AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Guns

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

Dick Heller, the named plaintiff in District of Columbia v. Heller *(2008), sought to register a semi-automatic rifle and a pistol whose magazine had a fifteen-round capacity. The Metropolitan Police Department of Washington, D.C., refused to allow Heller to register those weapons because registration was not permitted under the Firearms Registration Amendment Act of 2008, a District of Columbia law passed immediately after the Supreme Court in* Heller *declared that the district's previous ban on handguns violated the Second Amendment. The new D.C. law required that all firearms in the district be registered with the police department, limited registration to no more than one pistol every thirty days, and required applicants to demonstrate knowledge of firearms safety, take a firearms safety class, and understand local law on firearms. In addition, the district also banned "assault weapons," which included common brands of semi-automatic rifles, and any weapon that had a capacity of "more than ten rounds of ammunition." Heller filed a lawsuit in the local federal district court, claiming these regulations violated the Second Amendment and were inconsistent with* Heller. *The local district court granted summary judgment for the District of Columbia. Heller appealed to the Court of Appeals for the District of Columbia.*

The Court of Appeals by a 2–1 vote affirmed the licensing provisions, some of the registration provisions, and the ban on assault weapons. Judge Douglas Ginsburg's majority opinion maintained that the Court should use the intermediate scrutiny test, that most of the D.C. laws satisfied that standard, and that the federal district court should conduct a hearing to determine whether the remaining registration laws satisfied that standard. Why did Judge Ginsburg apply intermediate scrutiny? Did he maintain that intermediate scrutiny is the correct test of all gun control measures or only some? How did he distinguish between regulations that require only intermediate scrutiny and other regulations that may require more or less scrutiny? What standard did Judge Kavanaugh apply? Who has the better interpretation of Heller*? Who has the better interpretation of the Second Amendment?*

Heller v. District of Columbia *is consistent with a preliminary consensus among lower federal courts that most gun control regulations must satisfy either the intermediate scrutiny standard or a constitutional test similar to intermediate scrutiny. Judge Frank Easterbrook's influential opinion in* U.S. v. Skoien *(7th Cir. 2010) applied that intermediate scrutiny test when sustaining a state law prohibiting persons convicted of domestic violence from carrying a firearm. He wrote:*

> *First, domestic abusers often commit acts that would be charged as felonies if the victim were a stranger, but that are charged as misdemeanors because the victim is a relative (implying that the perpetrators are as dangerous as felons); second, firearms are deadly in domestic strife; and third, persons convicted of domestic violence are likely to offend again, so that keeping the most lethal weapon out of their hands is vital to the safety of their relatives.*

Most state courts and lower federal courts have similarly sustained state bans on assault weapons and laws prohibiting felons or persons convicted of certain misdemeanors from committing crimes. Nevertheless, important exceptions exist. The Supreme Court of North Carolina in Britt v. State *(2009) declared that the state could not forbid a person from carrying a weapon merely because that person had been convicted of one nonviolent felony thirty years ago. Justice Brady stated, "It is unreasonable to assert that a nonviolent citizen who has responsibly,*

safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety."[1]

GINSBURG, CIRCUIT JUDGE

In *District of Columbia v. Heller* (2008) the Supreme Court explained the Second Amendment "codified a *pre-existing*" individual right to keep and bear arms, which was important to Americans not only to maintain the militia, but also for self-defense and hunting. Although "self-defense had little to do with the right's *codification*, it was the *central component* of the right itself."

Still, the Court made clear "the right secured by the Second Amendment is not unlimited," and it gave some examples to illustrate the boundaries of that right. For instance, the Court noted "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." This limitation upon the right to keep and bear arms was "supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons."

The Court identified other historical limitations upon the scope of the right protected by the Second Amendment. For example, it noted, "The majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." It also provided a list of some "presumptively lawful regulatory measures":

> nothing 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.

. . .

Under *Heller,* therefore, there are certain types of firearms regulations that do not govern conduct within the scope of the Amendment. We accordingly adopt, as have other circuits, a two-step approach to determining the constitutionality of the District's gun laws. We ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny. As explained below, and again in keeping with other circuits, we think that insofar as the laws at issue here do impinge upon a Second Amendment right, they warrant intermediate rather than strict scrutiny.

