Civil Rights

No Conservative Consensus Yet: Douglas Ginsburg, Brett Kavanaugh, and Diane Sykes on the Second Amendment

*By Nelson Lund**

Note from the Editor:

This paper examines the largely unexplored subject of the different approaches courts are taking with regard the right to possess firearms following the Supreme Court's 2008 recognition of this right in *District of Columbia v. Heller*. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about this issue. To this end, while there is currently a limited amount of scholarship on this subject, we offer links below to various court decisions discussing this issue, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- District of Columbia v. Heller, 554 U.S. 570 (2008): http://www.supremecourt.gov/opinions/07pdf/07-290.pdf
- Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*): http://www.cadc.uscourts.gov/internet/opinions.nsf/DECA496973477C748525791F004D84F9/$file/10-7036-1333156.pdf
- Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011): http://www.ca7.uscourts.gov/tmp/ID0XPIFF.pdf

Introduction

For several decades, the District of Columbia banned the possession of handguns or any other operable firearm in the home. In *District of Columbia v. Heller*,[1] the Supreme Court concluded that the Second Amendment protects a private right to arms, which enables individuals to exercise their inherent right of self-defense, including the right to defend oneself against criminal violence. This conclusion was strongly supported by evidence about the original meaning of the constitutional provision. The Court then invalidated D.C.'s handgun ban on the ground that handguns are the most popular weapon for self-defense in the home today. Justice Scalia's majority opinion went on to endorse a broad range of gun control regulations without justifying them with evidence about the original meaning of the Second Amendment.[2] These included:

- Bans on the possession of firearms by felons and the mentally ill.
- Bans on carrying firearms "in sensitive places such as schools and government buildings."
- Laws imposing conditions and qualifications on the commercial sale of arms.
- Bans on carrying concealed weapons.
- Bans on "those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns" and apparently also machine guns.

In 1791, American citizens enjoyed an almost unlimited right to keep and bear arms because legislatures had chosen to impose almost no restrictions on that right. We have virtually no historical evidence about constitutional limits on the government's discretion to alter those legal rights because it had not become a matter of public controversy.

Heller might have been regarded as an exercise in judicial restraint if it had simply invalidated the D.C. law on the ground that it severely compromised what the Court called "the core lawful purpose of self-defense."[3] Unfortunately, the opinion's approval of various regulations not at issue in the case, combined with its lackadaisical reasoning in support of its various conclusions, created a mist of uncertainty and ambiguity.

After *McDonald v. City of Chicago*[4] held that the Fourteenth Amendment made the Second Amendment applicable to the states, the need for a workable framework of analysis became more acute. The lower courts have not enjoyed the luxury of confining their rulings to anomalous laws aimed at disarming the civilian population, which *Heller* said would be invalid "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."[5]

Faced with harder cases, and with the fogginess of the *Heller* opinion, these courts have understandably adapted the "tiers of scrutiny" framework widely used in other areas of constitutional law. They have quickly and fairly uniformly coalesced around an interpretation of *Heller* that provides an intelligible framework. The emerging consensus can be roughly summarized as follows:

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

* *Patrick Henry Professor of Constitutional Law and the Second Amendment, George Mason University School of Law*

This is an abbreviated version of Second Amendment Standards of Review in a *Heller* World, *forthcoming in the* Fordham Urban Law Journal, *published here with permission.*

The *Heller* Court seems to have self-consciously refrained from adopting such a framework, but neither did it specify any alternative. We might therefore expect Second Amendment jurisprudence to continue developing through the application of this model.

Maybe it will. But a vigorous challenge was recently advanced in a dissenting opinion by Judge Brett Kavanaugh of the D.C. Circuit. He rejected the consensus approach adopted by his court, arguing that a very different framework is dictated by Justice Scalia's opinion in *Heller*. It is therefore worth considering the differences between Judge Kavanaugh's approach and the one adopted by his colleagues and by other courts of appeals.

