Strictly Speaking: The Second Amendment after *Heller* and *McDonald*

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*Views expressed are my own and do not necessarily reflect the official views of the NRA.

The Second Amendment

- "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."

U.S. CONST. amend. II.

Heller and *McDonald's* basic holdings

- Twelve years ago, the Supreme Court invalidated a District of Columbia law that banned possession of an operable firearm in the home because it was inconsistent with the text and history preserved by the Second Amendment.

  District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

- Two years later, the Court that the Second Amendment was a fundamental right that applied to the states, and invalidated two similar ordinances, again, for being inconsistent with the text and history preserved by the Second Amendment.

  McDonald v. City of Chicago, Ill., 561 U.S. 742, 767–68 (2010).

The Second Amendment is not a second-class right.

- The Second Amendment is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights."

McDonald, 561 U.S. at 780.

A preexisting right

Heller teaches that the Second Amendment preserved a pre-existing right

- "[T]he Second Amendment … did not purport to *confer* a right to keep and bear arms. It did not say that 'the people shall have the right to keep and bear arms,' … but rather that 'the right of the people to keep and bear arms' (implying a preexisting right) 'shall not be infringed.'"

  Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 400 (2012) (emphasis in original) (footnotes and citation omitted)

A pre-existing right requires a historical analysis.

- Second Amendment "rights are enshrined with the scope they were understood to have when the people adopted them."

Heller, 554 U.S. at 634–35.

- The scope of Second Amendment is determined by "both text and history," not "'interest balancing.'" The Second Amendment "is the very product of an interest balancing by the people"; its protections are "elevate[d] above all other interests."

Id. at 595, 635

- This is true "whether or not future legislatures or (yes) even future judges think that scope too broad."

Id. at 635

Keep and bear arms

There are two rights preserved by the Second Amendment.

- The text protects two separate rights: the right to "keep" arms and the right to "bear" them.

  Heller, 554 U.S. at 591

- To "keep arms" means to "have weapons."

  Id. at 582, *see also id*. at 591 ("[K]eep and bear arms" is not a "term of art" with a "unitary meaning.").

- To "bear arms" means to "carry" them for "confrontation"—to "wear, bear, or carry" a firearm "upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person."

  Id. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)) (alteration in original).

Keeping arms in the home

- "The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute."

Heller, 554 U.S. at 628

- The Second Amendment takes "off the table" any "absolute prohibition of handguns held and used for self-defense in the home."

Id. at 616, 636.

Acquiring arms

- "[P]rohibiting the commercial sale of firearms . . . would be untenable under *Heller*."

  United States v. *Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010); Andrews v. State, 50 Tenn. 165, 178 (1871) ("The right to keep arms, necessarily involves the right to purchase them . . . and to purchase and provide ammunition suitable for such arms.").

- This was cited in every case challenging the closure of FFLs and ranges under COVID-19 Emergency Orders.

Carrying outside the home.

- Most courts will "assume" that there is some right to carry a firearm outside the home, but as long as there is not a complete ban on carrying, courts have generally upheld the regulation.

  Moore v. Madigan, 702 F.3d 933, 934 (7th Cir. 2012) (striking Illinois's ban on carrying); *Wrenn v. D.C.*, 864 F.3d 650 (D.C. Cir. 2017) (striking DC's restrictive requirements); *see* the justifiable need cases below affirming carry restrictions.)

The People

Who are the People?

- The Second Amendment protects "the right of the *people* to keep and bear Arms."

U.S. CONST. amend. II (emphasis added).

- "[T]he people,' … unambiguously refers to all members of the political community, not an unspecified subset."

Heller, 554 U.S. at 580.

- All "law-abiding, responsible citizens" have the right to bear arms.

Id. at 635

- *Heller* also teaches that there are certain subsets who are the exception to the people, such as "felons and the mentally ill."

Id. at 626.

Good Moral Character

- "A person of full age and good moral character desiring to be licensed to carry a concealed deadly weapon for personal protection or the protection of the person's property may be licensed to do so…."

  Del. Code Ann. tit. 11, § 1441(a).

- All "law-abiding, responsible citizens" have the right to keep and bear arms.

