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Post-*Heller* Second Amendment Jurisprudence

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Summary

This report examines the scope of the Second Amendment, as interpreted by the federal circuit courts of appeals, after the watershed Supreme Court decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago.* The Second Amendment states that "[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." Before the Supreme Court's 2008 opinion in *Heller,* the Second Amendment had received little Supreme Court attention and had been largely interpreted, at least by the lower federal courts, to be intertwined with military or militia use. Still, there had been ample debate in the lower federal courts and political discussion over whether the Second Amendment provides an individual right to keep and bear arms, versus a collective right belonging to the states to maintain militias, with the vast majority of the lower federal courts embracing the collective right theory.

In *Heller,* though, the Supreme Court adopted the individual right theory, holding that the Second Amendment protects an individual right for law-abiding citizens to keep and bear arms for lawful purposes including, most notably, self-defense in the home. Two years later in *McDonald,* the Court held that the Second Amendment applies to the states via selective incorporation through the Fourteenth Amendment.

After *Heller* and *McDonald,* numerous challenges were brought on Second Amendment grounds to various federal, state, and local firearm laws and regulations. Because *Heller* neither purported to define the full scope of the Second Amendment, nor suggested a standard of review for evaluating Second Amendment claims, the lower federal courts have been tasked with doing so in the Second Amendment challenges brought before them. As will be discussed in this report, these challenges include allegations that provisions of the Gun Control Act of 1968, as amended, as well as various state and local firearm laws (e.g., assault weapon bans, concealed carry regulations, firearm licensing schemes) are unconstitutional.

Generally, the courts have adopted a two-step framework for evaluating Second Amendment challenges. First, courts ask whether the regulated person, firearm, or place comes within the scope of the Second Amendment's protections. If not, the law does not implicate the Second Amendment. But if so, the court next employs the appropriate level of judicial scrutiny—rational basis, intermediate, or strict scrutiny—to assess whether the law passes constitutional muster. In deciding what level of scrutiny is warranted, courts generally ask whether the challenged law burdens core Second Amendment conduct, like the ability to use a firearm for self-defense in the home. If a law substantially burdens core Second Amendment activity, courts typically will apply strict scrutiny. Otherwise, courts generally will apply intermediate scrutiny. Most challenged laws have been reviewed for intermediate scrutiny, where a court asks whether a law is substantially related to an important governmental interest. And typically, the viability of a firearm restriction will depend on what evidence the government puts forth to justify the law. Yet sometimes courts take a different or modified approach from that described above and ask whether a challenged regulation falls within a category deemed "presumptively lawful" by *Heller*. If the law falls within such a category, a court does not need to apply a particular level of scrutiny in reviewing the restriction because the law does not facially violate the Second Amendment.

The body of this report discusses in detail notable post-*Heller* Second Amendment cases decided by federal courts of appeals. Because *Heller* and *McDonald* provide the only recent Supreme Court guidance on the Second Amendment, the analyses in these cases may provide useful guideposts for Congress should it seek to enact further firearm regulations.

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The Second Amendment states that "[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."[1] Before the Supreme Court's 2008 opinion in *District of Columbia v. Heller,* the right generally had been understood by federal courts to be intertwined with military or militia use.[2] That understanding was formed with little Supreme Court guidance: Before *Heller,* the Supreme Court had barely opined on the scope of the Second Amendment, making its last substantive remarks on the right in its 1939 ruling in *United States v. Miller.*[3] In *Miller,* the Supreme Court evaluated a criminal law banning possession of a certain type of firearm, asking whether it bore a "reasonable relationship to the preservation or efficiency of a well regulated militia" such that it garnered Second Amendment protection.[4] This passage spawned a longstanding debate over whether the Second Amendment provides an individual right to keep and bear arms versus a collective right belonging to the states to maintain militias, with the vast majority of the courts embracing the collective right theory.[5] Indeed, before the *Heller* litigation began only one circuit court—the Fifth Circuit[6] in *United States v. Emerson*—had concluded that the Second Amendment protects an individual's right to keep and bear arms.[7]

The Supreme Court's landmark 5-4 decision in *Heller* upturned the earlier majority view with its holding that the Second Amendment guarantees an individual right to possess firearms for historically lawful purposes, such as self-defense in the home.[8] But in *Heller* the Court did not

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[1] U.S. CONST., amend II.

[2] *See, e.g.,* Parker v. District of Columbia, 311 F. Supp. 2d 103, 104-05 (D. D.C. 2004) (noting that the "vast majority of circuit courts . . . reject[ed] an individual right to bear arms separate and apart from Militia use"); *see also* United States v. Miller, 307 U.S. 174, 178-79 (1939); Dan M. Peterson & Stephen P. Halbrook, *A Revolution in Second Amendment, Law,* 29-WTR DEL. LAW 12, 13 (2011/2012).

[3] *See* United States v. Miller, 307 U.S. 174, 178-79 (1939); *see also* Sandra S. Froman & Kenneth A. Klukowski, *A Round in the Chamber:* District of Columbia v. Heller *& the Future of the Second Amendment,* 9 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 16 (2008); Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J. L. & LIBERTY 48 (2008). Before *Miller,* the Second Amendment was discussed by the Supreme Court in *United States v. Cruikshank,* 92 U.S. 542 (1876), *Presser v. Illinois,* 116 U.S. 252 (1886), and *Miller v. Texas,* 153 U.S. 535 (1894). But the Court did not offer any meaningful substantive guidance on the nature of the right protected by the Second Amendment in those cases, holding only that the Second Amendment imposes restrictions on the federal government, not the states. *See Miller,* 153 U.S. at 538; *Presser,* 116 U.S. at 265; *Cruikshank,* 92 U.S. at 592; *see also* United States v. Emerson, 270 F.3d 203, 221 n.13 (5th Cir. 2001).

[4] *Miller,* 307 U.S. at 178-79; *see also* Lewis v. United States, 445 U.S. 55, 65 n.8 (1980).

[5] *See* Richard A. Allen, *What Arms? A Textualist View of the Second Amendment,* 18 GEO. MASON. U. CIV. RTS. L.J. 191, 191-93 (2008) (explaining the views taken by courts and scholars since *Miller*); Frye, *supra* note 3, at 49 & n.4 (collecting cases on both sides of the debate); Allison L. Mollenhauer, Note, *Shot Down!: The D.C. Circuit Disarms Gun Control Laws in* Parker v. District of Columbia, 53 VILL. L. REV. 353, 356 (2008) (noting that since *Miller,* "there has been disagreement among the federal circuits and legal analysts regarding whether the Second Amendment protects an individual's right to keep and bear arms or protects only the right of members of the militia to keep and bear arms"); Joseph Bradley Adams, Note, *Dispensing with the Second Amendment,* 12 TRINITY L. REV. 75 (2004) (explaining the two views "sparked" by *Miller*).

[6] This report references a significant number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Fifth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[7] 270 F.3d 203 (5th Cir. 2001); *see* Amanda C. Dupree, Comment, *A Shot Heard 'Round the District: The District of Columbia Circuit Puts a Bullet in the Collective Right Theory of the Second Amendment,* 16 AM. U. J. GENDER SOC. POL'Y & L. 413, 417-18 (2008); *but see, e.g.,* Silveira v. Lockyer, 312 F.3d 1052, 1086-87 (9th Cir. 2003) (adopting collective right theory); Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999) (same); United States v. Warin, 530 F.2d 103, 102 (6th Cir. 1976) (same); Frye, *supra* note 3, at 49 & n.4 (collecting circuit court cases that employed a collective right theory).

[8] *See, e.g.,* Jason Racine, Note, *What the Hell[er]? The Fine Print Standard of Review under* Heller, 29 N. ILL. U. L. REV. 605, 611 (2009).

define the full scope of that right, leaving lower courts to fill in the gaps. Indeed, the Court has said little on the matter, most notably by holding that the Second Amendment right is incorporated through the Fourteenth Amendment to apply to the states in *McDonald v. City of Chicago*.[9] Beyond *McDonald,* the Court has largely declined to grant certiorari[10] to the numerous Second Amendment cases percolating in the lower federal courts with one exception: In *Caetano v. Massachusetts,* the Supreme Court—in a single, two page ruling—granted a petition for certiorari and issued an unsigned, per curiam opinion vacating the decision of the Massachusetts Supreme Court that had upheld a state law prohibiting the possession of stun guns.[11] But the Court's opinion did little to clarify Second Amendment jurisprudence, principally noting that the state court opinion directly conflicted with *Heller* without discussing the matter in further detail.[12]

Accordingly, this report evaluates how the lower federal courts have interpreted *Heller* and the Second Amendment through challenges to various federal, state, and local firearm laws. In particular, this report focuses on federal appellate decisions, including what categories of persons, firearms, and places may be subject to government firearm regulation, and how federal, state, and local governments may regulate those categories. These appellate decisions include challenges to provisions of the Gun Control Act[13]—the primary federal law regulating the transfer and possession of firearms in interstate commerce—as well as state and local laws that provide further restrictions on the possession and sale of firearms, including assault weapon bans, concealed carry restrictions, and firearm licensing schemes, among others. This report is not intended to provide a comprehensive analysis of every Second Amendment issue brought in federal court since *Heller,* but highlights notable challenges to firearm laws that may be of interest to Congress.

District of Columbia v. Heller

Before *Heller,* the District of Columbia had a web of regulations governing the ownership and use of firearms that, taken together, amounted to a near total ban on handguns in the District.[14] One law generally barred the registration of most handguns.[15] Another law required persons with registered firearms to keep them "unloaded and either disassembled or secured by a trigger lock, gun safe, locked box, or other secure device."[16] And a third law prohibited persons within the District of Columbia from carrying (openly or concealed, in the home or elsewhere) an unlicensed firearm.[17] In 2003, six D.C. residents challenged those three measures as unconstitutional under the Second Amendment, arguing that the Constitution provides an

[9] McDonald v. City of Chicago, 561 U.S. 742 (2010).

[10] *See* Lawrence Hurley, REUTERS, *Supreme Court Rejects Challenge to State Assault Weapon Bans,* Reuters (Jun. 20, 2016 1:01 P.M.), http://www.reuters.com/article/us-usa-court-guns-idUSKCN0Z61JE (noting that the Supreme Court declined to review New York and Connecticut's assault weapon bans, which "underlined its reluctance to insert itself into the simmering national debate on gun control"); Matt Ford, THE ATLANTIC, *Have the Justices Gone Gun-Shy?* (Dec. 7, 2015), http://www.theatlantic.com/politics/archive/2015/12/supreme-court-gun-rights/419160/ (observing that the Supreme Court has yet to opine further on the Second Amendment since *Heller* and *McDonald*)**.**

[11] Caetano v. Massachusetts, 136 S. Ct. 1027 (2016) Stun guns are not regulated under the Gun Control Act. *See generally* Pub. L. No. 90-618, 82 Stat. 1213-2 (1968), codified as amended at 18 U.S.C. § 922.

[12] *See Caetano*, 136 S. Ct. at 1027-28.

[13] Pub. L. No. 90-618, 82 Stat. 1213-2 (1968).

[14] *See* Adam Winkler, Heller*'s Catch-22,* 56 UCLA L. REV. 1551, 1553 (2009).

[15] *See* Parker v. District of Columbia (*Parker II*), 478 F.3d 370, 373 (D. C. Cir. 2007).

[16] *See id.*

[17] *See id.*

individual right to bear arms.[18] In particular, the residents contended that the Second Amendment provides individuals a right to possess "functional firearms" that are "readily accessible to be used . . . for self-defense in the home."[19]

Parker v. District of Columbia: *Heller* in the District Court

In *Parker v. District of Columbia,*[20] the district court was tasked with gleaning the meaning of the right provided by the Second Amendment. The last word from the Supreme Court on this right was in its 1939 ruling, *United States v. Miller.*[21] *Miller* involved a challenge to a federal indictment for unlawfully transporting in interstate commerce an unregistered double barrel 12-gauge shotgun with a barrel less than 18 inches in length,[22] as had been prohibited by the National Firearms Act of 1934.[23] A district court had dismissed the indictment after concluding that the challenged criminal provision infringed the defendant's Second Amendment rights.[24] The Supreme Court, on direct appeal, reversed that ruling:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.[25]

In reaching that conclusion, the Court emphasized that the Second Amendment must be interpreted in the context in which it was enacted: "[w]ith [the] obvious purpose to assure the continuation and render possible the effectiveness of" Congress's power to "provide for organizing, arming, and disciplining, the Militia."[26]

Relying on the Supreme Court's guidance in *Miller,* the district court in *Parker* rejected the plaintiffs' contention that the Second Amendment provides an individual right to bear arms unrelated to militia use.[27] The court additionally noted that this conclusion matched those of every other federal circuit court to have considered the issue except for one recent Fifth Circuit decision.[28] Accordingly, the district court dismissed the lawsuit for failing to state a claim for relief under the Second Amendment, reasoning that it "would be in error to overlook sixty-five

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[18] Parker v. District of Columbia, 311 F. Supp. 2d 103, 103-04 (D. D.C. 2004).

[19] *Parker II*, 478 F.3d at 374.

[20] Initially, the case name for *Heller* was styled as Parker v. District of Columbia.

[21] 307 U.S. 174 (1939).

[22] *Id.* at 175.

[23] Act of June 26, 1934, 48 Stat. 1236-1240.

[24] *Miller*, 307 U.S. at 176-77.

[25] *Id.* at 178-79.

[26] *Id.* at 178 (citing U.S. CONST. art. I, § 8).

[27] Parker v. District of Columbia, 311 F. Supp. 2d 103, 105 (D. D.C. 2004).

[28] *Id.* at 106-07 (citing United States v. Bayles, 310 F.3d 1302, 1307 (10th Cir. 2002), United States v. Napier, 233 F.3d 394, 403 (6th Cir. 2000), Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999), United States v. Wright, 117 F.3d 1265, 1273 (11th Cir. 1997), Love v. Pepersack, 47 F.3d 120, 122 (4th Cir. 1995), United States v. Nelsen, 850 F.2d 1318, 1320 (8th Cir. 1988), Thomas v. Members of City Council of Portland, 730 F.2d 41, 42 (1st Cir. 1984), and United States v. Graves, 554 F.2d 65, 66 n.2 (3d Cir. 1977)). In *United States v. Emerson*, the Fifth Circuit concluded, after surveying the history and purpose underlying the Second Amendment, that it "protects the right of individuals . . . to privately possess and bear their own firearms . . . that are suitable as personal, individual weapons" regardless of the individual's relationship to militia or military service, and that *Miller* does not preclude that interpretation. 270 F.3d 203, 260 (5th Cir. 2001).

years of unchanged Supreme Court precedent and the deluge of circuit case law rejecting an individual right to bear arms not in conjunction with service in the Militia."[29]

Parker v. District of Columbia: *Heller* in the D.C. Circuit Court of Appeals

The D.C.-resident plaintiffs appealed to the D.C. Circuit, and a divided 3-judge panel reversed the district court's ruling.[30] The crux of the debate at the circuit court centered on whether the court should adopt the "collective right" versus "individual right" theory of the Second Amendment.[31] Framed this way, the D.C. Circuit, unlike the district court, perceived the issue before it as one of first impression, opining that *Miller* actually addressed the kinds of "arms" that the Second Amendment protects.[32]

Under the collective right theory advanced by the District of Columbia (District), the Second Amendment protects only the right of states to maintain and arm their militias.[33] Accordingly, the District argued that the Second Amendment's prefatory clause—"[a] well regulated Militia, being necessary to the security of a free State"—announces the Amendment's sole purpose: to protect state militias from federal intrusion, and limiting the right to keep and bear arms to military uses.[34] Under the individual right theory, advanced by the plaintiffs, the Second Amendment guarantees individuals a right to keep and bear arms for personal use.[35] Pointing to a different part of the Amendment's text, the plaintiffs argued that its operative clause—"*the right of the people* to keep and bear Arms shall not be infringed"—signals an individual right.[36]

The D.C. Circuit rejected the collective right theory advanced by the District, reasoning that Supreme Court precedent interpreting the meaning of "the people," as used in the Bill of Rights, required the court to conclude that "the people," as used in the Second Amendment, refers to individual persons, and thus the Amendment protects an individual right.[37] The court additionally noted that, because founding era-like militias no longer exist, the argument put forth by the District would render the Second Amendment a "dead letter."[38] Having established that the Second Amendment protects an individual right to keep and bear arms, the court next addressed the scope of that right by examining the lawful, private purposes for which founding-era persons owned and used firearms.[39] The court concluded that the right encompasses firearm uses pre-

[29] *Parker,* 311 F. Supp. 2d. at 109-10.

