PERMISSIBLE GUN REGULATIONS AFTER *HELLER*: SPECULATIONS ABOUT METHOD AND OUTCOMES

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This Essay speculates about the substance and timing of likely decisions by lower courts and the Supreme Court in dealing with issues left open by District of Columbia v. Heller. *It suggests that lower courts will not address those issues by examining original understandings regarding permissible gun regulations, but will instead apply to such regulations something like an intermediate standard of review or rational basis with bite, and will rarely find unconstitutional an existing regulation of guns, short of what in practice amounts to a complete ban. It speculates as well that the Supreme Court will allow most Second Amendment issues to percolate in the lower courts, and that the Court that takes up another Second Amendment issue may well have a different composition, one less sympathetic than the present Court to gun rights. It concludes that* Heller*'s fate may be similar to the fate of the Rehnquist Court's so-called Federalism Revolution—an important decision with relatively little enduring impact.*

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INTRODUCTION

After *District of Columbia v. Heller*,[1] we know two things: A complete ban on the possession of handguns for purposes of self-defense in the home is unconstitutional, and many longstanding forms of regulation—bans on possession by felons and prohibitions on carrying firearms in "sensitive places"—are constitutional.[2] What we do not know is why. Over the next several years, lower courts will explore questions that *Heller* left open, and eventually the Supreme Court will take up a case to clarify *Heller*'s meaning. In this Essay, I speculate about what the law is likely to look like when the Court revisits the Second Amendment, and about what the Court will (probably) do when it does. Briefly, my speculation is that the lower courts will deal with gun regulation by subjecting it to a standard-of-review analysis rather than an originalist, or traditionalist,[3] analysis,[4] that they will circle around a standard of review akin to either rational basis with bite or intermediate scrutiny, and that the Supreme Court—importantly, the Supreme Court as it will be in several years—will use rational basis with relatively weak bite.[5] I write as an observer of the processes of constitutional adjudication with no strong normative views about the Second Amendment's "proper" interpretation. As such an observer, I counsel gun-rights advocates to temper their jubilation at *Heller*'s outcome and gun-control proponents to avoid despair.

I. SOME AMBIGUITIES OF *HELLER*

Justice Scalia's opinion in *Heller* incorporates both originalism and a more modern standard-of-review analysis. Primarily, it is originalist in tenor, but when it comes to permissible regulations, it is more ambiguous as to which analysis is being used. All but one of its references to permissible regulations describes such regulations as historically justified. This could mean that they are justified in originalist terms as well; bans on gun possession by felons, for example, might be the modern form of some regulation well understood to be

1. 128 S. Ct. 2783 (2008).
2. *Id.* at 2816–17.
3. For sake of simplicity, this Essay will use the phrase "originalist analysis" to incorporate both an originalist and traditionalist approach.
4. For the distinction between these methods, see *infra* text accompanying notes 11–14.
5. Stuart Banner calls the issues I discuss in this Essay questions about the Second Amendment's "plumbing. What exactly will the doctrine look like? What kinds of regulation will be unconstitutional? Which guns? Which people?" Stuart Banner, *The Second Amendment So Far*, 117 HARV. L. REV. 898, 907 (2004).

permissible in 1791. It takes only a modest expansion of originalism to permit additional regulations that have become well established over many years; such an expansion has a traditionalist form not inconsistent with the backward-looking nature of originalism. Perhaps, then, modern gun regulations can be justified only if they are strongly analogous to, or are more or less direct descendants of, regulations in place in 1791.

In addition to the originalist theme, Justice Scalia's description of permissible regulations has a more modern standard-of-review tenor.[6] Criticizing Justice Breyer's analysis, Justice Scalia says that the regulation at issue in *Heller* would not survive scrutiny under any of the Court's usual standards of review (other than minimal rationality).[7]

The standard of review matters not merely for the obvious reason that using strict scrutiny makes it unlikely that many gun regulations would be constitutionally permissible. It matters as well because here, unlike in many other areas, the distinction between strict scrutiny and intermediate scrutiny, and more importantly between intermediate scrutiny and rational basis with bite, is likely to be consequential.[8] The reason is that the weaker standards of review ask courts to assess the degree to which regulations promote (important) public policies, with somewhat greater deference to legislative judgments about importance and efficacy under intermediate scrutiny than under rational basis with bite. And, in general, it is quite difficult to show with any moderately persuasive social-science evidence that discrete and moderate gun regulations—what political candidates and public opinion surveys refer to as reasonable gun regulations—do much if anything to advance public policies favoring reduction in violence, reduction in gun violence, reduction in accidents associated with guns, or pretty much anything else the public thinks the regulations might accomplish.[9] The degree of deference that courts give to legislative determinations will therefore matter a great deal; the line between intermediate scrutiny and rational basis with bite may thus be the one that matters.

