Louisianians congregating outside a courthouse had not deprived the victims of their privileges as American citizens to peaceably assemble or to keep and bear arms. *Cruikshank*, 92 U.S. at 552–53; see L. KEITH, *THE COLFAX MASSACRE* 109 (2008). According to the Court, the right to peaceably assemble codified in the First Amendment was not a privilege of United States citizenship because "[t]he right . . . existed long *before* the adoption of the Constitution." 92 U.S. at 551. Similarly, the Court held that the right to keep and bear arms was not a privilege of United States citizenship because it was not "in any manner dependent upon that instrument for its existence." *Id.* at 553. In other words, the reason the Framers codified the right to bear arms in the Second Amendment—its nature as an inalienable right that pre-existed the Constitution's adoption—was the very reason citizens could not enforce it against States through the Fourteenth.

*Id.* at 3060.

87. *Cruikshank*, 92 U.S. at 554.

88.

Indeed, *Cruikshank* has not prevented us from holding that other rights that were at issue in that case are binding on the States through the Due Process Clause. In *Cruikshank*, the Court held that the general "right of the people peaceably to assemble for lawful purposes," which is protected by the



In dissent, Justice Stevens argued that the Second Amendment should not be fully incorporated because guns are sometimes misused and therefore injure the liberties of innocent persons.<sup>89</sup> In a concurring opinion, Justice Scalia retorted that all rights, including the First Amendment, can be misused in ways that harm innocents; thus, all rights have an "ambivalent relationship to liberty."<sup>90</sup> He argued:

The source of the rule that only nonambivalent liberties deserve Due Process protection is never explained . . . . Surely Justice Stevens does not mean that the Clause covers only rights that have zero harmful effect on anyone. Otherwise even the First Amendment is out. Maybe what he means is that the right to keep and bear arms imposes too great a risk to others' physical well-being. But as the plurality explains, other rights we have already held incorporated pose similarly substantial risks to public safety.<sup>91</sup>

Justice Stevens acknowledged that in the United States, the right to keep and bear arms is "deeply rooted."<sup>92</sup> But as he pointed out, regulation of that right is also a longstanding tradition.<sup>93</sup> Justice Scalia agreed but said the dual tradition was no reason to evade incorporation.<sup>94</sup> The First Amendment, too, is a deeply rooted right and has a long tradition of regulation.<sup>95</sup>

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First Amendment, applied only against the Federal Government and not against the States. See 92 U.S. at 551-52. Nonetheless, over 60 years later the Court held that the right of peaceful assembly was a "fundamental righ[t] . . . safeguarded by the due process clause of the Fourteenth Amendment." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). We follow the same path here and thus consider whether the right to keep and bear arms applies to the States under the Due Process Clause.

*McDonald v. City of Chicago*, 130 S. Ct. 3020, 3031 (2010).

89. *Id.* at 3107 (Stevens, J., dissenting).

90. *Id.* at 3054 (Scalia, J., concurring) (quoting *id.* at 3107 (Stevens, J., dissenting)) (internal quotation marks omitted).

91. *Id.* at 3054-55 (Scalia, J., concurring) (citations omitted).

92. *Id.* at 3112 (Stevens, J., dissenting).

93. *Id.*

94. *Id.* at 3056 (Scalia, J., concurring).

95.

Justice Stevens next argues that even if the right to keep and bear arms is "deeply rooted in some important senses," the roots of States' efforts to regulate guns run just as deep. But this too is true of other rights we

## II. LOWER COURTS

Post-*Heller*, two of the most important Circuit Court of Appeals decisions on the Second Amendment are *Ezell v. City of Chicago*,<sup>96</sup> from the Seventh Circuit, and *Heller II*,<sup>97</sup> from the D.C. Circuit. Both decisions followed the Supreme Court's methodology by looking to First Amendment precedent for analogies. The D.C. Circuit, unfortunately, relied on *Turner Broadcasting*, which would have been the correct approach if Justice Breyer had written for the *Heller* majority rather than the dissent.

### A. *Ezell v. City of Chicago*<sup>98</sup>

Almost immediately after the Supreme Court ruled against the Chicago handgun ban in *McDonald v. City of Chicago*,<sup>99</sup> Mayor Daley and the Chicago City Council rushed to enact a new, and very repressive, gun control ordinance.<sup>100</sup> Its provisions included a requirement that in order to obtain a gun ownership permit, an applicant must pass a shooting test at a shooting range; the ordinance also outlawed (within the Chicago city limits) all shooting ranges that were open to the public, but it left untouched the thirty-four ranges in the city that were open only to government employees, such as the Chicago Police Department.<sup>101</sup>

The district court upheld the range ban, and the case was appealed to the Seventh Circuit.<sup>102</sup> The plaintiffs argued that practicing the safe use of a firearm is an essential part of the Second Amendment right.<sup>103</sup> Chicago replied that Chicago residents could just use firing ranges located in the suburbs.<sup>104</sup> The Seventh Circuit drew on First Amendment principle to reject Chicago's argument:

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have held incorporated. No fundamental right—not even the First Amendment—is absolute. The traditional restrictions go to show the scope of the right, not its lack of fundamental character.

*Id.*

96. 651 F.3d 684 (7th Cir. 2011).

97. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, (D.C. Cir. 2011). Also very important is *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014), decided too late to be addressed in depth in this Article.

98. 651 F.3d 684 (7th Cir. 2011).

99. 130 S. Ct. 3020 (2010).

100. *Ezell*, 651 F.3d at 689–90.

101. CHI. MUN. CODE § 8-20-120 (2010).

102. *Ezell*, 651 F.3d at 694.

103. *Id.* at 695.

104. *Id.* at 693.

This reasoning assumes that the harm to a constitutional right is measured by the extent to which it can be exercised in another jurisdiction. That's a profoundly mistaken assumption. In the First Amendment context, the Supreme Court long ago made it clear that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." The same principle applies here. It's hard to imagine anyone suggesting that Chicago may prohibit the exercise of a free-speech or religious-liberty right within its borders on the rationale that those rights may be freely enjoyed in the suburbs. That sort of argument should be no less unimaginable in the Second Amendment context.<sup>105</sup>

For purposes of the preliminary injunction motion, the court had to consider whether the plaintiffs would suffer an irreparable injury.<sup>106</sup> The Seventh Circuit straightforwardly adopted First Amendment precedent to hold that a deprivation of the exercise of the right is a per se irreparable injury.<sup>107</sup>

Most Circuits have adopted a two-step analysis for Second Amendment cases. The "two-step" analysis was first employed by the Third Circuit in *United States v. Marzzarella*.<sup>108</sup> The court explained

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105. *Id.* at 697.

106. *Id.* at 694.

107.

Beyond this crucial point about the form of the claim, for some kinds of constitutional violations, irreparable harm is presumed. See 11A Charles Alan Wright et al., *Federal Practice & Procedure* §2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). This is particularly true in First Amendment claims. See, e.g., *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006)] . . . . The loss of a First Amendment right is frequently presumed to cause irreparable harm based on "the intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if those rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." *Miles Christi Religious Order v. Twp. of Northville*, 629 F.3d 533, 548 (6th Cir. 2010). The Second Amendment protects similarly intangible and unquantifiable interests. *Heller* held that the Amendment's central component is the right to possess firearms for protection. 554 U.S. at 592–95, 128 S.Ct. 2783. Infringements of this right cannot be compensated by damages.

*Id.* at 699.

108. 614 F.3d 85 (3d Cir. 2010).

that “[b]ecause *Heller* is the first Supreme Court case addressing the scope of the individual right to bear arms, we look to other constitutional areas for guidance in evaluating Second Amendment challenges. We think the First Amendment is the natural choice.”<sup>109</sup> The first of the two steps is to determine whether the activity is within the scope of the Second Amendment; if the answer to the first question is “yes,” the second step is to apply the appropriate means–end analysis.<sup>110</sup>

For example, a plaintiff says, “I want to build my own nuclear missiles. The federal law against doing so infringes my Second Amendment rights.” A court would first examine whether nuclear missiles are Second Amendment “arms.” Since they are not, the court’s Second Amendment inquiry would end. The same analysis would be used for machine guns or for sawed-off shotguns, both of which *Heller* says are not Second Amendment “arms.”<sup>111</sup>

Conversely, a plaintiff might say, “I want to carry a knife, and a local ordinance forbids all carrying of knives.” The court would inquire whether knives are Second Amendment arms. The court should conclude that knives are Second Amendment arms.<sup>112</sup> So the court would then proceed to heightened scrutiny of the particular ordinance.

The Seventh Circuit adopted the two-step methodology and observed that the same methodology is used for the First Amendment: some types of verbal communication, such as commercial fraud, have always been considered outside the scope of the “speech” protected by the First Amendment.<sup>113</sup> Because

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109. *Id.* at 89 n.4.

110. *Id.* at 689.

111. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

112. David B. Kopel, Clayton Cramer & Joseph P. Olson, *Knives and the Second Amendment*, 47 U. MICH. J.L. REFORM 167, 191 (2013).

113.

The Supreme Court’s free-speech jurisprudence contains a parallel for this kind of threshold “scope” inquiry. The Court has long recognized that certain “well-defined and narrowly limited classes of speech”—e.g., obscenity, defamation, fraud, incitement—are categorically “outside the reach” of the First Amendment. *United States v. Stevens*, 130 S. Ct. 1577, 1584–85 (2010); *see also Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2733–35 (2011).

When the Court has “identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost benefit analysis.” *Stevens*, 130 S. Ct. at 1586. Instead, some categories of speech are unprotected as a matter of history and legal tradition. *Id.* So too with the Second Amendment. *Heller* suggests that some federal gun

practicing the safe use of a firearm at a firing range is obviously a Second Amendment activity, the Seventh Circuit then had to determine the proper standard of review.

The Court rejected Chicago's invitation to use abortion cases as the analogy<sup>114</sup> and instead followed the authorities, including the Supreme Court and other Circuit Courts, that indicated that the First Amendment was the proper guide.<sup>115</sup> The Seventh Circuit then provided a lengthy exposition of First Amendment doctrine, showing that the closer an activity is to the core of the First Amendment, the more rigorous the scrutiny.<sup>116</sup> The commonsense point is that

laws will survive Second Amendment challenge because they regulate activity falling outside the terms of the right as publicly understood when the Bill of Rights was ratified; *McDonald* confirms that if the claim concerns a state or local law, the "scope" question asks how the right was publicly understood when the Fourteenth Amendment was proposed and ratified. *Heller*, 554 U.S. at 625–28; *McDonald*, 130 S. Ct. at 3038–47. Accordingly, if the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 or 1868—then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review. *Heller*, 554 U.S. at 610–19; *McDonald*, 130 S. Ct. at 3038–42.

*Ezell v. City of Chicago*, 651 F.3d 684, 702–03 (7th Cir. 2011).

114. *Id.* at 706 (discussing the "undue burden" test).

115.

The City urges us to import the "undue burden" test from the Court's abortion cases, *see, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876–79 (1992), but we decline the invitation. Both *Heller* and *McDonald* suggest that First Amendment analogues are more appropriate, *see Heller*, 554 U.S. at 582, 595, 635; *McDonald*, 130 S. Ct. at 3045, and on the strength of that suggestion, we and other circuits have already begun to adapt First Amendment doctrine to the Second Amendment context.

*Ezell*, 651 F.3d at 706–07.

The abortion analogy had been used in some Ninth Circuit cases which have since been vacated. *See, e.g.*, *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc) (ordering parties to mediation, and summarizing thirteen-year history of the case, including the vacated three-judge panel decision with the "undue burden" standard).

116.

In free-speech cases, the applicable standard of judicial review depends on the nature and degree of the governmental burden on the First Amendment right and sometimes also on the specific iteration of the right.

For example, “[c]ontent-based regulations are presumptively invalid,” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and thus get strict scrutiny, which means that the law must be narrowly tailored to serve a compelling governmental interest, *id.* at 395; . . . Likewise, “[l]aws that burden political speech are subject to strict scrutiny.” *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010) (internal quotation marks omitted). On the other hand, “time, place, and manner” regulations on speech need only be “reasonable” and “justified without reference to the content of the regulated speech.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Supreme Court also uses a tiered standard of review in its speech-forum doctrine; regulations in a traditional public or designated public forum get strict scrutiny, while regulations in a nonpublic forum “must not discriminate on the basis of viewpoint and ‘must be reasonable in light of the forum’s purpose.’” *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 864 (7th Cir. 2008) (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001)).

