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Four Exceptions in Search of a Theory: *District of Columbia v. Heller* and *Judicial Ipse Dixit*

CARLTON F.W. LARSON*

INTRODUCTION

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess a firearm.¹ Justice Scalia's opinion for the Court suggested that the right was primarily about individual self-defense, particularly in "the home, where the need for defense of self, family, and property is most acute."² Indeed, the Court went so far as to claim, "[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."³

Yet the Court notoriously did not offer any standard of scrutiny for firearms regulations, simply concluding that the District of Columbia's handgun ban violated "any of the standards of scrutiny that we have applied to enumerated constitutional rights."⁴ However, the Court also went out of its way to announce the following:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.⁵

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1. 128 S. Ct. 2783, 2821–22 (2008).
2. *Id.* at 2817.
3. *Id.* at 2821.
4. *Id.* at 2817.
5. *Id.* at 2816–17.

The Court offered no citations to support this statement, and its ad hoc, patchy quality has been readily apparent to commentators, who have speculated that it was compromise language designed to secure Justice Kennedy's vote.⁶ More cuttingly, Justice Breyer suggested that these exceptions amounted to little more than "judicial *ipse dixit*."⁷

I call the exceptions in this statement the four *Heller* exceptions. Although these exceptions are arguably dicta, they are dicta of the strongest sort. The Court described these exceptions as "presumptively lawful regulatory measures," and it is hard to imagine the Court invalidating them in a future case.⁸ For all practical purposes, these issues have been decided—and decided in favor of constitutionality.

In this Essay, I explore the implications of these exceptions for the future of gun regulation in America. Specifically, I wish to treat these exceptions as serious statements of the law, and ask whether they fit into a coherent theory of the Second Amendment. What theory, if any, can explain the Court invalidating the District of Columbia handgun ban, while simultaneously upholding the laws referenced in the exceptions? My purpose is not to rehash the correctness of *Heller*, but to ask where we go from here, assuming *Heller* is valid law.

In broad terms, there are two general approaches to the exceptions. First, they could be examples of originalist reasoning at a fairly specific level of application, what Jack Balkin would refer to as "original expected application[s]."⁹ Under this view, the exceptions are justified because nobody in 1791 would have expected the Second Amendment to invalidate regulations of this sort. Indeed, in response to Justice Breyer's dissent, the Court noted, "[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us."¹⁰ The Court thus implied that specific historical justifications are necessary to uphold the exceptions. Yet, as I argue in Part I, such a view is almost impossible to maintain. The *Heller* exceptions lack the historical grounding that would normally justify an exception to a significant constitutional right. Whatever the Court is doing here, it is not rigorously grounded in eighteenth-century sources.

6. See, e.g., Mark Tushnet, *Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 420 (2009). For other denunciations of the arbitrary nature of these exceptions, see J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling of Law*, 95 VA. L. REV. 253, 279 (2009); and *A Puzzle About Heller*, <http://leiterlegalphilosophy.typepad.com/leiter/2008/06/a-puzzle-about.html> (June 27, 2008).

7. *Heller*, 128 S. Ct. at 2870 (Breyer, J., dissenting).

8. See *id.* at 2817 n.26 (majority opinion).

9. See Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 296–97 (2007).

10. *Heller*, 128 S. Ct. at 2821.

Second, the exceptions might be explained not on originalist grounds, but as results of an unstated standard of scrutiny. Under this view, the exceptions can be “reverse engineered” to identify the standard of scrutiny actually employed. As I argue in Part II, the standard of scrutiny simply *cannot* be strict scrutiny, as many of the exceptions are inexplicable under strict scrutiny, a point hinted at by Justice Breyer in dissent.¹¹ The Court is applying some lower standard of scrutiny, but it is difficult to know what precisely it is.

I. ORIGINALIST ANALYSIS OF THE *HELLER* EXCEPTIONS

Originalist theory has grown in sophistication over the last twenty years. Originalists now emphasize the original public meaning of the constitutional text rather than looking to the specific intent of the Framers or ratifiers.¹² Originalists have also emphasized a distinction between constitutional interpretation, which uses originalist methods to determine the linguistic meaning of constitutional text, and constitutional construction, which employs other methods to generate operative meaning in situations in which the text is unclear.¹³ As Professor Lawrence Solum, a leading proponent of this distinction, has emphasized, the *Heller* Court may well have used originalist methods of interpretation to determine the core meaning of the Second Amendment, while leaving the issues addressed by the exceptions to the more challenging task of constitutional construction.¹⁴ Under this view, there is little conflict between the bulk of the Court’s opinion and the exceptions, because they can be justified under different, although complementary, methodologies.

