

**New York State Bar Association**

***Task Force on Gun Violence***

**Final Report**

**March 2015**

Approved by the House of Delegates on March 28, 2015

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## PRELIMINARY OVERVIEW

### Gun Violence in America

Gun violence takes many forms, including highly visible and recurring mass shootings, chronic and endemic street violence in our cities, violence within families, suicides, and accidental shootings. The toll from gun violence is enormous: based on available data, over 30,000 people die from gunshot wounds each year in the United States.<sup>1</sup> More than twice that number are shot each year but do not die from their wounds—some 66,000 to 78,000 people annually.<sup>2</sup> Between 2001 and 2010, annual

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<sup>1</sup> FIREARM & INJURY CENTER AT PENN, FIREARM INJURY IN THE U.S. (Version 2011) (hereinafter “FIREARM INJURY IN THE U.S.”), at 5, COLLEGE OF URBAN AFFAIRS, CLEVELAND STATE UNIVERSITY, ADDING UP THE “BUTCHER’S BILL”: THE PUBLIC HEALTH CONSEQUENCES OF AMERICA’S SYSTEM OF GUN REGULATION (Mar. 28, 2013) (hereinafter “ADDING UP THE ‘BUTCHER’S BILL’”) at 21, *available at* [http://www.urban.csuohio.edu/publications/hill/ButchersBill\\_Hill\\_032813.pdf](http://www.urban.csuohio.edu/publications/hill/ButchersBill_Hill_032813.pdf) (reporting 32,000 people are killed each year by firearms from all causes: murder, suicide, accidental, lawful use of lethal force by law enforcement and a small number of undetermined killings). Annually, some 10,800 to 12,800 of those killed by gunshots are victims of firearm assault—homicide victims. ADDING UP THE “BUTCHER’S BILL” at 11, 21. Guns are responsible for 67% of all homicides in this country. FIREARM INJURY IN THE U.S. at 5. Firearm violence is the second leading cause of death for youth aged 15-24, surpassed only by car accidents and other unintentional injuries. *Id.* at 7. *See also* D. WEBSTER & J. VERNICK (EDS.). (2013). REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS, Johns Hopkins University Press (hereinafter “REDUCING GUN VIOLENCE”) at 1-2 (“[a]llmost as many Americans die from gunfire as die from motor vehicle crashes.”); *see generally* ADDING UP THE “BUTCHER’S BILL” at 2 (summarizing available data on firearm injuries and deaths and noting that from 2001 to 2011 more than 300,000 Americans died from gunshot wounds—119,000 being victims of homicide; the balance mostly suicides). The U.S. homicide rates are cyclical and currently stand at a 30-year low. REDUCING GUN VIOLENCE at 4 (noting rates were nearly twice as high as recently as 1991). Even so, the U.S. homicide rates are higher than in countries considered to be America’s economic counterparts, and the death rate by firearms is strikingly higher: eight times greater overall and seventy times higher than in high income Asian countries. *See* FIREARM INJURY IN THE U.S. at 12-14. The frequency of the use of firearms to commit homicides in this country reflects the prevalence of firearms in this country. An estimated 310 million firearms in private hands in the United States (*see* CONGRESSIONAL RESEARCH SERVICE, GUN CONTROL LEGISLATION (Nov. 14, 2012), at 8, *available at* <http://www.fas.org/sgp/crs/misc/RL32842.pdf>), with 43% of American households surveyed in December 2012 reporting having a gun in the home. INSTITUTE OF MEDICINE AND NATIONAL RESEARCH COUNCIL. PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE, (Washington, DC: The National Academies Press, 2013) (hereinafter “PRIORITIES FOR RESEARCH”) at 15, *available for purchase at* [http://www.nap.edu/catalog.php?record\\_id=18319](http://www.nap.edu/catalog.php?record_id=18319).

<sup>2</sup> ADDING UP THE “BUTCHER’S BILL,” *supra* note 1, at 2, 6-7 (between 2001 and 2010 more than 682,000 Americans were shot but did not die from their wounds); FIREARM INJURY IN

gunshot deaths remained relatively stable while the number of people shot but not killed increased.<sup>3</sup> Improvements in emergency medical care in treating gunshot wounds, drawn from the U.S. military’s battlefield experience in Afghanistan and Iraq, are believed to have saved many lives and kept the firearm homicide rate from climbing.<sup>4</sup> Many people who survive being shot suffer life-altering injuries.<sup>5</sup>

From 2001 to 2010 nearly a million Americans were struck by bullets and either killed or wounded.<sup>6</sup> This means that over that ten-year period every person living in this country stood a 1 in 314 chance of being struck by a bullet.<sup>7</sup> But the risk of firearm injury and death is not evenly distributed across the country and varies greatly by gender, race and socio-economic level.<sup>8</sup> Gunshot victims are overwhelmingly male.<sup>9</sup> Gunshot victimization patterns display striking racial disparities.<sup>10</sup> Firearm violence—being shot by another person—represents the

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THE U.S., *supra* note 1, at 6; REDUCING GUN VIOLENCE, *supra* note 1, at XXV (Introduction) (in 2010 73,505 persons were treated in hospital emergency rooms for nonfatal gunshot wounds.). The statistics show a general upward trend in the overall gunshot victimization rate (deaths and injuries of all kinds) but that trend is fueled almost exclusively by the increase in non-fatal shootings. ADDING UP THE “BUTCHER’S BILL,” *supra* note 1, at 6-7. Of the 682,000 non-fatally injured gunshot victims tallied between 2001 and 2011, 471,000 of them were victims of assaults. *Id.* at 2. (The annual number of firearm assault victims who survived being shot varied from a low of 37,321 to a high of 56,626.) *Id.* at 11. The balance of the non-fatal woundings consisted principally of accidental shootings as few people survive intentional, self-inflicted (suicidal) shootings. *Id.* at 2 and 17.

<sup>3</sup> ADDING UP THE “BUTCHER’S BILL,” *supra* note 1, at 10-12.

<sup>4</sup> Gary Fields & Cameron McWhirter, *In Medical Triumph, Homicides Fall Despite Soaring Gun Violence*, THE WALL STREET JOURNAL, Dec. 8, 2012, available at <http://www.wsj.com/articles/SB10001424127887324712504578131360684277812> (noting civilian advancements in treating gunshot victims at US hospitals came from improved battlefield trauma care for U.S. soldiers, including with respect to resuscitation and plasma transfusion - “new techniques borrowed from battlefield medicine.”). See ADDING UP THE “BUTCHER’S BILL,” *supra* note 1, at 12, 21.

<sup>5</sup> FIREARM INJURY IN THE U.S, *supra* note 1, at 6.

<sup>6</sup> ADDING UP THE “BUTCHER’S BILL,” *supra* note 1, at 2, 9.

<sup>7</sup> *Id.* at 21.

<sup>8</sup> FIREARM INJURY IN THE U.S., *supra* note 1, at 7-14; ADDING UP THE “BUTCHER’S BILL,” *supra* note 1, at 12-21.

<sup>9</sup> ADDING UP THE “BUTCHER’S BILL,” *supra* note 1, at 12-21.

<sup>10</sup> PRIORITIES FOR RESEARCH, *supra* note 1, at 14-15 (“African American males have the highest overall rate of firearm-related mortality: 32 per 100,000, twice that of white, non-

leading cause of death for African American males between the ages of 15 and 34.<sup>11</sup> An African American male is nine times more likely to be shot to death than a white male.<sup>12</sup> Suicides, however, have a reverse racial impact—a white male is ten times more likely than a black male to take his own life with a gun.<sup>13</sup> Overall, suicides represent nearly two thirds of all shooting deaths each year, approaching 20,000 out of the approximately 30,000 annual gun deaths.<sup>14</sup>

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Hispanic males (at 16.6 per 100,000), and three times that of Hispanic and American Indian males (at 10.4 and 11.8 per 100,000, respectively.”); *id.* at 30.