[30] *Parker II,* 478 F.3d 370 (D.C. Cir. 2007).

[31] *Id.* at 378-401.

[32] *Id.* at 380-81, 391, 392-94.

[33] *Id.* at 379.

[34] *Parker II,* 478 F.3d at 378.

[35] *Id.* at 379.

[36] *Id.* at 381 (emphasis added).

[37] *Id.* at 381-82. The court had relied on *United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990), in which the Supreme Court had declared that the phrase "the people," as used the First, Second, and Fourth Amendments, "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 265. The Court had made this declaration in its analysis of the Fourth Amendment to determine the question presented in *Verdugo-Urquidez*: "[W]hether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." *See id.* at 261, 265 The Court concluded that it does not. *Id.* at 261.

[38] *Parker II,* 478 F.3d at 378.

[39] *Id.* at 382.

existing the Constitution, such as hunting and self-defense against private misconduct or a tyrannical government.[40] And though the right could be subject to "reasonable restrictions," the court noted that the Constitution would not tolerate laws, like the District's, that amount to a "virtual prohibition" on handgun possession.[41]

One judge dissented on the ground that the District is not a state within the meaning of its use in the Second Amendment, and thus its protections—whatever they may be—do not reach it.[42]

District of Columbia v. Heller: Supreme Court's Ruling

The challenge made its way to the Supreme Court, which, in a 5-4 decision authored by Justice Scalia, affirmed the D.C. Circuit's conclusion that the Second Amendment provides an individual right to keep and bear arms for lawful purposes.[43] The majority arrived at this conclusion after undertaking an extensive analysis of the founding-era meaning of the words in the Second Amendment's prefatory and operative clauses. Applying that interpretation to the challenged D.C. firearm laws, the Court concluded that the District's functional ban on handgun possession in the home and the requirement that lawful firearms in the home be rendered inoperable were unconstitutional.[44]

Majority Opinion

Textual Analysis

The majority analyzed the Second Amendment's two clauses and concluded that the prefatory clause, indeed, announces the Amendment's purpose.[45] And though there must be some link between the stated purpose and the command in the operative clause, the Court concluded that "the prefatory clause does not limit . . . the scope of the operative clause."[46] Accordingly, the Court assessed the meaning of the Second Amendment's two clauses.

Prefatory Clause

"A well regulated Militia, being necessary to the security of a free State . . ."

Operative Clause

". . . the right of the people to keep and bear Arms, shall not be infringed."

Beginning with the operative clause, the Supreme Court first concluded that the phrase the "right of the people," as used in the Bill of Rights, universally communicates an individual right, and

[40] *Id.* at 395.

[41] *Id.* at 397-99.

[42] *Id.*, at 401-09 (Henderson, J., dissenting).

[43] District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742, 780 (2010) ("[O]ur central holding in *Heller*[is] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.").

[44] The Court did not evaluate the challenged licensing law on that ground that the District had asserted that, "'if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified,'" which the Court interpreted to mean that "he is not a felon and is not insane." *See Heller*, 554 U.S. at 630-31.

[45] *Id.* at 577.

[46] *Id.* at 577-78.

thus the Second Amendment protects a right that is "exercised individually and belongs to all Americans."[47] Next, the Court turned to the meaning of "to keep and bear arms."[48] "Arms," the Court said, has the same meaning now as it did during the eighteenth century: "any thing that a man wears for his defence, or takes into his hands, or use[s] in wrath to cast at or strike another," including weapons not specifically designed for military use.[49] The Court then turned to the full phrase "keep and bear arms." To "keep arms," as understood during the founding period, the Court said, was a "common way of referring to possessing arms, for militiamen *and everyone else.*"[50] And "bearing arms," during the founding period as well as currently, the Court said, means to carry weapons for the purpose of confrontation; but even so, the Court added, the phrase does not "connote[] participation in a structured military organization."[51] Taken together, the Court concluded that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[52] The Court added that its textual analysis was supported by the Amendment's historical background, which was relevant to its analysis because, the Court reasoned, the Second Amendment was "widely understood" to have codified a pre-existing individual right to keep and bear arms.[53]

Turning back to the prefatory clause, the Supreme Court majority concluded that the term "well-regulated militia" does not refer to state or congressionally regulated military forces as described in the Constitution's Militia Clause;[54] rather, the Second Amendment's usage refers to all "able-bodied men" who are "capable of acting in concert for the common defense."[55] And the security of a free "state," the Court opined, does not refer to the security of each of the several states, but rather the security of the country as a whole.[56]

Coming full circle to the Court's initial declaration that the two clauses must "fit" together, the majority concluded that the two clauses fit "perfectly" in light of the historical context showing that "tyrants had eliminated a militia consisting of all the able-bodied men . . . by taking away the people's arms."[57] Thus, the Court announced, the *reason* for the Second Amendment's codification was "to prevent elimination of the militia," which "might be necessary to oppose an oppressive military force if the constitutional order broke down."[58] But the *reason* for codification, the Court clarified, does not define the entire scope of the right the Second Amendment guarantees.[59] This is so because, the Court explained, the Second Amendment codified a pre-existing right that included using firearms for self-defense and hunting, and thus the pre-existing right also informs the meaning of the Second Amendment.[60]

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[47] *Id.* at 579-81.

[48] *Id.* at 581-91.

[49] *Id.*at 581.

[50] *Id.* at 582-83 (emphasis in original).

[51] *Id.* at 584.

[52] *Id.* at 592.

[53] *Heller,* 554 U.S. at 592-95.

[54] U.S. CONST. art I, § 8, cl. 15 ("The Congress shall have Power . . . to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.").

[55] *Heller,* 554 U.S. at 595-96.

[56] *Id.* at 597.

[57] *Id.* at 598

[58] *Id.* at 599.

[59] *Id.*

[60] *Id.* at 599-600.

Squaring Heller *with* Miller

The Supreme Court majority added that its conclusion was not foreclosed by its earlier ruling in *Miller*, which, as discussed above, had largely been viewed by the lower federal courts as advancing the collective right theory. Like the D.C. Circuit, the Supreme Court concluded that *Miller* addressed only the type of weapons eligible for Second Amendment protection.[61] Furthermore, in the Court's view, the fact that *Miller* assessed a type of unlawfully possessed weapon supported its conclusion that the Second Amendment protects an individual right, noting that "it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen."[62] Nor, the Court added, did *Miller* "purport to be a thorough examination of the Second Amendment," and thus, the Court reasoned, it cannot be read to mean more than "say[ing] 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."[63]

Scope of the Right

After announcing that the Second Amendment protects an individual's right to possess firearms, the Supreme Court explained that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited."[64] Nevertheless, the Court left for another day an analysis of the full scope of the right.[65] The Court did clarify, however, that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms," among other "presumptively lawful" regulations.[66] And as for the kind of weapons that may obtain Second Amendment protection, the Court noted that *Miller* limits Second Amendment coverage to weapons "in common use at the time" a reviewing court is examining a particular firearm, which, the Court added, "is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons."[67]

Second Amendment Analysis of D.C.'s Firearms Regulations

Finally, the Supreme Court applied the Second Amendment, as newly interpreted, to the contested D.C. firearm regulations—which amounted to a near-total handgun ban—and concluded that they were unconstitutional.[68] First, the Court declared that possessing weapons for self-defense is

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[61] *Id.* at 621-22.

[62] *Id.* at 622.

[63] *Id.* at 623-25.

[64] *Id.* at 626.

[65] *Id.*

[66] *Id.* at 626-27 & n.26.

[67] *Id.*at 627 (internal quotation marks and citations omitted) ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communication…the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."); *see also* Caetano v. Massachusetts, 136 S. Ct. 1027, 1027-28 (2016) (noting that the Massachusetts Supreme Court's conclusion "that stuns guns are not protected [by the Second Amendment] because they 'were not in common use at the time of the Second Amendment's enactment'. . . . is inconsistent with *Heller*'s clear statement").

[68] *Heller,* 554 U.S. at 628-36.

"central to the Second Amendment right," yet the District's handgun ban prohibits "an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose."[69] Moreover, the handgun prohibition extended into the home, where, the Court added, "the need for defense of self, family, and property is most acute."[70] Additionally, the requirement that firearms in the home be kept inoperable is unconstitutional because, the Court concluded, that requirement "makes it impossible for citizens to use them for the core lawful purpose of self-defense."[71] Thus, the Court ruled, the District's handgun ban could not survive under any level of scrutiny that a court typically would apply to a constitutional challenge of an enumerated right.[72]

Dissent: Justice Stevens

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented.[73] Justice Stevens did not directly quarrel with the majority's conclusion that the Second Amendment provides an individual right, asserting that it "protects a right that can be enforced by individuals."[74] But he disagreed with the majority's interpretation of the scope of the right, contending that neither the text nor history of the Amendment supports "limiting any legislature's authority to regulate private civilian uses of firearms" or "that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution."[75] Additionally, he characterized the majority's interpretation of *Miller* as a "dramatic upheaval in the law."[76] In his view, *Miller* interpreted the Second Amendment as "protect[ing] the right to keep and bear arms for certain military purposes" and not "curtail[ing] the Legislature's power to regulate the nonmilitary use and ownership of weapons." This interpretation, Justice Stevens added, "is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adaptation."[77]

Dissent: Justice Breyer

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, authored another dissent.[78] Although agreeing with Justice Stevens that the Second Amendment protects only militia-related firearm uses, in his dissent he argued that the District's laws were constitutional even under the majority's conclusion that the Second Amendment protects firearm possession in the home for self-defense.[79] He began by assessing the appropriate level of scrutiny under which Second Amendment challenges should be analyzed.[80] Justice Breyer suggested an interest-balancing inquiry in which a court would evaluate "the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the

[69] *Id.* at 628.

[70] *Id.* at 628-29.

[71] *Id.* at 630.

[72] *Id.* at 628-29.

[73] *Id.* at 636-80 (Stevens, J., dissenting).

[74] *Id.*at 636.

[75] *Id.* at 636-37.

[76] *Id.* at 639.

[77] *Id.* at 637-38.

[78] *Id.* at 681-723 (Breyer, J., dissenting).

[79] *Id.* at 681-82.

[80] *Id.* at 687-91.

latter."[81] In making that evaluation, Justice Breyer would ask "how the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the Second Amendment seeks to protect, and whether there are practical less burdensome ways of furthering those interests."[82] Applying those questions to the challenged D.C. laws, Justice Breyer concluded that (1) the laws sought to further compelling public-safety interests; (2) the D.C. restrictions minimally burdened the Second Amendment's purpose to preserve a "well regulated Militia" and burdened "to some degree" an interest in self-defense; and (3) there were no reasonable but less restrictive alternatives to reducing the number of handguns in the District.[83] Thus, in Justice Breyer's view, the District's gun laws were constitutional. He also anticipated that the majority's decision would "encourage legal challenges to gun regulation throughout the Nation."[84] The majority did not seem to voice disagreement with this prediction, but noted that "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."[85] Indeed, after *Heller* a series of challenges to federal and state firearms laws occurred.

Second Amendment Incorporation

Because *Heller* involved a challenged to a D.C. law, and because the District is generally not viewed as a state for purposes of constitutional law,[86] a question beyond the scope of *Heller* was whether the Second Amendment applies to the states.[87] Initially, the Bill of Rights was thought solely to restrict the power of the federal government.[88] Only after the Fourteenth Amendment's adoption did the Supreme Court contemplate whether the Bill of Rights applies to the states.[89] Section One of the Fourteenth Amendment declares that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of the Unites States; nor shall any state deprive any person of life, liberty, or property, without due process of law."[90] During the nineteenth and twentieth centuries, several theories were advanced, with varying results, concerning whether the Fourteenth Amendment requires states to comply with the Bill of Rights.[91] The theory that

[81] *Id.* at 689-90. The majority explicitly rejected Justice Breyer's suggested approach. *Id.* at 634 (majority opinion) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.").

[82] *Id.* at 693 (Breyer, J., dissenting).

[83] *Id.* at 691-719.

[84] *Id.* at 718.

[85] *Id.* at 635 (majority opinion).

[86] *See* Hepburn & Dundas v. Ellzey, 6 U.S. (2 Cranch) 445 (1805).

[87] *See Heller,* 554 U.S. at 620 n.23; Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment through the Privileges or Immunities Clause,* 39 N.M. L. REV. 195, 203 (2009).

[88] *See* Barron v. City of Baltimore, 32 U.S. (Pet.) 243 (1833); Livingston v. Moore, 32 U.S. (Pet.) 469, 551-52 (1833); *see also* McDonald v. City of Chicago, 561 U.S. 742, 754 (2010); *Heller,* 554 U.S. at 625; Klukowski, *supra* note 87, at 208; Jerold H. Israel, *Selective Incorporation: Revisited,* 71 GEO. L.J. 253, 254-55 (1982).

[89] *See McDonald,* 561 U.S. at 754.

[90] U.S. CONST. amend XIV, § 1.

[91] The Supreme Court initially was tasked with determining whether the Fourteenth Amendment's Privileges or Immunities Clause requires states to comply with the Bill of Rights in the *Slaughter-House Cases.* 83 U.S. (Wall) 36 (1873). According to the Court, it did not. *Id.* By the late nineteenth century, the Court began examining whether the Due Process Clause of the Fourteenth Amendment requires states to comply with the Bill of Rights; under that early inquiry, one of the Bill of Rights could be applied against the states, but without providing "the people" the same protections as against federal intrusions of those rights. *See McDonald,* 561 U.S. at 759-61; Suja A. Thomas,

eventually achieved the greatest success was selective incorporation through the Fourteenth Amendment's Due Process Clause.

Under the doctrine of selective incorporation, courts address whether the Due Process Clause of the Fourteenth Amendment fully incorporates a particular provision (and not an amendment as a whole) in the Bill of Rights and thus applies to the states.[92] To do so, courts evaluate whether the particular provision is "fundamental to our scheme of ordered liberty" as well as "deeply rooted in this Nation's history and tradition."[93] Most provisions of the Bill of Rights have been incorporated under this theory.[94] And most recently in *McDonald v. City of Chicago,* the Supreme Court addressed whether the Second Amendment applies to the states.[95]

McDonald v. City of Chicago

After *Heller* several firearms associations, along with residents of the City of Chicago and its neighboring suburb of Oak Park, Illinois, brought Second Amendment challenges to ordinances banning handgun possession in those municipalities.[96] The lawsuits were dismissed in the federal district court on the ground that the Supreme Court had yet to apply the Second Amendment to the states.[97] The Seventh Circuit affirmed, reasoning that century-old Supreme Court precedent had long ago announced that the Second Amendment does not apply to the states.[98]

The Supreme Court reversed in a 4-1-4 ruling authored by Justice Alito, concluding that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[99] Thus, the Court held that the Second Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.[100] The plurality first noted that *Heller* makes "unmistakabl[e]" that the

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Nonincorporation: The Bill of Rights after McDonald v. Chicago, 88 NOTRE DAME L. REV. 159, 163 (2012); Richard J. Hunter, *A Nomination of a Supreme Court Justice: The Incorporation Doctrine Revisited,* 35 OKLA. CITY U. L. REV. 365, 375-77 (2010); Kurt T. Lash, *Beyond Incorporation,* 18 J. CONTEMP. LEGAL ISSUES 447, 450-51 (2009); Klukowski, *supra* note 87, at 210-12. However, in the twentieth century, a minority of the Court, led by Justice Black, advanced the theory that the Due Process Clause of the Fourteenth Amendment fully incorporates the Bill Rights, making them applicable to the states. *See* Adamson v. California, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting); The Honorable Joseph R. Weisberger, *The Selective Incorporation Process & Judicial Activism,* 59 APR R.I. B.J. 13, 14-15 (2011); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities & Due Process Clauses,* 72 MO. L. REV. 1, 42 (2007).

[92] Peter J. Rubin, *Square Pegs & Round Holes: Substantive Due Process, Procedural Due Process, & The Bill of Rights,* 103 COLUM. L. REV. 833, 842 (2003); Thomas, *supra* note 91, at 163.

[93] *See McDonald,* 561 U.S. at 767 (emphasis omitted); *see also* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (asking whether a demand for a jury trial is a "right among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions") (internal quotation marks and citation omitted); Sen. Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government,* 55 WM. & MARY L. REV. 1241, 1273 (2014).

[94] *Compare McDonald,* 561 U.S. at 764 n.12 (listing incorporated rights), *with id.* at 764 n.13 (listing unincorporated rights).

[95] 561 U.S. 742 (2010).

[96] Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago, Ill., 567 F.3d 856, 857 (7th Cir. 2009).

