

**THE FEDERAL CIRCUITS’ SECOND AMENDMENT DOCTRINES**

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This Article describes the process for deciding Second Amendment cases, as set forth by the Circuits of the United States Courts of Appeals. The focus of the Article is *how* the circuit courts analyze Second Amendment cases.

In the eight years since the Supreme Court decided *District of Columbia v. Heller*, the circuit courts have collectively worked out a Second Amendment methodology. Although there are differences among the circuits, and sometimes among panels within the same circuit, the methodology described below has become standard, albeit not universal.

We have examined every post-*Heller* circuit case, including the unpublished ones. The cases are listed in the Appendix by circuit. We occasionally cite state court and federal district court cases that are especially illuminating.

Part I summarizes the key legal rules from *Heller*. Part II does the same for *McDonald v. Chicago*, which holds that the Second Amendment right is enforceable against the states. Part III enumerates the various rights that are included within the Second Amendment, in addition to the home defense right which was at issue in *Heller*. Part IV explicates the Two-Part Test nearly every circuit has adopted for analyzing Second Amendment issues. Part V explains how the circuits have wrestled with *Heller*'s ambiguous language about certain "presumptively lawful" gun controls, and how that language has been applied to the Two-Part Test. Part VI examines in detail the application of Step One of the Two-Part Test—namely, whether something is part of the Second Amendment right as traditionally understood. Part VII summarizes the different ways courts have treated the Second Amendment outside the home, such as whether bearing arms in public places passes or fails Step One. Part VIII examines the first decision that must be made under Step Two of the Two-Part Test: which level of heightened scrutiny to use. Part IX describes how various levels of heightened scrutiny are applied in Second Amendment cases. Among the topics is how consideration of alternative measures (which infringe less of the right) is less stringent in intermediate scrutiny. In conclusion, Part X summarizes all the elements of the Circuit Courts' Second Amendment doctrines. This Article was written in mid-2016; subsequent developments in cases that are discussed in the text are indicated in the footnotes.

## I. *HELLER*'S RULES

In 2008, the Supreme Court decided *District of Columbia v. Heller*, which the Court accurately described as its "first in-depth examination of the Second Amendment."<sup>1</sup> *Heller* involved three District of Columbia ordinances: a ban on handguns, with grandfathering for handguns that had been registered by

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1. 554 U.S. 570, 635 (2008).

January 1976; a prohibition on having an assembled, functional arm in one's home; and a prohibition on carrying without a license. The carry prohibition applied even inside the home—such as carrying a registered handgun from one room to another; carry licenses were never issued. The Court held the handgun ban and the functional firearms ban to be unconstitutional, and further, that Heller was entitled to be issued a carry license. The Court explained that the Second Amendment guarantees a pre-existing individual right to keep and bear arms, unconnected to service in a militia.<sup>2</sup>

The Court set forth many principles:

- The Second Amendment protects arms “in common use”—those that are “[t]ypically possessed by law-abiding citizens for lawful purposes.” Conversely, the Second Amendment does not protect arms which are “dangerous and unusual.”<sup>3</sup>
- Like other constitutional rights, the Second Amendment right is “not unlimited.”<sup>4</sup>
- A law that prohibits handguns in the home is plainly unconstitutional, without need to resort to strict or intermediate scrutiny.<sup>5</sup>

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2. “There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.” *Id.* at 595.

3. “We therefore read [United States v. Miller, 307 U.S. 174 (1939)] to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right.” *Id.* at 625. “*Miller* said, as we have explained, that the sorts of weapons protected were those ‘in common use at the time.’” *Id.* at 627 (quoting *Miller*, 307 U.S. at 179). “We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” *Id.*

4. *Id.* at 595. “Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.” *Id.*

5. [T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” would fail constitutional muster. *Id.* at 628–29 (internal citation omitted). “We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.” *Id.* at 634. See *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (“Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are categorically unconstitutional.”).

- It is “bordering on the frivolous” to argue that only the types of arms in existence in the eighteenth century are protected by the Second Amendment.<sup>6</sup>
- A ban on arms typically possessed by law-abiding citizens cannot be justified by the existence of available alternatives.<sup>7</sup>
- The choice of law-abiding citizens to prefer particular types of Second Amendment arms is conclusive.<sup>8</sup>
- When the core Second Amendment right is at stake, a court may not conduct an interest-balancing inquiry.<sup>9</sup>
- The right of self-defense is inherent to the Second Amendment.<sup>10</sup>
- The Second Amendment right is especially important in the home.<sup>11</sup> “[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>12</sup>

6. *Heller*, 554 U.S. at 582. “We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications and the Fourth Amendment applies to modern forms of search, 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.” *Id.* (internal citations omitted).

7. “It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.” *Id.* at 629.

8. “Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.” *Id.*

9. “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 . . . [The Second Amendment] is the very *product* of an interest-balancing by the people.” *Id.* at 634–35.

10. “As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right.” *Id.* at 628. The inherent right is not limited to the home; as Judge Posner recognized, “the interest in self-protection is as great outside as inside the home.” *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012). For an analysis of the natural rights basis of *Heller*, see David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 SYRACUSE L. REV. 235 (2008). For a collection of self-defense provisions in state constitutions, see Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399 (2007).

11. “The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one’s home and family, would fail constitutional muster.” *Heller*, 554 U.S. at 628–29 (internal quotation omitted).

12. *Id.* at 635.

- “[L]ongstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms” are “presumptively lawful.”<sup>13</sup>
- A law implicating the Second Amendment may not be subjected to rational basis review. Some form of heightened scrutiny is required.<sup>14</sup> This is because “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”<sup>15</sup>

Although much of the above was, arguably, stated as dicta, circuit courts treat Supreme Court dicta, especially from recent cases, as nearly as binding as a Supreme Court holding.<sup>16</sup> This principle has been repeatedly applied in

13. *Id.* at 626–27, 627 n.26.

14. “Obviously, [rational-basis scrutiny] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms . . . . If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.” *Id.* at 628 n.27.

15. *Id.* at 636. The phrase chosen by the Supreme Court was “in” sensitive places, not “around” or “near” sensitive places. This could suggest that the sensitive places rule is primarily for certain buildings, and not for areas around or near such buildings. See Amy Hetzner, *Where Angels Tread: Gun-Free School Zone Laws and an Individual Right to Bear Arms*, 95 MARQ. L. REV. 359, 392 (2011).

16. *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) (“We think that federal appellate courts are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement.”); *Newdow v. Peterson*, 753 F.3d 105, 108 n.3 (2d Cir. 2014) (“[W]e have an obligation to accord great deference to Supreme Court *dicta*”) (internal quotations omitted); *Oyebanji v. Gonzales*, 418 F.3d 260, 264–65 (3d Cir. 2005) (“[A]s a lower federal court, we are advised to follow the Supreme Court’s considered dicta.”) (internal quotation omitted); *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n.3 (4th Cir. 2004) (“[W]ith inferior courts, like ourselves . . . carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.”) (internal quotations omitted); *United States v. Becton*, 632 F.2d 1294, 1296 n.3 (5th Cir. 1980) (“We are not bound by dicta, even of our own court . . . . Dicta of the Supreme Court are, of course, another matter.”) (citation omitted); *United States v. Marlow*, 278 F.3d 581, 588 n.7 (6th Cir. 2002) (“Appellate courts have noted that they are obligated to follow Supreme Court *dicta*, particularly when there is no substantial reason for disregarding it, such as age or subsequent statements undermining its rationale.”); *Reich v. Cont’l Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994) (“In such a case the dictum provides the best, though not an infallible, guide to what the law is, and it will ordinarily be the duty of a lower court to be guided by it.”); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) (“[F]ederal courts ‘are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings, particularly when . . . [the dicta] is of recent vintage and not enfeebled by any [later] statement.’”) (citation omitted); *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (“We do not treat

Second Amendment cases.<sup>17</sup> This is appropriate, for the Court understood it was issuing the “first in-depth examination of the Second Amendment,” and

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considered dicta from the Supreme Court lightly. Rather, we accord it appropriate deference. As we have frequently acknowledged, Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them off because they were not a holding.” (internal citation and quotations omitted); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (“[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court’s outright holdings, particularly when the dicta is recent and not enfeebled by later statements.”); *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) (“[T]here is dicta and then there is dicta, and then there is Supreme Court dicta.”); *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003) (“For this inferior Court . . . carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.”) (internal citation, quotations, and brackets omitted).

17. See *Hollis v. Lynch*, 827 F.3d 436, 448 (5th Cir. 2016) (“Finally, amici argue that to the extent we rely on these passages from *Heller*, they are dicta. Amici may well be right as to some of the statements. Still, we are generally bound by Supreme Court dicta, especially when it is ‘recent and detailed.’”); *United States v. Khami*, 362 F. Appx. 501, 508 (6th Cir. 2010) (“[This Court has] noted that [we] are obligated to follow Supreme Court dicta, particularly when there is no substantial reason for disregarding it, such as age or subsequent statements undermining its rationale.”); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015); *Peterson v. Martinez*, 707 F.3d 1197, 1210 (10th Cir. 2013); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (Tymkovich, J., concurring); *United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010) (“[T]o the extent that this statement is superfluous to the central holding of *Heller*, we shall still give it considerable weight.”).

As the Third Circuit explained, most courts have treated *Heller*’s list of “presumptively lawful” gun controls as either part of the holding or as binding dicta:

There is some dispute over whether the language from *Heller* limiting the scope of the Second Amendment is dicta. Compare *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010) (characterizing this language as dicta), and *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (Tymkovich, J., dissenting) (same), with *United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010) (stating this language is not dicta), and *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (same). But even if dicta, it is Supreme Court dicta, and, as such, requires serious consideration. See *Heleva v. Brooks*, 581 F.3d 187, 188 n.1 (3d Cir. 2009) (“[W]e do not view [Supreme Court] dicta lightly.” (alterations in original) (internal quotation marks omitted)); see also *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) (“[T]here is dicta and then there is dicta, and then there is Supreme Court dicta.”). Several other courts of appeals have followed this dicta. See, e.g., *United States v. Skoien*, 614 F.3d 638, 640–41, (7th Cir. 2010) (en banc); *United States v. White*, 593 F.3d 1199, 1205–06 (11th Cir. 2010) (extending it to cover a ban on possession by domestic violence offenders); *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009) (finding the prohibition of juvenile possession of firearms was consistent with the approach of *Heller*’s dicta); *McCane*, 573 F.3d at 1047 (relying solely on this dicta to conclude a ban on possession of firearms by felons did not offend the Second Amendment); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009); *United States v. Fincher*, 538 F.3d 868, 873–74 (8th Cir. 2008) (upholding a ban on machine guns). Moreover, the Court itself reaffirmed the presence of these limitations in *McDonald*, 130 S. Ct. at 3047 (plurality opinion of Alito, J.).

presumably intended for the entire opinion to be instructive.<sup>18</sup> On the other hand, Judge Easterbrook of the Seventh Circuit rejects much of *Heller's* language, and has created alternative approaches which he considers to be superior.<sup>19</sup>

## II. MCDONALD'S RULES

### A. Core McDonald Principles

In 2010, the Supreme Court decided *McDonald v. City of Chicago*, holding that “the Second Amendment right is fully applicable to the States”<sup>20</sup> through the Fourteenth Amendment.<sup>21</sup> The Court made clear that the Second Amendment is just as “fundamental” as other Bill of Rights protections that have been incorporated in the Fourteenth Amendment.<sup>22</sup> “[T]he right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty”<sup>23</sup> and must be “regarded as a substantive guarantee.”<sup>24</sup> Accordingly, the Second Amendment may not be treated as a “second-class”

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United States v. Marzzarella, 614 F.3d 85, 90 n.5 (3d Cir. 2010) (citations simplified).

18. *Heller*, 554 U.S. at 635.

19. United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (“The language we have quoted warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish . . . . The opinion is not a comprehensive code; it is just an explanation for the Court’s disposition.”); Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir. 2015) (“The language from *Heller* that we have quoted is precautionary: it warns against readings that go beyond the scope of *Heller's* holding that ‘the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense.’”) (citation omitted).

Judge Easterbrook has earned a reputation among some in the legal profession for disregarding controlling precedent that does not support his desired conclusion. A recent law review article articulates especially blistering criticisms, and concludes that Judge Easterbrook is an unprincipled “stickler for rules who breaks the rules” with a “penchant for confabulation.” Albert W. Alschuler, *How Frank Easterbrook Kept George Ryan in Prison*, 50 VAL. U. L. REV. 7, 87 (2015).

20. 561 U.S. 742, 750 (2010).

21. A plurality of the Court concluded that the Second Amendment applies to the States by virtue of the Fourteenth Amendment’s Due Process Clause because it is “fundamental to [the American] scheme of ordered liberty” and “deeply rooted in the Nation’s history and tradition.” *Id.* at 767. Justice Thomas, concurring in part and concurring in the judgment, wrote that “the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.” *Id.* at 806 (Thomas, J., concurring in part and concurring in the judgment).

22. *Id.* at 778 (“In sum, it is clear 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.”).

23. *Id.*

24. *Id.* at 780.

right.<sup>25</sup> It may not be “singled out for special—and specially unfavorable—treatment.”<sup>26</sup>

The *McDonald* Court further made clear that “incorporation does not imperil every law regulating firearms”<sup>27</sup> and “state and local experimentation with reasonable firearms regulations will continue under the Second Amendment.”<sup>28</sup>

*McDonald* also reiterated *Heller*’s language declaring certain “longstanding regulatory measures to be “presumptively lawful”<sup>29</sup>:

We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as “prohibitions on the possession of firearms by felons and the mentally ill,” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” We repeat those assurances here. Despite municipal respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.<sup>30</sup>

#### B. *What Dates for Originalism?*

The Second Amendment (applying directly to the federal government) was ratified in 1791. The Fourteenth Amendment, which makes most of the Bill of Rights, including the Second Amendment, enforceable against state and local governments, was ratified in 1868. So when we are searching for original meaning, there are two periods to consider: around 1791 and around 1868.

First Amendment jurisprudence shows how to use both of these “original” eras. Like the Second Amendment, the First Amendment was ratified in 1791 and made applicable to the states in 1868. Courts do not treat the First Amendment as having a 1791 original meaning for federal laws and an 1868 original meaning for state laws. There is just one First Amendment, and the Fourteenth Amendment applies it to the states, full-strength. The same is also true for other Bill of Rights provisions that the Supreme Court has held to be incorporated in the Fourteenth Amendment.<sup>31</sup>

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25. *McDonald*, 561 U.S. at 780.

26. *Id.* at 745–46.

27. *Id.* at 786.

28. *Id.* at 785 (internal quotation marks and brackets omitted).

29. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 n. 26 (2008).

30. *McDonald*, 561 U.S. at 786 (citation omitted); *see also* *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1124 (10th Cir. 2015) (“Then, to underscore the importance of that language and to remove any doubt about the care that went into it and its importance in understanding the holding in *Heller*, several years later [in *McDonald*] the Court repeated that exact same language, with forceful affirmation.”).

31. The lone exception is the Sixth Amendment right to a criminal jury trial, for which only a diluted version applies to the states. *See Williams v. Florida*, 399 U.S. 78, 103 (1970) (federal juries must have twelve jurors, but state juries can be as small as six); *Johnson v. Louisiana*, 406

When Congress passed the Fourteenth Amendment, sending it to the states for ratification, the intention to make states obey the Second Amendment was clear.<sup>32</sup> Neither the proponents nor the opponents of the Fourteenth Amendment claimed that what the states would have to obey (e.g., freedom of the press, right to arms) was different from what the federal government already had to obey. So, there is just one Second Amendment and it applies equally to all governments within the American system.

Thus, the period around 1791 is relevant to any Second Amendment case, regardless of what type of government is involved. The same is true for 1868. *Heller* involved a federal law, since the District of Columbia municipal government was exercising powers that had been delegated by Congress. Yet when elucidating the original meaning of the 1791 Second Amendment, *Heller's* broad historical sweep found Second Amendment meaning in the Early Republic, the Age of Jackson, and all the way through Reconstruction.<sup>33</sup>

Lower courts that examine original meaning have always looked at 1791, and have also considered 1868, to the extent that the latter adds relevant information.<sup>34</sup> The one notable exception is the Seventh Circuit's *Highland Park* case, which will be discussed below. That case contradicted *Heller* by considering what types of arms were common in 1791, rather than what types of arms are common today.<sup>35</sup> Notably, the court did not consider 1868; for a results-oriented opinion, the omission of Fourteenth Amendment originalism was an understandable, albeit unjustifiable, approach.<sup>36</sup> Magazines holding more than ten rounds were in existence in 1791, but were not yet common. They were common by 1868.<sup>37</sup>

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U.S. 356, 364 (1972) (federal juries must be unanimous, but state juries can convict on a 9–3 vote).

32. *McDonald*, 561 U.S. at 775–76.

33. *Heller*, 554 U.S. at 614–19. For a survey of many of the nineteenth century sources, see David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359 (1998).

34. E.g., *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (“the Second Amendment right as it was understood at the relevant historical moment—1791 [Bill of Rights ratification] or 1868 [Fourteenth Amendment ratification]”) (brackets in original).

35. *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015).

36. In dissent, Judge Manion wrote, “Of course, our inquiry centers on the understanding of the right to keep arms in 1868 when the Fourteenth Amendment became law.” *Id.* at 417 (Manion, J., dissenting); see also *Ezell v. City of Chicago*, 651 F.3d 684, 705 (7th Cir. 2011) (“As we have noted, the most relevant historical period for questions about the scope of the Second Amendment as applied to the States is the period leading up to and surrounding the ratification of the Fourteenth Amendment.”).

37. David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 869 (2014–2015).

### III. IS THE SECOND AMENDMENT ONLY ABOUT GUNS FOR SELF-DEFENSE?

In *Heller* and *McDonald*, the plaintiffs emphasized the issue of self-defense. This has led some commentators to claim that the Second Amendment right is *only* about self-defense. *Heller*, however, repeatedly states that the right to keep and bear arms is for all legitimate uses:

- “Americans valued the ancient [militia] right; most undoubtedly thought it even more important for self-defense and hunting.”<sup>38</sup>
- “[T]he right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace.”<sup>39</sup>
- “The traditional militia was formed from a pool of men bringing arms ‘in common use at the time’ for lawful purposes like self-defense.”<sup>40</sup>
- The right applies to arms “typically possessed by law-abiding citizens for lawful purposes.”<sup>41</sup>
- While it is agreed that the Second Amendment protects militia use of arms, “[w]hether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case.”<sup>42</sup>

*McDonald* summarized “our central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.”<sup>43</sup> While self-defense in the home is central to the Second Amendment right, it is not the sole purpose of the right.

Every circuit court of appeals that has addressed the scope of the Second Amendment right has concluded that the right is not confined to self-defense.

#### A. All Lawful Uses, Including Hunting and Target Practice

The most influential post-*Heller* circuit court decision has been the Third Circuit’s *United States v. Marzzarella*.<sup>44</sup> That case created the Two-Part Test, which will be discussed *infra*, and which has been adopted by most of the circuits. *Marzzarella* noted that *Heller* protected the right to defensive arms:

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38. *Heller*, 554 U.S. at 599. Several state constitutions include an enumerated right to hunt and fish. See Stephen P. Halbrook, *The Constitutional Right to Hunt: New Recognition of an Old Liberty in Virginia*, 19 WM. & MARY BILL RTS. J. 197, 198 (2010).

39. *Heller*, 554 U.S. at 614 (quoting *Andrews v. State*, 50 Tenn. 165, 178 (1871)).

40. *Id.* at 624.

41. *Id.* at 625.

42. *Id.* at 636–37.

43. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

44. 614 F.3d 85 (3d Cir. 2010).

“And certainly, to some degree, it must protect the right of law-abiding citizens to possess firearms for other, as-yet-undefined, lawful purposes.”<sup>45</sup>

One of the early post-*Heller* cases, the D.C. Circuit’s *Heller II*, wrote that the Second Amendment as interpreted by the Supreme Court, was “not only to maintain the militia, but also for self-defense and hunting.”<sup>46</sup> As *Heller II* characterized the Supreme Court decision, “the Second Amendment protects the right to keep and bear arms for other ‘lawful purposes,’ such as hunting.”<sup>47</sup> In deciding the appropriate level of scrutiny to apply to a gun registration requirement, the court settled on intermediate scrutiny after determining that “none of the District’s registration requirements prevents an individual from possessing a firearm in his home or elsewhere, whether for self-defense or hunting, or any other lawful purpose.”<sup>48</sup>

The Fifth Circuit adopted a similar formulation, explaining that a federal statute that allows young adults to purchase handguns privately, but not from gun stores,<sup>49</sup> allows 18-to-20-year-olds to “possess and use handguns for self-defense, hunting, or any other lawful purpose.”<sup>50</sup>

In *United States v. Rene E.*,<sup>51</sup> the First Circuit upheld a restriction on juvenile possession of handguns because the statute “contains important exceptions”<sup>52</sup> for “self- and other-defense in the home, national guard duty, and hunting, among other things.”<sup>53</sup>

In *United States v. Masciandaro*,<sup>54</sup> the Fourth Circuit noted that the *Heller* Court “observed that throughout the country’s history, Americans have valued the right not only to be able to prevent the elimination of militia, but ‘even more important[ly], for self-defense and hunting.’”<sup>55</sup> Judge Niemeyer, writing separately, explained: “the right to keep and bear arms was found to have been understood to exist not only for self-defense, but also for membership in a militia and for hunting.”<sup>56</sup>

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45. *Id.* at 92.

46. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (internal citations omitted).

47. *Id.* at 1260.

48. *Id.* at 1258.

49. 18 U.S.C. §§ 922(b)(1), 922(c)(1) (2012), and attendant regulations.

50. *NRA v. BATFE*, 700 F.3d 185, 206–07 (5th Cir. 2012).

51. 583 F.3d 8 (1st Cir. 2009).

52. *Id.* at 14.

53. *Id.* at 16.

54. 638 F.3d 458 (4th Cir. 2011).

55. *Id.* at 466 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

56. *Id.* at 468 (internal citation omitted). The historical roots of the right to arms in the Fourth Circuit and Virginia are explored in Stephen P. Halbrook, *The Right to Bear Arms in the Virginia Constitution and the Second Amendment: Historical Development and Precedent in Virginia and the Fourth Circuit*, 8 LIBERTY U. L. REV. 619, 619–20 (2014).

In *United States v. Carter* (“*Carter I*”),<sup>57</sup> the Fourth Circuit acknowledged that in *Heller*, “The Court noted that the right to keep and bear arms was understood by the founding generation to encompass not only militia service, but also ‘self-defense and hunting.’”<sup>58</sup>

Later, in *Woollard v. Gallagher*,<sup>59</sup> the Fourth Circuit upheld a permit requirement for handgun carrying partly because no permit was necessary to “wear, carry, and transport handguns” to engage “in target shoots and practices, sport shooting events, hunting and trapping, specified firearms and hunter safety classes, and gun exhibitions.”<sup>60</sup>

Likewise, in *Kachalsky v. County of Westchester*,<sup>61</sup> the Second Circuit upheld a handgun licensing statute requiring an applicant to show “proper cause,” because state court precedent had defined “proper cause” to include “carrying a handgun for target practice, hunting, or self-defense.”<sup>62</sup>

In *Drake v. Filko*,<sup>63</sup> one of the reasons that a statute requiring applicants to demonstrate a “justifiable need” to publicly carry a handgun was constitutional was that the statute contained an exception for people employed in certain occupations, and for hunting.<sup>64</sup>

Judge Manion’s dissenting opinion in *Highland Park* explained:

*Heller* expressly rejected the view that the Second Amendment contained a unitary right and instead noted that lawmakers of the founding period routinely grouped multiple, related, rights under a singular right. Because the rights in the Second Amendment are many and varied, a court must identify the specific right implicated by a regulation.<sup>65</sup>

Thus, a law that unconstitutionally infringes upon hunting, militia service, target shooting, or other lawful uses should not be upheld because its effect on self-defense is de minimis. Conversely, a law that unconstitutionally infringes upon self-defense should not be upheld because its effect on militia service is

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57. 669 F.3d 411 (4th Cir. 2012) [hereinafter *Carter I*].

58. *Id.* at 414–15.

59. 712 F.3d 865 (4th Cir. 2013).

60. *Id.* at 879. For an overview of the circuit split on right to carry, see Elizabeth Beaman, Comment, *Who Gets to Determine if You Need Self Defense?: Heller and McDonald’s Application Outside the House*, 12 SETON HALL CIRCUIT REV. 139, 141 (2015).

61. 701 F.3d 81 (2d Cir. 2012).

62. *Id.* at 86. The court wrote that “[t]he proper cause requirement has remained a hallmark of New York’s handgun regulation” for over a century, as part of a statutory scheme whose purpose was “to prevent crimes of violence before they can happen, and at the same time preserve legitimate interests such as training for the national defense, the right of self defense, and recreational pursuits of hunting, target shooting and trophy collecting.” *Id.* at 97, 97 n.22.

63. 724 F.3d 426 (3d Cir. 2013).

64. *Id.* at 428 n.1.

65. *Friedman v. City of Highland Park*, 784 F.3d 406, 417 (7th Cir. 2015) (Manion, J., dissenting) (citing *District of Columbia v. Heller*, 554 U.S. 570, 591 (2008)).

de minimis. The full scope of all lawful uses is protected by the Second Amendment.

*B. Right to Practice and Training*

While many circuits have included target practice and training in their lists of the various rights protected by the Second Amendment, only one circuit has been required to address an actual governmental attempt to suppress such activities. After *McDonald*, the Chicago City Council enacted a new gun control statute, which prohibited firing ranges open to the public within city limits.<sup>66</sup> In *Ezell v. City of Chicago*, the Seventh Circuit determined that range training is protected by the Second Amendment.<sup>67</sup> “The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn’t mean much without the training and practice that make it effective.”<sup>68</sup>

In *Teixeira v. County of Alameda*,<sup>69</sup> the Ninth Circuit found *Ezell*’s reasoning persuasive and relied on it to hold that the Second Amendment protects “services including ‘state-mandated Hunter Safety Classes, Handgun Safety Certificates,’ and ‘classes in gun safety, including safe storage of firearms in accordance with state law,’ [b]ecause the Second Amendment protects a ‘right not as connected to militia service, but as securing the militia by ensuring a populace familiar with arms.’”<sup>70</sup>

Concurring in a case involving a government freeze on a defendant’s untainted assets, thus preventing the defendant from hiring counsel, and therefore violating the Sixth Amendment, Justice Thomas explained that “[c]onstitutional rights thus implicitly protect those closely related acts necessary to their exercise.”<sup>71</sup> He provided a litany of precedent for this principle, including:

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66. *Ezell v. City of Chicago*, 651 F.3d 684, 691 (7th Cir. 2011).

67. *Id.* at 711.

68. *Id.* at 704. After the *Ezell* decision, the city government created regulations that prohibited firing ranges in over ninety-eight percent of the city. This was held unconstitutional. See *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017).

69. 822 F.3d 1047 (9th Cir. 2016). An en banc rehearing was ordered in December 2016. *Teixeira v. County of Alameda*, 2016 WL 7438631 (9th Cir. 2016).

70. *Teixeira*, 822 F.3d at 1056 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 617 (2008)). The court elaborated, “to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.” *Id.* (quoting *Heller*, 554 U.S. at 617–18 (quoting Thomas Cooley, *The General Principles of Constitutional Law in the United States of America* 271 (1868))).

71. *Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring).

The right to keep and bear arms, for example, “implies a corresponding right to obtain the bullets necessary to use them,” *Jackson v. City and County of San Francisco*, 746 F.3d 953, 967 (C.A.9 2014) (internal quotation marks omitted), and “to acquire and maintain proficiency in their use,” *Ezell v. Chicago*, 651 F.3d 684, 704 (CA7 2011). See *District of Columbia v. Heller*, 554 U.S. 570, 617–618, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008) (citing T. Cooley, *General Principles of Constitutional Law* 271 (2d ed. 1891) (discussing the implicit right to train with weapons)); *United States v. Miller*, 307 U.S. 174, 180 (1939) (citing 1 H. Osgood, *The American Colonies in the 17th Century* 499 (1904) (discussing the implicit right to possess ammunition)); *Andrews v. State*, 50 Tenn. 165, 178 (1871) (discussing both rights). Without protection for these closely related rights, the Second Amendment would be toothless.<sup>72</sup>

In the federal circuits, the principles of Justice Thomas’s opinion have been uncontroversial. No circuit judge has disputed that the Second Amendment includes the right to training and practice, and includes the right to acquire ammunition.

### C. Militia

*Heller* makes it clear that the Second Amendment is not *solely* for the militia. Given the prefatory clause of the Amendment, militia uses of arms must necessarily be protected. *Heller* affirms the importance of the militia: “It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.”<sup>73</sup> Indeed,

There are many reasons why the militia was thought to be “necessary to the security of a free State.” See 3 Story § 1890. First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary—an argument that Alexander Hamilton made in favor of federal control over the militia. *The Federalist* No. 29, pp. 226, 227 (B. Wright ed.1961) (A. Hamilton). Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.<sup>74</sup>

In the 1939 *United States v. Miller* case, the Supreme Court reversed a completely unreasoned lower court decision that had held a portion of the National Firearms Act of 1934 to be unconstitutional.<sup>75</sup> The provision required

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72. *Id.* (alterations in original).

73. *Heller*, 554 U.S. at 599.

74. *Id.* at 597–98.

75. 307 U.S. 174 (1939). For a history of the case, see Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U.J.L. & LIBERTY 48, 63–64 (2008) (explaining that the district judge was a gun control advocate who was colluding with the U.S. Attorney to set up a Supreme Court test case), cited in *Heller*, 554 U.S. at 623.

registration and a tax for the acquisition of short-barreled shotguns.<sup>76</sup> *Miller* was opaquely written, and commentators spent decades arguing about its meaning. Some said that *Miller* meant that only militiamen had Second Amendment rights. Others said that only militia-type arms were covered by the Second Amendment.

*Heller* elucidated that *Miller* does not limit the Second Amendment right to militia purposes, but instead limits which weapons the militia aspect of the right protects. “We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”<sup>77</sup> According to *Heller*, the Second Amendment does *not* protect “dangerous and unusual” arms—even if those might be the most suitable arms for militia use.<sup>78</sup> The Court suggested that the automatic M-16 rifle may not be covered by the Second Amendment.<sup>79</sup> An earlier Supreme Court decision, *United States v. Staples*, had carefully distinguished the automatic M-16 from its semi-automatic relative, the AR-15.<sup>80</sup> The latter was “commonplace and generally available.”<sup>81</sup>

Post-*Heller*, lower courts have not needed to devote much attention specifically to militia uses. No case has involved arms that were not “dangerous and unusual,” and yet were suitable mainly for militia service, rather than for self-defense, hunting, or other recreation.

One opinion that does look at militia uses is the Seventh Circuit’s *Friedman v. City of Highland Park*,<sup>82</sup> which involved a municipal ban on so-

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76. *Miller*, 307 U.S. at 175 n.1. The *Miller* Court upheld a conviction for transporting in interstate commerce an unregistered shotgun with a barrel less than eighteen inches in length because

[I]n 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. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

*Id.* at 178.

77. *Heller*, 554 U.S. at 625. See *Hollis v. Lynch*, 827 F.3d 436, 445 (5th Cir. 2016) (“*Heller*, therefore, distinguished between two classes of weapons: (1) those that are useful in the militia or military, and (2) those that are ‘possessed at home’ and are in ‘common use at the time for lawful purposes like self-defense.’ The individual right protected by the Second Amendment *applies only to the second category of weapons*, though that category at times may overlap with the first. The Second Amendment does not create a right to possess a weapon solely because the weapon may be used in or is useful for militia or military service.”) (citation omitted).

78. *Heller*, 554 U.S. at 571.

79. *Id.* at 627.

80. 511 U.S. 600, 611 (1994).

81. *Id.*

82. 784 F.3d 406 (7th Cir. 2015).

called “assault weapons”<sup>83</sup> and “large-capacity magazines.”<sup>84</sup> Eschewing *Heller* as insufficiently instructive, Judge Easterbrook announced his own three-part test for arms bans. One element was whether the arms “have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia.’”<sup>85</sup>

Judge Easterbrook noted that the plaintiffs agreed that the suburb’s arms ban would be no less unconstitutional if it had been enacted by the State of Illinois. According to Judge Easterbrook, “states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms, so as to have them available when the militia is called to duty.”<sup>86</sup> Thus, any arms ban by a state could not violate the Second Amendment’s militia right, because states have full power to choose militia arms.

Judge Easterbrook had read the Second Amendment, but he forgot about Article I. That Article grants *Congress*, not the States, the power “[t]o provide for organizing, *arming*, and disciplining, the Militia,” while “reserving to the States” the appointment of officers and training.<sup>87</sup>

Accordingly, Congress, rather than the states, is the source for what arms the militia should use. Since Congress has not banned these so-called “large-capacity magazines” or “assault weapons,” such arms are necessarily militia arms under the *Highland Park* militia test.

Justices Thomas and Scalia dissented from the denial of certiorari in *Highland Park*. They pointed out Judge Easterbrook’s error about Article I, and they added: “Because the Second Amendment confers rights upon individual citizens—not state governments—it was doubly wrong for the Seventh Circuit to delegate to States and localities the power to decide which firearms people may possess.”<sup>88</sup>

Although hardly a model of textual fidelity, *Highland Park* does correctly recognize that the Second Amendment protects militia rights. *Heller* added clarity to the militia-related right articulated in *Miller*, rather than eliminating that right.

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83. “The ordinance defines an assault weapon as any semi-automatic gun that can accept a large-capacity magazine and has one of five other features: a pistol grip without a stock (for semiautomatic pistols, the capacity to accept a magazine outside the pistol grip); a folding, telescoping, or thumbhole stock; a grip for the non-trigger hand; a barrel shroud; or a muzzle brake or compensator. Some weapons, such as AR-15s and AK-47s, are prohibited by name.” *Id.* at 407. For an empirical analysis of “assault weapons,” see James B. Jacobs, *Why Ban “Assault Weapons”?*, 37 CARDOZO L. REV. 681 (2015).

84. “[T]hose that can accept more than ten rounds.” *Highland Park*, 784 F.3d at 407.

85. *Id.* at 410 (quoting *United States v. Miller*, 307 U.S. 174, 178–79 (1939)).

86. *Id.*

87. U.S. CONST. art. I, § 8, cl. 16 (emphasis added).

88. *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from the denial of certiorari).

Judge Easterbrook's test was similar to one previously created by the Massachusetts Supreme Judicial Court in *Commonwealth v. Caetano*, to uphold a ban on stun guns.<sup>89</sup> The U.S. Supreme Court summarily reversed and remanded *Caetano*. The per curiam opinion pointed out that all three elements of the test violated *Heller*.<sup>90</sup>

First, it was irrelevant whether stun guns existed in 1791. This contradicted *Heller*'s statement that the Second Amendment covers arms "that were not in existence at the time of the founding."<sup>91</sup>

Second, the Massachusetts court had said that stun guns were "dangerous and unusual."<sup>92</sup> Supposedly, they were unusual because they were "a thoroughly modern invention."<sup>93</sup> The Supreme Court responded that this was just another formulation for limiting the Second Amendment right to 1791 arms, and thus contrary to *Heller*.<sup>94</sup>

Third, the lower court had asserted that stun guns are not "readily adaptable to use in the military."<sup>95</sup> This contradicted *Heller*'s rejection of the assertion "that only those weapons useful in warfare are protected."<sup>96</sup>

Concurring, Justices Alito and Thomas argued that the case should not have been remanded; instead, the record was clear enough that the stun gun ban should have been stricken under a straightforward application of *Heller*.<sup>97</sup>

A final point about the various purposes for exercising Second Amendment rights: *Heller* leaves no doubt that self-defense is at the core of the right. This does *not* mean that all other purposes are outside the core. The core of a right can contain more than one thing. For example, the "freedom 'from bodily restraint' lies 'at the core of the liberty protected by the Due Process Clause.'"<sup>98</sup> This does not mean that such freedom is the *only* freedom in the core of Due Process Clause liberty. Nor are freedoms that may not be in the core unprotected by strict scrutiny.<sup>99</sup>

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89. 26 N.E.3d 688, 695 (Mass. 2015).

90. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam).

91. *Id.* at 1028.

92. *Caetano*, 26 N.E.3d at 692.

93. *Id.* at 693–94.

94. *Caetano*, 136 S. Ct. at 1028.

95. *Caetano*, 26 N.E.3d at 694.

96. *Caetano*, 136 S. Ct. at 1028 (citing *District of Columbia v. Heller*, 554 U.S. 570, 624–25 (2008)).

97. *Id.* at 1028–33 (Alito, J., concurring).

98. *Turner v. Rogers*, 564 U.S. 431, 433 (2011) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

99. "[T]he Fourteenth Amendment 'forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

Likewise, self-defense is not necessarily the only activity at the core of the Second Amendment. Surely defense of others (especially, family members in the home) and of property would be included. In *Heller*, “self-defense” is used as a shorthand that includes defense of others. While *Heller* repeatedly refers to the right of “self-defense,” *Heller* uses the term interchangeably with “lawful defense of self, family, and property,”<sup>100</sup> “the defense of himself and family and his homestead,”<sup>101</sup> “the home, where the need for defense of self, family, and property is most acute,”<sup>102</sup> “for protection of one’s home and family,”<sup>103</sup> and “using a gun to protect himself or his family from violence.”<sup>104</sup> Given the text of the Second Amendment, it would seem impossible to assert that militia uses are not also part of the core.