This is an intriguing and fascinating argument. I am not persuaded, however, that this explains exactly what the Court had in mind in *Heller*. The Court’s claim about the need to “expound upon the historical justifications for the exceptions” in a later case seems inconsistent with a stark interpretation/construction dichotomy.¹⁵ Moreover, Justice Scalia, the author of the opinion, has not generally embraced such a distinction; his methods are much closer to identifying “original expected application[s],” working at a very specific level of detail.¹⁶ Accordingly, this Part analyzes the exceptions as a Scalian originalist would, by

11. See *id.* at 2851 (Breyer, J., dissenting) (stating that the majority approves exceptions “whose constitutionality under a strict scrutiny standard would be far from clear”).

12. See Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 Nw. U. L. REV. 932, 933–34 (2009).

13. See *id.* at 934.

14. *Id.* at 969–71.

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

16. See Balkin, *supra* note 9.

seeking to identify historical predicates and justifications for the exceptions announced in *Heller*.¹⁷

A. THE FELON EXCEPTION

Even early supporters of a strong individual-rights view of the Second Amendment have readily endorsed prohibitions on ownership of firearms by convicted felons. For example, in an important 1983 *Michigan Law Review* article, Don Kates, a leader of the individual-rights movement, argued that felon disarmament laws were clearly constitutional because the “Founders [did not] consider[] felons within the common law right to arms.”¹⁸ Yet the actual sources Kates relied upon (and which subsequent writers have echoed¹⁹) are surprisingly thin. Indeed, so far as I can determine, no colonial or state law in eighteenth-century America formally restricted the ability of felons to own firearms. So what sources support this conclusion? The same three sources recur again and again in the literature, yet none are especially probative.

The first source offered to support the felon exclusion is a failed amendment offered by Samuel Adams in the Massachusetts ratifying convention.²⁰ Adams’s amendment would have invalidated any laws that “prevent the people of the United States, who are peaceable citizens, from keeping their own arms.”²¹ There are at least three reasons to question this source as supporting the felon exception. First, as a failed amendment offered by an Anti-Federalist, it has no direct link with the Second Amendment that was actually adopted. Second, the critical words “peaceable citizens” do not appear in the text of the Second Amendment itself, which refers broadly to “the people.” Third, “peaceable citizens” might mean “nonfelons,” but that reading is neither obvious nor required.²² Nonviolent criminals such as forgers, for example, might well be considered “peaceable.”

17. For a critical evaluation of the Court’s use of history in *Heller*, see Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625 (2008).

18. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983).

19. See, e.g., Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131, 147, 185 (1991); see also *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (relying on similar sources for the claim that “felons, infants, and those of unsound mind may be prohibited from possessing firearms”).

20. See, e.g., Halbrook, *supra* note 19, at 147 (citing DEBATES OF THE MASSACHUSETTS CONVENTION OF 1788, at 86–87, 266 (Boston, 1856)) (Samuel Adams’ proposed amendments); Kates, *supra* note 18, at 222, 267 (same).

21. THE DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, HELD IN THE YEAR 1788, at 86 (1856).

22. Cf. THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789) (defining “peaceable” as “[f]ree from war, free from tumult; quiet, undisturbed; not quarrelsome, not turbulent”).

The second source offered to support the felon exclusion is the state of New Hampshire's recommended amendment that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."²³ This proposal, unlike the Samuel Adams proposal, was adopted by a majority of the state convention, yet its terms are significantly narrower than a broad disarmament of felons. Rebellion is only one type of felony, and the explicit limitation to rebellion strongly suggests that extension to any other felony would be inappropriate.

The third source offered to support the felon exclusion, and certainly the strongest, is a minority report by Pennsylvania Anti-Federalists.²⁴ These dissenters offered a proposed amendment stating, in part, "no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals."²⁵ This is much closer to felon disarmament than is the Samuel Adams proposal or the New Hampshire proposal, and it suggests a broad power of disarmament for categories of persons deemed dangerous. Yet like the Samuel Adams proposal, it was offered by opponents of the Constitution, and its text is not reflected in the Second Amendment as proposed and ratified.