<sup>11</sup> See CDC, LEADING CAUSES OF DEATHS IN MALES UNITED STATES (2009), Table - Leading Causes of Death By Age Group, Black Males—United States 2009, reporting that “homicide” (including but not limited to deadly firearm assaults) is the leading cause of death among black males aged 15-19 (50.4% of all deaths); 20-24 (49.2 %); and 25-34 (32.8%). The CDC report is *available at* <http://www.cdc.gov/men/lcod/2009/LCODBBlackmales2009.pdf>. Similar numbers were reported for 2004. See NATIONAL VITAL STATISTICS REPORTS, DEATHS: LEADING CAUSES FOR 2004, (Vol. 56, No. 5) at 36, Table 1- leading causes of death by sex and race: reporting leading cause of death among black males aged 15-19 (45.3%), 20-24 (48.4%), and 25-34 (32.4%), *available at* [http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56\\_05.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_05.pdf). Homicide was also the leading cause of death for black males aged 15-24 in 1996. See NATIONAL VITAL STATISTICS REPORTS 1998 at 2, *available at* [http://www.cdc.gov/nchs/data/nvsr/nvsr47/nvs47\\_09.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr47/nvs47_09.pdf). A CDC report entitled, MORTALITY AMONG TEENAGERS AGED 12-19 YEARS: UNITED STATES, 1999-2006 (NCHS Data Brief Number 37, May 2010) concluded that, “Homicide is the leading cause of death for non-Hispanic black male teenagers. For all other groups, accident is the leading cause.” See CDC report at 1, 4 & Fig 4, *available at* <http://www.cdc.gov/nchs/data/databriefs/db37.htm>. A Florida Atlantic University medical school researcher reports that “[h]omicide is far and away the leading cause of death for young black men, more than car accidents, suicide and diseases combined.” See Scott Travis, *Homicide Leading Cause of Death of Young Black Men, Says FAU Researcher*, HUFFINGTON POST, Apr. 10, 2013, *available at* [http://www.huffingtonpost.com/2013/04/10/leading-cause-of-death-young-black-men-homicide\\_n\\_3049209.html](http://www.huffingtonpost.com/2013/04/10/leading-cause-of-death-young-black-men-homicide_n_3049209.html). “Death is inevitable, but premature death is not, including among young black men...[t]his is a devastating epidemic.” *Id.*

<sup>12</sup> Dan Keating, *Gun Deaths Shaped by Race in America*, WASHINGTON POST, Mar. 22, 2013, *available at* <http://www.washingtonpost.com/sf/feature/wp/2013/03/22/gun-deaths-shaped-by-race-in-america/>.

<sup>13</sup> *Id.*

<sup>14</sup> CONSORTIUM FOR RISK-BASED FIREARM POLICY, GUNS, PUBLIC HEALTH AND MENTAL ILLNESS: AN EVIDENCE- BASED APPROACH FOR STATE POLICY (Dec. 2, 2013) at 7, *available at* <http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/GPHMI-State.pdf> (“In 2011, nearly 20,000 people died as a result of firearm suicide, almost twice as many as were killed as a result of firearm homicide that year.”) (citing Hoyert, D.L., & Xu, J., DEATHS: PRELIMINARY DATA FOR 2011 (NATL. VITAL STATISTICS REPORT 2011) (2012) at 1-65)). See REDUCING GUN VIOLENCE, *supra* note 1 (reporting 62% suicides, 36% homicides and 2% unintentional); ADDING UP THE “BUTCHER’S

## Suicide

Firearms provide an effective means for committing suicide. Studies show that the lethality of firearms, coupled with the often sudden onset of suicidal thoughts and associated impulsive behavior, make for a particularly deadly combination.<sup>15</sup> More than 83% of suicides by gun are successful—some 20,000 fatalities out of 24,000 intentional self-inflicted shootings.<sup>16</sup> This contrasts with less effective means of committing suicide such as cutting one’s wrists or intentionally overdosing on medication.<sup>17</sup> Reducing access to firearms by those who have suicidal (or homicidal) ideations must be a goal, but the methods and means for doing so must be informed by mental health considerations and balanced against the right of law abiding citizens to keep firearms in the home for self-defense.<sup>18</sup>

### Mass Shootings and Mental Health.

Mental illness propels some people to kill other people, including in rare but recurring public mass shootings. These crimes often are committed by young men

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BILL,” *supra* note 1 at 8 (reporting 57% suicides, 39% homicides and balance either accidental or undetermined). Accidental deaths are inconsistently reported by medical examiners as homicides and accidental deaths and, as reported in federal statistical surveys, the numbers are unreliable. See Michael Luo & Mike McIntire, *Children and Guns: The Hidden Toll*, NEW YORK TIMES, Sept. 29, 2013, available at <http://www.nytimes.com/2013/09/29/us/children-and-guns-the-hidden-toll.html?pagewanted=all&r=1&> (investigation showed federal numbers underestimated actual accidental killings of children by 100% in four states and 50% in a fifth state, and generally overestimated adult accidental firearm deaths).

<sup>15</sup> See generally *Guns & Suicide: The Hidden Toll*, HARVARD SCHOOL OF PUBLIC HEALTH MAGAZINE (2014) at 1, (hereinafter “*Guns & Suicide: The Hidden Toll*”), available at <http://www.hsph.harvard.edu/magazine-features/guns-and-suicide-the-hidden-toll/> (“Though guns are not the most common method by which people attempt suicide, they are the most lethal.”) at 3-4 (describing impulsive acts).

<sup>16</sup> ADDING UP THE “BUTCHER’S BILL,” *supra* note 1, at 16-17.

<sup>17</sup> E D Shenassa, et al., *Lethality of Firearms Relative to Other Suicide Methods: a Population Based Study*, JOURNAL OF EPIDEMIOLOG. COMMUNITY HEALTH (2003) at 122, available at <http://jech.bmj.com/content/57/2/120.full> (“episodes involving firearms are 2.6 times more lethal than those involving suffocation” which was the next most lethal method). See *Guns & Suicide: The Hidden Toll*, *supra* note 15, at 1.

<sup>18</sup> The delivery of adequate mental health services to people thinking about committing acts of violence, whether against themselves or others, should be a priority in a caring society. As explained below, even if this country implemented stronger mental illness prevention and treatment programs and services, it would have a small impact on firearm assaults and related injuries and deaths.



who act alone, arm themselves with multiple semi-automatic firearms, typically equipped with extended magazine clips, and go on premeditated rampages.<sup>19</sup> The media attention paid to such mass shootings, including the killing of twenty elementary school children and six teachers at Sandy Hook Elementary School in 2012, and the deaths of fourteen people and injuries to another 58 in the Aurora, Colorado theater shooting in 2013, shapes the public debate over gun regulations with many people focused on keeping firearms out of the hands of the mentally ill.<sup>20</sup> Recommendations in this area include improving the collection and reporting of mental health treatments—especially involuntary hospitalizations—for more effective background checks, and strengthening laws to facilitate the removal of guns from the home after a family member has experienced a psychotic episode.<sup>21</sup>

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<sup>19</sup> See CONGRESSIONAL RESEARCH SERVICE, PUBLIC MASS SHOOTINGS IN THE UNITED STATES: SELECTED IMPLICATIONS FOR FEDERAL PUBLIC HEALTH AND SAFETY POLICY (Mar. 18, 2013) (hereinafter “CRS PUBLIC MASS SHOOTINGS”) at 10-11, 16-17, available at <http://fas.org/sgp/crs/misc/R43004.pdf>; Mark Follman, et al., *U.S. Mass Shootings, 1982-2012: Data From Mother Jones’ Investigation*, MOTHER JONES (Dec. 28, 2012, last updated Sept. 16, 2013), available at <http://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data>. Lois Beckett, *What Do We Actually Know About The Relationship Between Mental Illness and Mass Shootings?* MOTHER JONES (June 19, 2014) (hereinafter “*The Relationship Between Mental Illness and Mass Shootings*”), available at [www.motherjones.com/print/253921](http://www.motherjones.com/print/253921) (A Q&A with one of the leading researchers on mental health and violence).