Of course, were the courts to use the originalist method also embedded in *Heller*, these questions would not matter at all. Yet I doubt that lower

6. *See, e.g.*, *Heller*, 128 S. Ct. at 2820 ("[Certain regulations] are akin to modern penalties for minor public-safety infractions . . . .").

7. *Id.* at 2817 n.27.

8. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996) (seeming to apply a form of intermediate scrutiny not substantially different from strict scrutiny in a case involving gender discrimination).

9. For a discussion of some of the evidence, see MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS 85–102 (Geoffrey R. Stone ed., 2007).

courts will do so, for several reasons. Some lower court judges might be originalists or traditionalists in theory, but even they are likely to be standard-of-review judges in practice. The Supreme Court in *Heller* and some lower courts were able to apply originalism with respect to the core question of whether the Second Amendment protected an individual right or a right associated with membership in an organized militia because they could build on more than twenty years of scholarship directed at exactly that question. That historical literature touches on original understandings about permissible regulations, but does no more than that. Lower court judges do not have nearly as much material to use in an originalist mode as they and the Supreme Court had in *Heller*. They might be able to make some gestures in the direction of originalism and traditionalism,[10] but they will lack the materials for sustained originalist analysis.[11]

Perhaps more important, not all lower court judges are originalists or traditionalists, and even those who are also do standard-of-review analysis as a matter of routine. Lower court judges are more accustomed to doing standard-of-review analysis than to doing anything else, and they are likely to fall into familiar routines when confronted with challenges to gun regulations. This is particularly so when *Heller*, the most directly relevant Supreme Court decision, contains a standard-of-review passage they can readily cite in support of what they are likely to be inclined to do anyway.

Of course, saying that lower court judges will perform a standard-of-review analysis does not tell us what standard of review they will use. We can likely rule out strict scrutiny, but not because *Heller* directs lower courts to use something else. It is not difficult to generate an argument that the individual right recognized in *Heller* deserves the same degree of protection that other individual Bill of Rights guarantees get. Nor is it difficult to argue that the degree of protection is relatively high by drawing an analogy to First Amendment jurisprudence.[12] Rather, lower courts will, I think, be reluctant to apply strict scrutiny because of concern that such a standard imperils too many

10. *See, e.g.*, United States v. Luedtke, 589 F. Supp. 2d 1018, 1021 (E.D. Wis. 2008) (using a historical analysis, that "[i]n the classical republican political philosophy ascendant at the founding, the concept of a right to arms was tied to that of the 'virtuous citizen,'" to uphold a relatively new prohibition on the possession of guns by those subject to a domestic violence order).

11. I have little doubt that gun rights and gun-control proponents will generate information about these matters, although I am not confident about how quickly they will do so. In any event, lower courts will likely rely on studies generated by partisans only to bolster conclusions they reach for other reasons. In contrast, *Heller*'s originalism was enabled by studies undertaken by academics whom the Court could fairly regard as dispassionate and nonpartisan.

12. *But see* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007) (arguing that state courts interpreting guarantees of an individual right to gun ownership in state constitutions have not applied a high standard of review).

well-established, longstanding gun regulations.[13] The ban on possession of guns by convicted felons, for example, is almost certainly overbroad; not all felonies involve violence, nor are all felonies committed by people whose propensity to violate the law includes a propensity toward violence.[14] Strict scrutiny is strong medicine, raising all sorts of caution flags about judicial activism.[15] And, though judicial activism is justified when the Constitution requires it, the absence of strong direction—either from the Constitution's language, from historical evidence about early understandings regarding permissible regulations, or from the Supreme Court—will induce lower court judges to be cautious. I suspect that the closeness of the Court's division in *Heller*, to which I return in a moment, will have a similar effect.

The real choice, then, will be between intermediate scrutiny and rational basis with bite. Professor Winkler has argued that courts should look to the standards applied by state courts interpreting and applying state-level protections of weapons possession.[16] Without making any normative claim, I predict that lower courts will do so. Precedent-based decisionmaking probably dominates originalism and traditionalism as the usual mode of Constitutional interpretation,[17] and state court decisions could provide the precedents for such decisionmaking when the courts turn to interpreting the Second Amendment. As I read Professor Winkler's analysis, the state court decisions, although their language does not track precisely that used by the Supreme Court in formulating its federal standards of review, seem to circle around something more akin to rational basis with bite than to intermediate scrutiny, largely because of the

13. This is not to say, though, that lower court judges who did apply strict scrutiny would inevitably invalidate challenged regulations. I suspect that lower court judges are likely to find that many regulations, especially those reasonably analogous to the longstanding ones that the Court in *Heller* purported to leave untouched, survive what they will call strict scrutiny but that, on dispassionate analysis, probably amounts to intermediate scrutiny. (I have in mind here the obverse of the process by which the Court initially purported to rely solely on the rational-basis standard to invalidate a gender discrimination in *Reed v. Reed*, 404 U.S. 71 (1971), and then rather rapidly came to understand that it really was using intermediate scrutiny in gender discrimination cases.)