  Heller, 554 U.S. at 635

Moral-character requirements have been upheld.

- "New York … allows at-home licenses for applicants who show 'good moral character' and show that 'good cause' does not exist for denying a license."

  Libertarian Party of Erie Cty. v. Cuomo, 970 F.3d 106, 127 (2d Cir. 2020)

- "[T]he statute does not burden the ability of "*law-abiding, responsible* citizens."' Nor did the complaint allege that a responsible citizen could not get a license.

  Id. (quoting *Heller*, 554 U.S. at 635) (emphases in original)

- The Plaintiff had been arrested 50 times and frequently violated federal and family court orders. He lost.

Justifiable need clauses

- "The court shall issue the permit … only if … the applicant is a person of good character … and that he has a justifiable need to carry a handgun."

  N.J.S. § 2C:58–4(d).

- Justifiable need typically requires that there is "a special danger to the applicant's life that cannot be avoided by other means."

  In re Preis, 118 N.J. 564, 571, 573 A.2d 148, 152 (1990);

- The state generally determines if the need is sufficient under the statute.

  Scherr v. Handgun Permit Review Bd., 163 Md. App. 417, 437, 880 A.2d 1137, 1148 (2005)

The people don't have to justify the need to exercise their rights.

- The people do not have to justify the need to exercise their rights. They already did that by memorializing their rights in the Constitution.

  Heller, 554 U.S. at 635 (The Second Amendment "is the very product of an interest balancing by the people."

- It would be unthinkable to require one to justify their need to acquire constitutionally protected literature or contraceptive needs.

  See, e.g., Griswold v. Connecticut, 381 U.S. 479, 480 (1965) (striking a law that prohibited using contraceptives for the '"purpose of preventing conception"').

- Justifying your need to exercise your right to be free from self-incrimination would be completely absurd.

The Government must justify itself when infringing on a constitutional right.

- The reality is that the government has the burden to "justify invasion of fundamental constitutional rights."

Carey v. Population Servs., Int'l, 431 U.S. 678, 691 (1977)

Justifiable need restrictions have been upheld.

- The Second, Third, and Fourth Circuits have upheld them.

  Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

Shall not be infringed.

The two-step approach

- "First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.... If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid."

  Drake v. Filko, 724 F.3d 426, 429 (3d Cir. 2013) (quoting *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)); *Young v. Hawaii*, 896 F.3d 1044, 1051 (9th Cir. 2018) (collecting authorities)

The two step approach has been criticized.

- "*Heller* and *McDonald* 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."

  Heller v. D.C. (Heller II), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J. dissenting)

- "[U]nless the Supreme Court instructs us otherwise, we should apply a test rooted in the Second Amendment's text and history—as required under Heller and McDonald—rather than a balancing test like strict or intermediate scrutiny."

  Mance v. Sessions, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J. dissenting from denial of rehearing en banc) (joined by six other judges)

Tiers of Scrutiny are an interest balancing test.

- Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."

  Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011) (citations and quotations omitted).

- To survive intermediate scrutiny, a restriction must be "'narrowly tailored to serve a significant governmental interest'"

  Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (collecting authorities).

- The Second Amendment "is the very product of an interest balancing by the people"; its protections are "elevate[d] above all other interests."

  Heller, 554 U.S. at 635.

Courts treat the Second Amendment as a second-class right.

- The Second Circuit believes that "regulation of the right to bear arms 'has always been more robust' than analogous regulation of other constitutional rights."

  New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 261 (2d Cir. 2015) (quoting *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 100 (2d Cir. 2012)); *but see Bates v. State Bar of Arizona*, 433 U.S. 350, 371 (1977) ("habit and tradition are not in themselves an adequate answer to a constitutional challenge.").

- "If Teixeira were a bookseller … the fact that there were already ten other booksellers indeed would not matter. But he is a gun seller, and … *that changes the constitutional calculus.*"

  Teixeira v. County of Alameda, 873 F.3d 670, 688 (9th Cir. 2017) (emphasis added).

The tiers of scrutiny approach is illusory.

- Courts are supposed to chose a level of scrutiny on a "sliding scale."

