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DECISIONAL MINIMALISM AND THE JUDICIAL EVALUATION OF GUN REGULATIONS

RICHARD C. BOLDT*

In *District of Columbia v. Heller*,[1] a sharply divided United States Supreme Court held that the Second Amendment to the United States Constitution protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[2] Justice Scalia, writing for the majority, made clear that the Court's recognition of this right, which it found inconsistent with the District of Columbia's restriction on the possession of handguns in the home, did not mean that persons have "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[3] The Court chose not to delineate "the full scope of the Second Amendment,"[4] and also "declin[ed] to establish a level of scrutiny for evaluating Second Amendment restrictions."[5] Instead, Justice Scalia carved out a "safe harbor"[6] of gun regulations that are "presumptively lawful,"[7] and explained that the District's gun law would be unconstitutional under "any of the standards of scrutiny that we have applied to enumerated constitutional rights."[8]

The majority opinion in *Heller* is significant both for the constitutional right it established and for the questions of scope and operation associated with that right that it left unresolved. Justice Scalia's

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1. 554 U.S. 570 (2008).

2. *Id.* at 635.

3. *Id.* at 626.

4. *Id.*

5. *Id.* at 634.

6. Brannon P. Denning & Glenn H. Reynolds, Heller, *High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1247–48 (2009).

7. *Heller*, 554 U.S. at 626–29 (recognizing restrictions on "dangerous and unusual weapons," on the possession of guns by felons and persons with histories of mental illness, and on the carrying of arms in sensitive places).

8. *Id.* at 628. The right recognized in *Heller* applied only to federal laws. Subsequently, in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court determined that the right, still significantly under-defined, applies through the Fourteenth Amendment to the states as well.

choice to write this "narrow" opinion[9] has "unleashed a flood of litigation" in the lower courts,[10] as litigants and judges have confronted the uncertainty purposely left by the Supreme Court majority. *Woollard v. Sheridan*, a test case brought in the United States District Court for the District of Maryland by Raymond Woollard and the Second Amendment Foundation, is one of many such cases to be presented in recent months.[11] In his opinion concluding that Maryland's handgun permitting statute is unconstitutional under the Second Amendment, Judge Benson Everett Legg addressed in an expansive fashion one of the questions of operation left open by Justice Scalia's narrow *Heller* opinion—the degree of fit constitutionally required between a gun permitting regulation and the State's interest in public safety.[12]

Justice Scalia's choices, both with respect to the interpretive tools that he employed in *Heller* and the underlying interpretive perspective that animated his analysis in that case, suggest that Judge Legg's aggressive application of intermediate scrutiny in *Woollard* may have been misplaced.[13] While Justice Scalia's *Heller* decision relies on familiar "conservative" interpretive methods, including a hard-edged textual analysis and a heavy dose of originalism,[14] in order to find a "core" right of individual citizens to possess guns in their homes for self defense, his further choice to avoid resolving significant questions of scope and operation reflects a different form of conservative constitutional jurisprudence, which Professor Cass Sunstein has termed "Burkean minimalism."[15] In recent years, Supreme Court Justices associated with conservative originalism have been in some tension with others operating within the Burkean minimalist tradition.[16] Justice

9. Piszczatoski v. Filko, Civ. No. 10-16110 (WHW), 2012 WL 104917, at *6–7 (D.N.J. Jan. 12, 2012); Kachalsky v. Cacace, 817 F. Supp. 2d 235, 259–60 (S.D.N.Y. 2011). *See also* United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1674 (2011) (Judge Easterbrook urging that *Heller* not be over-read).

10. Stephen Kiehl, Comment, *In Search of a Standard: Gun Regulations after* Heller *and* McDonald, 70 MD. L. REV. 1131, 1132 (2011).

11. Woollard v. Sheridan, Civil No. L-10-2068, 2012 WL 695674 (D. Md. Mar. 2, 2012).

12. *Id.* at *10–12.