14. It is probably worth noting that over-breadth concerns, or something quite like them, are a routine part of strict scrutiny, which asks, among other things, whether the regulation in question is narrowly tailored toward accomplishing important public policies.

15. *See, e.g.*, J. Harvie Wilkinson III, *Of Guns, Abortion and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (criticizing *Heller* as "an act of judicial aggrandizement: a transfer of power to judges from the political branches of government—and thus, ultimately, from the people themselves").

16. *See* Winkler, *supra* note 12.

17. *See* Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 7 (Jeffrey Goldsworthy ed., 2006).

relatively casual acceptance by state courts of the proposition that legislative policies have some decent chance of accomplishing worthwhile policy goals.[18]

What will happen as lower court decisions accumulate? First, and easily overlooked, time will pass. And as it does the Supreme Court will change. That change is likely to have two dimensions. The first is a reduced need for originalism. In my view, *Heller* is likely to set the high-water mark for originalist interpretation. As I and others have noted, *Heller* provided the Court with a good opportunity to be originalist because the materials for other modes of interpretation—especially, precedent—were quite thin. Supreme Court precedents will of course remain thin until the Court takes up another Second Amendment case, but the Court is likely to take the accumulated lower court decisions as a relevant body of law that *it* can use to shape Second Amendment interpretation. The second dimension we are likely to see is a reduced commitment to originalism and to *Heller*. In addition, and probably more important, the Supreme Court that decides follow-ups to *Heller* almost certainly will be a Court with new members, some of whom are likely to be even less committed to originalist interpretation than some of the current justices.[19] And they are likely to be more accepting of views like Justice Breyer's when analyzing Second Amendment challenges. A reconstituted Court, I suspect, will be inclined to give *Heller* as narrow a scope as it can without overruling it. Rational basis with bite is a standard of review perfectly suited to that task.

The foregoing speculation is predicated on the assumption that the Supreme Court will not take up another Second Amendment case in the near future. That assumption is consistent with the Court's behavior in other areas after it has broken new ground. The insider jargon is "percolation": Make a big decision, wait to see what the lower courts do with it, and step in again only if the lower courts seem to be resisting the initial decision. I discuss in the next Part why I think that lower courts are unlikely to resist *Heller* openly even as they are likely to uphold gun regulations that gun-rights proponents are likely to characterize as obvious Second Amendment violations. So, if the Court follows its historical pattern, it will let Second Amendment issues percolate through the lower courts, which will consume time.

On the other hand, were a lower court to invalidate an important federal gun regulation, the Court would almost certainly grant review, no

18. Part II of this Essay examines three categories of regulations that might be adopted over the next few years, and shows how the standard-of-review question is likely to arise as lower courts consider the regulations' constitutionality.

19. They will likely be nominated by a president for whom Second Amendment rights are not a matter of central concern.

matter how little law had accumulated in the lower courts. The Court's enumeration of presumptively constitutional regulations, though, seems to insulate most existing important federal regulations from lower court invalidation. The question of incorporation—the applicability of Second Amendment rights to state regulation, which I discuss in the next Part—complicates speculation. Assuming that incorporation occurs, though, we would have to know how many important state laws regulating weapons are significantly different from existing federal regulations. Here, percolation seems likely to matter a great deal. It seems to me quite likely that the Court would wait to see what lower courts did with state regulations before it returned to the question of the Second Amendment's application to regulations significantly different from those it apparently approved in dictum as constitutional in *Heller*.[20]

Foreseeing the possibility of a change in the Court's composition, though, the *Heller* majority might pursue a different course: take advantage of what might be a temporary condition to do as much with Second Amendment rights as possible. Elsewhere I have called this a "shoot-the-moon" strategy.[21] Studies of the Court's internal dynamics suggest to me that doing so would create severe tensions within the Court, and at least some members of the *Heller* majority would have to live with those tensions after the Court's composition changed. Still, under some circumstances, a shoot-the-moon strategy makes sense. A group of justices who foresee themselves as a permanent minority on many issues important to them might think it worthwhile to get what they can now while forgoing relatively small chances of constituting an occasional majority on what they see as issues at the periphery of their main concerns.[22]

My speculations, then, are these: the Supreme Court will not take up a Second Amendment case in the near future (the incorporation question aside); lower courts will uphold nearly every existing federal regulation without much analysis; lower courts that do engage in some analysis will apply something like rational basis with bite, but almost always concluding that the challenged regulation is constitutional; the Supreme Court that does

20. For further discussion, see Adam Winkler, Heller's *Catch-22*, 56 UCLA L. REV. 1551 (2009).

21. Mark Tushnet, *Symposium Foreword: The First (and Last?) Term of the Roberts Court*, 42 TULSA L. REV. 495, 501 (2007).