In election-law cases, regulations affecting the expressive association rights of voters, candidates, and parties are subject to a fluctuating standard of review that varies with the severity of the burden on the right; laws imposing severe burdens get strict scrutiny, while more modest regulatory measures need only be reasonable, politically neutral, and justified by an important governmental interest. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190–91 (2008) . . . . “First Amendment challenges to disclosure requirements in the electoral context”—for example, laws compelling the disclosure of the names of petition signers—are reviewed “under what has been termed ‘exacting scrutiny.’” *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010). This standard of review requires “a substantial relation between the disclosure requirement and a sufficiently important governmental interest,” and “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” *Id.*

Similarly, restrictions imposed on adult bookstores are reviewed under an intermediate standard of scrutiny that requires the municipality to present “evidence that the restrictions actually have public benefits great enough to justify any curtailment of speech.” *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 462 (7th Cir. 2009) (citing *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)). And in commercial-speech cases, the Court applies an intermediate standard of review that accounts for the “subordinate position” that commercial speech occupies “in the scale of First Amendment values.” *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989). In this context intermediate scrutiny requires “a fit between the legislature’s ends and the means chosen to accomplish those ends, . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.” *Id.* at 480.

banning Shakespeare from bookstores would have to pass strict scrutiny, whereas putting sound amplification limits on performances of Shakespeare in a public park would need only to pass intermediate scrutiny. So:

Labels aside, we can distill this First Amendment doctrine and extrapolate a few general principles to the Second Amendment context. First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.<sup>117</sup>

How is the rule applied in practice? The *Ezell* court cited the Seventh Circuit precedent in *United States v. Skoien*,<sup>118</sup> which used intermediate scrutiny to uphold the federal ban on gun possession by persons convicted of domestic violence misdemeanors.<sup>119</sup> Such persons were not the "law-abiding, responsible citizen" of the *Heller* paradigm, so they were far from the core of the Second Amendment, and intermediate scrutiny was appropriate.<sup>120</sup>

In contrast, the firing range ban *did* apply to law-abiding citizens. Although the range ban did not directly impose any

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*Ezell*, 651 F.3d at 707–08.

117. *Id.* at 708.

118. 614 F.3d 638 (7th Cir. 2010).

119. *Ezell*, 651 F.3d at 708.

120. *Id.* at 701. The *Ezell* court explained:

In *Skoien* we required a "form of strong showing"—a/k/a "intermediate scrutiny"—in a Second Amendment challenge to a prosecution under 18 U.S.C. §922(g)(9), which prohibits the possession of firearms by persons convicted of a domestic-violence misdemeanor. 614 F.3d at 641. We held that "logic and data" established a "substantial relation" between dispossessing domestic violence misdemeanants and the important governmental goal of "preventing armed mayhem." *Id.* at 642. Intermediate scrutiny was appropriate in *Skoien* because the claim was not made by a "law-abiding, responsible citizen" as in *Heller*, 554 U.S. at 635; nor did the case involve the central self-defense component of the right, *Skoien*, 614 F.3d at 645.

*Ezell*, 651 F.3d at 708.

restrictions on how a citizen could engage in self-defense in the home, the range ban significantly limited a citizen's ability to practice for such self-defense. Accordingly, the Seventh Circuit determined that "not quite 'strict scrutiny'" was the appropriate standard in the instant case, and the city should bear the burden of persuasion that the standard was satisfied.<sup>121</sup>

At the preliminary injunction stage, the city had merely offered speculative concerns. Even if those speculations had some validity, they could be addressed by regulation, rather than by prohibition. As in a First Amendment context, anecdotes and speculation were grossly insufficient to meet the burden of heightened scrutiny.<sup>122</sup>

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121.

Here, in contrast, the plaintiffs are the "law-abiding, responsible citizens" whose Second Amendment rights are entitled to full solicitude under *Heller*, and their claim comes much closer to implicating the core of the Second Amendment right. The City's firing-range ban is not merely regulatory; it prohibits the "law-abiding, responsible citizens" of Chicago from engaging in target practice in the controlled environment of a firing range. This is a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense. That the City conditions gun possession on range training is an additional reason to closely scrutinize the range ban. All this suggests that a more rigorous showing than that applied in *Skoien* should be required, if not quite "strict scrutiny." To be appropriately respectful of the individual rights at issue in this case, the City bears the burden of establishing a strong public-interest justification for its ban on range training: The City must establish a close fit between the range ban and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights. Stated differently, the City must demonstrate that civilian target practice at a firing range creates such genuine and serious risks to public safety that prohibiting range training throughout the city is justified.

*Ezell*, 651 F.3d at 708–09.

122.

At this stage of the proceedings, the City has not come close to satisfying this standard. In the district court, the City presented no data or expert opinion to support the range ban, so we have no way to evaluate the seriousness of its claimed public-safety concerns. Indeed, on this record those concerns are entirely speculative and, in any event, can be addressed through sensible zoning and other appropriately tailored regulations. That much is apparent from the testimony of the City's own witnesses, particularly Sergeant Bartoli, who testified to several common-sense range



safety measures that could be adopted short of a complete ban.

The City maintains that firing ranges create the risk of accidental death or injury and attract thieves wanting to steal firearms. But it produced no evidence to establish that these are realistic concerns, much less that they warrant a total prohibition on firing ranges. In the First Amendment context, the government must supply actual, reliable evidence to justify restricting protected expression based on secondary public-safety effects. *See* [City of Los Angeles v.] *Alameda Books, Inc.*, 535 U.S. [425, 438 (2002)] (A municipality defending zoning restrictions on adult bookstores cannot “get away with shoddy data or reasoning. The municipality’s evidence must fairly support the municipality’s rationale for its ordinance.”); *see also* *Annex Books, Inc. v. City of Indianapolis*, 624 F.3d 368, 369 (7th Cir. 2010) (affirming preliminary injunction where a city’s “empirical support for [an] ordinance [limiting the hours of operation of an adult bookstore] was too weak”); *New Albany DVD, LLC v. City of New Albany*, 581 F.3d 556, 560–61 (7th Cir. 2009) (affirming preliminary injunction where municipality offered only “anecdotal justifications” for adult zoning regulation and emphasizing the necessity of assessing the seriousness of the municipality’s concerns about litter and theft).

By analogy here, the City produced no empirical evidence whatsoever and rested its entire defense of the range ban on speculation about accidents and theft. Much of the focus in the district court was on the possible hazards of mobile firing ranges. The City hypothesized that one cause of range-related injury could be stray bullets, but this seems highly implausible insofar as a properly equipped indoor firing range is concerned. The district court credited the plaintiffs’ evidence that “mobile ranges are next to Sam’s Clubs and residences and shopping malls and in parking lots, and there’s not been any difficulties with them in those places.” Commissioner Scudiero acknowledged that the law-enforcement and private-security firing ranges in Chicago are located near schools, churches, parks, and stores, and they operate safely in those locations. And Sergeant Bartoli testified about the availability of straightforward range-design measures that can effectively guard against accidental injury. He mentioned, for example, that ranges should be fenced and should designate appropriate locations for the loading and unloading of firearms. Other precautionary measures might include limiting the concentration of people and firearms in a range’s facilities, the times when firearms can be loaded, and the types of ammunition allowed. *See also, e.g.*, *NRA Range Source Book* (providing “basic and advanced guidance to assist in the planning, design, construction and maintenance of shooting range facilities”), <http://www.nrahq.org/shootingrange/sourcebook.asp> (last visited June 2, 2011); FLA. STAT. § 823.16(6) (2011) (referencing the safety standards of the *NRA Range Source Book*); KAN. ADMIN. REGS. § 115-22-1(b) (2011) (same); MINN. STAT. § 87A.02 (2010) (same); NEB. REV. STAT. § 37-1302.

Thus, the Seventh Circuit ordered that a preliminary injunction be issued against the Chicago range ban.<sup>123</sup>

While analyzing whether to order the injunction, the Seventh Circuit also engaged in a careful analysis of *Heller's* guidance for standards of review for the Second Amendment, as informed by the First Amendment. First, the Supreme Court had ruled that the Second Amendment categorically forbids some restrictions, without need to resort to standards of scrutiny.<sup>124</sup> This is consistent with the First Amendment. For example, if a municipality enacted an ordinance declaring, "Belief in the religion of Islam is illegal within city limits," a court should not offer the city attorney the opportunity to prove that the ordinance passes strict scrutiny. Like the First Amendment, the Second Amendment has itself performed the balancing test and made certain prohibitions off-limits.

As a practical matter, categorical prohibitions are more likely to arise in a Second Amendment context. No legislature would declare, "Only the following specified classes of persons may speak out loud in public places." But legislatures have enacted laws specifying that only certain preferred classes of persons may bear arms in public places. By the time that *McDonald* was decided, all such categorical restrictions had been legislatively repealed, except for those in Illinois and the District of Columbia. The Illinois ban was struck down by the Seventh Circuit in *Moore v. Madigan*,<sup>125</sup> Judge Posner's opinion in that case found no need to resort to standards of scrutiny. The challenge to the D.C. ban has been argued and submitted for decision, but not yet resolved the D.C. federal district court.<sup>126</sup>

The *Ezell* court likewise recognized that that the Supreme Court had rejected the notion that prohibition on common arms could be upheld if the prohibition were proven to pass heightened scrutiny.<sup>127</sup>

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123. *Id.* at 711.

124. See Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 380 (2009) ("Rather than adopting one of the First Amendment's many Frankfurter-inspired balancing approaches, the majority endorsed a categorical test under which some types of 'Arms' and arms-usage are protected absolutely from bans and some types of 'Arms' and people are excluded entirely from constitutional coverage."); see also *id.* at 405 (*Heller* "neither requires nor permits any balancing beyond that accomplished by the Framers themselves.").

125. 702 F.3d 933, 941 (7th Cir. 2012) ("[O]ur analysis is not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states.").

126. *Palmer v. District of Columbia*, No. 1:09-cv-01482 (D.C. Cir. filed Aug. 06, 2009).

127.

The firearms of today are not the same as firearms of 1791; likewise, the gun controls of today are not the same as those of 1791. This does not mean that modern guns are unprotected by the Second Amendment, nor does it mean that modern gun controls are necessarily unconstitutional. Rather, for both guns and gun control, “the proper interpretive approach is to reason by analogy from history and tradition.”<sup>128</sup>

Finally, the Seventh Circuit observed that the *Heller* majority had rejected Justice Breyer’s intermediate scrutiny “interest balancing” analysis for prohibitions on Second Amendment arms.<sup>129</sup>

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The Court’s failure to employ strict or intermediate scrutiny appears to have been quite intentional and well-considered. *Cf.* Tr. of Oral Arg. at 44, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Chief Justice Roberts: “Well, these various phrases under the different standards that are proposed, ‘compelling interest,’ ‘significant interest,’ ‘narrowly tailored,’ none of them appear in the Constitution. . . . 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.”).

*Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1273 n.5 (D.C. Cir. 2011).  
128. *Heller II*, 670 F.3d at 1275. The Court went on to explain:

Nor does it mean that the government is powerless to address those new weapons or modern circumstances. Rather, in such cases, the proper interpretive approach is to reason by analogy from history and tradition. *See Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007) (“[J]ust as the First Amendment free speech clause covers modern communication devices unknown to the founding generation, *e.g.*, radio and television, and the Fourth Amendment protects telephonic conversation from a ‘search,’ the Second Amendment protects the possession of the modern-day equivalents of the colonial pistol.”) (emphasis added), *aff’d sub nom. Heller*, 554 U.S. 570; Tr. of Oral Arg. at 77, *Heller*, 554 U.S. 570 (No. 07-290) (Chief Justice Roberts: “[Y]ou would define ‘reasonable’ in light of the restrictions that existed at the time the amendment was adopted . . . . [Y]ou can’t take it into the marketplace was one restriction. So that would be—we are talking about lineal descendants of the arms but presumably there are lineal descendants of the restrictions as well.”); *cf. Kyllo v. United States*, 533 U.S. 27, 31–35 (2001) (applying traditional Fourth Amendment standards to novel thermal imaging technology); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (allowing government to view property from airplanes based on common-law principle that police could look at property when passing by homes on public thoroughfares).

*Id.* at 1275.

129. *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011).