#### IV. THE EMERGENCE OF THE TWO-PART TEST

Almost every circuit court has adopted the Two-Part Test, which was created by the Third Circuit in *Marzzarella*.<sup>105</sup> The Third Circuit reasoned by analogy from the First Amendment—an approach that has become common in Second Amendment cases.<sup>106</sup>

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100. *Heller*, 554 U.S. at 571.

101. *Id.* at 616.

102. *Id.* at 628.

103. *Id.* at 628–29.

104. *Id.* at 634.

105. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); Adopted in: *NYSRPA, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *NRA v. BATFE*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 701–03 (7th Cir. 2011) (*but see* *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) (“[I]nstead of trying to decide what ‘level’ of scrutiny applies, and how it works, inquiries that do not resolve any concrete dispute, we think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia,’ and whether law-abiding citizens retain adequate means of self-defense.”)) (internal citations omitted); *United States v. Chovan*, 735 F.3d 1127, 1136–37 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010) (“*Heller* thus suggests a two-pronged approach to Second Amendment challenges to federal statutes.”) (internal quotations omitted); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 n.34 (11th Cir. 2012); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

The basic structure of the Two-Part Test can be found in an earlier case, *United States v. Skoien*, a Seventh Circuit panel decision that was later reversed on other grounds by an en banc court. *United States v. Skoien*, 587 F.3d 803, 808–09 (7th Cir. 2009), *reversed by* 614 F.3d 638, 645 (7th Cir. 2010) (en banc).

106. *See, e.g.*, *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (“This inquiry bears strong analogies to the Supreme Court’s free-speech caselaw.”); *Ezell*, 651 F.3d at 702–03, 706 (“Both *Heller* and *McDonald* suggest that First Amendment analogies are more appropriate, and on the strength of that suggestion, we and other circuits have already begun

Step One asks if the case involves the Second Amendment right.<sup>107</sup> If the answer to Step One is “yes,” then Step Two applies some form of heightened scrutiny to evaluate the statute or other governmental action. A similar methodology is implicit in many other forms of constitutional adjudication.

For example, imagine that a person is recorded while he is giving instructions for how to rob a particular bank at a particular time. He is indicated for conspiracy to rob a bank. He correctly points out that he is being punished because of what he spoke. So he argues that the conspiracy statute violates “the freedom of speech.” He will lose, because precedent establishes that speech which is integral to an underlying crime (such as bank robbery) is not part of “the freedom of speech.”<sup>108</sup> The defendant loses at Step One.

In another case, public school students are punished for wearing black armbands at school one day.<sup>109</sup> In context, the armbands are widely understood as expressing opposition to the Vietnam War. It could be argued that the First Amendment freedom of speech is irrelevant to the case; after all, none of the students are being punished for speaking. The Supreme Court, however, held that the black armbands did communicate ideas and therefore, fell within the protection of the First Amendment’s freedom of speech. Accordingly, the majority proceeded to Step Two, and tested the armband prohibition under heightened scrutiny.

Likewise, *Central Hudson*’s famous four-part test for commercial speech protection fits the broad structure of a Two-Part Test.<sup>110</sup> Step One is whether the speech falls in the category of “commercial speech.” To pass Step One, the speech must relate in some way to a commercial transaction; the speech must not be misleading; and the proposed underlying transaction must not be illegal (such as illegal sale of the fur of an endangered species).<sup>111</sup> If Step One is passed, then *Central Hudson* applies a multi-element test to determine whether the commercial speech restriction can be upheld.

For the Second Amendment, the Two-Part Test is as follows: “First, we ask whether the challenged law imposes a burden on conduct falling within the

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to adapt First Amendment doctrine to the Second Amendment context.” (internal citation omitted); see generally David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 419 (2014); Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97 (2009).

107. Not every circuit says “Two-Part Test” or “Step One” and “Step Two.” For example, the Second Circuit writes that there is a “two-step inquiry.” See, e.g., *NYSRPA*, 804 F.3d at 254.

108. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949); Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981 (2016).

109. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 50, 504 (1969).

110. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

111. *Id.*

scope of the Second Amendment's guarantee."<sup>112</sup> "If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid."<sup>113</sup>

Under the Two-Part Test, the burden of proof is on the government throughout. At Step One, the government has the burden of proving that the activity or thing at issue is outside the scope of the Second Amendment, as traditionally understood.<sup>114</sup> If the government fails to meet its burden on Step One, then the case proceeds to Step Two, which by definition involves some form of heightened scrutiny. Under all forms heightened scrutiny, the government always bears the burden of proof.<sup>115</sup>

#### V. "PRESUMPTIVELY LAWFUL" REGULATIONS

The Two-Part Test is conceptually straightforward in most applications. But there is one group of cases where a special difficulty arises. *Heller* and *McDonald* both stated that certain "longstanding" gun controls are "presumptively lawful."<sup>116</sup> These were laws barring guns for felons and the mentally ill; prohibiting *concealed* carry; or imposing conditions and qualifications on the *commercial* sale of arms.<sup>117</sup> The Court noted that its three-item list was not an exhaustive enumeration of every constitutionally-permissible gun control.<sup>118</sup>

112. *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010). "*Heller* suggests that some federal gun laws will survive Second Amendment challenge because they regulate activity falling outside the terms of the right as publicly understood when the Bill of Rights was ratified; *McDonald* confirms that if the claim concerns a state or local law, the 'scope' question asks how the right was publicly understood when the Fourteenth Amendment was proposed and ratified." *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011); *see also* *NRA v. BATFE*, 700 F.3d 185, 197 (5th Cir. 2012) ("As for step one, *Heller* itself suggests that the threshold issue is whether the party is entitled to the Second Amendment's protection. *See* *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) ('Assuming that *Heller* is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun . . . .').")

113. *Marzarella*, 614 F.3d at 89.

114. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014); *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (citing *Ezell*); *Ezell*, 651 F.3d at 702-03; *United States v. Chester*, 628 F.3d 673, 681-82 (4th Cir. 2010).

115. *See infra* note 681. In contrast, some state supreme courts, applying their own state's constitution, require that the challenger prove a government action or statute to be unconstitutional, even when a fundamental right is involved.

116. *District of Columbia v. Heller*, 554 U.S. 570, 626-27, 627 n.26 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

117. *Heller*, 554 U.S. at 626; *McDonald*, 561 U.S. at 786.

118. *Heller*, 554 U.S. at 627 n.26; *see also* *United States v. Decastro*, 682 F.3d 160, 165 (2d Cir. 2012) ("Although the Court did not expand on why these two classes of restrictions [carry restrictions in sensitive places; conditions and qualifications on the commercial sale of arms]

As the Fourth Circuit observed, “The full significance of these pronouncements is far from self-evident.” At the least, the list of the presumptively lawful regulations “provided a hint as to the types of governmental interests that might be sufficient to withstand Second Amendment challenges, as well as the contexts in which those interests could be successfully invoked.”<sup>119</sup>

The Supreme Court’s language about some “presumptively lawful” regulations does not fit easily into the Two-Part Test. As the Fifth Circuit explained:

We admit that it is difficult to map *Heller*’s “longstanding,” “presumptively lawful regulatory measures,” onto this two-step framework. It is difficult to discern whether “longstanding prohibitions on the possession of firearms by felons and the mentally ill, ... or laws imposing conditions and qualifications on the commercial sale of arms,” by virtue of their presumptive validity, either (i) presumptively fail to burden conduct protected by the Second Amendment, or (ii) presumptively trigger and pass constitutional muster under a lenient level of scrutiny. *See, e.g., Marzzarella*, 614 F.3d at 91 (recognizing that the designation—longstanding, presumptively lawful measure—is ambiguous). For now, we state that a longstanding, presumptively lawful regulatory measure—whether or not it is specified on *Heller*’s illustrative list—would likely fall outside the ambit of the Second Amendment; that is, such a measure would likely be upheld at step one of our framework.<sup>120</sup>

*Heller*’s “presumptively lawful” regulatory measures can, arguably, be applied to three different types of laws:

- Laws that fit exactly within the *Heller* list, such as a law banning gun possession by convicted felons.
- Laws that might be analogized to something on the *Heller* list, such as gun bans for other types of persons who are thought to be especially dangerous.
- Other types of laws that are “longstanding.”<sup>121</sup>

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would be permissible, the natural explanation is that time, place and manner restrictions may not significantly impair the right to possess a firearm for self-defense, and may impose no appreciable burden on Second Amendment rights.”); *Marzzarella*, 614 F.3d 85, 92–93 (“*Heller*’s list of presumptively lawful regulations is not exhaustive . . . and accordingly, the Second Amendment appears to leave intact additional classes of restrictions.”).

119. *United States v. Masciandaro*, 638 F.3d 458, 469 (4th Cir. 2011) (internal citation omitted).

120. *NRA v. BATFE*, 700 F.3d 185, 196 (5th Cir. 2012) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626, 627 n.26 (2008) (citations omitted)).

121. For an analysis of whether requiring advance permission from the government for the private lending or sale of a firearm is “longstanding,” see David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 HARV. J. LEGISL. 303 (2015).

For each of these types of laws, the question arises: Does the government automatically win any case involving such laws, because the government prevails at Step One of the Two-Part Test? Or should some of these laws be scrutinized under Step Two? If certain laws are “presumptively constitutional,” can a litigant rebut the presumption?

There is some dispute in the circuits about whether the “presumptively lawful” language is dicta or is a limitation on *Heller*’s holding.<sup>122</sup> The difference is not of great importance, because recent Supreme Court dicta is generally considered to be nearly as binding as a holding.<sup>123</sup>

Nor does the holding/dicta debate have much practical effect in limiting lower court discretion regarding the various categories. Broad statements in one case can be qualified by an exploration of exceptions in a subsequent case. Presumptions can be rebutted. *Heller* said “presumptively lawful,” not “conclusively lawful.”<sup>124</sup> To treat *Heller*’s presumptions as irrebuttable would negate the Second Amendment, as the Third Circuit explained in *Marzzarella*.<sup>125</sup>

The court explained why “Commercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment”<sup>126</sup>:

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122. On the dicta side: *Hollis v. Lynch*, 827 F.3d 436, 448 (5th Cir. 2016) (“these passages are dicta”); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *United States v. Khami*, 362 F. App’x 501, 508 (6th Cir. 2010) (“Since *Heller* indicates that its holding does not bring into question the constitutionality of § 922(g)(1), and this Court has not been presented with any convincing argument that its dicta should not be very persuasive in this case, the district court did not err in denying Defendant’s motion to dismiss.”); *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (Tymkovich, J., concurring) (“This instruction, as McCane points out, is dictum.”).

On the holding side: *United States v. Huet*, 665 F.3d 588, 600 (3d Cir. 2012) (“Although some of our sister circuits have classified the ‘presumptively lawful’ language in *Heller* as dicta . . . we disagree.”); *United States v. Barton*, 633 F.3d 168, 171–72 (3d Cir. 2011); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1124 (10th Cir. 2015) (“Although one could argue that language was dicta, it was in fact an important emphasis upon the narrowness of the holding itself and it directly informs the holding in that case.”); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (“Vongxay nevertheless contends that the Court’s language about certain long-standing restrictions on gun possession is dicta, and therefore not binding. We disagree. Courts often limit the scope of their holdings, and such limitations are integral to those holdings.”).

In favor of both dicta and holding: *United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010) (“First, to the extent that this portion of *Heller* limits the Court’s opinion to possession of firearms by *law-abiding* and *qualified* individuals, it is not dicta. . . . Second, to the extent that this statement is superfluous to the central holding of *Heller*, we shall still give it considerable weight.”).

123. See *supra* notes 16–17.

124. *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008).

125. *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010).

126. *Id.*

*Heller* endorsed “laws imposing conditions and qualifications on the commercial sale of firearms.” In order to uphold the constitutionality of a law imposing a condition on the commercial sale of firearms, a court necessarily must examine the nature and extent of the imposed condition. If there were somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*.<sup>127</sup>

The Ninth Circuit similarly recognized that such a result is “untenable.” In *Texeria v. County of Alameda*,<sup>128</sup> the court explained:

an exemption for certain “laws imposing conditions and qualifications on the commercial sale of arms,” does not mean that there is a categorical exception from Second Amendment scrutiny for the regulation of gun stores. If such were the case, the County could enact a total prohibition on the commercial sale of firearms. There is no question that “[s]uch a result would be untenable under *Heller*.” *Marzzarella*, 614 F.3d at 92 n. 8. Indeed, if all regulations relating to the commercial sale of firearms were exempt from heightened scrutiny, there would have been no need to specify that certain “conditions and qualifications on the commercial sale of arms” were “presumptively lawful.” see [David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?*, 127 Harv. L. Rev. F. 230 (2014)] (“[T]he exception proves the rule. There is a right to the commercial sale of arms, but it is a right that may be regulated by ‘conditions and qualifications.’”). As discussed, *supra*, we are satisfied that the historical right that the Second Amendment enshrined embraces the purchase and sale of firearms. The proper question, therefore, is whether Alameda County’s ordinance is the type of longstanding “condition[ ]” or “qualification[ ]” on the commercial sale of arms,” whose interference with the right to keep and to bear arms historically would have been tolerated.<sup>129</sup>

Here is how the commercial qualifications presumption might be applied. Suppose that a regulation requires that when the owner of a retail gun store goes home for the night, the store must have security devices to prevent/deter theft; this includes locking the guns in this display cases. This is an easy fit with the *Heller* presumptions, and can speedily be held as lawful.

Suppose instead that the anti-theft rule was that every gun in the store must be disassembled down to the smallest screw before the store closes at night. Or imagine a rule that gun stores may only be open for business five hours per week. Or that only persons with a college degree may work in a gun store. All of these would be “conditions and qualifications on the commercial sale of arms.” These laws are manifestly oppressive, extreme, and unreasonable. They

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127. *Id.* (quoting *Heller v. District of Columbia*, 554 U.S. 570, 571 (2008)).

128. 822 F.3d 1047 (9th Cir. 2016).

129. *Id.* at 1057 (quoting *Heller*, 554 U.S. at 626–27, n.26 (citations omitted)).

should be subject to heightened scrutiny, and with heightened scrutiny applied, should be ruled unconstitutional.

For convicted felons caught in possession of a firearm, many courts have speedily disposed of the felons' claims, with a brusque citation to the *Heller* language, usually in unpublished opinions.<sup>130</sup> In some circuits, the mentally ill

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130. *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (“McCane first argues that in light of the Supreme Court’s decision in *Heller*, in which the Court held that the Second Amendment provides an individual with a right to possess and use a handgun for lawful purposes within the home . . . § 922(g) violates the Second Amendment. The Supreme Court, however, explicitly stated in *Heller* that ‘nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.’”); *United States v. Bogle*, 717 F.3d 281, 281 (2d Cir. 2013) (“[T]he Supreme Court clearly emphasized that recent developments in Second Amendment jurisprudence should not ‘be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.’”).

Most such decisions are unpublished. *See United States v. Stuckey*, 317 F. App’x 48, 50 (2d Cir. 2009) (“The *Heller* Court made it clear that ‘nothing in [the] opinion should be taken to cast doubt on longstanding prohibition on the possession of firearms by felons.’”); *United States v. McRobie*, No. 08-4632, 2009 WL 82715, at \*1 (4th Cir. Jan. 14, 2009) (“McRobie’s final claim of error founders on the very case upon which it relies. While the *Heller* opinion recognized a Second Amendment right for citizens to bear arms, it specifically cautioned 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.’ Accordingly, we affirm McRobie’s conviction and sentence.”) (internal citation omitted); *United States v. Brunson*, 292 F. App’x 259, 261 (4th Cir. 2008) (“Regarding the Second Amendment, the Supreme Court has recently upheld the ‘longstanding prohibition on the possession of firearms by felons’ . . . . Accordingly, Brunson’s constitutional challenges to the firearm statute are meritless.”); *United States v. Ritchie*, 362 F. App’x 687, 688 (9th Cir. 2010) (“As the Supreme Court emphasized in *Heller*, its ruling did not change the longstanding prohibitions on possession of firearms by felons.”); *United States v. Nolan*, 342 F. App’x 368, 372 (10th Cir. 2009) (“Nolan was a convicted felon when he possessed the firearm in question. Thus, the Court specifically foreclosed his argument that his possession of the firearm was protected by the Second Amendment.”); *United States v. Molina*, 484 F. App’x 276, 285 (10th Cir. 2012) (rejecting the argument “that *Heller* somehow makes 18 U.S.C. § 922(g) unconstitutional in its prohibition of felons possessing firearms”); *United States v. Small*, 494 F. App’x 789, 791 (9th Cir. 2012) (“The Second Amendment. . .does not extend to felons and the mentally ill.”) (citation and brackets omitted); *United States v. Lapier*, 535 F. App’x 622, 622 (9th Cir. 2013) (“Lapier’s contention that recent Supreme Court decisions undermine this precedent is unpersuasive.”); *United States v. Brye*, 318 F. App’x 878, 880 (11th Cir. 2009) (relying entirely on *Heller*’s “longstanding” language); *United States v. Banks*, 350 F. App’x 419, 421 (11th Cir. 2009) (“The Court expressly stated that nothing from its decision ‘should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.’”); *United States v. Irish*, 285 F. App’x 326, 327 (8th Cir. 2008) (“[T]he Second Amendment does not bar laws prohibiting felons from possessing firearms.”); *United States v. Smith*, 329 F. App’x 109, 110 (9th Cir. 2009) (“The Supreme Court expressly excluded felons from its holding that the Second Amendment confers a federal individual right to keep and bear arms.”); *United States v. Gilbert*, 286 F. App’x 383, 386 (9th Cir. 2008) (“Under *Heller*. . .convicted felons, such as Gilbert, do not have the right to possess any firearms.”); *United States v. Battle*, 347 F. App’x 478, 480 (11th Cir. 2009) (“Because the Supreme Court in *Heller* stated that ‘the right secured by the Second Amendment is not unlimited’ and ‘nothing in our opinion should be taken to cast

have gotten the same treatment,<sup>131</sup> as have unlicensed firearms dealers,<sup>132</sup> and violators of concealed carry laws.<sup>133</sup> However, the Fourth Circuit has rejected this approach.<sup>134</sup> It remanded a case back to the district court, requiring the court to conduct a proper analysis by applying the Two-Part Test to a “presumptively lawful” ban on felons.<sup>135</sup> The Fifth Circuit also requires more than a simple reference to *Heller*’s dicta to uphold a regulation.<sup>136</sup>

As the Fourth Circuit observed in another case, “Some courts have treated *Heller*’s listing of ‘presumptively lawful regulatory measures,’ for all practical purposes, as a kind of ‘safe harbor’ for unlisted regulatory measures.”<sup>137</sup> These unlisted measures are said to be analogous to *Heller*’s felon/mentally ill ban. This has sometimes been done for persons convicted of domestic violence

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doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill,’ Battle’s argument that the permanent prohibition of the right to bear arms, as found in 18 U.S.C. § 922(g)(1), violates the Second Amendment is without merit.”)

131. *McRobie*, 2009 WL 82715 at \*1 (“*McRobie*’s final claim of error founders on the very case upon which it relies. While the *Heller* opinion recognized a Second Amendment right for citizens to bear arms, it specifically cautioned 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.’ Accordingly, we affirm *McRobie*’s conviction and sentence.”) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 n.26 (2008)); *Petramala v. U.S. Dep’t of Justice*, 481 F. App’x 395, 396 (9th Cir. 2012) (“*Petramala*’s inclusion in the National Instant Criminal Background Check System, after being adjudicated as a ‘mental defective’ under the Gun Control Act of 1968, imposed constitutionally permissible limits on his right to bear arms.”)

132. *United States v. Castro*, No. 10-50160, 2011 WL 6157466, at \*1 (9th Cir. Nov. 28, 2011) (“*Castro* argues that his prosecution for dealing weapons violates the Second Amendment. We disagree. The Supreme Court has made it clear that the government can continue to regulate commercial gun dealing.”)

133. *United States v. Davis*, 304 F. App’x 473, 474 (9th Cir. 2008) (“The Supreme Court specified that nothing in [*Heller*] was intended to cast doubt on the prohibition of concealed weapons in sensitive places.”)

134. The Fourth Circuit had previously followed this approach in two cases, but it has not followed the approach again since the court rejected it in *United States v. Pruess* (*Pruess I*), 416 F. App’x 274, 275 (4th Cir. 2011).

135. “Here, the district court concluded, based on the statement in *Heller* that ‘nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons,’ that § 922(g)(1) was not unconstitutional. *See* *District of Columbia v. Heller*, 554 U.S. 570, 571 (2008). However, as we have determined that a district court must conduct an analysis of a challenged regulation in light of *Heller*, we remand to the district court with instructions to make this determination in accordance with our decision in *Chester*.” *Pruess I*, 416 F. App’x at 275.

136. *See* *Hollis v. Lynch*, 827 F.3d 436, 448 (5th Cir. 2016) (“We conclude that these passages from *Heller* directly apply to the claims *Hollis* advances. Still, it is appropriate to undertake an independent inquiry as to whether machineguns are protected by the Second Amendment because these passages are dicta.”)

137. *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010).

misdemeanors,<sup>138</sup> persons subject to domestic violence restraining orders,<sup>139</sup> and illegal drug users.<sup>140</sup> The Fourth Circuit, though, rejected the argument

138. *United States v. Booker*, 644 F.3d 12, 24–25 (1st Cir. 2011) (“§ 922(g)(9) fits comfortably among the categories of regulations that *Heller* suggested would be ‘presumptively lawful.’ Section 922(g)(9) is, historically and practically, a corollary outgrowth of the federal felon disqualification statute. Moreover, in covering only those with a record of violent crime, § 922(g)(9) is arguably more consistent with the historical regulation of firearm than § 922(g)(1), which extends to violent and nonviolent offenders alike.”) (internal citation omitted); *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010) (conducting an analysis regarding the challenged ban on illegal drug users and concluding that a connection existed between drug use and violent crime, also justifying the ban by reasoning that “[k]eeping guns away from habitual drug abusers is analogous to disarming felons” and “[e]xtending the ban to those who regularly abuse drugs makes particular sense because the Court has noted the similarity between [illegal drug users and the mentally ill].”); *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010) (“although [it was] passed relatively recently, § 922(g)(9) addresses the thorny problem of domestic violence, a problem Congress recognized was not remedied by ‘longstanding’ felon-in-possession laws. We see no reason to exclude § 922(g)(9) from the list of longstanding prohibitions on which *Heller* does not cast doubt.”).

139. *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011) (“Although persons restricted by § 922(g)(8) need not have been convicted of an offense involving domestic violence, this statute—like prohibitions on the possession of firearms by violent felons and the mentally ill—is focused on a threat presented by a specific category of presumptively dangerous individuals.”).

140. *United States v. Dugan*, 657 F.3d 998, 999–1000 (9th Cir. 2011) (“[W]e see the same amount of danger in allowing habitual drug users to traffic in firearms as we see in allowing felons and mentally ill people to do . . . . Because Congress may constitutionally deprive felons and mentally ill people of the right to possess and carry weapons, we conclude that Congress may also prohibit illegal drug users from possessing firearms.”); *United States v. Richard*, 350 F. App’x 252, 260 (10th Cir. 2009) (upholding a prohibition on firearms possession by unlawful users of controlled substances; no analysis, other than asserting that *Heller*’s “presumptively lawful” list of gun controls is non-exhaustive).

The most detailed analysis in a Step One opinion on illegal drug users came from the Ninth Circuit:

[W]e see the same amount of danger in allowing habitual drug users to traffic in firearms as we see in allowing felons and mentally ill people to do so. . . . Habitual drug users, like . . . career criminals and the mentally ill, more likely will have difficulty exercising self-control, particularly when they are under the influence of controlled substances. Moreover, unlike people who have been convicted of a felony or committed to a mental institution and so face a lifetime ban, an unlawful drug user may regain his right to possess a firearm simply by ending his drug abuse. The restriction in § 922(g)(3) is far less onerous than those affecting felons and the mentally ill. Moreover, unlike people who have been convicted of a felony or committed to a mental institution and so face a lifetime ban, an unlawful drug user may regain his right to possess a firearm simply by ending his drug abuse. The restriction in § 922(g)(3) is far less onerous than those affecting felons and the mentally ill.

*Dugan*, 657 F.3d at 999. *Dugan* is a good example of doing the right analysis, but incompletely, and in the wrong place. First, *Dugan* failed to acknowledge that the statutory prohibition applies to all users, not just to habitual ones. Second, the court failed to follow the usual Ninth Circuit

that a lifetime arms prohibition for domestic violence misdemeanants is presumptively lawful under *Heller*.<sup>141</sup> And the Sixth Circuit refused to apply the language to a dangerous weapon enhancement.<sup>142</sup> The Ninth Circuit also requires more: “a regulation that merely resembles something listed by the Court in *Heller* will not avoid heightened constitutional scrutiny. Instead, the type of law in question must be both longstanding and closely match a listed prohibition.”<sup>143</sup> In *United States v. Chovan*,<sup>144</sup> the Ninth Circuit rejected the government’s argument that a gun ban for misdemeanants was part of a “long line of prohibitions and restrictions on the right to possess firearms by people perceived as dangerous or violent”; so the ban was not presumptively lawful.<sup>145</sup>

#### A. “Presumptively” in Step One

Some courts incorporate their analysis of “presumptively lawful” measures in Step One of the Two-Part Test. The most thorough argument for doing so came from the Third Circuit:

We recognize the phrase “presumptively lawful” could have different meanings under newly enunciated Second Amendment doctrine. On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny. Both readings are reasonable interpretations, but we think the better reading, based on the text and the structure of *Heller*, is the former—in other words, that these longstanding limitations are exceptions to the right to bear arms. Immediately following the above-quoted passage, the Court discussed “another important limitation” on the Second Amendment—restrictions on the types of weapons individuals may possess. [*Heller v. District of Columbia*, 554 U.S. 570, 628 (2008)]. The Court made clear that restrictions on the possession of dangerous and unusual weapons are not constitutionally suspect because these

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standard that the government must prove that the gun control in question (here, on drug users) is “longstanding” and “traditional.” Accordingly, the court should have proceeded to Step Two, and required the government to introduce evidence demonstrating that the prohibition passes some level of heightened scrutiny. By flippantly analyzing the prohibition only under Step One, the *Dugan* court negated the Second Amendment rights of a large class of people, based on nothing more than the judges’ personal intuitions.

141. *United States v. Staten*, 666 F.3d 154, 160 (4th Cir. 2011) (relying on *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010)).

142. *United States v. Greeno*, 679 F.3d 510, 517 (6th Cir. 2012) (“Because the list does not contain the Section 2D1.1(b)(1) dangerous weapon enhancement at issue in this case, we cannot rely on the list, alone, to reject Greeno’s Second Amendment challenge.”).

143. *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1057 (9th Cir. 2016).

144. *United States v. Chovan*, 735 F.3d 1127, 1127 (9th Cir. 2013).

145. *Id.* at 1137.

weapons are outside the ambit of the amendment. [*Heller*, 554 U.S. at 625] (“[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes....”). By equating the list of presumptively lawful regulations with restrictions on dangerous and unusual weapons, we believe the Court intended to treat them equivalently—as exceptions to the Second Amendment guarantee.<sup>146</sup>

The Eighth Circuit agrees that the *Heller* language can be read various ways, but “[i]t seems most likely that the Supreme Court viewed the regulatory measures listed in *Heller* as presumptively lawful because they do not infringe on the Second Amendment right.”<sup>147</sup>

The Ninth Circuit in *Jackson v. San Francisco* explained its methodology for Step One:

To determine whether a challenged law falls outside the historical scope of the Second Amendment, we ask whether the regulation is one of the “presumptively lawful regulatory measures” identified in *Heller*, 554 U.S. at 627 n. 26 or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment.<sup>148</sup>

In a later case, the court elaborated:

We . . . treat *Heller*’s “presumptively lawful regulatory measures” as examples of prohibitions that simply “fall outside the historical scope of the Second Amendment.” *Jackson*, 746 F.3d at 959–60. Given their longstanding acceptance, such measures are not subjected to the more exacting scrutiny normally applied when reviewing a regulation that burdens a fundamental right . . . . The burden is on the Government to demonstrate that a prohibition has historically fallen outside the Second Amendment’s scope before it can claim a presumption of validity.<sup>149</sup>

Once the government carries its burden of proving that a certain law is covered by “presumptively,” the burden of proof shifts to the party challenging the law. The party must rebut the presumption of constitutionality. As the Third Circuit wrote, “[b]y describing the felon disarmament ban as ‘presumptively’ lawful, the Supreme Court implied that the presumption may be rebutted.”<sup>150</sup>

146. *United States v. Marzarella*, 614 F.3d 85, 91 (3d Cir. 2010).

147. *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011); *cf.* *NYSRPA, Inc. v. Cuomo*, 804 F.3d 242, 257 n.73 (2d Cir. 2015) (“certain ‘presumptively lawful regulatory measures’ ostensibly fall outside of the Second Amendment’s *prima facie* protections”).

148. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (citation omitted); *cf.* *Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015) (“Consequently, we need not determine at this juncture whether firing-capacity regulations are among the longstanding prohibitions that fall outside of the Second Amendment’s scope.”).

149. *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1057–58 (9th Cir. 2016).

150. *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011) (citation omitted).

How to rebut the presumption? The D.C. Circuit analyzed the question in *Heller II*. “With respect to the first step, *Heller* tells us ‘longstanding’ regulations are ‘presumptively lawful’; that is, they are presumed not to burden conduct within the scope of the Second Amendment.”<sup>151</sup> The court continued:

This is a reasonable presumption because a regulation that is “longstanding,” which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right; concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment. A plaintiff may rebut this presumption by showing the regulation does have more than a *de minimis* effect upon his right. A requirement of newer vintage is not, however, presumed to be valid.<sup>152</sup>

*Heller II* then determined that minimal laws for handgun registration (such as collecting records of sale from firearms dealers) are longstanding, and therefore presumptively lawful; the court upheld the *de minimis* handgun registration requirement because that presumption was un rebutted.<sup>153</sup> A similar registration requirement on long guns, however, was not historic, but novel.<sup>154</sup> Accordingly, the case was remanded for evaluation under Step Two. After factual development in the district court, the D.C. Circuit in *Heller III* upheld some of D.C.’s novel gun registration laws and ruled others unconstitutional.<sup>155</sup>

#### B. “Presumptively” in Step Two

The Fourth Circuit suggests that the better place to analyze “presumptively” is in Step Two. In a case about whether a particular location was a “sensitive place” where gun-carrying could be banned, the Fourth Circuit wrote:

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151. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (internal citation omitted).

152. *Id.*; see also *Peterson v. Martinez*, 707 F.3d 1197, 1218 n.1 (10th Cir. 2013) (quoting *Heller II*: “A plaintiff may rebut the presumption of validity by showing that the regulation at issue has ‘more than a *de minimis* effect upon his right.’”).

153. *Heller II*, 670 F.3d at 1253 (“The record supports the view that basic registration of handguns is deeply enough rooted in our history to support the presumption that a registration requirement is constitutional. The Court in *Heller* considered ‘prohibitions on the possession of firearms by felons’ to be ‘longstanding’ although states did not start to enact them until the early 20th century. At just about the same time, states and localities began to require registration of handguns.”) (internal citation omitted).

154. *Id.* at 1255.

155. A less burdensome registration requirement than those found in *Heller III* was upheld in *Justice v. Town of Cicero*, 577 F.3d 768, 774 (7th Cir. 2009). But the *Justice* court did not provide any substantive Second Amendment analysis. It largely relied on its misbelief that the Second Amendment does not apply to the states or their subdivisions, and hastily added that even if it does, the registration requirement is constitutional because none of Justice’s firearms were prohibited.

Because of the relation between the first statement and the examples [in *Heller*], one might conclude that a law prohibiting firearms in a sensitive place would fall *beyond the scope* of the Second Amendment and therefore would be subject to no further analysis. But the Court added a footnote to its language, calling these regulatory measures “*presumptively* lawful.” The Court’s use of the word “presumptively” suggests that the articulation of sensitive places may not be a limitation *on the scope* of the Second Amendment, but rather on the analysis to be conducted with respect to the burden on that right.<sup>156</sup>

Soon after, the Fourth Circuit determined that either possible interpretation defeats a facial challenge to the “presumptively lawful” prohibition on felon gun possession:

Whichever meaning the Supreme Court had in mind negates a facial challenge to a felon in possession statute like § 922(g)(1). If such restrictions were outside the scope of Second Amendment coverage at ratification, then obviously it is not within Second Amendment protection now. On the other hand, if a § 922(g)(1)-type statute has some Second Amendment coverage, the fact it is “presumptively lawful” indicates it must “pass muster under any standard of scrutiny.” Under the well recognized standard for assessing a facial challenge to the constitutionality of a statute, the Supreme Court has long declared that a statute cannot be held unconstitutional if it has constitutional application.<sup>157</sup>

But as the Fourth Circuit observed in another case, some courts have turned “presumptively” into something that “approximates rational-basis review,” which *Heller* prohibits.<sup>158</sup>

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156. *United States v. Masciandaro*, 638 F.3d 458, 472 (4th Cir. 2011) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 n.26). The court declined to resolve the issue because it did not have to. “We need not, however, resolve the ambiguity in the ‘sensitive places’ language in this case, because even if Daingerfield Island is not a sensitive place, as Masciandaro argues, 36 C.F.R. § 2.4(b) still passes constitutional muster under the intermediate scrutiny standard.” *Id.* at 473. *See also* *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (“It is unclear to us whether *Heller* was suggesting that ‘longstanding prohibitions’ such as these were historically understood to be valid limitations on the right to bear arms or did not violate the Second Amendment for some other reason.”).

157. *United States v. Moore*, 666 F.3d 313, 318 (4th Cir. 2012). What the Fourth Circuit called the “well recognized standard” for facial vagueness challenges has been called into question by *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* held a statute unconstitutionally vague, even though it was capable of valid application. The *Johnson* Court explained, “although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision’s grasp.” *Id.* at 2560–61. Thus, “[i]t seems to us that the dissent’s supposed requirement of vagueness in all applications is not a requirement at all . . .” *Id.* at 2561.

158. *Chester*, 628 F.3d at 679; *United States v. Greeno*, 679 F.3d 510, 517–18 (6th Cir. 2012); *District of Columbia v. Heller*, 554 U.S. 570, 628–29 n.27 (2008).

In the Seventh Circuit, “[w]e do not think it profitable to parse these passages of *Heller* as if they contained an answer to the question whether § 922(g)(9) is valid. They are precautionary language. Instead of resolving questions such as the one we must confront, the Justices have told us that the matters have been left open.”<sup>159</sup> The First Circuit agrees with the Seventh’s assessment of the futility of parsing.<sup>160</sup>

In a Seventh Circuit case, Judge Manion explained in dissent:

[A] presumption is a very different thing from an assertion: we presume that laws are constitutional until and unless the regulation is challenged and a competent court informs us otherwise. In other words, it is a very different thing to presume a statute to be constitutional than to positively assert that it is.<sup>161</sup>

One of the most recent examinations of the “presumptively” issue came from the Tenth Circuit in *Bonidy v. U.S. Postal Service*.<sup>162</sup> The panel majority noted that *Heller*’s “presumptively lawful” list includes bans on gun carrying “in sensitive places, such as schools and government buildings.”<sup>163</sup> The majority extrapolated to hold: “[T]he Second Amendment right to carry firearms does not apply to federal buildings, such as post offices.”<sup>164</sup>

Concurring and dissenting, Judge Tymkovich wrote:

I do not agree that the dicta necessarily means “the Second Amendment right to bear arms has not been extended to ‘government buildings.’” . . . That overreads *Heller*’s dicta. While the list could certainly mean the right does not extend to schools or government buildings, it could just as easily (perhaps more easily) mean the right extends to those locations but that regulations in those locations presumptively survive scrutiny at step two of our two-prong Second Amendment analysis. And the fact that the *Heller* Court provided its list of exceptions in the course of explaining that the Second Amendment right is subject to certain limitations, *see Heller*, 554 U.S. at 626, suggests it describes presumptively permissible limitations on the right, not cases where the right is not burdened at all. *See United States v. Chester*, 628 F.3d 673, 679 (4th Cir.2010) (“[T]he phrase ‘presumptively lawful regulatory measures’ suggests the possibility that one or more of [the] ‘longstanding’ regulations ‘could be unconstitutional in the face of an as-applied challenge.’”) (quoting *United States v. Williams*, 616 F.3d 685, 692 (7th Cir.2010)). To say the right has not been extended to government buildings is to imply no plaintiff could

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159. *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010).

160. *United States v. Booker*, 644 F.3d 12, 23 (1st Cir. 2011).

161. *Friedman v. City of Highland Park*, 784 F.3d 406, 420 (7th Cir. 2015).

162. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015).

163. *Id.* at 1136.

164. *Id.* at 1125.

ever successfully challenge a restriction in any government buildings. That goes too far.<sup>165</sup>

The Eleventh Circuit seems to favor the Step Two approach: “While felons do not forfeit their constitutional rights upon being convicted, their status as felons substantially affects the level of protection those rights are accorded.”<sup>166</sup>

Regardless of whether “presumptively” is analyzed in Step One or Step Two, the Third Circuit makes an important point: “prudence counsels caution when extending these recognized exceptions to novel regulations unmentioned by *Heller*.”<sup>167</sup>

### C. *As-applied Challenges to Presumptively Lawful Regulations*

As-applied challenges sometimes succeed, even when they involve a gun control which is “presumptively lawful.”