22. Note, though, that the shoot-the-moon strategy assumes that the reconstituted Court will feel some obligation to respect as good precedents the decisions made when the strategy was being executed. Especially in light of the likely tensions such a strategy would create within the Court, I personally am skeptical that the decisions would be so regarded, and am therefore skeptical about the strategy's rationality.

consider substantive Second Amendment questions will contain new members who are likely to be unsympathetic to the method and outcome of *Heller*.

II. SKETCHING THE IMPLICATIONS OF *HELLER*'S AMBIGUITIES FOR LOWER COURTS

The preceding Part examined some ambiguities in *Heller*'s formulation of the method to be used in analyzing Second Amendment questions, focusing on their implications for lower courts and for the timing of the Supreme Court's further elaboration of the Second Amendment. Now I refocus on particular issues: the question of incorporation, and some specific forms of regulation, mostly on the state and local level.[23] My aim is to sketch the lines of argument that are likely to develop. Examining those arguments suggests to me that lower courts will probably apply rational basis with bite (or perhaps intermediate scrutiny), not so much because *Heller* so instructs them, but for reasons rooted in *Heller*'s ambiguities and the structure of lower court adjudication. Lower courts are, I suggest, likely to uphold almost everything they come across, with the exception of quite restrictive gun possession regulations, which they will invalidate in straightforward applications of *Heller*'s holding taken as narrowly as one fairly can. Post-*Heller* Second Amendment law will not be strongly supportive of expansive claims put forth by gun-rights advocates.

A. Incorporation

Heller was unusual in one respect: It involved a regulation of a sort usually adopted at the state or local level—indeed, it involved a city ordinance—but that happened to be directly subject to the Second Amendment because the city in question was the District of Columbia, the only city whose government is restricted by the Bill of Rights alone. Given the Court's effort to insulate most existing federal gun regulations from constitutional challenge, most of the interesting gun-rights cases for the future will involve state and

23. I do not discuss some policy proposals popular among gun-control proponents—for example, limitations on the number of guns that can be purchased within some specified period (usually, one month), and closing what gun-control proponents call the gun-show loophole, allowing some gun sales at organized gun shows to occur without going through the verification processes required for sales by federally registered gun dealers—because I find it impossible to construct plausible constitutional arguments, even after *Heller*, against them. These proposals implicate contested questions regarding their necessity and efficacy, but as far as I can tell, no interesting constitutional questions.

local regulations. These, though, are technically not Second Amendment cases but Fourteenth Amendment cases.

When challenges to state and local gun regulations arise, the first federal question will be whether state and local governments are bound at all by the restrictions that the Second Amendment imposes on the national government, through the incorporation of the Second Amendment into the Fourteenth.[24] The case for incorporation is far stronger on originalist grounds, at least for the Supreme Court, than the originalist case the Court accepted in holding that the Second Amendment protected an individual right to own handguns for self-protection in the home.[25] To reject incorporation after *Heller* is to strain at a gnat after swallowing the camel.[26]

But, for lower courts, there is a significant complication. Shortly after the Fourteenth Amendment's adoption, the Supreme Court held that the Second Amendment was not applicable to the states through the Fourteenth.[27] A bold lower court might try to distinguish those cases.[28] It might observe that *Heller* itself noted that these cases were decided before the Court had adopted its modern approach to selective incorporation, and "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."[29] It might observe as well that the cases discussed the Fourteenth Amendment without distinguishing among its provisions, and that the originalist case for incorporation might rest on either the Due Process or the Privileges or Immunities Clause, neither of which the Court discussed in detail. A bold lower court could say that the Court had not actually held that one or the other of those clauses did not incorporate the Second Amendment, only that the undifferentiated Fourteenth Amendment did.

Against this, though, stands the Supreme Court itself. The lower courts would have to say that the nineteenth-century cases had been effectively

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24. Such regulations will also have to survive challenges under state constitutions—either state constitutional guarantees of gun rights or the allocation of regulatory authority between state and city legislatures (preemption versus home rule).

25. *But see* Lawrence Rosenthal, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs* (Chapman Univ. Sch. of Law, Research Paper No. 09-302, 2009), *available at* http://ssrn.com/abstract=1245402 (arguing that the evidence for the public understanding of the Fourteenth Amendment as incorporating either the Bill of Rights as a whole or the Second Amendment specifically is at best not overwhelming).