As the Supreme Court had stated, the Second Amendment itself had performed the interest balancing, and prohibition was off limits.<sup>130</sup>

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130.

Turning first to *Heller*: The back and forth between the *Heller* majority opinion and Justice Breyer's dissent underscores that the proper Second Amendment test focuses on text, history, and tradition. In his dissent, Justice Breyer suggested that the Court should follow the lead of certain First Amendment cases, among others, that had applied a form of intermediate-scrutiny interest balancing . . . . *Heller*, 554 U.S. at 689–90, 704–05, 714 (Breyer, J., dissenting). Justice Breyer expressly rejected strict scrutiny and rational basis review. Instead, he explicitly referred to intermediate scrutiny and relied on cases such as *Turner Broadcasting* that had applied intermediate scrutiny. See *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189–225 (1997). And he discussed the strength of the government's interest and the fit between the law and those interests, as the Court does when applying heightened scrutiny. It is thus evident that Justice Breyer's *Heller* dissent advocated a form of intermediate scrutiny.

The Court responded to Justice Breyer by rejecting his "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Heller*, 554 U.S. at 634 (quoting *id.* at 689–90 (Breyer, J., dissenting)). The Court stated rather emphatically:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.*

In rejecting a judicial interest-balancing approach, the Court explained that the Second Amendment "is the very product of an interest balancing by the people" that judges should not "now conduct for them anew." *Id.* at 635. The Court added that judges may not alter the scope of the Amendment because "[c]onstitutional 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." *Id.* at 634–35. The Court emphasized that the scope of the right was determined by "historical justifications." *Id.* at 635. And the Court stated that tradition (that is, post-ratification history) matters because "examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification" is a "critical tool of constitutional interpretation." *Id.* at 605 (emphasis omitted).

(The Supreme Court has also made the same point about the First Amendment.<sup>131</sup>)

### B. *Heller II*<sup>132</sup>

While the Seventh Circuit's *Ezell* decision was a model of how to follow *Heller* by using First Amendment guidance, the D.C. Circuit's decision in *Heller II* was a model of how to evade *Heller* while still using some First Amendment cites.<sup>133</sup>

First, the D.C. Circuit cited to the Third Circuit's influential opinion in *Marzzarella*, which had used intermediate scrutiny to uphold the federal prohibition against possession of firearms with obliterated serial numbers; the serial number requirement was analogized to a time/place/manner regulation under the First Amendment.<sup>134</sup> The Third Circuit had upheld the prohibition, noting

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To be sure, the Court noted in passing that D.C.'s handgun ban would fail under any level of heightened scrutiny or review the Court applied. *Id.* at 628–29. But that was more of a gilding-the-lily observation about the extreme nature of D.C.'s law—and appears to have been a pointed comment that the dissenters should have found D.C.'s law unconstitutional even under their own suggested balancing approach—than a statement that courts may or should apply strict or intermediate scrutiny in Second Amendment cases. We know as much because the Court expressly dismissed Justice Breyer's *Turner Broadcasting* intermediate scrutiny approach and went on to demonstrate how courts should consider Second Amendment bans and regulations—by analysis of text, history, and tradition. *Id.* at 626–27, 634–35.

*Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1276–78 (D.C. Cir. 2011).

131. *United States v. Stevens*, 559 U.S. 460 (2010) (“The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”).

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

133. See generally *Heller II*, 670 F.3d 1244 (upholding the District of Columbia Council's prohibition of most semi-automatic rifles, and of firearms magazines holding more than 10 rounds of ammunition).

134.

In this we agree with the reasoning of the Third Circuit in *Marzzarella*. The court there applied intermediate scrutiny to the prohibition of unmarked firearms in part because it thought the ban was similar to a regulation “of the manner in which . . . speech takes place,” a type of regulation subject to intermediate scrutiny “under the time, place, and manner doctrine” of the First Amendment. 614 F.3d at 97. Notably, because the prohibition left a person “free to possess any otherwise lawful firearm,” the court reasoned it was “more accurately characterized as a regulation of the manner in which

that the federal law in no way impeded the possession of an otherwise lawful firearm.<sup>135</sup> This was a poor analogy for the D.C. Circuit to use because the D.C. law did expressly ban the possession of many otherwise lawful firearms and magazines.

Second, the D.C. Circuit cited the First Amendment's "alternative channels of communication" precedents to conclude that because people could own other guns and magazines, their Second Amendment rights were not harmed, as judged by intermediate scrutiny.<sup>136</sup>

This directly contradicted *Heller*. In *Heller*, the Supreme Court expressly rejected the notion that handgun bans were acceptable because people could use long guns for self-defense.<sup>137</sup> Moreover, "alternative channels" is a First Amendment doctrine that applies solely to public communications; it does not apply to the mere possession of First Amendment items in the home. "Alternative channels" is a theory for why leafleting may be limited at a state fair on public property;<sup>138</sup> it is not a theory allowing the criminalization of the possession of leaflets within one's own home.

On top of that, the First Amendment's alternative channels doctrine mandates a serious inquiry into the adequacy of those alternative channels, and requires strong evidence that the alternative channels are (at least) nearly as effective as whatever channel is being restricted. A government cannot ban political advertising on television merely by pointing out that a candidate's supporters can try to engage random strangers in conversation at public parks.

The D.C. Circuit, unfortunately, failed to engage in such serious analysis. Instead, the *Heller II* opinion merely cited to the opinion of

persons may lawfully exercise their Second Amendment rights." *Id.*

*Heller II*, 670 F.3d at 1262.

135. *Id.* at 1264.

136. *Id.* ("Here, too, the prohibition of semi-automatic rifles and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves."); see also Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1471 (2009) ("[W]here content-neutral speech restrictions are involved, restrictions that impose severe burdens (because they don't leave open ample alternative channels) must be judged under strict scrutiny, but restrictions that impose only modest burdens (because they do leave open ample alternative channels) are judged under a mild form of intermediate scrutiny.").

137. *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

138. See generally *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (holding that a law banning solicitations at fairgrounds is a valid time, place, manner restriction).

the D.C. police chief, and to the testimony of a gun prohibition lobbyist, as evidence that self-defense with other firearms and smaller magazines would be just as effective.<sup>139</sup> To say the least, the D.C. Circuit was clearly erroneous to treat such highly contested assertions as conclusive at the summary judgment stage.

The D.C. Circuit relied heavily on the First Amendment case *Turner Broadcasting*. This was dissenting Justice Breyer's cornerstone case in *Heller*. Because the *Heller* majority expressly rejected his argument, *Turner Broadcasting* is by definition not a legitimate precedent on which to build a decision upholding a prohibition on Second Amendment arms.

As Judge Kavanaugh pointed out in his *Heller II* dissent:

It is ironic, moreover, that Justice Breyer's dissent explicitly advocated an approach based on *Turner Broadcasting*; that the *Heller* majority flatly rejected that *Turner Broadcasting*-based approach; and that the majority opinion here nonetheless turns around and relies expressly and repeatedly on *Turner Broadcasting*.<sup>140</sup>

Judge Kavanaugh also elaborated his own theory of *Heller*'s meaning: while the First Amendment does include means/end review and balancing tests, *Heller* does not apply such an approach to the Second Amendment.<sup>141</sup> Rather, the question is whether a particular gun control can be justified by "history and tradition."<sup>142</sup> In Judge Kavanaugh's view, the "history and tradition" method upholds many gun controls which probably could not pass strict scrutiny.<sup>143</sup>

Judge Kavanaugh makes a plausible argument that this approach is the best reading of *Heller*. (Namely, that the gun controls that *Heller* legitimates in dicta would be shaky if analyzed under heightened scrutiny, but they are reasonably solid under the history and tradition test.)<sup>144</sup>

Without denigrating Judge Kavanaugh's analysis, the remainder of this Article does not consider it further. The Article is concerned with the predominant approach, which is to use the First Amendment to elucidate the Second Amendment. It should be noted that the Seventh Circuit's *Ezell* opinion also emphasizes the

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139. *Heller II*, 670 F.3d at 1259.

140. *Id.* at 1280 (Kavanaugh, J., dissenting).

141. *Id.* at 1280–84.

142. *Id.* at 1275.

143. *Id.* at 1274.

144. *Id.* at 1278.

importance of history and tradition, both in the context of categorical analysis (step one of the two-part test), and in heightened scrutiny analysis (step two of the two-part test).

### III. FIRST AND SECOND AMENDMENT ANALYTICAL PRINCIPLES

Part III of this Article describes some broad principles that apply to the First and Second Amendments. It does not address the application of particular First Amendment doctrines (e.g., prior restraint) to the Second Amendment; precise doctrinal issues are addressed in Part IV.

#### A. *The Amendment Is Not Limited to Its Core*

In the 1930s, Supreme Court majorities finally began taking the First Amendment seriously. For at least four decades thereafter, many scholars, and some judges, argued that the First Amendment only protected the core purpose of political speech.<sup>145</sup> Today, we appropriately recognize that the First Amendment protects speech for all legitimate purposes—including scientific and artistic. An abstract painting with no political content is “unquestionably” within the scope of the First Amendment.<sup>146</sup>

*Heller* teaches that the core purpose of the Second Amendment is self-defense, especially in the home.<sup>147</sup> As in the 1940s with the First Amendment, some courts and scholars refuse to acknowledge any protection for any activity outside the core. Yet the better reading of *Heller*, as elucidated in *McDonald v. City of Chicago*,<sup>148</sup> is that the Second Amendment protects all legitimate purposes for possessing and using firearms.<sup>149</sup> The government certainly has more leeway in setting reasonable hunting regulations than it does in restricting

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145. See, e.g., ALEXANDER MEIKELJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 94 (1948) (Freedom of Speech is only “speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest.”).

146. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (“[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.”).

147. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

148. 130 S. Ct. 3020 (2010).

149. *Id.* at 3023, 3030, 3036, 3044 (2010) (discussing “lawful purpose” or “lawful purposes”); see also *Heller*, 554 U.S. at 577, 620, 624–25, 628, 630 (2008).



self-defense, but hunting is still a Second Amendment activity, at least according to the Supreme Court.<sup>150</sup>

*B. The First and Second Amendments Have Synecdoches*

A synecdoche is the use of one part of something to refer to the whole.<sup>151</sup> For example, a person refers to his automobile as “my wheels.” The First Amendment’s freedom of “the press” is a synecdoche; its protection applies to many types of communication which are not produced with printing presses, such as political flyers that are handwritten rather than printed.

In the 1930s through the 1970s, courts and legal scholars spent a lot of time trying to figure out whether the First Amendment protected radio and television, as neither was a “press.” Conclusively resolving that question in favor of freedom made it easy for a later generation to recognize websites and blogs as obviously part of the freedom of the press.

Similarly, the Second Amendment’s protection of “arms” is not limited exclusively to weapons. It includes defensive devices—most obviously, armor (today, kevlar; in earlier times, leather or metal). This is consistent with Noah Webster’s classic 1828 dictionary of American English, which defined “arms” to include both weapons and “armor for defense and protection of the body.”<sup>152</sup>

Likewise, “arms” includes “alarms.” Indeed, the word root for “alarm” is the Italian “all’arme”—literally “to the arms.” Like defensive armor, alarms are part of a functional system of arms. The “alarm” indicates that the individual should take up her weapons and employ her armor. Thus, a government could not constitutionally outlaw burglar alarms.

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150. *McDonald*, 130 S. Ct. at 3108 (2010) (“Guns may be useful for self-defense, as well as for hunting and sport.”).

151. Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 19 (2010).

152. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). For the importance of Webster’s Dictionary to the development of American English, and as a source for the early meaning of the Constitution, see David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1404–09 (1998).

*C. Rights That Are Not Expressly Stated May Be Inferred from Other Rights—Examples Include the Right of Association and the Right of Self-Defense*

The First Amendment text says nothing about a right of association.<sup>153</sup> However, the Supreme Court has determined the right to be implicit because association is necessary to the exercise of the enumerated First Amendment rights.<sup>154</sup> The first right-of-association case was *NAACP v. Alabama*<sup>155</sup> in 1958. It involved a state government's attempt to discover the membership lists of a civil rights organization that was at high risk of state-tolerated violence from organizations like the Ku Klux Klan.<sup>156</sup> While the early cases involved the core right of expressive political association, over the last half-century the right of association has grown into a robust right that is recognized in apolitical contexts.<sup>157</sup>

Similarly, the Second Amendment contains at least one right that is not expressly stated in the text, but is a necessary implication of the express rights. The Second Amendment guarantees a right to “keep” and “bear” arms for a variety of purposes, the most important of which is self-defense. Ergo, self-defense is a Second Amendment right. A government that imposed no regulations on acquiring, owning, or carrying guns, but which forbade the use of guns for self-defense, would be violating the Second Amendment.

