BETWEEN SCYLLA AND CHARYBDIS: EZELL V. CITY OF CHICAGO (EZELL II) AND HOW THE SEVENTH CIRCUIT CONTINUES TO NARROW CHICAGO’S CONSTITUTIONAL PATH FORWARD ON GUN CONTROL

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“We then sailed on up the narrow strait with wailing. For on one side lay Scylla and on the other divine Charybdis terribly sucked down the salt water of the sea.”

INTRODUCTION

In 2008, the United States Supreme Court reset the landscape of the Second Amendment when it issued its landmark decision in District of Columbia v. Heller. The Court held for the first time that the Second Amendment right to “keep and bear arms” was an individual right unconnected with any militia service. Two years after this watershed decision, the Court took the inevitable next step in

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3 Id. at 595.
McDonald v. City of Chicago and held that the individual right recognized in Heller was fully applicable to state and local governments via incorporation by the Fourteenth Amendment.4

Justice John Paul Stevens warned in his dissent in McDonald that the Court’s decision would lead to “an avalanche of litigation that would mire federal courts in fine-grained determinations about which state and local regulations comport with the Heller right—the precise contours of which are far from pellucid.”5 Indeed, Heller did not fully define the scope of this newly recognized Second Amendment right, nor did it include a standard of review for how the lower courts were to enforce it.6 Now, because of McDonald, these same lower courts faced the daunting prospect of reviewing a seemingly endless array of state and local gun control legislation with little guidance from the Supreme Court on the proper Second Amendment analytical framework.7

In the void left by the Supreme Court, a majority of the Federal Circuit Courts of Appeals eventually settled on a two-step means-end framework similar in many ways to the framework used for challenges under the First Amendment.8 However, state and local officials and gun control advocates still faced an uncertain path forward. Advocates and legislators had to determine what regulations remained viable and worth pursuing to combat gun violence in the new constitutional regime of the Second Amendment.9 Some gun-control advocates remained hopeful that the Heller and McDonald decisions would have

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4 McDonald v. City of Chicago, 561 U.S. 742, [] (2010).
5 Id. at 904 (Stevens, J., dissenting).
6 See Heller, 554 U.S. at 718 (Breyer, J., dissenting) (“Because [the Court’s decision] says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges.”).
8 See infra at Section IB.
a limited affect on other gun control measures across the country.\footnote{See Robert Barnes and Dan Eagen, Supreme Court Affirms Fundamental Right to Bear Arms, WASHINGTON POST (June 29, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/06/28/AR2010062802134.html ("Over the long run, this apparent victory for gun rights may be more symbol than substance. It's actually a very narrow holding.").}

Although the Supreme Court had declared total bans on handgun ownership unconstitutional, advocates maintained that there was still a “broad range of gun regulation that remain[ed] presumptively legal.”\footnote{See Scott Neuman, Supreme Court Strikes Down Chicago Hand Gun Ban, NPR.ORG (June 28, 2010), http://www.npr.org/sections/thetwo-way/2010/06/28/128163284/supreme-court-strikes-down-chicago-handgun-ban (quoting Dennis Henigan, Vice President at the Brady Center to Prevent Gun Violence).}

While it is true that in the years following \textit{Heller} and \textit{McDonald} a range of federal, state, and local gun regulations were upheld by courts across the United States,\footnote{See generally, Stephen Kiehl, In Search of a Standard: Gun Regulations After Heller and McDonald, 70 MD. L. REV. 1131, 1151 (2011) (arguing that the response to \textit{Heller} and \textit{McDonald} was muted and that “[l]ower courts have been reluctant to read \textit{Heller} and \textit{McDonald} as inviting open season on gun regulations”).} the same is not necessarily true for the jurisdiction where \textit{McDonald} originated: the Seventh Circuit Court of Appeals. The Seventh Circuit, with some exceptions, has steadily expanded the scope of the Second Amendment right first recognized in \textit{Heller}, and it has repeatedly struck down state and local gun control measures as unconstitutional.\footnote{See discussion and cases cited infra at Section II.}

The most recent example of this trend is the case of \textit{Ezell v City of Chicago (Ezell II)}, decided in January of 2017.\footnote{Ezell v. City of Chicago, 846 F.3d 888 (7th Cir. 2017) (hereinafter “Ezell II”).} \textit{Ezell II} was the second round of litigation aimed at multiple Chicago gun control ordinances which the city had put in place after its total handgun ban had been invalidated by the Supreme Court in \textit{McDonald}.\footnote{Id. at 889-90.} \textit{Ezell II} specifically involved various city ordinances setting zoning and
distancing restrictions on the construction of live firing ranges, as well as a restriction on minors’ access to such ranges.16

A divided three judge Seventh Circuit panel struck down the ordinances as unconstitutional.17 Circuit Judge Diane Sykes wrote the majority opinion, in which she applied a “sliding scale” form of the two-step means-end test used by other circuits for Second Amendment claims and subjected the regulations to a heightened level of review akin to strict scrutiny.18 Judge Illana Rovner wrote a concurrence, dissenting in part, where she argued that some of the restrictions should have withstood constitutional scrutiny.19 Judge Rovner also had notably disagreed with the same majority and their use of the two-step means-end test in the previous iteration of the case Ezell I.20

This article examines Ezell II in the context of the current state of Second Amendment jurisprudence in the Seventh Circuit and the Federal Courts at large, an area of constitutional law which is still in its relative infancy. This article argues that the sliding scale means-end test the majority articulated and used in Ezell I & II was not properly applied to Chicago’s firing range ordinances. Furthermore, this article argues that the level of heightened scrutiny the court used in Ezell I and applied again in Ezell II, which appeared to be strict scrutiny, was inappropriate and out of sync with the level of scrutiny that has been applied in the majority of other circuits in comparable cases.

Part I of this article examines the background of Heller and McDonald, and the two-step means-end framework developed by the Circuit Courts to apply the decisions to a range of federal and local gun control regulations. Part II looks at the Seventh Circuit’s Second Amendment jurisprudence prior to Ezell II, and the background of the

16 Id. at 890.
17 Id.
18 See generally, id. at 892-93. As will be discussed further infra, Judge Sykes used different labels in Ezell I and Ezell II for the level of scrutiny being applied, but Judge Rovner noted in her opinion in Ezell I that it appeared to be strict scrutiny.
19 See id. at 898-900 (Rovner, J., concurring in part and dissenting in part).
20 See Ezell v. City of Chicago, 651 F.3d 684, 711 (7th Cir. 2011) (Rovner, J., concurring) (hereinafter “Ezell I”).
case, including the important decision in *Ezell I*. Part III examines the decision and the different opinions in *Ezell II* and argues that the majority incorrectly applied the two-step means-end scrutiny test, both in terms of the heightened level of scrutiny selected by Judge Sykes and how it was applied to the regulations at issue.

2016 marked a record year for gun violence in Chicago, and 2017 has shown little signs of improvement. In *Ezell II*, Judge Rover expressed her “sympathy for the City's difficult path between this Scylla and Charybdis,” as they attempt to combat gun violence while navigating the Constitutional reality imposed by *Heller* and *McDonald*. Unfortunately, the Seventh Circuit in *Ezell II* further narrowed the path forward for Chicago city officials to craft meaningful gun control ordinances that can survive constitutional scrutiny.

I. BACKGROUND: *Heller & McDonald*, AND THE NEW SECOND AMENDMENT LANDSCAPE IN THE FEDERAL COURTS

When the Supreme Court issued its decision in *Heller*, it marked the first time in nearly 70 years that the highest court in the United States had tackled the Second Amendment. The prior case, *Miller v. United States* in 1939, did not contain much elaboration on the scope of the Second Amendment. *Miller* involved a challenge to a state ban on sawed-off shotguns which the Court upheld as constitutional under the Second Amendment. The Court concluded that there was a lack of evidence showing “some reasonable relationship” between the use of a sawed-off shot gun and “the preservation or efficiency of a well

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22 *Ezell II*, 846 F.3d at 898.
24 See Henderson, *supra* note 9, at 432.
regulated militia,” and remanded the case for further proceedings, which did not occur.26

Although the opaque language of the Miller opinion led to decades of debate among courts and commentators as to the scope of the Court’s Second Amendment holding,27 the language in the opinion did appear to strongly suggest the Court’s view that the Second Amendment right to bear arms was only connected to militia service.28 Regardless of the merits of this view, the interpretation that the right to keep and bear arms is tied to militia service was foreclosed when the Supreme Court issued its landmark ruling in Heller.

A. D.C v. Heller & McDonald v. City of Chicago: The Supreme Court Resets the Stage on the Second Amendment

The District of Columbia’s total ban on hand gun ownership was the strictest gun control regulation in the country, and a ripe target for gun rights advocates.29 A leading libertarian think-tank spent years strategically assembling the perfect “law-abiding” plaintiffs to challenge the law and finally achieve judicial recognition of an individual right to keep and bear arms.30 The group found its ideal

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26 Id. No further proceedings occurred because the original defendant Miller had died, and the remaining defendant struck a plea deal after the Supreme Court’s decision. See Id.