None of these statements alone or collectively support the notion that felon disarmament laws were viewed as consistent with the Second Amendment at the time it was adopted. The best one can say is that at least some people in Pennsylvania felt criminals could be disarmed. And perhaps that is enough, in the absence of any explicit contemporary statements to the contrary. But such evidence would surely be inconclusive at best in other constitutional contexts. No court, for example, would rely on one statement from Pennsylvania Anti-Federalists to uphold a law that prohibited felons from exercising religious freedom.

The absence of an explicit felon exception in the text of the Second Amendment is echoed in state constitutional provisions.²⁶ Only one state constitutional provision addressing the right to bear arms contains an exception for felons.²⁷ This provision, Idaho's, was enacted in 1978.²⁸

23. 1 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787*, at 326 (2d ed. 1891); Kates, *supra* note 18, at 222.

24. See, e.g., Halbrot, *supra* note 19, at 142; Kates, *supra* note 18, at 222.

25. The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents (1787), in 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 662, 665 (1971).

26. For a useful overview of state constitutional provisions, see generally Eugene Volokh, *State Constitutional Right to Keep and Bear Arms*, 11 *TEX. REV. L. & POL.* 191 (2006).

27. See IDAHO CONST. art. I, § 11.

28. *Id.*

So where do felon disarmament laws come from? As far as I can determine, state laws prohibiting felons from possessing firearms or denying firearms licenses to felons date from the early part of the twentieth century. The earliest such law was enacted in New York in 1897, and similar laws were passed by Illinois in 1919, New Hampshire, North Dakota, and California in 1923, and Nevada in 1925.²⁹ California's law, which prohibited felons from owning or possessing any "pistol, revolver or other firearm capable of being concealed upon the person,"³⁰ was quickly challenged. A California appellate court upheld this law, noting that "the right to keep and bear arms is not a right guaranteed either by the federal Constitution or by the state Constitution."³¹ The court noted that the law limited a felon's natural right to self-defense against "personal violence," but concluded that such natural rights were subject to reasonable regulation by the legislature.³²

In 1930, a Uniform Fire Arms Act was adopted by the National Conference of Commissioners on Uniform State Laws.³³ The Uniform Act stated that "[n]o person who has been convicted in this state or elsewhere of a crime of violence, shall own a pistol or have one in his possession or under his control."³⁴ This formulation—limited to crimes of violence—was somewhat narrower than that of felonies more generally,³⁵ and it was adopted by Pennsylvania in 1931.³⁶

In sum, felon disarmament laws significantly postdate both the Second Amendment and the Fourteenth Amendment. An originalist argument that sought to identify 1791 or 1868 analogues to felon disarmament laws would be quite difficult to make.

B. THE EXCEPTION FOR THE MENTALLY ILL

The story is similar with respect to the exception for the mentally ill. One searches in vain through eighteenth-century records to find any laws specifically excluding the mentally ill from firearms ownership. Such laws seem to have originated in the twentieth century. The Uniform Fire

29. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING 862-63 (1925). For the New Hampshire act, see Act of May 4, 1923, § 3, 1923 N.H. Laws 138.

30. Act of June 13, 1923, ch. 339, § 2, 1923 Cal. Stat. 696, 696.

31. *People v. Camperlingo*, 231 P. 601, 603 (Cal. Ct. App. 1924).

32. *Id.* at 604.

33. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTIETH ANNUAL CONFERENCE 563 (1930) [hereinafter 1930 HANDBOOK].

34. *Id.*

35. *See id.* (defining "crime of violence" as "murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, burglary [housebreaking, breaking and entering, and larceny]").

36. Act of June 11, 1931, §4, 1931 Pa. Laws 497, 498.

Arms Act of 1930 prohibited delivery of a pistol to any person of “unsound mind,”³⁷ a provision echoed in subsequent state legislation.³⁸

Nonetheless, it is possible to make alternative originalist arguments. First, in eighteenth-century America, justices of the peace were authorized to “lock up” “lunatics” who were “dangerous to be permitted to go abroad.”³⁹ If this significant infringement of liberty was permissible, then the lesser step of mere disarmament would likely be permissible as well.

