CONSTITUTIONAL LAW — SECOND AMENDMENT — SEVENTH CIRCUIT HOLDS BAN ON FIRING RANGES UNCONSTITUTIONAL. — *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

The Supreme Court held in *District of Columbia v. Heller*[1] that the Second Amendment protects an individual right, unconnected with service in a militia, "to possess and carry weapons in case of confrontation."[2] In *McDonald v. City of Chicago*,[3] the Court held that this guarantee binds the states as well as the federal government.[4] The Court's decisions, however, left many applications of the Second Amendment in doubt.[5] Recently, in *Ezell v. City of Chicago*,[6] the Seventh Circuit granted a preliminary injunction against the enforcement of a Chicago prohibition on firing ranges, reasoning that the ban violated the Second Amendment right to keep and bear arms.[7] Working by analogy to First Amendment doctrine, the court held that a law that burdens the Second Amendment right is subject to heightened scrutiny unless the activity it regulates is beyond the right's "scope."[8] That scope, the court held, turns on how the right to keep and bear arms was understood in 1791 (when the Bill of Rights was ratified) or 1868 (when the Fourteenth Amendment was ratified).[9] A more complete analogy to the First Amendment, however, would have supported a different test: that a weapons regulation is exempt from Second Amendment scrutiny only if the activity it regulates has been subject to a long-standing and widespread "tradition of proscription."[10]

After the Supreme Court held Chicago's prohibition on handgun possession unconstitutional in *McDonald*, the Chicago City Council adopted the Responsible Gun Owners Ordinance.[11] The ordinance prohibited "[s]hooting galleries, firearm ranges, or any other place where firearms are discharged."[12] A group of Chicago residents, two gun rights advocacy organizations, and a firing-range company sued

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1 128 S. Ct. 2783 (2008).

2 *Id.* at 2797.

3 130 S. Ct. 3020 (2010).

4 *Id.* at 3026.

5 *Id.* at 3115 (Stevens, J., dissenting).

6 651 F.3d 684 (7th Cir. 2011).

7 *Id.* at 711.

8 *Id.* at 701–02.

9 *See id.* at 702.

10 Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011); *see also* Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347–48 (2011).

11 *Ezell*, 651 F.3d at 690.

12 CHI. MUN. CODE § 8-20-280. The ordinance also required individuals to undergo one hour of training at a firing range in order to possess a firearm. *Id.* § 8-20-120(a)(7). Thus, Chicago imposed on the exercise of the right to keep and bear arms a condition that it simultaneously made illegal to fulfill within city limits. *Ezell*, 651 F.3d at 698.

the city in federal court.[13] They sought a preliminary injunction against enforcement of the ban, which they claimed infringed the right to keep and bear arms.[14]

In an opinion by Judge Kendall, the district court denied the request for a preliminary injunction, holding that the plaintiffs had not met their burden of showing that denying the injunction would cause them irreparable harm and that they had some likelihood of success on the merits.[15] The court reasoned that the plaintiffs' harm — which it characterized as their being required to travel outside Chicago in order to train at a firing range — was not irreparable because it could be redressed by damages for travel expenses.[16] And it rejected the plaintiffs' contention that they were likely to succeed on the merits: First, it believed that the firing-range ban was not subject to heightened scrutiny.[17] And second, it concluded that even if heightened scrutiny did apply, Chicago could meet that standard.[18]

The Seventh Circuit reversed and remanded.[19] Writing for the panel, Judge Sykes[20] questioned the district court's focus on the availability of firing ranges outside Chicago, noting that harm to a constitutional right is not measured "by the extent to which it can be exercised in another jurisdiction."[21] Applying a presumption that deprivations of Second Amendment rights are irreparable, the court held that the plaintiffs had satisfied the first threshold requirement for a preliminary injunction.[22] Turning to the likelihood of success on the merits, the court articulated a two-step "framework for Second Amendment litigation."[23] First, a court assessing the constitutionality of a weapons regulation must determine whether the regulated activity is within the scope of the right to keep and bear arms.[24] If so, there follows "a

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[13] *Ezell*, 651 F.3d at 692.

[14] *Id.* at 690. The challenge did not depend on Chicago's requiring range training as a condition of gun ownership; instead, the plaintiffs claimed an independent Second Amendment right to train at a firing range. *Id.* at 712 (Rovner, J., concurring in the judgment).

