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## ANTI-EVASION DOCTRINES AND THE SECOND AMENDMENT

Brannon P. Denning

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# ANTI-EVASION DOCTRINES AND THE SECOND AMENDMENT

BRANNON P. DENNING\*

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## I. INTRODUCTION

The Supreme Court's holding in *Heller*<sup>1</sup> that the Second Amendment<sup>2</sup> guarantees an individual right to private gun ownership, and its subsequent incorporation of that right through the Fourteenth Amendment two years later<sup>3</sup> has, unsurprisingly, resulted in a welter of litigation attempting to define the contours of that right.<sup>4</sup> Much of the current litigation challenges the

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1. *District of Columbia v. Heller*, 554 U.S. 570 (2008); see Brannon P. Denning & Glenn H. Reynolds, *Five Takes on District of Columbia v. Heller*, 69 OHIO ST. L.J. 671 (2008).

2. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

3. *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020 (2010); see Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273 (2011).

4. For an early assessment of that litigation, see generally Brannon P.

constitutionality of various federal and state laws prohibiting certain persons, like felons or perpetrators of domestic violence, from possessing firearms; bans on the carrying of guns in certain places; bans of various types of weapons; and state and local licensing laws.<sup>5</sup>

But as Professor Glenn Reynolds recently observed, a common feature of the “normal constitutional law” of individual rights is the judicial recognition and protection of “penumbral” aspects of rights.<sup>6</sup> By this, he means either “auxiliary protections for a core constitutional right” or “the provisions of rights that are explicitly spelled out in the Constitution.”<sup>7</sup> For example, the Court has invalidated laws deemed to have a “chilling effect” on free speech.<sup>8</sup> In other cases, additional, unenumerated rights—most notably the right of privacy—have been inferred from textual ones.<sup>9</sup> Reynolds speculates that as Second Amendment jurisprudence becomes more “normal,” we might expect to see both types of penumbral protection for the right to keep and bear arms.<sup>10</sup>

This Article draws on previous work to examine whether the courts are creating doctrine that protects penumbral Second Amendment rights in Reynolds’s first sense. It asks whether courts are “ensur[ing] that the core right is genuinely protected by creating a buffer zone that prevents officious governmental actors from stripping the right of real meaning through regulations that

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Denning & Glenn H. Reynolds, Heller, *High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245 (2009). This is probably as good a place as any to admit that our title should read “High Water (Mark),” meaning “a point that represents the maximum rise of a body of water over land,” see Wikipedia, *High water mark*, [http://en.wikipedia.org/wiki/High\\_water\\_mark](http://en.wikipedia.org/wiki/High_water_mark) (describing the height of water over land) (as of Jan. 24, 2014, 15:09 GMT), as opposed to “a recognizable image or pattern in paper that appears as various shades of lightness/darkness when viewed by transmitted light . . . caused by thickness or density variations in the paper . . .” Wikipedia, *Watermark*, <http://en.wikipedia.org/wiki/Watermark> (describing physical paper watermarks) (as of Feb. 4, 2014, 16:21 GMT).

5. See *infra* notes 50–56 and accompanying text.

6. Glenn H. Reynolds, *Second Amendment Penumbra: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 247 (2012) (“The Second Amendment to the Constitution is now part of ‘normal constitutional law,’ which is to say that the discussion about its meaning has moved from the question of whether it means anything at all, to a well-established position that it protects an individual right, and is enforceable as such against both states and the federal government in United States courts.”).

7. *Id.* at 248 (footnote omitted).

8. *Id.*

9. *Id.* at 255.

10. *Id.* at 249.

indirectly—but perhaps fatally—burden its exercise.”<sup>11</sup> Are courts, in other words, creating what Mike Kent and I elsewhere term “anti-evasion doctrines” (“AEDs”): judicially-created decision rules that prevent officials from evading prior decision rules fashioned to implement constitutional principles.<sup>12</sup> Or are courts engaged in what we described, in a sequel, as “anti-anti-evasion,”<sup>13</sup> i.e., instances in which courts *decline* to create AEDs.

Part II briefly summarizes our earlier work on AEDs and anti-anti-evasion. Our earlier work offers a working hypothesis that the Supreme Court will decline to create AEDs if, in its judgment, the political safeguards of a particular constitutional principle are sufficiently robust to protect that principle.<sup>14</sup> Part III suggests the forms that Second Amendment AEDs might take and what kinds of laws might spur calls for their creation. Part IV examines recent federal court decisions for evidence of either AEDs or anti-anti-evasion. Part IV also discusses the significance of either for both the future of the right to keep and bear arms as well as Kent’s and my working hypothesis. A brief conclusion follows.

## II. ANTI-EVASION DOCTRINES AND ANTI-ANTI-EVASION: A BRIEF SUMMARY

Anti-evasion doctrines are “decision rules developed to fill gaps created by other decision rules . . . that could enable governmental actors to comply with the form of those earlier-developed rules while undermining the constitutional principle those rules were intended to implement.”<sup>15</sup> In other words, AEDs “attempt to optimize enforcement of constitutional principles by preventing their easy circumvention.”<sup>16</sup> Our earlier article identified four doctrinal forms that AEDs could take: (1) pretext tests; (2) proxy tests; (3) purpose tests; and (4) effects tests.<sup>17</sup> As we explained:

*[P]retext tests* ask whether government is, under cover of some permissible goal, actually attempting to regulate in a manner that the Constitution forbids. *Proxy tests* “regulate

11. *Id.* at 248.

12. Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773.

13. Brannon P. Denning & Michael B. Kent, Jr., *Anti-anti-evasion in Constitutional Law*, 41 FLA. ST. U. L. REV. 397 (2014).

14. *Id.* at 398 (describing our working hypothesis).

15. Denning & Kent, *supra* note 12, at 1779 (footnotes omitted).

16. *Id.*

17. *Id.*

on the basis of some characteristic that, while purportedly neutral, has little independent significance and is in reality a proxy for" some characteristic prohibited by the constitutional command or the decision rule. *Purpose tests* ask whether the law has been "developed or applied for constitutionally illegitimate reasons." Finally, *effects tests* "focus not on the explicit content of a statute or policy, but on its effects."<sup>18</sup>

Despite differences in form, we concluded that AEDs seemed to conform to a pattern: The Court would promulgate a decision rule that took the form of a rule, then it would backstop that rule with an anti-evasion doctrine that often took the form of a standard.<sup>19</sup> The remainder of the article canvassed the benefits and tradeoffs of AEDs and discussed their implications for constitutional doctrine more generally.<sup>20</sup>

But the Supreme Court does not always create AEDs; in some cases, it declines to create them for various reasons. We termed this "anti-anti-evasion."<sup>21</sup> To give one example cited in the article, the Court has held that states may not, consistent with the dormant Commerce Clause doctrine, deny out-of-state businesses or residents tax credits that are available to state residents.<sup>22</sup> Despite the fact that tax credits and cash subsidies have economically identical effects, however, the Court has consistently declined to subject discriminatory cash subsidies to the heightened scrutiny employed in tax credit cases.<sup>23</sup>

We identified four common reasons explicitly cited by the Court when it declines to create AEDs: (1) institutional competence and deference; (2) the presence of constitutionally significant distinctions that removes the challenged activity from the ambit of the previously-announced rule; (3) skepticism about challenges based on impermissible legislative purpose; and (4) consequentialist arguments.<sup>24</sup> A close reading of representative cases in which anti-

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18. *Id.* at 1780 (footnotes omitted).

19. *Id.* at 1793.

20. *Id.* at 1796–833.

21. Denning & Kent, *supra* note 13, at 399–400.

22. *See, e.g.,* Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564 (1997); New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988).

23. *See, e.g.,* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 n.15 (1994) ("We have . . . noted that '[d]irect subsidization of domestic industry does not ordinarily run afoul' of the negative Commerce Clause." (citations omitted)); Denning & Kent, *supra* note 13, at 402–03 (discussing the dormant Commerce Clause doctrine and subsidies).

24. Denning & Kent, *supra* note 13, at 415–22 (discussing all four reasons).

anti-evasion occurred, however, convinced us that other, unarticulated reasons were actually driving the outcomes in these cases.

We incorporated what we discerned as an important, if unarticulated driver of anti-anti-evasion into our “working hypothesis,” which posits that the Court will decline to create AEDs where it believes “that there are robust political protections . . . that sufficiently police the constitutional boundaries and prevent governmental overreaching.”<sup>25</sup> For example, because the Court “views the political process as typically better-equipped to safeguard constitutional principles in cases that involving taxing and spending decisions,” one tends to find lots of anti-anti-evasion by the Court in those cases.<sup>26</sup> But the key, we stressed, is the Court’s perception of the adequacy of the political safeguards more than the subject matter of the litigation.<sup>27</sup>

In the next section, I will examine the right to keep and bear arms in light of these earlier articles. Specifically, I speculate on the conditions that might produce calls for judicial creation of AEDs and what forms those AEDs might take. To do that though, I briefly consider *Heller*, *McDonald*, and the rule the Court produced to implement the Second Amendment.

### III. WHAT MIGHT SECOND AMENDMENT AEDS LOOK LIKE?

#### A. *Heller*, *McDonald*, and the Right to Keep and Bear Arms

In striking down Washington D.C.’s de facto ban on the keeping of firearms for self-defense,<sup>28</sup> the *Heller* Court concluded that the Second Amendment “guarantee[d] the individual right to possess and carry weapons in case of confrontation.”<sup>29</sup> But, the Court added, “the Second Amendment [does not] 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*

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25. *Id.* at 424.

26. *Id.* at 427.

27. *Id.* at 426–27 (noting that although dormant Commerce Clause cases involving taxing and spending issues, the Court has reason to doubt that political safeguards adequately protect the interests of out-of-state residents).

28. Washington D.C. made it unlawful to possess an unregistered handgun, then banned registration of handguns. *District of Columbia v. Heller*, 554 U.S. 570, 574–75 (2008). It also required long guns to be rendered inoperable for self-defense. *Id.* at 575.

29. *Id.* at 592.