The Gun Control Act of 1968 imposes a lifetime gun possession ban on all convicted felons.<sup>168</sup> No convicted violent felon has succeeded in an as-applied challenge to the federal statute.<sup>169</sup>

In *United States v. Williams*, the Seventh Circuit explained that although violent felons could not rebut the presumptive lawfulness of a gun ban, a non-violent felon might be able to do so: “*Heller* referred to felon disarmament bans only as ‘presumptively lawful,’ which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of

165. *Id.* at 1136 n.7 (Tymkovich, J., concurring in part and dissenting in part).

166. *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010).

167. *United States v. Marzzarella*, 614 F.3d 85, 93 (3d Cir. 2010).

168. 18 U.S.C. § 922(g)(1) (2012). There are a few exceptions for certain business law felonies. 18 U.S.C. § 921(a)(2)(A).

169. *See United States v. Stuckey*, 317 F. App’x 48 (2d Cir. 2009) (per curiam); *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011); *United States v. Brunson*, 292 F. App’x 259, 259 (4th Cir. 2008) (per curiam); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009) (“Anderson’s argument, as he acknowledges, was foreclosed in this circuit by *United States v. Darrington*, 351 F.3d 632, 633–34 (5th Cir. 2003) (holding that § 922(g) ‘does not violate the Second Amendment’) . . . *Heller* provides no basis for reconsidering *Darrington*. We therefore reaffirm *Darrington* and the constitutionality of § 922(g).”); *United States v. Frazier*, 314 F. App’x 801 (6th Cir. 2008); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010); *United States v. Irish*, 285 F. App’x 326 (8th Cir. 2008); *United States v. Khami*, 362 F. App’x 501 (6th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *United States v. Smith*, 329 F. App’x 109 (9th Cir. 2009); *United States v. Gilbert*, 286 F. App’x 383 (9th Cir. 2008); *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009); *Rozier*, 598 F.3d 768 (per curiam); *United States v. Battle*, 347 F. App’x 478 (11th Cir. 2009); *Baer v. Lynch*, 636 F. App’x 695 (7th Cir. 2016). *See also United States v. Phillips*, 827 F.3d 1171, 1175 (9th Cir. 2016) (upholding ban based on prior conviction for misprision of felony, because while it “is not a violent crime,” it is not “purely passive” either, and because it has been a federal felony since even before the ratification of the Second Amendment).

an as-applied challenge.”<sup>170</sup> So the lifetime prohibition for all felons “may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent.”<sup>171</sup>

The First Circuit similarly noted: “given the ‘presumptively lawful’ reference in *Heller*—the Supreme Court may be open to claims that some felonies do not indicate potential violence and cannot be the basis for applying a categorical ban.”<sup>172</sup>

In *United States v. Pruess* (“*Pruess II*”),<sup>173</sup> the Fourth Circuit rejected a challenge by a non-violent felon who could not “rebut the presumption of lawfulness of the felon-in-possession prohibition as applied to him”; he had repeatedly violated firearms laws.<sup>174</sup>

The Third Circuit elaborated on how “to raise a successful as-applied challenge”:

Barton must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections. For instance, a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen. Similarly, a court might find that a felon whose crime of conviction is decades-old poses no continuing threat to society. The North Carolina Supreme Court did just that in *Britt v. State*, 363 N.C. 546, 681 S.E.2d 320 (2009), finding that a felon convicted in 1979 of one count of possession of a controlled substance with intent to distribute had a constitutional right to keep and bear arms, at least as that right is understood under the North Carolina Constitution.<sup>175</sup>

170. *Williams*, 616 F.3d at 692.

171. *Id.* at 693.

172. *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011).

173. *United States v. Pruess*, 703 F.3d 242 (4th Cir. 2012) [hereinafter *Pruess II*].

174. *Id.* at 246.

175. *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011). The defendant in *Barton* was unable to develop the basis for his as-applied challenge and 18 U.S.C. § 922(g)(1) was upheld. *Cf.* *United States v. McCane*, 573 F.3d 1037, 1040 (10th Cir. 2009) (“Non-violent felons, for example, certainly have the same right to self-defense in their homes as non-felons . . . The question may be less clear, however, where the underlying felony is non-violent, such as financial fraud, perjury, or misleading federal investigators . . .”); *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010) (“[F]elon-in-possession laws could be criticized as ‘wildly overinclusive’ for encompassing nonviolent offenders . . .”); *United States v. Duckett*, 406 F. App’x 185, 187 (9th Cir. 2010) (Ikuta, J., concurring) (“[W]ere I not bound by [*Vongxay*], I would examine whether, notwithstanding the Supreme Court’s dicta in [*Heller*], the government has a substantial interest in limiting a non-violent felon’s constitutional right to bear arms . . . Indeed, other than felon disenfranchisement laws, which are grounded in §2 of the Fourteenth Amendment, I can think of no other constitutional disability that applies only to a certain category of persons . . . who may be excluded from ever exercising the right.”) (citations, brackets, emphasis, and quotations omitted); *United States v. Phillips*, 827 F.3d 1171, 1174 (9th Cir. 2016) (“[T]here are good reasons to be

The Fourth Circuit offered similar guidance:

[T]he Supreme Court's declaration in *Heller* that felon in possession statutes are "presumptively lawful regulatory measures" reinforces the fact that a litigant claiming an otherwise constitutional enactment is invalid as applied to him must show that his factual circumstances remove his challenge from the realm of ordinary challenges.<sup>176</sup>

The en banc Seventh Circuit in the influential *Skoien* case rejected a facial challenge to the lifetime gun ban for domestic violence misdemeanants, but suggested that there could be an as-applied challenge by misdemeanants who have been law-abiding for an extended period of time.<sup>177</sup> The Ninth Circuit in *Chovan* rejected such a challenge asserted by a law-abiding citizen of fifteen years, because Chovan "ha[d] not presented evidence to directly contradict the government's evidence that the rate of domestic violence recidivism is high. Nor has he directly proved that if a domestic abuser has not committed domestic violence for fifteen years, that abuser is highly unlikely to do so again."<sup>178</sup> In *Schrader v. Holder*,<sup>179</sup> the D.C. Circuit did not directly address the issue, but explained that it "would hesitate to find" a sixty-four-year-old veteran who was convicted over four decades prior of common-law misdemeanor assault and battery to be "outside the class of 'law-abiding, responsible citizens' whose possession of firearms is, under *Heller*, protected by the Second Amendment."<sup>180</sup>

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skeptical of the constitutional correctness of categorical, lifetime bans on firearm possession by all 'felons'").

176. *United States v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012). The *Moore* court would "not foreclose the possibility that a case might exist in which an as-applied Second Amendment challenge to § 922(g)(1) could succeed," but the defendant in that case was "not remotely close" to succeeding, because of his lengthy criminal history. The Fourth Circuit followed this framework in *United States v. Smoot*, 690 F.3d 215 (4th Cir. 2012). "Smoot's criminal history [was] likewise remarkably egregious." *Id.* at 221.

177. *See United States v. Skoien*, 614 F.3d 638, 638 (7th Cir. 2010). The case at issue, however, involved a recently charged recidivist, and did not require the court to examine the more complex issues surrounding § 922(g)(9). "Skoien is poorly situated to contend that the statute creates a lifetime ban for someone who does not pose any risk of further offenses . . . . A person to whom a statute properly applies can't obtain relief based on arguments that a differently situation person might present." *Id.* at 645.

178. *United States v. Chovan*, 735 F.3d 1127, 1142 (9th Cir. 2013).

179. 704 F.3d 980 (D.C. Cir. 2013).

180. *Id.* at 991.

VI. APPLYING STEP ONE OF THE TWO-PART TEST: DOES THE CHALLENGED LAW IMPOSE A BURDEN ON CONDUCT FALLING WITHIN THE SCOPE OF THE SECOND AMENDMENT'S GUARANTEE?

In this Part, we analyze decisions about whether something is within the scope of the right to arms. If something is not within the scope, then that is the end of any Second Amendment challenge. If something is within the Second Amendment scope, then the case continues, for evaluation under heightened scrutiny. We will address the heightened scrutiny rules later in this Article.

Part VI.A examines whether various types of arms have any Second Amendment protection. Part VI.B considers whether various types of persons have any Second Amendment protection. Part VI.C examines various activities that may or may not have Second Amendment protection. To reiterate: we are only looking at whether particular cases rise to being Second Amendment cases at all. We are not yet considering whether a restriction on the Second Amendment might be upheld in Step Two, following application of heightened scrutiny.

The most straightforward way for the government to win under Step One is to carry its burden of proving that the type of arm, person, or activity has historically been considered outside the scope of the Second Amendment right.<sup>181</sup>

The inquiry at Step One is primarily textual and historical. In the words of the Fifth Circuit, “[t]o determine whether a law impinges on the Second Amendment right, we look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee . . . *Heller* illustrates that we may rely on a wide array of interpretative materials to conduct a historical analysis.”<sup>182</sup>

According to the Fourth Circuit:

This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny.<sup>183</sup>

Thus, “there are certain types of firearms regulations that do not govern conduct within the scope of the Amendment,” said the D.C. Circuit.<sup>184</sup>

All published opinions place the burden of proof on the government at Step One<sup>185</sup>: “If the government cannot establish this—if the historical

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181. See *supra* note 114.

182. *NRA v. BATFE*, 700 F.3d 185, 194 (5th Cir. 2012).

183. *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (citations omitted).

184. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected—then there must be a second inquiry into the strength of the government’s justification for restricting or regulating the exercise of Second Amendment rights.”<sup>186</sup> An unpublished opinion from the Fourth Circuit appears to place the burden of proof on the individual.<sup>187</sup>

It should be noted that “even if the regulated activity presumably falls outside the scope of the Second Amendment right, a regulation may still be subject to an as-applied challenge.”<sup>188</sup>

#### A. Which Arms Are Second Amendment Arms?

The Second Amendment guarantees the right to keep and bear “arms.” This is not limited to firearms.<sup>189</sup> Under *Heller*, all bearable arms are presumed to be covered by the Second Amendment. The government may rebut the presumption by introducing sufficient historical evidence, as the Second Circuit explained:

*Heller* emphasizes that the “the Second Amendment extends, prima facie, to all instruments that constitute bearable arms.” *Heller*, 554 U.S. at 582. In other words, it identifies a presumption in favor of Second Amendment protection, which the State bears the initial burden of rebutting. See *Ezell*, 651 F.3d at 702–03 (“[I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment ... then the analysis can stop there....” (emphasis supplied)); cf. *Virginia v. Black*, 538 U.S. 343, 369 (2003) (Scalia, J., concurring in part, concurring in the judgment

185. Although, in *Berron v. Illinois Concealed Carry Licensing Review Bd.*, 825 F.3d 843 (7th Cir. 2016), Judge Easterbrook mistakenly applied a provision of the Administrative Procedure Act that automatically places the burden on the challenger. *Id.* at 847–48.

186. *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011). “[I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 or 1868—then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.” *Id.* at 702–03; see also *supra* note 114.

187. See *United States v. Chafin*, 423 F. App’x 342, 344 (4th Cir. 2011) (“Chafin contends that his conduct—the sale of a firearm to an unlawful user of drugs—falls within the historical scope of the Second Amendment. However, Chafin has not pointed this court to any authority, and we have found none, that remotely suggests that, at the time of its ratification, the Second Amendment was understood to protect an individual’s right to *sell* a firearm . . . . Accordingly, Chafin’s argument that § 922(d)(3) is unconstitutional under *Heller* must be rejected.”) (internal citation and quotation omitted). The unpublished *Chafin* opinion is plainly wrong. See *infra* Part VI.C.

188. *United States v. Greeno*, 679 F.3d 510, 521 (6th Cir. 2012); *United States v. Barton*, 633 F.3d 168, 172–73 (3d Cir. 2011); see *infra* Part V.C.

189. See, e.g., *State v. DeCiccio*, 105 A.3d 165 (Conn. 2014) (police batons, various knives); *People v. Yanna*, 824 N.W.2d 241 (Mich. App. 2012) (stun guns); *State v. Herrmann*, 873 N.W.2d 257 (Wis. Ct. App. 2015) (switchblade knives); David B. Kopel, Clayton Cramer & Joseph P. Olson, *Knives and the Second Amendment*, 47 U. MICH. J.L. REFORM 175 (2013).

in part, and dissenting in part) (defining “prima facie evidence” as that which, “if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports” (quoting Black’s Law Dictionary 1190 (6th ed.1990))).<sup>190</sup>

*Heller* itself explains that not all “arms” are protected by the Second Amendment. The arms that are not protected—that is, the arms for which the presumption of coverage has been rebutted—are those that are “dangerous and unusual.”<sup>191</sup> These are the opposite of arms that are in “common use” and “[t]ypically possessed by law-abiding citizens for lawful purposes.”<sup>192</sup> According to the *Heller* Court:

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those “in common use at the time.” We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of “dangerous and unusual weapons.”<sup>193</sup>

In *Miller*, the Supreme Court had held that a shotgun with a barrel less than eighteen inches in length was not necessarily covered by the Second Amendment.<sup>194</sup> The case was remanded for fact-finding, because the district court had quashed an indictment for violating the tax and registration system for short shotguns, but had not received any evidence about the uses of such guns.<sup>195</sup> According to *Heller*’s explanation of the meaning of *Miller*, the *Miller* case said “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. That accords with the historical understanding of the scope of the right.”<sup>196</sup>

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190. *NYSRA, Inc. v. Cuomo*, 804 F.3d 242, 257 n.3 (2d Cir. 2015). The court held a ban on the Remington 7615 unconstitutional because the government failed to rebut the presumption that it was protected by the Second Amendment; the government presented no evidence or argument regarding the weapon. *See id.* at 268–69. For an argument that the Second Amendment should not be limited to “bearable” arms, see Dan Terzian, *The Right to Bear (Robotic) Arms*, 117 PENN ST. L. REV. 755 (2013).

191. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

192. *Id.* at 625.

193. *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

194. *Miller*, 307 U.S. at 178.

195. *Id.*

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. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

*Id.*

196. *Heller*, 554 U.S. at 625.

What does “dangerous and unusual” mean? The Ninth Circuit followed the Supreme Court by treating the questions of “dangerous” and “unusual” as distinct: “To determine this, we consider whether the weapon has uniquely dangerous propensities and whether the weapon is commonly possessed by law-abiding citizens for lawful purposes.”<sup>197</sup> In other words, a weapon can be “dangerous” but not “unusual,” or vice versa. The “dangerous and unusual exclusion” is only for arms that are dangerous *and* unusual. The Supreme Court took the same approach in *Caetano*, declining to consider the dangerousness of stun guns because it had already determined that the lower court’s unusualness analysis was flawed.<sup>198</sup> Similarly, the Fifth Circuit in *Hollis v. Lynch*<sup>199</sup> conducted separate analyses to determine first whether machineguns are dangerous, then whether machineguns are also unusual.<sup>200</sup>

*Heller* provides a useful baseline. All weapons are dangerous, and *Heller* tells us that handguns (which are very frequently used in crime, and disproportionately so, compared to their percentage of the gun stock) are protected by the Second Amendment.<sup>201</sup> Ergo, a “dangerous” weapon must, at least, be more dangerous than handguns.

Second, something that is “unusual” would, at the least, have to be much more unusual than the gun at issue before the Court—namely Dick Heller’s 9-shot revolver.<sup>202</sup>

The Third Circuit added more clarity to the phrase “dangerous and unusual” when it held that the doctrine pertains to the weapon itself, as opposed to the manner in which the weapon is used.<sup>203</sup> Soon after, the Fifth Circuit reached the same conclusion in *Hollis*.<sup>204</sup>

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197. *Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015).

198. *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (*per curiam*); *see also id.* at 1031 (Alito, J., concurring) (“As the *per curiam* opinion recognizes, this is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual. Because the Court rejects the lower court’s conclusion that stun guns are ‘unusual,’ it does not need to consider the lower court’s conclusion that they are also ‘dangerous.’”).

199. 827 F.3d 436 (5th Cir. 2016).

200. *Id.*

201. *Heller*, 554 U.S. at 693–713 (Breyer, J., dissenting) (discussing social science data about frequent criminal misuse of handguns).

202. *See* Exhibit A, in *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004), *rev’d sub nom.*, *Heller*, 554 U.S. 570.

203. *United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame, Unknown Caliber Serial No. LW001804*, 822 F.3d 136, 143 (3d Cir. 2016) [hereinafter *United States v. One (1) Palmetto*]. “*Heller* plainly states that mere possession of certain weapons may be prohibited.” *Id.*

204. *Hollis*, 827 F.3d at 448 (“*Hollis* then argues that *Heller*’s dangerous and unusual test refers not to the characteristics of a class of weapons but the manner in which weapons are used. *Heller*, though, said ‘that the sorts of *weapons* protected [are] those in common use at the time . . . [and] that [this] limitation is fairly supported by the historical tradition of prohibiting the carrying

### 1. Pipe Bombs

An easy case for “dangerous and unusual” vs. common, typical, and for lawful purposes was *United States v. Tagg*.<sup>205</sup> The Eleventh Circuit held that pipe bombs are not covered by the Second Amendment because they are not typically possessed by law-abiding citizens for lawful purposes.<sup>206</sup>

### 2. Machine Guns

The 1939 *Miller* case had involved the National Firearms Act of 1934, whose tax and registration system applies to machine guns as well as short shotguns.<sup>207</sup> *Heller* opined that it would be “startling” to interpret the Second Amendment as rendering the National Firearms Act’s restriction on machine guns unconstitutional.<sup>208</sup>

The circuit courts have enthusiastically embraced this dicta.<sup>209</sup> Every post-*Heller* circuit court that has addressed the machine gun issue has rejected Second Amendment claims.<sup>210</sup>

of dangerous and unusual *weapons*.’ Thus, Hollis’s argument is tantamount to asking us to overrule the Supreme Court.” *Id.* at 447–48 (citations omitted) (alterations in original).

205. 572 F.3d 1320 (11th Cir. 2009).

206. *Id.* at 1326 (“Applying *Heller* to the facts of this case, we conclude that the pipe bombs at issue were not protected by the Second Amendment. Unlike the handguns in *Heller*, pipe bombs are not typically possessed by law-abiding citizens for lawful purposes.”).

207. *United States v. Miller*, 307 U.S. 174, 174 (1939).

208. *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008).

209. That being said, the Fifth Circuit made clear that *Heller*’s dicta alone cannot justify restrictions on machine guns. *See Hollis*, 827 F.3d at 448 (“We conclude that these passages from *Heller* directly apply to the claims Hollis advances. Still, it is appropriate to undertake an independent inquiry as to whether machineguns are protected by the Second Amendment because these passages are dicta.”).

210. *See United States v. Fincher*, 538 F.3d 868, 872 (8th Cir. 2008) (“Fincher’s possession of the [machine] guns did not fall within the protection of the Second Amendment.”); *United States v. Ross*, 323 F. App’x 117, 120 (3d Cir. 2009) (“Nothing in *Heller* supports Ross’s challenge to the constitutionality of a statute criminalizing the possession of a machine gun.”); *Hamblen v. United States*, 591 F.3d 471, 474 (6th Cir. 2009) (“whatever the individual right to keep and bear arms might entail, it does not authorize an unlicensed individual to possess unregistered machine guns for personal use.”); *United States v. Marzarella*, 614 F.3d 85, 94 (3d Cir. 2010) (“The Supreme Court has made clear the Second Amendment does not protect those types of weapons.”); *United States v. Hatfield*, 376 F. App’x 706, 707 (9th Cir. 2010) (“[M]odern sawed-off shotguns are not typically possessed for lawful purposes and constitute ‘dangerous and unusual weapons’ beyond the scope of the Second Amendment’s protection.”) (internal citation omitted); *United States v. Allen*, 630 F.3d 762, 766 (8th Cir. 2011) (Allen’s challenge to the constitutionality of the machinegun ban was foreclosed by *Fincher*, and “Nothing in [*McDonald*]—decided after *Fincher*—changes the rule in this circuit.”); *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) (“In short, machine guns are highly ‘dangerous and unusual weapons’ that are not ‘typically possessed by law-abiding citizens for lawful purposes.’”) (citation omitted); *United States v. Zaleski*, 489 F. App’x 474, 475 (2d Cir. 2012) (“Regardless of his membership in the unorganized militia . . . the Second Amendment does not protect Zaleski’s

In *United States v. Fincher*,<sup>211</sup> the Eighth Circuit upheld Fincher's conviction for possessing a machine gun in violation of 18 U.S.C. §§ 922(o) and 924(a)(2) and for possessing an unregistered sawed-off shotgun in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871. The court rejected Fincher's argument that he had a Second Amendment right to possess these firearms. "In discussing the limitations the government can place on an individual's right to possess firearms, the Court noted that *Miller* does not protect 'weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.'"<sup>212</sup> The court explained:

[U]nder *Heller*, Fincher's possession of the guns is not protected by the Second Amendment. Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use. Furthermore, Fincher has not directly attacked the federal registration requirements on firearms, and we doubt that any such attack would succeed in light of *Heller*. Accordingly, because Fincher's possession of guns is not protected by the Second Amendment, the district court did not abuse its discretion in preventing him from arguing otherwise to the jury.<sup>213</sup>

Historically, machine guns have always been rare in the hands of law-abiding citizens, partly because of the enormous cost of ammunition. When they were introduced to the U.S. market in the 1920s, they were a commercial failure for law-abiding citizens, although they did become popular with bootleggers.<sup>214</sup> However, in compliance with the NFA system, over a hundred thousand machine guns were lawfully possessed by citizens as of 1986, when Congress enacted a statute prohibiting sales to citizens of machine guns manufactured after May 19, 1986. This led the Ninth Circuit to adopt the circular argument that the machine gun prohibition is constitutional because machine guns are prohibited:

A machine gun is "unusual" because private possession of all new machine guns, as well as all existing machine guns that were not lawfully possessed before the enactment of § 922(o), has been unlawful since 1986. Outside of a

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personal possession of machine guns."); *United States v. One (1) Palmetto*, 822 F.3d 136, 142 (3d Cir. 2016) ("[T]he Second Amendment does not protect the possession of machine guns. They are not in common use for lawful purposes."); *Hollis*, 827 F.3d at 451 ("Machineguns are dangerous and unusual and therefore not in common use. They do not receive Second Amendment protection, so we uphold Section 922(o) at step one of our framework.").

211. 538 F.3d at 870.

212. *Id.* at 873 (quoting *Heller*, 554 U.S. at 625).

213. *Id.* at 874.

214. See JOHN ELLIS, *THE SOCIAL HISTORY OF THE MACHINE GUN* 151 (1975) (For sales to civilians: "Commercially, then, the gun was a flop."); see *id.* at 152–60 (detailing extensive use by gangsters); *Friedman v. City of Highland Park*, 784 F.3d 406, 416 (7th Cir. 2015) ("nobody has argued, before or since, that ordinary citizens used these weapons for lawful purposes").

few government-related uses, machine guns largely exist on the black market.<sup>215</sup>

This type of reasoning was persuasively criticized by the Seventh Circuit in *Friedman*; a prohibition cannot be its own constitutional justification.<sup>216</sup>

The Third Circuit held that § 922(o)'s ban on new machine guns applies to trusts.<sup>217</sup> Although trusts are not specifically listed among the entities defined as a "person" in the Gun Control Act,<sup>218</sup> the court reasoned that to hold otherwise "would allow any party—including convicted felons, who are expressly prohibited from possessing firearms under 18 U.S.C. § 922(g)(1)—to avoid liability under this section simply by placing a machine gun 'in trust.'"<sup>219</sup> The Fifth Circuit held the same in *Hollis*.<sup>220</sup>

215. *Henry*, 688 F.3d 640.

216.

And relying on how common a weapon is at the time of litigation would be circular to boot. Machine guns aren't commonly owned for lawful purposes today because they are illegal; semi-automatic weapons with large-capacity magazines are owned more commonly because, until recently (in some jurisdictions), they have been legal. Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned. A law's existence can't be the source of its own constitutional validity.

*Friedman*, 784 F.3d at 409. *But see* *Hollis v. Lynch*, 827 F.3d 436, 450–51 (5th Cir. 2016) ("Hollis and amici make one more argument. They claim the reason machineguns are not more popular is because they have been banned. This exact point was made by Justice Breyer in his dissent in *Heller* . . . This argument was made in dissent, though, illustrating that it was considered by the *Heller* majority and rejected. This argument was insufficient to carry the day in *Heller* and accordingly must fail here too.").

217. *United States v. One (1) Palmetto*, 822 F.3d 136, 140 (3d Cir. 2016).

218. Under 18 U.S.C. § 921, "The term 'person' and the term 'whoever' include any individual, corporation, company, association, firm, partnership, society, or joint stock company." 18 U.S.C. § 921 (2012).

219. *One (1) Palmetto*, 822 F.3d at 140. The court elaborated:

Interpreting the statute so as to include this exception would thereby swallow the rule. We refuse to conclude that with one hand Congress intended to enact a statutory rule that would restrict the transfer or possession of certain firearms, but with the other hand it created an exception that would destroy that very rule.

*Id.* at 140–41.

220. *Hollis*, 827 F.3d at 443.

Hollis contends that it is not he, personally, who would make and possess the machinegun but rather the Hollis Trust. Hollis argues that Section 922(o) only bars "persons" from making and possessing such weapons, and the relevant definition of persons does not include a trust. Therefore, because it is the Hollis Trust, with Hollis as trustee acting on its behalf, that desires to manufacture and possess the machinegun, Section 922(o) does not apply. This argument strains common sense and misunderstands trust law. Historically, "a trust was not considered a distinct legal entity[;]" it was "a 'fiduciary relationship' between multiple people." . . . In addition, the relevant definition of "person" uses the term "include," signifying a non-exhaustive list.

*Id.*

### 3. Suppressors, Grenades, and Directional Mines

In an unpublished opinion, *U.S. v. McCartney*,<sup>221</sup> the Ninth Circuit held that machine guns, silencers, grenades, and directional mines all fall outside of the Second Amendment's protections. While all these weapons were deemed dangerous and unusual, silencers, grenades, and directional mines were found to be "even more dangerous and unusual than machine guns."<sup>222</sup> For most of the listed items, the result in the unpublished *McCartney* seems unlikely to be changed by the fuller analysis that would be appropriate in a published opinion. For "silencers" (more properly, "suppressors" or "moderators"), the issue is much closer than *McCartney* recognized.<sup>223</sup>

The Fifth Circuit stated that grenades "may lawfully be barred from private ownership" in dicta in *Hollis*.<sup>224</sup>

### 4. Obliterated Serial Numbers

In *U.S. v. Marzzarella*,<sup>225</sup> the Third Circuit assumed that 18 U.S.C. § 922(k), which prohibits the possession of firearms with "removed, obliterated, or altered" serial numbers, burdened the Second Amendment right,<sup>226</sup> but was very skeptical in doing so.<sup>227</sup> "Because the presence of a serial number does not impair the use or functioning of a weapon in any way, the burden on Marzzarella's ability to defend himself is arguably *de minimis*."<sup>228</sup> But noting that "[a]n unmarked firearm . . . is no more damaging than a marked firearm,"<sup>229</sup> the court proceeded to Step Two of the Two-Part Test with the understanding that "Marzzarella's conduct may still fall within the Second

221. 357 F. App'x 73 (9th Cir. 2009).

222. *Id.* at 76.

223. See Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization & the Second Amendment*, 46 CUMBERLAND L. REV. 33 (2016).

224. *Hollis*, 827 F.3d at 447.

225. 614 F.3d 85 (3d Cir. 2010).

226. "[W]e hesitate to say Marzzarella's possession of an unmarked firearm in his home is unprotected conduct." *Id.* at 101. "[W]e cannot be certain that the possession of unmarked firearms in the home is excluded from the right to bear arms. Because we conclude § 922(k) would pass constitutional muster even if it burdens protected conduct, we need not decide whether Marzzarella's right to bear arms was infringed." *Id.* at 95.

227.

The District Court could not identify, and Marzzarella does not assert, any lawful purpose served by obliterating a serial number on a firearm. Because a firearm with a serial number is equally effective as a firearm without one, there would appear to be no compelling reason why a law-abiding citizen would prefer an unmarked firearm. These weapons would then have value primarily for persons seeking to use them for illicit purposes.

*Id.*

228. *Id.* at 94.

229. *Id.* at 95.

Amendment because his possession of the Titan pistol in his home implicates his interest in the defense of hearth and home—the core protection of the Second Amendment.”<sup>230</sup>

##### 5. Bans on Certain Ammunition

The Ninth Circuit in *Jackson* determined that a ban on the sale of hollow-point ammunition implicated the Second Amendment:

The Second Amendment protects “arms,” “weapons,” and “firearms”; it does not explicitly protect ammunition. Nevertheless, without bullets, the right to bear arms would be meaningless. A regulation eliminating a person’s ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose . . . Thus “the right to possess firearms for protection implies a corresponding right” to obtain the bullets necessary to use them . . . Indeed, *Heller* did not differentiate between regulations governing ammunition and regulations governing the firearms themselves. Rather, the Court considered the burden certain gunpowder-storage laws imposed on the Second Amendment right, and determined that they did not burden “the right of self-defense as much as an absolute ban on handguns.” This observation would make little sense if regulations on gunpowder and ammunition fell outside the historical scope of the Second Amendment. Conducting our historical review, we conclude that prohibitions on the sale of ammunition do not fall outside “the historical understanding of the scope of the [Second Amendment] right.”<sup>231</sup>

Justice Thomas quoted *Jackson* in a Sixth Amendment case, illustrating the point that constitutional rights “implicitly protect those closely related acts necessary to their exercise.”<sup>232</sup>

In an unpublished opinion, the Fourth Circuit upheld a ban on armor-piercing ammunition, deciding that armor-piercing ammunition is not typically possessed by law-abiding citizens for lawful purposes.<sup>233</sup>

All other courts to consider the issue of ammunition have concluded that the Second Amendment includes ammunition.<sup>234</sup>

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230. *Marzarella*, 614 F.3d at 94.

231. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967–68 (9th Cir. 2014) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 632 (2008)).

232. *Luis v. United States*, 136 S. Ct. 1083, 1097 (2016).

233. *Kodak v. Holder*, 342 F. App’x 907, 908–09 (4th Cir. 2009).

234. *See Pruess II*, 703 F.3d 242, 245 n.1 (4th Cir. 2012) (treating Supreme Court legal rule about guns as having the same meaning for ammunition); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (“The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn’t mean much without the training and practice that make it effective.”); *Herrington v. United States*, 6 A.3d 1237, 1243 (D.C. 2010) (right to ammunition is coextensive with the right to firearms); *Andrews v. State*, 50 Tenn. 165, 178 (1871) (“The right to keep arms, necessarily involves the right . . . to purchase and provide ammunition suitable for such arms”).

## 6. Bans on Guns and Magazines

After the Supreme Court's decision in *District of Columbia v. Heller*, the District Council enacted a new set of gun control ordinances. These ordinances were challenged by several plaintiffs, including Dick Anthony Heller, the victorious Supreme Court plaintiff. Two D.C. Circuit opinions arising from the challenge have thus acquired the shorthand names *Heller II* and *Heller III*. This is something of a misnomer, because the D.C. Circuit cases were not continuations of the Supreme Court case, and they involve different issues.<sup>235</sup>

In *Heller II*, the D.C. Circuit considered a challenge to a D.C. ordinance banning "large-capacity magazines" (over ten rounds) and also banning many semi-automatic rifles (labeled "assault weapons").<sup>236</sup> In American history, such bans were very rare. Accordingly, the prohibitions could not be considered "longstanding."<sup>237</sup>

The evidence at the summary judgment stage left no doubt that the prohibited arms were "common."<sup>238</sup> However, the Circuit was unsure about the exact nature of the common use: "whether these weapons are commonly used or are useful specifically for self-defense or hunting and therefore whether the prohibitions of certain semi-automatic rifles and magazines holding more than

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235. Usually a case name earns a roman numeral when it is a continuation of the original case. For example, *Brown v. Board of Education* (1954) held that mandated racial segregation in the public schools violated the Equal Protection Clause. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). In the same case, with all the same parties, the 1955 *Brown II* case detailed the remedy that would be required in segregated school districts. *Brown v. Bd. of Educ.*, 349 U.S. 753, 755–56 (1955). Likewise, the *Turner I* case upheld some congressionally-imposed restrictions on cable television providers, and remanded other issues for further fact-finding. *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 626–27 (1994). After the remand, the case returned to the Supreme Court, and, thanks to sufficient facts, other cable restrictions were upheld in *Turner II*. *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 188, 185 (1997). The only continuity between the Supreme Court's decision in *District of Columbia v. Heller* and the D.C. Circuit decisions in *Heller II* and *Heller III* is that they have one plaintiff in common. *District of Columbia v. Heller*, 554 U.S. 570, 570 (2008); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011); *Heller v. District of Columbia (Heller III)*, 801 F.3d 264 (D.C. Cir. 2015).

236. *Heller II*, 670 F.3d at 1249.

237. *Id.* at 1260.

238. *Id.* at 1261 ("semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use' . . . Approximately 1.6 million AR–15s alone have been manufactured since 1986, and in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market. As for magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000. There may well be some capacity above which magazines are not in common use but, if so, the record is devoid of evidence as to what that capacity is; in any event, that capacity surely is not ten.").

ten rounds meaningfully affect the right to keep and bear arms.”<sup>239</sup> The panel proceeded to Step Two of the Two-Part Test anyway, by assuming without deciding that the prohibition of these arms impinges upon the Second Amendment right.<sup>240</sup>

The Second Circuit relied on this precedent in *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo* (“*NYSRPA*”).<sup>241</sup> The panel chose to “follow the approach taken by the District Courts and by the D.C. Circuit in *Heller II* and assume for the sake of argument that these ‘commonly used’ weapons and magazines are also ‘typically possessed by law-abiding citizens for lawful purposes.’”<sup>242</sup> It is surprising that the Second Circuit felt the need to make an assumption, after acknowledging that “nearly four million units of a single assault weapon, the popular AR-15, have been manufactured between 1986 and March 2013.”<sup>243</sup> Even the defendant’s figures (which were arguably too low) admitted that “approximately seven million” so-called assault weapons are owned nationwide,<sup>244</sup> and about seventy-five million “large-capacity magazines” are owned nationwide.<sup>245</sup> Yet the court could only muster an *assumption* that these arms are typically possessed by law-abiding citizens for lawful purposes.<sup>246</sup>

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239. *Id.* This statement is especially perplexing because the court explained in just the previous paragraph that tens of millions of these arms are in common use. If not used for self-defense, hunting, sport, or some other lawful purpose, it is impossible to imagine why these firearms and magazines are so overwhelmingly popular. *Cf.* *Friedman v. City of Highland Park*, 784 F.3d 406, 416 n.4 (7th Cir. 2015) (“Weapons can be commonly used by both criminals and law-abiding citizens. For example, the court correctly notes that handguns have long been the preferred weapon for criminals and are ‘responsible for the vast majority of gun violence in the United States . . . .’ This, of course, is the same type of weapon that *McDonald* recognized as covered under the Second Amendment because it was (and still is) ‘the most preferred firearm in the nation.’ . . . In evaluating common use, *McDonald* considered as relevant only use by law-abiding citizens.”) (internal citations omitted).

240. *Heller II*, 670 F.3d at 1261. The court was uncertain whether the prohibitions impinged on the Second Amendment right, but it was “reasonably certain” that the prohibitions did not substantially burden the right. *Id.* at 1262.

241. 804 F.3d 242, 253 (2d Cir. 2015).

242. *Id.* at 257.

243. *Id.* at 255.

244. *Id.*

245. *Id.*

246. *NYSRPA*, 804 F.3d at 257. The court did find the far less common Remington 7615 to be deserving of Second Amendment protection, because by failing to present any argument at all regarding the Remington 7615, the government failed to rebut the presumption emphasized by *Heller* that the Second Amendment extends to all bearable arms. *Id.* at 257 n.73; see *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

In *Highland Park*, the Seventh Circuit similarly had trouble determining whether “assault rifles” were common:

Highland Park concedes uncertainty whether the banned weapons are commonly owned; if they are (or were before it enacted the ordinance), then they are not unusual. The record

The Ninth Circuit in *Fyock v. Sunnyvale* confronted a similar law—a municipal ordinance banning magazines over ten rounds, with no grandfathering. The Ninth Circuit found that the evidence, at the summary judgment stage, might support a finding that the magazines were “dangerous” but did not conclusively show that they were “unusual.”<sup>247</sup>

The Fifth Circuit provided a useful summary in *Hollis* of the different methods courts have used to determine if particular arms are in common use.

*Heller* concluded that handguns are “the most popular weapon chosen by Americans for self-defense in the home” and are therefore not unusual. 554 U.S. at 629. Every post-*Heller* case to grapple with whether a weapon is “popular” enough to be considered “in common use” has relied on statistical data of some form, creating a consensus that “common use is an objective and largely statistical inquiry.” *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015) (quotation marks omitted). Still, “what line separates ‘common’ from ‘uncommon’ ownership is something the Court did not say.” *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015). As a result, courts have differed in the statistics used and methodological approaches adopted.