[97] *Id.* at 857.

[98] *Id.* at 857-58 (citing *United States v. Cruikshank,* 92 U.S. 542 (1876), *Presser v. Illinois,* 116 U.S. 252 (1886), and *Miller v. Texas,* 153 U.S. 535 (1894)).

[99] McDonald v. City of Chicago, 561 U.S. 742, 778 (2010).

[100] *Id.* at 791. Although Justice Thomas was part of the five-Justice majority of the *McDonald* Court who agreed that the Second Amendment was applicable to the states via the Fourteenth Amendment, he disagreed with his colleagues' view that the Due Process Clause served as the proper basis for this incorporation. *Id.* at 805-58 (Thomas, J.,

basic right to self-defense is a "central component" of the Second Amendment and "deeply rooted in this Nation's history and tradition."[101] The Court reiterated much of the information recited in *Heller* about the founders' relationship to arms, including the fear many held—based on King George III's attempts to disarm the colonists—that the newly created federal government, too, would disarm the people to impose its will.[102] And even though the initial perceived threat of disarmament had dissipated by the 1850s, the plurality asserted that, still, "the right to keep and bear arms was highly valued for purposes of self-defense."[103] The Court also pointed to congressional debate in 1868 of the Fourteenth Amendment, during which Senators had referred to the right to keep and bear arms as a "fundamental right deserving of protection."[104]

In his concurring opinion, Justice Thomas said that he would have construed the Second Amendment to be applicable to the states via the Privileges or Immunities Clause of the Fourteenth Amendment because, in his view, "the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship."[105] But his opinion, nevertheless, provided the crucial fifth vote to hold that the Second Amendment applies to the states.[106]

Dissenting Opinions

Justice Breyer dissented (joined by Justices Ginsburg and Sotomayor), contending that "nothing in the Second Amendment's text, history, or underlying rationale . . . warrant[s] characterizing it as 'fundamental' insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes."[107] Additionally, he asserted that the Constitution provides no authority for "transferring ultimate regulatory authority over the private uses of firearms from democratically elected legislators to courts or from the States to the Federal Government."[108]

Justice Stevens authored another dissenting opinion, arguing that the question before the Court was not whether the Second Amendment, as a whole, applies to the states, but rather whether the Fourteenth Amendment requires that the liberty interest asserted—"the right to possess a functional, personal firearm, including a handgun, within the home"—be enforceable against the states.[109] In his view, the Second Amendment is not enforceable against the states, particularly because the Amendment is a "federalism provision" that is "directed at preserving the autonomy of the sovereign States, and its logic therefore resists incorporation by a federal court *against* the states."[110]

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concurring). In Justice Thomas's view, the Fourteenth Amendment's Privileges or Immunities Clause provided the source for incorporation, rejecting the *Slaughter-House Cases* "insofar as it precludes any overlap between the privileges and immunities of state and federal citizenship." *Id.* at 805-06, 855.

[101] *Id.* at 767-68 (internal emphasis, quotation marks, and citations omitted) (plurality).

[102] *Id.* at 768.

[103] *Id.* at 770.

[104] *Id.* at 775-76 (internal quotation marks and citations omitted).

[105] *Id.* at 778 (Thomas, J., concurring); *but see id.* at 859-60 (Stevens, J., dissenting) (agreeing with plurality's rejection of incorporation under the Privileges or Immunities Clause).

[106] *See* Alan Gura, Ilya Shapiro, & Josh Blackman, *The Tell-Tale Privileges or Immunities Clause*, 2010 CATO SUP. CT. REV. 163, 174 (2009-2010).

[107] *McDonald*, 561 U.S. at 913 (Breyer, J., dissenting).

[108] *Id.*

[109] *McDonald*, 561 U.S . at 858, 884, 890 (Stevens, J., dissenting).

[110] *Id.* at 897 (Stevens, J., dissenting) (internal quotation marks and citations omitted). Justice Stevens added that "[t]he

Federal Circuit Courts' Post-*Heller* Approach to Second Amendment Analysis

After *Heller* and *McDonald*, lawsuits were brought nationwide challenging on Second Amendment grounds various federal, state, and local firearms regulations. *Heller* did not define the full scope of the right protected by the Second Amendment, but the main take away may be summed up as follows: The Second Amendment protects the right of law-abiding citizens to possess weapons for lawful purposes, notably, self-defense in the home.[111] With this minimal guidance from the Supreme Court, the circuit courts largely have been applying a two-step inquiry, drawn from the discussion in *Heller*, to determine whether a particular law is constitutional.[112] First, courts ask whether the challenged law burdens conduct protected by the Second Amendment.[113] If it does not, the inquiry ends, as the law does not implicate the Second Amendment.[114] But if the challenged law does burden conduct protected by the Second Amendment, courts next ask whether, under some type of means-end scrutiny (described in more detail below), the law is constitutional under that standard of review.[115]

The Seventh Circuit stands out among the circuit courts of appeal for, at times, taking a somewhat different approach in the two-step analysis. In recent cases the court has declined, at step two, to dig "deeply into the 'levels of scrutiny' quagmire."[116] Instead, the court evaluates "the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights."[117] When the firearm restriction implicates core Second Amendment rights, the Seventh Circuit has suggested that the government must make a "rigorous showing" that may resemble something close to strict scrutiny.[118] For less severe burdens, the court requires the government to make a "strong showing" that a firearm regulation bears a "substantial relation" to an important governmental objective—a standard that resembles the intermediate scrutiny standard of review.[119]

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idea that States may place substantial restrictions on the right to keep and bear arms short of complete disarmament is, in fact, far more entrenched than the notion that the Federal Constitutional protects any such right," noting that "[f]ederalism is a far older and more deeply rooted tradition than is a right to carry or to own any particular kind of weapon." *See id.* at 899 (internal quotation marks and citation omitted).

[111] *See, e.g.*, McDonald, 561 U.S. at 767 ("[I]n *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right."); United States v. Masciandaro, 638 F.3d 458, 467 (4th Cir. 2011) ("The upshot of [*Heller* and *McDonald*] is that there now exists a clearly-defined fundamental right to possess firearms for self-defense within the home. But a considerable degree of uncertainty remains as to the scope of that right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation."); *see also* Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship & The Right to Bear Arms*, 85 N.Y.U. L. Rev. 1521, 1522-23 (2010).

[112] *See, e.g.*, Powell v. Tompkins, 783 F.3d 332, 347 n.9 (1st Cir. 2015) (collecting cases); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 254 & n.49 (2d Cir. 2015) (collecting cases); *see also* Ezell v. City of Chicago, 651 F.3d 684, 701 (7th Cir. 2011) ("The [Supreme] Court resolved the Second Amendment challenge in *Heller* without specifying any doctrinal 'test' for resolving future claims.").

[113] *See, e.g.*, United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

[114] *See id.*

[115] *See id*.

[116] United States v. Skoien, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc).

[117] *Ezell*, 651 F.3d at 703.

[118] *See id.* at 708. For a description of strict scrutiny, see *infra* section "Step Two: Applicable Standard of Review."

[119] *Skoien*, 614 F.3d at 641-42; *see also Ezell*, 651 F.3d at 708 ("In *Skoien* we required a 'form of strong showing'—a/k/a 'intermediate scrutiny'—in a Second Amendment challenge."); Nat'l Rifle Ass'n of Am., Inc. v. ATF, 700 F.3d

Step One: Scope of Second Amendment Protection

The first question in the two-part framework asks whether the challenged law targets conduct within the scope of the Second Amendment's protections. In making this determination, the reviewing courts typically engage in a textual and historical inquiry into the original meaning of the right, as the Supreme Court majority did in *Heller.*[120] Yet, even after concluding that the challenged regulation does not burden protected activity, courts, at times, have applied step two out of an "abundance of caution," given the lack of guidance from the Supreme Court as to how courts should analyze Second Amendment claims.[121]

"Longstanding" and "Presumptively Lawful" Regulations

For certain types of firearms regulations, some courts ask under step one whether the challenged regulation is "longstanding" and "presumptively lawful" and, if the answer is in the affirmative, the inquiry ends.[122] This analysis derives from the passage in *Heller* in which the Supreme Court announced that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions" that the Court considered to be "presumptively lawful," on the possession of weapons by certain categories of persons and in certain "sensitive places," as well as restrictions on possessing and selling certain types of weapons.[123] In particular, the Court mentioned that such laws include those prohibiting felons and the mentally ill from possessing weapons; forbidding firearms from being carried in schools and government buildings; and imposing conditions on the commercial sale of firearms.[124] This list was not meant to be exhaustive, and the Court did not elaborate further.[125] Some scholars have dubbed this passage *Heller*'s "safe harbor," intimating that restrictions similar to those listed in *Heller* would be found constitutional.[126] Dissimilarly, at least one circuit court has said that if a firearms regulation is "longstanding," it is not automatically constitutional but, rather, "enjoy[s] more deferential treatment" at step two.[127]

185, 194 (5th Cir. 2012) (commenting that *Skoien* "eschew[ed] the two-step framework . . . but appl[ied] intermediate scrutiny to a categorical restriction); United States v. Reese, 627 F.3d 792, 801 (10th Cir. 2010) (noting that the Seventh Circuit's test in *Skoien* resembles intermediate scrutiny). For a description of intermediate scrutiny, see *infra* section "Step Two: Applicable Standard of Review."

[120] *See, e.g., Ezell,* 651 F.3d at 701-02; Woollard v. Gallagher, 712 F.3d 865, 875 (4th Cir. 2013); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012*); Nat'l Rifle Ass'n of Am.,* 700 F.3d at 194.

[121] *See, e.g., Nat'l Rifle Ass'n of Am*., 700 F.3d at 204; *see also Woollard,* 712 F.3d at 875 ("We are not obliged to impart a definitive ruling at the first step . . . . And indeed, we and other courts of appeals have sometimes deemed it prudent to instead resolve post-*Heller* challenges to firearm prohibitions at the second step.").

[122] *See* Jordan E. Pratt, *A First Amendment-Inspired Approach to* Heller's *"Schools" and Government Buildings,"* 92 NEB. L. REV. 537, 562 (2014) ("While most of the federal circuits have settled on a bifurcated scope-scrutiny framework for dealing with Second Amendment challenges, they disagree on where to place Heller's 'presumptively lawful regulatory measures' on that framework. Some circuits treat them as categorical exceptions that either presumptively or conclusively burden conduct that falls completely outside the scope of the Second Amendment.").

[123] *See* District of Columbia v. Heller, 554 U.S. 570, 626-27 & n.26 (2008). Courts have pondered the weight to give that passage in response to assertions that it is dicta that need not be followed, but courts have generally given it great weight, noting, for example, that "it was in fact an important emphasis upon the narrowness of the holding itself and it directly informs the holding in that case." *See, e.g.,* Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1124 (10th Cir. 2015).

[124] *Heller,* 554 U.S. 626-27.

[125] *Id.* at 626-27 & n.26.

[126] *See, e.g.,* Stephen Kiehl, Comment, *In Search of a Standard: Gun Regulations after* Heller & McDonald, 70 MD. L. REV. 1131, 1142-44 (2011); Brannon P. Denning & Glenn H. Reynolds, Heller, *High Water(Mark)? Lower Courts & The New Right to Keep & Bear Arms,* 60 HASTINGS L.J. 1245, 1247-60 (2009).

[127] *See* Teixeira v. County of Alameda, 882 F.3d 1047, 1056 (9th Cir. 2016).

Whether at step one or two, the federal courts have grappled with what makes a particular firearm restriction "longstanding" and "presumptively lawful." Laws aligning neatly with those specifically recited by the *Heller* majority have been upheld, in some courts, as falling into *Heller's* safe harbor.[128] For laws falling outside those specified in *Heller,* the courts have generally found that a regulation can be longstanding even without a "precise founding-era analogue."[129] This is so because laws that the Supreme Court cited as "longstanding" in *Heller,* like laws barring felons and the mentally ill from possessing firearms, were not statutorily prohibited until the mid-twentieth century.[130] Conversely, other courts have observed the "relative futility of 'pars[ing] these passages of *Heller* as if they contain an answer'" to whether certain gun prohibitions are valid.[131] Additionally, one circuit court has criticized placing regulations into the so-called "safe harbor" because, in its view, that approach is too similar to rational-basis review, which *Heller* rejected.[132]

Additionally, the circuit courts have been attempting to decipher *why* the Supreme Court designated certain firearms restrictions as presumptively lawful.[133] Some courts have interpreted *Heller*'s discussion of presumptively lawful "longstanding prohibitions" on certain firearms to mean that such firearms are outside the scope of the Second Amendment.[134] Others *presume,* subject to rebuttal, that a longstanding regulation is unprotected by the Second Amendment and thus lawful.[135] Yet another interpretation that has been offered is that longstanding regulations are lawful not because they are outside the scope of the Second Amendment, but because, despite burdening protected activity, they would survive analysis under any standard of scrutiny.[136] So unlike the first two interpretations, which inquire into whether a regulation is presumptively lawful, under this latter view, the inquiry would take place during step two.

Step Two: Applicable Standard of Review

At step two, most courts analyze the challenged regulation under a particular level of scrutiny. Typically, constitutional claims are evaluated under rational basis, intermediate, or strict

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[128] *See* Kiehl, *supra* note 126, at 1142-44; *see also* United States v. Phillips, 827 F.3d 1171, 1174 (9th Cir. 2016) (concluding that § 922(g)(1) falls into *Heller's* safe harbor); United States v. Humphrey, 753 F.3d 813, 818 (8th Cir. 2014) (same); *but see* United States v. Williams, 616 F.3d 685, 692-94 (applying intermediate scrutiny to analysis of constitutionality of felon-in-possession statute).

[129] Nat'l Rifle Ass'n of Am., Inc. v. ATF, 700 F.3d 185, 196 (5th Cir. 2012); *see also* Untied States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) ("We do take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791.").

[130] *Nat'l Rifle Ass'n of Am*., 700 F.3d at 196.

[131] *See* United States v. Booker, 644 F.3d 12, 23 (1st Cir. 2011) (quoting *Skoien*, 614 F.3d at 640).

[132] *See* United States v. Greeno, 679 F.3d 510, 517-18 (6th Cir. 2012). For a description of rational basis review, *see infra* "Step Two: Applicable Standard of Review."

[133] *See, e.g.,* United States v. Chester, 628 F.3d 673, 679 (4th Cir. 2010); *see also* Jeff Golimowski, Note, *Pulling the Trigger: Evaluating Criminal Gun Laws in a Post*-Heller *World,* 49 AM. CRIM. L. REV. 1559, 1601-02 (2012) ("[L]ower courts are struggling to determine how to address existing gun laws because *Heller* did not explain why some laws seeming to restrict the Second Amendment right are presumptively lawful.").

[134] *See* United States v. Huet, 665 F.3d 588, 600 (3d Cir. 2012) ("[T]he longstanding limitations mentioned by the Court in *Heller* are exceptions to the right to bear arms."); *Nat'l Rifle Ass'n of Am.,* 700 F.3d at 196; United States v. Bena, 664 F.3d 1180, 1183 (8th Cir. 2011); United States v. Marzzarella, 614 F.3d 85, 91 (3d Cir. 2010).

[135] Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 686, 690 (6th Cir. 2016) (en banc); Heller v. District of Columbia (*Heller II)*, 670 F.3d 1244, 1253 (D.C. Cir. 2011); United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010).

[136] *Nat'l Rifle Ass'n of Am*., 700 F.3d at 196; *Marzzarella*, 614 F.3d at 91.

scrutiny.[137] Rational basis review is the most deferential to legislatures, with courts asking whether a statute is rationally related to a legitimate government purpose.[138] Under strict scrutiny—the most exacting standard of review—the government must show that the regulation furthers a compelling governmental interest and is narrowly tailored to serve that interest.[139] In between those two is intermediate scrutiny, in which a court asks whether (1) the regulation furthers a substantial or important governmental interest; (2) there is a reasonable or substantial fit between the asserted interest and the challenged law; and (3) the restriction is no greater than necessary to further that interest.[140] Under this method, "the fit needs to be reasonable," but "a perfect fit is not required."[141]

Heller provided little guidance on how courts ought to review Second Amendment claims.[142] The Supreme Court majority seemed to reject rational basis, as well as Justice Breyer's proposed interest-balancing inquiry, as adequate analytical tools.[143] In the majority opinion, though, the Court made numerous comparisons between the rights secured by the First and Second Amendments.[144] Accordingly, to determine the applicable level of scrutiny, courts have looked to First Amendment jurisprudence for guidance.[145] The Supreme Court's First Amendment jurisprudence applies strict scrutiny to laws that regulate the content of a message.[146] But if a law regulates only the time, place, or manner of how a message is conveyed, that law is subject to intermediate scrutiny.[147] As in that context, in Second Amendment challenges courts typically will "consider the nature of the conduct being regulated and the degree to which the challenged law

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[137] *See* Mario Barnes & Erwin Chemerinsky, *The Once & Future Equal Protection Doctrine?,* 43 CONN. L. REV. 1059, 1076-90 (2011); Ashutosh Bhagwat, *Hard Cases and the (D)evolution of Constitutional Doctrine,* 30 CONN. L. REV. 961, 963 (1998); *see generally* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[138] *See, e.g.,* U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 184 (1980); Bowman v. United States, 563 F.3d 765, 775-76 (6th Cir. 2008).