*purpose*.”<sup>30</sup> Rather, the Court understood “the inherent right of self-defense” to be “central to the Second Amendment right” especially in “the home, where the need for defense of self, family, and property is most acute.”<sup>31</sup>

The Court was careful, though, to hedge this right with a number of qualifications, which Glenn Reynolds and I have termed the “*Heller* safe harbor.”<sup>32</sup> Justice Scalia wrote:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>33</sup>

Scalia further qualified the opinion by acknowledging “another important limitation on the right to keep and carry arms”: only “the sorts of weapons . . . ‘in common use at the time’” were protected.<sup>34</sup> “[T]hat limitation,” he continued, “is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”<sup>35</sup>

The majority concluded that because the Washington D.C. ordinance banned ownership of “the handgun”—“the quintessential self-defense weapon”<sup>36</sup>—everywhere, including in the home, it could not be sustained “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights . . . .”<sup>37</sup> Moreover, requiring “that firearms in the home be rendered and kept inoperable at all times [made] it impossible for citizens to use them for the core lawful purpose of self-defense,” and thus this provision was held unconstitutional as well.<sup>38</sup>

*McDonald* extended *Heller*, incorporating the right to keep and bear arms through the Due Process Clause of the Fourteenth Amendment and applying it against state and local governments.<sup>39</sup>

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30. *Id.* at 595.

31. *Id.* at 628.

32. Denning & Reynolds, *supra* note 4, at 1247.

33. *Heller*, 554 U.S. at 626-27; see Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371 (2009).

34. *Heller*, 554 U.S. at 627.

35. *Id.*

36. *Id.* at 629.

37. *Id.* at 628 (footnote omitted).

38. *Id.* at 630.

39. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042 (2010).

Justice Thomas concurred with the plurality opinion, but would have used the Privileges or Immunities Clause as the incorporating vehicle.<sup>40</sup> In his opinion for the plurality, Justice Alito concluded that the right to keep and bear arms qualified as sufficiently “fundamental” to meet the Court’s test for selective incorporation.<sup>41</sup> In so doing, he emphasized that self-defense was *Heller’s* core:

Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is “the *central component*” of the Second Amendment right . . . . Explaining that “the need for defense of self, family, and property is most acute” in the home . . . we found that this right applies to handguns because they are “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family” . . . . Thus, we concluded, citizens must be permitted “to use [handguns] for the core lawful purpose of self-defense.”<sup>42</sup>

Justice Alito’s plurality opinion, however, also emphasized *Heller’s* careful circumscription of the right’s scope: “It is important to keep in mind,” he wrote, “that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’”<sup>43</sup> Repeating the *Heller* safe harbor, he concluded that like the initial recognition of the right in *Heller*, “incorporation does not imperil every law regulating firearms.”<sup>44</sup>

As numerous judges<sup>45</sup> and scholars<sup>46</sup> have noted, *Heller* and *McDonald* raised as many questions as they resolved. Despite the

40. *Id.* at 3058 (Thomas, J., concurring).

41. *Id.* at 3037.

42. *Id.* at 3036. Though, as noted, *supra* note 40 and accompanying text, Justice Thomas took a different route, his opinion gives no hint of disagreement with the plurality’s characterization of the right *Heller* recognized, *id.* at 3059 (Thomas, J., concurring) (*Heller* “held that the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defense”), or of the plurality opinion’s characterization of *Heller’s* qualifications to the right.

43. *Id.* at 3047.

44. *Id.*

45. See, e.g., *Heller*, 554 U.S. at 679–80 (Stevens, J., dissenting) (“The Court’s announcement of a new constitutional right to own and use firearms for private purposes . . . leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a ‘law-abiding, responsible citizen[n]’ the right to keep and



fact that we now have judicial confirmation that the right to keep and bear arms is an individual—as opposed to a “collective”—right, that the ability to engage in self-defense is at its core, and that it applies to all levels of government, other basic questions went unanswered. For example, what, precisely, is the standard of review courts are supposed to employ when evaluating restrictions on firearms or firearms ownership? Are certain arms and activities categorically excluded from Second Amendment protection? If so, in what order should courts answer those questions? Is the *Heller* safe harbor dicta? Is it some sort of “super-dicta” that binds courts despite not being necessary to resolve the case? Justice Scalia acknowledged that a number of important questions were left open but gamely justified the Court’s silence on the ground that *Heller* was the Court’s first foray into the area and it couldn’t be expect to answer everything at once.<sup>47</sup>

Bracketing those difficult questions for a moment, it seems that the Court did articulate what Mitchell Berman termed a “constitutional operative proposition”<sup>48</sup> for the Second Amendment. At a minimum, *law-abiding citizens have the right to own common firearms and have them available to use for self-defense at home.*<sup>49</sup> The Court seems to have been content to leave the fashioning of specific decision rules to the lower courts, suspecting that the signal it sent with the *Heller* safe harbor would be correctly interpreted by judges as counseling a go-slow approach.

For the most part, the Court’s signal has been heeded. Whatever the incongruities between the exclusions apparently sanctioned in the safe harbor and the *Heller* majority’s originalist methodology,<sup>50</sup>

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use weapons in the home for self-defense is ‘off the table’ . . . Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District’s policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.”) (citation omitted).

46. See generally 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, 1445 (2009) (“[H]ow should courts translate [the right to keep and bear arms] into workable constitutional doctrine?”).

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

48. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004) (arguing that constitutional adjudication is a three-step process; the Court articulates a constitutional operative proposition that fixes the meaning of the constitution, then develops “decision rules” that implement that operative proposition and produces a judgment in a particular case).