[15] Ezell v. City of Chicago, No. 10-CV-5135, 2010 WL 3998104, at *7–9 (N.D. Ill. Oct. 12, 2010).

[16] *Id.* at *7.

[17] *Id.* at *6.

[18] *Id.* at *8–9.

[19] *Ezell*, 651 F.3d at 711.

[20] Judge Kanne joined Judge Sykes's opinion.

[21] *Ezell*, 651 F.3d at 697.

[22] *See id.* at 699–700.

[23] *Id.* at 700–04. Other circuits have followed similar approaches. *See* Heller v. District of Columbia, No. 10-7036, 2011 WL 4551558, *5–6 (D.C. Cir. Oct. 4, 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010). *See generally* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009).

[24] *Ezell*, 651 F.3d at 701.

second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights."[25]

The *Ezell* court adopted a historical test for determining whether a weapons regulation is subject to Second Amendment scrutiny, noting that courts likewise consider "history and legal tradition" in ascertaining which categories of speech are unprotected by the Free Speech Clause.[26] If the challenged regulation is a federal law, the court's approach would presumptively subject it to such scrutiny unless the government establishes that the regulated activity is outside the scope of the Second Amendment right as understood in 1791, when the Bill of Rights was ratified.[27] If the challenged regulation is a state law, the same presumption applies, but "the focus of the original-meaning inquiry is carried forward [to 1868,] . . . when the Fourteenth Amendment was ratified."[28] Applying this framework to Chicago's firing-range ban, the court found unpersuasive the city's reference to "founding-era, antebellum, and Reconstruction state and local laws that limited the discharge of firearms in urban environments."[29] These laws, said the court, were not from "the most relevant historical period," that "leading up to and surrounding the ratification of the Fourteenth Amendment."[30] The court concluded that Chicago's evidence fell "far short" of establishing that the ban was categorically exempt from Second Amendment scrutiny.[31]

Proceeding to the second step of its analysis, the court observed that the rigor with which courts review speech regulations depends both on the proximity of the regulated speech to the "core" of the First Amendment and on the severity of the burden that the regulation imposes.[32] The court deemed that approach appropriate for Second Amendment cases as well.[33] The law was therefore subject to "not quite 'strict scrutiny'": Chicago had to "establish a close fit between the range ban and the actual public interest it serves" and show that the public interest is "strong enough" to justify the burden on Second Amendment rights.[34] This the city could not do, for it had "produced no empirical evidence whatsoever" about the dangers posed by the discharge of guns in urban environments.[35] Hence, the plaintiffs had

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[25] *Id.* at 703.
[26] *Id.* at 702.
[27] *See id.*
[28] *Id.*
[29] *Id.* at 705.
[30] *Id.*
[31] *Id.* at 706.
[32] *See id.* at 703.
[33] *See id.*
[34] *Id.* at 708–09.
[35] *Id.* at 709.

shown a substantial likelihood of success on the merits.[36] The court therefore ordered that a preliminary injunction against the enforcement of the range ban be granted.[37]

Judge Rovner concurred in the judgment, stating that the court was adopting a stricter standard of review than was justified.[38] She argued that the range ban did not "implicat[e] the core of the Second Amendment right"[39] but merely regulated training, "an area ancillary to a core right."[40] The regulation's burden on training, moreover, was not as substantial as the majority supposed: although the range ban prevented training involving the discharge of actual firearms, it did not forbid training with a gun simulator.[41] In light of the nature and degree of the regulation's burden on Second Amendment rights, Judge Rovner eschewed the majority's "not quite strict scrutiny" in favor of intermediate scrutiny, under which the ban would be permissible so long as it bore a "substantial relationship" to an "important government objective."[42] She concluded, however, that the city had failed to meet even this standard.[43]

Throughout its opinion, the *Ezell* court relied heavily on analogies to the First Amendment. In one respect, however, the court did not hew as closely to the First Amendment analogy as it could have. Although earlier cases were ambivalent about the relationship between tradition and the First Amendment's scope,[44] more recent Supreme Court decisions, starting with *United States v. Stevens*,[45] have assigned tradition a central role in the scope inquiry. Those cases have held that a speech regulation is exempt from heightened scrutiny only if there is "persuasive evidence" that the regulation is part of a long "tradition of proscription."[46] *Ezell*, by contrast, expressed its threshold

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[36] *Id.* at 710.