Second, one might make the originalist argument at a higher level of generality—that any person viewed as potentially dangerous could be disarmed by the government without running afoul of the “right to bear arms.” (This proposition would support felon disarmament laws as well.) The Revolution itself provided examples of such laws in action. Shortly before the outbreak of hostilities, a Massachusetts crowd of 2500 people assembled to disarm Tories.⁴⁰ The Continental Congress recommended that provincial assemblies “disarm all such as will not associate to defend the American rights by arms.”⁴¹ In 1777, Pennsylvania passed a law requiring city and county officials to disarm all individuals who had not taken the oath of allegiance to the state.⁴² In August 1777, the Continental Congress recommended that the states of Pennsylvania and Delaware disarm all persons “notoriously disaffected” to the American cause.⁴³ It also recommended that Pennsylvania executive authorities undertake a “diligent search” in Philadelphia for the “firearms, swords and bayonets” of those persons who had “not manifested their attachment to the American cause.”⁴⁴ The owners were to be compensated for their weapons, which were to be delivered to the state militia.⁴⁵

On balance, however, it seems unlikely that the Court would accept the argument at this level of generality. First, the Court may be wary of making too much of these revolutionary-era laws, as they may represent the type of excessive intrusions the Second Amendment was intended to

37. 1930 HANDBOOK, *supra* note 33, at 565.

38. *See, e.g.*, Act of July 20, 1968, ch. 737, § 7, 1968 Mass. Acts 623, 626 (codified as amended at MASS. GEN. LAWS ch. 140, § 129B (2008)); Act of July 20, 1965, ch. 1030, § 400, 1965 N.Y. Laws 2343, 2472 (codified at N.Y. PENAL LAW § 400.00.1 (McKinney 2008)).

39. HENRY CARE, ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT'S INHERITANCE 329 (6th ed. 1774).

40. DIRK HOERDER, CROWD ACTION IN REVOLUTIONARY MASSACHUSETTS 1765–1780, at 303 (1977).

41. 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 397 (Edmund C. Burnett ed., 1921).

42. Act of June 13, 1777, Ch. 756, § 3, 9 Pa. Laws 110, 112–13. Similar disarmaments of Tories occurred in New Jersey, South Carolina, and Connecticut. STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND THE CONSTITUTIONAL GUARANTEE 86, 90, 98–99 (1989).

43. 8 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 678–79 (Worthington C. Ford ed., 1907).

44. *Id.* at 679.

45. *Id.*

prevent. Second, at this level of generality, the justification would arguably erode the core of the Second Amendment right identified in *Heller*, at least in the absence of an internal domestic war. Finally, the justification suggests significant deference to a legislature's assessment of particular dangers—a deference the Court was unwilling to extend to the District of Columbia with respect to the handgun ban.

The strongest originalist argument for the exception for the mentally ill rests on the traditional ability of justices of the peace to confine individuals with dangerous mental impairments. Specific eighteenth-century laws disarming the mentally ill, however, simply do not exist.

C. THE EXCEPTION FOR SENSITIVE PLACES

The exception for sensitive places is probably the easiest of the exceptions to justify on strict originalist grounds. An English statute from 1328 prohibited subjects from appearing armed “in fairs, markets, [and] in the presence of the justices or other ministers.”⁴⁶ In the mid-1550s, a man was found “armed in Westminster Hall . . . when the king’s justices were sitting in their places doing justice.”⁴⁷ He was immediately imprisoned “for his aforesaid contempt and act, there to remain until his fine was assessed upon him.”⁴⁸ Asked “why he did this in the open hall, being the place of justice and of peace, he answered that he did so for his own safety.”⁴⁹ This argument, apparently, was insufficient to overcome the rule against appearing armed in court. These precedents might themselves justify the exception. On the other hand, this law predates the firearms right recognized in the English Bill of Rights, may not have been widely enforced, and may have been unfamiliar to the American Founders.⁵⁰ Moreover, the vague reference to “sensitive places”⁵¹ is not itself explicitly grounded in eighteenth-century sources, and the Court may intend to require more specific justifications for each particular sensitive place.

Evidence from the Reconstruction period may also support such limitations under the Fourteenth Amendment with respect to state laws. For example, in 1886, the Supreme Court of Missouri upheld an 1875 state law that made it a crime for a person to “go into any school-room or place where people are assembled for educational, literary, or social

46. Statute of Northampton, 2 Edw. III, c. 3 (1328), reprinted in 5 THE FOUNDERS' CONSTITUTION 209 (Philip B. Kurland & Ralph Lerner eds., 1987)

47. THE REPORTS OF WILLIAM DALISON 1552–1558, at 111 (John Baker ed., 2007).

48. *Id.*

49. *Id.*

50. See JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 104–06 (1994). The English statute was not completely unknown, however, as Blackstone approvingly cited the statute's separate prohibition of “riding or going armed, with dangerous or unusual weapons.” 4 WILLIAM BLACKSTONE, COMMENTARIES *148–49.