With respect to the first step, *Heller* tells us "longstanding" regulations are "presumptively lawful," that is, they are presumed not to burden conduct within the scope of the Second Amendment. This is a reasonable presumption because a regulation that is "longstanding," which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right; concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment. A plaintiff may rebut this presumption by showing the regulation does have more than a de minimis effect upon his right. A requirement of newer vintage is not, however, presumed to be valid.

. . .

The record supports the view that basic registration of handguns is deeply enough rooted in our history to support the presumption that a registration requirement is constitutional. The Court in *Heller* considered "prohibitions on the possession of firearms by felons" to be "longstanding" although states did not start to enact them until the early 20th century. At just about the same time, states and localities began to require registration of handguns.

. . .

[1] For a good discussion of state and lower federal court rulings in the wake of *District of Columbia v. Heller* on the right to bear arms, see Allen Rostron, "Justice Breyer's Triumph in the Third Battle over the Second Amendment," *George Washington Law Review* 80 (2012): 704.

. . . These early registration requirements, however, applied with only a few exceptions solely to handguns—that is, pistols and revolvers—and not to long guns. Consequently, we hold the basic registration requirements are constitutional only as applied to handguns. With respect to long guns they are novel, not historic.

. . .

The requirements that are not longstanding, which include . . . *all* the requirements as applied to long guns, affect the Second Amendment right because they are not de minimis. All of these requirements, such as the mandatory five hours of firearm training and instruction make it considerably more difficult for a person lawfully to acquire and keep a firearm, including a handgun, for the purpose of self-defense in the home—the "core lawful purpose" protected by the Second Amendment. . . .

. . .

Heller does reject any kind of "rational basis" or reasonableness test, but it leaves open the question what level of scrutiny we are to apply to laws regulating firearms. True, the Supreme Court often applies strict scrutiny to legislation that impinges upon a fundamental right. The Court has not said, however, and it does not logically follow, that strict scrutiny is called for whenever a fundamental right is at stake.

As with the First Amendment, the level of scrutiny applicable under the Second Amendment surely "depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." That is, a regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify.

As between strict and intermediate scrutiny, we conclude the latter is the more appropriate standard for review of gun registration laws. . . . [R]egistration requirements "do[ ] not severely limit the possession of firearms." Indeed, none of the District's registration requirements prevents an individual from possessing a firearm in his home or elsewhere, whether for self-defense or hunting, or any other lawful purpose.

As for the novel registration requirements, to pass muster under intermediate scrutiny the District must show they are "substantially related to an important governmental objective." That is, the District must establish a tight "fit" between the registration requirements and an important or substantial governmental interest, a fit "that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." We think the District has advanced, albeit incompletely—almost cursorily—articulated, two important governmental interests it may have in the registration requirements, *viz.,* to protect police officers and to aid in crime control. . . .

We cannot conclude, however, that the novel registration requirements—or any registration requirement as applied to long guns—survive intermediate scrutiny based upon the record as it stands because the District has not demonstrated a close fit between those requirements and its governmental interests. . . . For example, the Committee Report asserts "studies show" that "laws restricting multiple purchases or sales of firearms are designed to reduce the number of guns entering the illegal market and to stem the flow of firearms between states," and that "handguns sold in multiple sales to the same individual purchaser are frequently used in crime." The Report neither identifies the studies relied upon nor claims those studies showed the laws achieved their purpose, nor in any other way attempts to justify requiring a person who registered a pistol to wait 30 days to register another one. . . . Nor, however, do the plaintiffs present more meaningful contrary evidence concerning handguns, and neither the District nor the plaintiffs present any evidence at all concerning application of the registration requirements to long guns. . . .

In the light of these evidentiary deficiencies and "the importance of the issues" at stake in this case, . . . we believe the parties should have an opportunity "to develop a more thorough factual record."