28 See Henderson, supra note 9, at 432. As Justice Stevens noted in his dissent in Heller, virtually every Court of Appeals to interpret Miller understood it to hold that “the Second Amendment does not protect the right to possess and use guns for purely private, civilian purposes. D.C. v. Heller, 554 U.S. 570 n.2 (2008) (Stevens, J., dissenting) (listing cases).


plaintiff in Dick Heller, a security guard who carried a gun on duty but was denied a license by the District to keep his firearm in his home.\textsuperscript{31} In a bitterly split opinion, the Court in \textit{Heller} ruled that the District’s ban was unconstitutional.\textsuperscript{32} The Court held that the Second Amendment conferred an individual right to “possess a firearm unconnected with service in a militia,” as well as the right to use that arm for “traditionally lawful purposes such as self defense in the home.”\textsuperscript{33} In a sprawling opinion for the majority, Justice Scalia relied on what some scholars have called “new originalism” principles by looking at the “text, history and tradition” of the Second Amendment to conclude that it conferred an individual right.\textsuperscript{34} Additionally, Justice Scalia argued that the text and history indicated that the central core of an individual’s Second Amendment right was the “inherent right of self-defense.”\textsuperscript{35} By casting the Second Amendment in this way—as protecting an individual right to keep a firearm in the home for self-defense—the Court found that the District’s ban was necessarily unconstitutional.\textsuperscript{36}

Justice Stevens wrote a highly critical dissent in which he called the majority opinion a “strained and unpersuasive reading” of the Second Amendment’s text and history.\textsuperscript{37} Justice Stevens presented his own historical and textual analysis to argue that the right to keep and bare arms under the Second Amendment was solely connected to

\begin{footnotesize}
\begin{enumerate}
\item \textit{Heller}, 554 U.S. at 570.
\item \textit{Id.}
\item \textit{Heller}, 554 U.S. at 628.
\item See \textit{id.} at 630.
\item \textit{Heller}, 554 U.S. at 639 (Stevens, J., dissenting).
\end{enumerate}
\end{footnotesize}
militia service, and that neither the text nor the history presented by the majority “evidenced the slightest interest” on the part of the Founders “in limiting any legislature's authority to regulate private civilian uses of firearms.”

Justice Breyer also wrote a dissent arguing for an “interest-balancing inquiry” whereby the interests protected by the Second Amendment would be weighted against the public safety interests of the government to determine “whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.” The majority opinion expressly rejected Justice Breyer’s proposed framework, which is ironic given the interest balancing that is an inherent part of the two-step means-end test that would emerge in the lower courts.

Apart from its principle holding recognizing the individual right to keep and bear arms in the home for the purposes of self defense, the Court in *Heller* declined to “clarify the entire field” of the Second Amendment. The Court did note, however, that the right was not “unlimited” and indicated that many areas of gun regulation remained “presumptively lawful.” The Court cautioned that:

> [N]othing 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.

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38 *Id.* at 637.
39 *Id.* at 689 (Breyer, J., dissenting).
41 *Heller*, 554 U.S at 635.
42 *Id.* at 595.
43 See Kopel & Greenlee, *supra* note 27, at 214.
44 *Heller*, 554 U.S. at 626-27.
Additionally, in an attempt to square its holding with the cryptic ruling in *Miller*, the Court stated that the Second Amendment “does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.” Furthermore, the Second Amendment did not protect “dangerous and unusual” weapons. Apart from sawed-off shot guns and “machineguns,” however, the court did not explicitly point to other types of “unusual” weapons not typically used for “lawful purposes.”

Notably absent from the *Heller* majority’s discussion of Second Amendment principles was any concrete standard of review. The Court only stated that the District’s ban would fail under “any of the standards of scrutiny that we have applied to enumerated constitutional right,” though the Court later conceded in a footnote that the law would likely pass rational-basis review “like almost all laws” would. The only standard the Court seemed to foreclose was rational basis, stating that the test was not appropriate for evaluating legislative regulation of a “specific, enumerated right” under the Bill of Rights. Justice Breyer was critical of the majority leaving the lower courts “without clear standards” for resolving future Second Amendment disputes, and he warned that without clear standards the

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45 See Kopel & Greenlee, *supra* note 27, at 214.
46 *Heller*, 554 U.S. at 625.
47 *Id.* at 627.
48 *Id.* at 624-25 (“We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”). The Court did indicate that current bans on “machineguns” remained valid, and suggested that military style assault rifles like the M-16 were not protected arms. See *id.* For more on how the lower courts have approached this question of what arms constitute unprotected “dangerous and unusual” weapons, see Kopel & Greenlee, *supra* note 27, at 230-241.
49 For more analysis of the opinions in *Heller*, see generally, Rostron, *supra* note 40; Griepsma, *supra* note 34.
50 Griepsma, *supra* note 34.
51 *Heller*, 554 U.S. at 628.
52 *Id.* at 628, n. 27.
53 *Id.*
imminent wave of Second Amendment litigation “threaten[ed] to leave cities without effective protection against gun violence.”54

The Court did not clarify the standard of review question when it revisited the Second Amendment two years later in *McDonald v City of Chicago*.55 The Court in *McDonald* embarked on a historical inquiry to determine if the right to individual self-defense, which was recognized in *Heller* as a “central component of the Second Amendment,” was also so “deeply rooted in this Nation’s history and tradition” as to be part of the liberty protected by the Fourteenth Amendment.56 A majority of Justices answered in the affirmative, holding that the individual right to keep and bear arms for self-defense was one of the “fundamental rights necessary to our system of ordered liberty.”57 Therefore, the Second Amendment was incorporated and applied against state and local government through the Fourteenth Amendment.58

The plurality opinion by Justice Samuel Alito restated many of the same principles from *Heller*, including the recognition of presumptively valid regulations such as longstanding prohibitions of firearm possession by felons or the carrying of guns in “sensitive places.”59 However, the Court again did not fully elaborate the contours of the Second Amendment’s protections. Instead, after invalidating Chicago’s ban on handguns, Justice Alito signaled to

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54 Id. at 718 (Breyer, J., dissenting).
55 As previously mentioned, *McDonald* involved a challenge to hand gun ban’s in Chicago (and neighboring suburb of Oak Park, IL). See *McDonald v. City of Chicago*, 561 U.S. 742, 748 (2010).
57 *McDonald*, 561 U.S. at 777.
58 Id.
59 Id. at 786. (“We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill,’ ‘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.’ We repeat those assurances here.”).
states and local governments to continue to experiment with “reasonable firearms regulation.”\textsuperscript{60}

The Court, however, offered no additional guidance on what experiments in gun regulations might be “reasonable” and gave no standard to lower courts as to how they were to review the constitutionality of these state and local experiments in gun control.\textsuperscript{61} Though the \textit{McDonald} Court reaffirmed its rejection of any sort of a judicial balancing inquiry, like that proposed by Justice Breyer in \textit{Heller},\textsuperscript{62} the Court declined to address what standards of review or levels of scrutiny should guide lower courts going forward.\textsuperscript{63}

Justice Breyers’s dissent in \textit{Heller} and Justice Stevens’s dissent in \textit{McDonald} both warned of the inevitable flood of litigation in the lower courts, and the dangers of leaving no clear standards to guide the decisions. Over time though, a majority of the Federal Circuit Courts of Appeals would eventually develop and adopt their own framework for analyzing the new wave of Second Amendment challenges they encountered.

\textbf{B. The Federal Courts React to the New Second Amendment Regime: The Development of the Two-Step Means-End Test}

Not surprisingly, in the initial few years following \textit{Heller} and then \textit{McDonald}, there were hundreds of challenges to firearm regulations in the lower courts.\textsuperscript{64} As the Supreme Court had avoided describing the full scope of the Second Amendment’s protections, some of the initial lower court cases were concerned with the question of what other “lawful” uses of firearms were protected by the Second Amendment.

\textsuperscript{60} \textit{See Id.} at 785.
\textsuperscript{61} Kiehl, \textit{supra} note 56, at 1140-41.
\textsuperscript{62} \textit{McDonald}, 561 U.S. at 785.
\textsuperscript{63} \textit{See} Kiehl, \textit{supra} note 56, at 1140-41.
\textsuperscript{64} \textit{Id.} at 1141.
besides the right to keep arms in the home for self-defense. The problem that arose early on in all these cases was what standard courts should use to review regulations on firearm use when they allegedly burdened conduct determined to be within the scope of the Second Amendment.

In the initial years following the Supreme Court decisions, lower courts used virtually the complete range of standards to evaluate gun control measures, including varying levels of intermediate or strict scrutiny (or a hybrid of both), a reasonableness test, and an undue burden test similar to that applied in abortion cases. Some courts avoided setting any standard all together. Regardless of the test used, the gun control measures usually survived review.

Eventually, a guiding framework for analysis emerged in the form of a two-part means-end test similar to that used in the First Amendment context. The test was first explicitly articulated by the Third Circuit in United States v Marzzarella. The first step of this analysis is to determine whether the regulation at issue burdens conduct that falls within the scope of the Second Amendment protections. If the conduct does not fall within the scope of the Second Amendment or there is no burden, then the inquiry is complete and the regulation withstands constitutional review. If there is a burden on protected conduct, the second step is to evaluate the

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65 See e.g., Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1252 (D.C. Cir. 2011) (stating that the Second Amendment protects other lawful uses of firearms like hunting); see generally, Kopel & Greenlee, supra note 27.
66 Kiehl, supra note 56, at 1141.
67 See id. at 1145-49 (describing cases).
68 Id.
69 Id. at 1141. (“[T]he only consistency in the lower court cases is in the results. Regardless of the test used, challenged gun laws almost always survive.”) (internal citation omitted).
70 See Kopel & Greenlee, supra note 27, at 212-14.
71 United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).
72 Id.
73 Id.
regulation under some level of means-end scrutiny.74 The burden of proof is on the government throughout both steps.75

As to the first step, Heller described only one clear area of conduct that is at the core of the Second Amendment’s protection: the right of law-abiding individuals to keep a firearm in the home for self-defense.76 For other forms of conduct that do not clearly fit in the realm of home self-defense, the inquiry on whether the conduct is covered by the Second Amendment is primarily a historical and textual analysis modeled after the Heller decision itself.77 The courts rely on a “wide array of interpretative materials to conduct a historical analysis” in order to determine if the “historical traditions” surrounding the conduct at issue indicate it was considered protected activity.78 In practice, this step involves combing through a “variety of legal and other sources to determine the public understanding of [the] legal text in the period after its enactment or ratification.”79

Drawing analogies to historical gun control measures is rife with limitations, given the fundamental differences between the interests involved with the use of firearms in the founding area compared to gun violence concerns today.80 This conflict between current and