51. See discussion *infra* Part II.C.

purposes, or to any election precinct on election day, having upon or about his person any kind of firearms.”⁵² The court concluded, “The statute is designed to promote personal security, and to check and put down lawlessness, and is thus in perfect harmony with the constitution.”⁵³

D. THE EXCEPTION FOR COMMERCIAL REGULATION

I have been unable to identify any eighteenth-century American laws that specifically regulate commercial aspects of firearms sales. Although some state commercial regulation probably began in the nineteenth century, federal commercial regulation of firearms began in 1927, when Congress prohibited shipments of handguns to individuals through the mail.⁵⁴ Federal regulation of firearms dealers was also a significant component of the National Firearms Act of 1934,⁵⁵ the Federal Firearms Act of 1938,⁵⁶ and the Gun Control Act of 1968.⁵⁷ The commercial restrictions with which we are most familiar are thus almost entirely twentieth-century innovations.

The absence of commercial regulation in the eighteenth century does not necessarily mean, of course, that the original public meaning of the Second Amendment precluded such regulation. But it does mean that an originalist argument that proceeded by identifying specific eighteenth-century analogues to modern commercial regulations would be extremely difficult to make.

II. STANDARD OF SCRUTINY ANALYSIS OF THE *HELLER* EXCEPTIONS

If originalism fails to provide a sufficient grounding for all of the *Heller* exceptions, perhaps they can be justified under some form of balancing test, that is, by one of the typical tests that the Court uses when evaluating other constitutional rights. This Part explores whether any one test can explain each of the exceptions. I conclude that the answer is yes, but only under a low standard of scrutiny. Specifically, I argue that it is doctrinally impossible to conclude that strict scrutiny governs Second Amendment claims, while also upholding the four *Heller* exceptions.

I also briefly consider other possible tests that might apply. The Court has explicitly ruled out rational basis as the relevant test.⁵⁸ What are the other options? One possibility is an undue-burden test, such as

52. *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886).

53. *Id.*

54. Act of Feb. 8, 1927, ch. 76, 44 Stat. 1059, 1059–60 (1927).

55. 26 U.S.C. §§ 5801–5872.

56. 18 U.S.C. §§ 921–931.

57. Federal Gun Control Act, Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended in scattered sections of 26 U.S.C.).

58. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 n.27 (2008) (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”).

that used to evaluate abortion restrictions under *Planned Parenthood v. Casey*.⁵⁹ There is a hint of this in *Heller* itself, which notes that colonial regulations did not “remotely burden the right of self-defense as much as an absolute ban on handguns.”⁶⁰ Professor Lawrence Rosenthal has argued for this test, concluding that the exceptions would pass the test, but that the District of Columbia handgun ban would not.⁶¹ The irony of an undue-burden test somehow emerging implicitly from the pen of Justice Scalia, however, would be rich indeed,⁶² and I doubt that a Court majority would embrace this as the relevant test.

Other possibilities include some type of intermediate scrutiny or a reasonableness test. As Professor Adam Winkler has demonstrated, state courts interpreting firearms provisions in state constitutions have uniformly applied a reasonableness standard.⁶³ This test appears slightly more demanding than a rational-basis test, but still operates as a relatively deferential test.⁶⁴

Other alternatives might take the form of hybrid approaches. For example, Professor Calvin Massey has argued that material infringements of Second Amendment rights must be substantially related to a compelling state purpose, but that lesser infringements need not be.⁶⁵ Relatedly, the Fifth Circuit in *United States v. Emerson* held,

Although, as we have held, the Second Amendment *does* protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.⁶⁶

A. THE FELON EXCEPTION

The felon exception fares very poorly under traditional strict scrutiny, which requires that government action be narrowly tailored to serve a compelling state interest.⁶⁷ The problem is not the state interest prong, which is straightforward. Surely saving lives and preventing gun violence is a compelling state interest. But it is surprisingly difficult to

59. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

60. 128 S. Ct. at 2820.

61. Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 82–84 (2009).

62. *See, e.g., Casey*, 505 U.S. at 987 (Scalia, J., dissenting) (“The ultimately standardless nature of the ‘undue-burden’ inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis.”).

63. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686–87 (2007).

64. *Id.* at 716–17.

65. Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1137 (2000).

66. 270 F.3d 203, 261 (5th Cir. 2001).

67. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2851 (2008).

establish that the felon exclusion is narrowly tailored to serve this interest. That is, the fit between being a convicted felon and being someone who is likely to engage in unlawful acts with a gun, although far from irrational, is not especially tight.

Consider first the case of nonviolent felons. Why would we think that a tax evader,⁶⁸ an embezzler,⁶⁹ or someone who bribed a public official⁷⁰ would be more likely to commit acts of gun violence? As Professor Adam Winkler points out, “[i]t is hard to imagine how banning Martha Stewart or Enron’s Andrew Fastow from possessing a gun furthers public safety.”⁷¹ The same could be said about drunk drivers⁷² or the producers of obscenity.⁷³ And even with respect to violent criminals, the exception is sweepingly broad. Is it at all realistic to think, say, that a ninety-two year old man, confined to a wheelchair, who committed an armed burglary in his early twenties and was released from prison over sixty years ago, poses a realistic threat of unlawful gun violence? Felon exceptions are thus significantly over-inclusive because they disarm large numbers of people who pose no threat to anyone at all.

Second, there is the problem of gun misconduct that does not rise to the level of a felony, such as recklessly firing a gun into the air,⁷⁴ or leaving a loaded firearm in a location easily accessible to a child.⁷⁵ These offenders have demonstrated a prior misuse of firearms, but are not prohibited from future possession. In these cases, the felon exception is somewhat under-inclusive, if the state interest is preventing future unlawful conduct with a gun.

To see just how poorly felon disarmament laws fare under strict scrutiny, it is helpful to consider analogies with other constitutional provisions. Surely we would not strip felons of First Amendment rights to free speech or free exercise of religion, solely because some of those felons created child pornography or murdered someone as part of a Satanic ritual. Felons, and arguably felons most especially, have full protection under the Fourth, Fifth, Sixth, and Eighth Amendments with

68. See, e.g., 26 U.S.C. § 7201 (2006).

69. See, e.g., 18 U.S.C. §§ 656, 3581.

70. See, e.g., *id.* §§ 201, 3581.

71. Winkler, *supra* note 63, at 721.

72. See, e.g., CAL. VEH. CODE §§ 23153, 23566 (West 2000 & Supp. 2009); CAL. PENAL CODE § 17 (West 1999).

73. See, e.g., 18 U.S.C. §§ 1465, 3581.

74. See, e.g., FLA. STAT. § 790.15 (2008) (defining as a misdemeanor the offense of “knowingly discharg[ing] a firearm in any public place or on the right-of-way of any paved public road, highway, or street”).

75. Courts have upheld tort liability for leaving guns in places easily accessible to children. See, e.g., *Kuhns v. Brugger*, 135 A.2d 395 (Pa. 1957). On *Heller*’s implications for such tort lawsuits, see Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205 (2009).

respect to fair trial issues and constitutionally-permissible punishments. And it is hard to imagine that felons could be excluded from exercising other constitutional rights, such as procreation, contraception, or abortion. Indeed, the seminal case on procreation, *Skinner v. Oklahoma*, rejected a state attempt to single out habitual felons for sterilization.⁷⁶

Of course, the Fourteenth Amendment permits the disenfranchisement of felons,⁷⁷ so one could argue that elimination of Second Amendment rights is closer to the case of disenfranchisement than to the elimination of rights under other amendments. This case would be easy to make if the Supreme Court had grounded its decision on the communal aspect of gun ownership as part of the militia. Just as a community can exclude felons from voting, it can exclude felons from the people who constitute the state's militia. But according to the Supreme Court, the militia is not the primary focus of the amendment—it is about personal self-defense.⁷⁸

And that asserted focus makes it particularly difficult to justify the felon exception under strict scrutiny. It is very hard to see how the felon's interest in personal defense, in protecting his or her home and family (many of whom may be completely innocent of any crime), is diminished by his or her status as a convicted felon. Indeed, it does not seem unreasonable to believe that many convicted felons may be the *most* in need of a gun for purposes of self-defense. Their friends and associates may well be other criminals of a decidedly nasty bent, they may have histories of significant interpersonal violence, and they may live in dangerous and crime-ridden neighborhoods.

It is therefore implausible to claim that an across-the-board exclusion for all felons from this one particular constitutional right can be justified as narrowly tailored under strict scrutiny. The Court must have assumed, nonetheless, that the risk of inappropriate gun usage by felons outweighs any self-defense benefit to the felon. I entirely agree with this policy judgment, but it is important to note that it is a policy judgment nonetheless, not explicitly grounded in the Second Amendment's text or history, at least as that text and history is viewed by the *Heller* majority.