I conclude that the analytical framework in Judge Douglas Ginsburg's majority opinion is superior to Judge Kavanaugh's. The majority, however, misapplied that framework. A variation developed and applied by Judge Diane Sykes of the Seventh Circuit illustrates how the inferior federal courts can best approach novel Second Amendment issues.

I. *Heller II*

Prior to 2008, the District of Columbia had sought through its laws to effect an almost complete disarmament of the civilian population. After losing the *Heller* case, the D.C. government went back to the drawing board in an effort to restrict civilian access to guns as much as possible in light of *Heller*. In *Heller II*, the named plaintiff in that case, along with other individuals, challenged several provisions of the city's revised gun control laws.[6]

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

- A requirement that gun owners register each of their firearms with the government. The registrant is required to submit detailed information about himself and the weapon, and to renew the registration every three years. Citizens are forbidden to register more than one pistol in any thirty-day period.
- Every applicant for registration must in effect be licensed to register by passing a series of tests, attending a training course, and being fingerprinted and photographed.
- D.C. also prohibited a wide range of semi-automatic firearms, as well as any magazine with a capacity of more than ten rounds.

A. The Majority Opinion

Judge Ginsburg's majority opinion offered the following analysis and conclusions:

- The basic registration requirement, as applied to handguns but not long guns, is similar to longstanding regulations that are presumptively constitutional, and the plaintiffs failed to overcome this presumption by showing that the requirement has more than a *de minimis* effect on their constitutional rights.
- Some of the specific registration provisions are novel rather than longstanding, and are therefore subject to additional scrutiny. The court reached the same conclusion about the licensing requirements and about all of the registration and licensing requirements for long guns.

Relying largely on First Amendment free speech decisions, the court concluded that none of these requirements imposes "a substantial burden upon the core right of self-defense,"[7] and that strict scrutiny is therefore inappropriate. Instead, the court concluded that intermediate scrutiny should be applied, which requires the government to show that the regulations are "substantially related to an important governmental objective."[8] Finding that the record was insufficient to apply this standard of scrutiny, the court remanded for further proceedings.

- The court declined to decide whether semi-automatic rifles and large-capacity magazines receive any protection at all under the Second Amendment.[9] Assuming *arguendo* that they do, the court then concluded that it was "reasonably certain" that the prohibition does not substantially burden the right. Accordingly, it applied intermediate rather than strict scrutiny.

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

B. The Kavanaugh Dissent

Judge Kavanaugh thought that the majority's approach to the case was based on a complete misinterpretation of *Heller*. In his view, the Supreme Court has rejected the tiers-of-scrutiny approach. Instead, *Heller* teaches that courts are to assess gun regulations by looking to the Constitution's text and to history and tradition, and by drawing analogies from these sources when dealing with modern weapons and new circumstances.

Judge Kavanaugh analyzed the new case as follows:

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

Judge Kavanaugh's analysis was based on a misreading of *Heller*. The Supreme Court said that certain longstanding regulations are at least presumptively constitutional, and Judge Kavanaugh is right that registration requirements on gun owners are not longstanding. But *Heller* nowhere said that novel regulations are always unconstitutional. The Court rested its decision on a perception that many Americans today have good reasons for making handguns their preferred weapon for defense of the home. The Court did not say that the novelty of the handgun ban rendered it unconstitutional, or that a longstanding ban on handguns would have been upheld.

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

This reading of *Heller* is also technically flawed. The Supreme Court's holding involved only a particular handgun, which was a revolver, not a semi-automatic. *Heller* did not say, one way or the other, whether a ban on semi-automatic pistols would be unconstitutional.

Judge Kavanaugh also misread *Heller* on the common use test. In that case, the Supreme Court concluded that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[10] The awkward double negative in this statement strongly suggests that the Court was careful to avoid saying that all weapons typically possessed for lawful purposes *are* protected. Whatever the Court may decide in the future, it has not yet said that all weapons in common use for lawful purposes are *ipso facto* protected by the Second Amendment.