26. *See Matthew* 23:24 ("Ye blind guides, which strain at a gnat, and swallow a camel.").

27. *See* Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1875).

28. *See* Nordyke v. King, 563 F.3d 439 (9th Cir. 2009) (holding that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment, and distinguishing prior Supreme Court decisions on the ground that they held only that the Fourteenth Amendment's Privileges and Immunities Clause did not incorporate the Second Amendment).

29. District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008).

overruled, or adopt an aggressive reinterpretation of those cases in distinguishing them. The Supreme Court has chastised lower courts for relying on their own judgment that prior Supreme Court decisions directly on point had been effectively overruled by the Court.[30] That job, the Court said, was for the Court itself, and only for the Court: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[31] Again, this could be distinguished by an aggressive lower court, perhaps on the ground that the nineteenth-century cases do not directly control because of their failure to distinguish between the relevant Fourteenth Amendment clauses.[32] Yet, given the strength of the Court's views on who gets to overrule its own decisions, I suspect that the Court would review such an aggressive distinction were a lower court to use it as a predicate for invalidating some gun regulation.[33]

My point here is simple: After *Heller*, the first important question the Supreme Court will have to decide is incorporation. And, in doing so, it need not address any substantive questions about the Second Amendment's scope. Consider a lower court decision upholding a state or local gun regulation on the grounds that the nineteenth-century cases require it to hold that the Second Amendment's strictures do not apply to state and local regulations. The *Heller* Court, and any responsible Court for that matter, almost certainly would reverse that decision.[34] The lower court, though, would not have evaluated the regulation according to Second Amendment standards, whatever they are, and the proper course for the Court would be to remand the case to the lower court for application of those standards.

Here again time matters. Step One was *Heller*. Step Two will be incorporation. Step Three will be clarifying and applying *Heller*. At the ordinary pace of litigation, the Supreme Court will take Step Three more than a few years from now. That Supreme Court almost certainly will be different from the one that decided *Heller*, and probably in ways bearing on how it applies *Heller*.

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30. *See, e.g.*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

31. *Id.* at 484.

32. *See Nordyke*, 563 F.3d at 457 n.16 (after asserting that "there is no Supreme Court precedent directly on point," citing *Rodriguez de Quijas*, 490 U.S. at 484, with a "*cf.*" signal).

33. Notably, *Nordyke* is not such a case because it upheld the regulation at issue against a Second Amendment challenge.

34. In saying this, I do not mean to assert that the *Heller* dissenters could not responsibly take the position that the Fourteenth Amendment incorporated the Second, but only *as they would have interpreted it*—that is, as protecting a right associated with membership in an organized militia.

B. Types of Regulation

Proponents of gun regulations have shown a fair amount of creativity, coming up with a wide range of regulations that they characterize as reasonable that are both politically and constitutionally acceptable. I do not propose to assess the constitutionality of all existing, pending, or suggested gun regulations after *Heller*. As I have noted, Justice Scalia's opinion says that most, if not all, of the significant existing national gun regulations are presumptively constitutional. It is relatively easy to come up with examples of possibly unconstitutional applications of those regulations: preventing from owning a handgun for self-defense a person convicted of some white-collar crime who has experienced a religious conversion while in prison and now resides in a crime-ridden urban neighborhood while doing outreach social work,[35] or preventing a person subject to a domestic violence protection order from owning a gun when the order was issued with only rudimentary procedural protections.[36] I wonder, though, whether courts will actually get their hands on such cases, in light of prosecutorial discretion and limitations on anticipatory as-applied challenges to criminal laws.

In what follows, then, I focus on some generic categories of possible regulations rather than on specific examples of regulations already adopted somewhere. Nor do I consider the constitutionality under *Heller* of new national regulations, including, for example, the revival of the now-expired ban on private possession of so-called assault weapons, because, notwithstanding claims by the National Rifle Association (NRA),[37] I think it extremely unlikely that such regulations will be adopted in the relatively short run, which as I have

35. I have in mind someone inspired by former Watergate conspirator Charles Colson's example. I should note, though, that the argument for the unconstitutionality of the gun possession ban as applied to such a person rests either on a form of standard-of-review analysis more finely grained than is usual, or on insisting that the historically rooted idea that felons were not virtuous citizens connected lack of virtue with a propensity to violence.

36. Here the example is *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). The idea appears to be that it is permissible to restrict a person's physical movement to the relatively slight degree that domestic violence protection orders do after employing barebones due process requirements, but not permissible to impose more substantial restrictions, especially on specifically enumerated constitutional rights, without more than those minimal protections necessary to satisfy due process alone.