Some courts have taken the view that the total number of a particular weapon is the relevant inquiry. The Second Circuit determined that “large-capacity magazines” are in common use solely because of their high absolute number: 50 million. *Cuomo*, 804 F.3d at 255. Other courts have relied on proportions

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shows that perhaps 9% of the nation’s firearms owners have assault weapons, but what line separates “common” from “uncommon” ownership is something the Court did not say.

*Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015).

247. *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015).

Although *Sunnyvale* presented evidence regarding the increased danger posed by large-capacity magazines, it did not present significant evidence to show that large-capacity magazines are also “unusual.” Instead, *Fyock* presented evidence that magazines, including some meeting *Sunnyvale*’s definition of large-capacity magazines, are frequently offered for commercial sale and marketed for self-defense. He also presented sales statistics indicating that millions of magazines, some of which again were magazines fitting *Sunnyvale*’s definition of large-capacity magazines, have been sold over the last two decades in the United States.

Because *Fyock* relies primarily on marketing materials and sales statistics, his evidence does not necessarily show that large-capacity magazines are in fact commonly possessed by law-abiding citizens for lawful purposes. However, we cannot say that the district court abused its discretion by inferring from the evidence of record that, at a minimum, magazines are in common use. And, to the extent that certain firearms capable of use with a magazine—e.g., certain semiautomatic handguns—are commonly possessed by law-abiding citizens for lawful purposes, our case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable.

*Id.*

and percentages. The Fourth Circuit found that AR–15s are in common use because they accounted for “5.5 percent of all firearms, and 14.4 percent of all rifles produced in the [United States] . . .” *Kolbe v. Hogan*, 813 F.3d 160, 174, *reh'g en banc granted*, 636 Fed. Appx. 880 (4th Cir. 2016). The Seventh Circuit, though, held the opposite when it determined that AR–15s are not in common use because only “9% of the nation’s firearms owners have assault weapons.” *Friedman*, 784 F.3d at 409. These cases indicate there is considerable variety across the circuits as to what the relevant statistic is and what threshold is sufficient for a showing of common use.

More recently, two Supreme Court justices observed that the “relevant statistic” involves the counting of jurisdictions. In addressing whether stun guns are in common use, Justice Alito, joined by Justice Thomas, implied that the number of states that allow or bar a particular weapon is important:

[T]he number of Tasers and stun guns is dwarfed by the number of firearms. This observation may be true, but it is beside the point . . . . The more relevant statistic is that [200,000] . . . stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 States . . . . While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country.

[*Caetano v. Massachusetts*, 136 S. Ct. 1027, 1032–33 (2016)] (citations and quotation marks omitted). These two justices suggested that the 200,000 absolute number, *plus* that 45 states have “accepted [stun guns] as a legitimate means of self-defense,” was enough to determine that the stun gun is in common use. [*Caetano*, 136 S. Ct. at 1032–33].

This wide variety in methodological approaches suggest that these statistics—raw number, percentage and proportion, jurisdiction-counting—identify potentially relevant data for the common use inquiry. For purposes of the present case, we conclude it does not matter which set of numbers we adopt. None of them allow a conclusion that a machinegun is a usual weapon.<sup>248</sup>

### B. *Types of Individuals*

As noted *supra*, there are many cases that tersely uphold gun bans for convicted felons or the mentally ill, with a straightforward cite to *Heller*’s language on the topic.<sup>249</sup> There are also other cases, likewise noted above, which extrapolate from these two categories of prohibited persons to other prohibited person categories which were not enumerated by *Heller*. Other courts, however, have heeded the Third Circuit’s warning about not glibly using the felons/mentally ill language to simply assume that other prohibitions are constitutionally legitimate.<sup>250</sup> In this Part VI.B, we examine cases where courts have taken a more deliberative approach. These prohibited persons cases

248. *Hollis v. Lynch*, 827 F.3d 436, 448–49 (5th Cir. 2016) (citations simplified).

249. *See supra* notes 130–131.

250. *See supra* notes 139–145.

conclude that the prohibition does or may affect Second Amendment rights. Accordingly, the courts proceed to Step Two, select intermediate scrutiny, and then uphold the prohibition.

### 1. Domestic Violence Misdemeanants and Persons Subject to Domestic Violence Protective Orders

One of the most influential cases to apply Step Two to persons subject to domestic violence misdemeanor or restraining order prohibitions was the Seventh Circuit's *United States v. Skoien*.<sup>251</sup> The Seventh Circuit proceeded with the understanding that domestic violence misdemeanants had Second Amendment rights, and that any burden on those rights must be tested under heightened scrutiny.<sup>252</sup>

The Ninth Circuit determined: "At the first step of the inquiry, we conclude that by prohibiting domestic violence misdemeanants from possessing firearms, § 922(g)(9) burdens rights protected by the Second Amendment."<sup>253</sup> The government had not met its burden of proving that as a historical matter, persons with domestic violence convictions were outside the Second Amendment right:

Because of "the lack of historical evidence in the record before us, we are certainly not able to say that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors. We must assume, therefore, that [Chovan]'s Second Amendment rights are intact and that he is entitled to some measure of Second Amendment protection to keep and possess firearms in his home for self-defense."<sup>254</sup>

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251. *United States v. Skoien*, 614 F.3d 638, 638 (7th Cir. 2010). The Seventh Circuit first applied a version of the Two-Part Test in *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), which was later vacated by the court's en banc decision in *Skoien*, 614 F.3d 638. After deciding *Skoien* (en banc) and *Williams* without explicitly adopting the Two-Part Test but essentially applying it, the court formally adopted the Two-Part Test in *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011).

252. The Seventh Circuit wrote:

We simply cannot say with any certainty that persons convicted of a domestic-violence misdemeanor are wholly excluded from the Second Amendment right as originally understood. Because *Skoien* is not categorically unprotected, the government's use of § 922(g)(9) against him must survive Second Amendment scrutiny. My colleagues evidently agree; they move on to discuss the standard for determining whether the disarmament of domestic-violence misdemeanants is constitutionally permissible. This inquiry is necessary only if *Skoien*'s Second Amendment rights are intact notwithstanding his domestic-violence conviction.

*Skoien*, 614 F.3d at 651 (Sykes, J., dissenting).

253. *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013).

254. *Id.* (quoting *United States v. Chester*, 628 F.3d 673, 681–82 (4th Cir. 2010)); *see also* *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (categorical ban on firearms possession

Similarly, in *United States v. Reese*, the Tenth Circuit explained in a restraining order case:

[T]here is little doubt that the challenged law, § 922(g)(8), imposes a burden on conduct, i.e., Reese's possession of otherwise legal firearms, that generally falls within the scope of the right guaranteed by the Second Amendment. Thus, we must proceed to the second part of the analysis and evaluate § 922(g)(8) under some form of means-end scrutiny.<sup>255</sup>

The Eighth Circuit was not sure if a person subject to a domestic violence restraining order could pass Step One. To be cautious, the court proceeded to Step Two, and upheld the ban under intermediate scrutiny.<sup>256</sup> The Court found the prohibition "consistent with a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens."<sup>257</sup>

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by a class of individuals must be supported by a "strong showing," and § 922(g)(9)'s ban on domestic violence misdemeanants was supported by such a "strong showing.").

255. *United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010) (internal quotations and brackets omitted).

256. *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011).

In *Chester*, the Fourth Circuit refused to analogize the presumptively lawful ban for felons with the ban for domestic violence misdemeanants; the court was unable to say that "the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors." *Chester*, 628 F.3d at 681.

Then in *Staten*, the Fourth Circuit assumed *arguendo* that a domestic violence misdemeanant's Second Amendment rights were intact, and thus should be examined under Step Two. *United States v. Staten*, 666 F.3d 154, 160–61 (4th Cir. 2011). *Staten* was necessary even though the Fourth Circuit addressed the same issue in *Chester* because *Chester* left major questions unresolved. First, the government failed to argue whether domestic violence misdemeanants were covered by the Second Amendment. Second, while the court did determine that intermediate scrutiny was the proper standard of review, it did not decide whether the ban passed intermediate scrutiny, but instead remanded to the district court for the parties to better develop their arguments. Meanwhile, *Staten* made its way up to the Court of Appeals, presenting the same issue.

Finally, in *Chapman*, the Fourth Circuit confronted the related issue of a defendant subject to a domestic violence restraining order:

Chapman takes the position that § 922(g)(8) imposes a burden on conduct falling within the scope of the Second Amendment's guarantee as historically understood. The government takes the opposite position. We need not and do not resolve this issue because, assuming *arguendo* that Chapman's Second Amendment rights are intact and that he is entitled to some measure of Second Amendment protection to keep and possess firearms and ammunition in his home for self-defense, our following analysis leads us to conclude that intermediate scrutiny applies and § 922(g)(8)(A)-(B) and (C)(ii), as-applied to Chapman, survives intermediate scrutiny.

*United States v. Chapman*, 666 F.3d 220, 225 (4th Cir. 2012).

257. *Bena*, 664 F.3d at 1184. The court was also persuaded that the burden was mitigated by the time-limited nature of the law:

The prohibition, moreover, need not apply in perpetuity, but only so long as a person is "subject to" a qualifying court order. In Iowa, the order terminates at the conclusion of a

It is true that the Framers and the public at large wanted gun owners to be virtuous and peaceable (except when fighting was necessary). This is one reason for the preference for militias over standing armies; because the professional soldier was entirely dependent on the government, and lived a life of constant obedience to others, it was believed that moral degradation would result.<sup>258</sup> It is equally true that the Framers and the American people wanted virtuous people as voters, jurors, elected officials, and so on. But there is simply no tradition—from 1791 or 1866—of prohibiting gun possession (or voting, jury service, or government service) for people convicted of misdemeanors or subject to civil protective orders. The colonies and then the states certainly knew how to ban firearms possession for people who were considered dangerous (namely, slaves and Indians).<sup>259</sup> This “tradition” cannot be extended to every person whom a modern legislature might consider dangerous. A modern ban might be upheld under heightened scrutiny, but there is no tradition that persons subject to novel modern bans have been historically considered to have no Second Amendment rights at all.

## 2. Addicts or Users of Illegal Drugs

In *Carter I*, the Fourth Circuit assumed *arguendo* that a law prohibiting firearms possession by a person “who is an unlawful user of or addicted to any controlled substance” implicates the Second Amendment. But the court rejected the argument that the core right of the Second Amendment was implicated, because Carter was not a law-abiding citizen.<sup>260</sup> On remand, the

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criminal case, or after a prescribed period if the action results in a conviction or deferred judgment and the defendant ceases to pose a danger to the victim. On a facial challenge, we conclude that the Second Amendment does not preclude this type of regulatory measure. (internal citations omitted).

*Id.*

258. See, e.g., Simeon Howard, *A Sermon Preached to the Ancient and Honorable Artillery Company in Boston, June 7, 1773*, reprinted in NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE P. MOCSARY & MICHAEL P. O’ SHEA, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* 126–32 (2012).

259. See JOHNSON ET AL., *supra* note 258, at 111–15 (collecting colonial statutes); Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, *supra* note 121, at 336–40 (state statutes disarming slaves and free people of color).

260. *United States v. Carter (Carter I)*, 669 F.3d 411, 416 (4th Cir. 2012).

[W]e will assume that Carter’s circumstances implicate the Second Amendment . . . and our remand in this case is to afford the government the opportunity to substantiate the record and Carter the opportunity to respond. If we ultimately conclude that step two cannot be satisfied, we will need to address the government’s argument under step one.

*Id.*

government produced sufficient evidence to pass Step Two, and the prohibition was upheld.<sup>261</sup>

Likewise, in *United States v. Yancey*, the Seventh Circuit required the government to make a Step Two “strong showing” in order to uphold the statutory ban on gun possession by drug users.<sup>262</sup>

### 3. Juveniles and Young Adults

In *United States v. Rene E.*,<sup>263</sup> the First Circuit held that a ban on juvenile possession of handguns<sup>264</sup> does not offend the Second Amendment. First, such prohibitions are longstanding and consistent with the founding generation’s understanding of the right to keep and bear arms.<sup>265</sup> Second, the challenged law contained sufficient exceptions for hunting, national guard duty, and defense in the home.<sup>266</sup>

*Rene E.* did not apply the two-part test, but rather a mixture of text, history, and policy analysis.

In *NRA v. BATFE*, the Fifth Circuit found a ban on the sale of handguns from gun stores to adults under the age of twenty-one<sup>267</sup> “consistent with a longstanding, historical tradition, which suggests that the conduct at issue falls outside the Second Amendment’s protection.”<sup>268</sup> The court felt “inclined to uphold the challenged federal laws at step one of our analytical framework” but proceeded to step two “in an abundance of caution,”<sup>269</sup> where it upheld the ban under intermediate scrutiny.<sup>270</sup>

In *NRA v. McCraw*,<sup>271</sup> the Fifth Circuit upheld a state ban prohibiting eighteen to twenty-year-old adults from carrying handguns in public. The court recognized that it was bound by the *BATFE* decision.<sup>272</sup>

261. *United States v. Carter (Carter II)*, 750 F.3d 462, 470 (4th Cir. 2014) (applying intermediate scrutiny).

262. *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010).

But though Congress may exclude certain categories of persons from firearm possession, the exclusion must be more than merely ‘rational,’ and must withstand ‘some form of strong showing.’ [*United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010)]. (We have thus far, like the Supreme Court, declined to wade into the “‘levels of scrutiny’ quagmire,” *id.*; see also [*District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008)] (striking down D.C.’s law “[u]nder any level of scrutiny”).

*Id.*

263. 583 F.3d 8, 9 (1st Cir. 2009).

264. 18 U.S.C. § 922(x)(2)(A) (2012).

265. *Rene*, 583 F.3d at 12–13.

266. *Id.* at 13.

267. 18 U.S.C. § 922(b)(1), (c)(1) and attendant regulations.

268. *NRA v. BATFE*, 700 F.3d 185, 203 (5th Cir. 2012).

269. *Id.* at 204.

270. *Id.* at 207.

271. 719 F.3d 338, 349 (5th Cir. 2013).

In *Horsley v. Trame*, the Seventh Circuit upheld a requirement that Firearm Owner Identification (FOID) card applicants between eighteen and twenty-one years old obtain the written consent of a parent or legal guardian.<sup>273</sup> FOID cards are required to lawfully possess or acquire a firearm in Illinois. Without deciding whether eighteen- to twenty-year-olds are within the scope of the Second Amendment, the court upheld the requirement under intermediate scrutiny, based on the alternative channels available for eighteen- to twenty-year-olds to obtain FOID cards, including an appeal to the Director of the Illinois State Police and upon denial there, judicial review.<sup>274</sup>

#### 4. Aliens

The above cases about prohibited persons have involved American citizens, who as a general class have Second Amendment rights. But what about aliens? Lawful permanent resident aliens have Second Amendment rights, according to every federal district court to consider the issue. The courts have struck down various state laws (typically dating from the 1920s) which prohibited keeping or bearing arms by all non-citizens.<sup>275</sup>

These decisions are fortified by Supreme Court doctrine on Equal Protection and the Supremacy Clause, which for decades have been interpreted to forbid almost all state discrimination against lawful resident aliens, except for some types of government employment.<sup>276</sup> No state government which has lost a case involving the arms rights of resident aliens has bothered with an appeal, probably because of futility.

Illegal aliens are a different matter. The majority of circuits to address the issue have held that illegal aliens have no Second Amendment rights. Consequently, a challenge to the federal statute prohibiting gun possession by

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272. *Id.* at 347 (5th Cir. 2013) (proceeding to Step Two of the Two-Part Test because of a concern about the institutional challenges in conducting a definitive review of the relevant historical record, just as the BATFE court did).

273. 808 F.3d 1126, 1134 (7th Cir. 2015).

274. *See id.* at 1131–32.

275. *E.g.*, *Veasey v. Wilkins*, No. 5:14–CV–369–BO, 2015 WL 1884832, at \*2–3 (E.D.N.C. Apr. 24, 2015) (granting preliminary injunction against statute barring permanent resident aliens from obtaining concealed handgun carry permits); *Fletcher v. Haas*, 851 F. Supp. 2d 287, 301–02 (D. Mass. 2012) (striking law against issuance of carry permits to legal aliens). *Cf.* *People v. Zerillo*, 219 Mich. 635, 635 (Mich. 1922) (arms ban for legal aliens violates state constitution); *People v. Nakamura*, 62 P.2d 246, 247 (Colo. 1936) (same). The *Veasey* case was not appealed. The legislature subsequently amended the statute. *See* H.R. 562, § 14–415.12(a)(1), 2015 Leg. Reg. Sess. (N.C. 2015).

276. *E.g.*, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418–20 (1948) (showing California may not forbid legal resident aliens to acquire commercial fishing licenses). For a pre-*Heller* analysis, see Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891, 944 (2007) (arguing for expanded state discretion).

illegal aliens fails Step One. The most thorough analysis was in the Fifth Circuit's *United States v. Portillo-Munoz*.<sup>277</sup>

The courts have made clear that the Constitution does not prohibit Congress from making laws that distinguish between citizens and aliens and between lawful and illegal aliens. We find that analysis persuasive in interpreting the text of the Second Amendment. Whatever else the term means or includes, the phrase “the people” in the Second Amendment of the Constitution does not include aliens illegally in the United States such as Portillo . . . .<sup>278</sup>

Because the Second and Fourth Amendments both protect rights of “the people,” the Fifth Circuit frankly acknowledged that its decision suggested that illegal aliens have no Fourth Amendment rights either: “[N]either this court nor the Supreme Court has held that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally.”<sup>279</sup>

Even if illegal aliens do have Fourth Amendment rights:

[W]e do not find that the use of “the people” in both the Second and the Fourth Amendment mandates a holding that the two amendments cover exactly the same groups of people. The purposes of the Second and the Fourth Amendment are different. The Second Amendment grants an affirmative right to keep and bear arms, while the Fourth Amendment is at its core a protective right against abuses by the government. Attempts to *precisely* analogize the scope of these two amendments is misguided, and we find it reasonable that an affirmative right would be extended to fewer groups than would a protective right.<sup>280</sup>

The Fifth Circuit's attempt to delink the Second and Fourth Amendments misread *Heller*. The Supreme Court was very clear that the Second Amendment does not “grant an affirmative right.” Rather, the Second Amendment guarantees a pre-existing natural right. Also, it is odd for the Fifth Circuit to say that a right whose core is lawful self-defense is not a “protective” right.

The Eighth Circuit adopted the reasoning of *Portillo-Munoz*.<sup>281</sup> The Fourth Circuit remained agnostic on whether illegal aliens were among “the people.” Even if they were, they were neither “law-abiding, responsible citizens” nor

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277. 643 F.3d 437 (5th Cir. 2011).

278. *Id.* at 442.

279. *Id.* at 440 (arguing that at least some illegal aliens do have Second Amendment rights, and therefore they pass Step One). His reasoning was similar to that which was later adopted by the Seventh Circuit. Judge Dennis did not decide whether the illegal alien arms ban could be upheld under Step Two.

280. *Id.* at 440–41.

281. *See United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (“[T]he protections of the Second Amendment do not extend to aliens illegally present in this country.”).

among “the class of law-abiding members of the political community to whom the Second Amendment gives protection.”<sup>282</sup>

In *United States v. Meza-Rodriguez*,<sup>283</sup> the Seventh Circuit became the first circuit to hold that the Second Amendment protects illegal aliens.<sup>284</sup> The court reasoned that Meza-Rodriguez was entitled to Second Amendment protection because he had substantial connections with the United States and was in the United States voluntarily.<sup>285</sup> The court relied on the 1989 Supreme Court case *United States v. Verdugo-Urquidez*.<sup>286</sup> That case involved a United States Drug Enforcement Agency search of the property of a Mexican drug kingpin in Mexico. If the search had been conducted in the United States, it plainly would have violated the Fourth Amendment. The *Verdugo-Urquidez* Court quoted the Fourth Amendment, Second Amendment, and the First Amendment right to assemble, and pointed out that each of them protects a right of “the people.”<sup>287</sup>

Who are “the people?” Certainly not a Mexican in Mexico, said the Court.<sup>288</sup> Being one of “the people” requires that a non-citizen have “substantial connections” with the United States, which would require being in the United States voluntarily.<sup>289</sup>

The Seventh Circuit considered *Verdugo* to be controlling, especially since it had been approvingly quoted by *Heller*: “[T]he Second and Fourth Amendments should be read consistently” because “*Heller* noted the similarities between the Second Amendment and the First and Fourth Amendments, implying that the phrase ‘the people’ (which occurs in all three) has the same meaning in all three provisions.”<sup>290</sup>

In *United States v. Huitron-Guizar*, the Tenth Circuit avoided resolving the issue of whether illegal aliens have Second Amendment rights because the court determined § 922(g)(5) passed intermediate scrutiny regardless.<sup>291</sup>

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282. *United States v. Carpio-Leon*, 701 F.3d 974, 979 (4th Cir. 2012) (citing *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

283. 798 F.3d 664, 672 (7th Cir. 2015).

284. *Id.* at 673–74 (Flaum, J., concurring) (expressing “doubts that the Second Amendment grants undocumented immigrants the right to bear arms,” but thinking it best to “reserve resolution of this challenging constitutional question for a case that compels addressing it.”).

285. *Id.* at 672.

286. 494 U.S. 259 (1990).

287. *Id.*

288. *Id.*

289. *Meza-Rodriguez*, 798 F.3d at 670.

290. *Id.* at 669–70. The court upheld § 922(g)(5) under intermediate scrutiny, concluding that “Congress’s interest in prohibiting persons who are difficult to track and who have an interest in eluding law enforcement is strong enough to support the conclusion that 18 U.S.C. § 922(g)(5) does not impermissibly restrict Meza–Rodriguez’s Second Amendment right to bear arms.” *Id.* at 673.

291. 678 F.3d 1164, 1169 (10th Cir. 2012):

### 5. Use of a Gun in a Crime

In *United States v. Greeno*, the Sixth Circuit acknowledged that enhanced sentencing for using a gun in a crime is of “relatively recent vintage.”<sup>292</sup> Even so, the sentencing enhancement “falls outside the scope of the Second Amendment right as historically understood.”<sup>293</sup> The Second Amendment has been recognized to only protect the right to keep and bear arms for *lawful* purposes.<sup>294</sup> The enhancement, “like other historical restrictions on the possession and use of weapons, punishes an individual who possesses a dangerous weapon for an unlawful purpose and, thus, it falls outside the scope of the Second Amendment right.”<sup>295</sup>

Other courts have taken a similar approach. In *United States v. Potter*,<sup>296</sup> the Ninth Circuit upheld a statute proscribing firearm possession in furtherance of drug trafficking, explaining that “[b]oth implicitly and explicitly, the [*Heller*] Court made clear that its holding concerned the *lawful* possession and use of a firearm.”<sup>297</sup>

The Seventh Circuit held the same in *United States v. Jackson*.<sup>298</sup> “The Constitution does not give anyone the right to be armed while committing a felony, or even to have guns in the next room for emergency use should suppliers, customers, or the police threaten a dealer’s stash.”<sup>299</sup> The Seventh Circuit confirmed this position in an unpublished opinion, *United States v.*

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That Congress saw fit to exclude illegal aliens from carrying guns may indicate its belief, entitled to our respect, that such aliens, as a class, possess no such constitutional right. We think we can avoid the constitutional question by *assuming*, for purposes of this case, that the Second Amendment, as a “right of the people,” could very well include, in the absence of a statute restricting such a right, at least some aliens unlawfully here—and still easily find § 922(g)(5) constitutional. The apparent inconsistency in assuming the existence of a right before sustaining a law that acts as a blanket prohibition on it is, we believe, outweighed by the prudence of abstaining on a question of such far-reaching dimensions without a full record and adversarial argument. If the right didn’t apply at all, the case would be at an end. If the right *does* apply, even if in less robust dimensions than it does for citizens, the question is the level of scrutiny.

*Id.*

292. 679 F.3d 510, 519 (6th Cir. 2012). Enhanced sentencing begins in the 1920s with the Revolver Association Act, which later became known as the Uniform Firearms Act. *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, *supra* note 121, at 346–47.

293. *Greeno*, 679 F.3d at 518.

294. *Id.* at 520.

295. *Id.*

296. 630 F.3d 1260 (9th Cir. 2011).

297. *Id.* at 1261.

298. 555 F.3d 635 (7th Cir. 2009).

299. *Id.* at 636.

*Spaulding*,<sup>300</sup> explaining, “[c]arrying a gun during and in relation to a drug trafficking crime does not implicate the Second Amendment.”<sup>301</sup>

The Second Circuit read *Heller* as placing “an implicit limitation on the exercise of the Second Amendment right to bear arms for lawful purposes” and concluded that “the Second Amendment does not safeguard the *unlawful* purpose of possessing a firearm in furtherance of drug trafficking.”<sup>302</sup>

#### 6. Mentally Ill

In *United States v. Rehlander*,<sup>303</sup> the First Circuit addressed § 922(g)(4)’s firearms prohibition for persons committed to a mental institution. Under state law, there were two procedures for involuntary psychiatric hospitalization: one procedure provided an adversary proceeding, and the other did not.<sup>304</sup> The court held that Second Amendment rights could be deprived by the procedure that had an adversary proceeding, but not by the procedure that did not.<sup>305</sup> The court explained that “section 922 should not be read to encompass a temporary hospitalization” with only “ex parte procedures.”<sup>306</sup>

An unpublished Fourth Circuit opinion on the mentally ill failed to conduct a meaningful Second Amendment analysis.<sup>307</sup>

### C. Firearms Sales and Transfers

#### 1. Purchase and Sale of Firearms

In *Teixeira v. County of Alameda*,<sup>308</sup> the Ninth Circuit held that “the right to purchase and to sell firearms is part and parcel of the historically recognized right to keep and to bear arms.”<sup>309</sup> The court reasoned:

If “the right of the people to keep and bear arms” is to have any force, the people must have a right to acquire the very firearms they are entitled to keep and to bear. Indeed, where a right depends on subsidiary activity, it would make little sense if the right did not extend, at least partly, to such activity as well. . . . One cannot truly enjoy a constitutionally protected right when the

300. 366 F. App’x 670 (7th Cir. 2010).

301. *Id.* at 674.

302. *United States v. Bryant*, 711 F.3d 364, 366, 369 (2d Cir. 2013) (internal quotations omitted).

303. 666 F.3d 45, 50 (1st Cir. 2012).

304. *Id.* at 46.

305. *Id.* at 45.

306. *Id.* at 49.

307. *See United States v. McRobie*, No. 08-4632, 2009 WL 82715 (4th Cir. Jan. 14, 2009).

308. 822 F.3d 1047 (9th Cir. 2016).

309. *Id.* at 1056. As explained *supra*, the Ninth Circuit had previously held that the Second Amendment protects the sale of ammunition. *See Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014).

State is permitted to snuff out the means by which he exercises it; one cannot keep arms when the State prevents him from purchasing them. . . . Thus, the Second Amendment “right must also include the right to *acquire* a firearm.”<sup>310</sup>

## 2. Gun Show Sales

In *Nordyke v. King*,<sup>311</sup> the Ninth Circuit found that the Second Amendment was implicated by a law requiring firearms at a gun show to be “secured to prevent unauthorized use” when “not in the actual possession of the authorized participant.”<sup>312</sup> The court held this burden to be so minimal that the law would be upheld under any standard of scrutiny.<sup>313</sup>

The *Nordyke* case was brought by a business that put on gun shows.<sup>314</sup> Mr. Nordyke never claimed that the locking law for gun show vendors had any impact on his own ability to acquire a firearm, or to use a firearm for self-defense.<sup>315</sup> Rather, his Second Amendment claim was based solely on his right to engage in firearms commerce.<sup>316</sup> Addressing Mr. Nordyke’s claims on the merits, the Ninth Circuit correctly recognized that the Second Amendment includes the right to firearms commerce.<sup>317</sup>

## 3. Restrictions on Interstate Purchases

The Second Circuit says that it has adopted the Two-Part Test, but the Circuit does not always follow that test. In *United States v. Decastro*,<sup>318</sup> the Second Circuit determined that 18 U.S.C. § 922(a)(3), which, with exceptions,<sup>319</sup> prohibits a person from transporting a firearm obtained outside

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310. *Teixeira*, 822 F.3d at 1055, *reh’g en banc granted* 2016 WL 7438631 (9th Cir. 2016) (internal citations omitted).

311. 681 F.3d 1041 (9th Cir. 2012).

312. *Id.* at 1044. In *Nordyke*, twelve years into the case, the County asserted that its prohibition against gun shows on county property was actually just a locking ordinance for guns displayed at gun shows. This drastically reduced the Second Amendment burden.

313. *Id.* at 1045.

314. *Id.* at 1044.

315. *Id.*

316. *Nordyke*, 681 F.3d at 1044.

317. *Id.* at 1045.

318. *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012).

319. 18 U.S.C. § 922(a)(3) states that it shall be unlawful:

for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C)

her home state into her home state, “only minimally affects the ability to acquire a firearm.”<sup>320</sup> Therefore the interstate ban “does not substantially burden [the] right to keep and bear arms” because “it does nothing to keep someone from purchasing a firearm in her home state, which is presumptively the most convenient place to buy anything.”<sup>321</sup>

In other words, the prohibition on interstate handgun purchases did implicate the Second Amendment—a holding consistent with the general rule that if there is a fundamental right to possess something, there is necessarily a right to buy and sell it. Under the normal Two-Step Test, the next step would be to apply some form of heightened scrutiny. The Second Circuit could have selected intermediate scrutiny and presumably would have had an easy time upholding the law under that standard of review.

Instead, the panel said that because the law did not substantially burden the Second Amendment right, the law could be upheld under rational basis review.<sup>322</sup> No other Circuit has adopted this variant of the Two-Part Test. Every case from every other Circuit has held that if Step One is passed, it is necessary to go to Step Two, which always requires heightened scrutiny.

#### 4. Return of Seized Firearms

In *Walters v. Wolf*, the Eighth Circuit addressed a claim asserted against a city and its police chief for failing to return the plaintiff’s handgun and ammunition that had been seized at the time of the plaintiff’s arrest.<sup>323</sup> The court determined that the refusal to return the handgun and ammunition violated the plaintiff’s procedural due process rights, but the court rejected the Second Amendment claim because “[t]he defendants’ policy and action affected *one* of Walter’s firearms, which was lawfully seized. The defendants did not prohibit Walters from retaining or acquiring other firearms.”<sup>324</sup> The notion that a citizen can be deprived of a firearm he lawfully owns simply because other firearms may be available is irreconcilable with *Heller*. A court might as well assert that a government seizure of a person’s automobile does

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shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter.

18 U.S.C. § 922(a)(3)(2012).

320. *Decastro*, 682 F.3d at 164.

321. *Id.* at 168. Notably, the court overlooked the fact that the defendant had purchased the firearm in another state *because* it was so difficult to acquire one in his home state.

322. The court did note, however, that while it found § 922(a)(3) constitutional on its face, it could conceivably be held unconstitutional as applied, particularly since it “has no exception for the transportation of firearms purchased out-of-state by someone who is licensed to possess a gun at home.” *Id.* at 169 n.7.

323. 660 F.3d 307, 309 (8th Cir. 2011).

324. *Id.* at 318.

not affect the Fourth or Fifth Amendments, as long as the person owns a second car, or could lawfully acquire one.

A similar issue was presented to the Seventh Circuit in *Rhein v. Coffman*, where the plaintiff alleged that an official had taken too long to reinstate his firearms license after it was revoked.<sup>325</sup> The court pointed out that the plaintiff had no case, because he had sued the wrong official. Accordingly, there was no need to decide what constitutional time limits might apply:

The Supreme Court observed in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), that many details about how to implement the Second Amendment need to be worked out. The timing of hearings on requests for the restoration of firearms is among those details. We know from *Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), and similar decisions that the First Amendment requires prompt decisions when the question is whether speech can occur. Meanwhile *Barker v. Wingo*, 407 U.S. 514 (1972), and similar decisions hold that the Speedy Trial Clause of the Sixth Amendment allows years to pass before a criminal trial, even when the defendant is in custody. Where the Second Amendment fits on this spectrum is a novel question. The closest parallel may be a motion under Fed. R. Crim. P. 41(g) for the return of guns seized in a criminal prosecution. As far as we can see, courts have not established time limits for holding hearings and making decisions on motions to return firearms. We need not resolve the timing question in this case either.<sup>326</sup>

##### 5. Transfers to Prohibited Persons

It is self-evidently constitutional to prohibit providing arms to a person who is known by the provider to be prohibited, if the prohibition itself is constitutional.

However, two odd decisions adopt broader reasoning, which could be read to negate the Second Amendment rights of other persons. In *United States v. Huet*,<sup>327</sup> the Third Circuit determined that aiding and abetting the possession of a firearm by a convicted felon falls outside the scope of the Second Amendment. “Huet’s case presents no line-drawing problem. Because § 922(g)(1) and § 2 do not restrict the right of possession of the aider and abettor, Count Three simply does not implicate Huet’s rights under the Second Amendment.”<sup>328</sup>

In other words, if A helps B obtain a firearm, there is no Second Amendment issue involving A. This fails to consider the Third Circuit’s statement in *Marzzarella* that firearms commerce is protected by the Second Amendment. If B is a lawful possessor, then A has a Second Amendment right

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325. 825 F.3d 823 (7th Cir. 2016).

326. *Id.* at 826–27 (parallel cites omitted).

327. 665 F.3d 588 (2012).

328. *Id.* at 602–03.

to facilitate the possession. Similarly, if B has First Amendment rights, then A has his own First Amendment rights to facilitate A's exercise, such as by teaching him how to read, or by providing him with books.<sup>329</sup> The same is true for people who help women exercise their abortion rights.<sup>330</sup> The First Amendment freedom "of the press" includes the right to own and use printing presses; it also includes the right to manufacture and sell them.<sup>331</sup>

In the unpublished *United States v. Chafin*,<sup>332</sup> the Fourth Circuit held that the act of selling a firearm to an unlawful user of drugs<sup>333</sup> falls outside the scope of the Second Amendment:

Chafin contends that his conduct—the sale of a firearm to an unlawful user of drugs—falls within the historical scope of the Second Amendment. However, Chafin has not pointed this court to any authority, and we have found none, that remotely suggests that, at the time of its ratification, the Second Amendment was understood to protect an individual's right to *sell* a firearm. Indeed, although the Second Amendment protects an individual's right to bear arms, it does not necessarily give rise to a corresponding right to sell a firearm. *Cf. United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 128 (1973) ("We have already indicated that the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others."). Accordingly, Chafin's argument that § 922(d)(3) is unconstitutional under *Heller* must be rejected.<sup>334</sup>

*Chafin* is deservedly unpublished, and erroneous in several ways. First, it violated Fourth Circuit precedent by improperly shifting the burden of proof from the government to the individual, requiring the individual to prove that his conduct *is* within the scope of the Second Amendment as historically understood.<sup>335</sup>

Second, *Chafin*'s analogy to obscenity law is unsustainable. Obscenity has *always* been held to be outside the scope of First Amendment protection.<sup>336</sup> In contrast, firearms *are* protected by the Second Amendment, and have always been held to be so protected. Even the dissenters in *Heller* agreed that the

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329. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

330. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976).

331. The Founders believed that there were (at least) two manmade tools to which persons have a natural right: arms and presses. See Edward Lee, *Guns And Speech Technologies: How The Right To Bear Arms Affects Copyright Regulations Of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037, 1048–53 (2009).

332. *United States v. Chafin*, 423 F. App'x 342 (4th Cir. 2011).

333. A federal statute makes it unlawful to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is an unlawful user of or addicted to any controlled substance. 18 U.S.C. § 922(d)(3) (2012).

334. *Chafin*, 423 F. App'x at 344.

335. See *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

336. See, e.g., *Miller v. California*, 413 U.S. 15 (1973).

Second Amendment has always been construed to guarantee the firearms rights of individuals.<sup>337</sup>

The Supreme Court in the 1969 case *Stanley v. Georgia* held that a person may not be prosecuted for the possession of obscenity within his own home.<sup>338</sup> The 1973 case cited by *Chafin* declines to extend *Stanley* beyond the home.<sup>339</sup> *Chafin* treats *Heller* as if it were a handgun version of *Stanley*: an odious and constitutionally-unprotected item may be banned from manufacture, sale, purchase, or transportation, but individuals may not be prosecuted for home possession.<sup>340</sup> This is not remotely close to the tenor of *Heller*. Nor is it consistent with *McDonald's* holding that the Second Amendment is a “fundamental” right. The right to arms is the opposite of obscenity, for which there is no right at all, let alone a fundamental one.

If the *Chafin* court had not shifted the burden of proof, it might have engaged in historical inquiry, which would have revealed that there was no tradition in 1791 or 1866 of restricting the sale, loan, or gift of firearms by or to citizens who possessed civil rights.<sup>341</sup> In fact, King George’s restrictions on firearms commerce had played a major role in precipitating the American Revolution.<sup>342</sup> Other courts have recognized that the Second Amendment right includes firearms commerce.<sup>343</sup>

The Eighth Circuit upheld a conviction for providing a firearm to a prohibited person, but because of the bizarre facts of the case, the court focused on host liability instead of conducting a typical Second Amendment analysis.<sup>344</sup>

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337. *District of Columbia v. Heller*, 554 U.S. 570, 637 (2008).

338. 394 U.S. 557, 568 (1969).

339. *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 128 (1973).

340. *United States v. Chafin*, 423 F. App’x 344 (4th Cir. 2011).

341. See Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, *supra* note 121, at 336, 340; David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?*, 127 HARV. L. REV. 230, 235–37 (2014).