III. Applying *Heller*

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

Judges Ginsburg and Kavanaugh engaged in a detailed debate about the appropriate framework for analysis. Neither judge made a plausible case that his preferred framework can be derived from the *Heller* opinion. The real problem is that *Heller* is so Delphic, or muddled, that the kind of methodological debate found in *Heller II* is unresolvable. That said, Judge Ginsburg's approach seems to me to be clearly preferable.

First, as explained above, Judge Kavanaugh's approach required him to misread *Heller* in order to find guidance precise or clear enough to provide rules of decision in *Heller II*.

Second, and perhaps more important, Justice Scalia's *Heller* opinion itself shows that his use of history and tradition is little more than a disguised version of the kind of interest balancing that he purported to condemn. At crucial points, he simply issued *ipse dixits* unsupported by any historical evidence, and at other points, he misrepresented historical facts.[11] He could hardly have avoided doing so, given the paucity of relevant historical evidence about the original meaning of the Second Amendment. That problem is even more acute in cases dealing with less restrictive regulations. Covert interest-balancing dressed up as an analysis of history and tradition is no better than more straightforward interest-balancing in the form of strict or intermediate scrutiny, and almost certainly worse.

This is not to say that *Heller II* was correctly decided. Judge Kavanaugh's most powerful arguments are directed against the majority's application of its framework to the challenged regulations. Those regulations were manifestly meant to suppress the legitimate exercise of constitutional rights, and the majority was far too deferential to the government in reviewing them.

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

The government tried to do so by arguing that a registration system enables police officers who are executing warrants to determine whether residents in the dwelling have guns. This rationale is woefully inadequate. Even the greenest rookie officer in the District of Columbia would know that many residents possess unregistered guns. The regulation cannot accomplish the purpose advanced to justify it, and the justification cannot satisfy any form of heightened scrutiny.

Apart from the government's failure to show a substantial relation between public safety and its registration requirements, this kind of registration system has traditionally been resisted in American history for a reason closely bound up with an important purpose of the Second Amendment. When the government collects this kind of detailed information about individuals and the guns they own, it gives itself a powerful tool that it could use for the unconstitutional confiscation of guns or the unconstitutional harassment of gun owners.[12] Even a narrow reading of the Second Amendment would have to acknowledge that its purpose includes the prevention of such illegalities. For that reason, the District of Columbia should have an especially heavy burden to bear in justifying regulations that would help it to do what it has already demonstrated that it wants to do, namely disarm the civilian population. The government did not come close to meeting that burden.[13]

The majority's decision to uphold D.C.'s ban on a wide range of semi-automatic rifles is also inconsistent with heightened scrutiny. The banned rifles are defined primarily in terms of cosmetic features, and they are functionally indistinguishable from other semi-automatic rifles that are not banned. The regulation is therefore arbitrary and without any real relation to public safety. It certainly fails the majority's own test, under which "the Government has the burden of showing there is a substantial relationship or reasonable 'fit' between, on the one hand, the prohibition . . . and, on the other, [the Government's] important interests in protecting police officers and controlling crime."[14] That failure alone should have sufficed to invalidate the ban.

Heller assumed that fully automatic rifles are outside the protection of the Second Amendment. The *Heller II* majority analogized semi-automatic rifles to these unprotected weapons on the ground that semi-automatics can fire almost as rapidly as those that are fully automatic. This argument is fallacious. *Heller* treated fully automatic weapons as a special case, apparently on the basis of history and tradition, without saying anything at all to suggest some kind of penumbral rule that protected weapons must have a significantly slower rate of fire than those that are fully automatic.

Even assuming, *arguendo*, that such a penumbral rule was implied by *Heller*, D.C. allows other semi-automatic rifles that can fire just as quickly as those that are banned. The underinclusiveness of the regulation confirms it was not

based on a functional similarity between automatic and semi-automatic weapons. The putative similarity therefore cannot justify the regulation under heightened scrutiny.