[139] *See, e.g.,* Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2231 (2015); Republican Party of Minn. v. White, 416 F.3d 738, 749 (8th Cir. 2005).

[140] *See, e.g.,* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010); Drake v. Filko, 724 F.3d 426, 436 & n.14 (3d Cir. 2013).

[141] United States v. Staten, 666 F.3d 154, 162 (4th Cir. 2011); *see also* N.Y State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 261 (2d Cir. 2015) ("So long as the defendants produce evidence that 'fairly support[s]' their rationale, the laws will pass constitutional muster" under intermediate scrutiny (quoting City of Los Angeles v. Alameda Books, Inc. 535 U.S. 425, 438 (2002))).

[142] *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (noting that Justice Breyer, in dissent, "criticized [the majority] for declining to establish a level of scrutiny for evaluating Second Amendment restrictions.").

[143] *Id.* at 628 n.27, 634-35 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment . . . would have no effect."); *see* Friedman v. City of Highland Park, Ill., 784 F.3d 406, 410 (7th Cir. 2015) ("[I]f the Second Amendment imposed only a rational basis requirement, it wouldn't do anything."); United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010) ("*Heller* left open the level of scrutiny applicable to review a law that burdens conduct protected under the Second Amendment, other than to indicate that rational-basis review would not apply in this context.").

[144] *See Chester*, 628 F.3d at 682.

[145] *See, e.g.,* United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013); *Chester*, 628 F.3d at 682 ("Given *Heller's* focus on "'core' Second Amendment conduct and the Court's frequent references to First Amendment doctrine, we agree with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment."); *see also* Lauren Paglini, Comment, *How Far Will the Strictest State Push the Limits: The Constitutionality of California's Proposed Gun Law Under the Second Amendment,* 23 AM. U. J. GENDER SOC. POL'Y & L. 459, 469 (2015).

[146] *See, e.g.,* Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2231 (2015).

[147] *See, e.g.,* Ward v. Rock Against Racism, 491 U.S. 781 (1989); Ross v. Early, 746 F.3d 546, 552 (4th Cir. 2014).

burdens the right."[148] Thus, "[a] less severe regulation—a regulation that does not encroach on the core of the Second Amendment—requires a less demanding means-end showing."[149] In that case, courts apply a form of intermediate scrutiny to Second Amendment challenges.[150] For instance, in *United States v. Masciandaro,* the Fourth Circuit drew a line between firearm possession in the home versus outside the home, concluding that strict scrutiny would apply to the former and intermediate scrutiny to the latter:

> We assume that any law that would burden the "fundamental," core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny. But, as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.[151]

Borrowing further from First Amendment jurisprudence, several courts have asked whether a firearm law regulates only the "time, place, and manner" in which a person may exercise Second Amendment rights.[152] If so, intermediate scrutiny would be warranted.[153] Finally, based on *Heller,* most courts have viewed rational basis review as "off the table," leaving strict and intermediate scrutiny—the two categories of heightened scrutiny—for the courts to choose from.[154]

Post-*Heller* Rulings on the Constitutionality of Federal and State Firearm Regulations

Heller largely left unresolved much of the "who, what, where, when, and why" of Second Amendment protections.[155] The Supreme Court did make clear, however, that the Second Amendment (1) applies to law-abiding citizens who seek to use firearms for lawful purposes, particularly for self-defense in the home; and (2) does not protect dangerous and unusual weapons.[156] Since *Heller* and *McDonald,* the lower courts have been attempting to apply *Heller* in various Second Amendment challenges to federal, state, and local firearm laws. This section of the report highlights cases that have examined what classes of persons, weapons, and places are protected by the Second Amendment, as well as the manner in which such categories may be

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[148] *See, e.g.,* Kolbe v. Hogan, 813 F.3d 160, 179 (4th Cir. 2016) (internal quotation marks and citation omitted); *Chovan*, 735 F.3d at 1138; Nat'l Rifle Ass'n of Am. v. ATF, 700 F.3d 185, 195 (5th Cir. 2012).

[149] *See, Nat'l Rifle Ass'n of Am.,* 700 F.3d at 195.

[150] *See, e.g., id*.

[151] United States v. Masciandaro, 638 F.3d 458, 470-71 (4th Cir. 2011) (citing *Heller*); *see also* Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1126 (10th Cir. 2015) ("If Second Amendment rights apply outside the home, we believe they would be measured by the traditional test of intermediate scrutiny."); Kachalsky v. County of Westchester, 701 F.3d 81, 89 (2d Cir. 2012) ("What we know from [*Heller* and *McDonald*] is that Second Amendment guarantees are at their zenith within the home.").

[152] *See, e.g., Chovan*, 735 F.3d at 1145-45; United States v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010). When a law places a content-neutral, "time, place, and manner" restriction on public speech, only intermediate scrutiny is warranted. *See, e.g.,* Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[153] *See, e.g., Marzzarella*, 614 F.3d at 97.

[154] *See, e.g., Nat'l Rifle Ass'n of Am.,* 700 F.3d at 197.

[155] *See* United States v. Huitron-Guizar, 678 F.3d 1164, 1166 (10th Cir. 2012) (internal quotations omitted) (observing that the right to bear arms is qualified in numerous ways).

[156] Phrased differently, "the right to bear arms, as codified in the Second Amendment, affords no protection to 'weapons not typically possessed by law-abiding citizens for lawful purposes.'" *See Marzzarella*, 614 F.3d at 90-91 (quoting District of Columbia v. Heller, 554 U.S. 570, 625 (2008)).

permissibly regulated. Concerning federal regulations, most challenges stem from provisions of the Gun Control Act of 1968, as amended, which places limitations on the commercial sale and possession of firearms in interstate commerce.[157] The challenged state laws and regulations vary; this report highlights challenges to state assault weapon bans, concealed carry restrictions, firearm licensing schemes, and the commercial sale of arms, among others.

What Categories of Persons May Be Subject to Firearm Regulations?

Age Restrictions

Federal laws imposing age restrictions on gun possession and purchasing have survived judicial challenges. For instance, it is unlawful under 18 U.S.C. § 922(x)(2)(A) for juveniles (statutorily defined as persons under 18) to possess a handgun (subject to several exceptions).[158] Shortly after *Heller,* a 17-year-old convicted under § 922(x) challenged his conviction in the First Circuit, arguing that the statute violated his rights under the Second Amendment.[159] In particular, he argued that his interest in self-defense is "just as strong" as that of an adult and that the statute—enacted in 1994—cannot be viewed as "longstanding."[160] But the First Circuit in *United States v. Rene E.* disagreed, concluding that there has been a "longstanding tradition of prohibiting juveniles from both receiving and possessing handguns," with age-based gun restrictions being in place under federal law since 1968 and restrictions on juvenile possession of guns dating back more than a century at the state level.[161] Thus, the court concluded that the federal ban on juvenile possession of handguns fell within *Heller's* safe harbor for longstanding restrictions on firearm possession.[162]

Another provision in the Gun Control Act (and corresponding regulations) makes it unlawful for firearm dealers to sell handguns to persons under 21 years old.[163] The law was challenged in *National Rifle Association v. ATF* by persons between 18 and 21 years old who argued that it unconstitutionally burdened their right to keep and bear arms under the Second Amendment.[164] In its ruling, the Fifth Circuit commented that it was "inclined to uphold" the law and regulation under step one as a longstanding restriction outside the scope of the Second Amendment after finding historical support for similar firearm restrictions.[165] Nevertheless, in an "abundance of

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[157] *See* Pub. L. No. 90-618, 82 Stat. 1213-2 (1968); ATF, *Gun Control Act, https://www.atf.gov/rules-and-regulations/gun-control-act* (last reviewed June 23, 2016). The Gun Control Act revised restrictions that had been enacted by Congress a few months earlier as part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. Law No. 90-351, section 902, 82 Stat. 226 (1968).

[158] *See* Youth Handgun Safety Act, § 110201(a) of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). Exceptions to § 922(x)'s ban include possession in the course of employment, farming at the juvenile's residence, target practice, hunting, and instruction; possession with prior written consent of the juvenile's parent or guardian; possession in connection with membership in the armed services; and use for self-defense in the home. *See* 18 U.S.C. § 922(x)(3).

[159] United States v. Rene E., 583 F.3d 8 (1st Cir. 2009).

[160] *Id.* at 12.

[161] *Id.* at 12-15.

[162] *Id.* at 15-16.

[163] 18 U.S.C. § 922(b)(1); 27 C.F.R. § 478.99(b)(1).

[164] Nat'l Rifle Ass'n of Am., Inc. v. ATF, 700 F.3d 185 (5th Cir. 2012).

[165] *Id*. at 200-04.

caution,"[166] the court proceeded to step two of the two-part test formed after *Heller*. At step two, the court applied intermediate scrutiny, concluding that the age-based restriction does not burden the Second Amendment's core protections of law-abiding, responsible citizens, because "Congress found that persons under 21 tend to be relatively irresponsible and can be prone to violent crime, especially when they have easy access to handguns."[167] Nor does the restriction prevent 18 to 21 year olds from possessing handguns for self-defense in the home because, the court added, these persons may lawfully acquire handguns from responsible parents or guardians.[168] Ultimately, the court concluded that the laws survived intermediate scrutiny because the government showed a nexus between the firearm restriction and the government's interest in keeping guns out of the hands of young persons.[169] In doing so, the court gave particular attention to Congress's findings after a multi-year investigation that there was a causal relationship between the easy availability of firearms to persons under 21 and a rise in crime.[170]

Felons

Under 18 U.S.C. § 922(g)(1), the Gun Control Act makes it is a criminal offense for a felon to possess a firearm.[171] After *Heller,* the federal circuit courts have unanimously concluded that § 922(g)(1) does not violate the Second Amendment.[172] In upholding § 922(g)(1), some courts have relied on the passage in *Heller* in which the Supreme Court announced that "nothing in our opinion should be taken to cast doubt on the longstanding possession of firearms by felons."[173] For example, in *United States v. Vongxay*, the Ninth Circuit rejected an argument that this proclamation in *Heller* was mere dicta that the court need not follow and upheld the challenged provision as constitutional.[174] Some courts have opined, however, that the Supreme Court, "by describing the felon disarmament ban as 'presumptively lawful,'" meant that even if a facial challenge were to fail, the presumption could be rebutted in an as-applied challenge.[175] For

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[166] *Id*. at 204.

[167] *Id*. at 205-06.

[168] *Id*. at 206-07. In the dissent from the denial of rehearing en banc, six judges argued that the panel erred in applying intermediate scrutiny because, in their view, the restriction implicates the core function of the Second Amendment. *See* Nat'l Rifle Ass'n of Am., Inc. v. ATF, 714 F.3d 334 (5th Cir. 2013) (dissent from denial of rehr'g en banc). And even under that lower standard of scrutiny, the dissent would have held the law unconstitutional. *See id.*

[169] *Nat'l Rifle Ass'n of Am*., 700 F.3d at 207-11.

[170] *Id.* at 207.

[171] Under the statute, a felon is a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Some states have similar provisions. *See, e.g.,* CAL. PENAL CODE § 29800; ME. REV. STAT. ANN. tit. 15, § 393.

[172] *See, e.g.,* United States v. Moore, 666 F.3d 313, 316-17 (4th Cir. 2012) (collecting cases); Schrader v. Holder, 704 F.3d 980, 898-91 (D.C. Cir. 2013).

[173] *See, e.g., Moore,* 666 F.at 318 ("To the extent that Moore, or any similarly situated defendant, raises a facial challenge to the validity of § 922(g)(1), the clear declaration in *Heller* that such a felon in possession laws are a presumptively lawful regulatory measure resolves that challenge fairly quickly."); *see also* United States v. Barton, 633 F.3d 168, 171-72 (3d Cir. 2011); United States v. Rozier, 598 F.3d 768, 770-71 (11th Cir. 2010); United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010).

[174] *Vongxay*, 594 F.3d at 1115; *see also Barton*, 633 F.3d at 171-72 (rejecting contention that the *Heller* passage is "mere dicta"); *Rozier*, 598 F.3d at 771 n.6 (same).

[175] *See* Binderup v. Attorney Gen. of U.S., 836 F.3d 336, 347, 350 (3d Cir. 2016) (en banc); United States v. Moore, 666 F.3d 313, 319 (4th Cir. 2012); United States v. Torres-Rosario, 658 F.3d 110, 113 (1st Cir. 2011); United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010); An as-applied challenge "argues that a law is unconstitutional as enforced against the plaintiffs before the court," as opposed to a facial challenge to a law's constitutionality, which is "an effort to invalidate the law in each of its applications, to take the law off the books completely." *See* Speet v. Schuette, 726

example, the Third Circuit sitting en banc in *Binderup v. Attorney General United States of America* held that a person could rebut the presumption in an as-applied challenge to § 922(g)(1) if that person could sufficiently distinguish himself (and the crime of conviction) from the "traditional justifications" for excluding convicted felons from possessing firearms.[176] In contrast, the Fourth Circuit held more narrowly in *Hamilton v. Pallozzi* that generally, a felony conviction "removes one from the class of 'law-abiding, responsible citizens,' for the purposes of the Second Amendment," *unless* the person receives a pardon or the law defining the felony at issue is found unconstitutional or otherwise unlawful.[177]In yet another approach, the Seventh Circuit in *United States v Williams* noted that *Heller* deemed felon disarmament bans presumptively lawful, but required the government to provide "some form of strong showing" to justify § 922(g)(1)'s firearm ban.[178] After applying intermediate scrutiny, the circuit court concluded that the firearm ban was constitutional as applied to the defendant, who had a violent past, because the ban was substantially related to the government's objective of keeping firearms out of the hands of violent felons.[179]

Notably, one court held that an indictment under § 922(g)(1) was constitutional even as applied to a person who was not a felon forbidden from possessing a firearm, but who was charged with *aiding and abetting* a felon to possess a firearm in violation of that provision.[180] In *United States v. Huet,* the defendant was indicted under § 922(g)(1) and argued that the indictment was based solely on the government's evidence that she possessed a rifle in her home, which she shared with a convicted felon.[181] The district court dismissed the indictment on the ground that it would permit "'the total elimination of the [Second Amendment] right of a sane, non-felonious citizen to possess a firearm, in her home, simply because her paramour is a felon.'"[182] The Third Circuit disagreed, concluding that "a *properly-brought* aiding and abetting charge does not burden conduct protected by the Second Amendment."[183] Ultimately, the Third Circuit concluded that the indictment's dismissal was premature because the government must be allowed to further develop the evidentiary record to show that the defendant did more than merely possess a weapon in a home shared with a convicted felon, but actually *aided and abetted* that felon in possessing the firearm himself.[184] If that was the case, the defendant's conduct would be beyond the scope of the Second Amendment given *Heller's* comment that "the Second Amendment does not afford

F.3d 867, 871-72 (6th Cir. 2013) (internal quotations marks and citations omitted).

[176] 836 F.3d 336, 347 (3d Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2323 (2017). Although a majority of the en banc court agreed on that basic framework for evaluating an as-applied challenge, there was no majority agreement as to what the traditional justifications were for denying felons Second Amendment rights, and how one could distinguish himself from those justifications. *Compare id.* at 348-50 (Ambro, J.) (concluding that felons were traditionally barred from accessing firearms because the Second Amendment protects a "virtuous citizenry," and persons who commit serious crimes cannot categorized as such), *with id.* at 367-75 (Hardiman, J., concurring) (concluding that felons were traditionally barred from accessing firearms because of their propensity to commit violence).

[177] 848 F.3d 614, 626 (4th Cir. 2017). The court left open the possibility that the presumption could be rebutted for persons convicted of certain crimes labeled as misdemeanors but falling under the scope of § 922(g)(1) because of the potential term of imprisonment accompanying that misdemeanor. *Id.* at 626 n.11.

[178] United States v. Williams, 616 F.3d 685, 691-92 (7th Cir. 2010) (internal quotation marks and citation omitted).