. . . We are not aware of evidence that prohibitions on either semi-automatic rifles or large-capacity magazines are longstanding and thereby deserving of a presumption of validity. For the court to determine whether these prohibitions are constitutional, therefore, we first must ask whether they impinge upon the right protected by the Second Amendment. That is, prohibiting certain arms might not meaningfully affect "individual self-defense, [which] is 'the *central component*' of the Second Amendment

right." Of course, the Court also said the Second Amendment protects the right to keep and bear arms for other "lawful purposes," such as hunting, but self-defense is the "core lawful purpose" protected.

The Court in *Heller* recognized yet another "limitation on the right to keep and carry arms," namely that the "sorts of weapons protected" are those "'in common use at the time' for lawful purposes like self-defense." The Court found this limitation "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" Because the prohibitions at issue, unlike the registration requirements, apply only to particular classes of weapons, we must also ask whether the prohibited weapons are "typically possessed by law-abiding citizens for lawful purposes," if not, then they are not the sorts of "Arms" protected by the Second Amendment.

. . .

As we did in evaluating the constitutionality of certain of the registration requirements, we determine the appropriate standard of review by assessing how severely the prohibitions burden the Second Amendment right. Unlike the law held unconstitutional in *Heller,* the laws at issue here do not prohibit the possession of "the quintessential self-defense weapon," to wit, the handgun. Nor does the ban on certain semi-automatic rifles prevent a person from keeping a suitable and commonly used weapon for protection in the home or for hunting, whether a handgun or a non-automatic long gun. . . . As the District points out, the plaintiffs present hardly any evidence that semi-automatic rifles and magazines holding more than ten rounds are well-suited to or preferred for the purpose of self-defense or sport. Accordingly, we believe intermediate rather than strict scrutiny is the appropriate standard of review.

. . .

The Committee on Public Safety relied upon a report by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which described assault weapons as creating "mass produced mayhem." This description is elaborated in the Siebel testimony for the Brady Center: "The military features of semi-automatic assault weapons are designed to enhance their capacity to shoot multiple human targets very rapidly" and "[p]istol grips on assault rifles . . . help stabilize the weapon during rapid fire and allow the shooter to spray-fire from the hip position." The same source also suggests assault weapons are preferred by criminals and place law enforcement officers "at particular risk . . . because of their high firepower," as does the ATF. . . . In short, the evidence demonstrates a ban on assault weapons is likely to promote the Government's interest in crime control in the densely populated urban area that is the District of Columbia.

The record also supports the limitation on magazine capacity to ten rounds. The Committee relied upon Siebel's testimony that "[t]he threat posed by military-style assault weapons is increased significantly if they can be equipped with high-capacity ammunition magazines" because, "[b]y permitting a shooter to fire more than ten rounds without reloading, they greatly increase the firepower of mass shooters." The Siebel testimony moreover supports the District's claim that high-capacity magazines are dangerous in self-defense situations because "the tendency is for defenders to keep firing until all bullets have been expended, which poses grave risks to others in the household, passersby, and bystanders." Moreover, the Chief of Police testified the "2 or 3 second pause" during which a criminal reloads his firearm "can be of critical benefit to law enforcement." Overall the evidence demonstrates that large-capacity magazines tend to pose a danger to innocent people and particularly to police officers, which supports the District's claim that a ban on such magazines is likely to promote its important governmental interests.

We conclude the District has carried its burden of showing a substantial relationship between the prohibition of both semi-automatic rifles and magazines holding more than ten rounds and the objectives of protecting police officers and controlling crime. Accordingly, the bans do not violate the plaintiffs' constitutional right to keep and bear arms.

. . .

Our colleague has issued a lengthy dissenting opinion explaining why he would strike down both the District's registration requirements and its ban on semi-automatic rifles. We respond to his main arguments below.

KAVANAUGH, Circuit Judge, dissenting:

. . .

In *District of Columbia v. Heller* (2008), the Supreme Court held that handguns—the vast majority of which today are semi-automatic—are constitutionally protected because they have not traditionally been banned and are in common use by law-abiding citizens. There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles. Semi-automatic rifles, like semi-automatic handguns, have not traditionally been banned and are in common use by law-abiding citizens for self-defense in the home, hunting, and other lawful uses. Moreover, semi-automatic *handguns* are used in connection with violent crimes far more than semi-automatic *rifles* are. It follows from *Heller*'s protection of semi-automatic handguns that semi-automatic rifles are also constitutionally protected and that D.C.'s ban on them is unconstitutional. (By contrast, fully automatic weapons, also known as machine guns, have traditionally been banned and may continue to be banned after *Heller*.)