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

The majority also credited testimony that large-capacity magazines can tempt legitimate self-defense shooters to fire more rounds than necessary. This testimony shows at most that banning such magazines could conceivably have some good effects on some occasions. But the same could be said about D.C.'s original and unconstitutional ban on all handguns, which illustrates why the argument is fatally flawed. Banning medical books containing photos of corpses might save some children from psychological trauma, which would be a good thing, too. But nobody would consider such a book ban constitutional.

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

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

Chicago responded to *McDonald* in much the same fashion as the District of Columbia had responded to *Heller*: by adopting a sweeping and burdensome new regulatory regime to replace the handgun ban that the Supreme Court had invalidated. In *Ezell v. City of Chicago*,[15] the Seventh Circuit reviewed Chicago's decision to require one hour of range training as a prerequisite to lawful gun ownership, while simultaneously banning from the city any range at which this training could take place.

Judge Diane Sykes began by offering a more detailed and somewhat different interpretation of *Heller* and *McDonald* than that of the D.C. Circuit.[16] Briefly stated, she interpreted the Supreme Court's opinions as follows:

- Just as some categories of speech are unprotected by the First Amendment as a matter of history and tradition, some activities involving arms are categorically unprotected by the Constitution. To identify those categories, courts should look to the original public meaning of the right to arms (as of 1791 with respect to the Second Amendment and as of 1868 with respect to the Fourteenth Amendment).
- If an activity is within a protected category, courts should evaluate the regulatory means chosen by the government and the public benefits at which the regulation aims. "Borrowing from the Court's First Amendment doctrine, the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right."[17] Broadly prohibitory laws restricting the core Second Amendment right—like those at issue in *Heller* and *McDonald*—are categorically unconstitutional. All other laws must be judged by one of the standards of means-end scrutiny used in evaluating other enumerated constitutional rights, and the government always has the burden of justifying its regulations.

The court concluded that firing ranges are not categorically outside the protection of the Second Amendment. The evidence cited by the City fell "far short of establishing that target practice is wholly outside the Second Amendment as it was understood when incorporated as a limitation on the States."[18]

The more difficult question for the court involved the choice of a standard of review. Judge Sykes interpreted *Heller* to permit the use of First Amendment analogies, and she summarized the rather intricate set of tests generated by the Supreme Court in that area. From those cases, she distilled an approach to the Second Amendment. Severe burdens on the core right to self-defense will require an extremely strong public-interest goal and a close means-ends fit. As a restriction gets farther away from this core, it may be more easily justified, depending on the relative severity of the burden and its proximity to the core of the right.

Applying this test to the gun-range ban, the court concluded that the right to maintain proficiency in the use of weapons is an important corollary to the meaningful exercise of the core right. This requires a rigorous review of the government's justifications, "if not quite 'strict scrutiny.'"[19] The City did not come close to satisfying this standard. It produced no evidence establishing that firing ranges necessarily pose any significant threat to public safety, and at least one of its arguments was so transparently a makeweight that "[t]o raise it at all suggests pretext."[20]

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

First, *Heller II* adopted a view reflecting a somewhat loose consensus of other circuit courts. Judge Sykes, however, relied almost entirely on *Heller*, *McDonald*, and other Supreme Court decisions, and she exhibited a detailed and thoughtful familiarity with the Court's opinions. It is true that *Heller* and *McDonald* can be read differently, as Judge Kavanaugh showed in *Heller II*, but Judge Sykes' analysis has better support in the text of the opinions. Inferior federal courts are required to follow the Supreme Court,[21] but not to follow the lead of other circuits. It is therefore generally a better practice to focus on what the Supreme Court itself has said—to look, so to speak, for the Court's "original meaning"—than to play a kind

of telephone game by interpreting Supreme Court opinions on the assumption that other courts have read them correctly.