[179] *Id.* at 692-93.

[180] United States v. Huet, 665 F.3d 588 (3d Cir. 2012) (discussing defendant's indictment for acting in violation of 18 U.S.C. § 922(g)(1) and the aiding and abetting statute, 18 U.S.C. § 2).

[181] *Id.* at 601.

[182] *Id.* (quoting district court opinion).

[183] *Id.* (emphasis added).

[184] *Id.* at 601-02.

citizens a right to carry arms for 'any purpose.'"[185] And aiding and abetting a convicted felon in possessing a firearm, the court concluded, is not a protected right.[186]

Misdemeanants of Domestic Violence

A 1996 amendment to the Gun Control Act, commonly referred to as the Lautenberg Amendment and codified at 18 U.S.C. § 922(g)(9), prohibits persons convicted of a misdemeanor crime of domestic violence from possessing firearms. [187] Thus far, reviewing courts have uniformly upheld the provision against constitutional challenges. Several circuits have employed intermediate scrutiny to evaluate § 922(g)(9) and, in doing so, concluded that the firearm restriction is constitutional.[188] For instance, in *United States v. Staten,* the Fourth Circuit concluded that there is a reasonable fit between § 922(g)(9) and a substantial governmental interest—reducing domestic gun violence—because the government had established that domestic violence in the United States is a serious problem with high rates of recidivism, and, additionally, the "use of firearms in connection with domestic violence is all too common."[189]

Another circuit court, however, concluded that § 922(g)(9) is a presumptively lawful prohibition on the possession of firearms that need not be evaluated under a particular level of scrutiny.[190] In doing so, the Eleventh Circuit in *United States v. White* reasoned that § 922(g)(9) was passed, in part, because Congress had recognized that domestic violence with firearms had not been remedied by "longstanding felon-in-possession laws," and thus the court "s[aw] no reason to exclude § 922(g)(9) from the list of longstanding prohibitions on which *Heller* does not cast doubt."[191]

Additionally, the Seventh Circuit sitting en banc and using its unique approach[192] upheld § 922(g)(9) as constitutional after concluding that the government made a "strong showing" that § 922(g)(9) is substantially related to an important governmental objective.[193] In particular, the court observed that § 922(g)(9) satisfied the government's objective of keeping firearms out of the hands of persons likely to continue to use violence (as the government had found of misdemeanants of domestic violence).[194] In addition, studies presented showed high recidivism

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[185] *Id.* at 602 (quoting District of Columbia v. Heller, 554 U.S. 570, 595 (2008)).

[186] *Id*.

[187] *See* Pub. Law No. 104-208, § 658, 110 Stat. 371 (1996). The Supreme Court has not addressed the constitutionality of § 922(g)(9), but has considered several cases turning on the appropriate construction of the statutory provision. *See, e.g.,* Voisine v. United States, 136 S. Ct. 2272 (2016) (interpreting whether reckless domestic assault qualifies as a "misdemeanor crime of violence" under § 922(g)(9)); United States v. Castleman, 134 S. Ct. 1405 (2014) (examining the kind of "physical force" required for a crime to be considered a misdemeanor crime of violence under § 922(g)(9)); United States v. Hayes, 555 U.S. 415 (2009) (evaluating whether a predicate offense for a conviction under § 922(g)(9) must have a domestic relationship as a defining element). Dissenting in *Voisine,* Justice Thomas, seemed to question the constitutionality of a lifetime ban on misdemeanants of domestic violence. *See Voisine,* 136 S. Ct. at 2290-92 (Thomas, J., dissenting).

[188] 666 F.3d 154 (4th Cir. 2011); *see also* United States v. Chovan, 735 F.3d 1127, 1136-42 (9th Cir. 2013) (applying strict scrutiny to uphold § 922(g)(9)); United States v. Chester, 628 F.3d 673 (4th Cir. 2010) (rejecting argument that § 922(g)(9)) is "presumptively lawful" under *Heller* and establishing intermediate scrutiny as the appropriate test for evaluating Second Amendment challenges to § 922(g)(9)).

[189] United States v. Staten, 666 F.3d 154, 160-68 (4th Cir. 2011).

[190] 593 F.3d 1199 (11th Cir. 2010).

[191] *Id.* at 1205-06 (11th Cir. 2010) (internal quotation marks omitted).

[192] *See supra* section "Federal Circuit Courts' Post-*Heller* Approach to Second Amendment Analysis."

[193] United States v. Skoien, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc).

[194] *See id.* at 642

rates for domestic abusers and an increased risk of homicide with the presence of a firearm in the home of a convicted domestic abuser.[195]

Persons Subject to a Domestic Violence Protective Order

Similarly, 18 U.S.C. § 922(g)(8), which prohibits persons subject to certain domestic violence protective orders from possessing firearms, has survived post-*Heller* Second Amendment challenges.[196] For instance, in *United States v. Chapman,* the Fourth Circuit, applying intermediate scrutiny, assumed without deciding that a person subject to a qualifying domestic violence restraining order fell within the Second Amendment's protections and concluded that § 922(g)(8) does not unconstitutionally burden those protections.[197] Intermediate scrutiny was appropriate because, the court reasoned, a person subject to a domestic violence restraining order is not entitled to the benefit of the "core right identified in *Heller*—the right of a law-abiding, *responsible* citizen to possess and carry a weapon for self-defense."[198] In applying intermediate scrutiny the Fourth Circuit concluded that the government established a reasonable fit between § 922(g)(8) and the government's substantial interest in reducing domestic gun violence.[199] In particular, the court noted that § 922(g)(8) (among other things) "by its own terms, explicitly prohibits the use, attempted use, or threatened use of physical force against [an] intimate partner or child that would reasonable be expected to cause bodily injury."[200] Additionally, the court observed that § 922(g)(8)'s "prohibitory sweep [is] exceedingly narrow" because the provision applies only to restraining orders currently in force.[201]

Using a different approach, but reaching the same ultimate result, the Eighth Circuit in *United States v. Bena* concluded at step one of its analysis that § 922(g)(8) is constitutional on its face, reasoning that "[i]nsofar as § 922(g)(8) prohibits possession of firearms by those who are found to represent a 'credible threat to the physical safety of [an] intimate partner or child . . . it is consistent with a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens."[202]

Additionally, in an as-applied challenge, the Fourth Circuit in *United States v. Mahin* upheld the conviction of a person subject to a domestic violence protective order and had been found in violation of § 922(g)(8) by renting a firearm at a shooting range.[203] The court rejected the

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[195] *Id*. at 643-45.In addition to the Seventh Circuit, the First Circuit in *United States v. Booker* used its sister circuit's same method of analysis to conclude that § 922(g)(9) passes constitutional muster. 644 F.3d 12, 25-26 (1st Cir. 2011).

[196] For the protective order to come within § 922(g)(8)'s scope, it must (1) have been issued after notice and a hearing; (2) restrain the person from harassing, stalking, or threating an intimate partner (or that partner's child), or from engaging in conduct that would place that partner in reasonable fear of bodily injury to the partner or child; and (3) include a finding that the person represents a credible threat to the physical safety of the partner or child, or prohibits the use, attempted use, or threatened use of physical force against that partner or child. 18 U.S.C. § 922(g)(8).

[197] 666 F.3d 220, 225 (4th Cir. 2012); *see also* United States v. Reese, 627 F.3d 792 (10th Cir. 2010) (upholding § 922(g)(8) under intermediate scrutiny).

[198] United States v. Chapman, 666 F.3d 220, 226 (4th Cir. 2012).

[199] *Id.* at 226-31.

[200] *Id.* at 230.

[201] *Id.* at 228. Additionally, the court noted that that applicable protection orders may be issued only after notice and a hearing in which the person has an opportunity to participate, thus satisfying "the fundamental requirements of procedural due process." *Id.* at 228.

[202] United States v. Bena, 664 F.3d 1180, 1184 (8th Cir. 2011). The court left open whether § 922(g)(8) could be unconstitutional as applied to a person subject to an order entered without a finding of dangerousness. *Id.* at 1185.

[203] United States v. Mahin, 668 F.3d 119, 127-28 (4th Cir. 2012).

defendant's argument that possessing a firearm "for a limited period of time in the controlled environment of a commercial shooting range" is conduct that "must be exempted from prosecution" and is not the kind of conduct § 922(g)(8)'s seeks to criminalize.[204] Instead, the court reasoned that the defendant, "possessed the power . . . to leave the premises and use [a firearm] against those that sought the protections of the protective order."[205] The court did not find it relevant that the defendant did not actually leave the shooting range with the handgun and incite violence, because the intermediate scrutiny standard of review applicable to the challenged restriction, in the court's view, "has never been held to require a perfect end-means fit."[206] Accordingly, the court concluded that "[i]t is sufficient that § 922(g)(8) rests on an established link between domestic abuse, recidivism, and gun violence and applies to persons already individually adjudged in prior protective order to pose a future threat of abuse."[207]

Unlawful Drug Users and Addicts

18 U.S.C. § 922(g)(3), which criminalizes the possession of firearms by persons who unlawfully use or are addicted to any controlled substance, has been upheld as constitutional by several circuit courts.[208] In particular, circuit courts of appeals have upheld § 922(g)(3) under the Second Amendment because the ban prohibits conduct similar to those listed in *Heller* as presumptively lawful, namely felons and the mentally ill.[209] For instance, the Ninth Circuit in *United States v. Dugan* noted that habitual drug users, like felons and the mentally ill, "more likely will have difficulty exercising self-control, particularly when they are under the influence of controlled substances."[210]

Other circuits, however, have required the government to put forth evidence demonstrating a reasonable connection between § 922(g)(3) and an important governmental interest.[211] For instance, in *United States v. Carter* the Fourth Circuit initially vacated the conviction of a person convicted under § 922(g)(3) for possessing a firearm while unlawfully using marijuana, and the court remanded the case to the district court for the parties to develop the record and make arguments as to whether the conviction withstood intermediate scrutiny.[212] In evaluating the defendant's argument, the circuit court assumed without deciding that the defendant maintains Second Amendment protection notwithstanding his drug use.[213] And the court found on the record before it that the government had not demonstrated a connection between drug use and violence

[204] *Id.* at 127.

[205] *Id.*

[206] *Id.* at 127-28

[207] *Id.* at 128.

[208] 18 U.S.C. § 922(g)(3). The term "controlled substance" is defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802. *See id.* Habitual drug use must be contemporaneous with gun possession to fall within the prohibition at 18 U.S.C. § 922(g)(3). *See, e.g.,* United States v. Yancey, 621 F.3d 681, 687 (7th Cir. 2010) (collecting cases).

[209] *See* United States v. Seay, 620 F.3d 919, 925 (8th Cir. 2010) ("§ 922(g)(3) has the same historical pedigree as other portions of § 922(g) which are repeatedly upheld by numerous courts since *Heller*. . . . As such, we find that § 922(g)(3) is the type of 'longstanding prohibition[] on the possession of firearms' that *Heller* declared presumptively lawful."); *see also* United States v. Dugan, 657 F.3d 998, 999-1000 (9th Cir. 2011).

[210] *See Dugan*, 657 F.3d at 999-1000.

[211] For example, the Seventh Circuit in *United States v. Yancey* concluded that § 922(g)(3) "is substantially related to the important government interest in preventing violent crime," noting that [a]mple academic research confirms the connection between drug use and violent crime." 621 F.3d 681, 682-87 (7th Cir. 2010).

[212] 669 F.3d 411 (4th Cir. 2012).

[213] *Id.* at 416.

and thus had not shown a reasonable fit between § 922(g)(3) and its goal of keeping guns out of the hands of irresponsible and dangerous persons.[214] Unlike in other cases, the government had not provided any studies, empirical data, or legislative findings to support the restriction, and instead it had argued that "the fit was a matter of common sense."[215] However, the court noted that the government's burden on remand "should not be difficult to satisfy," given that evidence of danger of mixing drugs and guns was, in the court's view, "abundantly available."[216] And on remand, the government, indeed presented numerous studies showing a correlation between violent crime and drug use, which the Fourth Circuit ultimately found to substantiate the government's contention that "disarming drug users reasonably serves the important governmental interest of protecting the community from gun violence."[217]

Aliens

Another provision of the Gun Control Act, 18 U.S.C. § 922(g)(5), prohibits unlawfully present aliens and most categories of nonimmigrant visa holders from possessing firearms. In determining whether the Second Amendment covers non-U.S. citizens, courts have looked to whether such persons come within the ambit of "the people" as used in the text of Second Amendment.[218] This inquiry has produced a circuit split. Some courts that have considered the issue have concluded that "the people" does not encompass unlawfully present aliens.[219] For instance, the Fifth Circuit in *United States v. Portillo-Munoz* recounted that the Supreme Court in *Heller* noted that "the people" include "law-abiding, responsible citizens" and "all members of the political community."[220] Because unlawfully present aliens fit neither description, the court concluded that they are granted no rights by the Second Amendment.[221] Moreover, to bolster its

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[214] *Id.* at 417-21.

[215] *Id.* at 419.

[216] *Id.* at 418-19.

[217] United States v. Carter, 750 F.3d 462, 465-70 (4th Cir. 2014). The Ninth Circuit recently rejected a challenge to § 922(g)(3) as unconstitutional as applied to a holder of a Nevada medical marijuana card. *See* Wilson v. Lynch, 835 F.3d 1083 (9th Cir. 2016). Current federal law prohibits possession and distribution of marijuana for both recreational and medicinal purposes, but a number of states have established medical marijuana regulatory regimes. *See* CRS Report R43437, *Marijuana: Medical and Retail—An Abbreviated View of Selected Legal Issues*, by Todd Garvey, Charles Doyle, and David H. Carpenter; CRS Report R43435, *Marijuana: Medical and Retail—Selected Legal Issues*, by Todd Garvey, Charles Doyle, and David H. Carpenter. And Congress, most recently through a FY2017 appropriations act, has prohibited the Department of Justice from using funds to "prevent" states that have already legalized medical marijuana from "implementing their own state laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 537(2017) (extended into part of FY2018 by the Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-56); *see also* CRS Legal Sidebar WSLG1451, *District Court Holds Appropriations Language Limits Enforcement of Federal Marijuana Prohibition*, by Todd Garvey. In *Wilson v. Lynch*, the Ninth Circuit accepted the challenger's contention that she is not a user of marijuana and holds a state card that would permit her to use marijuana without violating state law only for political reasons. *Wilson*, 835 F.3d at 1091. Nevertheless, the Ninth Circuit found a reasonable fit between the law and the government's objective in preventing gun violence, resulting in the challenged restriction surviving intermediate scrutiny analysis. *Id.* at 1091-95. The court added that "it is eminently reasonable for federal regulators to assume that a registry cardholder is much more likely to be a marijuana user than an individual who does not hold a registry card." *Id.* at 1094.

[218] *See, e.g.*, United States v. Putillo-Munoz, 643 F.3d 437, 439-40 (5th Cir. 2011).

[219] *See Putillo-Munoz*, 643 F.3d at 439-40; United States v. Flores, 663 F.3d 1022 (8th Cir. 2011).

[220] *Id.* at 440 (quoting District of Columbia v. Heller, 554 U.S. 570 (2008)).

[221] *Id.*; *see also* United States v. Carpio-Leon, 701 F.3d 974, 978-79 (4th Cir. 2012) (declining to decide whether "the people" includes unlawfully present aliens but concluding that because such persons are not law-abiding, responsible citizens, they are beyond the scope of the Second Amendment).

conclusion that the restriction in § 922(g)(5) is constitutional, the court added that "Congress has the authority to make laws governing the conduct of aliens that would be unconstitutional if made to apply to citizens."[222]

However, two circuit courts, while ultimately holding § 922(g)(5) to be constitutional, have concluded that "the people," as used in the Second Amendment, could include some unlawfully present aliens.[223] For example, in *United States v. Meza-Rodriguez,* the Seventh Circuit analyzed § 922(g)(5) as applied to an alien who was brought to the United States as a young child.[224] In determining whether the defendant was protected by the Second Amendment, the court analyzed the meaning of "the people."[225] Like the Fifth Circuit, the Seventh Circuit found that *Heller* links Second Amendment rights to law-abiding citizens, which, as someone who entered the country illegally, Meza-Rodriguez technically is not.[226] But the court also concluded that the Supreme Court was not defining "the people" when making that connection in *Heller*.[227] Accordingly, the Seventh Circuit relied on the Supreme Court's earlier opinion in *United States v. Verdugo-Urquidez,* which opined that "the people," for the purposes of protection under the First, Second, and Fourth Amendments, "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[228] The defendant in *Meza-Rodriguez* met that standard because, the Seventh Circuit concluded, he had "extensive ties" with the United States, including his 20-year residency beginning as a child, attendance at U.S. public schools, and close family relationships with persons in the United States.[229] Nevertheless, the court held that § 922(g)(5) is constitutional, reasoning that the government made a strong showing that its interest in "prohibiting persons who are difficult to track and have an interest in eluding law enforcement" supports the firearm ban.[230]

Additionally, the Tenth Circuit in *United States v. Huitron-Guizar* assumed that unlawfully present aliens, like the defendant—who also had been in the United States for decades and was brought to the country as a young child—could assert a Second Amendment right, noting that "we hesitate to infer from *Heller* a rule that the right to bear arms is categorically inapplicable to non-citizens."[231] Applying intermediate scrutiny to § 922(g)(5), the court concluded that the law is constitutional, deferring to Congress's "constitutional power to distinguish between citizens and non-citizens, or between lawful and unlawful aliens, and to ensure safety and order."[232] Ultimately, the court found a substantial fit between the government's interests in crime control

[222] *Putillo-Munoz,* 643 F.3d at 441.