<sup>20</sup> See JOURNALIST’S RESOURCE CENTER, HARVARD KENNEDY SCHOOL SHORENSTEIN CENTER ON MEDIA, POLITICS AND PUBLIC POLICY, MASS MURDER, SHOOTING SPREES AND RAMPAGE VIOLENCE: RESEARCH ROUNDUP (Sep. 22, 2014) (hereinafter “RAMPAGE VIOLENCE: RESEARCH ROUNDUP”), available at <http://journalistresource.org/studies/government/criminal-justice/mass-murder-shooting-sprees-and-rampage-violence-research-roundup>. (“What some researchers call ‘rampage violence’—such as the shootings in Newtown, Conn., at Columbine High and Virginia Tech, and at Rep. Gabrielle Giffords’s political event in Tucson—plays a prominent role in the national consciousness, often touching off political debates over gun control laws, shifts in the culture and the role of violent media, particularly video games.”).

<sup>21</sup> *The Relationship Between Mental Illness and Mass Shootings*, *supra* note 19 (when indicators are present for risk of violence, such as the period surrounding involuntary hospitalizations, “that should be a time when firearms are removed” from them, noting potentially big improvement in suicide prevention); Sy Mukherjee, *The White House’s New Mental Health Regulations Are a Big Step Toward Gun Violence Prevention* THINK PROGRESS (Jan. 8, 2014), available at <http://thinkprogress.org/health/2014/01/08/3135021/federal-mental-health-background-checks-gun-violence/> (strengthening federal background check system); See generally Daniel Luzer, *The Gun Rights Crowd Might Be Right About Mental Health*, PACIFIC STANDARD THE SCIENCE OF SOCIETY, Sept. 27, 2013, available at <http://www.psmag.com/navigation/health-and-behavior/crazy-mass-violence-gun-rights->

But the extraordinary attention paid to mass shootings and searching for mental health solutions for such crimes, while understandable, draws attention away from the 95% of firearm homicides that occur outside that specific context, are not directly associated with mental illness, and thus are unlikely to be addressed through improvements in prevention and treatment of mental illness.

Mass shootings are statistically infrequent and account for a tiny percentage of the approximately 11,000 firearm homicides that occur each year in the United States.<sup>22</sup> Over the past three decades (1983-2013), firearm assaults claimed the lives of approximately 500,000 people in the United States,<sup>23</sup> with 547 (.01%) of those

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[mental-health-66802/](#) (noting among other things the need to improve infrastructure for inpatient psychiatric care that was dismantled in 1980s). *But see Tyler v. Hillsdale County Sheriff's Department*, (6<sup>th</sup> Cir., December 18, 2014), available at [http://scholar.google.com/scholar\\_case?case=4225019686939459984&q=Tyler+v.+Hillsdale+County+Sheriff%27s+Department&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=4225019686939459984&q=Tyler+v.+Hillsdale+County+Sheriff%27s+Department&hl=en&as_sdt=6,33) (reversing dismissal of as-applied Second Amendment challenge to 18 U.S.C. § 922(g)(4), prohibiting possession of firearms “by a person who has been committed to a mental institution.”). Action in *Tyler* was filed by plaintiff who had been involuntarily committed for less than a month, 28 years before, during “emotionally devastating” divorce. Court applied strict scrutiny which it said was incompatible with interest-balancing.

<sup>22</sup> CRS PUBLIC MASS SHOOTINGS, *supra* note 19, at Summary (“[W]hile tragic and shocking, public mass shootings account for few of the murders or non-negligent homicides related to firearms that occur annually in the United States.”). According to the Congressional Research Service, 78 public mass shootings have occurred in the United States since 1983, with an increasing number taking place in recent years (38 since September 11, 2001). *Id.* at 2; see Mark Follman, et al., *A Guide to Mass Shootings in America*, MOTHER JONES (May 24, 2014) at 1 (counting 69 since 1983) available at <http://www.motherjones.com/politics/2012/07/mass-shootings-map>.

<sup>23</sup> FBI Uniform Crime Reports (UCR), for 1995-2013, available at <http://www.fbi.gov/about-us/cjis/ucr/ucr-publications#> and summary of FBI UCR annual reports for 1983-1994 available at <http://www.disastercenter.com/crime/uscrime.htm>. According to these sources, a total of 557,574 people were murdered in the United States between 1983 and 2013. 67.7% of those murdered in 2011 were killed by firearms. See FBI Crime Report for 2011, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/violent-crime/violent-crime>. See Donald McNeil, Jr., *Gun Proliferation Fuels Homicide Rates in the Americas*, THE NEW YORK TIMES, Dec. 15, 2014, available at <http://www.nytimes.com/2014/12/16/health/gun-proliferation-fuels-homicide-rates-in-the-americas.html> (shootings account for 68 percent of homicides in the United States); FIREARM INJURY IN THE U.S., *supra* note 1, at 5 (guns are responsible for 67% of all homicides in this country). Firearms long have been the weapon of choice for committing homicides in the United States. See generally Alexia Cooper & Erica L. Smith, HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008: ANNUAL RATES FOR 2009 AND 2010, U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS (November 2011) at Figure 42 (Homicide, by Weapon Type, 1980-2008), available at <http://www.bjs.gov/content/pub/pdf/htus8008.pdf>.

victims killed in public mass shootings.<sup>24</sup> Even if firearms were effectively kept out of the hands of mentally ill persons in America, including the small number who may be prone to commit violence against others, experts estimate that the total number of homicides each year would drop only by three to five percent.<sup>25</sup> These same experts stress that it is hard to predict who among those suffering from mental illness will become violent, much less embark on a mass killing spree. As one advocate who works with the mentally ill put it, “assumed dangerousness is a far cry from actual dangerousness.”<sup>26</sup> The size of the mentally ill population presents enormous challenges to effective screening for violent behavior. In New York in one year (2012), 144,000 people were admitted for treatment in community hospitals, private psychiatric hospitals or state operated psychiatric centers.<sup>27</sup> But even that large group of mentally ill patients is under-inclusive and will omit three quarters or more of the dangerous people who will go on to commit mass shootings, as reflected in a 2001 study of 27 adolescent mass murderers. That study found less than 25% of the young mass murderers had a documented psychiatric history of any kind.<sup>28</sup>

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<sup>24</sup> CRS PUBLIC MASS SHOOTINGS, *supra* note 19, at Summary and 2

<sup>25</sup> Benedict Carey & Anemona Hartocollis, *Warning Signs of Violent Acts Often Unclear*, THE NEW YORK TIMES, Jan. 15, 2013, available at [http://www.nytimes.com/2013/01/16/health/breaking-link-of-violence-and-mental-illness.html?\\_r=0](http://www.nytimes.com/2013/01/16/health/breaking-link-of-violence-and-mental-illness.html?_r=0) (mentally ill commit about 4% of all violent crimes and about 20% of rampage mass shootings); Richard A. Friedman, M.D., *In Gun Debate, a Misguided Focus on Mental Illness*, THE NEW YORK TIMES, Dec. 17, 2012, available at [http://www.nytimes.com/2012/12/18/health/a-misguided-focus-on-mental-illness-in-gun-control-debate.html?\\_r=0](http://www.nytimes.com/2012/12/18/health/a-misguided-focus-on-mental-illness-in-gun-control-debate.html?_r=0). See *The Relationship Between Mental Illness and Mass Shootings*, *supra* note 19 at 5 (preventing mental health-related gun deaths would lead to projected 5% reduction in gun homicides; mental illness is a strong risk factor for suicide, not homicide).