13. I regard Judge Legg's intermediate scrutiny analysis as aggressive because of the relative lack of deference it accords to the policy decisions reached by Maryland officials. For a discussion of this form of intermediate scrutiny, *see infra* text accompanying notes 45–50.

14. *See* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006) (describing three jurisprudential schools within conservative constitutional thought: originalism, conservative perfectionism, and Burkean minimalism).

15. *Id.*

16. Sunstein identifies "massive disagreements" between Burkean minimalists and conservative originalists. In part, he describes the difference as follows: "Originalists are in the grip of a priori reasoning. Burkean minimalists prize stability, and they are entirely willing

Scalia's decision to deploy original meaning analysis (and his version of textualism) to ground the core right, but to shift to Burkean principles of judicial restraint when it came to addressing the scope and operation of that right, is therefore significant and also instructive for lower courts seeking guidance on the meaning of the Second Amendment. Judge Legg's analysis, I believe, misses that instruction and is thus at odds with the implied message of *Heller*.

Professor Sunstein's notion of "decisional minimalism" first emerged in his 1996 *Foreword* to the *Harvard Law Review*, where he urged a form of decision making in which judges say "no more than necessary to justify an outcome" and leave "as much as possible undecided."[17] Sunstein further elaborated this theory in subsequent published work, including a 2006 article in the *Michigan Law Review* entitled *Burkean Minimalism*.[18] Although he identifies commonalities between conservative originalism, conservative perfectionism, and Burkean minimalism—the three types of conservative constitutional thought that he catalogues—Sunstein explains that Burkean conservatives are unsettled by originalists because of the latter's relative indifference to the acts and judgments of actors within the constitutional order in the many years since the Founding, and by conservative perfectionists because of their extreme "rationalistic" reliance on theory building instead of settled practice and tradition.[19]

Sunstein describes the essential features of the Burkean perspective in the following terms:

> Burkean minimalists believe that constitutional principles must be built incrementally and by analogy, with close reference to long-standing practices. Like all minimalists, Burkeans insist on incrementalism; but they also emphasize the need for judges to pay careful heed to established traditions and to avoid independent moral and political arguments of any kind.[20]

Importantly, in Sunstein's version of Burkean minimalism, judicial practitioners should hew closely to established traditions and seek gradual incremental solutions, because of a pragmatic rule-consequentialist commitment to the idea that such an approach is

to accept rulings that do not comport with the original understanding when a decision to overrule them would disrupt established practices." *Id.* at 358–59.

17. Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6–8 (1996).

18. Sunstein, *supra* note 14.

19. *Id.* at 358–59.

20. *Id.* at 356.

"likely to produce better results, all things considered, than reliance on theories of one or another kind, especially when those theories are deployed by such fallible human beings as judges."[21] An important dimension of this form of judicial minimalism is its strong preference for narrow decisions. Narrow rulings, he explains, "focus on the particulars of the dispute before the Court."[22] By so limiting the law making associated with the judge's dispute-resolution function, Sunstein suggests that a minimalist approach is likely to produce fewer errors than other approaches that rely on broad rulings (or, at the least, is likely to produce errors that are not as "serious and difficult to reverse").[23] In part, this is because judges necessarily lack sufficient information to predict how a broad ruling might apply to the many, difficult to anticipate, future situations that could arise over time. In addition, the "small steps" inherent in narrow rulings "preserve" the Court's future "options," and reduce the costs of implementation and the transaction costs brought about by wide judicial decisions that often unsettle long-established traditional practices.[24]

Professor Sunstein acknowledges that Burkean minimalism, and its preference for narrow rulings, carries certain costs. First, he points out that narrow decisions may "breed unpredictability and perhaps unequal treatment,"[25] and, in fact, the uncertainty costs of decisional minimalism can be significant. A quick survey of the many state and lower federal court cases in the Second Amendment context post-*Heller* and post-*McDonald* would seem to bear out that observation.[26] In addition, because this approach "'export[s]' decision-making duties to others in a way that can increase those burdens in the aggregate,"[27] it is likely that the system-wide costs of decision making will be increased as a consequence of judicial reliance on incremental rulings. Not only are questions of scope and operation left unresolved

21. *Id.* at 359.