74 Id.
75 Kopel & Greenlee, supra note 27, at 214.
76 Marzzarella, 614 F.3d at 88; see also Kopel & Greenlee, supra note 27, at 211 (“Heller leaves no doubt that self-defense is at the core of the right” under the Second Amendment.).
77 See Kopel & Greenlee, supra note 27, at 229.
78 See NRA v. BATFE, 700 F.3d 185, 194 (5th Cir. 2012).
79 Id. at 194 n.8. (citing Heller, 554 U.S. at 605). Examples of these sources include similar arms-baring protections in state constitutions or legislation; commentaries by scholars and legislatures around the time of ratification; and 19th century legislation limiting or burdening the same or analogous conduct as the present law under review. See Id.
80 See Heller, 554 U.S. at 714-15 (Breyer, J., dissenting) (noting that the “self defense” interests of the founding era were not comparable to the urban-crime prevention interest of the present day, given that, to the founding era Americans living on the frontier, self defense meant protection from “outbreaks of fighting with Indian tribes, rebellions such as Shays' Rebellion, marauders, and crime-related dangers to travelers on the roads, on footpaths, or along waterways.”).
historical interests reflects the larger deficiency with using “original public meaning” analysis to determine the current scope of a constitutional right.\(^8\) Placing these issues aside for now, for this article’s purposes it is enough to say that under the two-step test adopted by the lower courts, the first step requires that judges examine all the historical evidence that the parties and the jurists themselves can muster. The ultimate goal is to determine if the present restriction on gun use or ownership under review “is consistent with a longstanding tradition” of founding era and 19\(^{th}\) century legislatures restricting gun use or ownership in a comparable manner.\(^2\)

In terms of the second step and the proper level of means-end scrutiny to apply, the Court in \textit{Heller} only foreclosed the use of rational basis review.\(^3\) Therefore, the lower courts have almost uniformly agreed that some level of heightened scrutiny applies.\(^4\) The courts select a level of scrutiny in a manner similar to the general First

\(\text{\small Footnotes:}\)

\(^8\) For a general critique of originalism and original public meaning analysis in the context of \textit{Heller}, see generally Morgan Cloud, \textit{A Conclusion in Search of a History to Support It}, 43 TEX. TECH L. REV. 29 (2010).

\(^2\) \textit{See BATFE}, 700 F.3d at 194 (5th Cir. 2012) (concluding after an exhaustive historical review that the challenged federal statute banning licenses dealers from selling firearms to minors under 21 was “consistent with a longstanding tradition of age- and safety-based restrictions on the ability to access arms,” which meant that the ability of 18-20 year olds to purchase firearms “falls outside the Second Amendment’s protection.”). The \textit{BATFE} court indicated that they were “inclined” to uphold the statute based on their historical analysis in step one, but they noted the “institutional challenges” in reaching a definitive historical conclusion, and thus they proceeded to analyze the statute under step two. \textit{Id.} For more examples of the historical inquiry of step one in practice, see, e.g., United States v. Rene E., 583 F.3d 8, 16 (1st Cir. 2009) (upholding similar statute banning minors from possessing firearms based on historical evidence); United States v. Greeno, 679 F.3d 510, 519 - 520 (6th Cir. 2012) (upholding sentencing enhancements for using firearms in the commission of a crime based on historical analysis).

\(^3\) \textit{Heller}, 554 U.S. at 628 n.27.

\(^4\) \textit{See Kopel & Greenlee, supra} note 27, at 274 n. 486 (listing cases from nearly every circuit agreeing that the use of rational basis is foreclosed and some heightened level of scrutiny applies). According to Kopel & Greenlee, the sole exception appears to be the Second Circuit, which requires a “substantial burden” on protected conduct for the Court to apply more than rational basis review. \textit{Id.}
Amendment framework, where “the level of scrutiny applicable under the Second Amendment . . . depend[s] on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.” \(^85\) Therefore, a law that imposes a “substantial burden” upon the core rights protected by the Second Amendment, such as self-defense in the home, needs to have a “strong justification” akin to strict scrutiny. \(^86\) A law that imposes a less substantial burden or that implicates conduct that is not a core right, like self-defense in the home but is more ancillary conduct such as registration requirements or permit fees, should be “proportionately easier to justify.” \(^87\)

The way in which any individual panels describe the level of scrutiny they are applying can vary widely from case to case and judge to judge. \(^88\) As a general principle, the highest level of scrutiny (strict scrutiny) is typically reserved for those laws that threaten the core Second Amendment rights of law abiding citizens to use a firearm in the home for self-defense \(^89\) or that restrict other activity that the historical inquiry of the first step indicates was traditionally at the core of the Second Amendment’s protections, such as hunting. \(^90\) For example, courts have applied strict scrutiny to lifetime bans on handgun ownership for nonviolent misdemeanants \(^91\) and a categorical ban on persons buying guns from outside their home state. \(^92\)

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\(^{85}\) *Heller II*, 670 F.3d at 1257 (citing United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).

\(^{86}\) *Id.*

\(^{87}\) *See id.*

\(^{88}\) *See Kopel & Greenlee, supra note 27, at 196.*

\(^{89}\) *See NRA v. BATFE, 700 F.3d 185, 195 (5th Cir. 2012) (“A regulation that threatens a right at the core of the Second Amendment—for example, the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family—triggers strict scrutiny.”) (citing *Heller* 554 U.S. at 635).*

\(^{90}\) *See Heller II*, 670 F.3d at 1252. For additional cases recognizing activities like hunting and target practice as covered by the Second Amendment, see generally Kopel & Greenlee, *supra* note 27, at 204-07.


\(^{92}\) Mance v. Holder, 74 F. Supp. 3d 795, 804 (N.D. Tex. 2015); For more examples, see generally Kopel & Greenlee, *supra* note 27, at 274-78.
Conversely, for regulations shy of the total bans on gun ownership found in *Heller* and *McDonald* that do not substantially burden the core rights protected under the Second Amendment, but which still implicate conduct within the scope of the Amendment’s protections, the courts tend to apply a less heightened standard more akin to intermediate scrutiny.93 The overwhelming majority of lower court decisions post-*Heller* involving the Second Amendment have applied something akin to intermediate scrutiny, whereby the regulation must be substantially related to an important government interest.94

Many courts using this two-step framework draw comparisons to the First Amendment framework for how they decide which level of heightened scrutiny to apply.95 For example, total bans on gun ownership in the home could be seen as comparable to content-based restrictions on speech, and thus subject to strict scrutiny.96 Similarly,

93 See Kopel and Greenlee, supra note 27, at 314.
94 See e.g., *Heller v. District of Columbia*, 670 F.3d 1244, 1261–64 (D.C. Cir. 2011) (applying intermediate scrutiny to prohibition on possession of magazines with a capacity of more than ten rounds of ammunition); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (applying intermediate scrutiny to a federal law prohibiting the possession of firearms by a person convicted of a misdemeanor crime of domestic violence), cert. denied, 132 S. Ct. 1538, 182 L.Ed.2d 175 (2012); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (applying intermediate scrutiny to a federal regulation which prohibits “carrying or possessing a loaded weapon in a motor vehicle” within national park areas), cert. denied, 132 S.Ct. 756, 181 L.Ed.2d 482 (2011); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny to a federal law which prohibits the possession of firearms with obliterated serial numbers), cert. denied, 131 S.Ct. 958, 178 L.Ed.2d 790 (2011); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny to a federal law which prohibits the possession of firearms while subject to a domestic protection order), cert. denied, 131 S.Ct. 2476, 179 L.Ed.2d 1214 (2011); *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (ban on magazines holding more than ten rounds is valid under intermediate scrutiny).
95 See e.g., *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010).
96 Cf. Jackson v. City & Cty. of San Francisco, 746 F.3d 953, 968 (9th Cir. 2014) (San Francisco ordinances regulating firearm storage in the home were distinguishable from the total bans on handgun possession invalidated in *Heller*, and were “akin to a content-neutral time, place, and manner restriction,” thus they only needed to survive intermediate scrutiny).
content-neutral regulations that only restrict the “time, place, and manner” by which the Second Amendment rights can be exercised, for example by regulating how firearms are stored when not in use, should be subjected only to intermediate scrutiny as in the speech context. Furthermore, at least one court has argued that intermediate scrutiny makes particular sense and is preferred in the Second Amendment context because of the unique public safety risk of the activity being regulated—firearm use—which sets it apart from other fundamental rights which are typically evaluated under strict scrutiny.

Thus, the consensus that has emerged in the courts appears to be a for applying a form of intermediate scrutiny in the majority of cases involving the Second Amendment, and reserving strict scrutiny for those cases that substantially burden the core right of self defense in the home, or other conduct that historical inquiry reveals is a core right of the Second Amendment.

The Seventh Circuit’s approach, however, has not been entirely in line with this majority view. Several of the Seventh Circuit’s early post-\textit{Heller} and \textit{McDonald} decisions attempted to avoid any discussion of a set standard of review or level of scrutiny. Furthermore, while the courts in \textit{Ezell I} and \textit{Ezell II} purported to adopt and apply the same two-step framework as used in a majority of

\[97 \textit{Id.}\]
\[98 \text{Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1126 (10th Cir. 2015), cert. denied, 136 S. Ct. 1486 (2016) (“The risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test, such as the right to marry and the right to be free from viewpoint discrimination, which can be exercised without creating a direct risk to others. Intermediate scrutiny appropriately places the burden on the government to justify its restrictions, while also giving governments considerable flexibility to regulate gun safety.”).}\]
\[99 \text{See Griepsma, supra note 34, at 296 (arguing intermediate scrutiny appears to be the most common level of scrutiny used in Second Amendment cases). See generally Kopel & Greenlee, supra note 27 (collecting cases, the majority of which apply something akin to intermediate scrutiny).}\]
circuits, in both those cases the test was improperly applied to strike down gun control measures.