<sup>26</sup> Anemona Hartocollis, *Mental Health Issues Put 34,500 on New York’s No-Guns List*, THE NEW YORK TIMES, Oct. 19, 2014, (hereinafter “*Mental Health Issues*”), available at [http://www.nytimes.com/2014/10/19/nyregion/mental-reports-put-34500-on-new-yorks-no-guns-list.html?\\_r=0](http://www.nytimes.com/2014/10/19/nyregion/mental-reports-put-34500-on-new-yorks-no-guns-list.html?_r=0) (“Mental health professionals and advocates point out ... the vast majority of people with mental illness are not violent [and] [a]ccurately predicting whether someone will be violent .. is also a highly fraught process.”).

<sup>27</sup> *Id.*

<sup>28</sup> J. Reid Meloy, Ph.D., et al., *Offender and Offense Characteristics of a Nonrandom Sample of Adolescent Mass Murders*, 40 J. AM. ACAD. ADOLESCENT PSYCHIATRY 719 (June 2001), available at [http://forensis.org/PDF/published/2001\\_OffenderandOffe.pdf](http://forensis.org/PDF/published/2001_OffenderandOffe.pdf). See *The Relationship Between Mental Illness and Mass Shootings*, *supra* note 19; Joseph Tanfani, *Keeping Guns*

The focus on mental illness in firearm homicides further stigmatizes the mentally ill who statistically may not be at any greater risk of committing acts of violence against others,<sup>29</sup> and are indeed at much higher risk of becoming victims of crime themselves.<sup>30</sup> Moreover, the penalization of the mental ill in this fashion may dissuade some mentally ill persons from seeking treatment,<sup>31</sup> and the focus on mental illness tends to distort the debate over gun laws as gun rights advocates oppose new restrictions by pointing to society's failure to treat mental illness as the cause of firearm violence.<sup>32</sup> In this way the focus on mental illness and gun deaths tends to divert attention from the larger problems of gun violence in America and the fact that 95% or more of all firearm homicides are committed by people who are not suffering from mental illness. The reality is that little will change in the numbers of firearm homicides no matter what policies are adopted to limit access to firearms by those suffering from mental illness.

In light of the considerable challenges in identifying potentially violent offenders, the difficulties in crafting laws that are considerate of the rights of mentally ill people who are not violent, and the limited impact any such laws will

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*Away From People with Mental Illness Is a Complex Issue*, LOS ANGELES TIMES, Sept. 21, 2013, available at <http://articles.latimes.com/2013/sep/21/nation/la-na-shooting-background-checks-20130921>; (According to a 2012 survey published by Mayors Against Illegal Guns, “in 43 mass shootings over the past four years, none of the shooters was prohibited for mental health reasons from possessing a gun under federal law.”); See also 2014 update MAYORS AGAINST ILLEGAL GUNS, ANALYSIS OF RECENT MASS SHOOTINGS (July 2014) available as PDF download at <http://everytown.org/resources/>).

<sup>29</sup> *Mental Health Issues*, *supra* note 26 at 4.

<sup>30</sup> See MENTAL HEALTH REPORTING, FACTS ABOUT MENTAL ILLNESS AND VIOLENCE, UNIVERSITY OF WASHINGTON SCHOOL OF SOCIAL WORK (2014), available at [http://depts.washington.edu/mhreport/facts\\_violence.php](http://depts.washington.edu/mhreport/facts_violence.php) (“People with psychiatric disabilities are far more likely to be victims than perpetrators of violent crime.”).

<sup>31</sup> *Mental Health Issues*, *supra* note 26, at 4.

<sup>32</sup> *Guns and the Mentally Ill: Why the NRA Keeps Talking About Mental Illness, Rather Than Guns*, THE ECONOMIST (Mar. 13, 2013), available at <http://www.economist.com/blogs/lexington/2013/03/guns-and-mentally-ill> (quoting NRA's executive vice-president “We have no national database of these lunatics . . . We have a completely cracked mentally ill system that's got these monsters walking the streets.”); Liz Nepoent, *NRA Takes Fire for Stance on Mental Illness*, ABC NEWS, Dec. 24, 2012, available at <http://abcnews.go.com/Health/nra-takes-fire-stance-mental-illness/story?id=18057336>.

have in reducing firearm homicides, the Task Force decided to devote its limited resources to other aspects of the gun violence problem in America.<sup>33</sup>

### **Urban Violence**

Poverty, educational disadvantages and many other social ills contribute to a culture of violence that produces the frequent staccato of small arms fire in poor neighborhoods, with cities deploying microphones to locate the shootings through acoustic triangulation. Urban gun violence is so prolific that residents of “the Crescent” section of Rochester (an area marked by unusually concentrated poverty) routinely hear gunshots, day and night. Shooting deaths are so common that a 15 year old growing up in that section of Rochester has been exposed to over 500 homicides committed within 2½ miles of his home.<sup>34</sup> Unlawful guns routinely find their way into the hands of inner city youth and contribute to the startling racial imbalance in homicides including the remarkable statistic that, “If you're black, you are almost 25 times more likely to be shot in New York City.”<sup>35</sup>

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<sup>33</sup> Mental health considerations play an enormous role in gun violence in the form of the 20,000 annual suicides by firearm. A caring society ought to tackle that problem directly, as it should the mental illness that is behind public mass shootings. The most effective solutions appear to be strengthening the delivery of mental health services to people who are in crisis, as well as strengthening programs to prevent, detect and treat mental illness. But strengthening programs to prevent and treat mental illness can be expected to reduce firearm homicides only by about 5%, as noted above.

<sup>34</sup> The source for this Rochester-specific data is John Klofas, a professor of criminal justice and director of the Center for Public Safety Initiatives at Rochester Institute of Technology. Prof. Klofas has studied Rochester homicide rates and gun violence data for several decades. His most recent paper, PRELIMINARY DESCRIPTIVE ANALYSIS OF ROCHESTER SHOOTINGS DATABASE (December 2012), is available at [http://www.rit.edu/cla/criminaljustice/sites/rit.edu.cla.criminaljustice/files/docs/WorkingPapers/2013/Preliminary%20Descriptive%20Analysis%20of%20the%20Rochester%20Shooting%20Database\\_for%20CPSI%20website.pdf](http://www.rit.edu/cla/criminaljustice/sites/rit.edu.cla.criminaljustice/files/docs/WorkingPapers/2013/Preliminary%20Descriptive%20Analysis%20of%20the%20Rochester%20Shooting%20Database_for%20CPSI%20website.pdf).

<sup>35</sup> See Thomas Tracy, *NYPD Stats: 70% of Shooting Suspects in First Half of 2013 Were Black*, DAILY NEWS (New York), Nov. 19, 2013, available at <http://www.nydailynews.com/news/crime/blacks-70-shooting-suspects-2013-nypd-article-1.1522917>. “Data collected during the first six months of the year reveal 74% of the city’s 567 shooting victims were black. An additional 21.5% were Hispanic. Less than 3% of shooting victims were white.” *Id.* One illustration of the flow of firearms into our urban communities, the New York City Police Department recently utilized a single undercover police officer to purchase over 250 firearms (including a machine gun, a fully automatic Mac 11 with silencer, and a semi-automatic SKS Soviet era rifle) from gun traffickers bringing the firearms from southern states into New York City.

The damaging effects of gun violence are profound and transcend deaths and physical injuries. Inner city children are traumatized repeatedly by the violence they experience and suffer substantially in their development as a result.<sup>36</sup>

### **Intimate Partner Violence Against Women**

Women in the United States face an elevated risk of being injured or killed by intimate partners and acquaintances, compared to women in other high income countries.<sup>37</sup> The overall female homicide rate (gun and non-gun) in the United States was reported in 2002 to be 5 times higher than in the other 25 countries studied; the female *firearms* homicide rate was 11 times higher.<sup>38</sup> Stated another way, while the "United States represented only 32 percent of the female population among 25 high-income countries, it accounted for 84 percent of all female firearm homicides."<sup>39</sup> "The difference in female homicide victimization rates between the U.S. and these other industrialized nations is very large and is closely tied to levels of gun ownership."<sup>40</sup> "A 2003 study about the risks of firearms in the home found that females living with a gun in the home were nearly three times more likely to be murdered than females with no gun in the home."<sup>41</sup> "Guns can easily turn domestic

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<sup>36</sup> See generally PRIORITIES FOR RESEARCH, *supra* note 1, at 1 ("Nonfatal violence often has significant physical and psychological impacts, including psychological outcomes for those in proximity to individuals who are injured or die from gun violence.").