In the Seventh Circuit's opinion in *McDonald*,<sup>158</sup> which the Supreme Court later reversed,<sup>159</sup> Chief Judge Easterbrook's

153. U.S. CONST. amend. I.

154. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 451 (1958).

155. *Id.*

156. *Id.* at 451; *see also* *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (“[E]ven though the governmental purpose be legitimate and substantial, [it] cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose . . .”).

157. *See, e.g.,* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660–61 (2000). Other “unarticulated rights” that have received judicial protection include the right “of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel.” *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 579–80 (1980).

158. *Nat'l Rifle Ass'n of Am. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *rev'd sub nom.*, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). *National Rifle Association v. Chicago & Oak Park* and *McDonald v. Chicago* were brought as separate cases, but the Seventh Circuit produced a single opinion for both. *Id.* The Supreme Court granted cert in *McDonald* but allowed both the National Rifle Association and the suburb of Oak Park to participate in the case as “respondents.”

concurring opinion offered an interesting logical argument: *Heller* says that self-defense is the core of the Second Amendment, so imagine that a state or local government outlawed armed self-defense.<sup>160</sup> Then, contended Judge Easterbrook, the same government could outlaw guns.<sup>161</sup>

If Judge Easterbrook's argument is correct, the Second Amendment guarantee would have no practical value. The supreme law of the land could be nullified by a local government's decision to outlaw armed self-defense and firearms.

The structural flaw in Judge Easterbrook's argument is this: any argument that allows a government to nullify an Amendment in the Bill of Rights must necessarily be invalid. The nature of the Bill of Rights is that it places certain human activities beyond the power of a government to prohibit them entirely.

The second, simpler flaw in Judge Easterbrook's argument is that what he described in his hypothetical is essentially what the District of Columbia did, which the Supreme Court ruled unconstitutional. In *Heller*, the Court struck down the D.C. Council's handgun prohibition ordinance *and* the Court separately struck down a different D.C. ordinance, which forbade use of a firearm for self-defense in the home.<sup>162</sup>

Thus, the Second Amendment expressly protects the keeping and bearing of arms for self-defense, and the Second Amendment by implication protects the defensive use of arms. Given that the Second Amendment guarantees the right to engage in self-defense by using arms, it seems inescapable that the Second Amendment guarantees a right to self-defense *simpliciter*. If this point is not obvious, just imagine a hypothetical:

Pursuant to *Heller*, handguns are Second Amendment "arms."<sup>163</sup> Applying *Heller's* rules for what types of arms are protected by the Second Amendment, one easily reaches the conclusion that knives are also Second Amendment arms.<sup>164</sup> It follows from that conclusion that a government may not make the use of a handgun or a knife for self-defense per se illegal. Yet what if a government allowed the use

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130 S. Ct. 3020 (2010).

159. 130 S. Ct. 3020 (2010).

160. Nat'l Rifle Ass'n of Am. v. City of Chicago, 567 F.3d 856, 859 (7th Cir. 2009).

161. *Id.*

162. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

163. *See id.* at 582 ("[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.").

164. Kopel et al., *supra* note 112, at 194–96.

of guns or knives for self-defense, but criminalized the use of one's hands or feet for self-defense?

The result would be unconstitutional for several reasons. First of all, as the American Founders saw things, the Second Amendment right, and the right of revolution which they had recently exercised against King George III, were both based on the natural law right of self-defense.<sup>165</sup> *Heller* is replete with explicit recognition of the natural right of self-defense as the basis of the Second Amendment.<sup>166</sup>

Second, it is preposterous to imagine that the nation which by enacting the Second Amendment in 1789–91 and applying it to the States via the Fourteenth Amendment in 1866–68 barred governments from taking away defensive firearms, yet meant to allow governments to criminalize crime victims who defended themselves with hands or feet.

Finally, when you use your forelimbs (your arms) for self-defense, then your arms are “arms” in the Second Amendment sense. Most Second Amendment “arms” are tools that you use with your forelimbs, your arms. There is a reason why the word for “handheld self-defense tools” is the same as the word for “forelimbs.” “Arms” are what you use to protect yourself. The Second Amendment right of armed self-defense, therefore, includes the right to use man-made tools, and the right to use one's own body, to defend one's own body from violent aggressors.

#### *D. Not All Original Practices Are Per Se Constitutional Today*

Original public meaning is not the only tool of constitutional interpretation, but it is a very important one, as is today agreed across a wide spectrum of scholarly and judicial perspectives. For example, the large majority of both Justice Scalia's opinion for the *Heller* majority and Justice Stevens's opinion for the dissent were on originalist grounds.<sup>167</sup>

Justice Scalia used what has become the standard method of originalist scholars: he examined “original public meaning” to see

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165. JOHNSON ET AL., *supra* note \*, at 117; see also David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 101 (2007) (arguing that an overwhelming consensus of past and present legal authorities, from all over the world, recognize self-defense as a foundational human right).

166. David B. Kopel, *The Natural Right of Self-Defense: Heller's Lesson for the World*, 59 SYRACUSE L. REV. 235, 237–38 (2008).

167. See generally *Heller*, 554 U.S. at 573–636; *id.* at 636–80 (Stevens, J., dissenting).

how the People who ratified the Second Amendment understood it.<sup>168</sup> These sources, such as early legal treatises, newspaper essays during the ratification period, and so on, are all public documents.

In contrast, Justice Stevens relied on “original meaning”—attempting to discern the unexpressed beliefs of the drafters of the Second Amendment.<sup>169</sup> The “original meaning” version of “originalism” was introduced into academic legal discourse in the 1980s, and it was eventually abandoned by almost all “originalists” because of the powerful critiques offered by skeptical scholars. Justice Stevens’ opinion exemplifies the flaws of “original meaning” as a guide to constitutional interpretation: how can a law be based on a judge’s intuition about what James Madison, or anybody else, “really” meant?

Justice Stevens reasoned that during the Founding Era, there was a great political controversy about federal vs. state control of the militia.<sup>170</sup> This is certainly true, and is proven by a vast number of newspaper essays, records of the state constitutional ratifying conventions, and so on. From this clear political fact, Justice Stevens leaps to the conclusion that the Second Amendment must have been intended to concern only arms for persons in militia service.<sup>171</sup>

But that is certainly not how the American People (who actually made the Second Amendment into the law of the land by ratifying it) understood the Second Amendment, as Justice Scalia ably explains. Nor is Justice Stevens correct in assuming that because there was a militia controversy, Madison wrote the Second Amendment for the sole purpose of saying something about the militia. To the contrary, Madison himself said that the Bill of Rights was meant to write into law principles that Federalists and Anti-Federalists all agreed on. Nobody wanted the new national government to establish a national church, and the First Amendment guarantees that the government will never be able to do so. Nobody wanted the national government to be able to take away citizens’ guns and leave them defenseless, and the Second Amendment guarantees that the government will never be able to do so.<sup>172</sup> For the hardcore originalist, the inquiry into original public meaning ends no later than 1793, when North Carolina and Rhode Island, enticed by the now-ratified Bill of Rights, joined the Union. Other, less restrictive originalists also take

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168. *Id.* at 605 (majority opinion) (“[T]he public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation”).

169. *See, e.g., id.* at 651–52 (Stevens, J., dissenting).

170. *Id.* at 653.

171. *Id.* at 679.

172. *See id.* at 605 (majority opinion).

early practices into account. Such practices are not a sure guide to original public meaning, but they are often of some evidentiary value.

Accordingly, one approach of gun control advocates is to scour early American municipal laws for the most severe firearms restrictions and extrapolate support from them for modern repressive laws. For example, Justice Breyer's *Heller* dissent cites laws restricting the carrying of loaded guns into buildings in Boston, and restricting the discharge of firearms in Boston, Philadelphia, and New York as evidence that the District of Columbia's ban on handguns was not much more severe than historical American practice.<sup>173</sup> Similarly, in *Ezell*, an amicus brief from some gun control advocates and history professors referenced seventeenth or eighteenth-century regulations on target shooting in cities.<sup>174</sup>

Oftentimes, the historical citations do not make much sense when examined closely. As the *Ezell* court pointed out, the early municipal laws about target shooting within city limits tended to be reasonable safety regulations, rather than all-out bans on target ranges.<sup>175</sup> Likewise, the fact that one city made it illegal to carry a loaded gun into a tavern, and several cities had safe storage rules for large quantities of gunpowder, is not exactly proof that handgun bans are permissible—especially considering that not a single jurisdiction in the Early Republic banned handguns (or any other type of firearm).

But sometimes, the use of early controls as support for modern gun control uses more plausible reasoning. For example, Adam Winkler's excellent book *Gunfight* points to some early state laws that forbade slaves to possess arms.<sup>176</sup> (Although the more typical state laws only forbade slave arms possession if the master had not given permission.<sup>177</sup>) Winkler's point is that the Second Amendment is consistent with laws that forbid gun possession by persons who are not part of civil society, or by persons who are (for good reason) considered especially likely to use violence against civil society if they acquire weapons. So, one could argue that the slave disarmament laws show the modern justification for disarming convicted felons (or, perhaps, convicted violent felons) and illegal aliens.

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173. *Id.* at 683–84 (Breyer, J., dissenting).

174. Brief of Paul Finkelman, et al. as Amici Curiae in Support of Appellee at 10, *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (No. 10-3525).

175. *Ezell v. City of Chicago*, 651 F.3d 684, 705–06 (7th Cir. 2011).

176. ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 115–16 (2011).

177. JOHNSON ET AL., *supra* note \*, at 114.

However, First Amendment jurisprudence offers at least a caveat to reliance on the early practices of a few repressive jurisdictions to justify modern repressions. Early American state governments usually had state constitutional provisions similar to the First Amendment, and some of these governments also had laws against blasphemy or seditious libel (bringing the government into disrepute). They had criminal and civil prosecution for libel cases where the truth of the statement was no defense. Today, under modern cases, such laws would plainly violate the First Amendment.<sup>178</sup>

As Justice Harlan observed in his oft-quoted dissent in *Poe v. Ullman*,<sup>179</sup> constitutional rights are based in part on tradition, and "tradition is a living thing."<sup>180</sup> Or as Justice Brennan put it, "an enduring and vital tradition . . . commands respect in part because the Constitution carries the gloss of history."<sup>181</sup> After a Federalist Congress abused its power by passing the Sedition Act in 1798, and Federalist federal judges abused their powers by forcing guilty verdicts for newspaper writers who criticized President John Adams,<sup>182</sup> the Adams-Jefferson election of 1800 repudiated the notion that the First Amendment allowed prosecutions for seditious libel.<sup>183</sup> First Amendment jurisprudence certainly does not take the view that every restriction on speech or the press that existed in some city in 1791 conforms to First Amendment rules. The most repressive local laws from 1791 or 1821 are not a sure guide to what the First Amendment permits today, nor should they be treated as an infallible guide to what the Second Amendment permits.

### *E. Both Amendments Accommodate Technological Change*

In the late nineteenth century, very high-speed printing presses proliferated, leading to the birth of the "penny press"—newspapers sold for one cent. Because the penny press made daily newspapers

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178. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (regarding matters of public concern); *Gertz v. Robert Welch*, 418 U.S. 323, 351-52 (1974) (regarding public figures); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284 (1964) (regarding public officials).

179. 367 U.S. 497 (1961).

180. *Id.* at 542 (1961) (Harlan, J., dissenting).

181. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 (1980) (Brennan, J., concurring) (right of public access to criminal trials).

182. See, e.g., *United States v. Cooper*, 25 F. Cas. 631 (C.C.D. Pa. 1800); JOHN C. MILLER, *CRISIS AND FREEDOM: THE ALIEN AND SEDITION ACTS* 122 (1951).

183. LEONARD LEVY, *EMERGENCE OF A FREE PRESS* 332-33 (1985).

available to a much broader (that is, less wealthy, and less educated) audience, they tended to focus on sensational and lurid stories.