[223] *See* United States v. Meza-Rodriguez, 798 F.3d 664 (7th Cir. 2015); United States v. Huitron-Guizar, 678 F.3d 1164, 1169 (10th Cir. 2012).

[224] *Meza-Rodriguez*, 798 F.3d at 666-67.

[225] *Id.* at 669.

[226] *Id.* .

[227] *Id*.

[228] *Id.* at 670-71 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).

[229] *Id.* at 670-72.

[230] *Id.* at 672-73.

[231] United States v. Huitron-Guizar, 678 F.3d 1164, 1168-69 (10th Cir. 2012). The Tenth Circuit also examined *Verdugo-Urquidez* but declined to draw any conclusions as to how that case would inform the circuit court's interpretation of *Heller's* mandates. *See id*. at 1167-69.

[232] *Id.* at 1170.

and public safety, and its desire to keep firearms out of the hands of those it deems as "irresponsible or dangerous."[233]

What Categories of Firearms May Be Subject to Government Regulation?

Assault Weapons and High Capacity Magazines

Several state "assault weapon"[234] bans have been upheld in federal court, including those in the District of Columbia, New York, Connecticut, and Maryland.[235] The Second and D.C. Circuits, in reviewing those laws, applied intermediate scrutiny and based their decisions on the specific evidence presented to tie the bans to the asserted state interests. And most recently, the Fourth Circuit, sitting en banc, concluded that the types of assault weapons banned in Maryland do not garner Second Amendment protection.

After *Heller*, the District of Columbia revised its gun laws by enacting the Firearms Registration Amendment Act of 2008 (FRA).[236] The FRA, among other things, banned assault weapons (including, as relevant here, semi-automatic rifles) and large-capacity magazines capable of

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[233] *Id.* at 1169-70.

[234] The term "assault weapon ban" was generally used to describe the Public Safety and Recreational Firearms Act (part of the Violent Crime Control and Law Enforcement Act of 1994), which established a 10-year prohibition on the manufacture, transfer, and possession of certain "semiautomatic assault weapons," as defined in the act, and large capacity ammunition feeding devices. *See* Pub. L. 103-322, 108 Stat. 1796 (1994); CHRISTOPHER S. KOPER, JERRY LEE CTR. OF CRIMINOLOGY, UNIV. OF PA., UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS OF GUN MARKETS & GUN VIOLENCE, 1994-2003, REPORT TO THE NATIONAL INSTITUTE OF JUSTICE, UNITED STATES DEPARTMENT OF JUSTICE 4 (2004), http://tinyurl.com/ycmqeqle. The 1994 law listed numerous weapons that qualified as "semiautomatic assault weapons." Pub. L. 103-322, 108 Stat. 1796 (1994). Additionally, the term "semiautomatic assault weapons" also applied to: (1) "a semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2 of—(i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon; (iii) a bayonet mount; (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and (v) a grenade launcher"; (2) "a semiautomatic pistol that has an ability to accept a detachable magazine and has at least 2 of—(i) an ammunition magazine that attaches to the pistol outside of the pistol grip; (ii) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer; (iii) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned; (iv) a manufactured weight of 50 ounces or more when the pistol is unloaded; and (v) a semiautomatic version of an automatic firearm"; and (3) ''a semiautomatic shotgun that has at least 2 of—(i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon; (iii) a fixed magazine capacity in excess of 5 rounds; and (iv) an ability to accept a detachable magazine." *Id.* Because the current state and local laws bear similarities to the former federal law and because of the common use of the term "assault weapons bans," in reference to these laws, for the purposes of this report, state laws, too, will be referred to as "assault weapons bans."

[235] These laws supplement firearms restrictions found in federal law, which outlaws automatic weapons, like machine guns. *See* 18 U.S.C. § 922(o). The circuit courts that have engaged in a post-*Heller* evaluation of the federal bar on machine guns have uniformly held that there is no Second Amendment right to possess such weaponry. *See, e.g.,* United States v. Henry, 688 F.3d 637, 640 & n.3 (9th Cir. 2012) (collecting cases). For example, in *United States v. Henry,* the Ninth Circuit pointed to *Heller's* announcement that the country's history of banning "dangerous and unusual weapons" limits the Second Amendment right to keep and bear arms and concluded that machine guns are such weapons and thus not protected by the Second Amendment. 688 F.3d 637, 640 (9th Cir. 2012). The Third Circuit held the same. United States v. One Palmetto State Armory PA-15 Machinegun, 822 F.3d 136 (3d Cir. 2016). The Fifth Circuit also concluded that machine guns are outside the scope of the Second Amendment, but only after conducting an independent inquiry into whether machine guns are "dangerous and unusual" weapons and contending that the *Heller* passage is dicta. *See* Hollis v. Lynch, 827 F.3d 436 (5th Cir. 2016).

[236] *See* Allen Rostron, *Protecting Gun Rights & Improving Gun Control after* District of Columbia v. Heller, 13 LEWIS & CLARK L. REV. 383, 398 n.71 (2009).

holding more than 10 rounds of ammunition.[237] In evaluating the ban's constitutionality, the D.C. Circuit assumed that semi-automatic rifles and high-capacity magazines garner Second Amendment protection but, after applying intermediate scrutiny, concluded that the provision was constitutional.[238] The court chose intermediate scrutiny because the law, in the court's view, did not substantially burden the Second Amendment because it did not completely ban handgun possession—described in *Heller* as the "quintessential self-defense weapon."[239] Nor, the court added, did the District's law prevent a person from having a different, "suitable and commonly used weapon" (e.g., handguns, non-automatic long guns) for self-defense in the home or hunting.[240] Next, the D.C. Circuit concluded that the ban survived intermediate scrutiny because the record evidence substantiated the District's assertion that the ban was substantially related to protecting police officers and crime control.[241] For example, evidence submitted "suggest[ed that] assault weapons are preferred by criminals and place law enforcement 'at particular risk . . . because of their high firepower.'"[242] And "the risk 'posed by military-style assault weapons," according to the circuit court, is "'increased significantly if they can be equipped with high-capacity ammunition magazines' because, 'by permitting a shooter to fire more than ten rounds without reloading, they greatly increase the firepower of mass shooters.'"[243]

The Second Circuit took a similar approach when analyzing assault weapon bans in New York and Connecticut, enacted after the shooting at Sandy Hook Elementary School in Newtown, Connecticut.[244] In *New York State Rifle & Pistol Association v. Cuomo,* the Second Circuit, applying intermediate scrutiny, upheld provisions banning assault weapons—defined as semi-automatic weapons with certain enumerated features—and large-capacity magazines capable of holding more than 10 rounds of ammunition, declaring that the dangers posed by such weapons "are manifest and incontrovertible."[245] However, the court struck down one provision in each state's law. New York's law also had a "load limit" that banned the possession of a firearm loaded with more than seven rounds of ammunition.[246] The court struck it down on the grounds that the ban "is entirely untethered from the stated rationale of reducing the number of assault weapons and large capacity magazines," and New York "failed to present evidence that the mere existence of this load limit will convince any would-be malefactors to load magazines capable of holding

[237] *Heller II*, 670 F.3d 1244, 1249, 1260 (D.C. Cir. 2011).

[238] *Id.* at 1261. Similarly, the Ninth Circuit denied a request to enjoin a ban on high-capacity magazines in Sunnyvale, California (enacted after voters passed a ballot measure establishing the ban), concluding, among other things, that the government met its burden of showing that the ban was likely to survive intermediate scrutiny. *See* Fyock v. Sunnyvale, 779 F.3d 992 (9th Cir. 2015). Based on Sunnyvale's evidence that large-capacity magazines increase the lethality in gunshot injuries by allowing more gunshots to be fired, the appellate court concluded the district court did not abuse its discretion in finding that the ban fit the government's substantial interest in reducing the danger of gun violence, especially mass shootings and crimes against law enforcement. *Id.* at 1000-01.

[239] *Heller II,* 670 F.3d at 1261-62 (quoting District of Columbia v. Heller, 554 U.S. 570, 629 (2008)).

[240] *Id.* at 1262.

[241] *Id.* at 1262-63

[242] *Id.*

[243] *Id.* at 1263.

[244] N.Y State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242 (2d Cir. 2015). Somewhat similar to *Heller II,* the Second Circuit chose intermediate scrutiny because the burden imposed by the challenged laws, though substantial, was not, in the court's view, severe. *Id.* at 260. The court reasoned that the laws banned only a limited subset of semiautomatic firearms—those containing one or more specified military-style features—and magazines, leaving numerous alternatives for people to exercise core Second Amendment rights. *See id.*

[245] *Id.* at 247-51.

[246] *Id.* at 249, 264.

ten rounds with only the permissible seven."[247] And Connecticut's law specifically banned one non-semiautomatic weapon; the court concluded that it did not pass constitutional muster under intermediate scrutiny given the state's failure to argue how the ban related to a substantial government interest.[248]

Taking a different approach, the Seventh Circuit in *Friedman v. City of Highland Park* evaluated the constitutionality of a Chicago suburb's assault weapon ban without applying a particular level of scrutiny to assess the ban's constitutionality, but rather, by asking "whether [the] regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation of a well regulation militia,' and whether law-abiding citizens retain adequate means of self-defense."[249] The court noted that features of the banned firearms were not available at ratification but are now commonly used for military and police purposes and, thus, "bear a relation to the preservation and effectiveness of state militias."[250] Still, because states are in charge of militias, the court reasoned, state governments (and other units of local government) ought to have the authority to decide when civilians may have military-grade firearms in order to have them ready for when the militia is called to duty.[251] The court also noted that other firearms, including long guns, pistols, and revolvers, were still available for self-defense.[252] Accordingly, the Seventh Circuit concluded that the assault weapons ban fell within the limits established by *Heller* and thus was constitutional.[253] In 2015, the Supreme Court denied granting a petition for a writ of certiorari over the dissent of Justices Thomas and Scalia.[254] In his dissent, Justice Thomas argued that the Seventh Circuit (and other circuits holding similarly) "upheld categorical bans on firearms that millions of Americans own for lawful purposes" and suggested that those bans ran afoul of *Heller* and *McDonald.*[255]

Lower courts have continued to review the constitutionality of assault weapon bans. Recently, the Fourth Circuit, sitting en banc in *Kolbe v. Hogan,* held that the Second Amendment does not protect the assault weapons and large-capacity magazines that Maryland had made unlawful.[256] In so holding, the court relied on a passage in *Heller* stating that "'weapons that are most useful in military service—M-16 rifles and the like—may be banned' without infringement upon the Second Amendment."[257] The court viewed *Heller* as drawing a line "between weapons that are

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[247] *Id.* at 264.

[248] *Id.* at 269. However, the court added that "[w]e do not foreclose the possibility that States could in the future present evidence to support such a prohibition. *Id.*

[249] Friedman v. City of Highland Park, Ill., 784 F.3d 406, 410 (7th Cir. 2015) (quoting District of Columbia v. Heller, 554 U.S. 570, 622-25 (2008) and United States v. Miller, 307 U.S. 174, 178-79 (1939)).

[250] *Id*. at 410.

[251] *Id.*

[252] *Id.* at 411.

[253] *Id.* at 412. In dissent, Judge Manion asserted that "[b]y prohibiting a class of weapons commonly used throughout the country, Highland Park's ordinance infringes upon the rights of its citizens to keep weapons in their homes for the purpose of defending themselves, their families, and their property" and are "directly at odds with the central holdings of *Heller* and *McDonald*." *See id*. at 412-13 (Manion, J., dissenting). He also disagreed with the approach taken, contending that the common two-part test should have been applied. *Id.* at 414-15.

[254] Friedman v. City of Highland Park, Ill., 136 S. Ct. 447 (2015) (denial of cert.) (Thomas, J., dissenting).

[255] *Id.* at 447.

[256] Kolbe v. Hogan, 849 F.3d 114, 121 (4th Cir. 2017) (en banc). The en banc court overturned a 3-judge panel ruling that held that Maryland's ban on assault weapons and large-capacity magazines must be reviewed under strict scrutiny. Kolbe v. Hogan, 813 F.3d 160, 168 (4th Cir. 2016). The dissent contended, like the original 3-judge panel, that the ban should have been evaluated under strict scrutiny. *Id.* at 152 (Traxler, J., dissenting).

[257] *Id.* at 131 (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008)). An "M16 rifle" is a type of machine

most useful in military service," which garner no Second Amendment protection, and "those that are not."[258] And "[b]ecause the banned assault weapons and large-capacity magazines are 'like' 'M-16 rifles'—'weapons that are most useful in military service,'" the court continued, "they are among those arms that the Second Amendment does not shield."[259] For instance, the court reasoned that, although the M-16 is a fully automatic weapon, whereas the firearms banned by the challenge state law—the AR-15 and similar rifles—are semiautomatic, the two types of firearms have nearly identical rates of fire and thus share "the military features . . . that make the M16 a devastating and lethal weapon of war."[260] The court similarly concluded that large-capacity magazines, by "enabl[ing] a shooter to hit multiple human targets very rapidly [and] contribut[ing] to the unique function of any assault weapon to deliver extraordinary firepower" are likewise "most useful in military service."[261] Additionally, the court held in the alternative that if the banned weapons garner any Second Amendment protection, the ban should be reviewed under intermediate scrutiny and, under that standard, the ban is lawful.[262]

Ammunition

At least one circuit court has found that ammunition, although not explicitly mentioned in the Second Amendment, is constitutionally protected because "the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them."[263] In the Ninth Circuit's view, "without bullets, the right to bear arms would be meaningless."[264] Even with that understanding, though, the Ninth Circuit in *Jackson v. City & County of San Francisco* upheld a San Francisco ordinance banning the sale of ammunition with no sporting purpose that is designed to expand or fragment upon impact.[265] The court concluded that banning a certain type of ammunition does not substantially burden the Second Amendment right to use firearms for self-defense because the restriction burdens only the manner in which that right is exercised, and thus ought to be reviewed under intermediate scrutiny.[266] The court ultimately concluded the ordinance substantially fit San Francisco's important interest in reducing the likelihood that shooting victims in the city will die from their injuries, noting that the city legislature, in enacting the legislation, had relied on evidence showing that hollow-point bullets are more lethal than regular bullets.[267]

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gun used by the U.S. military. *See* ATF, *Firearms Guide – Identification of Firearms – Section 3*, https://www.atf.gov/firearms/firearms-guide-identification-firearms-section-3 (last visited Oct. 18, 2017); James B. Jacobs, *Why Ban "Assault Weapons"?* 37 CARDOZO L. REV. 681, 685 (2015).

[258] *Kolbe*, 849 F.3d at 137.

[259] *Id.* at 135-36 (quoting *Heller*, 554 U.S. at 627).

[260] *Id.* at 136.

[261] *Id.* at 137.

[262] *Kolbe*, 849 F. 3d at 138.

[263] Jackson v. City & County of San Francisco, 746 F.3d 953, 967 (9th Cir. 2014) (internal quotation marks and citation omitted). The District of Columbia Court of Appeals held similarly, concluding that "from the Court's reasoning [in *Heller* and *McDonald*], it logically follows that the right to keep and bear arms extends to the possession of handgun ammunition in the home; for if such possession could be banned (and not simply regulated), that would make it 'impossible for citizens to use [their handguns] for the core lawful purpose of self-defense.'" *See* Herrington v. United States, 6 A.3d 1237, 1243 (D.C. 2010) (quoting District of Columbia v. Heller, 554 U.S. 570 (2008)).

[264] *Jackson*, 746 F.3d at 967.