<sup>37</sup> See David Hemenway, *Firearm Availability and Female Homicide Victimization Rates Among 25 Populous High-Income Countries*, 57 JOURNAL OF THE AMERICAN MEDICAL WOMENS ASSOCIATION 100-104 (Spring 2002) and Harvard School of Public Health press release April 17, 2002 (hereafter "JAMWA:"), available at [http://scholar.google.com/scholar?q=Firearm+Availability+and+Female+Homicide+Victimization+Rates+Among+25+Populous+High-Income&hl=en&as\\_sdt=0&as\\_vis=1&oi=scholart&sa=X&ei=cakAVcrFHCarggS3\\_ICYAg&ved=0CBsQgQMwAA](http://scholar.google.com/scholar?q=Firearm+Availability+and+Female+Homicide+Victimization+Rates+Among+25+Populous+High-Income&hl=en&as_sdt=0&as_vis=1&oi=scholart&sa=X&ei=cakAVcrFHCarggS3_ICYAg&ved=0CBsQgQMwAA)

<sup>38</sup> *Id.* at 102.

<sup>39</sup> VIOLENCE POLICY CENTER, WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2012 HOMICIDE DATA, (September 2014) ("WHEN MEN MURDER WOMEN") at 8 (emphasis original), available at <http://www.vpc.org/studies/wmmw2014.pdf>, (citing JAMWA at 102).

<sup>40</sup> JAMWA at 102. The differences cannot be explained by differences in urbanization or income inequality. *Id.* at 103.

<sup>41</sup> WHEN MEN MURDER WOMEN, at 1.

violence into domestic homicide.”<sup>42</sup> “[T]he figures demonstrate the importance of reducing access to firearms in households affected by [intimate partner violence].”<sup>43</sup>

### **Impact of Firearm Violence in All Forms**

The collateral consequences of firearm violence include economic costs associated with medical care (from emergency room to long term rehabilitative care) and prosecution and incarceration of offenders, as well as spending on social welfare programs that seek to reduce gun violence and its causes. Total estimated costs each year in the United States stemming from gunshot deaths and injuries are difficult to measure but have been estimated at \$174 billion in 2010 alone.<sup>44</sup> Broadly speaking, gun violence is a leading public health problem, criminal justice problem, and socio-economic problem.

### **The Association’s Role**

The legal profession has a responsibility to contribute to policy-making and lawmaking that impact important aspects of society. This Association has a long history of contributing thoughtful analysis to matters of pressing public concern. Gun violence in the United States occurs at such an extraordinary level that most people agree changes are needed, that we can do better, that we must find ways to reduce it. When the topic turns to new laws relating to guns, the debate tends to become severely polarized. The public debate over the Second Amendment tends to be emotion-laden and often reflects a misunderstanding of the history of the Second Amendment and current judicial decisions construing it.

The Association believes lawyers have a special role to play in addressing gun violence in America. Among our professional obligations is a duty to help educate policy makers, lawmakers and the public with respect to gun laws, and to promote

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (quoting LEONARD J PAULOZZI, ET AL., SURVEILLANCE FOR HOMICIDE AMONG INTIMATE PARTNERS--UNITED STATES, 1981-1998, 5 MORBIDITY AND MORTALITY WEEKLY REPORT SURVEILLANCES SUMMARIES 1-16 (October 12, 2001)).

<sup>44</sup> Henry Goldman, *Shootings Costing U.S. \$174 Billion Show Burden of Gun Violence*, BLOOMBERG, Dec. 21 2012, available at <http://www.bloomberg.com/news/2012-12-21/shootings-costing-u-s-174-billion-show-burden-of-gun-violence.html>. See also FIREARM INJURY IN THE U.S., *supra* note 1, at 30-31 (identifying economic and non-economic costs of gun violence); DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH (U. Mich. 2004) at 4 (direct costs estimated \$6 million per day in 1990s and noting estimates of over 1 hundred billion dollars annually).

public health and safety by advocating for constitutionally permitted and informed regulation of firearms.<sup>45</sup>

In keeping with these principles, then-President Seymour James commissioned the New York State Bar Association Task Force on Gun Violence to prepare a report with recommendations.<sup>46</sup> The Task Force's report does not seek to repeat arguments that have been made by others, nor has it attempted to cover all of the issues swirling around this divisive issue. The Task Force decided that its most valuable contributions can be to promote a better understanding of the historical and legal issues around which there is often more passion than reason and to identify those aspects of the gun violence problem that need to be better understood through research to improve legislative efforts to reduce gun violence. Until we have hard data on gun violence sufficient to illuminate the causes of gun violence, as well as data against which to measure the efficacy of laws designed to reduce such violence, gun laws will be proposed and debated premised largely on speculation and political orientation. The Task Force nonetheless hopes that its report can help law makers, policy makers and the public to engage in a reasoned discussion about gun regulations without stirring the passions that we have seen. With this in mind, the Task Force focused its efforts in two areas: (1) public

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<sup>45</sup> The American Bar Association agrees "that lawyers share a special responsibility to help create a just and secure society in which firearms are well-regulated."  
<http://www.americanbar.org/content/dam/aba/migrated/gunviol/docs/WhyLawyersShouldWorkToReduceGunViolence.authcheckdam.pdf>

The ABA has formed a standing committee on gun violence, identifying its mission as follows:

The Standing Committee on Gun Violence aims to address the problem of gun violence through public education, bar activation, and legislative effort aimed at reducing gun violence and by taking on a coordinating role for lawyers active in the ABA, for its Sections and Divisions, state and local bars, and private bar groups.

See [http://www.americanbar.org/groups/committees/gun\\_violence.html](http://www.americanbar.org/groups/committees/gun_violence.html).

<sup>46</sup> Recruited from the ranks of NYSBA members, the 21 members of the NYSBA Task Force come from widely varying backgrounds and include current and former prosecutors, a veteran police officer (who also is an attorney), criminal defense lawyers, general civil practitioners, and lawyers who specialize in family law, tort law, and municipal law. We have several members who are gun owners and actively pursue hunting, target shooting and gun collecting, and people who have never picked up a gun. Sadly, at least one member of the committee experienced gun violence directed at a family member who was shot (not fatally) in a robbery. The Task Force's membership reflects geographic and political party balance. A list of its members is attached as an Appendix.



education about gun laws and the Second Amendment and (2) supporting federal efforts to collect and share data on gun violence, which has been stymied by Congressional actions.

### **Public Education**

We provide an educational piece on the Second Amendment as construed by the Supreme Court of the United States in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 3025 (2010) and later lower court decisions. This section of the report identifies the legal framework against which all firearms laws must be judged; analyzes the existing gun laws including the recently enacted SAFE Act in New York; and offers the public a user-friendly, non-technical legal summary that can serve to inform the public debate, reduce misstatements of the law and uninformed rhetoric, and provide a platform for a more measured discussion of legislation directed at reducing gun violence.

### **Beyond the Law: Supporting Gun Violence Research**

The Task Force analyzed reports that certain Congressional acts inhibit gun violence research by removing funding from the Centers for Disease Control to undertake research regarding firearm deaths and injuries, and by restricting in part the Bureau of Alcohol, Tobacco and Firearms from sharing gun trace data. We recommend a policy position for the Association to adopt in connection with these restrictions so as to enhance the factual information available to lawmakers and policy makers and enable informed decisions.

### **Organization of Report**

The Report is divided into three sections, each distinct in focus.