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

50. Larson, *supra* note 33; see also Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009).

courts have turned a deaf ear to pleas by convicted felons,<sup>51</sup> including those convicted of nonviolent offenses,<sup>52</sup> domestic violence misdemeanants,<sup>53</sup> drug users,<sup>54</sup> and minors<sup>55</sup> for judicial relief from various restrictions on firearms ownership. Lower courts have proven creative, too, expanding the definition of “sensitive places” beyond the schools and government buildings suggested in *Heller*<sup>56</sup> and citing the “dangerous and unusual weapons” limit to uphold particular restrictions on particular types of arms.<sup>57</sup>

But there is still a judicially-identifiable core of the right to keep and bear arms.<sup>58</sup> What sorts of restrictions might legislators attempt to place on the right? What sorts of AEDs might be fashioned to prevent official attempts to evade the core principle with form-over-substance restrictions? Both questions are taken up in the following subsections.

### *B. Possible Triggers for AEDs*

Constitutional law is replete with laws and regulations that indirectly attempt to circumvent some constitutional protection. As the Court has said numerous times and in various ways, “the Constitution is concerned not with form, but with substance.”<sup>59</sup> What sorts of restrictions on the core right of gun ownership for self-defense might necessitate AEDs? At a minimum, laws that seek to make it extremely difficult or unreasonably expensive to obtain or maintain a gun at home, or which make it difficult to have the gun

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51. See, e.g., *United States v. Bogle*, 717 F.3d 281, 281–82 & n.1 (2d Cir. 2013) (listing cases).

52. See, e.g., *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010) (justifying inclusion of even non-violent felons in firearms ban).

53. See, e.g., *United States v. Chovan*, 735 F.3d 1127, 1139–41 (9th Cir. 2013).

54. *Yancey*, 621 F.3d at 685 (“habitual drug abusers, like the mentally-ill, are more likely to have difficulty exercising self-control, making it dangerous for them to possess deadly firearms”).

55. *Nat’l Rifle Ass’n, Inc. v. McCraw*, 719 F.3d 338 (5th Cir. 2013) (upholding Texas law prohibiting 18–20 year olds from carrying concealed weapons); *Nat’l Rifle Ass’n, Inc. v. Bureau Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir. 2012) (upholding federal law prohibiting federally licensed firearms dealers from selling handguns to minors).

56. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

57. See, e.g., *United States v. Henry*, 688 F.3d 637, 640 & n.3 (9th Cir. 2012) (listing cases).

58. *Heller*, 554 U.S. at 595.

59. *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 498 (1931). For other, similar expressions, see *Denning & Kent*, *supra* note 12, at 1774–75 nn.1–5.

available and operable for self-defense ought to raise constitutional concerns.

At some point, for example, high taxes on guns and ammunition could effectively infringe the right of most folks to own an operable gun useful for self-defense. House Resolution 3018, for example, would have increased taxes on firearms, including handguns, to 20% and imposed a 50% tax on the sale of ammunition.<sup>60</sup> States are experimenting with such tax increases as well.<sup>61</sup> Other proposals include curbing the “stockpiling” of weapons by taxing “successive firearm purchases by the same person.”<sup>62</sup> This escalating tax “might increase by 10% per weapon, so that by the sixth weapon the purchaser would pay half the value of the weapon in taxes. The tax would not prevent individuals from owning as many guns as they like, but would make the choice to create an arsenal significantly more expensive.”<sup>63</sup> Proposals that gun owners purchase liability insurance or pay a steep fine raise similar concerns.<sup>64</sup>

Theoretically permitting individual possession of guns, but making it practically impossible to acquire them—a complete ban on the sale of all firearms for example—would raise concerns as well.<sup>65</sup> Lengthy waiting periods<sup>66</sup> and requirements that guns be kept

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60. H.R. 3018, 113th Cong. (2013).

61. See, e.g., Rachel Bade, *Using sales taxes as a gun control tool*, POLITICO (Apr. 9, 2013, 4:39 AM), <http://www.politico.com/story/2013/04/guns-bullets-taxes-gun-control-tool-89782.html>; Keith Wagstaff, *Are high taxes an effective form of gun control?*, THE WEEK (Apr. 9, 2013), <http://theweek.com/article/index/242472/are-high-taxes-on-firearms-an-effective-form-of-gun-control> (discussing various proposals); see also Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1085 (2009) (proposing a \$600 tax).

62. Asha Rangappa, *The Cost of Freedom: Using the Tax Power to Limit Personal Arsenals*, YALE L. & POL'Y REV. INTER ALIA (Sept. 23, 2013, 2:15 PM), [http://ylpr.yale.edu/inter\\_alia/cost-freedom-using-tax-power-limit-personal-arsenals](http://ylpr.yale.edu/inter_alia/cost-freedom-using-tax-power-limit-personal-arsenals).

63. *Id.*

64. See, e.g., Cheryl K. Chumley, *Democrats push for \$10K fine for gun owners without liability insurance*, WASH. TIMES (Apr. 2, 2013), available at <http://www.washingtontimes.com/news/2013/apr/2/democrats-push-10k-fine-gun-owners-without-liabili>. For doubts about its efficacy, see Stephen G. Gilles & Nelson Lund, *Insurance as Gun Control?*, REGULATION, Fall 2013, at 38.