[265] *Id.* at 967-70 (evaluating S.F. CAL. POLICE CODE § 613.10(g)).

[266] *Id.* at 968.

[267] *Id.* at 969.

Where May Firearms Be Restricted by Government Regulation?

Firearms Outside the Home

Post-*Heller*, courts have disagreed about whether and the extent to which the Second Amendment protects the right to carry firearms outside the home.[268] For example, Illinois had banned persons (subject to certain exceptions) from carrying uncased, immediately accessible (i.e., ready to use) firearms outside the home, until the Seventh Circuit struck down that law, holding that it conflicted with *Heller's* interpretation of the Second Amendment.[269] The circuit court declined "to engage in another round of historical analysis to determine whether eighteenth-century America understood the Second Amendment to include a right to bear guns outside the home," reasoning that "[t]he Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside."[270] And the Seventh Circuit concluded that Illinois had not met its burden of showing more than a rational basis for how its "uniquely sweeping ban" justified its interest of increasing public safety.[271]

Yet in *Peterson v. Martinez,* the Tenth Circuit, in the course of evaluating Colorado's concealed carry regulations, concluded that the Second Amendment does not provide a right to carry a concealed firearm.[272] The Colorado law being reviewed in *Peterson* barred non-Colorado residents from carrying concealed firearms in most locations, but contained exceptions for certain places, like in one's home or place of business.[273] In upholding the law, the court observed that bans on the concealed carrying of firearms have long been on the books and have been upheld by courts going back to the nineteenth century.[274]. Thus, the law, in the court's view, fell into *Heller's* safe harbor.[275]

Government Property

Challenges brought against firearm prohibitions on federal property raise the question of whether such prohibitions fall into *Heller's* safe harbor for "sensitive places." For instance, by regulation, firearms are prohibited on U.S. postal property.[276] In *Bonidy v. U.S. Postal Service,* a Colorado resident with a concealed carry permit challenged the regulation as unconstitutional under the Second Amendment as applied to him because it forbade him from carrying his firearm into his local post office, as well as storing it in his car in the post office's parking lot while picking up his

[268] Cases related to the manner in which states regulate the concealed carry of firearms will be discussed in more detail later in this report. *See infra* section "'Good Cause' Requirements for Concealed Carry Licenses."

[269] Moore v. Madigan, 702 F.3d 933, 934, 942 (7th Cir. 2012). Four judges, including the dissenting judge in *Moore*, subsequently dissented from the denial of rehearing en banc, arguing, that "extending the right to bear arms outside the home and into the public sphere presents issues very different from those involved in the home itself, which is all the Supreme Court decided in [*Heller*]." Moore v. Madigan, 708 F.3d 901, 902 (7th Cir. 2012) (Hamilton, J., dissenting from denial of rehr'g en banc).

[270] *Moore*, 702 F.3d at 942.

[271] *Id*.

[272] Peterson v. Martinez, 707 F.3d 1197, 1209 (10th Cir. 2013).

[273] *Id*.

[274] *Id.* at 1210-11.

[275] *Id.* at 1209-12. The Ninth Circuit concluded similarly in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc).

[276] 30 C.F.R. § 232.1(l).

mail.[277] The Tenth Circuit rejected his claims, concluding that the restrictions did not implicate the Second Amendment because they concerned locations that were on government property.[278] In doing so, the court relied on the passage in *Heller* that carrying firearms in sensitive places like government buildings are presumptively lawful.[279] According to the circuit court, that language applies "with the same force" to the parking lot adjacent to a government post office because "the parking lot should be considered as a single unit with the postal building."[280] Yet noting that the restriction's application to the parking lot question presented a closer question than the restriction's application to the postal building, the Tenth Circuit alternatively concluded that, even assuming that Second Amendment rights applied there, the regulation survived intermediate scrutiny.[281] Ultimately, the Tenth Circuit concluded that the regulation was substantially related to the government's important interest in providing a safe environment for its employees and visitors.[282] And despite the challenger's contention that the regulation is over-inclusive because his post office is open to the public at all times yet "relatively unsecured," the court concluded that the U.S. Postal Service "is not required to tailor its safety regulations to the unique circumstances of each customer, or to craft different rules for each of its more than 31,000 post offices, or to fashion one set of rules for parking lots and another for its buildings."[283]

In another case involving government property, a federal circuit court concluded that a former Department of the Interior regulation prohibiting persons from possessing a loaded weapon in vehicles on national park grounds was constitutional after applying intermediate scrutiny.[284] The issue was brought to the Fourth Circuit in *United States v. Masciandaro* when a defendant convicted under the regulation contended that it violated his rights under the Second Amendment because he carried a handgun for self-defense when he slept in his car in national parks.[285] The government argued that national parks are the kind of "sensitive place[s]" envisioned by *Heller* where firearm bans would be

[277] Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1122-23 (10th Cir. 2015).

[278] *Id.* at 1124-29.

[279] *Id.* at 1124-25. Similarly, in an as-applied challenge to a regulation prohibiting the possession of loaded firearms and ammunition on property of the U.S. Army Corps of Engineers ("Corps"), 36 C.F.R. § 327.13, a district court in Georgia concluded that the Corps' property at issue falls into *Heller*'s safe harbor for laws regulating firearms in "sensitive places" like government buildings. *See* GeorgiaCarry.org v. U.S. Army Corps of Eng'rs, 212 F. Supp. 3d 1348, 1362 (N.D. Ga. 2016). The court acknowledged that the Corps' property is "more expansive than just a 'building,' but concluded that restriction of firearms on military property located near "sensitive infrastructure" fits into the safe harbor for "sensitive places." *Id.*

[280] *Id.* at 1125, 1128 (noting that post office parking lots often include collection boxes, thus allowing postal transactions to take place in the parking lot).

[281] *Id.*at 1125-26. The court chose intermediate scrutiny because the right asserted was outside the home. *Id.* at 1126. In a separate opinion, Judge Tymkovich disagreed with the conclusion that the regulation is lawful as applied to the parking lot. *Id.* at 1129-41 (Tymkovich, J., dissenting).

[282] *Id.* at 1127.

[283] *Id.* (internal quotation marks omitted).

[284] *See* United States v. Masciandaro, 638 F.3d 458, 460 (4th Cir. 2011) (evaluating former 36 C.F.R. § 2.4(b)). The regulation was promulgated pursuant to the Secretary of the Interior's authority under 16 U.S.C. § 3 "to make and public such rules and regulations as he may deem necessary or proper for the use and management of the parks . . . . under the jurisdiction of the National Park Service." *Id.* at 460-61. After the defendant's arrest but before his conviction, the Secretary of the Interior revised the regulation to permit persons to possess operable firearms in a national park so long as it is legal to do so in the state in which the park was located. *See* 74 Fed. Reg. 74,966, 74,971-72 (Dec. 10, 2008); *Masciandaro*, 638 F.3d at 460-61. That provision is now codified at 36 C.F.R. § 2.4(a).

[285] *Masciandaro*, 638 F.3d at 460-61, 465.

presumptively lawful.[286] The Fourth Circuit declined to evaluate that argument, concluding, instead, that regardless of a national park's status as a "sensitive place," the regulation survived intermediate scrutiny.[287] Under that analysis, the court ruled that the government has a substantial interest in providing safety to national park visitors, and the regulation was a narrow prohibition that was "reasonably adapted" to the government's interest. Furthermore, the court reasoned that loaded firearms concealed in vehicles are more dangerous, as they can fire accidentally or provide an opportunity for an assailant to flee.[288]

Interstate Acquisition of Firearms

The Gun Control Act, in 18 U.S.C. § 922(a)(3), makes it illegal (except in certain situations) for anyone except a licensed firearms importer, manufacturer, dealer, or collector to transport into or receive in the state where he resides a firearm that was purchased or obtained in a different state; in other words, a non-licensed person is prohibited from transporting across state lines firearms acquired outside of his state of residence.[289]

In analyzing a facial challenge to § 922(a)(3), the Second Circuit in *United States v. Decastro* concluded that § 922(a)(3) only minimally burdens the ability to acquire a firearm and is therefore permissible. Notably, in reaching this conclusion the Second Circuit did not apply heightened scrutiny.[290] In reaching its decision, the court looked to First Amendment jurisprudence, which allows for content-neutral time, place, or manner regulations of free speech.[291] In the court's view, "[b]y analogy, [a] law that regulates the availability of firearms is not a substantial burden on the right to keep and bear arms if adequate alternative remain for law-abiding citizens to acquire a firearm for self-defense."[292] Accordingly, for the defendant's facial challenge to prevail, he would have to show that '"no set of circumstances exist under which the [statute] would be valid, *i.e.,* that the law is unconstitutional in all of its applications,' or at least that it lacks a 'plainly legitimate sweep.'"[293] And the defendant could not prevail because, the court concluded, the statute has a plainly legitimate sweep by helping states enforce their own gun laws.[294] Nor would the federal prohibition on the interstate transfer of firearms be rendered unconstitutional in the event that some state laws governing firearm sales were found to be unconstitutional because the federal restriction contains no provision that facially "sanctions, compels, or encourages states" to burden the Second Amendment.[295]

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[286] *Id.*at 471.

[287] *Id.* at 473.

[288] *Id*.

[289] 18 U.S.C. § 922(a)(3); *see* United States v. Decastro, 682 F.3d 160, 162 (2d Cir. 2012).

[290] *Decastro*, 682 F.3d at 164-67.

[291] *Id.* at 167-68.

[292] *Id.* at 168.

[293] *Id.* (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008)).

[294] *Id.* at 168-69.

[295] *Id.* at 169.

How May the Government Regulate Firearms?

Firearm Registration Requirements

Washington D.C.'s 2008 FRA (discussed above) also required firearm owners to register their firearms (limited to no more than one pistol in a 30-day period) and, in doing so, submit each pistol to be registered for ballistics identification. Applicants were required, among other things, to renew each registration in person every three years, have vision qualifying for a driver's license, submit to being fingerprinted and photographed, submit to a background check every six years, and attend a specified amount of firearms training or safety instruction.[296] These requirements applied to long guns in addition to handguns.[297] The new registration requirements were challenged as unconstitutional. The D.C. Circuit concluded that the "mere registration" of a handgun, alone, is a presumptively lawful, longstanding regulation "deeply enough rooted in our history to support the presumption that a registration requirement is constitutional."[298] But as applied to long guns, the court concluded, registration is novel.[299] As for some of D.C.'s particular registration requirements listed above (as well as all of the requirements as applied to long guns), the court concluded that those must be evaluated under intermediate scrutiny to determine their constitutionality because they do not severely limit the exercise of Second Amendment rights.[300] The D.C. Circuit concluded, however, that the District had not demonstrated a "tight fit" between the registration requirements and its asserted interests of protecting police officers and crime control.[301] The court stated that the District must "present some meaningful evidence, not mere assertions, to justify its predictive judgments" about reducing firearms-related crimes, and the circuit court therefore remanded the case to the district court for the parties to have the opportunity to further develop the record.[302]

After this ruling, the District revised its firearms laws by enacting the Firearms Amendment Act of 2012 (FAA), removing some, but not all of the contested registration requirements for handguns and keeping basic registration requirements for long guns, along with many other generally applicable requirements for persons registering firearms.[303] Those requirements came before the D.C. Circuit again in a third round of *Heller v. District of Columbia*.[304] First, the court concluded that the burden from the basic registration requirements as applied to long guns was de minimis and thus did not implicate the Second Amendment.[305] The other requirements were met with different results. The court ruled that the District's asserted interests in protecting police officers and promoting public safety were substantial, but the circuit court concluded that only the

[296] *Heller II*, 670 F.3d 1244, 1248-49 (D.C. Cir 2011).

[297] *Id.* at 1255.

[298] *Id.* at 1253. Also in the vein of the government's ability to track firearms, the constitutionality of 18 U.S.C § 922(k)—which criminalizes the possession of a firearm with its serial number altered, removed, or obliterated—was upheld under intermediate scrutiny because, according to the Third Circuit, the law fit reasonably with the government's law enforcement interest in tracing weapons used in crimes by "reach[ing] only conduct creating a substantial risk of rendering firearms untraceable." *See* United States v. Marzzarella, 614 F.3d 85, 98-99 (3d Cir. 2010).

[299] *Heller II*, 670 F.3d at 1255.

[300] *Heller II*, 670 F.3d at 1255-58.

[301] *Id.* at 1258.

[302] *Id.* at 1259.

[303] D.C. Law. 19-170 (May 15, 2012); *see* Heller v. District of Columbia (*Heller III*), 801 F.3d 264, 269-70 (D.C. Cir. 2015).

[304] 801 F.3d 264.

[305] *Heller III*, 801 F.3d at 273-74.

interest in promoting public safety reasonably fit with some, but not all, of the contested regulations.[306] Those that reasonably fit the public safety interest, in the court's view, included the requirements to appear in person and be photographed and fingerprinted; the $13 fee to register the firearm, along with the $35 fee for fingerprinting; and the requirement that applicants satisfy a safety and training course requirement.[307] Those that did not survive scrutiny included the requirements (1) to bring the firearm to registration; (2) to renew registration every three years; (3) to have knowledge of local gun laws; and (4) the prohibition on registering more than one pistol in a 30-day period.[308] These divergent results were a product of the relative strength of the District's evidence, as determined by the D.C. Circuit, in attempting to show a fit between the District's asserted interests and the registration requirements.[309]

"Good Cause" Requirements for Concealed Carry Licenses

Some states and localities have enacted measures requiring a person seeking a concealed carry license to demonstrate "good cause" for needing one. The courts that have reviewed such measures have produced divergent rulings on the extent to which the ability to carry a concealed firearm is protected by the Second Amendment and what level of scrutiny should be applied to such laws.[310]

For instance, in *Kachalsky v. County of Westchester*, the Second Circuit considered a challenge by persons who were denied an unrestricted concealed carry license under New York law.[311] According to the state's concealed carry requirements, an applicant must demonstrate "proper cause" to obtain a concealed carry license—a restriction that had been construed by the New York state courts to require an applicant seeking an unrestricted concealed carry license for self-defense purposes to "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[312] The plaintiffs in *Kachalsky* argued that the concealed carry law is unconstitutional by preventing them from "carry[ing] weapons in public to defend themselves from dangerous confrontation."[313] But the Second Circuit rejected that contention. Assuming that the Second Amendment applied and employing intermediate scrutiny on account of the gun restriction affecting activities outside the home, the *Kachalsky* court held that the New York statute was substantially related to the government's interests in public safety and crime prevention.[314] And requiring persons to show an objective threat to personal safety before obtaining a concealed carry license, the court reasoned, is consistent with the right to bear arms, particularly given that "there is no right to engage in self-defense with a firearm until the objective circumstances justify the use of deadly force."[315]

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[306] *Id.* at 274-75.

[307] *Id.* at 275-81.

[308] *Id.*

[309] *Id*.

[310] *Id.* at 86-87 (internal quotation marks and citations omitted).

[311] 701 F.3d 81 (2d Cir. 2012).

[312] *Id.* at 86 (internal quotation marks and citations omitted).

[313] *Id.* at 87-88 (2d Cir. 2012).

[314] *Id.* at 93-100.

