

A “RIGHT” BY ANY OTHER NAME:
WILL COURTS TREAT THE RIGHT TO
KEEP AND BEAR ARMS AS A REAL
RIGHT OR A PRETEND ONE?

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THOUGH THE PRESS OF OTHER WORK PREVENTS ME FROM submitting a full-length essay, I want to thank the *Cardozo Law Review de•novo* for the opportunity to offer some thoughts about the standard of review in cases involving the right to keep and bear arms. Simply put, I think the lack of any credible empirical data to support the efficacy of gun regulations is going to put courts in a real bind in future gun cases—particularly ones where the lines are less bright than the handgun bans at issue in *District of Columbia v. Heller*¹ and *McDonald v. City of Chicago*.²

The historical evidence is overwhelming that our forbears, including those from both the founding and Reconstruction eras, considered the right own guns to be among the most sacred rights American citizens possess. Indeed, as I have argued elsewhere,³ the Second Amendment may be seen as a pledge, a promise that no matter how intellectual fashions might change and no matter what path other countries might take, there is no power to effect the blanket disarmament of American citizens under any pretext or justification whatsoever.

By contrast, the majority of people who make, enforce, and

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¹ 128 S. Ct. 2783 (2008).

² 130 S. Ct. 48 (2009).

³ See Clark M. Neily III, *The Right to Keep and Bear Arms in the States: Ambiguity, False Modesty, and (Maybe) Another Win for Originalism*, 33 HARV. J.L. & PUB. POLY 185, 193 (forthcoming Jan. 2010).

interpret laws in this country are drawn from a class that typically has little experience with—and even less personal need for—firearms. As a result, for many if not most political elites, gun ownership is a largely theoretical issue. Compared to the general population, very few politicians, judges, or other civic leaders will ever find themselves in a position where they actually *need* a gun, and in the unlikely event that they do, the gun will most likely be handled by another government official whose job it is to protect them.

But for whatever reason, it seems clear that many politicians and judges have deep-seated prejudices about guns that no amount of empirical data (or, more to the point, *lack* of empirical data) can dislodge. Which brings us to the standard of review for gun regulations and whether courts are likely to treat the right to keep and bear arms as truly fundamental, as the Framers of the Second and Fourteenth Amendments plainly understood it.

In its 1938 *United States v. Carolene Products Co.*⁴ decision, the Supreme Court formally announced its creation of a constitutional hierarchy that would largely define the Court's rights-based jurisprudence from that point on. Under the hierarchy, some rights—primarily those reflected in a “specific prohibition of the Constitution, such as those of the first ten amendments”⁵—would receive significant protection from the courts while other rights (including, particularly, economic liberties and private property ownership) would receive virtually none. Besides the Court's failure to offer any intellectually rigorous explanation or defense of that new hierarchy, a key question was just how serious judges would be in protecting rights they deemed “fundamental.”

With certain notable exceptions, the Supreme Court has a decent track record in applying meaningful scrutiny standards to regulations that trench on specifically enumerated rights, including freedom of speech, religion, and procedural protections like the right to counsel and to confront witnesses in criminal proceedings. Remarkably, however, the Court stood by for over two hundred years before stepping in to resolve the stark and divisive question of whether the Second Amendment protects an individual right to keep and bear arms or whether, instead, it is merely a rhetorical flourish with some vague, and by now anachronistic, connection to the arming of state militias.

⁴ *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

⁵ *Id.* at 153 n.4.

In *Heller*, the Court provided at least a partial answer to that question: The Second Amendment does protect an individual right, albeit of uncertain scope, and one that prevents the federal government from disarming citizens across-the-board, the way the District of Columbia had done by banning private ownership of handguns and the possession of all functional firearms in the home.

Two of the most important questions left unanswered in *Heller* were first, whether the right to keep and bear arms applies against state and local governments, and second, what standard of review courts should apply in evaluating gun regulations. The Supreme Court appears poised to answer the first question in *McDonald v. City of Chicago*, a case challenging a Chicago handgun ban very similar to the one struck down in *Heller*. But the second question has yet to be answered, leaving courts and commentators all over the map.