The damage was quite apparent. Copycat violence from media sensationalism dates back at least to 1888, when Jack the Ripper mutilated and murdered five prostitutes in London. The immense publicity given to Jack the Ripper led to many copycat murders and rapes.<sup>184</sup>

Even so, the high-speed presses were seen as solidly within the First Amendment. They did the same thing that an old-fashioned Franklin press did (put ink onto sheets of newspaper), except that they did so much more rapidly. Based on what can be gathered from historical research into the First Amendment, nobody in 1888 claimed that high-speed presses were outside the First Amendment because “the freedom of . . . the press” only applied to the types of presses that existed in 1789.

Still, today some persons claim with a straight face that the Second Amendment should only apply to muskets. The *Heller* Court properly described this claim as “bordering on the frivolous.”<sup>185</sup> The exercise of a constitutional right is not limited to the technology of the late eighteenth century.

It should also be noted that improvements in firearms from 1789 until the present are quite small compared to improvements in press technology. In 1789, an abuse of freedom of the press (e.g., an intentional libel) could only spread as fast as a man on horseback could carry copies of a newspaper from one city to the next. A libel in a New York newspaper might never reach all the way to Georgia, let alone cross the Atlantic. But today, libels spread globally in seconds. So when *Newsweek* published a false story that American guards at Guantanamo Bay had desecrated the Koran, a few days later innocent people in Asia were murdered by criminals who had been incited by *Newsweek*’s untrue story.<sup>186</sup> The velocity and reach of a single newspaper article today is at least thousands of times greater than it was in 1789.

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184. LOREN COLEMAN, *THE COPYCAT EFFECT: HOW THE MEDIA AND POPULAR CULTURE TRIGGER THE MAYHEM IN TOMORROW’S HEADLINES* 135–37 (2004).

185. *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (characterizing the argument “that only those arms in existence in the 18th century are protected by the Second Amendment” as “bordering on the frivolous” and holding that “[j]ust as the First Amendment protects modern forms of communications . . . the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”).

186. See, e.g., David B. Kopel, *Newsweek’s Bad Streak Hits Home*, *ROCKY MOUNTAIN NEWS*, May 21, 2005, at 14C.



In contrast, for the Second Amendment, firearms today are much more reliable today than they used to be. Under optimal conditions, a firearms user in 1789 could fire about three or four accurate shots per minute. Today under optimal conditions, a firearms user might be able to fire about fifty or sixty accurate shots per minute (although, in practice, very few people can do so.)

As for the most common Second Amendment arms—knives—the technological improvements have been even smaller. Folding knives are now accessible to common people, rather than a luxury item for the wealthy. Improvements in metallurgy have made knives more durable and have reduced the need for frequent sharpening. Excellent quality knives are more affordable today than they used to be. But really, a knife is still a knife: a blade and a handle.<sup>187</sup>

*F. Both Amendments Aim for the Preservation or Restoration of Ordered Liberty and Civic Virtue*

The First Amendment is more than just a list of important rights. It is a vision of sustainable society of ordered liberty. “A republic, if you can keep it,” as Benjamin Franklin was reported to have said, can only endure if the people have civic virtue. The virtuous citizen makes up his own mind about matters of religion and conscience (free exercise), rather than submissively believing whatever a national church (no establishment) tells him. He is inculcated in virtue by attending the church of his own free choice (free exercise). He speaks his mind freely and listens to others who do the same (free speech, free press). He joins with other virtuous citizens to discuss and debate the concerns of the day (right to assemble). When government policies should be changed, the citizens tell the government specifically what to change (right to petition). This is the “active liberty” of self-governance celebrated by Justice Breyer.<sup>188</sup>

It is true that the First Amendment guarantees anyone’s right to live like a hermit immersed in one’s own eccentric thoughts. Yet the grander vision of the First Amendment is to make the United States a collective, voluntary school for everyone’s moral improvement. The moral improvement of an individual, and of a society, is fostered by making sure that people will exercise their personal choices of conscience (and not just accept and be taxed to support the official government religion); that people can improve their minds by

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187. Kopel et al., *supra* note 112, at 169.

188. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 15–16 (2006).

sharing ideas and learning from others (rather than being sheltered from ideas that initially seem disagreeable); and that they can participate in collective civic activities (assembly and petition) to promote the common good.

The First Amendment is not only a means for self-government; it is the method by which mature self-governance is supposed to be learned. The Second Amendment is exactly the same.

The affirmation of the importance of the militia puts national and community self-defense directly in the hands of the responsible citizenry. The Second Amendment citizen is courageous and vigilant in safeguarding God-given rights against infringement. The Second Amendment citizen is skilled and practiced in the use of arms to defend those rights when necessary. Rather than being submissively dependent solely on the government for personal and community security, the Second Amendment citizen takes responsibility for protecting herself and her community. Article I of the Constitution gives the federal government the authority to work with the States to foster these virtues by providing proper training.<sup>189</sup>

The mature, self-governed, self-controlled citizens of the First and Second Amendments are the opposite of the impetuous mobs reviled by the Founders. The mob is easily gulled into becoming the ally of the demagogue. The First and Second Amendment citizen has the wisdom, the knowledge, and the tools to resist the demagogue.

Such citizens do not “judge of an ill principle in government only by an actual grievance.”<sup>190</sup> Rather, as Edmund Burke observed of the Americans of 1775, they “anticipate the evil” and “auger misgovernment at a distance.”<sup>191</sup> As the author of the First and Second Amendments wrote, “[I]t is proper to take alarm at the first experiment on our liberties. The freemen of America did not wait until usurped power had strengthened itself by exercise, and entangled the question in precedents.”<sup>192</sup>

*In extremis*, the First and Second Amendment citizens are the ones who will restore constitutional order if the constitutional rule of law itself is usurped by a government.<sup>193</sup>

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189. U.S. CONST., art. I, § 8, cl. 16.

190. Edmund Burke, *On Moving His Resolutions for Conciliation with the Colonies*, Speech to Parliament 26 (Mar. 22, 1775).

191. *Id.*

192. James Madison, *Mem'l and Remonstrance Against Religious Assessments*, Speech to the General Assembly of the Commonwealth of Virginia (1785).

193. See, e.g., THE FEDERALIST NO. 33, at 203 (Alexander Hamilton) (Heirloom ed., Arlington House 1966) (1788) (arguing that if the federal government exceeds its authority and uses its powers tyrannically, “the people, whose creature [the Constitution] is, must appeal to the standard they have formed, and take such

G. *Guns and Newspapers Are Not Like Movies of  
Men Having Sex with Sheep*

The (imaginary) movie *Boy and Sheep* was a favorite hypothetical of Frederick Schauer, the law professor who provided the legal doctrine for the Reagan administration's campaign against pornography. Surprisingly, some scholars have argued that the exercise of Second Amendment rights should be treated like the *Boy and Sheep* movie: allowed in the home, and banned everywhere else.

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measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify."); THE FEDERALIST NO. 29, at 187 (Alexander Hamilton) (Heirloom ed., Arlington House 1966) (1788) (If the federal government tried to use the militia to impose tyranny on the states, where would the militia march itself "but to the seat of the tyrants, who had meditated so foolish as well as so wicked a project; to crush them in their imagined intrenchments of power and to make them an example of the just vengeance of an abused and incensed people?"); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1890 (Fred B. Rothman & Co. 1991) (1833) (stating that the Second Amendment means that armed citizens in the militia can suppress insurrections against constitutional order, and can also restore constitutional order if an anti-constitutional government usurps ungranted powers).

Theodore Schroeder was leader of the Free Speech League, the first group in American history to defend the rights of all speakers on all subjects based on the principles of the First Amendment. Schroeder's 1916 book, *Free Speech for Radicals*, used the Glorious Revolution of 1688 to argue for protection of speech urging the overthrow of the government:

If we are to erect this complaint against disarming part of the people into a general principle, it must be that in order to maintain freedom we must keep alive both the spirit and the means of resistance to government whenever "government is in rebellion against the people," that being a phrase of the time. This of course included the right to advocate the timeliness and right of resistance.

The reformers of that period were more or less consciously aiming toward the destruction of government from over the people in favor of government from out of the people, or as Lincoln put it, "government of, for and by the people." Those who saw this clearest were working towards the democratization of the army by abolishing standing armies and replacing them by an armed populace defending themselves, not being defended and repressed by those in whose name the defense is made.

Upon these precedents, others like them, and upon general principles reformers like DeLolme and John Cartwright made it plain that the right to resist government was one protected by the English Constitution.

Professor Darrell Miller provides the legal rationale: as a general matter, obscenity may be prohibited.<sup>194</sup> However, in 1969, the Supreme Court carved out an exception in *Stanley v. Georgia*:<sup>195</sup> a person who possesses obscenity in his own home may not be criminally prosecuted for the possession.<sup>196</sup> Therefore, argues Miller, the Second Amendment can be limited purely to the home, with no right to carry outside the home.<sup>197</sup>

Maryland's highest court and the eminent Fourth Circuit Judge Harvie Wilkinson have essentially adopted this approach, although not the obscenity-based rationale.<sup>198</sup> They argue that the Second Amendment is only for inside the home.<sup>199</sup> Notwithstanding the Supreme Court's numerous statements in *Heller* and *McDonald* about the right to carry outside the home, they insist that the Second Amendment rights expire as soon as one crosses the threshold of one's abode.<sup>200</sup>

As Professor Eugene Volokh points out, the premise of the Supreme Court's obscenity-in-the-home decisions (such as *Stanley*) was not that obscene literature has protected value, but that allowing its criminalization and seizure in the home violates other protected interests, such as privacy.<sup>201</sup> In contrast, the Second Amendment recognition of an express right to "keep and bear arms" indicates that the Constitution views arms themselves as valuable. A more natural analogy between the Second Amendment and obscenity law might argue as follows: while most common firearms are valuable and constitutionally protected, like most speech, there is also a class of extreme, unusually dangerous, or otherwise low-value weapons that are outside of the protections of the Second Amendment—much as obscenity forms a limited class of speech that is outside the normal protections of the First Amendment.

Another variant of obscenity-style arguments comes from some commentators who urge that local communities be permitted to craft their own, more restrictive standards regulating firearms.<sup>202</sup> These

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194. *Miller v. California*, 413 U.S. 15 (1973).

195. 394 U.S. 557 (1969).

196. *Id.* at 568 (1969).

197. Darrell A.H. Miller, *Guns as Smut: Defending the Home-Based Second Amendment*, 109 COLUM. L. REV. 1278, 1278 (2009). *But see* Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 98 (2009).

198. *See United States v. Masciandaro*, 638 F.3d 458, 474–75 (4th Cir. 2011); *Williams v. Maryland* 10 A.3d 1167, 1178–79 (Md. 2011).

199. *Masciandaro*, 638 F.3d at 474–75; *Williams*, 10 A.3d at 1178–79.

200. *Masciandaro*, 638 F.3d at 474–75; *Williams*, 10 A.3d at 1178–79.

201. Volokh, *supra* note 197, at 98.

202. *See, e.g., Michael B. de Leeuw et al., Ready, Aim, Fire?* District of Columbia

proposals mirror the approach suggested by Justice Breyer's dissent in *Heller*, which proposed an interest-balancing approach that would accommodate the special problems faced by urban communities.<sup>203</sup>

It is certainly true that the Second Amendment, like any other article of the Bill of Rights, allows room for local communities to have local rules. The laws about discharging a firearm in one's backyard can be stricter in New York City than in rural Montana.

But the point of the Fourteenth Amendment is that there is a national baseline of civil rights, below which a state or local government may not sink. This is true even for suppression of allegedly obscene speech. The Supreme Court's *Miller* test allows for community standards in suppression of obscenity; part of the test for obscenity is "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."<sup>204</sup> However, another part of the *Miller* test uses national standards to determine whether "the work, taken as a whole, lacks serious literary, artistic, political or scientific value."<sup>205</sup> So, for example, the state of Georgia could not outlaw the R-rated film *Carnal Knowledge*, a mainstream movie about two college friends and the sexual partners they had over the course of their lives—even if a Georgia jury had found the film to be obscene.<sup>206</sup>

The correct expression of how the obscenity doctrine can be analogized to the Second Amendment is that the First Amendment protects speech/press in general, but there are some exceptions for traditionally understood misuses of the right, such as obscenity and libel. Similarly, the Second Amendment protects the use of firearms in general, but not misuses of the right, such as armed robbery or firing a gun in circumstances that endanger innocent persons (e.g., shooting a gun in the air on New Year's Eve in crowded city). To a limited degree, local conditions may inform what constitutes an abuse of the right. The celebratory shot on New Year's Eve may be per se criminal in crowded Philadelphia, but not necessarily so on one's 300-acre farm in Idaho.