The first section discusses the Supreme Court's watershed decision in *Heller* in 2008 in which the high court held that the Second Amendment protects the right of individuals to possess handguns in the home for purposes of self-defense, and surveys the Second Amendment case law post-*Heller*, including state and federal challenges to New York gun regulations. (*See, infra*, pages 13-50).

The second section provides a detailed history of the Second Amendment and gun regulations in America from the early days of the Republic to just before *Heller*—to put *Heller* and the current gun debate into proper context. (*See, infra*, pages 55–83).

Finally, the third section addresses the absence of gun violence data, including why that information is missing, and proposes corrective actions to enable lawmakers and policy makers to make informed judgments about gun regulations. (See, *infra*, pages 83–93). A proposed NYSBA policy statement in support of such research is included.

The Report includes as an appendix a plain English summary of *Heller* and the Second Amendment historical review.

The three sections making up this report can be viewed as discrete stand-alone reports and can be read in any order.

The members of the Task Force wish to thank past President Seymour James for creating the Task Force in 2013 and providing the opportunity to serve on it, and thank immediate past President David Schraver and President Glenn Lau Kee for their sustained leadership on this important issue and steadfast support of the Task Force’s work.

## EXECUTIVE SUMMARY

### *Heller* and the Current State of the Law

In *Heller v. District of Columbia*, 554 U.S. 570 (2008), the Supreme Court split 5-4 in finding that the Second Amendment guarantees the right of individuals to keep and bear arms (specifically handguns) for self-defense in the home—rejecting the so-called “collective rights” view that the Second Amendment protected only the right of citizens to bear arms for militia duty.<sup>47</sup> The Court, even as it embraced the individual right as one that includes the right to “bear or carry” weapons and thus might apply outside the home, reaffirmed the lawfulness of many existing gun regulations which substantially limit the exercise of individual Second Amendment rights outside the home. Lower courts applying *Heller* largely have rejected Second Amendment challenges to gun laws but two federal circuit courts (Ninth and Seventh) in high profile rulings struck down state gun laws that barred or restricted public carry of firearms.<sup>48</sup> These circuit court decisions signal the developing nature of Second Amendment rights and the prospect for continued litigation as advocates for a strong Second Amendment seek to limit the power of government to pass laws regulating the ownership, possession, transfer/sale and use of guns. Even with much unsettled about the precise contours of the Second Amendment, we expect most forms of state and federal gun regulation likely will be upheld under the developing post-*Heller* case law, although the Supreme Court could fundamentally change the law in future cases, for example by requiring lower courts to apply a more exacting standard of review or by specifically defining robust Second Amendment rights outside the home.

The Task Force recommends that the Association educate the public and assist lawmakers and policy makers to better understand gun rights and gun regulations under the Second Amendment as construed in *Heller* and by courts applying *Heller*. In doing so, the Association can make clear that the individual

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<sup>47</sup> The Second Amendment provides:

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.

<sup>48</sup> See *Post-Heller Litigation Summary* LAW CENTER TO PREVENT GUN VIOLENCE (Nov. 21, 2014), <http://smartgunlaws.org/post-heller-litigation-summary>. See Section 1.5, *infra*, at p. 24.

right to possess a firearm is not absolute but rather is heavily qualified by public safety considerations, and that state and federal legislatures remain free to pass reasonable laws to reduce gun violence in keeping with long-recognized police powers.

## **Second Amendment History**

The Second Amendment reads as follows:

*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.*

The Federalist-dominated first Congress adopted the Second Amendment in 1787 with fresh concerns about domestic insurrections including the just suppressed uprising in Massachusetts known as Shays' Rebellion. The fledgling nation needed to be prepared to suppress such domestic unrest and the Federalists and Anti-Federalists fashioned a system by which state and federal governments would share in the command and training of a centralized militia to put down such rebellions. Federalists were not worried that the newly formed and thinly financed central government would one day grow strong and threaten individual liberties. Discussion of the need to protect the individual right to bear arms in order to stand up to an overreaching, liberty-imperiling federal army was the talk of some Anti-Federalists who sought to weaken the federal government. But Anti-Federalists did not hold sway in Congress, and there is no evidence that the Federalist majority in Congress sought to grant Constitutional protection to the individual right to bear arms, which was a long-standing common-law right. Federalists viewed each and every amendment as unnecessary and worked to ensure the amendments did not undermine the Constitution. The historical record supports the conclusion that the majority party in Congress intended to leave gun rights and regulations to the states without a Constitutional guarantee that would make it easier for rebellious farmers, slaves or other domestic insurrectionists to foment trouble.

Even so, the language of the Second Amendment is ambiguous. The drafters chose language that awkwardly expresses either an individual right to keep and bear arms for self-defense, or one limited to militia service. The historical record perhaps fits best into a hybrid view of the Second Amendment whereby its drafters intended the Constitution to protect the individual right to bear arms in connection

with militia service (the federal government could never take away arms needed for militia service) but did not intend to enshrine the use and possession of firearms for other purposes such as self-defense or hunting. Those latter rights were protected at common law subject to balancing against other rights and interests.

The historical record unambiguously demonstrates that gun regulations were common in this country both before and after the adoption of the Second Amendment, and shows that the common law right to keep and bear arms for self-defense was heavily qualified. States regularly banned or restricted carrying firearms in public, and such restrictions were generally upheld against Second Amendment challenges.

The history of gun regulations in the United States makes clear that the Second Amendment does not erect an inviolate barrier to gun laws as some suggest. Those who advocate an absolutist “shall not be infringed” view of the Second Amendment do not understand either the history of the Second Amendment or the Supreme Court’s treatment of that history, including the high court’s express endorsement of long-standing gun regulations.

### **Beyond the Law: Supporting Gun Violence Research**

Federal research in the area of gun violence was largely curtailed by Congress in the mid-1990s when Congress took away funding from the Centers for Disease Control, which had been studying the issue from a public health perspective. Moreover, federal legislation dating back to 1996 restricted the ATF from sharing gun trace data. While some of the limitations on sharing trace data among law enforcement agencies have been removed or lessened, restrictions remain. These Congressional actions have reduced the knowledge base for lawmakers and policy makers interested in reducing gun violence.

The Task Force recommends that the Association adopt a policy supporting the removal of all restrictions on funding of the Centers for Disease Control to conduct gun violence research and the ability of ATF to share gun trace data where appropriate.

**REPORT SECTION ONE:**

***DISTRICT OF COLUMBIA V. HELLER***

**AND**

**THE CURRENT STATE OF THE LAW**

## 1. The Supreme Court's Decision in *District of Columbia v. Heller*

In *District of Columbia v. Heller*<sup>49</sup> the Supreme Court of the United States held that the Second Amendment protects an individual's right to own a handgun for self-defense in the home, and strongly indicated the right to bear arms for self-defense extends outside the home although subject to a wide range of restrictions under state and federal law. In doing so, the high court charted new ground. It rejected the prevailing "collective rights" theory that linked the right to bear arms to militia service—a view of the Second Amendment widely followed in lower courts that often cited for support of the Supreme Court's decision in *United States v. Miller*.<sup>50</sup> Until *Heller*, almost every federal court had interpreted *Miller* to recognize a collective right.

### 1.1 *Heller* Background

Dick Heller was employed by the District of Columbia as a special police officer. He was authorized to carry a handgun while on duty at the Federal Judicial Center. The District of Columbia denied his application to register a handgun to keep at home. Heller challenged a D.C. ordinance that prohibited handguns (subject to grandfathering provisions), established certain firearm license requirements (but not for handguns), and mandated that all firearms had to either be kept disassembled or unloaded and under a trigger lock within the home. The effect of those provisions was to prohibit Heller from keeping a handgun in his home for self-defense.<sup>51</sup> Therefore, he filed suit in the United States District Court for the District of Columbia, claiming, among other things, that the ordinance violated his Second Amendment rights.