37. *See, e.g.*, News Release, Statement of NRA Executive Vice President Wayne LaPierre on President-elect Obama's Employment Application Form Demanding to Know If Applicants Are "Registered" Gun Owners, (Nov. 13, 2008), http://www.NRAILA.org/News/Read/NewsReleases.aspx?ID=11813 (stating that the Obama administration has "every intention of putting together an administration that is hostile to firearms ownership and to Second Amendment rights. . . . This is more proof that this administration is coming after our freedom and NRA stands ready").

suggested is the relevant time frame. Some of the categories are modeled on regulations already adopted, though, while others involve proposed regulations that seem to have some potential of adoption somewhere in the country.

1. Registration and Similar Requirements

Oddly, *Heller* may actually ease the path to the adoption of regulations requiring that those who wish to possess handguns register their ownership, with the right to possess a gun contingent on satisfying licensing-like rules such as demonstrating one's ability to use guns responsibly and accurately, and knowledge about safe storage of weapons.[38] The reason is that gun-rights advocates had been able to portray registration and licensing requirements as one step toward gun-control proponents' ultimate goal of gun confiscation. *Heller* rules out that goal as long as it stands. The slippery slope to gun confiscation is not quite as slippery after *Heller*, though gun-rights proponents can continue to argue that there is still some grease on the slope.[39]

Yet, not all registration requirements accompanied by conditions under which registration will be allowed can be constitutional after *Heller*.[40] How will lower courts deal with registration requirements? There is one obvious baseline: They will not allow requirements functionally equivalent to a complete ban.[41] I assume that lower courts will determine whether a requirement falls within that category by examining—prospectively, I suppose, but based on evidence offered by the requirement's challengers and defenders—how many ordinary citizens are likely to be able to satisfy the requirements. So, for example, a testing requirement that amounted in practice to a requirement that a gun owner be as good at hitting targets as professional marksmen would so sharply narrow the class of those likely to get a license as to functionally serve as a complete ban. Lower courts will struggle to draw the line between such requirements and those that exclude 33 percent of the population

38. For a discussion of a Canadian licensing test, see TUSHNET, *supra* note 9, at 110–11.

39. It would be rhetorically awkward to simultaneously point out that the Second Amendment guaranteed an individual right to own handguns for self-defense in the home and that that right rested on a Supreme Court decision that might be overruled in the indefinite future.

40. In form, the statute at issue in *Heller* was a registration requirement, with conditions so stringent that no ordinary citizen could satisfy them. District of Columbia v. Heller, 128 S. Ct. 2783, 2787 & n.1 (2008) (noting that the District of Columbia prohibits registration of handguns with "minor exceptions").

41. I doubt that legislatures or city councils will try to adopt complete bans after *Heller*, but there are some already on the books that would clearly fail were the Second Amendment as interpreted in *Heller* to be incorporated into the Fourteenth. More likely, legislative bodies inclined toward stringent regulation will impose requirements that could reasonably be challenged as the functional equivalents of complete bans.

(or 50 percent or some other arbitrary percentage). I offer my guess that the functionally-equivalent-to-a-complete-ban standard will set a relatively high threshold for finding unconstitutionality.

Below that threshold, courts will have to deal with the standard-of-review question that the Supreme Court finessed in *Heller*.[42] My sense is that the relevant legal communities have begun to describe the standard of review in terms drawn from the Court's abortion jurisprudence: Regulations will be permitted unless they place undue burdens on the right identified in *Heller*. Unfortunately, that verbal formulation tells us almost nothing, in large part because the abortion jurisprudence itself has given it almost no content—and indeed has done little to explain how one decides that one regulation does not impose an undue burden while another does. To the extent that one can extract something from the abortion cases, it is that the undue-burden standard might require rational basis with bite, intermediate scrutiny, or more likely something in between.

I suspect that lower courts will not be comfortable being put in the position of the people who design college and law school admissions tests asking, "How hard is it, really, to pass this test?"[43] I suspect that they are likely to examine what test designers would call the "face validity" of licensing requirements, asking whether a particular requirement seems in a common sense way to deal with something relevant to a person's likely ability to use guns responsibly, and not the "construct validity" of such requirements, asking whether the requirement actually does have some bearing on that ability.[44] Assessing construct validity entails doing the kind of empirical investigation that most formulations of intermediate scrutiny suggest is required, whereas assessing face validity does not. If I am right in speculating that lower courts will examine only face validity, the law of gun licensing will gravitate toward the rational basis with bite end of the continuum of standards of review.

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42. An originalist approach to registration and licensing requirements is, I think, almost certainly likely to be rejected. On the one hand, direct historical analogues to contemporary licensing schemes are somewhere between rare and nonexistent. That would suggest that all such schemes are unconstitutional, a conclusion that I doubt any but the boldest lower court judges would reach. On the other hand, registration and licensing schemes are more finely tuned in identifying individuals whose ownership of weapons might not threaten important public goals any more than do the categorical exclusions the Court described as presumptively constitutional. That would suggest that such schemes should be presumptively constitutional, depending on their stringency.