[37] *Id.* at 711.

[38] *Id.* at 713 (Rovner, J., concurring in the judgment).

[39] *Id.* (quoting *id.* at 708 (majority opinion)) (internal quotation marks omitted).

[40] *Id.*

[41] *See id.* at 712.

[42] *Id.* at 713 (quoting United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010)) (internal quotation marks omitted).

[43] *See id.*

[44] Early Supreme Court cases suggested that tradition was a sufficient condition for exempting a regulation from the ambit of the First Amendment, but later decisions rejected that premise. *Compare* Robertson v. Baldwin, 165 U.S. 275, 281 (1897) (suggesting that libel has been unprotected since "time immemorial"), *with* New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964) (extending First Amendment protection to some speech formerly considered libel). Some cases also implied that tradition is not a necessary condition for exempting a regulation from First Amendment protection. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 763–64 (1982).

[45] 130 S. Ct. 1577 (2010).

[46] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011); *see also* Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2348–49 (2011) (holding that a regulation's being part of a tradition dating to the founding is sufficient for deeming it presumptively consistent with the First

scope inquiry in terms of the "public understanding" of the right to keep and bear arms in 1791 or 1868.[47]

Although both require historical analysis, the originalist test (at least as applied by the Seventh Circuit) and the traditionalist test differ in important respects. First, whereas the objective of the originalist inquiry is to discern a provision's public understanding at the time of its adoption, the touchstone of the traditionalist inquiry is whether the laws alleged to be exempt from heightened scrutiny have long been in place. In *Brown v. Entertainment Merchants Ass'n*,[48] for example, the Supreme Court rejected reliance on Justice Thomas's claim in dissent that "the founding generation would not have understood 'the freedom of speech' to include a right to speak to children without going through their parents."[49] Because of the "absence of any precedent" for restrictions on speaking to minors without first obtaining their parents' permission, such restrictions were subject to strict scrutiny.[50] Second, whereas the originalist test's focus is a specific moment, the traditionalist inquiry is not restricted to a particular historical period. For instance, in rejecting the contention that violent speech is categorically unprotected by the First Amendment, *Brown* considered American practice during the nineteenth and twentieth centuries.[51]

Instead of adopting an originalist test for the scope of the Second Amendment, the *Ezell* court could have simply borrowed the relevant First Amendment formulation and held that a weapons regulation is exempt from Second Amendment scrutiny[52] only if it is part of a "'universal and long-established' tradition of prohibit[ion]."[53] Guns, to be sure, are not speech, and the jurisprudence of the Second Amend-

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Amendment); *Stevens*, 130 S. Ct. at 1585–86 (holding that a regulation's being part of a long-standing tradition is necessary for deeming it presumptively consistent with the First Amendment).

47 The Seventh Circuit's adoption of different historical reference periods for federal and state gun regulations is inconsistent with the "well established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government." McDonald v. City of Chicago, 130 S. Ct. 3020, 3035 n.14 (2010). *McDonald* confirmed that this rule applies to the Second Amendment. *See id.* at 3048 (plurality opinion).

48 131 S. Ct. 2729.

49 *Id.* at 2759 (Thomas, J., dissenting).

50 *Id.* at 2736 n.3 (majority opinion).

51 *See id.* at 2736–38.

52 *Heller* held that laws that burden the right to keep and bear arms may not simply be reviewed under the rational basis test, but it did not specify how those laws *should* be reviewed. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2817–18, 2818 n.27 (2008). Judges in the lower federal courts have resolved this uncertainty in different ways. *Compare Ezell*, 651 F.3d at 708 (applying "not quite 'strict scrutiny'"), *and* Heller v. District of Columbia, No. 10-7036, 2011 WL 4551558, *8 (D.C. Cir. Oct. 4, 2011) (applying intermediate scrutiny), *with id.* at *23 (Kavanaugh, J., dissenting) (rejecting "balancing test[s] such as strict or intermediate scrutiny" in favor of categorical rules "based on text, history, and tradition").