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v. *Heller and Communities of Color*, 25 HARV. BLACKLETTER L.J. 133, 136 (2009).

203. *District of Columbia v. Heller*, 554 U.S. 570, 689 (Breyer, J., dissenting).

204. *Miller v. California*, 413 U.S. 15, 24 (1973).

205. *Id.*

206. *Jenkins v. Georgia*, 418 U.S. 153 (1974). The movie starred Jack Nicholson and Candice Bergen.

## IV. PARTICULAR DOCTRINES

This Part examines several doctrinal tools that have been important in First Amendment law. Most of them can be straightforwardly used with the Second Amendment. The doctrine of prior restraints, however, has some Second Amendment applicability, but in a more complex and restrained manner.

*A. Anti-Constitutional Legislative Purpose*

If the *intended purpose* of a law is to prohibit speech that is protected by the First Amendment, then the law is necessarily unconstitutional. Similarly, if the *intended purpose* of a law is to harm racial minorities or other suspect classes, then the law is a violation of the Equal Protection Clause of the Fourteenth Amendment. Even if the law is written in a manner that is facially neutral, courts must inquire into the legislative motive. For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>207</sup> a city council enacted an ordinance that banned certain killings of animals.<sup>208</sup> Although the ordinance was facially neutral, the Supreme Court struck it down as a violation of the Free Exercise Clause because the legislative history plainly showed that the purpose of the ordinance was to suppress the practice of the Santeria religion.<sup>209</sup>

Even when a legislative majority is motivated by racial animus, or by a desire to suppress First Amendment rights, legislators are often canny enough to avoid overtly expressing their anti-constitutional malice. But when the suppression of Second Amendment rights is involved, many legislators wear their malice with pride. The legislative histories of many gun control laws on the books today contain numerous instances of legislators promoting a restriction because they want to reduce the “proliferation of guns” in society—the equivalent of trying to constrict the “proliferation of newspapers and mosques”—or because the legislators express some sort of pacifist-aggressive<sup>210</sup> belief that the use of armed force for self-defense is illegitimate.

The inquiry regarding anti-constitutional legislative purpose is not a situation where “one drop of ink spoils the whole pitcher of milk.” If a legislature enacts a law for legitimate reasons, the law

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207. 508 U.S. 520 (1993).

208. *Id.* at 527.

209. *Id.* at 540.

210. See generally David B. Kopel, *Pacifist-Aggressives Versus the Second Amendment*, 3 CHARLESTON L. REV. 1 (2008).

does not become unconstitutional because a few isolated legislators express anti-First Amendment purposes.

In the 1968 case *United States v. O'Brien*,<sup>211</sup> the Supreme Court upheld a federal statute prohibiting the destruction of draft cards.<sup>212</sup> The Court noted that Congress had many good reasons to vote for the statute—particularly, the efficient operation of the Selective Service System.<sup>213</sup> In floor speeches, three representatives had indicated their desire to suppress draft card burning as a form of protest against the Vietnam War.<sup>214</sup> The Court held that while these representatives' motives were plainly contrary to the First Amendment, the anti-rights motives of "a handful" of legislators did not poison the statute as a whole.<sup>215</sup>

The same rule can be directly applied to the Second Amendment. Congress does have a dedicated minority of people who hate guns and gun owners. Any gun control bill that passes Congress will get the pro-hate vote. But that should not automatically make the bill unconstitutional. Rather than focusing on the fringe of the bill's advocates, the inquiry about anti-constitutional animus should focus on the core of its advocates. For example, what did the chief sponsors say? If the sponsors are plainly motivated by anti-constitutional bigotry, the bigots' bill ought to be very carefully reviewed by the courts.

A case that was wrongly decided under this principle is the Ninth Circuit's now defunct 2011 three-judge panel decision in *Nordyke v. King*.<sup>216</sup> *Nordyke* began in 1999, after Alameda County, California, outlawed the possession of firearms on county property.<sup>217</sup> The ordinance was enacted to ban gun shows at a public fairground.<sup>218</sup> The "King" in *Nordyke v. King* was Alameda County Supervisor Mary King, author of the 1999 ordinance.<sup>219</sup> She wrote to the County Attorney that she had "been trying to get rid of gun shows on County property" for "about three years," and that "spineless people hiding behind the constitution" angered her.<sup>220</sup> At a press conference touting the ban, King declared that the County

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211. 391 U.S. 367 (1968).

212. *Id.* at 386.

213. *Id.*

214. *Id.*

215. *Id.*

216. 644 F.3d 776 (9th Cir. 2011), *vacated*, 681 F.3d 1041 (9th Cir. 2012) (holding that all previous Ninth Circuit opinions in *Nordyke* are void).

217. *Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012).

218. *Id.*

219. *Nordyke*, 644 F.3d at 780.

220. *Id.*

government should no longer provide a place for people to “display guns for worship as deities for the collectors who treat them as icons of patriotism.”<sup>221</sup>

Nevertheless, the County Attorney would later insist that the ordinance did not ban gun shows. Once the County finally committed itself to an odd interpretation of the ordinance, which had the effect of allowing gun shows to be held at the fairgrounds as long as the guns had cable locks to prevent theft, the case became moot.<sup>222</sup> During the long history of *Nordyke*, the Ninth Circuit twice heard the case en banc; all the prior decisions of the three-judge panels were vacated and have no precedential value.<sup>223</sup>

The disappearance is salutary because the three-judge panel was plainly wrong in its treatment of County Supervisor King’s anti-constitutional animus. A *Nordyke* panel cited *O’Brien* for the principle that stray legislative comments do not necessarily invalidate a statute.<sup>224</sup> In so doing, the *Nordyke* court misapplied *O’Brien*. The comments from a few U.S. Representatives that were at issue in *O’Brien* were not the comments from the bill’s lead sponsor.<sup>225</sup> What the lead sponsor says about a bill is considerably more important than are the comments of a few straggling legislators who take the microphone to announce their support.

Properly applied, the rule about anti-constitutional animus should raise serious doubts about the constitutionality of the so-called “SAFE Act,” which New York Governor Andrew Cuomo rammed through the state legislature in January 2013.<sup>226</sup> Purportedly enacted as “emergency” legislation, the bill was written in secret by lobbyists from the Brady Campaign and from Michael Bloomberg’s “Mayors Against Illegal Guns.”<sup>227</sup> Inter alia, the bill outlaws loading more than seven rounds of ammunition into a magazine for the purpose of self-defense.<sup>228</sup> Governor Cuomo’s address to the state legislature demanded enactment of the restriction because he said that hunters do not need more than seven rounds. This is true for many hunting situations, although not all. Much more fundamentally, Governor Cuomo treated the Second

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221. *Id.* at 780 n.2.

222. *See Nordyke*, 681 F.3d at 1044.

223. *See Nordyke*, 644 F.3d. at 781–82.

224. *Id.*

225. *See United States v. O’Brien*, 391 U.S. 367, 385 (1968).

226. S.B. 2230, 2013 Leg., 236th Sess. (N.Y. 2013) (“The New York Secure Ammunition and Firearms Enforcement Act of 2013”).

227. Fredric Dicker, *Gov Faking Care of Business, Execs Fume*, N.Y. POST (Mar. 25, 2013), <http://nypost.com/2013/03/25/gov-faking-care-of-business-execs-fume/>.

228. *See* N.Y. S.B. 2230.



Amendment as if it only protects the right to hunt; this is part of the Second Amendment,<sup>229</sup> but it is not the most important part. The “core” of the Second Amendment is self-defense.<sup>230</sup> Governor Cuomo and his “SAFE” Act, therefore, rejected the core of the Second Amendment.

Closely related to the prohibition of laws that are enacted because of anti-constitutional animus is the principle that mere emotions are not a legitimate basis for infringing First Amendment rights.<sup>231</sup> In the free speech context, precedents strongly show that a listener’s feeling of offense does not grant the listener a veto over others’ right to speak.<sup>232</sup> Rather, First Amendment citizens must have the maturity to tolerate unsettling, unattractive, and even hostile speech from their fellow citizens in the public square.

Quite often, anti-gun laws are enacted by legislators who announce that they do not expect the legislation to actually do any good, but that they are voting for the bill as a “symbolic” measure, or to express the feelings of their constituents. This should not be sufficient for any measure that restricts fundamental personal freedoms. If the legislature can provide a solid empirical foundation for a gun control law, the law may have a chance of passing heightened scrutiny and thus being found constitutional. Mere emotions are not a legitimate basis for infringing the rights of American citizens.

### *B. Chilling and Vagueness*

Vague laws create a “chilling effect” because citizens are unsure which actions are or are not illegal; to be safe from prosecution, citizens must steer far clear of the conduct that a statute vaguely defines.<sup>233</sup> Courts are especially vigilant about declaring a statute “void for vagueness” when a statute may chill the exercise of First

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229. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3108 (2010) (“Guns may be useful for self-defense, as well as for hunting and sport . . .”).

230. *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008).

231. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“[G]overnment may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Boos v. Barry*, 485 U.S. 312, 320 (1988) (concerning speech that offends foreign diplomats).

232. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (concerning speech that might cause fights); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (concerning fees for policing costs to prevent fights).

233. See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (finding that vagueness makes citizens “steer far wider of the unlawful zone”).

Amendment rights.<sup>234</sup> Courts should be equally vigilant about the Second Amendment.

The chilling effect of vagueness is particularly harmful in a Second Amendment context. Licensed firearms dealers operate their businesses in a very highly regulated business environment. A dealer can lose its license, or the ability to have the license renewed, for regulatory violations. Accordingly, concerns about the chilling effect of vague laws are even stronger in a Second Amendment context than in regards to the First Amendment. Bookstores, after all, are not required to have a federal license just to sell books to the public. No federal or state regulator has the ability to revoke a bookstore's license for alleged violations of a vague law about what kind of books may be sold.

As for the consumers, the vagueness problem is again even stronger in a Second Amendment context. If the chilling effect of a vague law prevents a person from obtaining and reading a particular book, that person's intellectual life may be harmed. If the chilling effect of a vague law prevents a person from obtaining and using a particular firearm, that person may be murdered.

Different types of guns are not fungible. It is unreasonable to tell somebody, "So what if a vague law prevents you from obtaining an AR-15 rifle? You can just buy a .357 revolver instead." The problem is that the gun that is made unobtainable by a vague law may be the best firearm for that particular person to use safely for self-defense. For a disabled person with mobility impairments and weak upper body strength, the low recoil and easy-to-control AR-15 is often the best choice for home defense. For a person whose circumstances require walking at night in high-crime neighborhoods, the powerful .357 revolver, with its greater ability to stop an attacker with a single hit, might be the best choice.

### C. *Less Restrictive Means*

The doctrine of "less restrictive means" is well-established for the First and Fourteenth Amendments. A particular speech restriction is unconstitutional if the government's goal could be accomplished by less restrictive means.<sup>235</sup>

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234. See, e.g., *NAACP v. Button*, 371 U.S. 415, 432 (1963).

235. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) ("[T]he court should ask whether the challenged regulation is the least restrictive means among the available effective alternatives."); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (asking whether the challenged provision "burden[s] no more speech than necessary to serve a significant government interest"); *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (inquiring whether statute "burden[s] substantially

Under state constitutional law, the doctrine has been applied to the right to arms. The leading case is the 1972 Colorado decision in *City of Lakewood v. Pillow*.<sup>236</sup> There, a suburb's city council was concerned about gun crime, and responded by enacting a broad ban on many forms of carrying or transporting firearms.<sup>237</sup> The Colorado Supreme Court unanimously struck down the ban.<sup>238</sup> Citing First Amendment precedent, the Court explained:

A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.<sup>239</sup>

This, of course, was nearly verbatim from *Shelton v. Tucker*<sup>240</sup> and other Supreme Court First Amendment precedents. The *Pillow* precedent has been followed by courts in several other states.<sup>241</sup>

An earlier Colorado decision, *People v. Nakamura*,<sup>242</sup> preceded the formal creation of the "less restrictive means" test, but used similar reasoning. Under the influence of the Ku Klux Klan, the state legislature had outlawed firearms possession by legal resident aliens.<sup>243</sup> The purported purpose was to preserve the wild game of Colorado for consumption by the citizens of Colorado.<sup>244</sup>

At the time, Fourteenth Amendment doctrine imposed no bar to Colorado forbidding legal aliens from obtaining hunting licenses. But

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more speech than is necessary" to advance the government interest). Closely related to "less restrictive means" is the doctrine that speech restrictions (and race-based government classifications under the Equal Protection Clause) must be "narrowly tailored." They must "burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765.