II. THE SEVENTH CIRCUIT’S APPROACH

The en banc Seventh Circuit has only granted review of a Second Amendment challenge on one occasion, and it was in the relatively immediate aftermath of *Heller* and *McDonald* in 2010. The en banc court, in an opinion authored by then Chief Judge Frank Easterbrook, held a federal statute that banned firearm possession by individuals convicted of misdemeanor crimes of domestic violence was permissible under the Second Amendment. The court noted the language from *Heller* on presumptively valid regulations—like bans on felons possessing guns—as evidence that some categorical bans on firearm ownership could be constitutional. But, Judge Easterbrook’s opinion strongly cautioned the lower courts against reading too much into the language of *Heller* beyond its principle holding conferring an individual right, one part of which was to keep a firearm in the home for self defense. While the *Skoien* court declined to delve too “deeply into the ‘levels of scrutiny’ quagmire,” it did agree that some form of “strong showing” was necessary and indicated that the law would pass intermediate scrutiny review.

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100 Ezell v. City of Chicago, 846 F.3d 888, 893 (7th Cir. 2017) (“We note for good measure that most other circuits have adopted the framework articulated in *Ezell I*”).
101 See United States v. Skoien, 614 F.3d 638 (7th Cir. 2010).
102 See id. at 640-42.
103 Id. at 640.
104 Id. (“We do not think it profitable to parse these passages of *Heller* as if they contained an answer to the question whether § 922(g)(9) is valid. They are precautionary language. . . . What other entitlements the Second Amendment creates, and what regulations legislatures may establish, were left open. The opinion is not a comprehensive code; it is just an explanation for the Court’s disposition. Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration.”)
105 Id. at 642 (The government conceded the regulation was only valid “if substantially related to an important governmental objective” and the court stated
Though it is not the explicit framework in the opinion, the analysis in Skoien can be viewed as roughly in line with the two-step means-end test. The court recognized that misdeemants with domestic violence convictions were not totally excluded from Second Amendment protection (step one) and indicated the statute would pass intermediate scrutiny (step two). Not long after Skoien, the three-judge panel in Ezell I (2011) formally adopted the same two-step framework now used by the majority of other circuits. Ezell I is discussed in more detail below as important background for Ezell II.

A. Too Clever by Half: Ezell I and Chicago’s First Attempt at Post-McDonald Gun Regulation

Ezell I is worth examining in some detail as it is not only the first round of litigation for the case that is the primary subject of this article, but it also is critically important to the Seventh Circuit’s Second Amendment jurisprudence in how the majority adopted and described the two-step test. Furthermore, the manner in which the majority in Ezell I inappropriately applied the two-step framework was significant in constraining the constitutional path forward for gun control advocates seeking to curtail gun violence in Chicago.

After the Supreme Court declared Chicago’s ban on handgun ownership unconstitutional in McDonald, the City Council organized hearings to determine what steps they could take to continue to combat gun violence in the city. Just four days after the decision in McDonald, and after testimony from a range of academics, experts,
and community activists, the City Council passed the Responsible Gun Owners Ordinance (the “Ordinance”). The Ordinance contained a sweeping array of gun control measures and restrictions including: bans on certain types of weapons, ammunition and accessories; forbidding the sale or transfer of weapons except in limited circumstances; and a complex permitting regime. Inevitably, the Ordinance was challenged in a flood of new litigation by gun owners, retailers, and rights activists.

*Ezell I* specifically involved provisions of the Ordinance that banned all live firing-ranges within the city limits. The range ban on its own would perhaps already be suspect, but another part of the Ordinance conditioned firearm permits on the completion of a state certified firearm safety course with a mandated requirement of one-hour of range-training. Thus, as a practical matter, no individual could satisfy their Chicago permit requirements within the city limits.

A group of gun owners, activists, and a prospective firing range operator brought suit against the city seeking a restraining order and injunction against enforcement of the firing-range ban. The plaintiffs argued that the Ordinance burdened their Second Amendment right to keep a firearm in the home for self-defense—because live training was required for a permit—as well as their right to maintain proficiency in firearm use which they claimed was also protected by

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109 *Id.*

110 See *Id.* at 690-91. The full Ordinance is available at https://www.ispfsb.com/Public/Firearms/Ordinances/chicago.pdf.

111 See e.g., Illinois Ass’n of Firearms Retailers v. City of Chicago, 961 F. Supp. 2d 928, 931 (N.D. Ill. 2014) (ordinance banning nearly all sale and transfer of arms); Second Amendment Arms v. City of Chicago, 135 F. Supp. 3d 743, 747 (N.D. Ill. 2015) (zoning requirements for gun stores and ban on displaying their firearms in windows, as well as a permit fee requirement).

112 *Ezell I*, 651 F.3d at 690-91 (CHI. MUN.CODE § 8–20–280 prohibited all “[s]hooting galleries, firearm ranges, or any other place where firearms are discharged”)

113 *Id.*

114 *Id.*

115 *Id.*
the Second Amendment. After a hearing and some limited testimony, the District Court denied both the plaintiffs’ motions for a temporary restraining order and for a preliminary injunction.

The Court of Appeals, in a unanimous judgment, reversed the district court and remanded with instructions for the district court to issue a preliminary injunction against the firing range ban. Judge Diane Sykes, who notably had dissented from the en banc decision in Skoien, wrote the majority opinion which was joined by Judge Michael Kanne. Judge Ilana Rovner concurred in the judgment but filed a separate opinion. Judge Sykes described the primary issue before the court as whether the firing range ban violated the Second Amendment on its face, and whether the ability to maintain proficiency in firearm use through live range training fell within the scope of the Second Amendment.

To answer this question, Judge Sykes utilized the framework of the two-step means-end test discussed supra, which at the time was already starting to be utilized in several other circuits. Judge Sykes described the first step of the analysis as “a textual and historical inquiry into original meaning” to determine if the conduct fell within the scope of the Second Amendment right as it was publicly

116 Id.
118 Ezell I, 651 F.3d at 703.
119 Id. at 689.
120 Id. at 711.
121 Id. at 697-98. The court also addressed the preliminary issues of standing, and the district court’s improper conclusion that the ability of the plaintiffs to leave the city limits for firearm training meant that the second Amendment was not implicated at all. Id. Rather, the court noted the general rule that the ability to exercise a constitutional right someplace else does not mean the right is not infringed, and because this was a facial challenge to a law and involved a burden on a constitutional right, irreparable harm was presumed and the inquiry needed to move to the likelihood of success on the merits.
122 Id. at 703 (noting the Third, Fourth, and Tenth Circuit had recently adopted the framework).
understood at the time of ratification. Judge Sykes described the second step as an inquiry into “the strength of the government’s justification for regulating or restricting” the exercise of that right. Similar to the second step in the other circuits, this involves applying some heightened level of “mean-end scrutiny” to the law.

In this case, the majority answered the first inquiry by holding that the core right to possess firearms for self defense also “implies a corresponding right to acquire and maintain proficiency in their use.” The City attempted to point to a number of founding era, antebellum and Reconstruction laws that limited the discharge of firearms in public urban environments as evidence that the original public meaning of the Second and Fourteenth Amendment did not include a right to live firing-range training. The majority dismissed these statutes as unpersuasive, claiming that most were restrictions on the “time, place, and manner” that firearms could be discharged and were not as severe as the City’s total ban on firing ranges. As the majority concluded the City failed to meet its burden in showing that live firearm training was “wholly outside the Second Amendment,” the analysis needed to proceed to step two.

Similar to the court in Marzzarella, Judge Sykes next looked to First Amendment doctrine for guidance on the level of scrutiny to

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123 Id. at 700. The relevant time period depends on whether the law at issue is federal or state/local action. See id. (“Heller suggests that some federal gun laws will survive Second Amendment challenge because they regulate activity falling outside the terms of the right as publicly understood when the Bill of Rights was ratified; McDonald confirms that if the claim concerns a state or local law, the ‘scope’ question asks how the right was publicly understood when the Fourteenth Amendment was proposed and ratified.”)

124 Id. at 703.
125 Id.
126 Id.
127 Id. at 705.
128 Id. The city did offer some evidence of historical regulations that totally banned the discharge of firearms in city limits, but the majority distinguished those regulations as focused on “fire suppression” and not relevant to Chicago’s offered justifications for theft prevention and injury from stray bullets. Id.
129 Id. at 706.
chose, and the appropriate circumstances for applying intermediate or strict scrutiny.130 Setting the “labels aside,” however, Judge Sykes extrapolated from the First Amendment doctrine to a “sliding scale” test for Second Amendment claims, whereby the general principles of review are:

First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.131

Judge Sykes' formulation of the second step is generally similar to that developed in the other circuits at the time,132 but her mention of setting aside the labels of strict and intermediate scrutiny is significant. The other circuits to adopt the two-step test at the time had typically described the choice of what level of scrutiny at the second step of the analysis in more binary terms as a choice between strict and intermediate scrutiny.133 Judge Sykes' opinion later demonstrates that the application of this sliding-scale scrutiny as she has described it allows for even more flexibility for judges to tilt the scale in how they characterize the nature of the right and the appropriate level of

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130 Id. 706-708.
131 Id. at 708.
132 See, e.g., United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010) (“the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right”).
133 See e.g., United States v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010) (choosing between strict and intermediate scrutiny); United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010) (same).
scrutiny. Furthermore, setting aside labels can obscure just exactly what level of review a judge is applying.\textsuperscript{134}

In terms of the appropriate level of scrutiny for the City’s ordinance banning firing ranges, Judge Sykes contrasted the case with the factual circumstances of \textit{Skoien} where the court had required a “strong showing” akin to intermediate scrutiny.\textsuperscript{135} In \textit{Skoien}, intermediate scrutiny was appropriate because the ban on domestic violent misdemeanants did not impact the rights of “law-abiding, responsible citizens,”\textsuperscript{136} nor, according to Judge Sykes, did it implicate the central right of self defense.\textsuperscript{137} Here, the firearm ban prevented “law-abiding citizens” from engaging in target practice, which, according to Judge Sykes, was a “serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.”\textsuperscript{138} Also of note was that a firearm permit in Chicago required live range training.\textsuperscript{139} Taken together, this necessitated “a more rigorous standard than was applied in \textit{Skoien},” or what Judge Sykes described as “not quite ‘strict scrutiny.’”\textsuperscript{140} This standard required the city “establish a close fit between the range ban and the actual public interests it serves, and also that the public’s interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights.”\textsuperscript{141}

The court held that the city did not come close to meeting this burden, stating that the record contained no data or expert opinion but only mere speculation on the public health risks due to stray bullets

\textsuperscript{134} As is discussed further infra, Ezell I and Ezell II are themselves prime examples of this, as the majority describes the standard of review in different ways in each case, despite it supposedly being the same.