Silvester v. Harris, 843 F.3d 816, 821 (2016).

- Destructions of the right are held unconstitutional under any level of scrutiny; laws that severely burden the core of the right are subject to strict scrutiny; and laws that do not place a substantial burden on the right are subject to intermediate scrutiny.

Id. (citations omitted)

- There is no sliding scale. "There is … near unanimity in the post-Heller case law that when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate."

Id. at 823

The Third Circuit is no different.

- The court always picks intermediate scrutiny.

  Holloway v. Attorney Gen. United States, 948 F.3d 164, 172 (3d Cir. 2020); *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 118 (3d Cir. 2018); *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 353 (3d Cir. 2016); *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013); *United States v. Marzzarella*, 614 F.3d 85, 99 (3d Cir. 2010)

Courts frame the issue at step 1 to apply intermediate scrutiny at step 2.

- The Third Circuit held that the core of the Second Amendment is the right to keep an arm in the home, so anything outside the home gets intermediate scrutiny.

Drake v. Filko, 724 F.3d 426, 436 (3d Cir. 2013)

- It repeated the same reason—a ban on 10+round magazines is not a total ban on firearms—five different ways to chose intermediate scrutiny.

Ass'n of New Jersey Rifle & Pistol Clubs, Inc., 910 F.3d 106, 117–18 (3d Cir. 2018)

- A lot of courts will just "assume" that the right is burdened somewhat, so that it only has to apply intermediate scrutiny.

United States v. Torres, 911 F.3d 1253, 1257 (9th Cir. 2019) ("we assume (without deciding) that the Second Amendment extends to unlawful aliens, and we conclude that § 922(g)(5) is constitutional under intermediate scrutiny."); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) ("We are free to make that assumption because the good-and-substantial-reason requirement passes constitutional muster under what we have deemed to be the applicable standard—intermediate scrutiny.").

Courts do not apply actual intermediate scrutiny either.

- "While our Court has consulted First Amendment jurisprudence concerning the appropriate level of scrutiny to apply to a gun regulation, we have not wholesale incorporated it into the Second Amendment. This is for good reason: 'the risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights ...."'

  Ass'n of New Jersey Rifle & Pistol Clubs, Inc., 910 F.3d at 124 n.28 (citations and brackets omitted).

- The Second Amendment is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights."

  McDonald, 561 U.S. at 780.

Courts are very deferential, too.

- Judge Bibas criticized a majority panel for applying a "version [of scrutiny that] is watered down—searching in theory but feeble in fact."

  Ass'n of New Jersey Rifle & Pistol Clubs, Inc., 910 F.3d at 130 (Bibas, J., dissenting).

- Likewise, Justice Alito recently criticized the Second Circuit for accepting "with no serious probing" New York City's unsubstantiated "public safety arguments [that] were weak on their face."

  New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York, 140 S. Ct. 1525, 1544 (2020) (Alito, J. dissenting).

The Third Circuit's Intermediate Scrutiny Approach.

- '"Under intermediate scrutiny, the government must assert a significant, substantial, or important interest; there must also be a reasonable fit between that asserted interest and the challenged law, such that the law does not burden more conduct than is reasonably necessary."'

  Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey, 910 F.3d 106, 119 (3d Cir. 2018) (brackets and citations omitted); *see also Ezell v. City of Chicago*, 651 F.3d 684, 707–709 (7th Cir. 2011) (analyzing several forms of intermediate scrutiny).

The government gets a pass at step one.

- "The State of New Jersey has, undoubtedly, a significant, substantial and important interest in protecting its citizens' safety."

  Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey, 910 F.3d 106, 119 (3d Cir. 2018); *Fyock*, 779 F.3d at 1000; *Sylvester*, 843 F.3d at 827.

- The right to keep and bear arms in Constitution "elevate[d it] above all other interests."

  Heller, 554 U.S. at 635; id. at 636 (acknowledging "the problem of handgun violence"*); But see Ezell v. City of Chicago (Ezell II)*, 846 F.3d 888, 895 (7th Cir. 2017) ("[T]he City continues to assume … that it can invoke these interests as a general matter and call it a day.").