The felon exception would, however, pass a reasonableness test. It would probably also pass intermediate scrutiny, since it is arguably substantially related to an important state interest. It may also pass an undue-burden test, although this may be somewhat more doubtful, given that the law does exclude felons entirely from gun ownership.

76. 316 U.S. 535, 535 (1942).

77. See U.S. CONST. amend. XIV, § 2.

78. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791–94 (2008).

B. THE EXCEPTION FOR THE MENTALLY ILL

The purpose of this exception is presumably to keep the mentally ill from harming themselves and others through use of a firearm. And surely this is a compelling state interest. The question, as with felons, is whether it is narrowly tailored. If so, then the exception passes strict scrutiny and any other test as well.

“Mental illness” is an extremely broad category, covering a range of conditions, some of which may be significantly more dangerous than others. For example, the *Diagnostic and Statistical Manual of Mental Disorders*, a widely used handbook for mental-health professionals, lists the following, among others, as forms of mental disorders: learning disabilities, stuttering, autism, attention deficit disorder, eating disorders, alcohol abuse, nicotine dependence, and insomnia.⁷⁹ It is hard to see why persons with these conditions should be categorically excluded from firearms ownership, and any law that included such conditions within a definition of the mentally ill would fail strict scrutiny. A law more narrowly focused on truly delusional people, who have serious trouble perceiving reality, by contrast, would likely be permissible.

It is also somewhat problematic that the mentally ill are not excluded from the use of many other devices that may be equally harmful. A delusional person behind the wheel of an automobile is a serious menace to society, and a kitchen knife in the hands of a mentally-unbalanced person can be as dangerous as a gun. Why should guns in particular be excluded from the mentally ill, assuming their need for self-defense is similar to that of other individuals? A law prohibiting the mentally ill from using the Internet would likely fail strict scrutiny under the First Amendment, even if it could be shown that many mentally-ill persons often use the Internet in ways harmful to themselves and to others.

In short, although this exception, if focused on a specific subset of the mentally ill, would probably be upheld under strict scrutiny, it is by no means a clear-cut case, and a broader law would almost certainly fail. It is, however, a relatively easy case under a reasonableness test, and possibly an undue-burden test or an intermediate-scrutiny test.

C. THE EXCEPTION FOR SENSITIVE PLACES

The exception for sensitive places includes, according to the Court, government buildings and schools.⁸⁰ What characteristics determine a “sensitive” place? The Court does not say. Do hospitals, subways, sport stadiums, train stations, or shopping malls count? And why does the

79. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (DSM-IV) 13–26 (4th ed. 2000).

80. See *Heller*, 128 S. Ct. at 2817.

entire District of Columbia, filled with government buildings and repeatedly subject to terrorist threats, not qualify as a “sensitive place”? Since a law simply prohibiting possession of firearms in all “sensitive places” would be void for vagueness,⁸¹ the standard of scrutiny will apply only to more specific statutory language. This means that lower courts will have to address, case by case, whether particular locations are sufficiently “sensitive” to fall within the exception.

One answer may be that the *Heller* self-defense right, which the Court claims lies at the heart of the Second Amendment, simply has little applicability outside the home.⁸² This is not entirely implausible, since *Heller* provides little guidance on the geographic scope of the self-defense right. But it is not especially consistent with *Heller* either. First, if the right has little applicability outside the home, there would be no need for the Court to single out “sensitive” places, as opposed to places outside the home more generally. Second, although it is possible that most cases of self-defense arise in the home, this is far from obvious, and *Heller* at least hints at the value of self-defense outside the home.⁸³

Another answer could readily explain the case of at least some government buildings. One could argue that once a security perimeter has been established with metal detectors and weapons checks, no person within the perimeter would need a gun for protection. This would also explain the case of airports (and given that even First Amendment rights can be more limited in airports than in other public places,⁸⁴ restriction of Second Amendment rights should follow as a matter of course). But this answer cannot cover all of the supposed “sensitive places.” Not all government buildings have security protections in place; many state and local government buildings have no protection whatsoever. Nor does it explain the case of schools, most of which do not have security perimeters at all.

So how do the government buildings and school exceptions fare under traditional strict scrutiny? The state interest, presumably, is to

81. See, e.g., *Coates v. Cincinnati*, 402 U.S. 611, 614–16 (1971) (invalidating a Cincinnati ordinance that used the term “annoying”).