The district court dismissed the complaint applying the substantial body of law construing the Second Amendment as protecting the collective right to participate in a well regulated state militia. The D.C. Circuit Court of Appeals reversed. It held, among other things, that the total ban on handguns violated the

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<sup>49</sup> 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), available at [http://scholar.google.com/scholar\\_case?case=2739870581644084946&q=district+of+columbia+v.+heller&hl=en&as\\_sdt=40000006&as\\_vis=1](http://scholar.google.com/scholar_case?case=2739870581644084946&q=district+of+columbia+v.+heller&hl=en&as_sdt=40000006&as_vis=1).

<sup>50</sup> 307 U.S. 174 (1939). *Miller* is discussed *infra* at 114.

<sup>51</sup> *Heller*, 554 U.S. at 573-574, 628. See Adam Winkler, *Heller's Catch-22*, *infra*, note 214 at 1553.

individual right to possess firearms under the Second Amendment. The Supreme Court granted *certiorari* and on June 26, 2008, rendered a 5-4 decision in favor of Heller upholding the Court of Appeals' decision and striking down the D.C. handgun regulation. Justice Antonin Scalia authored the majority opinion and was joined by Justices John G. Roberts, Jr. (Chief Justice), Clarence Thomas, Anthony Kennedy, and Samuel Alito. In dissent were Justices John Paul Stevens, David Souter, Ruth Bader-Ginsburg, and Stephen Breyer.

## 1.2 *Heller* Majority Opinion

The majority opinion concludes that the Second Amendment protects the individual right to possess a handgun unconnected with service in a militia, and the right to use that handgun for traditionally lawful purposes, such as self-defense within the home.<sup>52</sup> The majority opinion adopted a linguistic analysis, advocated by law professor Nelson Lund,<sup>53</sup> that essentially jettisons the introductory clause from the analysis of the Amendment. The majority reasoned that the introductory clause cannot change the meaning of the operative clause.<sup>54</sup>

The majority proceeded to interpret the language of the Amendment as follows:

- “well regulated” meant nothing more than the imposition of proper discipline and training.<sup>55</sup>
- “militia” simply meant males physically capable of acting in concert for the common defense.<sup>56</sup>

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<sup>52</sup> The Court found that the Second Amendment guarantees “the individual right to possess and carry weapons in case of confrontation.” *Heller*, 554 U.S. at 570, 592.

<sup>53</sup> Nelson T. Lund, *A Primer on the Constitutional Right to Keep and Bear Arms*, VIRGINIA INSTITUTE FOR PUBLIC POLICY (June 2002) at 2-3, (hereinafter “*Primer on the Constitutional Right*”), available at [http://www.virginia institute.org/publications/primer\\_on\\_const.php](http://www.virginia institute.org/publications/primer_on_const.php). According to a Washington Post article, Professor Lund is the “Patrick Henry professor of constitutional law and the Second Amendment at George Mason University, a chair endowed by the National Rifle Association.” Peter Finn, *NRA Money Helped Reshape Gun Law*, WASHINGTON POST, Mar. 13, 2013 at 1 (hereinafter “*NRA Money*,” available at [http://www.washingtonpost.com/world/national-security/nra-money-helped-reshape-gun-law/2013/03/13/73d71e22-829a-11e2-b99e-6baf4ebe42df\\_story.html](http://www.washingtonpost.com/world/national-security/nra-money-helped-reshape-gun-law/2013/03/13/73d71e22-829a-11e2-b99e-6baf4ebe42df_story.html)).

<sup>54</sup> *Heller*, 554 U.S. at 578.

<sup>55</sup> *Id.* at 597.

<sup>56</sup> *Id.* at 595-597.



- “bear arms” did not have a distinctly military connotation or usage at the time and could be read to have a non-military meaning.<sup>57</sup>
- “the people” refers to individual citizens, not citizens acting in a collective body.<sup>58</sup>

The last observation carries special weight. The majority believed that any interpretation restricting the Second Amendment right to “keep and bear arms” to militia members, a subset of the people, was incompatible with the award of the right to “the people.” The majority found support for reading “the people” as individual citizens, and not as a collective body, in the fact that other amendments use “the people” to mean individual citizens.<sup>59</sup> The Court also found support in state constitutions and Bills of Rights that employed language the majority believed enshrined an individual’s right to keep and bear arms.<sup>60</sup> The majority reasoned that to give a different meaning to the Second Amendment would make it an “odd outlier.”<sup>61</sup>

The majority quickly dispensed with the Court’s prior decision in *Miller*: “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>62</sup> The majority observed that, “dangerous and unusual” weapons not “in common use” when the Second Amendment was adopted may fall outside its purview and thus be subject to complete bans.<sup>63</sup>

Turning to the D.C. regulation at issue, the Court held that the ordinance violated the plaintiff’s Second Amendment right because it prohibited an entire class of arms (handguns) favored for the lawful purpose of self-defense in the

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<sup>57</sup> *Id.* at 581-592.

<sup>58</sup> *Id.* at 579-581.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 601-603.

<sup>61</sup> *Id.* at 603.

<sup>62</sup> *Id.* at 625; *id.* at 623 (“*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons”).

<sup>63</sup> *Id.* at 627. The majority opinion also noted that Second Amendment protections are not limited to weapons in existence in 1791, just as First Amendment protections are not limited to forms of communication in existence in 1791. *Id.*

home.<sup>64</sup> The high court found that the requirement that any lawfully possessed firearms be disassembled or unloaded and bound by a trigger lock made it impossible for citizens to effectively use a firearm for the core lawful purpose of self-defense in the home, and therefore violated the Second Amendment right.<sup>65</sup>

The *Heller* majority opinion, however, substantially qualified its pronouncement of an individual right to bear arms by expressly recognizing — albeit *in dicta* — the presumptive validity of many existing gun regulations, stating that: “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>66</sup> The Supreme Court described these existing state and federal regulations as presumptively valid.<sup>67</sup> As Justice Scalia openly acknowledged, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.”<sup>68</sup>

### 1.3 *Heller* Dissenting Opinions

Justices Stevens and Breyer wrote separate dissenting opinions. Justice Stevens focused his criticism on the majority’s textual and historical analysis. Relying on amici submissions from linguistic professors and historians, Justice Stevens read the preamble to the Second Amendment as setting out a clear statement of its purpose: “It confirms that the Framers’ single-minded focus in

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<sup>64</sup> *Id.* at 628-635; *id.* at 628 (“the law totally bans handgun possession in the home ...[t]he handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.”).

<sup>65</sup> *Id.* at 571 (“The prohibition extends . . . to the home, where the need for defense of self, family and property is most acute.”). *Id.* at 628. The Court’s *holding* regarding the Second Amendment is limited to the right to defend one’s home: “In sum, we hold that the District’s ban on possession in the home violates the Second Amendment, as does the prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.” *Id.* at 635; *id.* at 629 (“the American people have considered the handgun to be the quintessential self-defense weapon.”).

<sup>66</sup> *Id.* at 626-627.

<sup>67</sup> *Id.* at 627 n.26.

<sup>68</sup> *Id.* at 626; *id.* at 595. (“Of course the right was not unlimited, just as the First Amendment’s right of free speech was not. 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.”).

crafting the constitutional guarantee ‘to keep and bear arms’ was on military uses of firearms, which they viewed in the context of service in state militias.”<sup>69</sup> He placed substantial weight on the legislative history showing conscientious objector language was part of early drafts of the Second Amendment. Based on this, he concluded that a conscientious objector exception to bearing arms necessarily connoted militia service.<sup>70</sup> Justice Stevens also pointed to the historical context and concern for organized militias to deal with domestic and foreign threats.<sup>71</sup> He concluded that the great weight of authority supported connecting the right to bear arms to state militia service, and believed it was Heller’s burden, as the petitioner seeking to overturn at least 70 years of case law supporting that view, to prove otherwise.<sup>72</sup>

Justice Breyer’s dissent assumed the Second Amendment enshrined an individual right to bear arms apart from militia service, but he would have held that the D.C. law did not unreasonably burden, under an “interest-balancing” analysis, Heller’s Second Amendment rights.<sup>73</sup>

#### 1.4 *Heller’s Unusual Critics and Proponents*

The majority opinion in *Heller* has been heavily criticized by historians, political scientists, lawyers and judges, with most of the criticism coming from within the ranks of those who favor expanding gun regulations.<sup>74</sup> Outside that mainstream criticism, two conservative judges have publicly criticized the decision. Judge Richard Posner of the Seventh Circuit called the majority’s treatment of history an example of “law office” history—that is, the work product prepared by lawyers “tendentiously dabbling in history, rather than by disinterested

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<sup>69</sup> *Id.* at 643.