D.C.'s registration requirement, which is significantly more stringent than any other federal or state gun law in the United States, is likewise unconstitutional. *Heller* and later *McDonald* said that regulations on the sale, possession, or use of guns are permissible if they are within the class of traditional, "longstanding" gun regulations in the United States. Registration of all lawfully possessed guns—as distinct from licensing of gun owners or mandatory record-keeping by gun sellers—has not traditionally been required in the United States and even today remains highly unusual. Under *Heller*'s history- and tradition-based test, D.C.'s registration requirement is therefore unconstitutional.

It bears emphasis that *Heller*, while enormously significant jurisprudentially, was not revolutionary in terms of its immediate real-world effects on American gun regulation. Indeed, *Heller* largely preserved the status quo of gun regulation in the United States. *Heller* established that traditional and common gun laws in the United States remain constitutionally permissible. The Supreme Court simply pushed back against an outlier local law—D.C.'s handgun ban—that went far beyond the traditional line of gun regulation.

. . .

In my view, *Heller* and *McDonald v. City of Chicago* (2010) leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny. To be sure, the Court never said something as succinct as "Courts should not apply strict or intermediate scrutiny but should instead look to text, history, and tradition to define the scope of the right and assess gun bans and regulations." But that is the clear message I take away from the Court's holdings and reasoning in the two cases.

As to bans on categories of guns, the *Heller* Court stated that the government may ban classes of guns that have been banned in our "historical tradition"—namely, guns that are "dangerous and unusual" and thus are not "the sorts of lawful weapons that" citizens typically "possess[ ] at home." The Court said that "dangerous and unusual weapons" are equivalent to those weapons not "in common use." . . . Thus, the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns" or automatic "M-16 rifles and the like." That interpretation, the Court explained, "accords with the historical understanding of the scope of the right." "Constitutional rights," the Court said, "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." The scope of the right is thus determined by "historical justifications." And tradition (that is, post-ratification history) also 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."

. . .

As to regulations on the sale, possession, or use of guns, *Heller* similarly said the government may continue to impose regulations that are traditional, "longstanding" regulations in the United States.

. . .

Just because gun regulations are assessed by reference to history and tradition does not mean that governments lack flexibility or power to enact gun regulations. Indeed, governments appear to have *more* flexibility and power to impose gun regulations under a test based on text, history, and tradition than they would under strict scrutiny. After all, history and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right, as the Court said in *Heller.* By contrast, if courts applied strict scrutiny, then presumably very few gun regulations would be upheld. . . .

. . .

When legislatures seek to address new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed, there obviously will not be a history or tradition of banning such weapons or imposing such regulations. That does not mean the Second Amendment does not apply to those weapons or in those circumstances. 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.

. . . .

Strict and intermediate scrutiny today are primarily used in substantive due process and equal protection cases, and for certain aspects of First Amendment free speech doctrine. Strict and intermediate scrutiny tests are not employed in the Court's interpretation and application of many other individual rights provisions of the Constitution.

For example, the Court has not typically invoked strict or intermediate scrutiny to analyze the Jury Trial Clause, the Establishment Clause, the Self-Incrimination Clause, the Confrontation Clause, the Cruel and Unusual Punishments Clause, or the Habeas Corpus Clause, to name a few. . . .

. . . .

To sum up so far: Because the Supreme Court in *Heller* did not adopt a strict or intermediate scrutiny test and rejected judicial interest balancing, I must disagree with the majority opinion's decision in this case to adopt the intermediate scrutiny balancing test. In my view, it is a severe stretch to read *Heller,* as the majority opinion does, as consistent with an intermediate scrutiny balancing test. The Supreme Court struck down D.C.'s handgun ban because handguns have not traditionally been banned and are in common use by law-abiding citizens, not because the ban failed to serve an important government interest and thus failed the intermediate scrutiny test. And the Court endorsed certain gun laws because they were rooted in history and tradition, not because they passed the intermediate scrutiny test.