236. 501 P.2d 744 (Colo. 1972).

237. *Id.* at 745.

238. *Id.* at 746.

239. *Id.* at 745.

240. 364 U.S. 479 (1960).

241. See David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1195 n.455 (2010) (listing state court cases that have followed *Pillow*).

242. 62 P.2d 246 (Colo. 1936).

243. *Id.* at 247.

244. *Id.*

the Colorado Supreme Court ruled that the legislative prohibition on gun possession went too far.<sup>245</sup> Instead of banning all gun possession by aliens, the legislature could instead have enacted a less restrictive law that simply forbade aliens to hunt.

#### *D. Overbreadth*

As the dissent in *Nakamura* pointed out, the *Nakamura* majority had a good point about the unconstitutionality of banning gun possession by aliens who wanted to have firearms for self-defense or target shooting.<sup>246</sup> However, Mr. Nakamura himself had been caught poaching.<sup>247</sup> Because Nakamura himself was engaged in something that everyone agreed could be criminalized, the dissent argued that the prosecution of Nakamura was not unconstitutional.<sup>248</sup>

The majority (obviously) disagreed, striking down the statute and setting Nakamura free. The *Nakamura* majority was using a doctrine that would later be called “overbreadth.” Under the overbreadth doctrine, a defendant can say, “I admit that my conduct can be criminalized by the statute. However, the statute is overbroad because it also outlaws constitutionally protected activities. Therefore, the entire statute should be struck down.”

Overbreadth is established as a First Amendment doctrine, although not every First Amendment situation allows its use. As to whether overbreadth applies outside the First Amendment, courts have split; the majority of state courts that have directly considered the issue have ruled that overbreadth can be used in right to arms cases.<sup>249</sup>

There is some confusion on this issue because of the related word “overbroad.” In the most technical, narrow sense, “overbreadth” is a doctrine about standing to raise the violations of constitutional rights of third persons. The word “overbroad,” however, is often used in First and Second Amendment jurisprudence to simply say that a statute “goes too far”; in other words, that the statute is not “narrowly tailored” or the statute is not the “least restrictive alternative.” The word “overbreadth” can also be used in the same way that “overbroad” has been used.

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245. *Id.*

246. *Id.* at 248, (Bouck, J., dissenting).

247. *Id.* at 246.

248. *Id.* at 248.

249. See David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1121, 1126, 1161, 1195–96, 1200, 1207–08 (2010).

A good example was a federal district court decision about a New York state law imposing various restrictions on "gun shows" in *Scope, Inc. v. Pataki*.<sup>250</sup> In *Pataki*, the plaintiffs and the court agreed that the legislature could impose licensing laws on actual gun shows—large public events where dozens or hundreds of vendors rent tables to display guns for sale.<sup>251</sup> However, the legislative definition of "gun show" was so broad that it encompassed many things that are not really gun shows—such as the private meetings of target-shooting clubs or hunting clubs. The court held that the definition was defective because of "overbreadth," for it infringed the gun clubs' First Amendment rights of "free speech, assembly and petition."<sup>252</sup>

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250. 386 F. Supp. 2d 184 (W.D.N.Y. 2005).

251. *Id.* at 191.

252. *See id.* According to the court:

The Third cause of action also pertains to New York General Business Law section 895, and alleges that, "[i]f the purpose of [the statute] in so far as it designates 'events' sponsored by '[persons] devoted to the collection, competitive use, sporting use, or any other legal use of firearms, rifles or shotguns' as a 'gun show,' is to declare any assembly of gun owners anywhere for any purpose a 'gun show,' it is over broad and infringes upon the right of free speech, right to lawfully assemble, and the right to peacefully petition guaranteed by the First Amendment of the Bill of Rights."

....

... "GUN SHOW" DEFINITION OVERBROAD

Plaintiff's Third cause of action alleges that section 895(1) is so broad that it essentially declares any assembly of gun owners for any purpose a "gun show" and infringes on plaintiffs' right to lawfully assemble, right to free speech and right to petition the government. The Court agrees that the statute is overbroad.

....

"Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The Supreme Court wrote that to invalidate a state statute that regulates harmful, or constitutionally unprotected conduct, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (footnote omitted).

....

As the Supreme Court wrote in *Keyishian v. Board of Regents*, 385

*E. Prior Restraints and Prohibited Persons*

Although many First Amendment doctrines are easy to apply to the Second Amendment, one doctrine that is not is the rule against prior restraints. Some gun rights advocates make an argument along the following lines: If a law requires prior government permission to exercise Second Amendment rights—such as a license to carry a gun in public or an instant check to buy a gun in a store—that law is a prior restraint; prior restraints are per se unconstitutional; therefore, the licensing or background check laws are unconstitutional.

One problem with that argument is that today, virtually everyone accepts the constitutionality of some Second Amendment prior restraints that would unquestionably be unconstitutional in a First Amendment context. An absolute core of the prior restraint doctrine for the First Amendment is that the government may not require a business to have a special license in order to commercially manufacture or sell books or newspapers. Yet for the Second Amendment, I am not aware of anyone who has made the argument that it is an unconstitutional prior restraint to require that persons who wish to engage in the business of commercially manufacturing or selling firearms obtain a Federal Firearms License.<sup>253</sup>

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U.S. 589, 602 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488), “even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”

As indicated above, the Court determines that the plain meaning of the first clause of section 895(1) defines any gathering of a gun club to be a “gun show.” Since the Court is unaided by a narrowing State court interpretation, it is not persuaded by defendants’ argument that by relying on the title of Article 39-DD, the first clause of section 895(1) can be interpreted in a manner that passes constitutional muster. Here, unaided by a narrowing State court interpretation, the Court finds that the first clause in the definition of a “gun show” in New York General Business Law section 895(1) is overbroad and infringes on the gun club plaintiffs’ constitutionally protected rights to free speech, assembly and petition. Therefore, the Court grants plaintiffs’ motion for judgment on the pleadings with respect to the Third cause of action.

*Id.* at 188–95.

253. In some situations, there may be arguments about whether Congress’s regulation of such businesses is really a proper application of Congress’s power to regulate “Commerce . . . among the several states.” As applied to a firearms store that sells only to in-state customers, the FFL requirement may well contradict the original public understanding of the interstate commerce power. But that is an Article I question, not a Bill of Rights question.

A second problem with the simple version of the prior restraint argument is that under modern First Amendment doctrine, prior restraints are not ipso facto unconstitutional. Back in the day when Blackstone was writing, the English "liberty of the press" was binary: there could be absolutely no form of prior restraints, such as requiring printers to have a license.<sup>254</sup> (And certainly not requiring newspaper readers to get government permission in advance!) At the same time, nothing restricted the subsequent punishment of writers and publishers. The punishment of consumers for possessing printed matter (e.g., an obscene book) also lacked any restrictions.

But since the 1760s, freedom of the press doctrine in America has changed considerably. From 1791 to the present, subsequent punishment has been forbidden, except for in a "few limited areas"; these exceptions are "long familiar to the bar," "well-defined," and "narrowly limited classes of speech" like obscenity and incitement.<sup>255</sup>

Meanwhile, as the Supreme Court has stated in the *Pentagon Papers* case and others, prior restraints are highly disfavored, but they may be constitutional in some situations, such the disclosure of troop movements during wartime.<sup>256</sup>

The case for a broader allowance of prior restraints is stronger in the context of the Second Amendment because—unlike the First Amendment—it includes a doctrine of prohibited persons.

Consider two criminals: the first criminal commits treason by stealing government secrets about troop movements during wartime and publishing those secrets. The person intends to give aid and comfort to the enemy during wartime, which he accomplishes. Thousands of American soldiers are killed by a foreign enemy because their location was revealed.

Criminal A is prosecuted for treason and serves 20 years in federal prison, plus five more years on parole. Upon release from supervision under prison/parole, the convicted traitor is then free to

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254. See Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037, 1059–64 (2009).

255. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); see also *Brown v. Entm't Merchts. Ass'n*, 131 S. Ct. 2729, 2733 (2011); *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969).

256. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (explaining that a prior restraint "comes to this Court with a heavy presumption against its constitutional validity" and the government "carries a heavy burden of showing justification"); see also *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (concerning a permanent injunction of commercial advertising for illegal transactions); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

speak and publish as he wishes about anything. He can write a book, start a magazine, or become a newspaper columnist. His freedom of speech and of the press is just as broad as the freedoms of the law-abiding patriotic widows and orphans of the soldiers whom he intentionally caused to die.

Unlike Criminal A, Criminal B has never acted with malice aforethought. But one evening, Criminal B was drunk at a bar, and started a fistfight with another patron. Criminal B punched the patron in the jaw, knocking him off balance so that he slipped on some spilt beer, fell backwards, hit his head on the floor, and died.

Criminal B was convicted of manslaughter and served the same sentence as did Criminal A. Upon release from supervision, Criminal B also enjoys full First Amendment rights.

Criminal A and Criminal B, as convicted felons, may be barred from voting for the rest of their lives, depending on the statutes of their state of residence. By federal law, Criminal A and Criminal B are also prohibited from possessing firearms for the rest of their lives.<sup>257</sup> Their only escape hatch for the voting ban and the gun ban is an executive pardon.<sup>258</sup>

Do the above policies make sense? For voting, the theory is that convicted criminals have shown that they are so heedless of the rights of others that they should not participate in governing the community. Voting is a form of power over other people, and the convicted felons have arguably demonstrated that they are not trustworthy to exercise such power.

Criminal B has shown that he has very bad judgment about the use of force, so the firearms prohibition makes sense as applied to him. Criminal A has never personally misused force, so the firearms prohibition is more dubious for him. Criminal B has never misused his freedom of the press rights, so there is no reason that he should be deprived of First Amendment rights after release. On the other hand, Criminal A is a flagrant abuser of the freedom of the press, yet his First Amendment rights remain pristine.

The results are not entirely logical. They cannot be based on the assertion that guns can kill or physically injure people but speech cannot; the fact is that incitement to crime can and does directly cause criminal violence against innocents. Even speech is not criminally

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257. See 18 U.S.C. § 922(g) (2012).

258. Nominally, federal law has a provision for the discretionary restoration of firearms rights for convicted felons. 18 U.S.C. § 925(c) (2012). However, appropriations riders for the last two decades have forbidden the Bureau of Alcohol, Tobacco, Firearms & Explosives from using appropriated funds to carry out the restoration of rights program.



prosecutable as incitement, misuse of the freedom of speech and of the press often does result in violence against innocent victims.

However, in this Article I am not attempting to change First or Second Amendment doctrine—only to explicate how doctrines that have been well-developed in the First Amendment context may be used in a Second Amendment context. The *Heller* Court expressly stated in dicta that bans on gun possession by “convicted felons” are “presumptively constitutional.”<sup>259</sup> A few courts have upheld as-applied challenges by persons convicted of non-violent crimes who have led exemplary lives for decades since their conviction—e.g., an individual convicted of marijuana possession in 1971.<sup>260</sup> But unless the Supreme Court changes its mind, bans on firearms possession by convicted felons are generally constitutional. Many lower courts have extrapolated from the *Heller* felons dicta to uphold other categories of “prohibited persons,” such as domestic violence misdemeanants or persons under domestic violence restraining orders.<sup>261</sup>

Thus, under current doctrine, the Second Amendment *does* allow for categories of prohibited persons, and the First Amendment does not. This is at least part of the answer to why the simplistic version of the First Amendment rule against prior restraints cannot be transposed to the Second Amendment. Under the First Amendment, there is *no* legitimate government interest in preventing any particular individual (even an individual convicted of speech-related felonies) from speaking. But there is a strong government interest in preventing gun possession by persons who have demonstrated themselves to be at high risk for gun misuse. A speedy and accurate background check for customers in gun stores is therefore not an unconstitutional prior restraint of Second Amendment rights, even though the same check would be an unconstitutional First Amendment prior restraint if it were applied in book stores (even as a limited background check on purchasers of especially dangerous books, such as instructions about how to manufacture bombs).