- Courts strike regulations whose "sheer breadth is so discontinuous with the reasons offered for it that the [regulation] seems inexplicable by anything but animus toward the class it affects."

  Romer v. Evans, 517 U.S. 620, 632 (1996)

The Government often gets the pass at step one—even without evidence.

- The Ninth Circuit found that the county had a substantial interest in zoning gun shops when it was undisputed that the County Planning Department found that granting the gun shop a conditional use permit would *NOT* '"materially affect adversely the health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare…."'

Teixeira, 873 F.3d at 697

This doesn't go over in other contexts.

- In cases of [sex discrimination], our precedent instructs that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.

  U.S. v. Virginia, 518 U.S. 515, 535-36 (1996) (citation omitted)

- The court applies a "searching analysis" into the justification.

  Id. at 536.

- The court rejected "Virginia's alleged pursuit of diversity through single-sex educational options."

  Id.

The Third Circuit purports to be better

- The government "must 'present some meaningful evidence, not mere assertions, to justify its predictive [and here conclusory] judgments"' that it is promoting public safety.

  Binderup v. Attorney Gen. United States of Am., 836 F.3d 336, 354 (3d Cir. 2016) quoting *Heller*, 670 F.3d at 1259) (alteration in original)

- But the burden is still low.

The Third Circuit defers to the government's argument instead of applying any type of scrutiny.

New Jersey legislators, however, have made a policy judgment that the state can best protect public safety by allowing only those qualified individuals who can demonstrate a "justifiable need" to carry a handgun to do so….

This measured approach neither bans public handgun carrying nor allows public carrying by all firearm owners; instead, the New Jersey Legislature left room for public carrying by those citizens who can demonstrate a "justifiable need" to do so. We refuse Appellants' invitation to intrude upon the sound judgment and discretion of the State of New Jersey.

Drake v. Filko, 724 F.3d 426, 439-40 (3d Cir. 2013); See also *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 122 (3d Cir. 2018)

The Majority in *Heller* rejected the Third Circuit's deferential approach.

- Justice Breyer, in a dissenting opinion, argued that courts should "defer[] to a legislature's empirical judgment" in Second Amendment Cases.

Heller, 554 U.S. at 690 (Breyer, J. dissenting)

- The majority in *Heller* expressly rejected this.

Id. at 629 n.27

The Tailoring Requirement often gets dropped.

- The Ninth Circuit has described this as "not a strict one."

Silvester, 843 F.3d at 827.

- "The State is required to show only that the regulation 'promotes a substantial government interest that would be achieved less effectively absent the regulation."

Id. at 829.

- That test is "incomplete, because a court must also determine whether the government action burden[s] substantially more [protected conduct] than is necessary to further that interest."

Young, 896 F.3d at 1073

Dropping the tailoring requirement is a misapplication of First Amendment jurisprudence.

- It starts with *O'Brien*, the draft-card burning case.
- The restriction must (1) "further[] an important or substantial governmental interest;" (2) the … interest is unrelated to the suppression of free expression;" and (3) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

  United States v. O'Brien, 391 U.S. 367, 369 (1968).

- "an incidental burden on speech is no greater than is essential … under *O'Brien*, [if] the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

  United States v. Albertini, 472 U.S. 675, 689 (1985) (Albertini was banned from protesting on a military base after he had previously been caught destroying documents on the base.)

In those cases the government was regulating conduct—speech was incidental.

- The comparison for Second Amendment Purposes would be something like reckless endangerment.

  11 Del.C. §§ 603, 604.

- Shooting from a moving car or shooting at someone's house is reckless endangerment.

  White v. State, 173 A.3d 78, 83 (Del. 2017) (citations omitted)

- This is incidental to, not a direct regulation of, the right to keep and bear arms.
- The *O'Brien* and *Albertini* test—"promotes a substantial government interest that would be achieved less effectively absent the regulation"—would be more appropriately applied here.

Lower courts will keep doing this until SCOTUS says otherwise.

- "I share Justice ALITO's concern that some federal and state courts may not be properly applying *Heller* and *McDonald*. The Court should address that issue soon."

  New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J. concurring)

The End