\textsuperscript{135} Ezell I, 651 F.3d at 708.

\textsuperscript{136} \textit{id.} at 708 (citing \textit{Heller}, 554 U.S. at 634).

\textsuperscript{137} \textit{id.}

\textsuperscript{138} \textit{id.}

\textsuperscript{139} \textit{id.}

\textsuperscript{140} \textit{id.}

\textsuperscript{141} \textit{id.} at 708-709.
and more guns susceptible to theft. \footnote{142}{Id.} Interestingly, Judge Sykes noted that the concerns of the city on the record could be “addressed through sensible zoning and other appropriately tailored regulations,” \footnote{143}{Id. at 709.} which is of note considering her later opinion in \\textit{Ezell II} discussed below. Because the range ban was “wholly out of proportion” to the public interests the city purported to serve, the court concluded that the plaintiffs had a strong likelihood of success on the merits and ordered the issuance of a preliminary injunction. \footnote{144}{Id.}

Judge Rover wrote a concurrence in which she agreed with the ultimate judgment insofar that the firing range ban was an unconstitutional burden on the core right of self-defense identified in \\textit{Heller} because the practical effect was that law abiding citizens would not be able to obtain a permit for a gun even if the sole purpose was self-defense in the home. \footnote{145}{See \\textit{Ezell I}, 651 F.3d at 711 (Rovner, J. concurring) (“The regulation is two clever by half… That residents may travel outside the jurisdiction to fulfill the training requirement is irrelevant to the validity of the ordinance inside the City. In this I agree with the majority . . . the City may not condition gun ownership for self-defense in the home on a prerequisite that the City renders impossible to fulfill within the City limits.”).} Judge Rovner also did seem to agree that the right to use a firearm for self-defense in the home implied some protected right to train to use guns safely, \footnote{146}{Id. at 712 (“the right to use a firearm in the home for self-defense would be seriously impaired if gun owners were prevented from obtaining the training necessary to use their weapons safely for that purpose”).} but she pointed out that did not necessarily imply a right to live firearm training, as there were other options like classroom and simulated training. \footnote{147}{Id. (“There is no ban on classroom training. There is no ban on training with a simulator and several realistic simulators are commercially available, complete with guns that mimic the recoil of firearms discharging live ammunition.”) (citing to examples of simulation systems).} Regardless,
Judge Rovner concluded that the limited evidence on the record supporting the City’s public safety justifications, and the fact that the Ordinance was a complete ban on the training necessary to obtain a permit, meant that the range ban was “unlikely to withstand scrutiny under any standard of review.”

However, this conclusion was the end of Judge Rovner’s agreement with the majority, and her concurrence was highly critical of the manner in which Judge Sykes applied the two-step analysis, specifically the level of scrutiny the majority applied. Despite Judge Sykes eschewing labels, Judge Rover recognized the standard applied by the majority as “akin to strict scrutiny,” which she argued was “more stringent [a standard] than is justified by the text or the history of the Second Amendment.” Judge Rover noted that the range ban was not a complete ban on conduct “implicating the core of the Second Amendment,” but rather the ban should be characterized as a “a regulation in training, an area ancillary to a core right.” Because the “right to maintain proficiency in firearms handling is not the same as the right to practice at a live gun range,” Judge Rovner could not agree that a more rigorous standard than the intermediate scrutiny that was applied in Skoien was necessary.

Additionally, Judge Rovner noted that the historical evidence of regulations offered by the City was proof that intermediate scrutiny was the more appropriate standard. Despite the majority’s attempt to distinguish the ban on live training from the historical regulations, Judge Rovner argued that the Ordinance fell into the same category of many of the historical laws which regulated the “time, place and manner of gun discharges.” Just as some of the historical examples of regulations were focused on only the time of day or location that

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148 Id.
149 See id. at 713.
150 Id.
151 Id. (emphasis added).
152 Id.
153 See id.
154 Id.
firearms could be discharged, the live firing range ban was just a restriction on one “aspect of firearms training,” i.e. a restriction on one manner of training (live as opposed to simulated) and on the place (within the city limits). Given these similarities, the “intermediate scrutiny applied to time, place and manner restrictions” in the First Amendment context would have been “both adequate and appropriate” in this Second Amendment case.

Furthermore, the manner in which the majority summarily dismissed the City’s offered public safety justification as “entirely speculative” was, in Judge Rovner’s words, “naïve” and “unfounded.” Judge Rovner argued that the historical examples of gun regulation offered by the city showed that “public safety was a paramount value to our ancestors,” and that public safety concerns sometimes “trumped the Second Amendment right to discharge a firearm in a particular place.” Though the nature of the public safety concern may have changed from the founding area to now, the “historical context” nonetheless should have been proof for the majority that “cities may take public safety into account in setting reasonable time, place and manner restrictions on the discharge of firearms within City limits.” Given the unique “inherently dangerous” nature of guns, Judge Rovner argued that Chicago “has a right to impose reasonable time, place and manner restrictions on the operation of live ranges in the interest of public safety and other legitimate governmental concerns.”

155 Id. (“as the majority itself points out, one statute prohibited the discharge of firearms before sunrise, after sunset, or within one quarter mile of the nearest building. Others prohibited firearms discharge without specific permissions and only then at specific locations”).
156 Id. at 714.
157 Id.
158 Id.
159 Id.
160 Id.
161 Id.
162 Id. at 714-15.
“time, place and manner” restriction, the appropriate means of analysis should have been intermediate scrutiny.163

While Judge Rovner may have agreed that the City could not even meet this level of scrutiny, based on the lack of evidence on the record and the ban effectively making it impossible to achieve a permit in the city limits,164 her concurrence in Ezell I is incredibly important to the future of Second Amendment analysis in the Seventh Circuit. Judge Rovner was operating in the same two-step framework as the majority, by looking at the historical evidence for the scope of the Second Amendment right and choosing the appropriate level of scrutiny based on the nature of that right and how it was being regulated. Doing this analysis led her to appropriately conclude intermediate scrutiny as the standard of review based on the nature of the ban as a time, place, and manner restriction.165 This approach is in line with how other circuits have applied the two-step analysis and likewise applied intermediate scrutiny for time, place, and manner style gun restrictions, or when the activity at issue is an ancillary right and not a core Second Amendment right.166 Judge Rovner’s concurrence in Ezell I in other words is an early post-Heller example of faithful application of the two-step analysis to gun regulation under the Second Amendment.

Conversely, Judges Sykes majority opinion, while it was pivotal in laying the foundation and formally adopting the two-step Second Amendment analysis for the Seventh Circuit,167 is an example in how

163 Id. at 714.
164 Id. at 712.
165 Id. at 714.
166 See e.g., cases cited supra, note 94.
167 For examples of cases since Ezell I applying the two-Step test, see Horsley v. Trame, 808 F.3d 1126, 1132 (7th Cir. 2015) (applying test to parent signature requirement for minors under 21 to get FOIA card); Justice v. Town of Cicero, Ill., 827 F. Supp. 2d 835, 844 (N.D. Ill. 2011) (applying test to township ordinances requiring firearm registration and fees); Southerland v. Escapa, 176 F. Supp. 3d 786, 789 (C.D. Ill. 2016) (applying two-step test to state ban on public carrying of long guns and rifles).
the test leaves perhaps too much room for individual judges to place a finger on the sliding scale. It is ironic that Judge Sykes, who touted the “original public meaning” historical analysis in *Heller*, was so quick to dismiss the substantial historical evidence offered by the City as irrelevant and unpersuasive.168 This irony perhaps can serve as a larger indictment on this form of original public meaning analysis because judges without formal training as historians can come to widely different views on what conclusions to draw from history; indeed, just as Justice Scalia and Justice Stevens did in *Heller*.169 However, this is beyond the scope of this article. Regardless, if nothing else it was an inappropriate application of the historical inquiry aspect of the two-step test for Judge Sykes to so quickly reject the historical corollaries between the City’s firing range regulation and past “time, place, manner” restrictions. Judge Sykes instead characterized the right of live fire arm training as one “implicating the core of the Second Amendment” without much historical justification of her own for that conclusion.170 Characterizing the right in this way allowed Judge Sykes to apply “something akin to strict scrutiny,” despite her own claim it was “not quite strict scrutiny.”171

Regardless of the label, the regulation appeared subject to a level of scrutiny that few gun control measures could survive, and certainly higher than the intermediate scrutiny that would have been appropriate for such a “time, place, and manner” measure. While the regulation in *Ezell I* would have likely failed any level of scrutiny, setting the precedent of essentially strict scrutiny, which is binding on the lower courts, can have far-reaching implications for future gun control regulations.172 The decision also set a narrow path forward for

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168 *Ezell I*, 651 F. 3d at 711 (Rovner concurring) (“Given the majority's nod to the relevance of historical regulation, curt dismissal of actual regulations of firearms discharges in urban areas is inappropriate.”).


170 *Ezell I*, 651 F.3d at 711 (Rovner, concurring).

171 Id.

172 See, e.g., Tony Kole And Ghost Industries, LLC, Plaintiffs, v. Village Of Norridge, Defendant., No. 11 C 3871, 2017 WL 5128989, at *11 (N.D. Ill. Nov. 6,
Chicago to enact replacement gun control measures, which, as we will see in *Ezell II*, it was unable to navigate.