22. *Id.* at 362.

23. *Id.* at 363. It is fair to ask at this point what the responsibility of a lower court should be in response to a narrow Burkean minimalist opinion of the Supreme Court. As I explain below, Burkean minimalism couples narrow decision making with a strong presumption in favor of established practices and traditions. *See infra* text accompanying notes 31–33. That second feature of decisional minimalism provides significant guidance to lower courts in this respect.

24. Sunstein, *supra* note 14, at 363.

25. *Id.* at 365.

26. In his concurring opinion in *United States v. Chester*, Judge Davis observed that "Heller has left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations." 628 F.3d 673, 688–89 (4th Cir. 2010) (Davis, J., concurring).

27. Sunstein, *supra* note 14, at 366.

by the Supreme Court likely to arise in lower federal courts and state courts, they also are likely to occupy more of the time and attention of those legal advisers to state legislatures and executive branch officials who must make reasonable predictions about whether various regulatory options are likely to pass constitutional muster going forward.

Both the potential advantages and costs of the Burkean approach to constitutional adjudication then are on display in the Second Amendment context. Justice Scalia was clear in *Heller* that, because this was the Court's "first in-depth examination of the Second Amendment," the Justices were not attempting to "clarify the entire field."[28] Describing both the scope and operation of Second Amendment rights after *Heller* as "a vast *terra incognita*" the Fourth Circuit in *United States v. Masciandaro* observed that it is "not far-fetched to think" that *Heller* intentionally left open the application of the Second Amendment outside the home because the dangers of accidentally formulating the right to bear arms too broadly "would rise exponentially as one moved the right from the home to the public square."[29] Picking up on this Burkean preoccupation with risk avoidance, the Illinois Appellate Court in *People v. Dawson* explained that the United States Supreme Court has "deliberately and expressly maintained a controlled pace" in unfolding its Second Amendment jurisprudence precisely to avoid errors.[30]

The majority opinion in *Heller* reflects the Burkean minimalist preference for narrow decisions designed to minimize risk, but its adoption of a second key element of Burkean minimalism also suggests the way forward. Because of the inherent uncertainty that narrow decision making produces, this second injunction of Sunstein's minimalist theory, which requires judges to be mindful of and deferential to longstanding settled practices and traditions, becomes espe-

28. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

29. 638 F.3d 458, 475–76 (4th Cir. 2011).

30. 934 N.E.2d 598, 605 (Ill. App. Ct. 2010), *cert. denied*, 131 S. Ct. 2880 (2011), *abrogation recognized by* People v. Williams, 2011 Ill. App. 093,350 (Ill. App. Ct. 2011). Professor Sunstein suggests that the goals of Burkean minimalism are served both by narrow decisions and by "shallow" ones. He defines a shallow decision as one that attempts "to produce rationales and outcomes on which diverse people can agree, notwithstanding their disagreement on or uncertainty about the most fundamental issues." Sunstein, *supra* note 14, at 364. On these terms, one could characterize the Supreme Court's decision in *McDonald* as a shallow decision, given that the five Justices who agreed that the *Heller* right applies against the states relied upon two different legal theories to derive that result. Professor David Cohen has characterized this as an example of a voting paradox, noting that there was no majority on the Court for any one legal theory supporting the outcome in the case. *See* David S. Cohen, *The Paradox of* McDonald v. City of Chicago, 79 GEO. WASH. L. REV. 823 (2011); David S. Cohen, McDonald*'s Paradoxical Legacy: State Restrictions of Non-Citizens' Gun Rights*, 71 MD. L. REV. 1213 (2012).

cially important.[31] One can observe this second feature of Burkean minimalism in the Court's identification of "safe harbors" for long-established gun regulations, but also in its indication that the examples of constitutionally permissible regulation provided by the Court are not meant to be an exhaustive list.[32] Thus, while the Court's recognition of a core right in *Heller* clearly is meant to take certain regulatory options "off the table,"[33] the majority also instructs lower courts to address with caution those statutes and regulations that have a settled and well-established place outside of the core. In Burkean terms, this use of tradition is essential to mitigate the very uncertainty created by the Court's narrow ruling in the first instance.