. . .

There is no basis in *Heller* for drawing a constitutional distinction between semi-automatic handguns and semi-automatic rifles. As an initial matter, considering just the public safety rationale invoked by D.C., semi-automatic handguns are more dangerous as a class than semi-automatic rifles because handguns can be concealed. As was noted by the dissent in *Heller*, handguns "are the overwhelmingly favorite weapon of armed criminals." So it would seem a bit backwards—at least from a public safety perspective—to interpret the Second Amendment to protect semi-automatic handguns but not semi-automatic rifles.

More to the point for purposes of the Second Amendment as construed in *Heller* protects weapons that have not traditionally been banned and are in common use by law-abiding citizens. Semi-automatic rifles have not traditionally been banned and are in common use today, and are thus protected under *Heller.*

. . .

Semi-automatic rifles remain in common use today, as even the majority opinion here acknowledges. . . . In 2007, the AR-15 *alone* accounted for 5.5 percent of firearms and 14.4 percent of rifles produced in the United States for the domestic market. . . . A brief perusal of the website of a popular American gun seller underscores the point that semi-automatic rifles are quite common in the United States. Semi-automatic rifles are commonly used for self-defense in the home, hunting, target shooting and competitions. And many hunting guns are semi-automatic.

Although a few states and municipalities ban some categories of semi-automatic rifles, most of the country does not, and even the bans that exist are significantly narrower than D.C.'s. What the Supreme Court said in *Heller* as to D.C.'s handgun ban thus applies just as well to D.C.'s new semi-automatic rifle ban: "Few laws in the history of our Nation have come close to the severe restriction of the District's" law.

In attempting to distinguish away *Heller*'s protection of semi-automatic handguns, the majority opinion suggests that semi-automatic rifles are almost as dangerous as automatic rifles (that is, machine guns) because semi-automatic rifles fire "almost as rapidly." Putting aside that the majority opinion's data indicate that semi-automatics actually fire two-and-a-half times slower than automatics, . . . the problem with the comparison is that semi-automatic *rifles* fire at the same general rate as semi-automatic *handguns.* And semi-automatic handguns are constitutionally protected under the Supreme Court's decision in *Heller.* . . . The majority opinion next contends that semi-automatic handguns are good enough to meet people's needs for self-defense and that they shouldn't need semi-automatic rifles. But that's a bit like saying books can be banned because people can always read newspapers. . . .

. . .

The fundamental problem with D.C.'s gun registration law is that registration of lawfully possessed guns is not "longstanding." Registration of all guns lawfully possessed by citizens in the relevant jurisdiction has not been traditionally required in the United States and, indeed, remains highly unusual today.

In considering D.C.'s registration requirement, it's initially important to distinguish registration laws from licensing laws. Licensing requirements mandate that gun owners meet certain standards or pass certain tests before owning guns or using them in particular ways. Those laws can advance gun safety by ensuring that owners understand how to handle guns safely, particularly before guns are carried in public. For example, many jurisdictions that permit the carrying of concealed weapons have traditionally imposed licensing requirements on persons who wish to carry such weapons. Registration requirements, by contrast, require registration of individual guns and do not meaningfully serve the purpose of ensuring that owners know how to operate guns safely in the way certain licensing requirements can. For that reason, registration requirements are often seen as half-a-loaf measures aimed at deterring gun ownership. . . .

. . .

. . . As D.C. acknowledges, there is not, and never has been, a "comprehensive federal system of firearm registration." Similarly, the vast majority of states have not traditionally required registration of lawfully possessed guns. . . . There certainly is no tradition in the United States of gun registration imposed on all guns. And laws regulating gun sellers provide no support for D.C.'s registration requirement, which compels every gun owner to register every gun he or she lawfully possesses.

. . .

Because the vast majority of states have not traditionally required and even now do not require registration of lawfully possessed guns, D.C.'s registration law—which is the strictest in the Nation and mandates registration of all guns—does not satisfy the history- and tradition-based test set forth in *Heller* and later *McDonald.*

. . .