**B. Variations on the Two-Step: Other Notable Post Ezell I Cases in the Seventh Circuit**

After the Court in *Ezell I* adopted the two-step framework in 2011, the test became the general standard for the Seventh Circuit in Second Amendment challenges going forward.\textsuperscript{173} However, the en banc Seventh Circuit has notably not addressed the two-step framework adopted in *Ezell I*, nor has it revisited the Second Amendment at all since *Skoien*, though it came very close in *Moore v. Madigan*.\textsuperscript{174}

The panel decision in *Moore* was significant in that it found two Illinois statutes categorically banning the carrying of guns in public unconstitutional.\textsuperscript{175} Rather than explicitly apply the two-step framework adopted in *Ezell I*, Judge Richard Poser in his majority opinion instead concluded that the text and the history of the Second Amendment implied that the right to “keep and bear arms” for self-defense was not limited to the home but extended to the right to carry a gun for self-defense in public.\textsuperscript{176} The court held that Illinois had

\textsuperscript{173} See, e.g., *Southerland v. Escapa*, 176 F. Supp. 3d 786, 789 (C.D. Ill. 2016) (acknowledging that “the Seventh Circuit has provided a two-step analysis in evaluating the constitutionality of statutes under the Second Amendment”) (citing to *Ezell I*, at 701).

\textsuperscript{174} *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). A petition for a rehearing en banc was denied, though four of the ten active judges reviewing the petition would have granted the rehearing and seemed to indicate the panel decision should be overturned. *See generally Moore v. Madigan*, 708 F.3d 901, 902 (7th Cir. 2013) (Hamilton, J., dissenting, joined by, Rovner, Williams, & Wood, JJ.).

\textsuperscript{175} *Moore*, 702 F.3d at 933 (The laws at issue had exceptions for police officers and security personal, as well as certain exclusions for carrying a gun on one’s own property, but otherwise prohibited the carrying of any “ready to use” gun outside.).

\textsuperscript{176} *See id.* (“The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as
failed to offer “more than merely a rational basis for believing that its uniquely sweeping ban [was] justified by an increase in public safety,” thus the laws could not withstand constitutional scrutiny.177

Where the majority in Moore did not seem to explicitly utilize the two-step means-end test in striking down the state-wide gun control law, the majority in Friedman v. City of Highland Park, Illinois similarly used its own unique analysis in upholding a ban on certain semi-automatic assault weapons and high capacity magazines.178 In his opinion for the majority, Judge Easterbrook developed a three-part test that looked at: (1) whether the arms being banned were common at the time of the Second Amendments ratification; or alternately (2) whether the type of arm had a “reasonable relationship” to militia service; and finally (3) the availability of other unrestricted firearms to be used for self-defense.179

Both Friedman and Moore appear to be outliers in the Seventh Circuit’s jurisprudence on the Second Amendment in terms of their analytical approach, though interestingly they reached opposite conclusions regarding the ultimate constitutionality of the gun regulations.180 Moore in particular was a major setback for gun
control advocates, but the court did leave the door open for a wide range of more nuanced legislation than the invalidated blanket bans.  

Indeed, the new state-wide licensing requirements for carrying guns in public that replaced the outright ban have been upheld. 

Apart from these notable outliers, most decisions in the Seventh Circuit since *Ezell I* have applied the two-step framework the majority adopted.  

III. *Ezell II* – CHICAGO TAKES ANOTHER SHOT AT REGULATION OF FIRING RANGES

The decision in *Ezell I* is critically important not just in relation to the application of the two-step analysis in the Seventh Circuit, but because its holding required that Chicago had to find a new approach to regulate live firing-ranges in the city. The new approach the City adopted became the subject of *Ezell II*.

Chicago responded to the decision in *Ezell I* by promulgating a large variety of new regulations concerning firing ranges, including “zoning restrictions, licensing and operating rules, construction standards, and environmental requirements.” The same plaintiffs from *Ezell I* returned to court to argue that the new regulations also...
violated the Second Amendment. After cross-motions for summary judgment at the district court level, the trial judge issued a ruling invalidating some ordinances while upholding many others, which both sides appealed. Only three of the ordinances remained at issue on appeal: (1) a zoning requirement that permitted ranges only in “manufacturing districts”; (2) a distancing requirement that barred any firing range within 100 feet of other ranges or within 500 feet of any district zoned for residential use, as well as within 500 feet from any “preexisting school, day-care facility, place of worship, liquor retailer, children's activities facility, library, museum, or hospital”; and (3) a regulation prohibiting anyone under the age of 18 from entering a shooting range. The district court had invalidated the manufacturing district zoning requirement, finding the City had failed to provide enough evidence to support “more than merely a rational basis” for the necessity of placing firing ranges exclusively in manufacturing districts. However, the court had upheld the distancing requirements based on Heller’s language supporting “longstanding prohibitions on the carrying of firearms in sensitive places,” and the ban on minors largely because “minors are not guaranteed Second Amendment Rights.”

Judge Sykes, again writing for the majority and joined by Judge Kanne, affirmed the lower court in holding the manufacturing district requirement unconstitutional, but reversed regarding the other two regulations, finding that the distancing requirements and the ban

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185 Those plaintiffs being individual gun owners, gun rights originations, and a company seeking to build firing ranges. See id.
186 Id.
187 Id at 89. The unchallenged rulings involved ordinances setting construction standards, requiring range masters be present, and that all firing range employees had FOID cards, which were all upheld, and limits on firing range hours of operation which were declared unconstitutional. See generally, Ezell v. City of Chicago, 70 F. Supp. 3d 871, 875 (N.D. Ill. 2014), aff'd in part, rev'd in part, 846 F.3d 888 (7th Cir. 2017)
189 Id. at 889.
on minors in ranges also were unconstitutional. Judge Rovner concurred in the judgment regarding the manufacturing district requirement and the total ban on minors entering firing ranges, but she dissented from the decision regarding the distancing requirements.

A. The Next Round of Ordinances Meets the Next Application of the Two-Step Test from Ezell I

Judge Sykes began her majority opinion in Ezell II by restating the key principals of the two-step analysis established in her opinion in Ezell I, where “resolving Second Amendment cases usually entails two inquiries. The threshold question is whether the regulated activity falls within the scope of the Second Amendment . . . then there must be a second inquiry into the strength of the government’s justification for restricting or regulating the exercise of Second Amendment rights.”

Again, the first step is a “textual and historical” inquiry to determine whether the regulated conduct falls within the scope of the Second Amendment, and the second step is a sliding scale “means-end” test where the regulation is examined under a “heightened standard of scrutiny,” the precise level of which depends on “how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on the right.” Judge Sykes further noted that, by the time of Ezell II, the majority of other circuits had now adopted the same or similar two-step framework.

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190 Ezell II, 846 F.3d at 890.
191 See generally, id. at 898-907 (Rovner, J., concurring in part and dissenting in part).
192 Id. at 892 (majority opinion).
193 Id.
194 See id. at 893; see generally, Tyler v. Hillsdale Cty. Sheriff’s Dep’t, 775 F.3d 308, 326 (6th Cir. 2014) (en banc); Jackson v. City & County of San Francisco, 746 F.3d 953, 961 (9th Cir. 2014); Nat'l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 194 (5th Cir. 2012); Heller v. District of Columbia, 670 F.3d 1244, 1252 (D.C. Cir. 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792,
In terms of the threshold scope question, the same holding and analysis from *Ezell I* was applied in the current case: that the Second Amendment “individual right of armed defense . . . includes a corresponding right to acquire and maintain proficiency in firearm use through target practice at a range.”

Interestingly, when describing how the court had applied step two of the framework in *Ezell I*, Judge Sykes stated that the court “applied a strong form of intermediate scrutiny.”

What was once “not quite strict scrutiny” before was now a “strong form of intermediate scrutiny.” Whatever the level of scrutiny, the majority did not elaborate further on what specific form of scrutiny it was applying to the regulations at issue in *Ezell II*. Rather, Judge Sykes focused on the language from the sliding-scale test in *Ezell I*, which requires that the City demonstrate “a close fit between the range ban and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights.”

In order to establish this “close fit” between the challenged regulations and the “actual public interests they serve,” the majority agreed with the lower court in finding that the City needed to do so with “actual evidence, not just assertions.”

Judge Sykes proceeded to examine this evidence and analyze whether there was such a close fit. In doing so, Judge Sykes argued that the critical failure of the lower court’s approach was analyzing the zoning and distancing requirements separately, stating instead that they “stand or fall together,” and that they are “a single regulatory

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800–01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

195 *Id.* at 892-93 (restating that “[r]ange training is not categorically outside the Second Amendment. To the contrary, it lies close to the core of the individual right of armed defense.”).

196 *Id.* at 893.

197 *See* *Ezell v. City of Chicago*, 651 F.3d, 708 (7th Cir. 2011).

198 *Ezell II*, 846 F.3d at 893.

199 *Id.*

200 *Id.* at 894.

201 *Id.*
package for purposes of Second Amendment Scrutiny. Furthermore, Judge Sykes disagreed with the lower courts understanding of the *Heller* language on prohibitions of carrying firearms in “sensitive places.” While declining to resolve the question of the presumptive validity of those categories of “longstanding prohibitions,” Judge Sykes indicated that the distancing requirement did not fall into any of those categories, because it dealt with firing ranges and not the carrying of firearms themselves. In addition, Judge Sykes argued that the distancing requirement from residential districts implied that the City was suggesting that firearms “are categorically incompatible with residential areas,” which she stated was “flatly inconsistent with *Heller*, which was explicit that firearm possession in the home for self-defense is the core of the Second Amendment.”

Judge Sykes’s opinion next examined the city’s evidence that the zoning and distance requirements supported their offered public safety interests, specifically that “firing ranges attract gun thieves, cause airborne lead contamination, and carry a risk of fire.” On this score, the City was severely lacking in evidence, having presented no empirical data that the mere presence of a firing range would increase the risk of theft or crime, or that distancing firing ranges from schools and residences had a connection to reducing these risks. The City’s own expert witnesses also had testified to the lack of empirical support for the connection between the regulations and

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202 *Id.* Judge Sykes elaborated by arguing that: “The two zoning requirements work in tandem to limit where shooting ranges may locate. The impact of the distancing rule cannot be measured “standing alone,” as the district judge thought; to meaningfully evaluate the effect of the buffer-zone requirement, we need to know which zoning districts are open to firing ranges.” *Id.*

203 *See Id.* at 894-95.