The *Woollard* case presents questions both as to the scope of the right recognized in *Heller* and the operation of that right. That is, the case provided Judge Legg with an opportunity to address whether the Second Amendment right extends beyond the home, a question of scope that the Fourth Circuit previously had left unresolved,[34] and whether the Maryland gun regulation at issue in the case meets the constitutional standard of intermediate scrutiny, assuming the right does extend to the possession and carrying of guns outside the home.[35]

The relevant portions of the Maryland statute that Mr. Woollard and the Second Amendment Foundation challenged prohibit the open or concealed carrying of a handgun outside the home without a permit.[36] The State officials charged with responsibility for determining whether to issue such a permit are directed by the law to insure that an applicant meets certain enumerated conditions, particularly relating to a past criminal record, a history of substance misuse, or a "propensity for violence or instability."[37] In addition, an applicant must establish that he or she "has good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended dan-

31. *See* Sunstein, *supra* note 14, at 359.

32. *See Heller*, 554 U.S. at 626–27 & n.26.

33. *Id.* at 636.

34. *Masciandaro,* 638 F.3d at 474.

35. Woollard v. Sheridan, Civil No. L-10-2068, 2012 WL 695674, at *10–12 (D. Md. Mar. 2, 2012).

36. *See* MD. CODE ANN., CRIM. LAW § 4–203 (West 2010), *declared unconstitutional by* Woollard v. Sheridan, Civil No. L-10-2068, 2012 WL 695674 (D. Md. Mar. 2, 2012); Md. CODE ANN., PUB. SAFETY § 5–303 (West 2010).

37. *Woollard*, 2012 WL 695674, at *1. These aspects of the Maryland permit statute were not challenged in *Woollard*.

ger."[38] In making a determination whether an applicant has a "good and substantial reason," State officials must consider "whether the applicant has any alternative available to him for protection other than a handgun permit," and "whether the permit is necessary as a reasonable precaution for the applicant against apprehended danger."[39] There is a substantial body of law instructing State officials in the application of this standard.[40]

In his opinion granting summary judgment to Woollard and the Second Amendment Foundation, Judge Legg determined that the right recognized in *Heller* does extend beyond the home and thus is implicated by Maryland's handgun permitting scheme.[41] He further determined that portions of that law fail intermediate scrutiny and are therefore unconstitutional.[42] Although the decision to reach and decide the scope question—the question whether the right extends beyond the home—may itself have been in tension with the decisional minimalism that characterizes *Heller*, it is possible to concede that point and still conclude that the form of intermediate scrutiny employed by the District Court was inconsistent with the Supreme Court's approach to developing Second Amendment jurisprudence.

Under Judge Legg's version of intermediate scrutiny, the question is whether Maryland's permitting scheme is "reasonably adapted to a substantial government interest."[43] Judge Legg acknowledges that the "degree of fit" between the gun regulation and the concededly legitimate police power goal of "promoting public safety need not be perfect; it must only be substantial."[44] But he then determines that the Maryland statute fails the fit portion of this test, because of "the overly broad means by which it seeks to advance this undoubtedly legitimate end."[45] Judge Legg asserts that the regulation is, in effect, a "rationing system" designed "simply to reduce the total number of firearms carried outside of the home by limiting the privilege to those

38. MD. CODE ANN., PUB. SAFETY § 5–306(a)(5)(ii).

39. MD. CODE REGS. 29.03.02.04 (2012). An individual whose permit application has been denied may appeal the decision to the Handgun Permit Review Board, which may sustain, reverse, or modify the decision. MD. CODE ANN., PUB. SAFETY § 5–312 (West 2010).

40. The leading case is *Snowden v. Handgun Permit Review Bd. of the Md. Dep't of Pub. Safety & Corr. Servs.*, 45 Md. App. 464, 413 A.2d. 295 (1980).