In the Second Amendment context, the proper inquiry for prior restraints is whether the restraint lasts no longer than is absolutely necessary. The Supreme Court has provided detailed guidance on this issue. In the 1965 case of *Freedman v. Maryland*,<sup>262</sup> the Supreme Court reviewed a state law providing that before a film could be

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259. *District of Columbia v. Heller*, 554 U.S. 570, 571 (2008).

260. *See, e.g., Britt v. State*, 681 S.E.2d 320 (N.C. 2009) (holding that the state constitutional right to arms forbids a complete ban on gun possession by a person who had been law-abiding for twenty-seven years after release from prison for a controlled substance offense).

261. *See, e.g., United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010).

262. 380 U.S. 51 (1965).

theatrically released in Maryland, a state government review panel had to review it to make sure that it was not obscene.<sup>263</sup> Notably, the Court did not simply declare that the review panel was per se unconstitutional as a prior restraint on First Amendment rights. Rather, the Court set three strict limits on how the prior restraint could operate: “First, the burden of proving that the film is unprotected expression must rest on the censor.”<sup>264</sup> This rule is quite easy to apply to the Second Amendment. If the government denies someone a gun license because the person supposedly has a felony conviction, the government must prove that the individual does indeed have such a conviction. A criminal justice database that merely shows that a person was arrested, but contains no record of a conviction, would not be sufficient to carry the burden of proof.

Second, according to the *Freedman* Court:

[W]hile the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor’s determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film.<sup>265</sup>

This *Freedman* rule can also be applied to the Second Amendment, although not universally. Legal “obscenity” is a judgment call, rather than an objective determination.<sup>266</sup>

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263. *Id.* at 52 (1965). *Freedman* is not limited to movies or obscenity. See *Nat’l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 44 (1977) (citations omitted) (discussing *Freedman* regarding a state trial judge’s injunction against the holding of a parade and stating that “[i]f a State seeks to impose a restraint of [that] kind, it must provide strict procedural safeguards, including immediate appellate review”).

264. *Freedman*, 380 U.S. at 58.

265. *Id.* at 58–59.

266. This would not be true if “obscenity” could be defined by purely objective criteria; e.g., “a film is always obscene if it shows for even a second a human’s genitals, and a film is never obscene if there is no display of genitalia.” An objective standard might be easy to administer, but it would run afoul of the Supreme Court’s *Miller* test, which applies the First Amendment to define unprotected obscenity as comprising only materials that lack serious literary, artistic, scientific, or political

But most of the time, a prohibited person firearms denial will be based on objective criteria, such as records in the state's judicial database showing that the individual was convicted of a particular crime on a particular date. Sometimes, however, there is a need for judgment. For example, Colorado's concealed handgun carry licensing law requires the issuing sheriff to deny the permit if the applicant is a prohibited person under state law *and* also gives the sheriff the discretion to deny the application if the applicant would be a danger to himself or others.<sup>267</sup> The discretionary provision, known as the "naked man rule," allows the sheriff to deny a carry permit to the man who sits naked in his front yard, screaming about the imminent Martian invasion, but who has not been criminally convicted or adjudicated mentally ill.

Any Colorado carry permit applicant who is denied has the right of judicial appeal, with the sheriff carrying the burden of proof.<sup>268</sup> In practice, the burden is easy to meet when there is a record of a conviction or mental adjudication, but harder to meet for the naked man rule. In an appeal of a permit denial based on the naked man rule, the Sheriff is required to meet the burden of proof by introducing specific documented evidence of the applicant's past behavior, proving by a preponderance of evidence that the applicant would likely be a danger to himself or others if he had a carry permit.<sup>269</sup> The Colorado system is an appropriate application of *Freedman's* second prong to the Second Amendment.

*Freedman's* third requirement was that if the censorship board denied an exhibitor a license for a particular film, judicial review and a judicial determination must be the "shortest fixed period compatible with sound judicial resolution."<sup>270</sup> It is well-known that

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value. *Miller v. California*, 413 U.S. 15, 24 (1993). The determination about the lack of such value requires judgment that cannot be reduced to purely objective terms.

267. COLO. REV. STAT. § 18-12-203 (2013) ("[I]f the sheriff has a reasonable belief that documented previous behavior by the applicant makes it likely the applicant will present a danger to self or others if the applicant receives a permit to carry a concealed handgun, the sheriff may deny the permit.").

268. *Id.* § 18-12-207.

269. *Id.*

270. *Freedman*, 380 U.S. at 58. According to the Court:

Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. Therefore, the procedure must also assure a prompt final judicial decision, to minimize

many movies last only a few weeks or less in theatrical release; without very swift judicial review, a censor's incorrect denial of a license might result in the movie missing its narrow window of opportunity to be seen in Maryland theaters.

The *Freedman* Court's concern with expedition applies even more strongly to Second Amendment prior restraints. Erroneous deprivation of theatrical release of a film when the film is theatrically viable may cost the producer a lot of money. But lost money can be fully compensated by a judicial award of after-the-fact damages. Back in 1965, when there were no VHS tapes, DVDs, or Netflix, a filmgoer who was deprived of the ability to see a film during the original theatrical release might have to wait years before the film reappeared for an evening in a theater that specialized in showing older movies.

On the other hand, a deprivation of Second Amendment rights for even a few days can literally be fatal. For example, a Wisconsin woman named Bonnie Elmasri was the victim of a stalker. She purchased a handgun in a store, but because of Wisconsin's law requiring a "waiting period" for the purchase of a handgun, she could

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the deterrent effect of an interim and possibly erroneous denial of a license.

Without these safeguards, it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country; for we are told that only four States and a handful of municipalities have active censorship laws.

It is readily apparent that the Maryland procedural scheme does not satisfy these criteria. First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination. We hold, therefore, that appellant's conviction must be reversed. The Maryland scheme fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the § 2 requirement of prior submission of films to the Board an invalid previous restraint.

*Id.* at 58–59 (citation omitted).

not take the gun home with her. Before the waiting period expired, Ms. Elmasri expired, murdered by the stalker.<sup>271</sup>

Waiting periods and lengthy licensing periods are the subjects for which the prior restraint doctrine is most relevant in a Second Amendment context. Decades ago, it might have been true that the government would need a week or more to manually review the various paper records which would reveal whether a gun purchaser was a prohibited person. Today, with the availability of the computerized National Instant Criminal Background Check System, such a check takes a few seconds.

As this Article is being written, the CalGuns Foundation has brought a federal civil rights lawsuit against California's ten-day waiting period for gun purchases.<sup>272</sup> The suit does not challenge California's background check requirement for purchases. Instead, the suit challenges the 10-day waiting period that follows the passage of the background check. The waiting period might once have been necessary for the check itself, but it is not at all necessary today. The federal district court denied the California's motion for summary judgment in favor of the waiting period.<sup>273</sup> In the twenty-first century, delays of ten days for the simple exercise of the right to purchase a firearm are indefensible.<sup>274</sup>

*Freedman's* prior restraint regulations also make sense regarding another form of prior restraint, a form that is quite similar to the Maryland movie censorship board whose operating procedures the Court declared unconstitutional in *Freedman*. Maryland is one of a small number of states that only allow new models of handguns to be sold once a board approves them as passing various safety criteria. Putting aside the constitutionality of the certification requirement in the first place, the actual operation of the Maryland Handgun Roster Board is a flagrant violation of *Freedman*. The Board has sometimes gone for years without having a quorum because the Governor (attempting to suppress handgun sales) refused to carry out his duty to appoint members. New models of handguns have languished for years in administrative limbo before the Board finally got around to allowing their sale.

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271. David Kopel, *Waiting Periods*, in *GUNS: WHO SHOULD HAVE THEM?* 61–62 (David B. Kopel ed., 1995).

272. *Silvester v. Harris*, No. 1:11-CV-2137AWISAB, 2013 WL 6415670 (E.D. Cal. Dec. 9, 2013).

273. *Id.* at \*7.

274. In a First Amendment context, the maximum length of a temporary injunction against the dissemination of an obscene book was three days. See *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

There is no reason for such decisions to take more than a few days, at most. The presence or absence of specific safety features can be determined in less than a day by a competent gunsmith who is hired by the state, and who can disassemble and examine an exemplar gun supplied by the manufacturer. Other safety testing (such as whether a gun will accidentally discharge if it is repeatedly dropped from a specified height onto a concrete floor) can also be conducted in a day or two, at most. The Maryland Handgun Roster Board is an unconstitutional prior restraint for the same reason that the Maryland movie censorship board was.

### *F. Rights of Minors*

A plethora of First Amendment precedent has established two complementary rules for minors: first, the exercise of First Amendment rights by minors may be limited in ways that would be unconstitutional if applied to adults.<sup>275</sup> The limits are constitutional when they are closely tied to the special vulnerabilities and immaturity of minors. Second, minors have First Amendment rights, and the exercise of these rights may be constrained but not abridged. A curfew law may prohibit a twelve-year-old from attending a midnight rock concert; the government may not categorically forbid twelve-year-olds from playing musical instruments in public.

As with the First Amendment, there is a long tradition of American laws imposing some limits on the exercise of Second Amendment rights by minors. The question of Second Amendment rights of minors is a topic worthy of its own article, so I will confine myself to the easiest scenario: categorical prohibition.

New York, New Jersey, Iowa, and some other jurisdictions have eccentric laws that forbid minors from exercising Second Amendment rights.<sup>276</sup> It is actually a crime in Iowa for an eleven-

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275. *See, e.g., Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (finding a compelling interest in "protecting the physical and psychological well-being of minors" by "shielding minors from the influence of literature that is not obscene by adult standards"); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (protecting unsupervised children from offensive speech); *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding prohibition of selling to minors materials which are obscene as "to minors").

276. *E.g.* N.J.S. § 2C:58-6.1 (no long gun possession for under 18, and no handguns for under 21; certain exceptions allowed, but no for lawful self-defense); N.Y. CITY ADMIN. CODE §§ 10-303, 10-305 (No gun possession without a permit; no permits issued to persons under 21. Exceptions for long guns when under the supervision of a permit holder, but not for handguns); D.C. CODE ANN. § 7-2502.03 (no gun possession except for a personally registered gun; no registration for persons under 21, except persons 18-20 can register with notarized parental permission and

year-old to hold a handgun in her hands, even at a target range while under immediate parental supervision.<sup>277</sup> Such total prohibitions are patently unconstitutional.

One does not really need the First Amendment to see the Second Amendment unconstitutionality of complete prohibitions. But the First Amendment does offer a useful analogy, showing the difference between limited restrictions and categorical bans.

### CONCLUSION

Much more can, and should, be written about the intersection of First and Second Amendment doctrines. This Article has attempted to advance scholarly and judicial analysis by examining various principles and doctrines that were originally developed for the First Amendment that may be useful for analyzing the Second Amendment. The Supreme Court's decisions in *Heller* and *McDonald* show that for analysis of the Second Amendment, the First Amendment is in a preferred position.<sup>278</sup> Lower courts such as the Seventh Circuit and the D.C. Circuit have followed the Supreme Court's teaching in this regard, although the D.C. Circuit seems to have forgotten that Justice Breyer was writing for the *Heller* dissent, not the majority. Many First Amendment principles and doctrines have ready application to the Second Amendment. A few, such as prior restraint, require a more selective and nuanced approach.

For a few decades in the late twentieth century, the Second Amendment was ignored or denigrated by some courts.<sup>279</sup> Now that the Second Amendment has been restored to its rightful position as part of normal constitutional law, the Second Amendment will, like many other provisions of the Constitution, continue to be influenced by the rich body of doctrines and precedents that were first developed for the First Amendment.

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civil liability).

277. See IOWA CODE § 724.22(5) (banning all handgun possession in all circumstances by persons less than 14 years old).

278. Cf. *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting) ("The First Amendment puts free speech in the preferred position . . ."); *Saia v. New York*, 334 U.S. 558, 562 (1948) (striking down as facially unconstitutional a requirement that sound trucks were allowed only with a police permit, which the police had limitless discretion to deny, and noting that while "[c]ourts must balance the various community interests in passing on the constitutionality of local regulations of [such character]" they also "should be mindful to keep the freedoms of the First Amendment in a preferred position").

279. See, e.g., David B. Kopel, *The Second Amendment in the Tenth Circuit: Three Decades of (Mostly) Harmless Error*, 86 DENVER U. L. REV. 901 (2009).