53 Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002) (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 377 (1995) (Scalia, J., dissenting)).

ment need not copy that of the First in every respect.[54] Here, however, reliance on the First Amendment analogy would be warranted.[55]

To begin, the Supreme Court's rationales for using legal tradition to determine the First Amendment's scope apply to the Second Amendment as well. First, the Court has said that speech restrictions bearing the endorsement of long-established and universal traditions are presumptively constitutional because such traditions provide strong and reliable evidence of original meaning.[56] Second, it has treated long-standing laws as an independent guide to constitutional meaning because such laws reflect the principles to which the American people have adhered over time.[57] And third, it has emphasized the ability of a tradition-based test to constrain judicial discretion.[58] None of these justifications are unique to speech; to the contrary, each is a general principle of constitutional interpretation, applicable to the Second Amendment just as much as it is to the First.[59]

Further, the three ends that the Supreme Court's recent First Amendment cases have said a tradition-based test serves are, according to *Heller*, also relevant to the interpretation of the Second Amendment. *Heller*'s insistence that the Amendment's scope depends

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[54] *Cf.* Recent Case, *En Banc Seventh Circuit Holds Prohibition on Firearm Possession by Domestic Violence Misdemeanants to Be Constitutional:* United States v. Skoien, 124 HARV. L. REV. 1074, 1077–81 (2010) (critiquing the analogy between the First and Second Amendments).

[55] At first, it might seem anomalous for the Supreme Court to consult laws from the eighteenth, nineteenth, and twentieth centuries in determining the scope of a right whose basic meaning the Court settled only in the twenty-first century. But as *Heller* acknowledged, "the Second Amendment, like the First . . . , codified a *pre-existing* right." *Heller*, 128 S. Ct. at 2797. That right, *McDonald* confirmed, is "deeply rooted in this Nation's history and tradition." McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (internal quotation marks omitted). Thus, even laws predating *Heller* reflect the public understanding, over time, of the right to keep and bear arms, and courts are justified in relying on those laws in fashioning Second Amendment doctrine.

[56] The Court has suggested that long-standing laws provide evidence of original meaning in holding that legislators' votes are not protected speech. Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347–49 (2011). *See generally McIntyre*, 514 U.S. at 375–78 (Scalia, J., dissenting) (discussing the connection between legal tradition and original meaning).

[57] The Court has linked tradition and the "judgment [of] the American people" in holding that violent video games, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011) (alteration in original) (quoting United States v. Stevens, 130 S. Ct. 1577, 1585 (2010)) (internal quotation marks omitted), and depictions of animal cruelty, *Stevens*, 130 S. Ct. at 1585, are protected. *See generally* Rutan v. Republican Party of Ill., 497 U.S. 62, 95–97 (1990) (Scalia, J., dissenting) (discussing the connection between legal tradition and the "principles . . . [of] the American people").

[58] In *Stevens* and *Brown*, the Court said that a tradition-based test denies judges "freewheeling authority" to declare categories of speech outside the bounds of the First Amendment. *Brown*, 131 S. Ct. at 2759 (quoting *Stevens*, 130 S. Ct. at 1586) (internal quotation mark omitted); *Stevens*, 130 S. Ct. at 1586. *See generally McDonald*, 130 S. Ct. at 3057–58 (Scalia, J., concurring) (discussing how a tradition-oriented methodology constrains judges).

[59] *Cf.* Robertson v. Baldwin, 165 U.S. 275, 281–88 (1897) (using tradition to discern the scope of the Thirteenth Amendment's prohibition on involuntary servitude).

on its original meaning is plain enough.[60] But in holding that the District of Columbia's handgun ban infringed the right to keep and bear arms, *Heller* also emphasized the values shared by the American people[61] as well as the importance of cabining judicial discretion.[62]

The Supreme Court's Second Amendment case law, moreover, does not merely aspire to comporting with the Amendment's original meaning, reflecting the long-held principles of the American people, and constraining judges. The methodology underlying those precedents also establishes the Court's conviction that reliance on legal tradition is the appropriate means of attaining those ends. Central to *Heller*'s holding that the Second Amendment protects a right to keep and bear arms for self-defense is the premise that legal tradition provides more reliable evidence of original meaning than do sources such as the text's drafting history.[63] Central to *McDonald*'s holding that the Fourteenth Amendment makes this right applicable to the states is the premise that long-standing laws reflect shared national values.[64] And implicit in both *Heller*'s and *McDonald*'s preferring tradition-based tests to alternatives offered by the dissenting Justices is the premise that tradition-based tests constrain judicial discretion.[65] In short, the principles that justify holding that tradition determines whether speech regulations are categorically exempt from First Amendment scrutiny also justify, in at least equal measure, holding that tradition determines whether weapons regulations are categorically exempt from Second Amendment scrutiny.