41. *Woollard*, 2012 WL 695674, at *5–7.

42. *Id.* at *10–12.

43. *Id.* at *10.

44. *Id.* (quoting Heller v. District of Columbia, 698 F. Supp. 2d 179, 191 (D.D.C. 2010), *aff'd in part, vacated in part*, 670 F.3d 1244 (D.C. Cir. 2011)). Interestingly, if read together these two statements suggest that both the ends and the fit must be "substantial."

45. *Id.*

who can demonstrate 'good reason' beyond a general desire for self-defense."[46] In response to the State's arguments that limiting the total number of handguns carried in public is a good thing because the general presence of handguns presents a danger to the public and the police, the court concludes that "[t]hese arguments prove too much," because "the challenged regulation does no more to combat [the public safety dangers posed by handguns] than would a law indiscriminately limiting the issuance of a permit to every tenth applicant."[47] The statutory limitation, on this logic, "is not tailored to the problem it is intended to solve."[48]

While Judge Legg's exacting examination of the degree of tailoring in this case might be sustainable under strict scrutiny, it is a curious form of intermediate analysis, particularly given that the court considers only the State's interest in reducing the costs associated with handgun carry but not its interest in simultaneously maximizing the potential benefits of permitting a relatively small subset of individuals with particularly compelling needs to carry weapons notwithstanding the possibility that their gun may be wrested away during an assault or misused in an unforeseen way. That the State had identified a reduction in the overall number of handguns present in public as one of its goals does not necessarily mean that the statutory scheme was "simply"[49] designed to accomplish that one objective. Policy makers could plausibly have sought a balance of outcomes, including the overall reduction of handguns coupled with efforts to insure that those guns remaining in use would be in the hands of those who would most benefit from having them. That choice, to weigh the relative risks and benefits of a regulated practice and to shape statutes and regulations to maximize the multiple public policy objectives in tension, is, after all, the sort of discretionary judgment that officials in the political branches of state government regularly make, and that a more deferential form of scrutiny should seek to accommodate. Indeed, such an accommodation is especially appropriate in this field, given that the Supreme Court, adopting a Burkean minimalist stance, has signaled an intention to go slowly and to build up the law with considerable regard for well-established policies and practices, plausibly including regulations governing the issuance of handgun carry permits.

46. *Id.* at *11.
47. *Id.*
48. *Id.*
49. By which I understand Judge Legg to have meant "exclusively."

As a contrast to Judge Legg's analysis in *Woollard*, it is useful to consider the approach to intermediate scrutiny adopted by Judge William H. Walls in *Piszczatoski v. Filko*, a case decided by the United States District Court for the District of New Jersey just two months earlier.[50] *Piszczatoski* also involved a Second Amendment challenge to a state handgun permitting law, in this instance a New Jersey provision limiting handgun permits to applicants able to demonstrate a "justifiable need."[51] After a lengthy and far more conservative analysis of the scope issue,[52] Judge Walls turned to the question whether the New Jersey requirement survives intermediate scrutiny. Framing the analysis according to a standard derived from the Third Circuit's First Amendment speech cases, Judge Walls found first that the government's interest in public safety was "important or even compelling."[53] With respect to the fit component of the test, Judge Walls, guided by a principle of "substantial deference to the [legislature's] predictive judgments,"[54] concluded that New Jersey policy makers had not acted on "political whim" but had instead made "reasonable inferences based on substantial evidence."[55] Judge Walls noted the State's express policy "to limit the use of guns as much as possible,"[56] and invoked the reasoning of the District Court in *Peruta v. County of San Diego*, that a statute requiring a particularized showing of need was a constitutionally permissible means of accomplishing an important governmental interest in "reducing the number of concealed weapons in public in order to reduce the risks to other members of the public."[57]

Perhaps most relevant to the Burkean norms established in the *Heller* decision, Judge Walls's intermediate scrutiny analysis in *Piszczatoski* accorded substantial significance to the longevity of the State's policy. His opinion pointed out that the New Jersey legislature had decided as early as 1924 to adopt a permitting scheme in which indi-

50. Piszczatoski v. Filko, Civ. No. 10-16110 (WHW), 2012 WL 104917 (D.N.J. Jan. 12, 2012).

51. *Id.* at *1.