65. Cf. Darrell A.H. Miller, *Guns as Smut: Defending the Home-bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009) (suggesting that, outside the home, legislators be permitted “near plenary” power to restrict guns elsewhere).

66. Volokh, *supra* note 46, at 1538–39 (discussing the constitutionality of waiting periods).

locked or unloaded, too, could significantly burden the right to self-defense recognized in *Heller* and *McDonald*.<sup>67</sup>

One consequence of the Court's choice to place self-defense—as opposed to deterring governmental tyranny—at the core of the Second Amendment, however, is that proposals to require licensing or registration of guns or records of gun sales are less likely to face serious constitutional challenge. None of those initiatives would likely substantially burden the ability of someone to engage in armed self-defense in the home. Licensing or registration requirements—assuming they are not unreasonably onerous—would not prevent someone from keeping a weapon in the home and having it available for self-defense. Had the Court determined that the core of the Second Amendment included ensuring an armed citizenry to deter the government from oppressing its people, on the other hand, then registration and licensing requirements that gave the government information on the location of privately-owned weapons and the identity of their owners could be seen as undermining that core purpose.

### C. Second Amendment AEDs

What form might Second Amendment AEDs take? An earlier article identified a number of types of doctrinal vehicles the Court employed for AEDs and examples of their use elsewhere in constitutional law.<sup>68</sup> Anti-evasion doctrines, Mike Kent and I noted, have a distinguished pedigree and are fairly common, as the following examples demonstrate.<sup>69</sup> Chief Justice Marshall warned of using the Necessary and Proper Clause pretextually—as a way to evade Article I's enumeration of powers.<sup>70</sup> The Court has also enforced the substance of the Tonnage Clause<sup>71</sup> not only by enforcing its literal terms and striking down duties based on the carrying capacity of ships, but also by prohibiting taxes on things that would be proxies for carrying capacity.<sup>72</sup> The Free Speech and Free

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67. *Id.* at 1545 (discussing “Restrictions on Sellers”).

68. *See supra* note 18 and accompanying text.

69. *See Denning & Kent, supra* note 12, at 1779–96 (full discussion of “Defining and Classifying Anti-Evasion Doctrines”).

70. *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819); *see Denning & Kent, supra* note 12, at 1780.

71. U.S. CONST. art. I, § 10, cl. 3 (prohibiting the “[a]ny duty of Tonnage” without congressional consent).

72. *Denning & Kent, supra* note 12, at 1784–85; *see, e.g., Polar Tankers, Inc. v. Valdez*, 557 U.S. 1, 10 (2009) (concluding that a tax on value of oil tankers “is closely correlated with cargo capacity” and thus prohibited by the Tonnage Clause).

Exercise Clauses of the First Amendment employ purpose tests to guard against the danger that facially neutral laws will conceal impermissible motives.<sup>73</sup> Discriminatory effects on interstate commerce by facially neutral laws are also sufficient under the dormant Commerce Clause doctrine to invalidate those laws.<sup>74</sup>

Any of the forms identified could be potentially useful to enforce the constitutional principle recognized in *Heller* and *McDonald*. Pretext and purpose tests, for example, could be used to smoke out impermissible goals to prevent gun ownership or gun use in self-defense. Proxy tests might serve to prevent regulation of things (ammunition comes to mind) that are proxies for gun ownership and, if they escaped judicial scrutiny, could substantially interfere with exercise of the *Heller—McDonald* core right. Effects tests, too, could prevent official flanking maneuvers designed to strike at Second Amendment rights indirectly by examining the actual operation and impact of ostensibly valid or useful laws.

#### IV. SECOND AMENDMENT AEDS: EVIDENCE FROM THE LOWER COURTS

In the wake of the Court's recognition of a right to keep and bear arms in *Heller*, as well as the incorporation of that right in *McDonald* and its application to state and local laws, efforts to regulate guns have had to adjust. Some jurisdictions have sought ways to prevent private gun ownership while paying lip service to the Court. As noted above, the Court has developed doctrines to deal with these evasions in numerous areas of constitutional law. The question following *Heller* was whether lower courts would follow suit and develop similar AEDs to prevent official subversion of the constitutional principle announced by the Court,<sup>75</sup> or would they resist the Court as they had in other contexts?<sup>76</sup> Lower courts' pre-

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73. Denning & Kent, *supra* note 12, at 1788–89; *see, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (subjecting to strict scrutiny any regulation of speech “adopted . . . because of disagreement with the message it conveys” even if it is facially neutral); *see also* *Church of the Lukumi Bablu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540 (1993) (“ordinances . . . enacted ‘because of,’ not merely ‘in spite of,’ their suppression of [a] religious practice” are subject to strict scrutiny despite facial neutrality).

74. *Hunt v. Wash. State Apple Advers. Comm’n*, 432 U.S. 333, 353 (1977); Denning & Kent, *supra* note 12, at 1789–90.

75. *See* Glenn H. Reynolds & Brannon P. Denning, *Heller’s Future in the Lower Courts*, 102 NW. U. L. REV. 2035 (2008).