204 *Id.*

205 *Id.*

206 *Id.* at 895.

207 *Id.* The City did cite to a National Institute for Occupational Safety and Health report on the dangers of improperly ventilated shooting ranges to the environment, but the same report included guidelines on techniques for how to avoid those consequences. *Id.*
the risks to public safety and health from fire or environmental hazards.\textsuperscript{208} Furthermore, insofar as there was evidence of risks, Judge Sykes noted that the City had promulgated a host of other regulations on the proper construction and operation of firing ranges which would alleviate many of the safety concerns without necessitating zoning or distance requirements.\textsuperscript{209} These construction requirements had been upheld by the District Court and were not on appeal.\textsuperscript{210}

While Judge Sykes did not dismiss the general concerns of the city to public health and safety, in the end she stated that “there must be evidence” to support the City’s rational.\textsuperscript{211} The lack of such evidence meant that the city had failed to establish a “close fit” between the regulations and their justification, and they were unconstitutional under the “strong form of intermediate scrutiny” or the “not quite strict scrutiny” that the court was applying.\textsuperscript{212}

In terms of the ban on minors, Judge Sykes noted that there was “zero historical evidence that firearm training” for minors under 18 was “categorically unprotected,” and neither the City nor the Court could find any evidence to the contrary.\textsuperscript{213} Furthermore, the cases relied upon by the City all dealt with prohibitions on minors “possessing, purchasing, or carrying firearms,”\textsuperscript{214} and the only Seventh Circuit case related to minors dealt with a parental signature

\begin{footnotesize}
\begin{itemize}
\item 208 \textit{Id.}
\item 209 \textit{Id.}
\item 210 \textit{Id.}
\item 211 \textit{Id.}
\item 212 \textit{Id.}
\item 213 \textit{Id. at 896.}
\item 214 \textit{See, e.g.,} NRA v. McCraw, 719 F.3d 338 (5th Cir. 2013) (upholding a state law banning 18- to 20-year-olds from carrying handguns in public); NRA v BATFE, 700 F.3d 185 (5th Cir. 2012) (upholding a federal law prohibiting 18- to 21-year-olds from purchasing a handgun); United States v. Rene E., 583 F.3d 8 (1st Cir. 2009) (upholding a federal law prohibiting juvenile handgun possession); People v. Mosley, 33 N.E.3d 137 (2015) (upholding a state law banning 18- to 20-year-olds from carrying handguns outside the home).
\end{itemize}
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requirement for so called “FOID” cards. Because the City could not prove minors were categorically excluded, the court preceded to the second step. Again, the City had little evidence other than generalized assertions about the safety of children, with one of their own witnesses admitting that the best place for minors to train with firearms would in fact be a controlled firing range. The City offered many other general justifications based on child development and health, but with no concrete evidence the categorical ban could not withstand constitutional scrutiny.

B. Judge Rovner: Separating and Weighing the Heavy Public Interests

Judge Rovner, again finding herself writing separately, restated the sliding-scale test from Ezell I and her own contradictory assertion from that case that the right to participate in range training was not an “important corollary” to the core right of self defense but was, at most ancillary to the core right. Judge Rovner argued that for the purposes of the current dispute “we can ignore whether there is a difference in these two descriptions and assume that the right is an important one: although not part and parcel of the core right, close to but subordinate to it. How far subordinate is yet unknown.” What Judge Rovner and the majority did agree on was that this case was different, and that what they were reviewing was not an outright ban but a “regulation of where when and how firing ranges may operate.” Interestingly, Judge Rovner did not seek to characterize

215 See Horsley v Trame, 808 F.3d. 1126, 1127 (7th Cir. 2015). The Seventh Circuit panel in Horsley did not answer the question of whether minors are categorically excluded from the Second Amendment, as the district court in Ezell II believed they were, but rather the Horsley court had held the FOID card requirement satisfied intermediate scrutiny whatever the scope of minor’s rights. Id.

216 Ezell II, 846 F.3d at 897.

217 See id. at 898.

218 Id. at 899 (Rovner, J., concurring in part and dissenting in part).

219 Id.

220 Id.
these firing-range regulations as “time, place and manner” restrictions as she had in Ezell I, but instead stated in a footnote that the term “is heavily loaded with attachments to a particular level of scrutiny under First Amendment jurisprudence—a quagmire better to avoid in this case.”

Now eschewing labels of the proper level of scrutiny herself, Judge Rovner instead focused on the manner of the majority’s application of the two-part test, and specifically the assertion, “without any rationale,” that the manufacturing district and distance requirements “stand or fall together.” Judge Rovner agreed with the majority on the manufacturing district requirement being unconstitutional on the lack of evidentiary support but was highly critical of Judge Sykes’ claim that the zoning requirement necessarily fell with it. Judge Rovner agreed that there was a lack of any “robust, reliable evidence” tying the manufacturing district requirement to the actual public safety justifications offered by the City, and that the “generalized propositions that firing ranges pose a danger—in terms of both crime and environmental impact—did not justify restricting them to manufacturing districts only as opposed to other industrial zones.”

However, Judge Rovner noted that unlike the manufacturing regulation, which made a categorical determination on where a particular land used belongs, the distancing regulation was a “much more focused determination of how close a particular use (which may have unique impacts) may be to other uses.” In Judge Rovner’s view, under a sliding scale levels of scrutiny test, the two regulations had to be addressed separately because they had separate government rationales and separate effects on the public interest of Chicago citizens.

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221 Id. n. 2.
222 Id. at 900.
223 See id. at 899-900.
224 Id at 901.
225 Id. at 900.
226 Id.
Judge Rovner proceeded to evaluate these interests and regulations separately, and even though she came to the same conclusion on the manufacturing district requirement, she reached the opposite on the distance requirements. For the distance requirement, Judge Rovner first noted that, on its own, it did not impact as much of the available land in the city as it did when taken together with the zoning requirement, which only made about 10.6% percent of the land in the city available for firing ranges. On its own, the distancing requirement did not reduce the available land as much; therefore, it “imposed a significantly lighter burden on the placement of firing ranges,” and the sliding-scale test from *Ezell I* dictated that “a lighter burden requires a lesser justification.” Where the zoning requirement was a blanket prohibition for all firing ranges in every area except manufacturing districts, the distancing regulation was a “precise and targeted approach” to protect areas that the city “routinely singles out for protection—places where children and the sick are gathered, for example.” Thus, the difference between the two was the “difference between a carpet bomb and a surgical strike,” and the evaluation of the public benefit was vastly different.

Moreover, Judge Rovner disagreed with the majority regarding the “sensitive places” language from *Heller* regarding longstanding historical prohibitions on “carrying of firearms in sensitive places such as schools and government buildings.” Judge Rovner declined to opine whether this language indicated a categorical exception for such regulations but argued that it was enough to support the conclusion that a “sufficiently strong public interest” justified regulations distancing these “sensitive places” from firing ranges.

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227 *Id.*
228 *Id.* at 902.
229 *Id.*
230 *Id.*
231 *Id.*
232 *Id.* (emphasis in original).
233 *Id.*
Judge Rovner also criticized the majority’s argument that the distancing requirement, specifically regarding the distance from residential areas, was incompatible with Heller’s main premise of keeping a gun in the home for self-defense. As Judge Rovner noted:

[k]eeping or even carrying a firearm for self-defense poses a substantially different risk than does creating a public accommodation where large numbers of people will gather with firearms loaded with lead-contaminated, explosive-filled ammunition and fire them. Firing a gun poses significantly greater risks than the mere keeping or carrying of a gun, in terms of potential accidents, attractiveness to criminals, and environmental lead exposure.234

In short, the uniquely dangerous nature of guns, and firing ranges with large quantities of them being regularly discharged, as well as the interests in preventing theft in crime, all “cause a heavy weight on the public interest side of the scale”235

In terms of evidence, Judge Rovner noted that in the First Amendment context the Supreme Court had rejected any requirement for empirical data showing an ordinance will successfully lower crime.236 While the City could not tie any evidence to the manufacturing district requirement, they did have evidentiary support for their argument that locating firing ranges near vulnerable populations and residences carried risks that could be alleviated through distancing requirements.237 Judge Rovner noted this evidence in the numerous other examples in the City code of setting distancing requirements which created a “buffer zone” between dangerous or adult-themed businesses and sensitive areas such as schools or

234 Id. at 903.
235 Id.
236 Id.
237 Id. at 903-904.
hospitals. 238 This support, along with the heavy public interest rational, was enough to allow the distancing regulations to survive constitutional scrutiny in Judge Rovner’s view. 239

Finally, in terms of the ban on minors, Judge Rovner agreed that the City had failed to show any evidence supporting the categorical exclusion of minors from firing ranges under the Second Amendment. 240 However, Judge Rovner noted that in the First Amendment context, the rights of minors are limited to different degrees in different contexts, and that even beyond that “it goes without saying that the government may restrict the rights of minors for the purposes of protecting their health and safety.” 242 Pointing to examples of the “long history of protecting minors, even where fundamental rights are in play,” Judge Rovner felt it important to note that where an outright ban on entering firing ranges was too far, a variety of “stringent regulations for minors in firing ranges would withstand much scrutiny when supported by appropriate evidence.” 243

C. The State of the Two-Step Test and Gun Control Legislation in the Seventh Circuit after Ezell II

The majority opinion in Ezell II is interesting not only because it further cemented the use of the two-step sliding-scale analysis established in Ezell I, but also because Judge Sykes avoided stating with clarity what level of scrutiny on that scale was being applied.