52. *Id.* at *4–16 (concluding that New Jersey's handgun permit law does not burden conduct protected by the Second Amendment).

53. *Id.* at *21 (citing United States v. Salerno, 481 U.S. 739, 745 (1987); Schall v. Martin, 467 U.S. 253, 264 (1984)).

54. *Id.* (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997)).

55. *Id.*

56. *Id.* at *22 (quoting State v. Valentine, 307 A.2d 617, 619 (N.J. Super. Ct. App. Div. 1973)).

57. *Id.* at *21 (quoting Peruta v. County of San Diego, 758 F. Supp. 2d 1106, 1110, 1117 (S.D. Cal. 2010)).

viduals would be required to make a "showing of 'need'"[58] and stressed that the "need" requirement had been retained in all of the subsequent iterations of the statute.[59] Similar evidence of the longstanding nature of handgun regulation in Maryland was available to Judge Legg in the *Woollard* case as well. Although the tenure of the provision scrutinized in *Woollard* is not as lengthy as that of the New Jersey statute, a prior version of the current permitting law in Maryland was enacted roughly four decades ago.[60] In addition, a statutory prohibition against the concealed carry of handguns was adopted in Maryland as early as 1886,[61] which suggests that significant limitations on a citizen's ability to possess and carry handguns in public have been part of the State's legislative tradition for well over a century.[62]

Notwithstanding the variations in statutory approach to handgun regulation from Maryland to New Jersey to California and elsewhere in the United States, the broader context here is that handgun regulation has a long and well-established pedigree in state laws going back to the nineteenth century. A 1915 article in the *Harvard Law Review* reasoned:

> The guaranty is to insure the safety of the people, their "laws and liberties," against assaults from any source or quarter, but not to give individuals singly or in groups uncontrollable means of aggression upon the rights of others. Granting that the individual may carry weapons when necessary for his personal defense or that of his family or property, it is submitted that he may be forbidden to carry dangerous weapons except in cases where he has reason to believe and does believe that it is necessary for such defense. In fine, I venture the opinion that, without violence to the constitutional guaranty of the right of the people to bear arms, the carrying of weapons by individuals may be regulated, restricted, and even prohibited according as conditions and

58. *Id.* at *21.

59. *Id.*.

60. S.B. 205 (1972).

61. 1866 Md. Laws, ch. 375, § 1.

62. Perhaps in recognition of the State's early regulation of concealed handguns, Judge Legg noted at the end of his intermediate scrutiny analysis that he would not "speculate as to whether a law that required a 'good and substantial reason' only of law-abiding citizens who wish to carry a *concealed* handgun would be constitutional." Woollard v. Sheridan, Civil No. L-10-2068, 2012 WL 695674, at *12 (D. Md. Mar. 2, 2012). The 1886 statute severely restricting concealed carry is relevant more broadly, however, to show the State's longstanding tradition of handgun regulation outside of the home.

> circumstances may make it necessary for the protection of the people.[63]

To the extent that the Supreme Court embraced Burkean minimalism in *Heller*, the tradition of balanced handgun regulation in the states generally, and the more particular regulatory practice in Maryland, ought to count significantly in both the determination of the scope of the right and in its operation. The judicial exercise of intermediate scrutiny under these circumstances, while not toothless rational basis review, should be characterized by a deferential stance toward the sensitive public policy judgments reached decades ago and maintained over the years by officials in the legislative and executive branches of state government. Many lower courts confronting these issues have explicitly or implicitly recognized the essentially conservative nature of this developing jurisprudence, its Burkean incrementalism. The District Court in *Woollard* chose a more aggressive path, and in that respect misread the important cautionary signals that the Supreme Court majority has provided.

63. Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 477 (1915).