76. *See, e.g.*, Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003); Glenn H. Reynolds & Brannon P. Denning, *Lower Court*

*Heller* treatment of the Second Amendment was not encouraging.<sup>77</sup> However, several recent cases, including cases from the courts of appeals, show judges employing AEDs to prevent subversion or evasion of the core right to gun ownership for self-defense.

A. *Ezell v. City of Chicago*<sup>78</sup> and *Illinois Association of Firearms Retailers v. Chicago*<sup>79</sup>

Immediately following the Supreme Court's decision in *McDonald*, Chicago rushed to pass an ordinance that "was designed to make gun ownership as difficult as possible"<sup>80</sup> in the city. The ordinance provided for a total ban on the sale or transfer of guns in the city,<sup>81</sup> bans on possession outside the home and certain types of weapons and "an elaborate permitting regime," among other provisions.<sup>82</sup> The permitting regime "conditioned [receipt of a permit] upon completion of a certified firearm-safety course" that included "one hour of range training."<sup>83</sup> The same Chicago ordinance, however, prohibited gun ranges from operating in the city limits and prohibited the discharge of firearms in the city.<sup>84</sup> The plaintiffs sought a preliminary injunction, which the district court denied.<sup>85</sup> For its part, the City argued that range training was categorically unprotected by the Second Amendment.<sup>86</sup>

A unanimous panel of the Seventh Circuit, however, refused to countenance Chicago's blatant attempt to continue its gun ban by other means: "The right to possess firearms for protection," Judge

*Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?* 2000 WIS. L. REV. 369 (2000).

77. Brannon P. Denning, *Can the Simple Cite Be Trusted? Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 963 (1996).

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

79. *Illinois Ass'n of Firearms Retailers v. City of Chicago*, No. 10 C 04184, 2014 WL 31339 (N.D. Ill. Jan. 6, 2014).

80. *Ezell*, 651 F.3d at 715 (7th Cir. 2011) (Rovner, C.J., concurring).

81. *Id.* at 690 (the only exception was a transfer through inheritance); see Volokh, *supra* note 46, at 1545 (discussing challenge to the gun transfer ban).

82. *Ezell*, 651 F.3d at 691.

83. *Id.*

84. *Id.*

85. *Ezell v. City of Chicago*, No. 10 C 5135, 2010 WL 3998104 (N.D. Ill. Oct. 12, 2010) *rev'd*, 651 F.3d 684 (7th Cir. 2011).

86. *Id.* at 693; see Denning & Kent, *supra* note 13, at 418–19 (describing one justification of "anti-anti-evasion" as arguing that the principle does not cover the regulated activity at issue or that some distinction takes it out of the principle's protection).

Sykes wrote, “implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn’t mean much without the training and practice that make it effective.”<sup>87</sup> The court went on to highlight the contradiction inherent in the City’s position: It considered range training “so critical to responsible firearm ownership that it mandates this training as a condition of lawful firearm possession,” but argued that “range training is categorically outside the scope of the Second Amendment and may be completely prohibited.”<sup>88</sup>

Having rejected Chicago’s argument that range training was unprotected, the court then addressed the appropriate standard of review. Surveying standards employed in other areas of constitutional law, the court synthesized the following rule:

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>89</sup>

In granting the plaintiffs’ preliminary injunction against the range firing ban, the court concluded that the City had failed to “establish[] . . . a close fit between range ban and the actual public interests it serves . . . .”<sup>90</sup> In the court’s opinion, the city “produced no empirical evidence whatsoever and rested its entire defense of the range ban on speculation about accidents and theft.”<sup>91</sup> Though Judge Rovner’s concurrence found the majority’s test too stringent, she acknowledged that the live-range requirement coupled with the ban on ranges within the city “was not so much a nod to the importance of live-range training as it was a thumbing of the municipal nose at the Supreme Court” whose “effect [was] another complete ban on gun ownership within City limits.”<sup>92</sup>

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87. *Ezell*, 651 F.3d at 704.

88. *Id.* at 704–05.

89. *Id.* at 708. Earlier in the opinion, the court rejected the “undue burden” test urged by the City, concluding that “First Amendment analogues are more appropriate . . . .” *Id.* at 706.

90. *Id.* at 708–09.

91. *Id.* at 709.

92. *Id.*; see also *id.* at 715 (noting that “the Supreme Court now spoken in *Heller* and *McDonald* on the Second Amendment right to possess a gun in the home

In addition to banning gun ranges, Chicago's ordinance also banned the sale or transfer of firearms within the city limits, except transfers that occurred through inheritance.<sup>93</sup> In January 2014, a district court invalidated the ban.<sup>94</sup> Noting that the Second Amendment guaranteed "the right to keep and bear arms for self-defense," Judge Chang held that the right "must also include the right to *acquire* a firearm, although that acquisition right is far from absolute . . . ."<sup>95</sup>

Plaintiffs had argued that insofar as acquiring a weapon through sale or transfer was a proxy for gun possession, the ban should be categorically struck down.<sup>96</sup> The judge declined to adopt that position,<sup>97</sup> but, relying on *Ezell*, held that because "the ban on gun sales and transfers prevents Chicagoans from fulfilling . . . the *most fundamental* prerequisite of legal gun ownership—that of simple acquisition," the City had to "demonstrate that otherwise legitimate gun sales and transfers creates such genuine and serious risks to public safety that prohibiting them within Chicago is justified."<sup>98</sup> The City was unable to meet its burden.