[315] *Id.* at 100. Conversely, a recent district court ruling from District of Columbia applied strict scrutiny to D.C.'s "good reason" requirement for a concealed carry permit when a challenger requested that the court preliminarily enjoin the law. *See* Grace v. District of Columbia, —F.Supp.3d— , No. 15-2234, 2016 WL 2908407 (D. D.C. May, 17, 2016). Under the law, enacted in 2015, the Chief of the Metropolitan Police Department "may" issue a license to carry a concealed firearm upon a finding that 'it appears that the applicant has good reason to fear injury to his or her person or

California has a somewhat similar law as that upheld in *Kachalsky*: An officer "may" issue a concealed carry license to applicants who have demonstrated good moral character and good cause for the license.[316] But when two California counties' policies for determining good cause were challenged under the Second Amendment, the Ninth Circuit, sitting en banc in *Peruta v. County of San Diego*, concluded that the Second Amendment "does not extend to the carrying of concealed firearms in public by members of the general public.[317] In reaching this conclusion, the court engaged in a historical analysis to determine whether the Second Amendment codified a pre-existing right to carry a concealed weapon in public at the time of the ratification of the Second and Fourteenth Amendments.[318] And based on the Supreme Court's ruling a few decades after the Fourteenth Amendment's ratification, in which the Court announced that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons,"[319] plus state court rulings in the years following the Second Amendment's ratification concluding similarly, the Ninth Circuit held that the Second Amendment "does not include, in any degree, the right of a member of the general public to carry concealed firearms."[320] Accordingly, because concealed carry is not encompassed by the Second Amendment, the Ninth Circuit held that California's good-cause requirement withstood constitutional scrutiny.[321]

Breaking with the Second and Ninth Circuits, the D.C. Circuit in *Wrenn v. District of Columbia* held that the right of law-abiding citizens to carry a concealed firearm in public (i.e., "concealed carry") is a core component of the Second Amendment and struck down the District's good cause

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property or has any other proper reason for carrying a pistol, and the he or she is a suitable person to be so licensed." D.C. CODE § 22-4506(a). To show a good reason to fear in jury, the applicant must show "a special need for self-protection distinguishable from the general community as supported by evidence of specific threats or previous attacks that demonstrate a special danger to the applicant's life." D.C. CODE § 7-2509-11(1)(A). Other "proper reasons" include employment in a job requiring handling cash or other valuables transported on the person. D.C. CODE § 7-2509-11(1)(B). The court concluded that the right to carry weapons outside the home not only is protected by the Second Amendment, but is one of its "core" protections "[g]iven that the Second Amendment's central purpose is self-defense and that this need arises more frequently in public, it logically follows that the right to carry arms for self-defense in public lies at the very heart of the Second Amendment." *Id.* at *11-12. The court found the burden to be substantial, applied strict scrutiny, and concluded that the law "likely" was not narrowly tailored to promote a compelling government interest. *Id.* at *13-15. An appeal has been filed, and the case is pending in the D.C. Court of Appeals.

[316] CAL. PENAL CODE § 26150(a). California's penal code contains many other exceptions to its general ban against carrying weapons in public. *See* CAL. PENAL CODE §§ 25300-26405

[317] Peruta v. County of San Diego, 824 F.3d 919, 927 (9th Cir. 2016) (en banc), *cert. denied,* 137 S. Ct. 1995 (2017). The court expressly declined to reach the question whether the Second Amendment protects the ability to carry weapons openly in public. *Id.*.

[318] *Id.* at *929-39.

[319] *See* Robertson v. Baldwin, 165 U.S. 275 (1897).

[320] *Peruta,* 824 F.3d at 939.

[321] *Id.* There were two dissenting opinions. In one, Judge Silverman stated that he would have concluded that the law could not survive heightened scrutiny. *Id.* at 956-58 (Silverman, J., dissenting). In another, Judge Callahan contended that "the majority eviscerates the Second Amendment right of individuals to keep and bear arms as defined by *Heller* and reaffirmed in *McDonald. Id.* at 946 (Callahan, J., dissenting). Falling somewhere between the Ninth and Second Circuit decisions is the Third Circuit's ruling in *Drake v. Filko,* which alternatively held that (1) New Jersey's requirement that individuals seeking to carry a handgun in public must demonstrate "a justifiable need" is a longstanding regulation that does not burden conduct within the scope of the Second Amendment's protections; and (2) even if the law burdened protected Second Amendment rights, the law survived intermediate scrutiny. 724 F.3d 426, 429-40 (3d Cir. 2013) (analyzing N.J. STAT. ANN. § 2C:58-4(c)). Justifiable need is defined under New Jersey law as "the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun." N.J. ADMIN. CODE § 12:54-2.3(d)(1).

concealed carry regime.[322] The District of Columbia's framework regulating concealed carry authorized the Chief of the Metropolitan Police Department to issue a concealed carry license to a person who, as relevant here, has "good reason to fear injury to his or her person or property" or "any other proper reason for carrying a pistol."[323] Demonstrating the requisite fear "at a minimum require[s] a showing of a special need for self-protection distinguishable from the general community as supported by evidence of specific threats or previous attacks that demonstrate a special danger to the applicant's life."[324] Other "proper reasons" where a concealed carry license could be granted included employment requiring handling cash or other valuables to be transported by the applicant.[325] In striking down the District's law, the D.C. Circuit first held that the core right in the Second Amendment for law abiding citizens to keep and bear arms for self-defense extends beyond the home.[326] But instead of choosing a level of scrutiny under which to analyze the law, the court ruled that the District's law effectively is a "total ban" on the exercise of that core right and thus is per se unconstitutional.[327] In particular, the court reasoned that the District's law "destroys the ordinarily situated citizen's" self-defense needs by requiring law-abiding citizens to demonstrate a need for self-protection that is "distinguishable" from other law-abiding members of the community.[328] Thus, the court concluded that it "needn't pause to apply tiers of scrutiny, as if strong showings of public benefits could save this destruction of so many commonly situated D.C. residents' constitutional right to bear common arms for self-defense in any fashion at all."[329] After the D.C. Circuit declined the District's request to rehear the case en banc, the District announced that it would not seek Supreme Court review, thus leaving the circuit split intact for the foreseeable future.[330]

Commercial Sale of Firearms

So far only one federal court of appeals—the Ninth Circuit—has engaged in an in-depth analysis of whether the Second Amendment includes a right to sell commercial firearms. Overturning a 3-judge panel of the Ninth Circuit, an 11-judge en banc panel concluded in *Teixeira v. County of Alameda* that there is no independent Second Amendment right to sell firearms.[331] At issue in *Teixeira* was an ordinance in Alameda County, California, requiring businesses seeking to sell firearms to obtain a permit.[332] A permit would not be granted if, as relevant here, the business would be within 500 feet of a residentially zoned district.[333] After Alameda County denied a

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[322] Wrenn v. District of Columbia, 864 F.3d 650, 667 (D.C. Cir. 2017).

[323] D.C. CODE § 22-4506(a).

[324] *Id.* § 7-2509.11(1)(A).

[325] *Id.* § 7-2509.11(1)(B).

[326] *Wrenn*, 864 F.3d at 657.

[327] *Id.*

[328] *Id.* at 666.

[329] *Id.*

[330] *See* Ann E. Marimow & Peter Jamison, WASH. POST, *D.C. Will Not Appeal Concealed Carry Gun Ruling to Supreme Court* (Oct. 5, 2017), https://www.washingtonpost.com/local/dc-politics/dc-will-not-appeal-gun-law-to-supreme-court/2017/10/05/e0e7c054-a9d0-11e7-850e-2bdd1236be5d_story.html?utm_term=.072137d1a7c7; Martin Asutermuhle, WAMU, *Court Rejects D.C.'s Request to Save Concealed-Carry Law, Setting Up Possible Appeal to Supreme Court* (Sept. 28, 2017), http://wamu.org/story/17/09/28/court-rejects-d-c-s-request-rehearing-decision-shooting-citys-concealed-carry-law/.

[331] Teixeira v. Cty. of Alameda, 2017 WL 4509038 (9th Cir. Oct. 10, 2017) (en banc).

[332] *See* ALAMEDA COUNTY, CA. CODE OF ORDINANCES § 17.54.131.

[333] *See id*.

permit on that ground to applicants seeking to open a retail firearms store, the applicants challenged the zoning ordinance under the Second Amendment.[334]

The en banc Ninth Circuit concluded that "the Second Amendment does not confer a freestanding right, wholly detached from any customer's ability to acquire firearms, upon a proprietor of a commercial establishment to sell firearms."[335] The court reasoned that regulations on firearms sales fall into *Heller*'s safe harbor for "presumptively lawful" regulations "imposing conditions and qualifications on the commercial sale of arms."[336] Still, the court viewed *Heller*'s safe harbor language as "sufficiently opaque" to warrant a full textual and historical review of the Second Amendment's applicability to the commercial sale of arms.[337] This review led the court to the same conclusion: The Second Amendment, as written, "did not encompass a freestanding right to engage in firearms commerce divorced from the citizenry's ability to obtain and use guns."[338]

But the right to *acquire* firearms, the Ninth Circuit clarified, *is* protected.[339] The court reasoned that "the core Second Amendment right to keep and bear arms for self-defense wouldn't mean much without the ability to acquire arms."[340] And though the court concluded that firearms dealers may assert that right on behalf of their potential customers, in this case, the permit applicants did not allege that the zoning permit denial interfered with the ability of Alameda County residents to acquire firearms.[341] The court explained that evidence established that, without the gun store that the partners sought to open, "Alameda County residents may freely purchase firearms within the County," given that County was already home to 10 gun stores, including one that stood 600 feet away from the proposed site of the new store.[342] And, the court continued, "gun buyers have no right to have a gun store in a particular location, at least as long as their access is not meaningfully constrained."[343] Accordingly, the court declined to determine the precise scope of the right to acquire firearms and the appropriate level of review to analyze claims of a deprivation of that right.[344]

Licensing Fees

In *Kwong v. Bloomberg*, the Second Circuit reviewed a New York law requiring residents to obtain a license to possess a handgun, along with an implementing New York City measure that imposed a licensing fee of $340 for a three-year permit.[345] The plaintiffs argued that the licensing fee imposed an unconstitutional burden on the exercise of their Second Amendment rights.[346] In

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[334] *Teixeira*, 822 F.3d at 1049-52.

[335] *Teixeira*, 2017 WL at *10.

[336] *Id.* (quoting *Heller*, 554 U.S. 570, 626-27 & n.26 (2008)).

[337] *Id.*

[338] *Id.*

[339] *Id.* at *6

[340] *Id.* (internal quotation marks and citations omitted).

[341] *Id.*

[342] *Id.* at *7.

[343] *Id.* at *8.

[344] *Id.* at *6.

[345] Kwong v. Bloomberg, 723 F.3d 160, 162 (2d Cir. 2013).

[346] *Id.* at163. Plaintiffs also alleged that the New York state law was impermissible on equal protection grounds, on account of the statute allowing New York City's licensing fees to be significantly greater than other local jurisdictions. However, the Court concluded that the state measure was constitutionally permissible on this ground, as well. *Id.* at 170-72.

upholding the fee, the Second Circuit found it "difficult to say that the licensing fee, which amounts to just over $100 per year, is anything more than a marginal, incremental or even appreciable restraint on one's Second Amendment's rights"—and thus would not implicate heightened scrutiny—but refrained from so holding because, in its view, New York City's law also survived under intermediate scrutiny.[347] The court reasoned that the regulation serves New York City's important interest in recouping the costs incurred in operating its licensing scheme, which is designed to promote public safety and reduce gun violence.[348]

Storage Requirements

For handguns to be kept in a residence in San Francisco, California the law requires that those handguns, when not on the person, be stored in a locked container or disabled with a trigger lock.[349] The Ninth Circuit evaluated this requirement in *Jackson v. City and County of San Francisco*.[350] The circuit court found that, although the law implicates the core of the Second Amendment right by imposing restrictions on the use of handguns in the home, unlike the former D.C. law evaluated in *Heller* requiring handguns to be made completely inoperable, the burden in San Francisco's law was not substantial, and thus intermediate scrutiny was warranted.[351] The court appeared to distinguish San Francisco's law from D.C.'s former law by noting that firearms kept in modern gun safes may be quickly opened and retrieved for use.[352] Moreover, the court noted that, although the law makes it more difficult for residents to use handguns for self-defense in the home by having to retrieve the firearm from a locked container or remove a trigger lock, the requirement still burdens only the manner in which persons exercise their Second Amendment right.[353]. Thus, the Court concluded that a higher level of scrutiny was unwarranted.[354]

Under intermediate scrutiny, the Ninth Circuit concluded that there was a reasonable fit between the regulation and the city's substantial interest in reducing the number of gun-related injuries and deaths from unlocked handguns in the home.[355] On appeal to the Supreme Court, the Court denied certiorari in *Jackson* over the dissent of Justice Thomas, who was joined by Justice Scalia.[356] Justice Thomas described *Jackson* as "in serious tension with *Heller*" by prohibiting San Francisco residents from keeping their handguns "'operable for the purpose of immediate self-defense,' when not carried on their person."[357] Justice Thomas added that such a burden on a core Second Amendment right "is significant," stating that "nothing in our decision in *Heller* suggested that a law must rise to the level of the absolute prohibition at issue in that case to constitute a 'substantial burden' on the core of the Second Amendment right."[358]

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[347] *Id*. at 167-68 (internal quotation marks and citation omitted).

[348] *Id.* at 168-69.

[349] S.F. CAL. POLICE CODE, art. 45, § 4512.

[350] Jackson v. City & County of San Francisco, 746 F.3d 953 (9th Cir. 2014).

[351] *Id.* at 964-65.

[352] *Id.* at 964.

[353] *See id.*

[354] *See id*.

[355] *Id.* at 965-66.

[356] Jackson v. City & County of San Francisco, 135 S. Ct. 2799 (2015) (denial of cert) (Thomas, J., dissenting).

[357] *Id.* at 2801 (quoting District of Columbia v. Heller, 554 U.S. 570, 630 (2008)). Justice Thomas added that San Francisco's ordinance "burdens [its residents'] right to self-defense at the times they are most vulnerable—when they are sleeping, bathing, changing clothes, or otherwise indisposed." *Id*.

[358] *Id.*

Enhanced Punishment

When calculating a defendant's sentence under the United States Sentencing Guidelines, judges apply a "dangerous weapon enhancement" under § 2D1.1(b)(1), which increases the defendant's total offense level if "a dangerous weapon (including a firearm) was possessed during the course of a drug crime.[359] When challenged as unconstitutional under the Second Amendment, the Sixth Circuit in *United States v. Greeno* looked to whether the Second Amendment, "as historically understood, protected the possession of weapons by individuals engaged in criminal activity."[360] And the court concluded that penalizing firearm possession during a drug crime—through a sentencing enhancement—"is consistent with the historical understanding of the right to keep and bear arms, which did not extend to possession of weapons for unlawful purposes."[361] Thus, the court concluded that § 2D1.1(b)(1) did not implicate the Second Amendment and therefore was constitutional.[362]

Conclusion

Although the circuit courts of appeals have taken various approaches in evaluating Second Amendment challenges, the results tend to share similar outcomes. Accordingly, without further guidance from the Supreme Court, Congress may find the circuit court rulings instructive should the legislature seek to enact measures that would add or modify the categories of persons or weapons subject to firearm regulations.

Almost all federal courts reviewing Second Amendment challenges post-*Heller* have adopted a two-step approach to evaluating Second Amendment challenges. First, courts ask whether the regulated person, firearm, or place comes within the scope of the Second Amendment's protections. If not, the law does not run afoul of the Second Amendment. If, on the other hand, the challenged law does implicate the Second Amendment, courts must next decide the appropriate level of scrutiny—rational basis, intermediate, or strict scrutiny—to employ in determining whether the law passes constitutional muster. In deciding which level to choose, courts generally ask whether the challenged law burdens core Second Amendment conduct, like the ability to use a firearm for self-defense in the home. If a law substantially burdens core Second Amendment activity, courts typically will apply strict scrutiny. Otherwise, courts will apply intermediate scrutiny. In addition, sometimes circuit courts have taken a different approach by asking whether the challenged regulation is "presumptively lawful" as envisioned by *Heller*. And in the rare case where a court determines that a law has a de minimis burden on Second Amendment activity, these courts have applied rational basis review. Conversely, some courts have deemed rational-basis review as "off the table" based on the majority's comments in *Heller.* All told, most firearm laws have been reviewed under intermediate scrutiny, where the courts require a reasonable fit between the challenged law and a substantial or important governmental interest asserted as the basis for the law.

Based on these various approaches, it appears that the government can justify a firearm regulation in a number of ways. First, at step one, the government can show that the regulation is a longstanding, presumptively lawful regulation. The government typically can do this by tying the regulation to those restrictions identified in *Heller* as presumptively lawful. In some cases, a challenged restriction might not be among those listed in *Heller* as presumptively lawful.

[359] U.S.S.G. § 2D1.1(b)(1).

[360] United States v. Greeno, 679 F.3d 510, 519-20 (6th Cir. 2012).

[361] *Id.* at 520.

[362] *Id*.

However, given the *Heller* Court's admonishment that the list was not intended to be exhaustive, later courts have concluded that a challenged law is presumptively lawful by analogizing it to restrictions identified in *Heller* as presumptively permissible. In other cases, the government can show that a firearm regulation is presumptively lawful by proving that a restricted person is not a lawful, responsible citizen and thus outside the scope of the Second Amendment. Additionally, the government can make a historical showing that the firearm regulation is longstanding and thus lawful.

Second, if the inquiry proceeds to the second step, the government must show that the regulation is substantially related to an important governmental interest. The cases show that the success of a law under this inquiry will depend on the evidence that the government puts forth. The courts will not take mere assertions by the government but require meaningful evidence, like legislative findings, empirical evidence, and academic studies. Based on the courts' admonishments, future legislation to regulate firearms may face a greater chance of survival in the courts if that legislation evidences a clear fit between the government's interest and the regulation.

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