342. David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283, 291–301 (2012).

343. See *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1056 (9th Cir. 2016) (“the right to purchase and to sell firearms is part and parcel of the historically recognized right to keep and to bear arms.”); *Nordyke v. King*, 681 F.3d 1041, 1043–44 (9th Cir. 2012). See also *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967–68 (9th Cir. 2014) (the Second Amendment protects the sale of ammunition); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (“The right to possess firearms for protection implies a corresponding right to acquire [firearms] . . .” It follows that the right to sell firearms is also implied. For if nobody had a right to sell arms, the right to keep and bear arms and the implied right to acquire arms would not just be infringed, but meaningless.).

344. *United States v. Stegmeier*, 701 F.3d 574, 578, 580, 583 (8th Cir. 2012).

#### D. Storage Laws and Licensing Fees

In *Jackson v. San Francisco*,<sup>345</sup> the Ninth Circuit determined that the Second Amendment was implicated by a city ordinance requiring that handguns be “stored in a locked container or disabled with a trigger lock that has been approved by the California Department of Justice” when not being “carried on the person of an individual over the age of 18.”<sup>346</sup> “Because storage regulations . . . are not part of a long historical ‘tradition of proscription,’ we conclude that section 4512 burdens rights protected by the Second Amendment.”<sup>347</sup> The court explained that the storage law had nothing to do with any of *Heller*’s “presumptively lawful” gun controls:

In analyzing the scope of the Second Amendment, we begin with the list of “presumptively lawful” regulations provided by *Heller*. Section 4512 resembles none of them, because it regulates conduct at home, not in “sensitive places”; applies to all residents of San Francisco, not just “felons or the mentally ill”; has no impact on the “commercial sale of arms,” and it regulates handguns, which *Heller* itself established were not “dangerous and unusual.”<sup>348</sup>

In *Kwong v. Bloomberg*,<sup>349</sup> the Second Circuit upheld a handgun licensing fee of several hundred dollars. The court determined the requirement would “easily” survive intermediate scrutiny “[b]ecause the record demonstrates that the licensing fee is designed to allow the City of New York to recover the costs incurred through operating its licensing scheme, which is designed to promote public safety and prevent gun violence.”<sup>350</sup> Notably, none of the plaintiffs had complained that the City’s high fees impeded them from acquiring arms.<sup>351</sup>

### VII. THE SECOND AMENDMENT OUTSIDE THE HOME

The Second Amendment guarantees “the right to keep and bear arms.”<sup>352</sup> The text does not limit the exercise of this right solely to one’s home—any more than the text of the First Amendment limits the right of free exercise of religion or the freedom of speech to one’s home. When the Framers meant to limit a right to the home, they knew how to do so, as in the Third Amendment. Common sense and long historical practice show that First and Second Amendment rights are often exercised outside the home: carrying a gun for protection, attending a church, or speaking in a public place.

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345. 746 F.3d 953 (9th Cir. 2014).

346. *Id.* at 958.

347. *Id.* at 963 (internal citations omitted).

348. *Id.* at 962 (internal citations omitted).

349. 723 F.3d 160, 165, 168 (2d Cir. 2013).

350. *Id.* at 168.

351. *Id.*

352. U.S. CONST. amend. II.

Some courts have read *Heller* as if it said nothing at all about bearing arms. For example, the Maryland Court of Appeals wrote that it would not recognize any right to bear arms unless the Supreme Court expressly so directed.<sup>353</sup>

The Supreme Court, however, does not read *Heller* so obtusely. In *National Federation of Independent Business v. Sebelius*,<sup>354</sup> the Supreme Court identified “the right to bear arms” as among the “protected civil rights.”<sup>355</sup> As *McDonald* explained, the *Heller* decision “held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home.”<sup>356</sup> According to *McDonald*, *Heller* held that the Second Amendment protects the right to keep and bear arms “for the purpose of self-defense.”<sup>357</sup> The holding is not limited to self-defense in the home. Rather, *McDonald* characterizes the D.C. ban on defensive home handguns as an example of the types of laws that violate the Second Amendment’s right of self-defense.<sup>358</sup>

As to the contours of the right to bear arms, *Heller* offered two rules: First, prohibitions on carrying *concealed* weapons were “longstanding” and “presumptively constitutional.”<sup>359</sup> So were bans on carrying arms “in sensitive places such as schools and government buildings. . . .”<sup>360</sup> These exceptions prove the rule.<sup>361</sup>

353. *Williams v. Maryland*, 10 A.3d 1167, 1177 (Md. 2011).

354. 132 S. Ct. 2566 (2012).

355. *Id.* at 2600.

356. *McDonald v. City of Chicago*, 561 U.S. 742, 749–50 (2010).

357. *Id.* at 750.

358. *Id.* at 742.

359. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008). In *Martinez*, the Tenth Circuit held that the concealed carrying of firearms fell outside the scope of the Second Amendment, because concealed carry was expressly listed as a “presumptively lawful” longstanding law in *Heller*. *Peterson v. Martinez*, 707 F.3d 1197, 1211–12 (10th Cir. 2013). “As an example of the limited nature of the Second Amendment right to keep and carry arms, the Court observed that ‘the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.’ And the Court stressed that ‘nothing in our opinion should be taken to cast doubt on longstanding prohibitions.’” *Id.* at 1210 (internal citations omitted).

360. *Heller*, 554 U.S. at 626.

361. The exceptions about concealed carry and sensitive places prove the rule that Americans have the right to carry firearms (openly, if the legislature so requires) in places which are not “sensitive.” If the Second Amendment only applied to the keeping of arms at home, and not to the bearing of arms in public places, then there would be no need to specify the exception for carrying arms in “sensitive places” or carrying concealed. *Id.* at 1208.

Similarly, the exception for “prohibitions on the possession of firearms by felons and the mentally ill” is an exception to the general rule that individual Americans have a right to possess arms. The exception only makes sense if the general rule is valid. After all, if no-one had a right

In this Part, we examine federal circuit cases, which have taken various positions on whether the Second Amendment includes bearing arms outside one's home. We also examine cases about the parameters of the right, such as whether it includes carrying in post offices, or on private property contrary to the wishes of the owner. We also describe the state of qualified immunity for law enforcement interactions with people who are lawfully carrying.

A. *Right Exists Outside the Home*

As of 2012, the only state that formally prohibited exercise of the right to bear arms, was Illinois. There, carrying arms outside of one's home or place of business was illegal. There was no process for a person even to apply for a license to carry. The law had some exceptions for certain activities (e.g., hunting, taking a firearm to a gunsmith for repair) and for certain favored classes of people (e.g., city councilmen). But the ordinary carrying of arms in public for lawful self-defense was prohibited.

The Seventh Circuit ruled the Illinois prohibition unconstitutional, in *Moore v. Madigan*,<sup>362</sup> written by Judge Richard Posner. As he put it, "The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside."<sup>363</sup> After all, "the interest in self-protection is as great outside as inside the home,"<sup>364</sup> for "in Chicago, at least, most murders occur outside the home."<sup>365</sup> The court elaborated:

Both *Heller* and *McDonald* do say that "the need for defense of self, family, and property is *most* acute" in the home, *id.* at 3036 (emphasis added); 554 U.S. at 628 but that doesn't mean it is not acute outside the home. *Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home, as when it says that the amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. Confrontations are not limited to the home.

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to possess arms, then there would be no need for a special rule that felons and the mentally ill may be barred from possessing arms. *Id.*

The third *Heller* exception is "laws imposing conditions and qualifications on the commercial sale of arms." The word "commercial" does not appear because the Supreme Court was trying to use extra ink. The statement that "conditions and qualifications" on the commercial sale of arms demonstrates that the commercial sale of arms is a Second Amendment right, but one whose regulations should often be upheld. The commercial sales exception tells that restrictions on non-commercial firearms transfers—including sales, gifts, and loans—have no presumption of constitutionality. *Id.*

362. 702 F.3d 933, 942 (7th Cir. 2012).

363. *Id.*

364. *Id.* at 941.

365. *Id.* at 937.

The Second Amendment states in its entirety 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” (emphasis added). The right to “bear” as distinct from the right to “keep” arms is unlikely to refer to the home. To speak of “bearing” arms within one’s home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home.<sup>366</sup>

The textual right to bear arms was consistent with self-defense needs, both in the olden days and in the modern urban jungle:

[O]ne doesn’t have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home. Suppose one lived in what was then the wild west—the Ohio Valley for example (for until the Louisiana Purchase the Mississippi River was the western boundary of the United States), where there were hostile Indians. One would need from time to time to leave one’s home to obtain supplies from the nearest trading post, and en route one would be as much (probably more) at risk if unarmed as one would be in one’s home unarmed. . . .<sup>367</sup>

Twenty-first century Illinois has no hostile Indians. But a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress. But Illinois wants to deny the former claim, while compelled by *McDonald* to honor the latter. That creates an arbitrary difference. To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*. It is not a property right—a right to kill a houseguest who in a fit of aesthetic fury tries to slash your copy of Norman Rockwell’s painting *Santa with Elves*.<sup>368</sup> That is not self-defense, and this case like *Heller* and *McDonald* is just about self-defense.<sup>369</sup>

The *Moore* court did not apply strict or intermediate scrutiny. “[O]ur analysis is not based on degrees of scrutiny, but on Illinois’s failure to justify the most restrictive gun law of any of the 50 states.”<sup>370</sup>

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366. *Id.* at 935–36 (citations simplified).

367. *Madigan*, 702 F.3d at 936.

368. Readers curious about what might provoke this hypothetical fit may view *Santa With Elves*, THE SATURDAY EVENING POST, <http://www.saturdayeveningpost.com/wp-content/uploads/satevepost/20151202-9221202.jpg> [<http://perma.cc/FF5G3H78>].

369. *Madigan*, 702 F.3d at 937.

370. *Id.* at 941.

As to whether a complete prohibition on bearing arms benefits safety, Judge Posner found that the “theoretical empirical evidence . . . overall is inconclusive.” That evidence was actually “consistent with concluding that a right to carry firearms in public may promote self-defense.”<sup>371</sup> The public safety argument for the “uniquely sweeping ban” was severely weakened by the fact that bearing arms was statutorily allowed in all forty-nine other states; the Illinois Attorney General had not offered any reason why exercising the Second Amendment in Illinois was more dangerous than exercising it in other states.<sup>372</sup>

Thus, the prohibition of the exercise of the enumerated right to bear arms was categorically unconstitutional. In Part VIII, we will further examine the doctrinal issues of categorical invalidation.

The Illinois legislature complied with *Moore* by enacting a statute similar to those in over forty other states: concealed carry is allowed with a license; the license requires safety training and a background check.

This licensing scheme was challenged in *Berron v. Illinois Concealed Carry Licensing Review Board*.<sup>373</sup> In *Berron*, four separate appeals brought by persons denied concealed-carry permits were consolidated at the appellate level. These plaintiffs first complained that the licensing scheme was unconstitutional because it allowed them to be denied a permit without a sufficient explanation why, thus leaving them unable to challenge the denial. However, during the course of the appeal, the Illinois legislature adopted a new, revised set of regulations that appeared to remedy the deficiencies complained of by the plaintiffs, so their arguments were unripe.<sup>374</sup>

The court then addressed the plaintiffs’ second claim: that requiring a license at all for concealed carry is unconstitutional.<sup>375</sup> The plaintiffs compared the licensing requirement to an unconstitutional prior restraint of speech under the First Amendment.<sup>376</sup> The court, however, was not convinced. It reasoned that since *Heller* had approved substantive limits on the Second Amendment right (e.g., only law-abiding citizens are entitled to exercise the right), surely “[a state] may use a licensing system to enforce them.”<sup>377</sup>

Next, the court addressed the plaintiffs’ argument that “even if licenses may be required, they must be issued unless the state proves a disqualifying

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371. *Id.* at 942.

372. *Id.*

373. 825 F.3d. 843, 846 (7th Cir. 2016).

374. Except for one plaintiff, who won a suit in state court in which the court directed the Licensing Review Board to issue him a concealed-carry license, so his claim was dismissed for mootness. *Id.* at 845–46.

375. *Id.* at 846.

376. *Id.* at 847.

377. *Id.*

condition by clear and convincing evidence”<sup>378</sup> rather than the statute’s preponderance of the evidence standard. Throughout the litigation, the government argued that the preponderance of the evidence standard was adequate.<sup>379</sup> The Seventh Circuit took it a step further:

Plaintiffs next maintain that, even if licenses may be required, they must be issued unless the state proves a disqualifying condition by clear and convincing evidence. Neither *Heller* nor *McDonald* is concerned with licensing, so this contention lacks support in the Supreme Court’s most-applicable decisions. As a matter of administrative law, the proponent of a position bears the burden of showing entitlement by a preponderance of the evidence. Plaintiffs are the applicants for licenses, so they bear the burden of showing entitlement. To be more precise, a state may assign applicants that burden without transgressing the Constitution. Illinois is a little more generous, placing the burden on the state to show why an application should be denied.<sup>380</sup>

Unfortunately, Judge Easterbrook’s excursion into administrative law was disingenuous. The *Greenwich Collieries* case did not announce some general rule of administrative law.<sup>381</sup> Rather, the Supreme Court was applying 5 U.S.C. § 556(d), part of the federal Administrative Procedure Act.<sup>382</sup> That section does state that “the proponent of a rule or order has the burden of proof,” but the federal APA had nothing to do with the state administrative procedure at issue in *Berron*.<sup>383</sup>

Second, Judge Easterbrook ignored the *Heller* and *McDonald* language, and the controlling Seventh Circuit opinion of *Madigan*, that the Second Amendment right to bear arms applies outside the home.<sup>384</sup>

Third, Judge Easterbrook did not address Seventh Circuit precedents—including his own—that the government always bears the burden of persuasion when restricting constitutional rights, including Second Amendment rights.<sup>385</sup>

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378. *Berron*, 825 F.3d. at 847.

379. *Moustakas v. Margolis*, 154 F. Supp. 3d 719, 725, 731 (N.D. Ill. 2016); *DeServi v. Bryant*, 70 F. Supp. 3d 921, 923–24, 926 (N.D. Ill. 2014).

380. *Berron*, 825 F.3d at 847–48 (citing *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994)).

381. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

382. *Id.*

383. 5 U.S.C. § 556(d) (2012).

384. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (“The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.”).

385. Indeed, Judge Easterbrook, who drafted the *Berron* opinion, has said in two different opinions that burdens on the Second Amendment right require heightened scrutiny, which necessarily puts the burden on the government. *See United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (“If a rational basis were enough, the Second Amendment would not do anything—because a rational basis is essential for legislation in general.”); *Friedman v. City of*

Thus, under *Heller*, a state cannot “assign applicants that burden” of proving their entitlement to exercise their constitutional right to bear arms.<sup>386</sup> The dicta was wrong, but that does not mean that the result in *Berron*, upholding the statute, was necessarily incorrect. The Illinois legislature had already placed on the government the burden of proof for denying a carry permit application. The issue was only about how much evidence was necessary: preponderance, or clear and convincing? To resolve the question, the court could have looked at licensing systems for other constitutional rights (e.g., parade permits) and at the carry licensing systems of other states. These would offer guidance as to whether the preponderance standard is considered appropriate in the context of constitutional licensing.

### B. Unable to Decide Whether Right Exists

#### 1. Fourth Circuit

The Fourth Circuit first addressed the right to bear arms in *United States v. Masciandaro* in 2011.<sup>387</sup> The defendant had parked his car and slept in it overnight in a parking lot at a National Park. He had a defensive gun in his car, which violated a then-existing federal regulation.<sup>388</sup>

The court could not agree on whether the Second Amendment applies outside the home, but the court determined that the law would satisfy the appropriate standard of review even if there is a right to bear arms.

Writing for the court, Judge Harvie Wilkinson warned that judicial application of *Heller* beyond handguns in the home would make the judges responsible for any gun misuse that resulted: “On the question of *Heller*’s applicability outside the home environment, we think it prudent to await direction from the Court itself.”<sup>389</sup> Judge Wilkinson, like Judge Posner, is an outspoken critic of the *Heller* decision.<sup>390</sup> Uniquely among the federal circuits,

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Highland Park, 784 F.3d 406, 410 (7th Cir. 2015) (“All legislation requires a rational basis; if the Second Amendment imposed only a rational basis requirement, it wouldn’t do anything.”).

386. *Berron v. Illinois Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847–48 (7th Cir. 2016); As explained *supra* note 19, Judge Easterbrook has earned a reputation among some in the legal profession for ignoring or disingenuously applying controlling precedent to reach the result he wants.

387. 638 F.3d 458 (4th Cir. 2011).

388. 36 C.F.R. § 2.4(b) (2010). Subsequently, Congress enacted a statute to allow carrying in National Parks by anyone in compliance with the laws of the host state. 16 U.S.C. §§ 1a–7b (2010); 123 STAT. 1764–65, § 512 (2009). For example, carrying with a concealed handgun carry permit in states that require permits or by any lawful carrier in states that do not require permits.

389. *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J., joined by Duffy, J., writing for the court).

390. J. Harvie Wilkinson, III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009). For a reply, see Nelson Lund & David B. Kopel, *Unraveling Judicial*

the *Masciandaro* majority asserted that the Supreme Court had left the lower courts with absolutely no guidance about the scope of the right to bear arms beyond the home.<sup>391</sup>

Writing separately, Judge Niemeyer found it “sufficiently clear that, *in this case*, Masciandaro’s claim to self-defense—asserted by him as a law-abiding citizen sleeping in his automobile in a public parking area—does implicate the Second Amendment.”<sup>392</sup> He reasoned that “[*Heller*] found that the right included the right to ‘protect[ ] [oneself] against both *public* and private violence,’ thus extending the right in some form to wherever a person could become exposed to public or private violence.”<sup>393</sup> Judge Niemeyer pointed out that “the right to keep and bear arms was found to have been understood to exist not only for self-defense, but also for membership in a militia and for hunting, neither of which is a home-bound activity.”<sup>394</sup>

Without deciding whether the right to keep and bear arms applies outside the home, the majority proceeded to Step Two and decided that intermediate scrutiny would be appropriate, since “as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.”<sup>395</sup> The court upheld the law, finding that “reasonable measures to secure public safety” are justified “where large numbers of people, including children, congregate for recreation.”<sup>396</sup>

The Fourth Circuit returned to the right to bear arms in *Woollard v. Gallagher*.<sup>397</sup> Like many states, Maryland requires a permit to carry a handgun for protection. The applicant must demonstrate a “good-and-substantial-reason” for receiving the permit.<sup>398</sup> As interpreted by Maryland courts, the exercise of an enumerated constitutional right is considered neither “good” nor “substantial.”<sup>399</sup> Instead, the applicant must demonstrate a unique and

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*Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson, III*, 25 J.L. & POLITICS 1, 1–2 (2009).

391. “There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions.” *Masciandaro*, 638 F.3d at 475.

392. *Id.* at 468 (Niemeyer, J. writing separately).

393. *Id.* at 467 (internal citation omitted) (brackets in original).

394. *Id.* at 468.

395. *Id.* at 470.

396. *Masciandaro*, 638 F.3d at 473. For a critique of the decision, see Stephen P. Halbrook, *No Right to “Bear Arms”? A Critical Analysis of United States v. Masciandaro*, 1 WAKE FOREST L. REV. ONLINE 116 (2011).

397. 712 F.3d 865, 874 (4th Cir. 2012).

398. *Id.* at 876.

399. *Id.*

particularized threat—such as a particular criminal who has made a credible threat to murder the particular applicant.<sup>400</sup>

The Fourth Circuit did not decide whether there is a right to bear arms, but proceeded to Step Two of the Two-Part Test under the assumption that the Second Amendment right applies outside the home.<sup>401</sup> The court then subjected the law to intermediate scrutiny, following *Masciandaro*, where the court had “announced that intermediate scrutiny applies ‘to laws that burden [any] right to keep and bear arms outside of the home.’”<sup>402</sup>

The Fourth Circuit found that “[t]he State has clearly demonstrated that the good-and-substantial-reason requirement advances the objectives of protecting public safety and preventing crime because it reduces the number of handguns in public.”<sup>403</sup> Constricting lawful carry had many benefits:

- “Decreasing the availability of handguns to criminals via theft”;
- “Lessening ‘the likelihood that basic confrontations between individuals would turn deadly’”;
- “Averting the confusion, along with the ‘potentially tragic consequences’ thereof, that can result from the presence of a third person with a handgun during a confrontation between a police officer and a criminal suspect”;
- “Curtailing the presence of handguns during routine police-citizen encounters”;
- “Reducing the number of ‘handgun sightings’ that must be investigated”; and
- “Facilitating the identification of those persons carrying handguns who pose a menace.”<sup>404</sup>

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400. *Id.*

401. “We hew to a judicious course today, refraining from any assessment of whether Maryland’s good-and-substantial-reason requirement for obtaining a handgun permit implicates Second Amendment protections. That is, we merely assume that the *Heller* right exists outside the home and that such right of Appellee Woollard has been infringed. We are free to make that assumption because the good-and-substantial-reason requirement passes constitutional muster under what we have deemed to be the applicable standard—intermediate scrutiny.” *Id.* at 876.

402. *Woollard*, 712 F.3d at 876 (quoting *United States v. Masciandaro*, 638 F.3d 458, 470–71 (4th Cir. 2011)). “The Appellees would have us place the right to arm oneself in public on equal footing with the right to arm oneself at home, necessitating that we apply strict scrutiny in our review of the good-and-substantial-reason requirement. Unfortunately for the Appellees, their argument is foreclosed by our precedent.” *Id.* at 878. *Cf.* *Friedman v. City of Highland Park*, 784 F.3d 406, 419 (7th Cir. 2015) (“Insofar as Highland Park’s ordinance implicates the right to carry or use these weapons outside of one’s property, it is subject to intermediate scrutiny.”).

403. *Woollard*, 712 F.3d at 879.

404. *Id.* at 879–80.

## 2. Third Circuit

On paper, New Jersey's statutory system for carry permits looks roughly similar to Maryland. Yet while permits are rare in Maryland, they hardly exist in New Jersey.<sup>405</sup> In *Drake v. Filko*,<sup>406</sup> the Third Circuit declared itself agnostic as to whether the Second Amendment exists outside the home.<sup>407</sup>

The majority then applied intermediate scrutiny to the New Jersey system, assuming for the sake of argument that the right might "extend beyond the home."<sup>408</sup> Like *Woollard*, the *Drake* majority said that there could be some benefits from a near-prohibition of carrying defensive arms in public, and these potential benefits were sufficient to pass intermediate scrutiny.<sup>409</sup>

In dissent, Judge Hardiman pointed out that the *Filko* majority was reading *Heller* much more narrowly than the Supreme Court does:

Most importantly, the *McDonald* Court described the holding in *Heller* as encompassing a general right to self-defense. The very first sentence of *McDonald* states: "Two years ago, in *District of Columbia v. Heller*, we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home." Describing the holding this way—first establishing the legal principle embodied in the Second Amendment and then explaining how it was applied—demonstrates that the legal principle enunciated in *Heller* is not confined to the facts presented in that case.<sup>410</sup>

Further, the *Heller* Court had "consistently employed language referring to a more general right to self-defense than one confined to the home."<sup>411</sup> The Court had described the Second Amendment as guaranteeing "the individual right to possess and carry weapons in case of confrontation."<sup>412</sup> "The Court also defined 'bear arms' to include being 'armed and ready for offensive or

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405. The same is even more so in Hawaii, where permits are never issued, except to security guards. As of 2015, there were 221 carry permits issued to security guards, and no licenses issued to private citizens. Paul Perrone, Dep't of the Att'y Gen., *Firearms Registrations in Hawaii, 2015*, 9 (Mar. 2015), <http://ag.hawaii.gov/cpja/files/2016/03/Firearm-Registrations-in-Hawaii-2015.pdf> [<http://perma.cc/A2DV-XZR7>].

406. 724 F.3d 426, 426 (3d Cir. 2013).

407. *Id.* at 430–31.

408. *Id.* at 430 n.5.

409. *Id.* at 430.

410. *Id.* at 445 (Hardiman, J., dissenting).

411. *Drake*, 724 F.3d at 444 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010)).

412. *Id.* at 444 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008)).

defensive action in a case of conflict with another person.”<sup>413</sup> “Obviously, confrontations and conflicts ‘are not limited to the home.’”<sup>414</sup>

### 3. First Circuit

The First Circuit does not use the Two-Part Test. Instead, it simply looks at text, history, precedent, and policy. (Of course these considerations are also relevant in the Two-Part Test.) In the D.C. Circuit, Judge Kavanaugh’s dissent in *Heller II* argued that a similar methodology was the one used by the Supreme Court in *Heller*, and thus should be used by lower courts.<sup>415</sup> Some district courts have also used this methodology.<sup>416</sup>

In *Hightower v. City of Boston*,<sup>417</sup> the First Circuit upheld the denial of a carry permit to an individual who had falsified her application. In dicta, the court echoed Judge Wilkinson’s hesitancy to enforce the right to bear arms.

Under the Massachusetts licensing scheme, if an applicant is statutorily eligible for a license, the licensing authority *may* issue the license if it appears that the applicant is a suitable person to be issued such license.<sup>418</sup> Hightower’s license had been revoked for untruthful answers on her application. “Hightower argue[d] that she is entitled to a declaration that the Second Amendment secures the right to publicly carry a handgun outside of her home for self-defense, and that this right cannot be made to depend on a suitability determination by licensing officials.”<sup>419</sup> The court disagreed, finding that “the government may regulate the carrying of concealed weapons outside of the home”<sup>420</sup> because “[i]t is plain that the interest Hightower advances in carrying concealed weapons outside the home is distinct from this core interest emphasized in *Heller*.”<sup>421</sup>

413. *Id.* at 444.

414. *Id.* (quoting *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012)).

415. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (text, history, tradition).

416. *See, e.g., Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1117–19 (N.D. Ill. 2012) (striking ban on issuing gun permits to people who had been convicted of violating a carrying ban which was later held to be unconstitutional); *cf. Rocky Mountain Gun Owners v. Hickenlooper*, 371 P.3d 768, 783 (Colo. App. 2016) (Graham, J., dissenting) (interpreting Colorado Constitution).

417. 693 F.3d 61, 74 (1st Cir. 2012).

418. MASS. GEN. LAWS ch. 140, § 131(d) (2015). This statute was successfully challenged in *Richmond v. Peraino*, 128 F. Supp. 3d 415, 419–20 (D. Mass. 2015). In an as-applied challenge, the state failed to demonstrate that the revocation of a license based on a 40-year-old marijuana conviction was “supported by some form of ‘strong showing,’ necessitating a substantial relationship between the restriction and an important governmental objective.” *Id.* at 19 (internal quotation omitted).

419. *Hightower*, 693 F.3d at 71.

420. *Id.* at 73.

421. *Id.* at 72.

The court declined to define the scope of the Second Amendment beyond the home:

We agree with Judge Wilkinson's cautionary holding in *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), *cert. denied*, [565] U.S. [1058], 132 S. Ct. 756 (2011), that we should not engage in answering the question of how *Heller* applies to possession of firearms outside of the home, including as to "what sliding scales of scrutiny might apply." *Id.* at 475. As he said, the whole matter is a "vast *terra incognita* that courts should enter only upon necessity and only then by small degree." *Id.*<sup>422</sup>

Hightower's as-applied challenge failed because a "requirement that firearms license applicants provide truthful information, enforced by the revocation of licenses if the applicant provides false information, serves a variety of important purposes."<sup>423</sup> In fact, "[t]he prohibition of the inclusion of false information in a license application is necessary to the functioning of the licensing scheme."<sup>424</sup> Hightower's facial challenge, which focused on the amount of discretion conferred by the suitability requirement, failed because Hightower failed to show "that the statute lacks any plainly legitimate sweep" and because her as-applied claim demonstrated a constitutional application of the scheme: "where false information is provided on an application form."<sup>425</sup>

### C. Right Exists Outside the Home, But in a Very Weak Form

New York State's carry licensing system is highly arbitrary and discretionary. In most counties, permits are issued by trial court judges.<sup>426</sup> Issuing practices vary widely by county. Some issuing authorities consider self-defense not to be a "proper cause."

Like the Fourth Circuit, the Second Circuit also thought the question of a right to arms outside the home was confusing. The Second Circuit concluded that "the Amendment must have *some* application in the very different context of the public possession of firearms."<sup>427</sup> The Second Circuit said that home defense was the core of the Second Amendment; and because restrictions on carrying arms in public did not affect the core right, and because there was a historic tradition of greater regulation for arms outside the home than inside, the Circuit adopted intermediate scrutiny.<sup>428</sup>

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422. *Id.* at 74. *But see* *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) ("that 'vast *terra incognita*' has been opened to judicial exploration by *Heller* and *McDonald*. There is no turning back by the lower federal courts").

423. *Hightower*, 693 F.3d at 74.

424. *Id.* at 75.

425. *Id.* at 78.

426. N.Y. PENAL L. § 400.000. In New York, "Supreme Court" refers to trial courts of general jurisdiction. N.Y. JUD. CT. ACTS §§ 140 to 140-B.

427. *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (emphasis in original).

428. *Id.* at 93-95.

The Second Circuit tested and upheld the near-prohibitory application under the weakest possible formulation of intermediate scrutiny: “if it is substantially related to the achievement of an important governmental interest.”<sup>429</sup> As will be detailed in Part VIII.E *infra*, the Second Circuit has created its own eccentric and feeble version of heightened scrutiny for the Second Amendment.

*D. No Right to Concealed Carry Outside the Home*

In *Peruta v. County of San Diego*,<sup>430</sup> an en banc panel of the Ninth Circuit held that “there is no Second Amendment right for members of the general public to carry concealed firearms in public.”<sup>431</sup> While longstanding precedent surely supports the court’s holding that a concealed carry ban in complete isolation is constitutional, the court clumsily mischaracterized the issue in the case to reach this holding.

The court ignored the fact that the open carrying of firearms is also prohibited in California. Thus, by upholding the concealed carry ban, the court allowed typical law-abiding citizens to be entirely prohibited from carrying firearms in public. The court’s refusal to acknowledge this complete bar on bearing arms is especially peculiar for two reasons: First, all four lower court decisions leading up to the en banc panel’s decision were based on the availability of open carry.<sup>432</sup> Second, of all the authorities the court cited in its extensive historical analysis, precisely none support the outcome of the case (a complete ban on bearing arms).<sup>433</sup> Not a single case, statute, or constitutional provision cited by the court supports a complete ban on bearing arms.<sup>434</sup> In

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429. *Id.* at 96.

430. *Peruta v. Cty. of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016).

431. *Id.* at 924, 927.

432. The district courts and Ninth Circuit panels all based their holdings on the availability of open carry; the district courts upheld the concealed carry restrictions based on the then-availability of open carry, while the Ninth Circuit panels struck down the restrictions based on the then-unavailability of open carry. *Peruta v. Cty. of San Diego*, 758 F. Supp. 2d 1106, 1114 (S.D. Cal. 2010); *Richards v. Cty. of Yolo*, 821 F. Supp. 2d 1169, 1178 (E.D. Cal. 2011); *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1178–79 (9th Cir. 2014); *Richards v. Prieto*, 560 F. App’x 681, 682 (9th Cir. 2014).

433. Every case cited by the court either upheld a concealed carry ban when open carry remained available, struck down a concealed carry ban, assumed the right to bear arms applies outside the home, or relied on an erroneous pre-*Heller* collective right interpretation of the Second Amendment. Every American statute and constitutional provision cited by the court either left open carry available or granted the legislature the ability to prescribe the manner in which arms could be borne. *Peruta*, 824 F.3d at 933–39.

434. Judge Graber’s concurrence, endorsed by the majority, argued that “even if we assume that the Second Amendment applied to the carrying of concealed weapons in public, the provisions at issue would be constitutional” under intermediate scrutiny. *Id.* at 942 (Graber, J., concurring). This concurrence is similarly based on the concealed carry ban being considered in

fact, the precedent the court relied on to hold concealed carry bans constitutional overwhelmingly and undeniably support the dissent's conclusion that "[s]tates may choose between different manners of bearing arms for self-defense so long as the right to bear arms for self-defense is accommodated."<sup>435</sup>

It cannot be said for certain why the court framed the issue in a way that failed to even address the plaintiffs' true burden, or why the court ignored the fact that the precedent it relied on just as strongly supported the dissent's conclusion; but it would not be unreasonable to speculate that the court was unable to justify a complete ban on bearing arms, and hoped instead to open the door for concealed carry and open carry bans to be justified separately but implemented simultaneously.<sup>436</sup>

#### E. *Right to Carry on Government Property*

In *United States v. Dorosan*,<sup>437</sup> an unpublished opinion from the Fifth Circuit, the court upheld a handgun ban on United States Postal Service property (including the parking lot), even "[a]ssuming Dorosan's Second Amendment right to keep and bear arms extends to carrying a handgun in his car."<sup>438</sup> The court determined that the Postal Service had constitutional authority to restrict guns on its own property; that the parking lot where postal trucks were loaded was a "sensitive place" under *Heller*;<sup>439</sup> and that Dorosan could have parked off Postal Service property and kept his gun in his car.<sup>440</sup> The court would have upheld the law "under any applicable level of scrutiny."<sup>441</sup>

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isolation. If it were considered in conjunction with the open carry ban, it would strike at the core of the Second Amendment (that being self-defense) and could not even be subjected to the intermediate scrutiny interest-balancing test. *See* *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

435. *Peruta*, 824 F.3d at 945, 948 (Callahan, J., dissenting).

436. By considering the concealed carry ban in isolation, the court created the opportunity for a future court to use the same approach to uphold an open carry ban in isolation. This willfully blind approach could eviscerate the right to bear arms. In dissent, Judge Callahan recognized that "Constitutional rights would become meaningless if states could obliterate them by enacting incrementally more burdensome restrictions while arguing that a reviewing court must evaluate each restriction by itself when determining its constitutionality." *Id.* at 953 (Callahan, J., dissenting). Based on the majority's handling of *Peruta*, it does not seem unreasonable to suggest that the court intended to open the door for an approach that could make the right to bear arms meaningless.

437. 350 F. App'x 874, 874 (5th Cir. 2009).

438. *Id.* at 875.

439. "Moreover, the Postal Service used the parking lot for loading mail and staging its mail trucks. Given this usage of the parking lot by the Postal Service as a place of regular government business, it falls under the 'sensitive places' exception recognized by *Heller*." *Id.* at 875–76.

440. *Id.* at 876.

441. *Id.*

In the Tenth Circuit's *Bonidy v. U.S. Postal Service*,<sup>442</sup> the postal issue received a more thorough analysis. The majority opinion was written by Judge David Ebel.<sup>443</sup> Judge Ebel upheld a regulation prohibiting "the storage and carriage of firearms on USPS property," including the postal service parking lot.<sup>444</sup> The ban on *concealed* carry was valid under Tenth Circuit precedent, which, following *Heller*, had found that concealed carry is not part of the Second Amendment right.<sup>445</sup>

As for open carry, the post office was a "government building" and was therefore a "sensitive place." Thus, *Heller* allowed a ban on gun carrying. The post office parking lot (which was only for customers, not for truck loading) was sufficiently related to the post office building that the parking lot too was a sensitive place.<sup>446</sup>

In an alternative holding, the *Bonidy* court considered the possibility that the parking lot might not be a "sensitive place."<sup>447</sup> And further, that *Moore* might be correct that there is a right to bear arms. After all, "'bear' certainly implies the possibility and even the likelihood that the arms will be carried outside the home."<sup>448</sup> And "the need for self-defense, albeit less acute, certainly exists outside the home as well."<sup>449</sup> Without deciding whether there is a right to bear arms, the *Bonidy* majority assumed that there was.<sup>450</sup>

The court explained, "[i]f Second Amendment rights apply outside the home, we believe they would be measured by the traditional test of intermediate scrutiny."<sup>451</sup> This was because:

[t]he right to carry weapons in public for self-defense poses inherent risks to others. Firearms may create or exacerbate accidents or deadly encounters . . . [t]he risk . . . distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny

442. 790 F.3d 1121, 1121 (10th Cir. 2015).

443. *Id.* at 1122. Before and after *Heller*, Judge Ebel has been the Tenth Circuit's most ardent opponent of Second Amendment rights. David B. Kopel, *The Second Amendment in the Tenth Circuit: Three Decades of (Mostly) Harmless Error*, 86 DENV. U. L. REV. 901, 930-32, 949, 953 (2009).

444. *Bonidy*, 790 F.3d at 1123.

445. *Id.* at 1124 (citing *Peterson v. Martinez*, 707 F.3d 1197, 1212 (10th Cir. 2013)).

446. *Id.* at 1125. ("We conclude, on the facts of this case, that the parking lot should be considered as a single unit with the postal building itself to which it is attached and which it exclusively serves. There is, in fact, a drop-off box for the post office in the parking lot, meaning that postal transactions take place in the parking lot as well as in the building. Thus, the previously quoted language in *Heller* applies with the same force to the parking lot as to the building itself.").

447. *Id.* at 1124.

448. *Id.* at 1125.

449. *Bonidy*, 790 F.3d at 1125.

450. *Id.* at 1125-26.