Second, and this is more important, Judge Sykes took the importance of the Second Amendment more seriously than the *Heller II* majority. Whereas *Heller II* casually applied intermediate scrutiny in a way that too often accepted flimsy justifications for the regulations, Judge Sykes insisted on the kind of rigor that courts routinely demand in First Amendment cases. Unlike the *Heller II* majority, she gave appropriate attention to the fundamental principle, expressly adopted by the Supreme Court, that the Second Amendment should not "be singled out for special—and specially unfavorable treatment."[22] If enough other judges will follow her lead, perhaps the Second Amendment will not return to its pre-*Heller* status as a kind of constitutional pariah.

Conclusion

The Supreme Court's *Heller* opinion disapproved a governmental ban on keeping a handgun in the home, while endorsing a number of other gun control regulations. The Court refused to adopt any clear analytical framework for resolving the countless issues about which *Heller* said nothing. Some of its reasoning, or rhetoric, suggests that such issues should be resolved solely by consulting American history and tradition, along with the text of the Constitution. Other parts of the opinion can be read to point toward the use of the Court's "tiers of scrutiny" approach.

The federal courts of appeals have declined to follow the history-and-tradition approach. The effort by Judge Brett Kavanaugh to take that approach in his *Heller II* dissent illustrates why this approach is not likely to prove fruitful, or even workable. The D.C. Circuit's majority opinion in *Heller II* illustrates the perils of adapting the "tiers of scrutiny" approach without an adequate regard for the value of Second Amendment rights. Judge Diane Sykes' opinion for the Seventh Circuit in *Ezell* shows that circuit judges who are so inclined can show appropriate respect both to the Supreme Court and to the Second Amendment. She deserves to be widely imitated.

Endnotes

1 554 U.S. 570 (2008).

2 For a detailed analysis, see Nelson Lund, *The Second Amendment,* Heller *and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1356-68 (2009), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=1324757.

3 554 U.S. at 630.

4 130 S. Ct. 3020 (2010). In this case, the Court struck down a handgun ban similar to the one at issue in *Heller*. For further details, see Nelson Lund, *Two Faces of Judicial Restraint (Or Are There More?) in* McDonald v. City of Chicago, 63 Fla. L. Rev. 487 (2011), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=1658198.

5 554 U.S. at 628-29.

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

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

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

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

10 554 U.S. at 625.

11 For a detailed proof of these claims, see Lund, *supra* note 2, at 1356-67.

12 This is not a paranoid fantasy. *See*, *e.g.*, Stephen P. Halbrook, *"Only Law Enforcement Will Be Allowed to Have Guns": Hurricane Katrina and the New Orleans Firearm Confiscations*, 18 Geo. Mason U. C.R. L.J. 339 (2008) (discussing the aftermath of a police decision that only law enforcement officers would be allowed to possess guns in New Orleans after Hurricane Katrina struck the area).

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

14 *Id*. at 1262.

15 651 F.3d 684 (7th Cir. 2011).

16 After the district court denied the plaintiffs' motion for a preliminary injunction, the Seventh Circuit reversed and remanded with orders to grant the motion. Because of the procedural posture of the case, the court of appeals did not issue a decision on the merits. In explaining why the plaintiffs had demonstrated a strong likelihood of success on the merits, however, the court provided a detailed analysis that I will treat for simplicity of exposition as though it were a merits decision.

17 651 F.3d at 703.

18 *Id.* at 704-06.

19 *Id.* at 708.

20 *Id.* at 709-10.

21 State courts may have more latitude than federal courts in dealing with guidance from the Supreme Court. *See* Nelson Lund, *Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court's Errors*, 19 Geo. Mason L. Rev. 1029, 1039-41 (forthcoming 2012), *draft available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=2033946.

22 McDonald v. City of Chicago, 130 S. Ct. 3020, 3044 (2010); *cf*. United States v. Skoien, 614 F.3d 638, 651-54 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (criticizing Judge Frank Easterbrook's majority opinion for relieving the government of its burden of justifying its disarmament regulation and for depriving a criminal defendant of an opportunity to contest the dubious non-record evidence on which the majority relied).