Because *Heller* involved a total ban on an entire category of protected arms (analogous to, say, a categorical ban on books, newspapers, or magazines under the First Amendment), there was really no need for the Court to articulate any specific standard of review—except perhaps to take the misnamed and entirely fraudulent “rational basis test” off the table, which is arguably necessary for any (defensible) finding of unconstitutionality. As a result, it remains unclear whether the right to keep and bear arms will receive the strict scrutiny normally accorded to so-called fundamental rights, or an intermediate level of review such as the “reasonableness” standard urged by the United States in the amicus brief it filed in *Heller*.⁶

The reason this is such a momentous question is because judges and politicians have become so proficient at paying lip service to at the Constitution while making a mockery of its text, history, and purpose. For example, the Constitution specifically withheld from Congress a general police power, but Congress exercises that power anyway. There are literally thousands of federal criminal laws whose only passing connection to the Constitution is Article I, Section 8’s Commerce Clause, in which Congress has—with the Supreme Court’s express authorization—discovered an essentially limitless font of power that the Framers of the Constitution specifically meant to (and did) withhold.⁷

⁶ Brief for the United States as Amicus Curiae, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 157201, available at <http://www.gurapossessky.com/news/parker/documents/07-290tsacUnitedStates.pdf>.

⁷ Compare *Gonzales v. Raich*, 545 U.S. 1 (2005), and *Wickard v. Filburn*, 317 U.S. 111 (1942), with U.S. CONST. art. I, § 8.

It seems clear that the only way to prevent legislators from overstepping the legitimate constitutional bounds of their authority is for courts to fully enforce both the letter and the spirit of the Constitution, which is not merely a blueprint for government, but a charter of liberty. This is true both with respect to enforcing constitutional limits on the sources of government power (which the Supreme Court largely refuses to do anymore) and enforcing constitutionally protected rights in a way that prevents the government from regulating those rights out of existence on the basis of a mere whim—or, as seems to be the case with guns, unsupported prejudice.

Simply put, there is no credible evidence that gun control regulations reduce crime, lessen the amount of gun violence, or have any other positive public policy effects—let alone a *net* beneficial effect.⁸ As a result, it should be very difficult to uphold many gun laws if the right to keep and bear arms is accorded anything close to fundamental status because one of the most important distinctions between fundamental and non-fundamental rights is the burden the government faces in trying cases under the two different regimes. With non-fundamental rights, the rational basis test generally applies, and the government may regulate on the basis of whim, prejudice, malice, or for no reason at all, as long as some “conceivable justification” can be hypothesized for why the government *might* have enacted the challenged regulation.

By contrast, when regulating conduct that implicates fundamental rights, the government is usually required to offer an *actual* justification for the regulation that has at least some empirical support in the sense that the government can provide credible evidence that the regulation

⁸ As Kevin Baker (author and proprietor of The Smallest Minority, <http://smallestminority.blogspot.com/>) noted in comment on Armed and Dangerous:

There have been two meta-studies of all of the available research on gun control available. The first was performed under a directive from the Carter administration, published in 1983 as *Under the Gun: Weapons, Crime, and Violence in America* by Wright, Rossi and Daly. The second was performed by the National Academies of Science under directive from the Clinton administration, published in 2004 as *Firearms and Violence: A Critical Review*. Unsurprisingly, both reports—twenty years apart!—concluded that all the research done so far proved *inconclusive*. “Gun control” laws could not be shown to have reduced violent crime, accidents, or suicide with any statistical certainty, and *relaxing* gun control laws (shall-issue concealed carry primarily) could not be shown to have had *any effect* on crime, either.

Comment of Kevin Baker on Armed and Dangerous, <http://esr.ibiblio.org/?p=314> (July 22, 2008 6:46PM).

The two studies mentioned are JAMES D. WRIGHT, PETER H. ROSSI & KATHLEEN DALY, *UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA* (1983) and COMM. TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, NAT’L RESEARCH COUNCIL, *FIREARMS AND VIOLENCE: A CRITICAL REVIEW* (2005).

actually advances an important government interest. As noted above, there appear to be no *credible* studies showing that gun control regulations have ever achieved anything, and—as with most fundamental rights—that should be the end of it.

Will gun rights be treated differently than other fundamental constitutional rights when it comes to the standard of review and specifically the government's burden of justifying, with evidence, regulations that impinge on people's right to keep and bear arms? Stay tuned.