451. *Id.* at 1126.

test, such as the right to marry and the right to be free from viewpoint discrimination, which can be exercised without creating a direct risk to others.<sup>452</sup>

The court upheld the ban because it was “substantially related to the USPS’s important interest in creating a safe environment for its patrons and employees.”<sup>453</sup> The *Bonidy* court emphasized two special factors. First, this was a case of government “as a proprietor of a state-owned business rather than regulating private activity.”<sup>454</sup> In addition, “the regulation applies only to a very limited spatial area (that is, USPS facilities) and affects private citizens only insofar as they are doing business with the USPS on USPS property.”<sup>455</sup>

Judge Tymkovich concurred in part and dissented in part; he agreed that the ban inside the post office was constitutional.<sup>456</sup> For the parking lot, he agreed that intermediate scrutiny was the correct standard.<sup>457</sup> On the facts, his disagreement with the majority was whether a less restrictive alternative was available.<sup>458</sup> Less restrictive alternatives are discussed *infra*.

On the law, Judge Tymkovich chastised the majority for refusing to decide that the Second Amendment does guarantee a right to arms outside the home.<sup>459</sup> To Judge Tymkovich, it was “incontestable that the Second Amendment applies outside of home self-defense.”<sup>460</sup> The Supreme Court had been clear, he wrote.

*Heller* had said that the Second Amendment included the right to “possess and carry weapons in case of confrontation,” including for “self-defense and hunting.”<sup>461</sup> According to *Heller*, “‘bear arms’ means to ‘wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.’”<sup>462</sup> The *Heller* “presumptively lawful” carry ban for “sensitive places” implies that “restrictions on free carry in other locations would be granted no such presumption.”<sup>463</sup>

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452. *Id.* This implies that restrictions on the Second Amendment rights of law-abiding citizens inside the home should be subjected to strict scrutiny.

453. *Id.* at 1127.

454. *Bonidy*, 790 F.3d at 1127.

455. *Id.*

456. *Id.* at 1129.

457. *Id.*

458. *Id.*

459. *Bonidy*, 790 F.3d at 1136.

460. *Id.* at 1130.

461. *Id.*

462. *Id.* 1131 (Tymkovich, J., concurring in part and dissenting in part).

463. *Id.* at 1130.

Moreover, “[v]iolence occurs outside the home, and to call the need for self-defense most acute in the home is to acknowledge it exists elsewhere. Confrontations do not just occur in the home, and hunting never does.”<sup>464</sup>

In sum, “[o]nly an unrealistic reading of that language could restrict the right to the home, and it is hard to believe a founding generation who routinely carried weapons for protection outside the home and traveling would agree.”<sup>465</sup>

One other case about government property has been decided by a circuit court: *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*.<sup>466</sup> The U.S. Army Corps of Engineers bans loaded firearms, bows, and “other weapons” on some of its Georgia property.<sup>467</sup> According to the court’s tendentious characterization of the plaintiffs’ claims, “[T]he plaintiffs [hung] their hats on a single, sweeping argument: that the regulation completely destroys their Second Amendment rights, thereby obviating the need for a traditional scrutiny analysis.”<sup>468</sup>

The court rejected that argument:

The Corps’ firearms regulation . . . applies only to Corps property: it is narrowly cabined to a specific area, and in this case that area is specifically designated for recreation. The plaintiffs can freely exercise their right to bear arms for self-defense elsewhere, whether in the home or on the streets, without running afoul of this regulation.<sup>469</sup>

“[S]o narrow a restriction on so limited a geographic expanse cannot fairly be said to destroy the plaintiffs’ Second Amendment rights altogether.”<sup>470</sup>

Because the plaintiffs had (according to the court) presented no other argument, the court had “no reason to and [did not] address whether the Corps’ firearms regulation would pass muster under any form of elevated scrutiny.”<sup>471</sup>

#### F. *Carrying on Private Property Against the Wishes of the Owner*

In *GeorgiaCarry.Org, Inc. v. Georgia*,<sup>472</sup> the plaintiffs challenged a statute against carrying guns (even with a carry license) in “a place of worship, unless

464. *Bonidy*, 790 F.3d at 1130.

465. *Id.*

466. 788 F.3d 1318, 1320 (11th Cir. 2015).

467. *See* 36 C.F.R. § 327.13(a) (2002). There are exceptions for law enforcement officers, hunting or fishing, and authorized shooting ranges. Shortly before the Ninth Circuit was to hear oral argument on another challenge to the Corps’ gun ban, the Corps announced that it will be revising the regulation, to allow firearms possession. *See* David Kopel, *Second Amendment May Be Restored on Army Corps of Engineers Land*, WASH. POST (Mar. 10, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/10/second-amendment-may-be-restored-on-army-corps-of-engineers-land/> [http://perma.cc/4MHA-5Z2J].

468. *GeorgiaCarry.Org, Inc.*, 788 F.3d at 1320.

469. *Id.* at 1326.

470. *Id.*

471. *Id.* at 1324.

the governing body or authority of the place of worship permits the carrying of weapons or long guns by license holders.”<sup>473</sup> The court aggressively construed the pleadings, and asserted that the Plaintiffs failed to plead an as-applied challenge, even though the plaintiffs included a church that wanted to allow carry on its property. So the court ruled only on the strawman issue of a facial challenge.<sup>474</sup>

To state a facial challenge . . . Plaintiffs must take the position that the Second Amendment protects a right to bring a firearm on the private property of another against the wishes of the owner. Put another way, Plaintiffs must argue that the individual right protected by the Second Amendment, in light of *Heller* and *McDonald*, trumps a private property owner’s right to exclusively control who, and under what circumstances, is allowed on his or her own premises.<sup>475</sup>

. . . [P]roperty law, tort law, and criminal law provide the canvas on which our Founding Fathers drafted the Second Amendment. A clear grasp of this background illustrates that the pre-existing right codified in the Second Amendment does not include protection for a right to carry a firearm in a place of worship against the owner’s wishes. Quite simply, there is no constitutional infirmity when a private property owner exercises his, her, or its—in the case of a place of worship—right to control who may enter, and whether that invited guest can be armed, and the State vindicates that right.<sup>476</sup>

#### G. *Qualified Immunity and Right to Carry*

In *Gonzalez v. West Milwaukee*, the defendant was twice arrested for disorderly conduct for openly carrying a holstered handgun into retail stores.<sup>477</sup> Both times, Gonzalez’s handgun was temporarily confiscated, and later

472. *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1244 (11th Cir. 2012).

473. GA. CODE ANN. § 16-11-127(b)(4) (2016).

474. *GeorgiaCarry.Org, Inc.*, 687 F.3d at 1260. The subtext that the Eleventh Circuit used for the facial challenge was from *United States v. Salerno*, 481 U.S. 739, 745 (1987). The *Salerno* case said that in a facial challenge, a plaintiff must prove that “no set of circumstances exists under which the [statute] would be valid.” The Eleventh Circuit explained that “[w]hile *Salerno* is often criticized, its holding remains binding precedent, which we faithfully apply here.” *GeorgiaCarry.Org, Inc.*, 687 F.3d at 1255, n.19. More recently, the oft-criticized *Salerno* has been called into doubt by *Johnson v. United States*, 135 S. Ct. 2551, 2551 (2015). *Johnson* held a statute unconstitutionally vague, even though it was capable of valid application. The *Johnson* Court explained, “although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision’s grasp.” *Id.* at 2560–61. Thus, “[i]t seems to us that the dissent’s supposed requirement of vagueness in all applications is not a requirement at all. . .” *Id.* at 2561.

475. *GeorgiaCarry.Org, Inc.*, 687 F.3d at 1261.

476. *Id.* at 1264.

477. 671 F.3d 649, 651 (7th Cir. 2012).

returned. Gonzalez brought a § 1983 action against the arresting officers, but the Seventh Circuit ruled against him.

Police officers are entitled to “qualified immunity” against civil rights lawsuits, unless their actions violate clearly established law. “At the time of the arrests, the state constitutional right to bear arms was relatively new, and Wisconsin law was unclear about the effect of the right on the scope of the disorderly conduct statute. Moreover, the Supreme Court had not yet decided *McDonald v. City of Chicago*.”<sup>478</sup> Since the law was in flux, nothing about open carry was “clearly established,” so the officer was entitled to qualified immunity.<sup>479</sup>

The Second Circuit took a similar approach in *Burgess v. Town of Wallingford*,<sup>480</sup> an unpublished opinion involving open carry in a crowded pool hall. *McDonald* post-dated the time of the incident.<sup>481</sup>

### VIII. WHAT LEVEL OF SCRUTINY APPLIES?

In this Part VIII, we examine how the circuits choose which level of heightened scrutiny to apply in Step Two. Then in Part IX, we will examine how courts have applied various forms of heightened scrutiny. However, to avoid discussing one case twice, the methodological division is not quite strict. For example, Part VIII discusses the Second Circuit’s *New York State Rifle & Pistol Association v. Cuomo* (“*NYSRPA*”),<sup>482</sup> “a casebook guide to eviscerating”<sup>483</sup> Second Amendment rights; the discussion includes the selection of an intermediate scrutiny standard of review, and the fabrication of a novel and feeble version of that standard. The Second Circuit has violated *McDonald* by treating the Second Amendment as a “second-class” right,<sup>484</sup> “singled out for special—and specially unfavorable—treatment.”<sup>485</sup>

#### A. *How to Choose Between Strict and Intermediate Scrutiny*

Almost all circuit cases agree that any law which burdens Second Amendment rights must receive something stricter than rational basis review.<sup>486</sup> The Second Circuit, however, says that only laws which impose a

478. *Id.* at 652.

479. *Id.* at 659–60.

480. 569 F. App’x 21, 21 (2d Cir. 2014).

481. *Id.* at 23.

482. 804 F.3d 242 (2d Cir. 2015).

483. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1685 (2015) (Kennedy, J., concurring).

484. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

485. *Id.* at 745.

486. *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (“The Court made plain in *Heller* that a rational basis alone would be insufficient to justify laws burdening the Second Amendment.”); *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013) (“*Heller* makes clear that we may not apply rational basis review to a law that burdens protected Second Amendment

conduct.”); *United States v. Huet*, 665 F.3d 588, 600 (3d Cir. 2012) (“Although the Court did not decide on a level of scrutiny to be applied in cases involving Second Amendment challenges, it rejected rational basis review.”); *United States v. Marzzarella*, 614 F.3d 85, 95–96 (3d Cir. 2010) (“The Government argues a rational basis test should apply to § 922(k), but *Heller* rejects that standard for laws burdening Second Amendment rights.”); *NRA v. BATFE*, 700 F.3d 185, 195 (5th Cir. 2012) (“rational basis review, which *Heller* held ‘could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right’ such as ‘the right to keep and bear arms.’”); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (“*Heller* left open the issue of the standard of review, rejecting only rational-basis review.”); *United States v. Masciandaro*, 638 F.3d 458, 469 (4th Cir. 2011) (“The Court did, however, rule out a rational basis review, because that level of review ‘would be redundant with the separate constitutional prohibitions on irrational laws.’”) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008)); *United States v. Carter (Carter I)*, 669 F.3d 411, 415 (4th Cir. 2012) (“The Court did not say which form of scrutiny should apply, but it did rule out rational basis scrutiny . . .”); *United States v. Chapman*, 666 F.3d 220, 225 n.2 (4th Cir. 2012) (“Rational-basis review, which is the most lenient level of means-end scrutiny, is inapplicable to review a law that burdens conduct protected under the Second Amendment.”); *BATFE*, 700 F.3d at 194 (If the law falls within the scope of the Second Amendment’s guarantee, “the second step is to determine whether to apply intermediate or strict scrutiny to the law . . .”); *Hollis v. Lynch*, 827 F.3d 436, 446–47 (5th Cir. 2016) (“[If a] law impinges upon a right protected by the Second Amendment . . . we proceed to the second step, which is to determine whether to apply intermediate or strict scrutiny to the law.”) (internal quotations and brackets omitted); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (“If a rational basis were enough, the Second Amendment would not do anything—because a rational basis is essential for legislation in general.”) (citations omitted); *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010) (“But though Congress may exclude certain categories of persons from firearm possession, the exclusion must be more than merely ‘rational,’ and must withstand ‘some form of strong showing.’”) (citations omitted); *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011) (“For our purposes, however, we know that *Heller*’s reference to ‘any standard of scrutiny’ means any *heightened* standard of scrutiny; the Court specifically excluded rational-basis review.”) (emphasis in original); *Moore v. Madigan*, 702 F.3d 933, 939 (7th Cir. 2012) (“[A] ban as broad as Illinois’s can’t be upheld merely on the ground that it’s not irrational.”); *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 (7th Cir. 2015) (“The Supreme Court has steered away from prescribing a particular level of scrutiny that courts should apply to categorical bans on the possession of firearms by specified groups of people, though it has said that rational-basis review would be too lenient.”); *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) (“*All* legislation requires a rational basis; if the Second Amendment imposed only a rational basis requirement, it wouldn’t do anything.”); *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) (“In *Heller*, the Supreme Court did not specify what level of scrutiny courts must apply to a statute challenged under the Second Amendment. The *Heller* Court did, however, indicate that rational basis review is not appropriate.”); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (“While *Heller* did not specify the appropriate level of scrutiny for Second Amendment claims, it nevertheless confirmed that rational basis review is not appropriate.”); *Van Der Hule v. Holder*, 759 F.3d 1043, 1051 (9th Cir. 2014) (“Second Amendment questions are reviewed under heightened scrutiny . . .”); *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1058 (9th Cir. 2016) (“[T]he Ordinance must be subjected to heightened scrutiny—something beyond mere rational basis review . . .”); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1141 (10th Cir. 2015) (Tymkovich, J., concurring in part and dissenting in part) (“[W]hile the government’s justifications might suffice to uphold this regulation on rational-basis review, *Heller* demands more.”); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244,

“substantial” burden receive more than rational basis. Even then, they receive only the weakest form of intermediate scrutiny.

The more common view agrees with the D.C. Circuit: “As with the First Amendment, the level of scrutiny applicable under the Second Amendment surely ‘depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.’”<sup>487</sup> Similarly, in the Tenth Circuit, “‘the Second Amendment can trigger more than one particular standard of scrutiny,’ depending, at least in part, upon the ‘type of law challenged and the type of [Second Amendment restriction] at issue.’”<sup>488</sup> Other circuits agree that scrutiny should be stricter in some circumstances, and less strict in others.

The Seventh Circuit’s *Ezell* explained that there is a sliding scale, depending on how close a restriction comes to the core of the right:

[W]e can distill this First Amendment doctrine and extrapolate a few general principles to the Second Amendment context. First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government’s means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.<sup>489</sup>

In the Seventh Circuit, the firearms ban for persons convicted of misdemeanor domestic violence required a “strong showing.”<sup>490</sup> In *Skoien*, that showing was made; the court found the ban to be “vital to the safety of their relatives.”<sup>491</sup> If a law affected “the gun rights of the entire law-abiding adult population of Illinois,” the government “would have to make a stronger showing,” according to *Madigan*.<sup>492</sup> As *Ezell* wrote, “a severe burden on the

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1256 (D.C. Cir. 2011) (“*Heller* clearly does reject any kind of ‘rational basis’ or reasonableness test . . .”).

487. *Heller II*, 670 F.3d at 1257 (citing *Chester*, 628 F.3d at 682) “[W]e determine the appropriate standard of review by assessing how severely the prohibitions burden the Second Amendment right.” *Id.* at 1261. “[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify.” *Id.* at 1257. Strict scrutiny is sometimes considered to be an impossible standard for the government to meet, but precedent shows otherwise. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006).

488. *United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010).

489. *Ezell*, 651 F.3d at 708.

490. *Skoien*, 614 F.3d. at 641.

491. *Id.* at 643.

492. *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012).

core Second Amendment right . . . will require an extremely strong public-interest justification and a close fit between the government's means and its end."<sup>493</sup>

Thus, Chicago's ban on target ranges received "not quite 'strict scrutiny.'"<sup>494</sup> Chicago's ban on almost all gun sales and transfers also received "'not quite strict scrutiny.'"<sup>495</sup> Strict scrutiny was appropriate for a lifetime gun ban for non-violent misdemeanants.<sup>496</sup>

In the Fifth Circuit, "[A] law impinging upon the Second Amendment right must be reviewed under a properly tuned level of scrutiny—i.e., a level that is proportionate to the severity of the burden that the law imposes on the right."<sup>497</sup> "A regulation that threatens a right at the core of the Second Amendment—for example, the right of a law-abiding, responsible adult to . . . use a handgun to defend his or her home and family . . . triggers strict scrutiny. A less severe regulation—a regulation that does not encroach on the core of the Second Amendment—requires a less demanding means-ends showing."<sup>498</sup>

This standard required strict scrutiny for a federal statute barring persons from buying handguns outside their state of residence.<sup>499</sup> Strict scrutiny was also applied to a ban on firearms in parking lots of businesses where alcohol is sold or served.<sup>500</sup>

The Fourth Circuit standard is: "[A]ny 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," so intermediate scrutiny applies.<sup>501</sup> Or according to another panel, a "severe burden on the core Second Amendment right of armed self-defense should require a strong justification," but "less severe burdens on the right" and "laws that do not implicate the central self-defense concern of the Second Amendment[ ] may be more easily justified."<sup>502</sup> The analysis turns on "the nature of a person's Second Amendment interest

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493. *Ezell*, 651 F.3d at 708.

494. *Id.*

495. *Illinois Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 939 (N.D. Ill. 2014).

496. *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1123 (N.D. Ill. 2012).

497. *NRA v. BATFE*, 700 F.3d 185, 198 (5th Cir. 2012).

498. *Id.* at 195.

499. *Mance v. Holder*, 74 F. Supp. 3d 795, 804 (N.D. Tex. 2015). The decision has been appealed to the Fifth Circuit.

500. *Taylor v. City of Baton Rouge*, 39 F. Supp. 3d 807, 816 (M.D. La. 2014).

501. *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).

502. *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (quotation and citation omitted).

[and] the extent to which those interests are burdened by government regulation.”<sup>503</sup>

The Fourth Circuit’s *Woollard* decision again drew the line for the law-abiding between home (strict scrutiny) and outside (intermediate scrutiny): “The Appellees would have us place the right to arm oneself in public on equal footing with the right to arm oneself at home, necessitating that we apply strict scrutiny in our review of the good-and-substantial-reason requirement. Unfortunately for the Appellees, their argument is foreclosed by our precedent.”<sup>504</sup>

Under Fourth Circuit precedent, strict scrutiny applied to a statute banning the possession, sale, or carrying of guns during declared emergencies, such as snow storms.<sup>505</sup>

In the Ninth Circuit, “[I]f a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right, we may apply intermediate scrutiny.”<sup>506</sup> So a regulatory ban on firearms while camping or hiking on Army Engineers property “poses a substantial burden on a core Second Amendment right and is therefore subject to strict scrutiny.”<sup>507</sup>

In the rest of this Part, we examine how the intermediate scrutiny standard has been applied.

#### B. *Intermediate Scrutiny for Prohibited Persons: Drug Users, Domestic Violence Offenders, Illegal Aliens, and Common-Law Misdemeanants*

The Seventh Circuit required bans on domestic violence misdemeanants (*Skoien*),<sup>508</sup> felons (*Williams*),<sup>509</sup> and drug users (*Yancey*)<sup>510</sup> to satisfy “some form of strong showing.”<sup>511</sup> The First Circuit required the same “strong showing” in *Booker* for domestic violence misdemeanants.<sup>512</sup>

In *Reese*, the Tenth Circuit, citing *Marzzarella* and *Skoien*, used intermediate scrutiny for the firearms ban for persons subject to domestic violence protective orders. The statute only “prohibit[s] the possession of

503. *Masciandaro*, 638 F.3d at 470.

504. *Woollard v. Gallagher*, 712 F.3d 865, 878 (4th Cir. 2013).

505. *Bateman v. Perdue*, 881 F. Supp. 2d 709, 714–16 (E.D.N.C. 2012).

506. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014).

507. *Morris v. U.S. Army Corps of Eng’rs*, 990 F. Supp. 2d 1082, 1086 (D. Idaho 2014).

508. *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010); 18 U.S.C. § 922(g)(9) (2012).

509. *United States v. Williams*, 616 F.3d 685, 691 (7th Cir. 2010); 18 U.S.C. § 922(g)(1).

510. *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010); 18 U.S.C. § 922(g)(3).

511. *Skoien*, 614 F.3d at 641; *Williams*, 616 F.3d at 691; *Yancey*, 621 F.3d at 683.

512. *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011).

firearms by narrow classes of persons who, based on their past behavior, are more likely to engage in domestic violence.”<sup>513</sup>

*Reese* was followed by the Fourth Circuit in *Chapman*. The court explained why Mr. Chapman only deserved intermediate scrutiny:

(1) a judicial finding that he likely committed domestic abuse; (2) his engaging in behavior causing him to be judicially prohibited for 180 days from using, attempting to use, or threatening to use physical force against his intimate partner that would reasonably be expected to cause bodily injury; (3) his serious attempts at suicide using firearms in the very home in which he claims to have possessed such firearms for self-defense and his endangering the life of his ex-wife in the process; and (4) his discharge of a firearm out of the bedroom window in the direction of his ex-wife. Accordingly, we conclude that intermediate scrutiny is the appropriate standard of scrutiny for Chapman and similarly situated persons.<sup>514</sup>

Thus, “Chapman’s claim is not within the core right identified in *Heller*—the right of a law-abiding, *responsible* citizen to possess and carry a weapon for self-defense.”<sup>515</sup> This point was reiterated in *Mahin*.<sup>516</sup>

In *United States v. Chester* the Fourth Circuit rejected strict scrutiny for domestic violence misdemeanants. They are “not within the core right identified in *Heller*—the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense.”<sup>517</sup> The Fourth Circuit did the same for the subjects of domestic violence protective orders in *U.S. v. Staten*.<sup>518</sup> Intermediate scrutiny also applied to drug users in *Carter I* and *Carter II*.<sup>519</sup>

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513. *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010). The court noted domestic assaults involving firearms are substantially more deadly than those that do not and that there is a high recidivism rate for domestic abusers. Although the *Reese* court only required intermediate scrutiny, it explained that the law would have passed strict scrutiny. *Id.* at 804 n.4.

514. *United States v. Chapman*, 666 F.3d 220, 226 (4th Cir. 2012).

515. *Id.* at 225–26 (emphasis in original).

516. *United States v. Mahin*, 668 F.3d 119, 123 (4th Cir. 2012) (“[T]he courts of appeals have generally applied intermediate scrutiny to uphold Congress’ effort under § 922(g) to ban firearm possession by certain classes of non-law-abiding, non-responsible persons who fall outside the Second Amendment’s core protections. . . . We join the growing consensus in holding that Mahin’s conviction under § 922(g)(8) is constitutionally sound.”).

517. 628 F.3d 673, 680 (4th Cir. 2010).

518. 666 F.3d 154, 159 (4th Cir. 2011).

519. *United States v. Carter (Carter I)*, 669 F.3d 411, 416 (4th Cir. 2012); *United States v. Carter (Carter II)*, 750 F.3d 462, 470 (4th Cir. 2014) (“[T]he government adequately demonstrated a reasonable fit between its important interest in protecting the community from gun violence and § 922(g)(3), which disarms unlawful drug users and addicts” because “the empirical evidence and common sense support the government’s contention that drug use, including marijuana use, frequently coincides with violence.”).

In *Huitron-Guizar*, the Tenth Circuit used intermediate scrutiny for a Second Amendment challenge by an illegal alien.<sup>520</sup> The Seventh Circuit also applied intermediate scrutiny to a challenge by an illegal alien in *Meza-Rodriguez*.<sup>521</sup>

Like other circuits, the Ninth Circuit used intermediate scrutiny for domestic violence misdemeanants, in *Chovan*.<sup>522</sup> Judge Bea dissented:

[S]electing intermediate scrutiny as the correct level at which to review a categorical, status-based disqualification from the core right of the Second Amendment also does not make sense.<sup>523</sup>

[I]n the Founding period, felonies historically resulted in disqualification from certain rights, but misdemeanors did not, nor did infractions, nor restraining orders. I therefore conclude that domestic violence misdemeanants are not disqualified from the core protection of the Second Amendment, and that § 922(g)(9) accordingly should be analyzed, not under intermediate scrutiny, but under strict scrutiny.<sup>524</sup>

Likewise, Justice Thomas in *Voisine v. United States* pointed out that there are no other examples of a lifetime ban on the exercise of a constitutional right because of a misdemeanor conviction.<sup>525</sup>

In *Schrader v. Holder*,<sup>526</sup> the D.C. Circuit applied intermediate scrutiny to a challenge by a common-law assault and battery misdemeanant. Without deciding whether common-law misdemeanants fall within the scope of the Second Amendment, the court upheld the ban under intermediate scrutiny

520. *United States v. Huitron-Guizar*, 678 F.3d 1164, 1170 (10th Cir. 2012) (holding that, assuming without deciding that illegal aliens have Second Amendment rights, the prohibition withstands intermediate scrutiny because “courts must defer to Congress as it lawfully exercises its constitutional power to distinguish between citizens and non-citizens, or between lawful and unlawful aliens, and to ensure safety and order.”).

521. *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 (7th Cir. 2015). “Congress’s interest in prohibiting persons who are difficult to track and who have an interest in eluding law enforcement is strong enough to support the conclusion that 18 U.S.C. § 922(g)(5) does not impermissibly restrict [an illegal alien’s] Second Amendment right to bear arms.” *Id.* at 673.

522. *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (“In sum, § 922(g)(9) does not implicate the core Second Amendment right, but it does place a substantial burden on the right. Accordingly, we conclude that intermediate rather than strict scrutiny is the proper standard to apply.”). The *Chovan* court upheld § 922(g)(9) under intermediate scrutiny. *Id.* at 1140–41.

523. *Id.* at 1145.

524. *Id.* at 1149. State courts have also recognized the potential problem of a lifetime prohibition for a misdemeanor. *See, e.g.*, *Odle v. Dep’t of State Police*, 43 N.E.3d 1223, 1233 (Ill. App. Ct. 2015).

525. *Voisine v. United States*, 136 S. Ct. 2272, 2291–92 (2016) (Thomas, J., dissenting).

526. 704 F.3d 980, 989 (D.C. Cir. 2013).

since “common-law misdemeanants as a class cannot be considered law-abiding and responsible.”<sup>527</sup>

*C. Fifth Circuit: Intermediate Scrutiny for 18–20-Year-Olds*

In *NRA v. BATFE*,<sup>528</sup> the Fifth Circuit only required intermediate scrutiny to uphold a statute prohibiting licensed firearms dealers from selling handguns to persons between the ages of eighteen and twenty. “Like the federal bans targeting felons and the mentally ill, the federal laws targeting minors under 21 are an outgrowth of an American tradition of regulating certain groups’ access to arms for the sake of public safety.”<sup>529</sup> So, “[t]o the extent that the ban on handgun sales to minors under 21 is analogous to longstanding, presumptively lawful bans on possession by felons and the mentally ill . . . the ban at bar should trigger an ‘intermediate’ level of scrutiny.”<sup>530</sup>

The court also compared the ban to *Heller*’s presumptively lawful laws imposing conditions and qualifications on the commercial sale of arms.<sup>531</sup> The court further explained that “unlike the D.C. ban in *Heller*, this ban does not disarm an entire community, but instead prohibits commercial handgun sales to 18–to–20–year–olds—a discrete category. The narrow ambit of the ban’s target militates against strict scrutiny.”<sup>532</sup> The court was also persuaded by the alternative methods through which adults under twenty-one could still acquire handguns, and by the temporary effect of the ban.<sup>533</sup> Accordingly:

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527. *Id.* The federal prohibition for felons (18 U.S.C. § 922(g)(1) (2012)) does not actually say “felonies.” Rather it applies to any crime punishable by more than one year in prison. This was relevant in *Dutton v. Commonwealth*, where the Third Circuit found that Dutton was prohibited from gun possession because the (non-domestic) misdemeanor of which he had been convicted carried a maximum sentence of up to five years. *Dutton v. Commonwealth*, 503 F. App’x 125, 127 (3d Cir. 2012).

528. 700 F.3d 185 (5th Cir. 2012).

529. *Id.* at 205.

530. *Id.* at 206. “We further state that a longstanding measure that harmonizes with the history and tradition of arms regulation in this country would not threaten the core of the Second Amendment guarantee. Thus, even if such a measure advanced to step two of our framework, it would trigger our version of ‘intermediate’ scrutiny.” *Id.* at 196.

531. *Id.* (“Far from a total prohibition on handgun possession and use, these laws resemble ‘laws imposing conditions and qualifications on the commercial sale of arms,’ which *Heller* deemed ‘presumptively lawful.’”).

532. *Id.* at 205.

533. *BATFE*, 700 F.3d at 206 (“[T]hese laws do not strike the core of the Second Amendment because they do not prevent 18–to–20–year–olds from possessing and using handguns ‘in defense of hearth and home.’”). Of course it is not always easy or even possible to find a private seller. Nor does every young adult have a parent willing to gift a handgun. Although young adults may purchase long guns from gun stores, in many situations a long gun is an insufficient alternative to a handgun. *See* *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) (explaining why many Americans find handguns preferable for self-defense).

[T]hese laws demand only an “intermediate” level of scrutiny because they regulate commercial sales through an age qualification with temporary effect. Any 18-to-20-year-old subject to the ban will soon grow up and out of its reach. It is useful to compare this case with *United States v. Yancey*, in which the Seventh Circuit held that 18 U.S.C. § 922(g)(3), the illegal-drug-user firearm possession ban, was “far less onerous” than the firearm-possession bans on felons and the mentally ill because “unlike those who have been convicted of a felony or committed to a mental institution and so face a lifetime ban, an unlawful drug user like [the defendant] could regain his right to possess a firearm simply by ending his drug abuse.” Similar logic applies here. The temporary nature of the burden reduces its severity. Consequently, we hold that these laws deserve what we have dubbed an “intermediate” level of scrutiny.<sup>534</sup>

The reasoning is flawed. First, that a severe burden will be lifted in a few years does not change the present severity of the burden. That a person will be able to protect herself with a handgun three years from now is cold comfort when she cannot protect herself with a handgun from an imminent threat today. Similarly, the fact that a now-pregnant woman would be eligible to get an abortion in three years would not bolster the constitutionality of a law preventing her from getting an abortion today. Second, the court’s comparison to unlawful drug users is misguided. As the court explained, the unlawful drug user can end the prohibition by simply ending his drug use—it is completely within the prohibited person’s control.<sup>535</sup> In contrast, an age limitation is completely beyond the prohibited person’s control.

Nevertheless, the Fifth Circuit adopted the same approach in *NRA v. McCraw*,<sup>536</sup> a challenge to the Texas statutes for issuing handgun carry permits only to persons twenty-one or older.<sup>537</sup>

The *BATF* court’s rationales for why an age-based restriction on gun possession and use does not burden the core of the Second Amendment right apply equally to the state’s age-based restriction here. Moreover, we cannot

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534. *BATFE*, 700 F.3d at 207 (citation omitted). “Congress, in turn, reasonably tailored a solution to the particular problem: Congress restricted the ability of persons under 21 to purchase handguns from FFLs, while allowing (i) 18-to-20-year-old persons to purchase long-guns, (ii) persons under 21 to acquire handguns from parents or guardians, and (iii) persons under 21 to possess handguns and long-guns.” *Id.* at 209.

535. *United States v. Carter (Carter I)*, 669 F.3d 411, 419 (4th Cir. 2012) (“[I]t is significant that § 922(g)(3) enables a drug user who places a high value on the right to bear arms to regain that right by parting ways with illicit drug use.”); *see also* *United States v. Yancey*, 621 F.3d 681, 687 (7th Cir. 2010) (“[T]he gun ban extends only so long as Yancey abuses drugs. In that way, Yancey himself controls his right to possess a gun.”).

536. *NRA v. McCraw*, 719 F.3d 338 (5th Cir. 2013).

537. Young adults may obtain carry permits if they are serving in the Armed Forces (including the National Guard or the Reserve) or have been honorably discharged therefrom. *See* TEX. GOV’T CODE § 411.172(g) (2015); H.B. 322, 79th Reg. Sess. (Tex. 2005).

say that, even if 18-20-year-olds' gun rights are at the core of the Second Amendment, the Texas scheme burdens those rights to any greater degree than the federal law challenged in *BATF*. As in *BATF*, the restriction here has only a temporary effect. And, because it restricts only the ability to carry handguns in public, it does not prevent those under 21 from using guns in defense of hearth and home. Finally, it is not a complete ban on handgun use; it bans such use only outside a home or vehicle. Therefore, we must follow our decision in *BATF* and apply intermediate scrutiny to the Texas laws.<sup>538</sup>

The *McCraw* court then upheld the law. It determined that “[t]he Texas laws advance the same important government objective as the one upheld in *BATF* . . . namely, advancing public safety by curbing violent crime.”<sup>539</sup> The court elaborated:

First, the Texas laws have a similarly “narrow ambit” as the federal law in *BATF*. Both the state scheme and the federal laws target the “discrete category” of 18–20-year-olds. Second, the state scheme is in some ways more related to Texas’s public safety objective than the law in *BATF*, because the state laws only regulate those persons who carry guns in public. Third, the Texas scheme restricts only the carrying of one type of gun—handguns. It is true, as plaintiffs claim, that Texas could have taken other, less restrictive approaches, such as allowing 18–20-year-olds to get a license if they demonstrate a particularly high level of proficiency and responsibility with guns. But the state scheme must merely be reasonably adapted to its public safety objective to pass constitutional muster under an intermediate scrutiny standard. Texas need not employ the least restrictive means to achieve its goal. Given the substantial tailoring of the Texas scheme, plaintiffs overbreadth argument is unpersuasive.<sup>540</sup>

*McCraw* was correct that the least restrictive alternative requirement is used for strict scrutiny, not intermediate scrutiny. However, *McCraw* erred by not considering the milder version of this test, which *does* apply in intermediate scrutiny: whether there is a substantially less burdensome alternative. The issue will be discussed further in Part IX.F., *infra*.

#### D. Third Circuit: Obliterated Serial Numbers

In *Marzarella*, the Third Circuit held that a law banning possession of a firearm with an obliterated serial number<sup>541</sup> merited intermediate scrutiny,

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538. *McCraw*, 719 F.3d at 348. The history of the right to arms in Texas is detailed in Stephen P. Halbrook, *The Right to Bear Arms in Texas*, 41 BAYLOR L. REV. 629 (1989).

539. *McCraw*, 719 F.3d at 348.

540. *Id.* at 349 (citations omitted). The court also found it persuasive that 18–20-year-olds were not prevented from defending themselves in their residences. *Id.*

541. 18 U.S.C. § 922(k) (2012).

although the question was “not free from doubt.”<sup>542</sup> The serial number law “was neither designed to nor has the effect of prohibiting the possession of any class of firearms,” so it was “a regulation of the manner in which persons may lawfully exercise their Second Amendment rights.”<sup>543</sup> By analogy to the First Amendment, an arms ban is like content discrimination on free speech, which

is subject to the most exacting scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). Regulations of the manner in which that speech takes place, however, receive intermediate scrutiny, under the time, place, and manner doctrine. *See Ward [v. Rock Against Racism]*, 491 U.S. [781,] 791 [1989]. Accordingly, we think § 922(k) also should merit intermediate, rather than strict, scrutiny.<sup>544</sup>

The serial number law “constitutes a substantial or important interest” by “preserving the ability of law enforcement to conduct serial number tracing;” and the law fits closely with that interest by almost always burdening only “those intending to engage in illicit behavior.”<sup>545</sup> The court further noted that the law would pass even strict scrutiny, because the interest was compelling and the law was the least-restrictive method of serving that interest, and did not burden more firearms possession than necessary.<sup>546</sup>

*E. D.C. Circuit: Intermediate Scrutiny for Registration, Semi-Autos, and Magazines*

In *Heller II*,<sup>547</sup> the D.C. Circuit upheld a handgun registration requirement and prohibitions on many semi-automatic rifles and on so-called “large-capacity magazines”<sup>548</sup> under intermediate scrutiny. The court compared the minimal requirements of the handgun registration law to the serial number requirement in *Marzzarella*. Neither the registration nor serial number requirement prevented anyone from possessing any firearm for any purpose.<sup>549</sup>

542. *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010). “[I]t is not the case that [strict scrutiny] must be applied to all Second Amendment challenges. Strict Scrutiny does not apply automatically any time an enumerated right is involved.” *Id.* at 96.

543. *Id.* at 97.

544. *Id.*

545. *Id.* at 98–99.

546. *Id.* at 100.

547. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011).

548. *Id.* at 1247–48. The term “large-capacity magazines” is an epithet invented by gun prohibition organizations. Supposedly, any magazine with a capacity of greater than seven rounds (or ten, or fifteen, depending on local politics) is “large.” In D.C., any magazine over ten rounds was said to be “high” capacity. In fact, magazines over ten rounds are the standard magazines supplied by manufacturers for many popular handguns and rifles, and have been so for a century and a half. *See* David B. Kopel, *The History of Firearms Magazines*, 78 ALBANY L. REV. 849, 853–62 (2015).

549. *Heller II*, 670 F.3d at 1257–58; *Marzzarella*, 614 F.3d at 97.

Surprisingly, the court also compared the semi-automatic rifle and magazine prohibitions to *Marzzarella's* serial number requirement to justify applying intermediate scrutiny to those laws.<sup>550</sup> This was inappropriate. The D.C. court explained that, like the serial number requirement, “the prohibition of semi-automatic rifles and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves.”<sup>551</sup> Why not? Because in the words of *Marzzarella*, as quoted by the D.C. Circuit, the law “left a person ‘free to possess any otherwise lawful firearm.’”<sup>552</sup>

This was disingenuous. When *Marzzarella* explained that the serial number requirement leaves a person “free to possess any otherwise lawful firearm” it simply meant that any lawful firearm remained lawful under the law so long as it was labeled with a serial number. The *Heller II* court quoted the language for an entirely different point: as long as some other firearms remain lawful, even an entire class of firearms can be banned.