43. Imagine a judge unfamiliar with handguns attempting to determine the difficulty of a performance test by going to a shooting range.

44. An inclination to focus on face rather than construct validity might be reinforced by the inevitable factual controversies that will break out over whether, and the degree to which, a requirement does indeed have construct validity.

2. Safe-Storage Requirements

Another form of regulation currently in favor among gun-control proponents is the safe-storage law. These regulations take numerous forms: requirements that weapons be stored unloaded, or in locked containers, for example. Their purpose is to inhibit accidental weapons discharges and deliberate but rash weapons use. *Heller* points in opposing directions with respect to safe-storage laws. The Court summarized the right protected by the Second Amendment as one that would be protected as long as—and perhaps only as long as—a person had immediate access to a functioning handgun for use in self-defense in the home.[45] Looking at the reasoning supporting that conclusion, though, we find only this: The city required that handguns "be rendered and kept inoperable at all times," which "makes it impossible for citizens to use them for the core lawful purpose of self-defense."[46] "At all times" and "impossible" are different from "immediate": Safe-storage laws do not make it impossible to use a handgun for self-defense, although they make it harder to do so.[47] In addition, responding to Justice Breyer's citation of a number of safe-storage requirements in effect in the founding era, Justice Scalia observed that "[n]othing about" those laws "remotely burden[s] the right of self-defense as much as an absolute ban on handguns."[48] This at least opens up the possibility that a contemporary safe-storage law might similarly and constitutionally burden the right protected by *Heller*. Of course, whether it does so would depend on how difficult the safe-storage requirement makes it to retrieve the weapon and render it useful for self-defense.[49] And so once again we are in standard-of-review land.

3. Banning Particular Types of Weapons

The final type of regulation I consider is the ban on particular types of weapons. *Heller* indicated that longstanding bans on private possession of machine

45. *See Heller*, 128 S. Ct. at 2821–22 (2008) ("In sum, we hold that the District's . . . prohibition against rendering any lawful firearm in the home *operable* for the purpose of *immediate* self-defense [violates the Second Amendment].") (emphasis added).

46. *Id.* at 2818.

47. The degree to which they make it harder will depend on precisely what the requirement is, and will certainly be contested in litigation challenging safe-storage requirements.

48. *Heller*, 128 S. Ct. at 2820.

49. Arguing for the City in *Heller*, Walter Dellinger asserted that it took him three seconds to disable trigger locks that the city required on long guns such as rifles and shotguns. Transcript of Oral Argument at 79, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290).

guns or sawed-off shotguns were constitutional. What about bans on so-called assault weapons or what formerly were described as "Saturday Night Specials"?[50]

Here, too, *Heller* supports competing conclusions. It appears to allow strict regulation of, and perhaps bans on, the possession of "dangerous and unusual weapons."[51] But exactly how to measure dangerousness is unclear, in light of the fact that handguns, possession of which is protected by the Second Amendment as interpreted in *Heller*, can be lethal when used as designed. Reflection on the proposition that the *Heller* Court assumed that machine guns were dangerous (as well as unusual) suggests one candidate to measure dangerousness: the increase in lethality for effort expended. That measure would support the constitutionality of bans on the possession of semi-automatic weapons, which decrease the effort needed to fire second and successive shots.[52]

The dangerousness criterion has to be assessed as well in light of the Court's discussion of why possession of handguns for self-defense in the home was protected by the Second Amendment. The Court enumerated the practical reasons why people seeking to defend themselves would like to have ready access to a handgun:

> It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police.[53]

Handguns, that is, are especially useful when used for self-defense in the home. Perhaps, then, we should qualify the dangerousness criterion by insisting that dangerousness be assessed in light of the utility of a particular type of weapon. And, once again, *Heller* provides little guidance on how to do so.

The criterion "unusual" also raises questions. Justice Scalia's originalist analysis led him to conclude that the Second Amendment right extended to the possession of weapons that were "in common use" at the time of the Amendment's adoption.[54] And his description of the utility of handguns for self-defense in the home ended, "Whatever the reason, handguns are the

50. I put aside the well-known difficulties of defining the banned weapons in ways that are not amenable to ready evasion.

51. *Heller*, 128 S. Ct. at 2817 (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *148).

52. Perhaps the increase in dangerousness, so defined, is not large enough to make the weapons dangerous in the *Heller* Court's eyes. My personal view is that some of the Justices in the *Heller* majority had no real idea about how to define the category of dangerous and unusual weapons except that it included machine guns.

53. *Heller*, 128 S. Ct. at 2818.