82. See *Heller*, 128 S. Ct. at 2817.

83. See *id.* at 2793 (citing 2 COLLECTED WORKS OF JAMES WILSON 1142 & n.X (Kermit L. Hall & Mark David Hall eds., 2007) (reference to the natural right of defense of “one’s person or house”)). Wilson, incidentally, was the one Framer who appears to have actually used firearms in defense of his house. See Carlton F.W. Larson, *The Revolutionary American Jury: A Case Study of the 1778–1779 Philadelphia Treason Trials*, 61 SMU L. REV. 1441, 1506–08 (2008) (discussing the 1779 attack on Wilson’s house by members of the Philadelphia militia). On the applicability of *Heller* outside the home, see generally Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225 (2008).

84. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680–82 (1992) (holding that airports are nonpublic forums for First Amendment purposes and noting that the security perimeter distinguished airports from bus and train stations).

prevent unlawful gun violence from taking place, surely a compelling interest. Are the restrictions narrowly tailored? Perhaps. If no guns are permitted in these places, then no gun violence will presumably occur. But, of course, not every person carrying a gun is necessarily intent on violent activity; thus such laws are arguably broader than necessary. Moreover, such an argument was implicitly rejected in *Heller*, which held that the solution to handgun violence cannot simply be elimination of all handguns. On the other hand, it is hard to think of a practical alternative to gun bans in these places that would actually work. It is possible that a court could uphold these laws under strict scrutiny, but it is by no means an obvious case.

The exception for sensitive places would, however, pass muster under a reasonableness test, an undue-burden test, or an intermediate-scrutiny test.

D. THE EXCEPTION FOR COMMERCIAL REGULATION

The exception for commercial regulation of firearms sales initially seems to fit comfortably within the Supreme Court's traditional deference to state regulation of commercial transactions under a rational-basis test.⁸⁵ Yet laws regulating such transactions probably cannot be justified solely because of their commercial aspects. A First Amendment analogy again is helpful. Suppose a state passed a law singling out sellers of books for special restrictions, and in general made it more difficult for individuals to purchase books. Such a law would surely be subject to strict scrutiny under the First Amendment, and would almost certainly fail. Similarly, the Court has emphasized that restrictions on the sale and distribution of contraceptive devices are subject to heightened scrutiny, notwithstanding the commercial nature of the laws at issue.⁸⁶ So if commercial sales of guns are to be treated differently than commercial transactions with respect to other constitutional rights, the Court ought to explain precisely why that is.

The existence of this exception is yet further evidence that the relevant test is not strict scrutiny, as most commercial regulations, not only of guns, but of any product, would probably fail strict scrutiny. Such regulations, however, would pass a reasonableness test, an undue-burden test, and probably intermediate scrutiny as well.

CONCLUSION

So what did *Heller* ultimately hold? How should lower courts, seeking to be faithful to the Court's opinion, evaluate Second

85. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

86. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 689 (1977) (invalidating New York law forbidding anyone other than a licensed pharmacist from selling nonprescription contraceptives).

Amendment claims in future cases? One possibility is to apply originalist analysis similar to that used by the Court in *Heller*. But this can only yield partial and incomplete answers to a range of quite difficult questions, and, moreover, cannot be fully justified given the existence of the four *Heller* exceptions.

These exceptions will ultimately have to be justified under some standard of scrutiny. As explained in Part II, the standard simply cannot be strict scrutiny, if the exceptions are taken as binding statements of the law. The exceptions can be easily justified, however, under a reasonableness standard, and possibly under an undue-burden or an intermediate-scrutiny test. I have some doubts as to whether a reasonableness test is consistent with the invalidation of the District of Columbia handgun ban; perhaps the Court simply viewed the ban as an extreme form of unreasonable regulation. Nonetheless, my guess is that the Court is applying a test slightly more stringent than reasonableness. Beyond that, however, the *Heller* opinion is quite opaque, and the relevant standard of scrutiny will be left to the lower courts for initial development. I make no normative claims as to which of the possible tests is preferable, leaving that daunting task to others in this Symposium.⁸⁷ I do hope, however, that when the Supreme Court returns to this area, it does what it conspicuously failed to do in *Heller*, that is, explain not only *what* it has decided, but *why*.

87. See, e.g., Calvin Massey, *Second Amendment Decision Rules*, 60 HASTINGS L.J. 1431 (2009).