Not only is such reasoning unsupported by *Marzzarella*, but it was expressly rejected by the Supreme Court in *Heller*.<sup>553</sup> Because the D.C. prohibitions on arms in common use and typically possessed by law-abiding citizens extended to the home, the laws should have been held categorically unconstitutional under *Heller*.<sup>554</sup> At the very least, since the prohibitions applied in the home and therefore struck at the core of the Second Amendment, strict scrutiny should have applied rather than intermediate.

The *Heller II* court further erred by settling on intermediate scrutiny because “[u]nlike the law held unconstitutional in *Heller*, the laws at issue here do not prohibit the possession of ‘the quintessential self-defense weapon,’ to wit, the handgun.”<sup>555</sup> So-called “large-capacity” magazines and semiautomatic rifles had not been shown to be “preferred” or “well-suited” for sport or self-defense.<sup>556</sup> There were alternative arms available.<sup>557</sup> But none of that matters. The court misinterpreted *Heller*.

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550. *Heller II*, 670 F.3d at 1257.

551. *Id.* at 1262.

552. *Id.* (quoting *Marzzarella*, 614 F.3d at 97).

553. *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) (“It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed.”).

554. *See supra* note 5.

555. *Heller II*, 670 F.3d at 1261–62.

556. *Id.* at 1262 (“[T]he plaintiffs present hardly any evidence that semi-automatic rifles and magazines holding more than ten rounds are well-suited to or preferred for the purpose of self-defense or sport.”).

557. *Id.* (“Nor does the ban on certain semi-automatic rifles prevent a person from keeping a suitable and commonly used weapon for protection in the home or for hunting, whether a handgun or a non-automatic long gun.”).

First, a law does not have to prohibit the possession of handguns, nor be equally burdensome as a handgun ban, in order to trigger strict scrutiny. “[H]andguns are the most popular weapon chosen by Americans for self-defense in the home,” said the Supreme Court.<sup>558</sup> According to the logic of the D.C. Circuit, since handguns are the most preferred self-defense arms, for anything other than a handgun ban, strict scrutiny would never exist. However, nothing in *Heller* or *McDonald* can be read to set the handgun ban as the minimal requirement that must be reached in order to trigger strict scrutiny.

Rejecting Justice Breyer’s intermediate scrutiny-like balancing test, the *Heller* Court wrote: “Under any of the standards of scrutiny that we have applied to enumerated constitutional rights [the handgun ban] would fail constitutional muster.”<sup>559</sup> Thus, the handgun ban was so outrageous that it did not even deserve a strict scrutiny analysis. The Court held the handgun ban, the functional firearm ban, and the carry ban to be unconstitutional, and did not even bother walking through the steps of strict scrutiny.

In a dissent from the denial of certiorari in a different case, Justice Thomas similarly criticized *Heller II*:

In [*Heller II*], the Court of Appeals recognized that the law “burdens the core of the Second Amendment right,” yet concluded that, because the law’s burden was not as “severe” as the one at issue in *Heller*, it was “not a substantial burden on the Second Amendment right itself.” But 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.<sup>560</sup>

Second, the D.C. Circuit’s emphasis on the availability of other arms contradicted the Supreme Court: “It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed.”<sup>561</sup>

*Heller II* had remanded several issues involving D.C.’s gun registration law; these involved “novel” registration requirements, rather than the

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558. *Heller*, 554 U.S. at 629.

559. *Id.* at 628–29.

560. *Jackson v. City of San Francisco*, 135 S. Ct. 2799, 2801 (2015) (Thomas, J., dissenting from denial of certiorari) (citation omitted). This dissent was joined by Justice Scalia. *Id.* at 2799.

561. *Heller*, 554 U.S. at 629. The decision which the Supreme Court affirmed said the same thing:

The District contends that since it only bans one type of firearm, “residents still have access to hundreds more,” and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous. It could be similarly contended that all firearms may be banned so long as sabers were permitted.

*Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff’d sub nom. Heller*, 554 U.S. 570.

traditional, *de minimis* handgun registration which had been upheld by *Heller II*.<sup>562</sup> The case later returned to the D.C. Circuit as *Heller III*.<sup>563</sup> There, the D.C. Circuit applied intermediate scrutiny to each of the novel registration requirements.<sup>564</sup> The Circuit upheld in-person fingerprinting and photographing for applicants;<sup>565</sup> registration fees of \$13.00 per firearm and \$35.00 for fingerprinting;<sup>566</sup> and a requirement for each registrant to complete a one-hour, safety-training course.<sup>567</sup>

*Heller III* found that several other provisions failed intermediate scrutiny: requiring registered guns to be brought to the police headquarters;<sup>568</sup> re-registration every three years;<sup>569</sup> a test about knowledge of local gun laws;<sup>570</sup> and a prohibition on registering more than one pistol in a thirty-day period.<sup>571</sup>

562. *Heller II*, 670 F.3d at 1254–55, 1260.

563. *Heller v. District of Columbia (Heller III)*, 801 F.3d 264 (D.C. Cir. 2015).

564. *Id.* at 297.

565. *Id.* at 275.

The District has presented substantial evidence from which it could conclude that fingerprinting and photographing each person registering a gun promotes public safety by facilitating identification of a gun's owner, both at the time of registration and upon any subsequent police check of the gun's registration. The requirement that registrants appear in person is necessary in order for a photograph and fingerprints to be taken.

*Id.*

566. *Id.* at 278 (“As we already said in *Heller II*, ‘administrative . . . provisions incidental to the underlying regime’—which include reasonable fees associated with registration—are lawful insofar as the underlying regime is lawful.”).

567. *Id.* at 278–79 (“The District has presented substantial evidence from which it could conclude that training in the safe use of firearms promotes public safety by reducing accidents involving firearms . . .”).

568. *Heller III*, 801 F.3d at 277.

The District, however, has offered no evidence—let alone substantial evidence—from which it can be inferred that verification will promote public safety. . . . The district court nonetheless deemed it a “common-sense inference” that “if in-person appearance is necessary to verify the identity of the registrant, then physically bringing the gun is similarly necessary to verify the character of the registered weapon.” Yet common sense suggests a person would not go to the trouble of obtaining a registration certificate for a weapon other than a weapon in his possession. On the contrary, common sense suggests that bringing firearms to the [Metropolitan Police Department] would more likely be a threat to public safety; as *Heller* maintains, there is a “risk that the gun may be stolen en route or that the [would-be registrant] may be arrested or even shot by a police officer seeing a ‘man with a gun’ (or a gun case).”

*Id.* (citations omitted).

569. *Id.* at 277 (“The District has offered three justifications for the requirement that a gun owner re-register his firearm every three years. None is supported by substantial evidence from which the District could reasonably have concluded that requiring re-registration would advance an important governmental interest.”).

570. *Id.* at 279.

None of the District's experts . . . offers any reason to believe that knowledge of the District's gun laws will promote public safety. Indeed, the closest the District's experts

*F. Second Circuit: Only “Substantial” Burdens Get Heightened Scrutiny*

The Second Circuit only requires heightened scrutiny if the challenged law “substantially burdens” the Second Amendment right. Laws which are burdensome, but not “substantially” so, receive only rational basis review. This approach is contrary to other circuits, which have held that strict scrutiny is appropriate for some burdens, and intermediate scrutiny for other burdens. The Second Circuit is violating *McDonald*’s instruction that the Second Amendment is not a “second-class” right,<sup>572</sup> to be “singled out for special—and specially unfavorable—treatment.”<sup>573</sup>

The Second Circuit first announced its specially unfavorable rule in *U.S. v. Decastro*:

Given *Heller*’s emphasis on the weight of the burden imposed by the D.C. gun laws, we do not read the case to mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny. Rather, heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes).<sup>574</sup>

The Second Circuit confirmed this approach in *Kachalsky v. City of Westchester*.<sup>575</sup> The *Kachalsky* court found that a statute requiring an applicant to show “proper cause” in order to obtain a handgun carry license “places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public.”<sup>576</sup> Thus, “some form of heightened scrutiny would be appropriate.”<sup>577</sup> As discussed *supra*, some New York officials refuse to issue permits to law-abiding, trained adult applicants, simply because issuing

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came to addressing the subject was the statement by Chief Lanier that “in order to make registrants more clearly accountable under the law, it is important to be able to demonstrate that they were taught and aware of the requirements.” This assertion, however, does not tie knowledge of the law to the District’s interest in public safety.

*Id.*

571. *Id.* at 279–80 (“The District has not presented substantial evidence to support the conclusion that its prohibition on the registration of ‘more than one pistol per registrant during any 30-day period,’ D.C. CODE § 7-2502.03(e), ‘promotes a substantial governmental interest that would be achieved less effectively absent the regulation.’ It is therefore unconstitutional.”) (citation omitted).

572. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

573. *Id.* at 778–79.

574. *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012).

575. 701 F.3d 81, 93 (2d Cir. 2012).

576. *Id.*

577. *Id.* The Second Circuit stated, “The proper cause requirement falls outside the core Second Amendment protections identified in *Heller*,” since it applies outside the home. *Id.* at 94. Importantly though, in *Kachalsky*, “unlike *Decastro*, there are no alternative options for obtaining a license to carry a handgun.” *Id.* at 93.

officials oppose ordinary citizens carrying arms for protection.<sup>578</sup> The Second Circuit upheld those near-prohibitory policies, by applying an unusually weak form of intermediate scrutiny.<sup>579</sup>

Later, in *Kwong v. Bloomberg*, the Second Circuit upheld a handgun-licensing fee without determining whether it imposed a “substantial” burden.<sup>580</sup> “[W]e find 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 rights. . . .”<sup>581</sup> Regardless, the court determined the fee requirement passed “intermediate scrutiny.”<sup>582</sup>

The Second Circuit reinforced its specially unfavorable rule in *New York State Rifle & Pistol Ass’n v. Cuomo* (“NYSRPA”):

Though *Heller* did not specify the precise level of scrutiny applicable to firearms regulations, it rejected mere rational basis review as insufficient for the type of regulation challenged there. At the same time, this Court and our sister Circuits have suggested that heightened scrutiny is not always appropriate. In determining whether heightened scrutiny applies, we consider two factors: (1) “how close the law comes to the core of the Second Amendment right” and (2) “the severity of the law’s burden on the right.” Laws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny.<sup>583</sup>

The court made two critical errors in its analysis. First, *Heller* did not just “reject[] mere rational basis review as insufficient for the type of regulation challenged there.”<sup>584</sup> *Heller* very explicitly rejected mere rational basis review for *all* regulations that burden the Second Amendment, to any degree:

Obviously, [rational-basis scrutiny] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.<sup>585</sup>

578. See *supra* note 426.

579. *Kachalsky*, 701 F.3d at 96.

580. *Kwong v. Bloomberg*, 723 F.3d 160, 167–68 (2d Cir. 2013).

581. *Id.* at 167.

582. *Id.* at 168 (finding the government has a compelling interest in a gun licensing system, so fees to support the cost of administration pass intermediate scrutiny).

583. 804 F.3d 242, 254 (2d Cir. 2015) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)). For analysis of the statute at issue, see Stephen P. Halbrook, *N.Y.’s Not So “SAFE” Act*, 78 ALB. L. REV. 789, 791 (2015) (lead attorney for plaintiffs).

584. *NYSRPA*, 804 F.3d at 258.

585. *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (citation omitted).

As noted *supra*, the other Circuits have followed *Heller* by stating that rational basis is off the table for any government action which burdens Second Amendment rights.<sup>586</sup>

Second, the Second Circuit erroneously cited *Ezell* for support. The quoted language from *Ezell* was the test the Seventh Circuit used to decide which level of *heightened* scrutiny should apply.<sup>587</sup> The Seventh Circuit had already rejected rational basis review, recognizing that *Heller* prohibits it.<sup>588</sup> “For our purposes, however, we know that *Heller*’s reference to ‘any standard of scrutiny’ means any *heightened* standard of scrutiny; the Court specifically excluded rational-basis review.”<sup>589</sup> *Ezell* reiterated: “Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right . . . are categorically unconstitutional. . . . For all other cases, however, we are left to choose an appropriate standard of review from among the heightened standards of scrutiny the Court applies to governmental actions alleged to infringe [on] enumerated constitutional rights.”<sup>590</sup>

Therefore, the Second Circuit’s application of rational basis review not only contradicts *Heller*, but also the Seventh Circuit authority that the Second Circuit cited as support.<sup>591</sup>

Building on the aggressive misreading of *Heller* and the appropriate standards of scrutiny, the Second Circuit made another egregious error in *NYSRPA*.<sup>592</sup> The court began by acknowledging that the core of the Second Amendment was at issue: that “Semiautomatic assault weapons and large-capacity magazines are commonly owned by many law-abiding Americans, and their complete prohibition, including within the home, requires us to consider the scope of Second Amendment guarantees ‘at their zenith.’”<sup>593</sup> And “the statutes at issue implicate the core of the Second Amendment’s protections by extending into the home, ‘where the need for defense of self, family and property is most acute.’”<sup>594</sup>

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586. See *supra* Section VIII.A. and note 486.

587. *Ezell*, 651 F.3d at 706.

588. *Id.*

589. *Id.* at 701.

590. *Id.* at 703 (citations omitted).

591. *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012). The D.C. Circuit in *Heller II* said that “de minimis” burdens would receive only rational basis review. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1276 (D.C. Cir. 2011). This does not go nearly as far as the Second Circuit has. There are many burdens which could be more than “de minimis” but less than “substantial.” *Id.* at 1255, 1257. And unlike the Second Circuit, the D.C. Circuit did not take strict scrutiny off the table. *Id.* at 1256.

592. *NYSRPA v. Cuomo*, 804 F.3d 242, 253 (2d Cir. 2015)

593. *Id.* at 258.

594. *Id.*

Yet the court then applied only intermediate scrutiny, because “the regulated weapons are not nearly as popularly owned and used for self-defense as the handgun, that ‘quintessential self-defense weapon.’ Thus these statutes implicate Second Amendment rights, but not to the same extent as the laws at issue in *Heller* and *McDonald*.”<sup>595</sup> As discussed *supra*,<sup>596</sup> it is absurd to read *Heller* or *McDonald* to say that only laws *as* restrictive as a complete handgun ban (“the most popular weapon chosen by Americans for self-defense in the home”)<sup>597</sup> warrant strict scrutiny. Nothing in *Heller* or *McDonald* supports such a limited application. Indeed, the handgun ban was so egregious the Supreme Court did not even bother with a heightened scrutiny analysis.<sup>598</sup>

*NYSRPA* upheld the “semiautomatic assault weapon” and “large-capacity magazine” bans because “numerous ‘alternatives remain for law-abiding citizens to acquire a firearm for self-defense.’”<sup>599</sup> This squarely contradicts *Heller*’s determination that “[i]t is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed.”<sup>600</sup>

Thus, the Second Circuit skirted *Heller*’s precedent by using handgun bans as a baseline for strict scrutiny; by explaining that the weapons at issue were not as popular as handguns (although the court acknowledged that Americans own somewhere around seventy-five million of the prohibited magazines and seven million of the prohibited semiautomatic firearms),<sup>601</sup> and by implying that some Second Amendment arms are less worthy of protection than others.<sup>602</sup> The court accurately pointed out that “*Heller* explicitly endorsed prohibitions against any ‘weapons not typically possessed by law-abiding citizens for lawful purposes,’ including, for example, short-barreled

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595. *Id.*

596. *See supra* Section VIII.E.

597. *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

598. *Id.* at 628–29 (“Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,’ would fail constitutional muster.”) (internal citation omitted).

599. *NYSRPA*, 804 F.3d at 260–61.

600. *Heller*, 554 U.S. at 629.

601. *NYSRPA*, 804 F.3d at 255.

602. *Id.* at 260 n.98:

Plaintiffs’ related argument—that the availability of unbanned firearms “is irrelevant under *Heller*”—rests on a misapprehension of the Supreme Court’s logic. To be sure, *Heller* did indicate that “[i]t is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed.” But *Heller* went on to explain that handguns are protected as “the most popular weapon chosen by Americans for self-defense in the home.” Of course, the same cannot be said of the weapons at issue here.

*Id.* (citations omitted).

shotguns.”<sup>603</sup> But this tells us nothing about arms—such as the rifles, shotguns, and magazines at issue in *NYSRPA*—which are agreed to be very commonly owned and popular.<sup>604</sup>

In determining whether the arms prohibition was substantially related to the government interest of controlling crime, the Second Circuit emphasized that the banned guns are effective:

When used, [the banned guns] tend to result in more numerous wounds, more serious wounds, and more victims. These weapons are disproportionately used in crime, and particularly in criminal mass shootings like the attack in Newtown. They are also disproportionately used to kill law enforcement officers . . . .

. . . Indeed, plaintiffs explicitly contend that these features improve a firearm’s “accuracy,” “comfort,” and “utility.” This circumlocution is, as Chief Judge Skretny observed, a milder way of saying that these features make the weapons more deadly.<sup>605</sup>

Similarly, the court justified the magazine ban because “large-capacity magazines result in ‘more shots fired, persons wounded, and wounds per victim than do other gun attacks.’”<sup>606</sup>

Assuming this is true, a firearm’s superiority for self-defense is no reason to accord it less protection under the Second Amendment. To the contrary, *Heller* recognized that:

There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police.<sup>607</sup>

So handguns are better suited for self-defense—that is, better for shooting people. The Supreme Court was also unimpressed by the fact that handguns are used very disproportionately in violent crimes compared to long guns.<sup>608</sup> Rather, *Heller* stated that “[w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”<sup>609</sup> Misuse by criminals is no reason to deprive law-abiding citizens of common arms. “[T]he Supreme Court

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603. *Id.*

604. *Id.* at 255.

605. *Id.* at 262.

606. *NYSRPA*, 804 F.3d at 263–64 (quoting *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1263 (D.C. Cir. 2011)).

607. *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

608. *Id.* at 695, 702.

609. *Id.* at 629.

made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts," observed the Seventh Circuit's Judge Posner.<sup>610</sup>

The standard magazines and semiautomatic firearms at issue in *NYSRPA* were Second Amendment arms and therefore the broad prohibition of them should have been held categorically unconstitutional under *Heller*. State courts have readily applied *Heller*'s teaching that prohibitions on Second Amendment arms are flatly unconstitutional, without need to resort to ends/means testing.<sup>611</sup>

Even if the interest-balancing approach expressly rejected by *Heller* in prohibition cases were proper,<sup>612</sup> the New York prohibitions applied to law-abiding citizens in their homes; therefore, strict scrutiny should have applied.

Even under intermediate scrutiny, the court's reasoning was flawed and invalid under *Heller*. Prohibiting citizens from having arms which are better-suited for self-defense is not a legitimate government interest, let alone a "substantial" or "important" one. Guns which are more accurate, more comfortable, and easier to use are not the ones that can be singled out for prohibition. Prohibiting a gun because of superior accuracy is irrational, given

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610. *Moore v. Madigan*, 702 F.3d 933, 934, 939 (7th Cir. 2012) (explaining that *Heller* would have been decided the other way had the possibility of higher crime or death rates been sufficient to justify a ban); *see also* *Friedman v. City of Highland Park*, 784 F.3d 406, 413 (7th Cir. 2015):

To be sure, assault rifles and large capacity magazines are dangerous. But their ability to project large amounts of force accurately is exactly why they are an attractive means of self-defense. While most persons do not require extraordinary means to defend their homes, the fact remains that some do. Ultimately, it is up to the lawful gun owner and not the government to decide these matters. To limit self-defense to only those methods acceptable to the government is to effect an enormous transfer of authority from the citizens of this country to the government—a result directly contrary to our constitution and to our political tradition. The rights contained in the Second Amendment are "fundamental" and "necessary to our system of ordered liberty." The government recognizes these rights; it does not confer them.

*Id.* (Manion, J., dissenting) (citation omitted).

611. *See, e.g.,* *People v. Yanna*, 824 N.W.2d 241, 246 (Mich. Ct. App. 2012) (concluding a total prohibition of Tasers or stun guns is unconstitutional); *see also* *State v. Herrmann*, 873 N.W.2d 257, 258, 262, 265 (Wis. Ct. App. 2015) (concluding a total prohibition of switchblade knives is unconstitutional).

612. *Heller*, 554 U.S. at 634;

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. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

*Id.* at 634–35.

that the Second Amendment right includes self-defense and hunting, two activities for which accuracy is very important.

Further, the Second Circuit considered only the government's evidence, rather than both sides'.<sup>613</sup> The *NYSRPA* court held that if the government produced sufficient evidence to support its rationale, then the government wins.<sup>614</sup> The court cited but did not follow the Supreme Court's *City of Los Angeles v. Alameda Books*; that case set up a three-stage process for consideration of evidence from both sides.<sup>615</sup> According to *Alameda Books*, although the government's evidence might, in isolation, be considered persuasive, the government does not win "[i]f plaintiffs succeed in casting doubt on a municipality's rationale" by "demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings."<sup>616</sup> Then, "the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance."<sup>617</sup>

Under *Alameda Books*, the Second Circuit should have considered the plaintiffs' evidence, which supported plaintiffs' claims that the prohibitions did not advance public safety, and did endanger law-abiding citizens.

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613. See *NYSRPA, Inc. v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015).

614. *Id.*

615. 535 U.S. 425, 433–34 (2002). *NYSRPA* contradicts *Alameda Books* in an additional manner. The above-quoted language is from the plurality opinion. Justice Kennedy's concurring opinion is on narrower grounds, and thus is controlling for precedential purposes. Lower courts have so recognized, in applying *Alameda Books*. *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 624 n.7 (7th Cir. 2004); *Ctr. for Fair Pub. Pol'y v. Maricopa Cty.*, 336 F.3d 1153, 1161 (9th Cir. 2003). The *Alameda Books* case involved controls on adult bookstores. The government had a legitimate interest in reducing the non-speech secondary effects of the stores, such as attracting prostitution. The government had no legitimate interest in suppressing the content of the speech in the books that were being sold. Justice Kennedy explained if the government reduces speech by X amount, and thereby reduces the secondary effects by the same amount, the law is not narrowly tailored under intermediate scrutiny. It is impermissible to "reduce secondary effects by reducing speech in the same proportion." *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring). "It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech." *Id.* at 450. "The rationale of the ordinance must be that it will suppress secondary effects—and not by suppressing speech." *Id.* at 449–50. The New York statute in *NYSRPA* was purportedly aimed at secondary effects (criminal misuse of guns). But the statute in fact aimed at suppressing the exercise of a constitutional right (gun possession in the home by law-abiding citizens). A licensing or background statute might pass the *Alameda Books* test: without reducing the exercise of the right (law-abiding possession), the statute might reduce the secondary effect (criminal misuse). The New York SAFE Act is like a law that attempts to reduce prostitution by outlawing non-obscene adult bookstores.

616. *Alameda Books*, 535 U.S. at 426.

617. *Id.* at 439.

By the *NYSRPA* standard, the government will always win when it litigates competently. Gun rights cases often involve contested statistics, social science, and so on. Defending gun control laws, government lawyers marshal experts, studies, affidavits, and other evidence. The other side will do the same. As long as the government lawyers are thorough during litigation, they will almost always win. *NYSRPA* turns Second Amendment litigation into a game with only one possible winner in almost every situation. That is not a standard that applies to the rest of the Bill of Rights.

According to the *NYSRPA* court, the D.C. handgun ban in *Heller* failed intermediate scrutiny.<sup>618</sup> Yet under *NYSRPA*'s specially unfavorable version of Second Amendment intermediate scrutiny, the ban would have been upheld. Under *NYSRPA*, there are only two questions in evaluating an arms ban:

- (1) Is there an important government interest? — Obviously yes, preventing violent criminals from shooting people.<sup>619</sup>
- (2) Is there evidence to “fairly support” the inference that a handgun ban could advance the government interest? — Yes.<sup>620</sup>

As detailed in Justice Stephen Breyer's *Heller* dissent, there is extensive social science evidence about the harms of handgun misuse, disproportionate to other firearms. Further, there is (disputed) social science evidence that handgun bans are effective at reducing handgun crime.<sup>621</sup> Under *NYSRPA*, that is all that is needed for the government to win under intermediate scrutiny. Plaintiffs' evidence to the contrary would not even be considered.

Although the Second Circuit purported to be deferring to the “fact-finding” and “predictive judgments” of “the legislature,” the court was in fact deferring to the New York attorney general.<sup>622</sup> The New York ban was jammed through the legislature under an “emergency” procedure that prevented legislative hearings and fact-finding.<sup>623</sup> The Second Circuit deferred not to the legislature but to the post-hoc litigation record created by the attorney general.<sup>624</sup>

618. *NYSRPA*, 804 F.3d at 269.

619. *Id.* at 261.

620. *Id.*

621. *District of Columbia v. Heller*, 554 U.S. 570, 693–704 (2008) (Breyer, J., dissenting) (summarizing pro/con social science data and studies).

622. *NYSRPA*, 804 F.3d at 261–62.

623. On January 14, 2013, New York Governor Andrew Cuomo issued a “Message of Necessity” and unveiled his bill to ban many firearms and magazines, and to impose many other gun controls. The massive bill passed the Senate that evening and the Assembly the next day. There were no legislative hearings. No citizen had the opportunity to speak. Legislators did not have time to read the bill before they voted. Cuomo had made a secret “pact” with Republican Senate Majority Leader Dean Skelos. Skelos ensured the passage of some key items on the Cuomo agenda. He offered no opposition to Cuomo's reelection in 2014; in return, Cuomo invested no effort in trying to wrest control of the Senate from the Republicans. Fredric U. Dicker, *Cuomo Had a Secret Re-election 'Pact' with Republicans*, N.Y. POST, Nov. 10, 2014.

Evading the intermediate scrutiny requirement of considering substantially less burdensome alternatives (e.g., a strict licensing system, rather than prohibition), Judge Cabranes cited one of his prior opinions in which less burdensome alternatives had not been relevant, and accordingly were not discussed.<sup>625</sup>

*NYSRPA*'s manipulation of intermediate scrutiny in order to uphold a ban on arms poses dangers beyond the Second Amendment. Intermediate scrutiny formulations adopted in one context are often later used in another. For example, *Turner Broadcasting* (First Amendment intermediate scrutiny for cable television regulations) relied on *Rostker v. Goldberg* (Equal Protection intermediate scrutiny for sex discrimination).<sup>626</sup> First Amendment intermediate scrutiny includes a "time, place, and manner" test, and also has a separate four-part test for commercial speech.<sup>627</sup> Yet applications of the commercial speech test can incorporate time/place/manner precedent,<sup>628</sup> or the two tests can be jumbled into one.

Likewise, articulations of the Second Amendment standards of review and doctrine have been applied to other situations.<sup>629</sup> Such cross-pollination is a

Skelos is no longer in the Senate, and has been sentenced to five years in prison for federal corruption convictions. Benjamin Weister & Vivian Yee, *Dean Skelos Is Sentenced to 5 Year in Prison in Corruption Case*, N.Y. TIMES, May 12, 2016. Governor Cuomo has been under investigation by the U.S. Attorney for corruption, but has not thus far been criminally charged. Jennifer Fermino, Kerry Burke & Denis Slattery, *Preet Bharara Says de Blasio, Cuomo Should 'Stay Tuned' as Executive Offices are 'Far From Immune' to his Corruption Cleanup*, N.Y. DAILY NEWS, Apr. 13, 2016.

624. *NYSRPA*, 804 F.3d at 256–57.

625. In *Ernest J. v. Stone*, the government sought to commit Ernest J. because he had violated his conditions of release, after having pleaded not guilty by reason of mental disease. 452 F.3d 186, 191–93 (2d Cir. 2006). To revoke Ernest J.'s conditional release, the standard of proof was "preponderance of the evidence." *Id.* at 187. In contrast, involuntary commitments for persons who have never pleaded not guilty by reason of mental disease must meet a higher standard: "clear and convincing evidence." *Id.* Was this an Equal Protection violation? Applying intermediate scrutiny, Judge Cabranes held the law constitutional. *Id.* at 200, 202. The *Ernest J.* court faced a binary choice: Is it unconstitutionally discriminatory to have looser commitment standards for people who have pleaded not guilty by reason of mental disease, than for people who have not? The issue of less restrictive alternatives was not relevant.

626. *Turner Broad. Sys. v. F.C.C. (Turner II)*, 520 U.S. 180, 185 (1997); *Rostker v. Goldberg*, 453 U.S. 57, 82–83 (1981) (male-only military conscription is constitutional).

627. *United States v. Edge Broad. Co.*, 509 U.S. 418, 419, 424 (1993).

628. *Id.* at 421, 430–31, 436 (1993) (analyzing a commercial speech case on lottery advertising) (applying *Ward v. Rock Against Racism*, 491 U.S. 781, 784, 798–99 (1989) (upholding sound limits on rock concerts in New York City's Central Park as a time/place/manner regulation)); *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 536–37, 537 n.16 (1987) (applying both tests together).

629. See *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 909, 918–19 (7th Cir. 2015) (reviewing abortion restrictions) (citing *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011)); *Johnson v. Whitehead*, 647 F.3d 120, 122, 133 (4th Cir. 2011) (assessing habeas

legitimate part of the development of constitutional doctrine. But when courts disfavor the Second Amendment by fabricating novel and feeble versions of intermediate scrutiny in order to uphold gun controls, the weak version of intermediate scrutiny can then be imposed on other rights where intermediate scrutiny is used, including many First Amendment regulations, and Equal Protection against discrimination based on sex or illegitimacy. An intermediate scrutiny test under which the government always wins as long as it presents some credible evidence endangers much more than just the Second Amendment.

Commendably, the Second Circuit did rule for the plaintiffs when the government had no evidence. The New York law prohibited owners of 10-round magazines from putting more than seven rounds into a magazine.<sup>630</sup> This regulation was rejected, because insufficient evidence was presented showing that a seven-round load limit “best protect[ed] public safety.”<sup>631</sup> The government “failed to present evidence that the mere existence of this load limit will convince any would-be malefactors to load magazines capable of holding ten rounds with only the permissible seven.”<sup>632</sup>

*G. Ninth Circuit: Intermediate Scrutiny for Storage Mandates, Ammunition Sales Restrictions, and Magazine Bans*

In *Jackson v. San Francisco*,<sup>633</sup> the Ninth Circuit explained that “laws which regulate only the ‘manner in which persons may exercise their Second Amendment rights’ are less burdensome than those which bar firearm possession completely.”<sup>634</sup> And, “Similarly, firearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not.”<sup>635</sup>

A San Francisco ordinance requires handguns to be locked in a container or trigger locked if not being carried on the individual’s person.<sup>636</sup> The court used intermediate scrutiny even though the court acknowledged that “[h]aving to retrieve handguns from locked containers or removing trigger locks makes it

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corpus attempt to block immigration removal) (citing intermediate scrutiny standard from *United States v. Chester*, 628 F.3d 673, 600 (4th Cir. 2010)); *Free Speech Coal., Inc. v. Holder*, 957 F. Supp. 2d 564, 568, 590–591 (E.D. Pa. 2013), *rev’d in part on other grounds*, 787 F.3d 142 (3d Cir. 2015) (reviewing First Amendment challenge to regulations on pornography producers) (citing intermediate scrutiny standard from *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010)).

630. *NYSRPA, Inc. v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015).

631. *Id.*

632. *Id.*

633. 746 F.3d 953 (9th Cir. 2014).

634. *Id.* at 961.

635. *Id.*

636. *Id.* at 958.

more difficult ‘for citizens to use them for the core lawful purpose of self-defense’ in the home [and] therefore burdens the core of the Second Amendment right.”<sup>637</sup>

Unlike the challenged regulation in *Heller*, section 4512 does not substantially prevent law-abiding citizens from using firearms to defend themselves in the home. Rather, section 4512 regulates how San Franciscans must store their handguns when not carrying them on their persons. This indirectly burdens the ability to use a handgun, because it requires retrieving a weapon from a locked safe or removing a trigger lock. But because it burdens only the “manner in which persons may exercise their Second Amendment rights,” the regulation more closely resembles a content-neutral speech restriction that regulates only the time, place, or manner of speech. The record indicates that a modern gun safe may be opened quickly. Thus, even when a handgun is secured, it may be readily accessed in case of an emergency. Further, section 4512 leaves open alternative channels for self-defense in the home, because San Franciscans are not required to secure their handguns while carrying them on their person. Provided San Franciscans comply with the storage requirements, they are free to use handguns to defend their home while carrying them on their person.<sup>638</sup>

Thus, Section 4512 does not impose the sort of severe burden that requires the higher level of scrutiny applied by other courts in this context.<sup>639</sup>

Accordingly, we conclude section 4512 is not a substantial burden on the Second Amendment right itself. Even though section 4512 implicates the core of the Second Amendment right, because it does not impose a substantial burden on conduct protected by the Second Amendment, we apply intermediate scrutiny.<sup>640</sup>

The court agreed with the city that the “requirement that persons store handguns in a locked storage container or with a trigger lock when not carried on the person is substantially related to the important government interest of reducing firearm-related deaths and injuries.”<sup>641</sup>

*Jackson*’s doctrinal methodology may, arguably, be defensible, but its willful obliviousness to the facts of the case is not. As Justice Thomas noted in his dissent from the denial of certiorari, the San Francisco law, like the law rejected in *Heller*, prohibits citizens “from *keeping* those handguns ‘operable for the purpose of *immediate* self-defense’ when not carried on their person. The law thus burdens their right to self-defense at the times they are most

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637. *Id.* at 964.

638. *Jackson*, 746 F.3d at 964–65 (citations omitted) (quoting *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)).

639. *Id.*

640. *Id.* at 965.

641. *Id.* at 966.

vulnerable—when they are sleeping, bathing, changing clothes, or otherwise indisposed.”<sup>642</sup>

Further, it is difficult to see how the important government interest of reducing firearm-related deaths and injuries is advanced by requiring residents to carry firearms on their person if they want to have a firearm readily accessible for self-defense. Such a requirement would cause residents to carry firearms far more frequently and in impractical situations when they otherwise would not carry a firearm, perhaps resulting in *more* firearm accidents.

Also in *Jackson*, the Ninth Circuit applied intermediate scrutiny to a ban on the sale of hollow-point ammunition within San Francisco; the law in no way restricted possession or use of such ammunition.<sup>643</sup> The court found no substantial burden on Second Amendment rights because “[t]here is no evidence in the record indicating that ordinary bullets are ineffective for self-defense.”<sup>644</sup> “A ban on the sale of certain types of ammunition does not prevent the use of handguns or other weapons in self-defense.”<sup>645</sup> The sales ban “limits only the manner in which a person may exercise Second Amendment rights by making it more difficult to purchase certain types of ammunition.”<sup>646</sup> It “leaves open alternative channels for self-defense in the home. *Jackson* may either use fully-jacketed bullets for self-defense or obtain hollow-point bullets outside of San Francisco’s jurisdiction.”<sup>647</sup>

*Jackson* adopted a schizophrenic view on the effectiveness of hollow points. On the one hand, they are more effective: “It is self-evident that San Francisco’s interest in reducing the fatality of shootings is substantial”<sup>648</sup> and “San Francisco carried its burden of establishing that [the ban] is a reasonable fit to achieve its goal of reducing the lethality of ammunition, and [the ban] thus satisfies intermediate scrutiny.”<sup>649</sup>

On the other hand, the ban was upheld because the inferior effectiveness of other ammunition would (supposedly) have no effect on self-defense by law-abiding citizens.<sup>650</sup>

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642. *Jackson v. City of San Francisco*, 135 S. Ct. 2799, 2801 (2015) (Thomas, J., dissenting from denial of certiorari) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

643. *Jackson*, 746 F.3d at 968.

644. *Id.*

645. *Id.*

646. *Id.*

647. *Id.*

648. *Jackson*, 746 F.3d at 969.

649. *Id.* at 970.

650. *Id.* at 968.

*Jackson* contends that hollow-point bullets are far better for self-defense than fully jacketed ammunition because they have greater stopping power and are less likely to overpenetrate or ricochet. Barring their sale, she argues, therefore imposes a substantial burden on the right of self-defense. We disagree. There is no evidence in the record indicating that ordinary bullets are ineffective for self-defense.