238 See id. (citing to municipal distancing restrictions for “machine shops,” “nitrocellulose” manufacturing facilities, slaughter houses, and the operation of unmanned aircraft).
239 Id. at 904.
240 Id.
240 Id. (“To the extent that McDonald and its progeny allow for firearm ownership within the City of Chicago, the practical argument that parents who have guns within the City limits might also wish to teach gun safety to their children is not without merit.”).
241 Id at 904-905.
242 Id. at 905.
243 Id.
After characterizing the level of scrutiny from *Ezell I* as “a strong form of intermediate scrutiny,” and requiring a “close fit,” the opinion focuses largely on the lack of evidence proffered by the city and a failure to show more than mere general and speculative health and safety concerns.\(^{244}\) It is true that the hard evidence was particularly lacking for the manufacturing district requirement and the requirement would likely have failed under any standard of review.\(^{245}\) Indeed, that the manufacturing ban would have failed regardless of the standard of scrutiny perhaps answers the question of why Judge Sykes concluded that the distancing requirement—which seemed on more solid footing on its own—necessarily had to fall with it.\(^{246}\) As Judge Rovner noted, the correct application of the sliding scale test would have seen the two restrictions analyzed separately and on its own the distancing requirement should have survived.\(^{247}\)

Regardless of the decision to examine both regulations together, it is important to highlight the standard of review the court used in *Ezell II* because of its implications on future decisions. Based on the discussion of *Ezell I*, we can assume that what Judge Sykes was applying was the same “not quite strict scrutiny” or “strong form of intermediate scrutiny” she had previously described and applied to regulations affecting firearm training.\(^{248}\) Similarly for Judge Rovner, though she also avoided explicit description of any standard of scrutiny, we can likely assume that she was applying a form of

\(^{244}\) See id at 896 (majority opinion).

\(^{245}\) See id. at 901-902 (Rovner, J., concurring in part and dissenting in part) (observing that the City’s limited evidence that the manufacturing requirement prevented lead contamination at most established a rational basis for the law, which was not enough to survive review).

\(^{246}\) Id. at 894 (majority opinion).

\(^{247}\) Id. at 900 (Rovner, J., concurring in part and dissenting in part).

\(^{248}\) See id. at 892-93 (majority opinion) (“We take as settled what was established in *Ezell I* . . . This holding and these observations control here.”).
intermediate scrutiny appropriate for “time, place, manner” gun use restrictions, based on her allusions to her own opinion in *Ezell I*.²⁴⁹

While in *Ezell I* the distinction may not have been important because the complete ban on firing ranges would have failed under either level,²⁵⁰ we can see in *Ezell II* why it is vitally important what standard of scrutiny on the sliding scale the courts apply. Applying intermediate scrutiny for time, place, and manner style gun restrictions as Judge Rovner has advocated would have almost certainly led the distancing requirement to survive review.²⁵¹ But, by characterizing the right in a manner that requires what is essentially strict scrutiny review, Judge Sykes has all but ensured that regulations involving firing ranges, or implicating this right to live fire arm training, must necessarily fail. While the City failed to present more than speculative evidence for the manufacturing zoning requirement, and their evidence for the distancing requirements was far from robust,²⁵² one is left to wonder how much evidence they would have to muster to meet a standard of review akin to strict scrutiny.

The result in *Ezell II* is also ironic given Judge Sykes’ own words in *Ezell I* encouraging Chicago to replace its total ban on ranges with zoning regulations.²⁵³ Judge Sykes incorrectly discounted the Supreme Court’s language from *Heller* regarding the validity of longstanding

²⁴⁹ *See id.* at 899 (Rovner, J., concurring in part and dissenting in part) (describing her disagreement with the majority in *Ezell I* has how to characterize the right to range training).

²⁵⁰ *See Ezell I*, 651 F. 3d 684, 712 (Rovner, J. concurring).

²⁵¹ *See Ezell II*, 846 F.3d at 904 (Rovner, J. concurring in part and dissenting in part) (“given the lighter burden imposed by the distancing regulations, the strong public interest in protecting residential areas and sensitive areas from the risks associated with firing ranges, these regulations pass constitutional muster”); *see also Ezell I*, 651 F. 3d at 712 (Rovner, J. concurring) (“The City has a right to impose reasonable time, place and manner restrictions on the operation of live ranges in the interest of public safety and other legitimate governmental concerns.”).

²⁵² *See Ezell II*, 846 F. 3d at 901-02 (Rovner, J. concurring in part and dissenting in part).

²⁵³ *Ezell I*, 651 F. 3d at 709 (“on this record [the City’s] concerns are entirely speculative and, in any event, can be addressed through sensible zoning and other appropriately tailored regulations.”)
prohibitions on carrying guns in “sensitive places” like schools. Judge Sykes conclusion that the distancing requirements were not a “limitation on where firearms may be carried” and thus did not fall under the “sensitive places” language in *Heller* was erroneous. Quite the opposite, firing ranges are places with high concentrations of firearms being carried and discharged in one location. It seems obvious that restricting how close these firing ranges can be located to schools and residences falls squarely within the coverage of the Supreme Court’s language on presumptively valid longstanding prohibitions on the carrying of guns in “sensitive places.” If nothing else, they would seem to be the kind of “sensible zoning” restrictions that Judge Sykes herself encouraged the City to pursue. Indeed, as Judge Rovner noted in her dissent, the City has commonly enacted similar distancing restrictions on how close dangerous businesses can be located to places that serve vulnerable populations at schools or hospitals.

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254 See Ezell II, 846 F.3d at 894-95.
255 See id at 902 (Rovner, J., concurring in part and dissenting in part).
256 See id. at 903 (“owning, keeping or even carrying a firearm for self-defense poses a substantially different risk than does creating a public accommodation where large numbers of people will gather with firearms loaded with lead-contaminated, explosive-filled ammunition and fire them.”).
257 See id.
258 See Ezell I, 651 F.3d at 709.
259 See Ezell II, 846 F.3d at 903 (Rovner, J., concurring in part and dissenting in part). A related argument, which Judge Rovner does not directly address, would be to draw an analogy between analyzing zoning and distancing requirements under the Second Amendment to how courts have approached zoning restrictions on adult book stores and theaters under the First Amendment. See Second Amendment Arms v. City of Chicago, 135 F. Supp. 3d 743, 754 (N.D. Ill. 2015). The district court in *Second Amendment Arms* considered this very possibility in a case involving similar Chicago zoning ordinances which limited the location of firearms retailers. *Id.* The court rejected the use of the Supreme Court’s First Amendment burden shifting framework for zoning restrictions of adult-use businesses. *Id.* The court said the framework was a poor fit in the Second Amendment context because regulations on the commercial sale of fire-arms fell into *Heller’s* language regarding presumptively valid longstanding regulations. See id. Interesting then, and contrary to the *Ezell II*
For now, *Ezell II* is binding precedent in the Circuit, and lower courts that encounter regulations that burden, or could be seen as burdening, this “right to maintain proficiency in firearm use,” will presumably be bound to apply this “strong form of intermediate scrutiny.”\(^{260}\) Of course, the flexibility inherent in the sliding-scale means-end test should still allow other panels or district courts in the Seventh Circuit to apply the more deferential form of intermediate scrutiny for other gun regulations that only implicate the “time, place, and manner” of firearm use.

The full effects of this precedent remain to be seen, but what can be said is *Ezell II* gives support to courts to apply a heightened standard of review akin to strict scrutiny to strike down gun control regulations. The use of this stringent standard of review for regulations that in reality only regulate the time, place, and manner of firearm use is wholly inappropriate and ultimately dangerous given the unique public safety risks involved.

**CONCLUSION**

After initially asking for a delay in the injunctions ordered by the Seventh Circuit, the City withdrew its motion.\(^{261}\) Thus, after seven years the *Ezell* litigation appears to have come to a close. While it remains to be see how the City will respond to the ordinances being struck down, we can assume for the time being that construction of firing ranges can soon begin without concern for their distance from schools, residential areas, or high crime areas where their concentrated stock of guns could be susceptible to theft.

This result has very real effects for the people of Chicago, whom are already struggling with an unprecedented level of gun violence causing injury and death in their city. Obviously, preventing the construction of firing ranges in practical terms does nothing to court, the district court in *Second Amendment Arms* upheld the zoning restrictions based on the strong presumption of their validity under the language in *Heller*.\(^{260}\) *Ezell II*, 846 F.3d at 893 (majority opinion).

affirmatively lower the current historical levels of gun violence. However, given the uniquely dangerous nature of fire arms and the extraordinary risk they pose to public safety, it is not hard to understand the City’s desire to enact whatever control measures they can. Indeed, it appears a fairly legitimate concern that allowing firing ranges, with their high concentrations of firearms packed in one location, might make the task of limiting the number of guns on the street more difficult.

That task has been made monumentally more difficult in the current Second Amendment constitutional regime. After McDonald foreclosed the City’s complete bans on handgun ownership, the realm of permissible regulation has only been further narrowed in the years since. Ezell I and II, though focused on the seemingly confined issue of firing range training, have great implications for future attempts at regulation. Any future gun control measures that implicate this newly recognized right to live firearm training seem destined to fall under the strict scrutiny review used by the court.

The time will soon come for the en banc Seventh Circuit to clarify the position for the lower courts that encounter Second Amendment challenges. If presented with the opportunity, the en banc court should use Judge Rovner’s opinions in both Ezell I & II as examples of how to correctly apply the two-step test for the Second Amendment. Local governments like Chicago do have their own responsibility in future lawsuits to present better and more concrete empirical evidence to support the public health justifications for their proposed gun control measures. In turn, these local governments need courts to apply the appropriate standard of review. That standard needs to be one where gun control regulations that only affect the “time, place and manner” of firearm use, or other ancillary conduct unconnected with self-defense in the home, are only subject to intermediate scrutiny.

In the meantime, Chicago has been left, as Judge Rovner sympathized, navigating a narrow straight between a dreaded “Scylla and Charybdis.” On one hand, the City faces a gun violence epidemic garnering national attention and threatening the health and safety of its citizens on a daily basis. On the other, there is an expanding realm of protected Second Amendment activities historically unconnected to
the past and far beyond the original right to self-defense in the home recognized in *Heller*. The City will have to continue to experiment with gun control regulations to find those measures that can tread this narrow constitutional path forward.

Of course, in the absence of similar regulations in neighboring jurisdictions, the actual impact of any local regulations on gun violence is very much an open question. In the end, any truly effective measure to combat the City’s gun violence problem will likely require a more national scale.