Chicago gave three reasons for the sale and transfer ban: (1) restricting criminals' access to licensed dealers; (2) restricting illegal market acquisitions; and (3) eliminating "unsafe" gun stores from the city.<sup>99</sup> The problem for the City was that in trying to raise transaction costs for criminals seeking to acquire guns, it also burdened "law-abiding residents who want to exercise their Second

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for self-defense and the City must come to terms with that reality. Any regulation on firearms ownership must respect that right.").

93. *Illinois Ass'n of Firearms Retailers v. City of Chicago*, No. 10 C 04184, 2014 WL 31339, at \*1 (N.D. Ill. Jan. 6, 2014).

94. *Id.*

95. *Id.*

96. *Id.* at \*7 ("Plaintiffs first argue that the ban on firearm sales and transfers is categorically unconstitutional, under the notion that the right to *acquire* a firearm is a necessary prerequisite to exercise the right to possess that firearm for self-defense, so banning sales and transfers is just like banning possession for self-defense."); *Denning & Kent*, *supra* note 12, at 1784–88 (discussing AEDs taking the form of proxy tests).

97. *Illinois Ass'n of Firearms Retailers*, 2014 WL 31339, at \*7 (noting that "the Court need not draw the line here between restrictions that are prerequisites to the exercise of the core Second Amendment right, and thus might be categorically unconstitutional, and lesser restrictions on the core right that require historical and means-end analyses").

98. *Id.* at \*9, \*10.

99. *Id.* at \*10.



Amendment right.”<sup>100</sup> Moreover, none of the reasons given explained why *gifts* of guns were also banned.<sup>101</sup>

B. *Silvester v. Harris*<sup>102</sup>

California law requires, subject to several exemptions, a ten-day waiting period between the purchase and delivery of a gun, even for persons who are not prohibited from possessing firearms, and who, in fact, hold registered firearms or possess certain state licenses procured after going through background checks.<sup>103</sup> Plaintiffs, each of whom “owned at least one firearm,” sued, alleging that the restriction violated the Second Amendment.<sup>104</sup> Rejecting calls for the application of a “substantial burden” test and instead applying the Ninth Circuit’s two-step inquiry, the district court denied the state’s motion for summary judgment on the plaintiff’s suit.<sup>105</sup>

The State argued first that there was no burden on Second Amendment rights; rather, the waiting period was simply “a regulation on the commercial sale of firearms and one of the ‘tools’ available to California to address the problem of firearm violence.”<sup>106</sup> It didn’t keep citizens from acquiring arms for self-defense; the State noted, for example, that one might borrow a gun if needed immediately.<sup>107</sup> The law was rationally related to reducing violence, the State argued, by its creation of a “cooling off” period to deal with those people who have an impulse to use a firearm to commit an act of violence” and to allow for effective background checks to be performed on gun purchasers.<sup>108</sup> Those who already have weapons, the State added, “may have become ineligible following the purchase of the first firearm.”<sup>109</sup> The State argued that the law would satisfy intermediate scrutiny as well.<sup>110</sup>

The plaintiffs charged that the law operated as a form of prior restraint because “[e]very gun purchaser in California is deprived of the right to bear arms for at least 10 days, and is required to make

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100. *Id.* at \*12.

101. *Id.* at \*16.

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

103. *Id.* at \*1.

104. *Id.*

105. *Id.* at \*7.

106. *Id.* at \*2.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at \*3.

additional trips to obtain the firearm. There are no alternative means of legally exercising this fundamental right without going through these burdens.”<sup>111</sup> Given the systems available for doing background checks, the plaintiffs argued, “the [ten]-day waiting period [is not] reasonable.”<sup>112</sup>

The court applied the Ninth Circuit’s “two-step inquiry” under which the standard of review varies depending on “(1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law’s burden on the right.”<sup>113</sup> The standard of review is applied after an “historical inquiry [determining] whether the conduct at issue was understood to be within the scope of the right to keep and bear arms at the time of ratification.”<sup>114</sup>

“There can be no question,” the court wrote, “that actual possession of a firearm is a necessary prerequisite to exercising the right to keep and bear arms.”<sup>115</sup> Thus, California’s argument that the burden on the right to keep and bear arms is a minor one “is a tacit acknowledgement that a protected Second Amendment right is burdened.”<sup>116</sup> The judge then concluded that the State had presented insufficient evidence for its cooling-off or sufficiency-of-background-check justifications for the law. “[T]here is nothing before the Court to suggest that the [ten]-day period is a ‘reasonable fit’ that is not substantially broader than necessary to determine if an individual is disqualified from owning a firearm”<sup>117</sup> or to support the cooling off theory.<sup>118</sup>

### C. New York State Rifle and Pistol Association v. Cuomo<sup>119</sup>

One final case worth mentioning involved a challenge to a variety of restrictions enacted in New York following the murders at Sandy Hook Elementary School. The New York legislature prescribed background checks, mandated recertification of gun licenses every five years, established a database for gun licenses, banned “assault weapons,” regulated “large-capacity” magazines, prohibited loading more than seven rounds in a ten-round magazine,

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111. *Id.*

112. *Id.*

113. *Id.* at \*4; *United States v. Chovan*, 735 F.3d 1127, 1137–38 (9th Cir. 2013).