*Heller* and *McDonald* forbid the type of analysis used by the Ninth Circuit. As Justice Thomas wrote in dissenting from denial of certiorari in another case, it does not matter whether the government deems other arms sufficiently effective for self-defense: “all that is needed for citizens to have a right under the Second Amendment to keep” any Second Amendment arm is that “[t]he overwhelming majority of citizens who own and use [them] do so for lawful purposes.”<sup>651</sup>

In *Fyock*,<sup>652</sup> the Ninth Circuit applied intermediate scrutiny to an ordinance banning “large-capacity magazines.”<sup>653</sup> The court explained that “[i]ntermediate scrutiny is appropriate if the regulation at issue does not implicate the core Second Amendment right *or* does not place a substantial burden on that right.”<sup>654</sup> The court admitted that the laws restricted “the ability of law-abiding citizens to possess large-capacity magazines within their homes for the purpose of self-defense.”<sup>655</sup> However:

Measure C is simply not as sweeping as the complete handgun ban at issue in *Heller* and does not warrant a finding that it cannot survive constitutional scrutiny of any level. Indeed, Measure C does not affect the ability of law-abiding citizens to possess the “quintessential self-defense weapon”—the handgun. Rather, Measure C restricts possession of only a subset of magazines that are over a certain capacity. It does not restrict the possession of magazines in general such that it would render any lawfully possessed firearms inoperable, nor does it restrict the number of magazines that an individual may possess. To the extent that a lawfully possessed firearm could not function with a lower capacity magazine, Measure C contains an exception that would allow possession of a large-capacity magazine for use with that firearm.<sup>656</sup>

The challenge to the ban failed, in part because the challenge was only an interlocutory appeal, which required the Ninth Circuit to “determine only

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*Id.* This switches the issue. Other ammunition may be *effective*, but hollow points are *more* effective. First, they are more likely to stop an assailant; this is why hollow-points are near-universal for law enforcement handgun ammunition. Second, hollow-points are *more* effective for self-defense because they are safer for innocent bystanders; they are much less likely to exit the assailant’s body and strike a third person. Similarly, there is no evidence that long guns are ineffective for self-defense. But for many people, handguns are superior. The availability of a less effective alternative to handguns did not justify the D.C. handgun ban in *Heller*.

651. *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from the denial of certiorari) (citing *McDonald v. City of Chicago*, 561 U.S. 742, 767–68 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008)).

652. *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015).

653. *Id.* at 994, 998.

654. *Id.* at 998–99.

655. *Id.* at 999.

656. *Id.* (citation omitted) (quoting *Heller*, 554 U.S. at 629).

whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand.”<sup>657</sup>

The problem with the reasoning in *Fyock*, and similar cases, was explained by Judge Kavanaugh in his *Heller II* dissent. Although D.C. had banned many, but not all, semi-automatic rifles, that still constituted “a ban on a class of arms”:

A ban on a class of arms is not an “incidental” regulation. It is equivalent to a ban on a category of speech. Such restrictions on core enumerated constitutional protections are *not* subjected to mere intermediate scrutiny review. The majority opinion here is in uncharted territory in suggesting that intermediate scrutiny can apply to an outright ban on possession of a class of weapons that have not traditionally been banned.<sup>658</sup>

### IX. HEIGHTENED SCRUTINY APPLIED

This Part examines several model cases which applied strict scrutiny, “not quite” strict scrutiny, intermediate scrutiny, and categoricalism to gun control laws. Each of the cases provides a synthesis and illustration of the application of Step Two of the Two-Part Test.

#### A. *The Rules of Second Amendment Heightened Scrutiny*

*Marzzarella*, the creator of the Two-Part Test, described two levels of heightened scrutiny. In strict scrutiny, the law must be “narrowly tailored to serve a compelling state interest.”<sup>659</sup> “Narrow tailoring requires that the regulation actually advance the compelling interest it is designed to serve. The law must be the least-restrictive method of serving that interest, and the burdening of a significant amount of protected conduct not implicating the interest is evidence the regulation is insufficiently tailored.”<sup>660</sup>

Next, *Marzzarella* described Second Amendment intermediate scrutiny, based on First Amendment intermediate scrutiny. The governmental end must “be more than just legitimate, either ‘significant,’ ‘substantial,’ or ‘important.’”<sup>661</sup>

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657. *Id.* at 995.

658. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1285 (D.C. Cir. 2011).

659. *United States v. Marzzarella*, 614 F.3d 85, 99 (3d Cir. 2010) (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 465 (2007)).

660. *Id.* at 100 (internal citations omitted); *see also* *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (finding strict scrutiny requires a law to be the least restrictive means of achieving a compelling state interest; strict scrutiny is not only for prohibitions, but also for some lesser burdens).

661. *Marzzarella*, 614 F.3d at 97–98; *cf.* *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013) (“Although courts have used various terminology to describe the intermediate scrutiny standard, all forms of the standard require (1) the government’s stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the

As for “fit,” strict scrutiny requires “narrow tailoring.” For intermediate scrutiny, “the fit” needs to “be reasonable, not perfect.”<sup>662</sup> This is satisfied if the law “fits closely” with the government interest.<sup>663</sup> Or as the D.C. Circuit put it, “a tight fit.”<sup>664</sup>

In strict scrutiny, the government’s means must be “the least restrictive alternative.” Intermediate scrutiny’s rule about alternatives is looser; the *least* restrictive means is not required.<sup>665</sup> Instead, *Marzzarella* applied the rule from First Amendment intermediate scrutiny: the means “need not be the least restrictive means of serving the interest, but may not burden more speech than is reasonably necessary.”<sup>666</sup> As reiterated in a subsequent Third Circuit case, although a law tested under intermediate scrutiny “need not be the least restrictive means of serving the interest, [the law] may not burden more [conduct] than is reasonably necessary.”<sup>667</sup> In the words of the D.C. Circuit, the government must prove that “the means chosen are not substantially broader than necessary to achieve that interest.”<sup>668</sup>

Strict scrutiny and intermediate scrutiny are the best-known forms of heightened scrutiny. But there are others. For racial preferences in higher education, “deferential strict scrutiny” is used. Because of the importance of academic freedom, courts defer to an institution’s determination of whether a

asserted objective.”); *NRA v. BATFE*, 700 F.3d 185, 295 (5th Cir. 2012) (“requires the government to demonstrate a ‘reasonable fit’ between the challenged regulation and an ‘important’ government objective.”).

662. *Marzzarella*, 614 F.3d at 98; *see also* *United States v. Mahin*, 668 F.3d 119, 127–28 (4th Cir. 2012) (“For intermediate scrutiny has never been held to require a perfect end-means fit.”); *United States v. Chapman*, 666 F.3d 220, 228 (4th Cir. 2012) (“[T]he fit needs to be reasonable, but not perfect.”); *United States v. Staten*, 666 F.3d 154, 167 (4th Cir. 2011); *United States v. Carter (Carter I)*, 669 F.3d 411, 417 (4th Cir. 2012) (quoting *Marzzarella*, 614 F.3d at 98); *United States v. Carter (Carter II)*, 750 F.3d 462, 465 (4th Cir. 2014) (“The government was required to show that the fit between § 922(g)(3) and the government’s important goal is ‘reasonable, not perfect.’”); *Peterson v. Martinez*, 707 F.3d 1197, 1222 (10th Cir. 2013) (“The challenged statute must be substantially related to advancement of an important governmental objective, but it need not provide a perfect fit.”).

663. *Marzzarella*, 614 F.3d at 99.

664. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1258 (D.C. Cir. 2011).

665. *Staten*, 666 F.3d at 162 (“[T]he government is not required to prove that § 922(g)(9) is the least intrusive means of reducing domestic gun violence.”); *United States v. Masciandaro*, 638 F.3d 458, 474 (4th Cir. 2011); *Woollard v. Gallagher*, 712 F.3d 865, 878–79 (4th Cir. 2013).

666. *Marzzarella*, 614 F.3d at 98 (internal citations omitted); *see also Heller II*, 670 F.3d at 1258 (“a fit ‘that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.’”).

667. *Drake v. Filko*, 724 F.3d 426, 453 (3d Cir. 2013) (Hardiman, J., dissenting); *see Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 969 (9th Cir. 2014); *see also Marzzarella*, 614 F.3d at 98.

668. *Heller II*, 670 F.3d at 1258 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 782–83 (1989)).

particular racial mix of students is a “compelling” interest.<sup>669</sup> The deference is only for the “ends” test; the “means” testing of narrow tailoring is undiluted in its rigor.<sup>670</sup> Somewhat analogously, the Tenth Circuit used a specially lenient form of intermediate scrutiny for a ban on guns in post office parking lots, because government property was involved, and the physical scope of the prohibition was so narrow.<sup>671</sup>

For content-neutral laws which affect the First Amendment right of association, the Court has developed a means/end test of “exacting . . . scrutiny.”<sup>672</sup> The ends rule is the same as in strict scrutiny: a compelling state interest. The means rule is weaker: the government interest “cannot be achieved though means significantly less restrictive of associational freedoms.”<sup>673</sup> Similarly, the Seventh Circuit has employed a “not quite strict scrutiny” standard for laws which come near the core of the Second Amendment but do not go inside the core.

Some infringements of constitutional rights are categorically void, with no need to delve into the means/ends analysis of strict, not quite strict, exacting, or intermediate scrutiny. *Heller* is an obvious example: the handgun ban and the ban on having a home firearm in an operable status were declared void, without resort to means/ends testing.<sup>674</sup>

Bright-line rules declaring certain government actions categorically unconstitutional, without the need for a means/ends test, are common in constitutional law. They are found in the First Amendment,<sup>675</sup> Fifth Amendment,<sup>676</sup> Sixth Amendment,<sup>677</sup> Eighth Amendment,<sup>678</sup> Tenth Amendment,<sup>679</sup> and Fourteenth Amendment.<sup>680</sup>

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669. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

670. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419–20 (2013).

671. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1122–23, 1127 (10th Cir. 2015).

672. *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014).

673. *Id.*; *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). In other contexts, the Court sometimes uses “exacting scrutiny” as a synonym for strict or rigorous scrutiny. *See Harris*, 134 S. Ct. at 2639.

674. *District of Columbia v. Heller*, 554 U.S. 570, 613 (2008).

675. *Hosanna-Tabor Evang. Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (forbidding interference with “ecclesiastical decisions”); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion) (categorically-prohibiting “government from regulating, prohibiting, or rewarding religious beliefs as such.”). Likewise, some Establishment Clause violations, such as excessive entanglement, are unconstitutional without further inquiry. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338–39 (1987) (finding anything which creates excessive government entanglement with religion is invalid).

676. *Loretto v. Telep. Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (finding “permanent physical occupation” is always a taking); *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (“[P]rotection against double jeopardy unequivocally prohibits a second trial following an acquittal.”).

In this Part, we will examine representative cases for Second Amendment application of intermediate scrutiny, for “not quite strict scrutiny,” and for categorical invalidation.

### B. *The Burden of Proof*

Throughout U.S. constitutional law, heightened scrutiny places the burden of proof for all elements on the government. As *Marzzarella* said, the court “presume[s] the law is invalid, and the government bears the burden of rebutting that presumption.”<sup>681</sup>

A typical formulation of the intermediate scrutiny burden of proof is: “To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective.”<sup>682</sup> Of

677. *United States v. Booker*, 543 U.S. 220, 226, 244 (2005) (categorically holding that sentences may never exceed the maximum allowed by facts proven beyond a reasonable doubt to the jury or admitted by defendant).

678. *Kennedy v. Louisiana*, 554 U.S. 407, 412, 447 (2008) (barring no capital punishment for crimes against individuals not causing death).

679. *New York v. United States*, 505 U.S. 144, 154, 161 (1992) (finding Congress cannot commandeer state legislatures).

680. *Planned Parenthood v. Casey*, 505 U.S. 833, 837, 846 (1992) (allowing regulation but not prohibition of pre-viability abortion).

681. *United States v. Marzzarella*, 614 F.3d 85, 99 (3d Cir. 2010); *see also* *United States v. Chapman*, 666 F.3d 220, 226 (4th Cir. 2012) (“Under intermediate scrutiny, the government bears the burden of establishing a reasonable fit between the challenged statute and a substantial governmental objective.”); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (“Significantly, intermediate scrutiny places the burden of establishing the required fit squarely upon the government.”); *Ezell v. City of Chicago*, 651 F.3d 684, 706 (7th Cir. 2011) (“[T]he City bears the burden of justifying its action under *some* heightened standard of judicial review.”); *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1061 (9th Cir. 2016) (“Under heightened scrutiny, the County bears the burden of justifying its action.”) (internal quotations omitted).

682. *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); *see also* *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (quoting *Williams*, 616 F.3d at 692); *United States v. Huitron-Guizar* 678 F.3d 1164, 1169 (10th Cir. 2012) (“Under [intermediate scrutiny] a law is sustained if the government shows that it is substantially related to an important official end.”) (internal quotations omitted); *NRA v. McCraw*, 719 F.3d 338, 348 (5th Cir. 2013) (“In order to withstand intermediate scrutiny, the Texas scheme must be reasonably adapted to achieve an important government interest. Furthermore ‘[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation,’ or relying ‘on overbroad generalizations.’”) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)); *Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 272–73 (D.C. Cir. 2015):

To meet the first requirement, the District must demonstrate that the harms to be prevented by the regulation “are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” We do not, however, review *de novo* the District’s evidence of the harm to be prevented and the likely efficacy of the regulation in preventing that harm. Rather, it is our remit to determine only whether the

course this formulation does not recapitulate every sub-rule for the ends/means test. Likewise, a sentence that summarizes strict scrutiny (e.g., “narrowly tailored to serve a compelling state interest”) usually does not list all the sub-rules (such as least restrictive alternative, not underinclusive, not overinclusive).

### C. *Why Domestic Violence Bans Pass Intermediate Scrutiny*

The Fourth Circuit’s *Staten* case provides a good example of the kind of facts that pass intermediate scrutiny. In this case, the gun ban was for convicted domestic violence misdemeanants:

[T]he government has established that: (1) domestic violence is a serious problem in the United States; (2) the rate of recidivism among domestic violence misdemeanants is substantial; (3) the use of firearms in connection with domestic violence is all too common; (4) the use of firearms in connection with domestic violence increases the risk of injury or homicide during a domestic violence incident; and (5) the use of firearms in connection with domestic violence often leads to injury or homicide.<sup>683</sup>

The Fourth Circuit’s *Chapman* addressed a similar statute, involving domestic violence restraining orders.<sup>684</sup> The court admitted:

[The statute] may be somewhat over-inclusive given that not every person who falls within in [sic] it would misuse a firearm against his own child, an intimate partner, or a child of such intimate partner, if permitted to possess one. This point does not undermine the constitutionality . . . however, because it merely suggests that the fit is not a perfect one; a reasonable fit is all that is required under intermediate scrutiny.<sup>685</sup>

Subsequently, *Mahin* elaborated why the restraining order statute is “narrowly tailored” and thus had a “reasonable fit.”<sup>686</sup> Compared to the lifetime ban for domestic violence misdemeanants, the restraining order statute “is even more narrowly tailored.”<sup>687</sup> First, the restraining order prohibition is

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District “has drawn reasonable inferences based on substantial evidence.” If it has done so, and if the means chosen are not overbroad, then “summary judgment . . . is appropriate regardless of whether the evidence is in conflict.”

*Id.* (quoting *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 662–64, 666 (1994) and *Turner Broad. Sys., Inc. v. FCC (Turner II)*, (internal citations omitted) 520 U.S. 188, 185, 195–96, 211 (1997)).

683. *United States v. Staten*, 666 F.3d 154, 167 (4th Cir. 2011). As discussed *supra* in Part V, there is some controversy about the appropriateness of a lifetime ban of misdemeanants, which was not at issue in *Staten*. See *supra* Part V.

684. *Chapman*, 666 F.3d at 223.

685. *Id.* at 231 (citing *Staten*, 666 F.3d at 167–68).

686. *United States v. Mahin*, 668 F.3d 119, 125 (4th Cir. 2012).

687. *Id.*

“temporally limited.”<sup>688</sup> Second, the prohibition only applies “to persons *individually* adjudged to pose a future threat of domestic abuse,” at a hearing with due process.<sup>689</sup>

D. “Not Quite Strict Scrutiny” for a Firing Range Ban

The Seventh Circuit’s *Ezell* established a sliding scale for the stringency of Second Amendment review. The closer to the core of the right, the stricter the scrutiny.<sup>690</sup>

So in *Skoien*, for domestic violence misdemeanants, the Seventh Circuit had “required a ‘form of strong showing’—a/k/a ‘intermediate scrutiny’ . . . . Intermediate scrutiny was appropriate in *Skoien* because the claim was not made by a ‘law-abiding, responsible citizen’ as in *Heller*; nor did the case involve the central self-defense component of the right.”<sup>691</sup> (*Skoien* said his gun was for hunting only.)

When “the plaintiffs *are* the ‘law-abiding, responsible citizens’ whose Second Amendment rights are entitled to full solicitude under *Heller*, . . . their claim comes much closer to implicating the core of the Second Amendment right.”<sup>692</sup>

The Chicago ban on firing ranges needed rigorous scrutiny:

The City’s firing-range ban is not merely regulatory; it *prohibits* the “law-abiding, responsible citizens” of Chicago from engaging in target practice in the controlled environment of a firing range. This is a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.”<sup>693</sup>

To make matters worse, the city required training at a range in order to obtain a firearms permit; yet the city banned all ranges. “All this suggests that a more rigorous showing than that applied in *Skoien* should be required, if not quite ‘strict scrutiny.’”<sup>694</sup>

What does “not quite strict scrutiny” mean?

[A] close fit between the range ban and the actual public interests it serves, and also that the public’s interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights. Stated differently, the City must demonstrate that civilian target practice at a firing range creates such

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688. *Id.*

689. *Id.* (emphasis added).

690. *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

691. *Id.* (citations omitted).

692. *Id.*

693. *Id.*

694. *Id.*

genuine and serious risks to public safety that prohibiting range training throughout the city is justified.<sup>695</sup>

The Chicago government had “not come close to satisfying this standard.”<sup>696</sup> The government had failed to present any data or expert opinion to support the law and relied purely on “speculation.”<sup>697</sup>

Speculation is one of the important differences between intermediate scrutiny and rational basis review. In rational basis, the government can win with post-hoc speculation. The canonical rational basis case, *Williamson v. Lee Optical*, involved legislative restrictions on eyeglass sales, with obvious economic benefit for optometrists, and harms to consumers and to eye glass providers.<sup>698</sup> With no reliance on legislative history, the Supreme Court speculated that the legislature might have had legitimate concerns.<sup>699</sup>

Heightened scrutiny is different. “Speculation” is forbidden.<sup>700</sup> Nor can the government “get away with shoddy data or reasoning.”<sup>701</sup>

695. *Ezell*, 651 F.3d at 708–09.

696. *Id.* at 709.

697. *Id.* at 690 (“the City’s claimed harm to the public interest is based entirely on speculation.”) “[The City’s] concerns are entirely speculative.” *Id.* at 709. “[T]he City produced no empirical evidence whatsoever and rested its entire defense of the range ban on speculation about accidents and theft.” *Id.* “The harms invoked by the City are entirely speculative.” *Id.* at 710.

698. *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955).

699. *Id.* (“The legislature might have concluded . . . . But the legislature might have concluded . . . . Or the legislature may have concluded . . . . [I]t might be thought that the particular legislative measure was a rational way to correct it.”). In the modern articulation of rational basis review, the government “has no obligation to produce evidence to sustain the rationality of a statutory classification.” *Heller v. Doe*, 509 U.S. 312, 319 (1993). “[C]ourts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends.” *Id.* There need only be “some footing in the realities of the subject addressed by the legislation.” *Id.* The classification may be “wholly irrelevant to the achievement of the State’s objective.” *Id.* at 324 (internal quotation marks omitted). A court “must disregard the existence of alternative methods of furthering the objective.” *Id.* at 330 (internal quotation marks omitted). Although legislative “assumptions” might be “erroneous, the very fact that they are ‘arguable’ is sufficient, on rational-basis review, to ‘immunize’ the [legislative] choice from constitutional challenge.” *Id.* at 333 (brackets in original).

700. “The Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.” *Grant v. Meyer*, 828 F.2d 1446, 1456 (10th Cir. 1987). But even for commercial speech intermediate scrutiny, speculation is forbidden. The government’s “burden is not satisfied by mere speculation or conjecture.” Instead, it “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them.” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001); *see also* *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (“Speculation” and “conjecture” fail intermediate scrutiny).

701. *Ezell*, 651 F.3d at 709 (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002)). For a case misapplying *Alameda Books*, see the Second Circuit’s *NYSRPA* opinion, discussed *supra*.

Even if the Chicago government had presented extensive evidence about the dangers of public ranges, the range ban still was unconstitutional; “more closely tailored regulatory measures” were available.<sup>702</sup> The legal issues about alternative, less burdensome measures are discussed in Part IX.F *infra*.

*E. Something More Exacting Than Intermediate Scrutiny for Ban on New Gun Retailers*

In *Teixeira v. County of Alameda*, prospective gun store operators challenged a county ordinance that prohibited them from opening a gun store in the county.<sup>703</sup> The court first determined that the ordinance “comes close” to the core of the Second Amendment:

Here, there is no question that an ordinance restricting the commercial sale of firearms would burden the right of a law-abiding, responsible citizen to possess and carry a weapon, because it would inhibit his ability to acquire weapons. We are therefore satisfied that such a regulation comes close to the core of the Second Amendment right.<sup>704</sup>

The record was insufficient for the court to determine exactly how severe the burden of the ordinance was, but it provided guidance to the district court on remand: if the ordinance “merely regulates where gun stores can be located rather than banning them—it burdens only the *manner* in which persons may exercise their Second Amendment rights” and therefore requires only intermediate scrutiny.<sup>705</sup> However, if “the Ordinance was ‘not merely regulatory,’ but rather functioned as a total ban on all new gun retailers, a ‘more rigorous showing’ than even intermediate scrutiny, ‘if not quite ‘strict scrutiny,’ would have been warranted.”<sup>706</sup>

*F. Categorical Scrutiny for a Near-Prohibition on Bearing Arms*

In *Madigan*, the Seventh Circuit confronted a near-prohibition on bearing arms.<sup>707</sup> The government “would have to make a stronger showing” than what

702. *Ezell*, 651 F.3d at 710. “Indeed, on this record those concerns are entirely speculative and, in any event, can be addressed through sensible zoning and other appropriately tailored regulations. That much is apparent from the testimony of the City’s own witnesses, particularly Sergeant Bartoli, who testified to several common-sense range safety measures that could be adopted short of a complete ban.” *Id.* at 709.

703. *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1051 (9th Cir. 2016).

704. *Id.* at 1059 (internal quotations and citations omitted).

705. *Id.* at 1060 (internal quotations omitted).

706. *Id.* (quoting *Ezell*, 651 F.3d at 708). The court later reiterated, “If on remand evidence does confirm that the Ordinance, as applied, completely bans new gun stores (rather than merely regulates their locations), something more exacting than intermediate scrutiny will be warranted.” *Id.* at 1063.

707. *Moore v. Madigan*, 702 F.3d 933, 934 (7th Cir. 2012).

had been necessary in *Skoien*, regarding domestic violence convicts.<sup>708</sup> The law about convicts was nothing like a law against “the gun rights of the entire law-abiding adult population of Illinois.”<sup>709</sup>

Unlike *Ezell*, the government defending the carry ban had introduced plenty of social science evidence, as had the plaintiffs. When the social science evidence is contested, does that justify a prohibition for law-abiding citizens? No. “Illinois has not made that strong showing . . .”<sup>710</sup>

A blanket prohibition on carrying gun [sic] in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public *might* benefit on balance from such a curtailment, though there is no proof it would. In contrast, when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places; since that’s a lesser burden, the state doesn’t need to prove so strong a need. Similarly, the state can prevail with less evidence when, as in *Skoien*, guns are forbidden to a class of persons who present a higher than average risk of misusing a gun.<sup>711</sup>

The “mere possibility” that a gun control law will save lives is not enough.<sup>712</sup> If it were, “*Heller* would have been decided the other way.”<sup>713</sup>

As discussed *supra*, some state courts have employed categorical invalidation for prohibitions on types of Second Amendment arms.<sup>714</sup> Justices Thomas, Scalia, and Alito have described this categorical approach to arms bans as the correct application of *Heller* and *McDonald*.<sup>715</sup>

### G. Substantially Less Burdensome Alternatives

As noted in Part IX.A., intermediate scrutiny does not require that the government action be the *least* restrictive alternative. Rather, the court need only consider alternatives which would burden substantially less of the right. The Supreme Court’s most recent explication of the rule was in *McCullen v. Coakley*, a case involving intermediate scrutiny for time, place, and manner restrictions on demonstrations near abortion clinics.<sup>716</sup>

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708. *Id.* at 940.

709. *Id.*

710. *Id.*

711. *Id.*

712. *Madigan*, 702 F.3d at 939.

713. *Id.*

714. *See supra* note 611.

715. *See supra* III.C.

716. *McCullen v. Coakley*, 134 S. Ct. 2518, 2525, 2530 (2014).

### 1. Cases Where Alternatives Were Found

The D.C. Circuit straightforwardly followed and quoted *McCullen*, in *Heller III*. The court explained: “To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government’s interests, not simply that the chosen route is easier.”<sup>717</sup> Put another way, the means must not be “overbroad.”<sup>718</sup>

The *Heller III* court held the requirement for triennial re-registration of guns to be unconstitutional, because there were less burdensome alternatives.<sup>719</sup> It was true that during re-registration, the District could run a background check on the registered owner, and see if the owner had become a prohibited person (e.g., convicted of a felony) in the years subsequent to the original registration.<sup>720</sup> But “‘District officials and experts conceded [that] background checks could be conducted at any time without causing the registrations to expire.’ The re-registration requirement cannot survive intermediate scrutiny on the (dubious) basis that it will make this task easier.”<sup>721</sup>

The District also wanted re-registration “to maintain the accuracy of the registration database.”<sup>722</sup> But a less burdensome alternative was already in

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717. *Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 277–78 (D.C. Cir. 2015); *McCullen*, 134 S. Ct. at 2540. One case, the Fifth Circuit’s *McCraw*, was mixed-up about “least” versus “less.” *NRA v. McCraw*, 719 F.3d 338 (5th Cir. 2013). The court thought that because intermediate scrutiny does not mandate the “least” restrictive alternative, the court had no obligation to consider anything about alternatives:

It is true, as plaintiffs claim, that Texas could have taken other, less restrictive approaches, such as allowing 18–20-year-olds to get a license if they demonstrate a particularly high level of proficiency and responsibility with guns. But the state scheme must merely be reasonably adapted to its public safety objective to pass constitutional muster under an intermediate scrutiny standard. Texas need not employ the least restrictive means to achieve its goal. Given the substantial tailoring of the Texas scheme, plaintiffs’ overbreadth argument is unpersuasive.

*Id.* at 349.

This is like saying “Neptune has no gravity, because Neptune is not Jupiter.” It is true that Jupiter has the *most* gravity of any planet; the fact does not prove that Neptune has *no* gravity. Likewise, strict scrutiny has the *most* rigorous test regarding alternatives; the fact does not prove that other forms of heightened scrutiny have *no* test for alternatives.

Ignoring the normal rules of intermediate scrutiny just because Second Amendment rights are involved is contrary to *McDonald*, which says that the Second Amendment is not a “second-class” right, to be “singled out for special—and specially unfavorable—treatment.” *McDonald v. City of Chicago*, 561 U.S. 742, 778–79, 780 (2010).

718. *Heller III*, 801 F.3d at 273.

719. *Id.* at 280.

720. *Id.* at 286–88.

721. *Id.* at 277.

722. *Id.* at 278.

place: the D.C. “requirement that gun owners report relevant changes in their information, such as a new address.”<sup>723</sup>

Likewise, re-registration was supposed to help “determine when firearms have been lost or stolen.”<sup>724</sup> Again, the substantially less burdensome alternative was already in operation: the law requiring immediate report of the loss or theft of a gun.<sup>725</sup>

The Seventh Circuit, applying “not quite strict scrutiny” to a firing range ban, pointed out that there were alternatives to prohibition.<sup>726</sup> The *Ezell* court agreed with the City that gun thefts from range patrons could endanger public safety, as could stray bullets exiting a range.<sup>727</sup> But the danger “can be addressed through sensible zoning and other appropriately tailored regulations.”<sup>728</sup>

Sergeant Bartoli testified about the availability of straightforward range-design measures that can effectively guard against accidental injury. He mentioned, for example, that ranges should be fenced and should designate appropriate locations for the loading and unloading of firearms. Other precautionary measures might include limiting the concentration of people and firearms in a range’s facilities, the times when firearms can be loaded, and the types of ammunition allowed.<sup>729</sup>

The court then cited range safety manuals, and range safety statutes from other states, which demonstrated the availability of less burdensome alternatives.<sup>730</sup> The range prohibition was unconstitutional, because the City’s interests “may be addressed by more closely tailored regulatory measures.”<sup>731</sup>

Evaluating a near-prohibition on defensive handgun carry, the Seventh Circuit in *Madigan* pointed out that there were many alternatives to prohibition.<sup>732</sup> “Illinois has lots of options for protecting its people from being shot without having to eliminate all possibility of armed self-defense in public.”<sup>733</sup> Indeed, every other state had similar concerns about the “dangers that widespread public carrying of guns may pose.”<sup>734</sup> All the other states “have decided that a proper balance between the interest in self-defense and the dangers created by carrying guns in public is to limit the right to carry a

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723. D.C. CODE § 7-2502.08 (2016).

724. *Heller III*, 801 F.3d at 278.

725. D.C. CODE § 7-2502.08(a)(1); *Heller III*, 801 F.3d at 278.

726. *Ezell v. City of Chicago*, 651 F.3d 684, 709 (7th Cir. 2011).

727. *Id.* at 694.

728. *Id.* at 709.

729. *Id.*

730. *Id.* at 709–10.

731. *Ezell*, 651 F.3d at 710.

732. *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012).

733. *Id.*

734. *Id.*

gun to responsible persons rather than to ban public carriage altogether, as Illinois with its meager exceptions comes close to doing.”<sup>735</sup>

Among the alternatives, “some states sensibly require that an applicant for a handgun permit establish his competence in handling firearms.”<sup>736</sup> Even “[t]he New York gun law upheld in *Kachalsky*,” despite being “one of the nation’s most restrictive such laws . . . is less restrictive than Illinois’s law.”<sup>737</sup>

## 2. Cases Where Alternatives Were Not Found

That courts must look for less burdensome alternatives does not mean that they will always find one. The Ninth Circuit in *Jackson* rejected a proposed alternative because it was actually more burdensome.<sup>738</sup> The alternative would have criminalized the carrying of hollow-point ammunition for lawful self-defense, instead of banning the sale (but not possession) of hollow-point ammunition as the law did.<sup>739</sup>

The Tenth Circuit’s foundational Second Amendment case is *United States v. Reese*, which applied intermediate scrutiny to the domestic violence restraining order gun ban.<sup>740</sup> *Reese* upheld the challenged law only after determining there was not “a severable subcategory of persons as to whom the statute is unconstitutional.”<sup>741</sup> In other words, there was not an identifiable group of people whom the statute unnecessarily burdened.

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735. *Id.*

736. *Id.* at 941.

737. *Madigan*, 702 F.3d at 941.

738. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 969–70 (9th Cir. 2014).

739. *Id.*

*Jackson* contends that San Francisco could have adopted less burdensome means of restricting hollow-point ammunition, for example by prohibiting the possession of hollow-point bullets in public, but allowing their purchase for home defense. *See, e.g.*, N.J. Stat. Ann. § 2C:39-3(f), (g). Even if this is correct, intermediate scrutiny does not require the least restrictive means of furthering a given end. *Ward*, 491 U.S. at 798, 109 S.Ct. 2746. *City of Renton* emphasizes that a “city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” 475 U.S. at 52, 106 S.Ct. 925 (internal quotation omitted). We also doubt that the laws to which *Jackson* points are indeed less burdensome than section 613.10(g). Because section 613.10(g) affects only the *sale* of hollow-point ammunition, San Franciscans are free to use and possess hollow-point bullets within city limits. Under *Jackson*’s “less burdensome” alternatives, individuals would face criminal prosecution for possessing such ammunition outside the home. Given the availability of alternative means for procuring hollow-point ammunition, section 613.10(g) imposes only modest burdens on the Second Amendment right.

*Id.* at 969–70.

740. *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010).

741. *Id.* at 803.

In the Tenth Circuit's *Bonidy*, all judges recognized the requirement to consider less burdensome alternatives.<sup>742</sup> The majority and dissent disagreed about the feasibility of the alternative.<sup>743</sup> The case involved a federal regulation banning guns in post office customer parking lots.

In dissent, Judge Tymkovich pointed out that the Post Office could issue permits for guns in its parking lots:

At any rate, the ease with which the government could alter this regulation to address its concerns while still respecting the Second Amendment rights of lawful carriers undercuts any substantial-relation argument. As the district court noted, rather than a flat ban on gun storage, the regulation could allow discretionary issuance of permits to use the parking lot with the gun in a locked vehicle concealed in a glove compartment or console. Such a policy would let the Postal Service control the carrying of firearms in locations where security concerns are indeed so pressing as to make a wholesale ban on firearms substantially related to those goals.<sup>744</sup>

The majority countered that putting the Post Office into the gun-permit business was unfeasible:

To require the USPS to tailor a separate gun policy for each of its properties or indeed for its many diverse customers would present an impossible burden not required by the intermediate scrutiny test.

. . . [A]n alternative system involving piecemeal exceptions and individual waivers would be wasteful and administratively unworkable, and would raise entirely new problems related to fairness, official discretion, and equal administration of the laws. . . . Under a more nuanced or discretionary regime, problems of perceived unfairness or unreasonableness—and accompanying litigation—would likely multiply, not disappear.<sup>745</sup>

#### CONCLUSION

Collectively, the United States Circuit Courts of Appeals have adopted a doctrine for deciding Second Amendment cases. Although exceptions can be found, the mainstream approach of the circuits is as follows:

When Second Amendment rights are at issue, rational basis review is off the table. The Second Amendment right has many purposes, including self-defense, hunting, target shooting, militia, and all other lawful purposes. Self-defense is at the core of the right. The “arms” protected by the Second Amendment are the common arms typically possessed by law-abiding citizens, rather than dangerous and unusual weapons.

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742. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1121 (10th Cir. 2015).

743. *Id.* at 1129.

744. *Id.* at 1123 (Tymkovich, J., concurring in part and dissenting in part) (internal quotations and citations omitted).

745. *Id.* at 1127–28.

Most circuits apply the Two-Part Test created by the Third Circuit in *United States v. Marzzarella*. In Step One of the Test, the issue is whether the government law or action restricts the Second Amendment right, as that right has been traditionally and historically understood. The government may win the case at Step One if the government can carry its burden of proving that the restriction at issue is outside the traditional understanding of the Second Amendment right.

If the government does not carry its burden on Step One, the case proceeds to Step Two, where some level of heightened scrutiny will be applied. Some laws, such as a near-complete ban on bearing arms in public, are unconstitutional, without need to resort to strict or intermediate scrutiny. For other laws, the choice between strict and intermediate depends on a variety of factors, including: the scope of the persons affected (all law-abiding persons vs. particularly dangerous persons), the scope of restriction (prohibition vs. regulation), where the law applies (inside the home vs. in public), whether the law limits a person's choice of arms, and whether the law affects self-defense and defense of others.

The Supreme Court in *Heller* and *McDonald* had described certain gun controls as being "presumptively lawful." Laws which are exactly the same as the ones listed in *Heller* are often tested under Step One, but sometimes are tested under Step Two. Laws which are claimed to be analogous to the specific laws named in *Heller* are best tested in Step Two, but are sometimes analyzed under Step One.

The standards for Second Amendment strict or intermediate scrutiny (or for "not quite strict scrutiny") are drawn from their First Amendment analogues. The more stringent the scrutiny, the stronger a government interest must be shown, and the better the "fit" must be between the law and the government interest. For example, strict scrutiny requires proof that the law is the "least restrictive alternative." In intermediate scrutiny, the government need only prove that there are no alternatives that would burden substantially less of the rights of law-abiding citizens.

In Step Two, as in Step One, the burden of proof is always on the government.

**APPENDIX: SECOND AMENDMENT CASES**

## SUPREME COURT

United States v. Miller, 307 U.S. 174 (1939)	05/15/39
Staples v. United States, 511 U.S. 600 (1994)	05/23/94
District of Columbia v. Heller, 554 U.S. 570 (2008)	06/26/08
McDonald v. City of Chicago, 561 U.S. 742 (2010)	06/28/10
Caetano v. Massachusetts, 136 S. Ct. 1027 (2016)	03/21/16

## FIRST CIRCUIT

United States v. Rene E., 583 F.3d 8 (1st Cir. 2009)	08/31/09
United States v. Booker, 644 F.3d 12 (1st Cir. 2011)	05/02/11
United States v. Torres-Rosario, 658 F.3d 110 (1st Cir. 2011)	09/23/11
Hightower v. City of Boston, 693 F.3d 61 (1st Cir. 2012)	08/30/12
United States v. Carter, 752 F.3d 8 (1st Cir. 2014)	04/30/14

## SECOND CIRCUIT

United States v. Stuckey, 317 F. App'x 48 (2d Cir. 2009) (unpublished)	03/18/09
United States v. Decastro, 682 F.3d 160 (2d Cir. 2012)	06/01/12
United States v. Zaleski, 489 F. App'x 474 (2d Cir. 2012) (unpublished)	07/13/12
Kachalsky v. Cty. of Westchester, 701 F.3d 81 (2d Cir. 2012)	11/27/12
United States v. Bryant, 711 F.3d 364 (2d Cir. 2013)	04/03/13
United States v. Bogle, 717 F.3d 281 (2d Cir. 2013)	05/23/13
Kwong v. Bloomberg, 723 F.3d 160 (2d Cir. 2013)	07/09/13
Burgess v. Town of Wallingford, 569 F. App'x 21 (2d Cir. 2014) (unpublished)	06/12/14
New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242 (2d Cir. 2015)	10/19/15

## THIRD CIRCUIT

United States v. Ross, 323 F. App'x 117, 120 (3d Cir. 2009) (unpublished)	04/27/09
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