The doctrinal case for reliance on tradition to determine the Second Amendment's scope is, if anything, even stronger than its First Amendment counterpart. Pre-*Stevens* First Amendment cases did not

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60 *See Heller*, 128 S. Ct. at 2821.

61 *See id.* at 2817–18 (relying on the American people's "hav[ing] considered the handgun to be the quintessential self-defense weapon").

62 *See id.* at 2821 (rejecting an interest-balancing test as "judge-empowering").

63 *Heller* claimed that legal materials — laws, cases, and treatises — created long before and long after the adoption of the Bill of Rights were "critical" to its quest for the "original understanding of the Second Amendment" but that reliance on other sources such as the Amendment's drafting history was "dubious." *Id.* at 2802–05.

64 According to *McDonald*, whether a Bill of Rights guarantee binds the states depends on whether the right it protects is "fundamental from an American perspective." McDonald v. City of Chicago, 130 S. Ct. 3020, 3046 (2010) (plurality opinion). This question, in turn, is answered with reference to the nation's "history and tradition." *Id.* at 3036 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (internal quotation mark omitted).

65 *Heller* consulted legal tradition to determine whether the District of Columbia's interest in preventing handgun-related violence justified the burden the handgun ban imposed on the right to keep and bear arms. *See Heller*, 128 S. Ct. at 2818. It simultaneously rejected a "freestanding 'interest-balancing' approach" because such a test did not constrain judges. *Id.* at 2821.

McDonald used legal tradition to determine whether the Second Amendment guarantee applies to the states, *see McDonald*, 130 S. Ct. at 3036 (plurality opinion), while rejecting Justice Stevens's proposed multifactor test in part because of its "subjectiv[ity]." *See id.* at 3048.

suggest a strong connection between tradition and the Amendment's scope, let alone establish that tradition was dispositive.[66] Still, in the face of those precedents, the Court has made tradition central to its First Amendment inquiry. In the Second Amendment context, by contrast, no precedents stand in the way of reliance on tradition.

Indeed, the Court's cases concerning the right to keep and bear arms support such reliance. Dicta in *Heller* clearly contemplate a tradition-based test for the Second Amendment's scope. The Court noted that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."[67] It added that the Second Amendment right is limited to weapons "in common use,"[68] observing that this limitation "is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[69] In *McDonald*, the Court repeated *Heller*'s assurances concerning the limits of the right to keep and bear arms.[70] And even though none of these limits were before the Court in *Heller* or *McDonald*, lower courts have relied on the Court's pronouncements in upholding a broad array of gun regulations.[71]

The adoption of a tradition-based test for the Second Amendment's scope would not have changed the outcome in *Ezell*.[72] But it might alter the result in other cases.[73] The application of a tradition-based test in those cases would be most faithful to the doctrine of the Second Amendment as well as that of the First.

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[66] *See, e.g.*, New York v. Ferber, 458 U.S. 747, 763–64 (1982); New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964).

[67] *Heller*, 128 S. Ct. at 2816–17.

[68] *Id.* at 2817 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)) (internal quotation mark omitted).

[69] *Id.*

[70] *McDonald*, 130 S. Ct. at 3047 (plurality opinion); *see also id.* at 3056 (Scalia, J., concurring) ("[T]raditional restrictions go to show the scope of the right" to keep and bear arms.).

[71] *See* Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1565–67 (2009).

[72] *Ezell*'s marginalization of restrictions on the discharge of firearms in urban environments that were passed outside the "most relevant historical period," *Ezell*, 651 F.3d at 705, would have been inappropriate under the traditionalist approach. Still, as the court pointed out, most of these laws included exceptions for target practice, *id.*, and so would not have established a tradition exempting Chicago's firing-range ban from further Second Amendment review.

[73] For example, *Ezell*'s approach might well require heightened scrutiny of the federal prohibition on the possession of handguns by juveniles, 18 U.S.C. § 922(x) (2006), because the evidence about the founding generation's view of such prohibitions is arguably inconclusive, *see* United States v. Rene E., 583 F.3d 8, 15–16 (1st Cir. 2009). But a tradition-based test would not subject this law to Second Amendment scrutiny, because there is a "longstanding tradition of prohibiting juveniles from both receiving and possessing handguns." *Id.* at 12.