114. *Silvester*, 2013 WL 6415670, at \*4.

115. *Id.* at \*5.

116. *Id.*

117. *Id.*

118. *Id.*

119. *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, No. 13-CV-291S, 2013 WL 6909955 (W.D.N.Y. Dec. 31, 2013).

and imposed restrictions on the sales of ammunition.<sup>120</sup> Applying the Second Circuit's "substantial burden" test,<sup>121</sup> the district court upheld much of the New York law.<sup>122</sup>

The court did, however, find that the portion of the law limiting the number of rounds that could be loaded into a magazine infringed the right to keep and bear arms. First, the court held that regulations regarding the loading of a weapon implicated the Second Amendment. "Certainly," the court reasoned, "if the firearm itself implicates the Second Amendment, so too must the right to load that weapon with ammunition. Round restrictions . . . are therefore deserving of constitutional scrutiny."<sup>123</sup> It continued:

It stretches the bounds of this Court's deference to the predictive judgments of the legislature to suppose that those intent on doing harm (whom, of course, the Act is aimed to stop) will load their weapon with only the permitted seven rounds. In this sense, the provision is not "substantially related" to the important government interest in public safety and crime prevention.

. . . [T]his provision, much more so than with respect to the other provisions of the law, presents the possibility of a disturbing perverse effect, pitting the criminal with a fully-loaded magazine against the law-abiding citizen limited to seven rounds.

. . . This Court has ruled that New York is entitled to regulate assault weapons and large-capacity magazines under the principal presumption that the law will reduce their prevalence and [accessibility] in New York State, and thus, inversely, increase public safety . . . . The ban on the number of rounds a gun owner is permitted to load into his [ten]-round magazine, however, will obviously have no such effect because [ten]-round magazines remain legal. As described above, the seven-round limit thus carries a much stronger possibility of disproportionately affecting law-abiding citizens.<sup>124</sup>

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120. *Id.* at \*2-4.

121. *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012).

122. *New York State Rifle & Pistol Ass'n*, 2013 WL 690995, at \*15-16, \*18, 19-24.

123. *Id.* at \*11.

124. *Id.* at \*18.

One swallow does not a summer make, as the saying goes, but these four cases suggest several things that are worth commenting upon. First, these and other decisions<sup>125</sup> indicate that the lower courts are taking the Supreme Court seriously and attempting to define the contours of the Second Amendment. There does not seem to be the “surely-they-can’t-be-serious” incredulity that met *Lopez* and, to a lesser degree, *Morrison* in the lower courts.<sup>126</sup> Second, a mark of that seriousness, or at least acceptance, is the nascent development of AEDs for the Second Amendment. While it is early days, the doctrine emerging from lower courts has an anti-evasion component. For example, the courts have generally understood that regulation of activities like gun sales are proxies for gun ownership and have not excluded them from Second Amendment protection. In addition, the standards of review emerging from the lower courts in these cases follow the pattern that identified in the earlier article. The decision rules—be they the “substantial burden” test or something more stringent—tend to resemble standards that, *ex post*, require government actors to articulate reasons and to demonstrate a tighter means-ends fit to justify the infringement of some aspect of the right to keep and bear arms than would be required under a rational basis test.

Finally, the cases in which the courts have adopted these embryonic AEDs tend to support Mike Kent’s and my working hypothesis: that AEDs will be created where judges few the political safeguards as insufficiently robust to provide protection for the constitutional principle at issue.<sup>127</sup> It seems no accident that the anti-evasion cases have arisen in jurisdictions that are especially hostile to gun rights. Chicago, in particular, seemed determined to pass laws that honored the right in form, but sought to gut it of any real substance. It is to their credit that courts refused to countenance the more obvious attempts to resist both *Heller* and *McDonald*.

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125. See, e.g., *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (invalidating an Illinois total ban on the carrying of guns in public, even where necessary for self-defense).

126. See *supra* note 76; see also Reynolds & Denning, *supra* note 75, at 2041–42 (suggesting reasons why *Heller* might be treated differently than the Court’s decisions in *Lopez* and *Morrison*).

127. Denning & Kent, *supra* note 13, at 398 (proposing the working hypothesis to explain when the Court will and will not create AEDs).

## V. CONCLUSION

The Supreme Court regularly employs anti-evasion doctrines to prevent form over substance circumvention of constitutional principles where there is reason for courts to question whether existing political safeguards are robust enough to provide protection for those principles. The evolving right to keep and bear arms offers a unique opportunity to test that hypothesis and to observe AED creation in real time. While previous articles focused only on the Supreme Court, cases from the lower courts suggest that they, too, play a role in the development and application of AEDs.<sup>128</sup> These cases suggest that lower courts are alert to the possibility officials will attempt to impose restrictions striking at the heart of the constitutional principle recognized in *Heller* and *McDonald* and are creating doctrinal responses to prevent evasion.

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128. Finding anti-evasion in the lower courts also offers some possibilities for future research. A couple of questions immediately come to mind: Does anti-evasion look different in the lower courts? Has the Supreme Court tended to simply endorse doctrines that originate below? I hope to return to some of these questions in future work.