54. *Id.* at 2815 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

most popular weapon chosen by Americans for self-defense in the home."[55] A weapon might be unusual and (if dangerous) subject to a ban consistent with the Second Amendment if it was not in wide enough use when the ban was adopted.[56] The NRA's web site states that semi-automatic weapons, including semi-automatic rifles, shotguns, and handguns "account for about 15 percent of the 250+ million privately-owned firearms in the U.S."[57] Is ownership of such weapons sufficiently widespread to mean that they are popular and in common use? What about a ban on some subset of such weapons such as semi-automatic handguns, which, if the NRA is right, constitute something less than 15 percent of the weapons in private hands? And, to home in on a question directly related to the standard of review, to what extent should the fact that a popularly elected legislative body has sought to ban a type of weapon be taken as an indication that possession of such a weapon is not popular, at least in the enacting jurisdiction?

As we have seen, there are two ways of approaching such questions. Lower courts could engage in an originalist inquiry. They could try to identify some weapon that was understood to be "dangerous and usual" in the founding era, attempt to determine how widespread was its ownership, and then compare the result to the contemporary popularity of the banned weapon. For reasons I have already given, I doubt that lower courts will be well equipped to make such an inquiry, at least within a reasonable time frame.[58] The alternative is some sort of categorical balancing, in which the lower court considers dangerousness, utility, and popularity to decide whether a ban on a particular type of weapon is consistent with the *Heller* Court's indication that legislatures can ban dangerous and unusual weapons.[59] Finally, the standard-of-review issue recurs, here in a slightly altered form—as the degree of deference a court gives to a legislature's judgment that a type of weapon is sufficiently dangerous, insufficiently popular, and not sufficiently more useful than handguns.

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55. *Id.* at 2818.

56. *Cf. id.* at 2869 (Breyer, J., dissenting) ("On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so.").

57. NAT'L RIFLE ASS'N INST. FOR LEGISLATIVE ACTION, SEMI-AUTOMATIC FIREARMS AND THE "ASSAULT WEAPON" ISSUE (Sept. 3, 2008), http://www.NRAILA.org/Issues/FactSheets/Read.aspx?id=238.

58. *See supra* note 11 (expressing skepticism about the usefulness to lower courts of information generated by partisans).

59. For a discussion of categorical balancing in the Second Amendment context, see Mark Tushnet, Heller *and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. (forthcoming 2009, on file with author).

In discussing registration requirements and safe-storage laws, I suggested that lower courts would incline toward using rational basis with bite to evaluate the constitutionality of such laws. However, my intuitions about their inclinations with respect to bans on particular types of weapons are quite weak. But, if the trend in lower court decisions dealing with other forms of regulation is toward rational basis with bite, I would guess they will use a similar standard of review in this setting as well.

CONCLUSION

Near the end of the *Heller* opinion, Justice Scalia responded to Justice Breyer's criticism of the Court "for leaving so many applications of the right to keep and bear arms in doubt" by observing that initial forays into previously unexplored doctrinal territory rarely create "a state of utter certainty," and that "there will be time enough" to develop the doctrine as later cases come to the Court.[60] Fair enough. But one might recall a similar passage in *United States v. Lopez*, where Chief Justice Rehnquist rejected the criticism that the Court's decision would produce "legal uncertainty," which, he wrote, was an inevitable side-effect of federalism doctrine.[61] Again, fair enough. But, to give an ironic spin to Justice Souter's terse words at the conclusion of his dissent in *Lopez*, "we know what happened."[62] Even without any relevant change in the Court's composition, the Federalism Revolution inaugurated by *Lopez* sputtered out.

By the time the Supreme Court addresses a substantive Second Amendment question, that Amendment may well be something like federalism after the Federalism Revolution: available to strike down an occasional law almost at random, and with some effects on the policymaking process but with no substantial doctrinal content.[63] Like the Rehnquist Court's federalism decisions, the contemporary meaning of the Second Amendment was strongly contested and is likely to remain so. By the time the Supreme Court gets around to hearing substantive Second Amendment challenges, the only real question for the Court will be, I suspect, whether to give *Heller* a respectful burial by rejecting the individual-rights interpretation it adopted, or to pretend that the Second Amendment protects an individual right while giving essen-

60. *Heller*, 128 S. Ct. at 2821.
61. United States v. Lopez, 514 U.S. 549, 566 (1995).
62. *Id.* at 615 (Souter, J., dissenting).
63. In referring to substantive Second Amendment challenges, I mean to put to one side the incorporation issue.

tially no content to it except as a constitutional barrier to complete prohibitions on handgun possession in the home for self-defense purposes.[64]

64. If I am right, each of those components—handguns, home, self-defense purposes—will be strictly construed as well.