<sup>70</sup> *Id.* at 655-656; 660-661.

<sup>71</sup> *Id.* at 714-715.

<sup>72</sup> *Id.* at 651; *see id.* at 639-640.

<sup>73</sup> *Id.* at 681, 693-723.

<sup>74</sup> *See, e.g.,* Robert J. Spitzer, *Gun Law, Policy and Politics*, NY ST. BJ 87 (2012) at 60. (“The *Heller* and *McDonald* rulings established, as a matter of law, an individual rights interpretation of the Second Amendment. But while judges can change the law, they cannot change history, and the historical record largely contradicts the bases for these two recent rulings.”).

historians.”<sup>75</sup> He concluded that the majority opinion “is evidence of the ability of well-staffed courts to produce snow jobs.”<sup>76</sup> Judge J. Harvie Wilkinson of the United States Court of Appeals for the Fourth Circuit leveled even harsher criticism stating the high court had violated rules of judicial restraint and originalism to divine an individual right, equating the unsupported right to that of the judicially-fashioned right to abortion recognized in *Roe v. Wade*.<sup>77</sup>

Judge Wilkinson’s criticism of *Heller* drew pointed responses from Alan Gura, who argued *Heller*, Law Professor Lund, and others.<sup>78</sup> Conversely, a number of prominent liberal law professors, including Lawrence Tribe, have concluded the amendment protects an individual right.<sup>79</sup> Former constitutional law professor, now President of the United States, Barack Obama agrees that the Second Amendment confers an individual right although subject to significant state and federal regulation.<sup>80</sup>

No matter how one views *Heller*’s treatment of history and the high court’s pronouncement of a constitutionally protected individual right to possess firearms

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<sup>75</sup> Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008) available at <http://www.newrepublic.com/article/books/defense-looseness>. For a description of how the Second Amendment legal paradigm was shifted, see *NRA Money*, *supra* note 46.

<sup>76</sup> *Id.*

<sup>77</sup> J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VIRGINIA L. REV. 253 (2009), available at [http://www.law.gmu.edu/assets/files/publications/misc/Wilkinson\\_SSRN1265118.pdf](http://www.law.gmu.edu/assets/files/publications/misc/Wilkinson_SSRN1265118.pdf).

<sup>78</sup> See Alan Gura, *Heller and the Triumph of Originality Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127 (2009), available at <http://uclalawreview.org/pdf/56-5-3.pdf>; Nelson Lund and David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and The Faux Conservatism of J. Harvie Wilkinson, III*, GEORGE MASON UNIVERSITY SCHOOL OF LAW, JOURNAL OF LAW AND POLITICS (Winter 2009), available at <http://davekopel.org/2A/LawRev/Unraveling-Judicial-Restraint.pdf>.

<sup>79</sup> Adam Liptak, *Ruling on Guns Elicits Rebuke from the Right*, THE NEW YORK TIMES, Oct. 20, 2008, available at [http://www.nytimes.com/2008/10/21/washington/21guns.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2008/10/21/washington/21guns.html?_r=1&pagewanted=all).

<sup>80</sup> See <http://2012.presidential-candidates.org/Obama/Gun-Control.php> (collecting President Obama’s statements about the Second Amendment). Interpreting the text of the Second Amendment is admittedly “mushy business” (Eugene Volokh, *The Commonplace Second Amendment*, 73 NYU L. REV. 793, 812 (1998) (hereinafter “*The Commonplace Second Amendment*”), available at <http://www2.law.ucla.edu/volokh/common.htm>) and subject to differing interpretations with political considerations never far away.

in the home for self-defense, it is the controlling law in this country, and provides the framework within which all laws regulating guns must be analyzed.

### 1.5 The Quality of the Guidance Provided by *Heller*

In recognizing an individual right to bear arms on one hand, but then on the other hand cabining that right by recognizing broad categories of presumptively lawful gun regulations, *Heller* raises more questions than it answers.<sup>81</sup> The *Heller* majority opinion did not address whether the Second Amendment restricts *state* (as opposed to federal) regulation of firearms and did not provide a standard for evaluating the constitutionality of other laws and regulations that impact the Second Amendment right. The Court did not provide guidance as to what “manner” or “purposes” of keeping a weapon would be protected by the Second Amendment. In outlining the broad area of existing gun regulations that are “presumptively lawful” the Court did not say whether the presumption is rebuttable or irrebuttable (i.e., conclusively presumed), and if any are subject to being rebutted the Court provided

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<sup>81</sup> See Calvin R Massey, *Second Amendment Decision Rules*, 60 *Hastings L.J.* 1431, 1431 (2009) (noting that the *Heller* Court “offered little guidance concerning [Second Amendment] decision rules”), available at <http://librarysource.uchastings.edu/repository/Massey/60HastingsLJ1431.pdf>; Allen Rostron, *Justice Breyer’s Triumph in the Third Battle Over the Second Amendment*, 80 *GEO. WASH. L. REV.* 704, 707 (2012), available at [http://www.gwlr.org/wp-content/uploads/2012/06/80\\_3\\_Rostron.pdf](http://www.gwlr.org/wp-content/uploads/2012/06/80_3_Rostron.pdf) (arguing that the lower courts, in struggling with how to interpret the Court’s ambiguous doctrinal approach in *Heller* and *McDonald*, have largely embraced a restrained approach “that leads to all but the most drastic restrictions on guns being upheld.”). Nicole Price, *District of Columbia v. Heller: Firing Blanks?*, 60 *MERCER L. REV.* 1437, 1459 (2009) (“As written, the majority’s opinion in *Heller* is both sufficiently ambiguous and narrowly tailored for lower courts to sidestep a massive upset of federal gun control laws.”); See *United States v. Marzzarella*, 614 F.3d 85, 101 (3d Cir. 2010), available at [https://scholar.google.com/scholar\\_case?case=16863015434812666842&q=United+States+v.+Marzzarella&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=16863015434812666842&q=United+States+v.+Marzzarella&hl=en&as_sdt=6,33) (noting that “Second Amendment doctrine remains in its nascency, and lower courts must proceed deliberately when addressing regulations unmentioned by *Heller*.”); see also *United States v. Barton*, 633 F.3d 168, at 172 n.4, available at [https://scholar.google.com/scholar\\_case?case=13115005534933840095&q=Barton+633+F.3d+&hl=en&as\\_sdt=6,33#\[4\]](https://scholar.google.com/scholar_case?case=13115005534933840095&q=Barton+633+F.3d+&hl=en&as_sdt=6,33#[4]) (noting difficulty in applying *Heller* to novel problem); Jeff Golimowski, *Pulling the Trigger: Evaluating Criminal Gun Laws in A Post-Heller World*, 49 *AM. CRIM. L. REV.* 1599, 1605 (2012) (“Not surprisingly, this lack of clear direction, which was left unresolved by *McDonald*, has caused the lower courts to develop their own, sometimes contradictory, standards”).

no hint at what current or historical evidence can rebut it.<sup>82</sup> Nor did the Court provide meaningful guidance as to what length of time a law might be “on the books” before it could be deemed a “longstanding” regulation within the meaning of the *Heller* exception to the Second Amendment. And the Court was all but silent about the standard of review.<sup>83</sup> As a result, *Heller* has given rise to what one scholar called a “morass of conflicting lower court opinions.”<sup>84</sup>

### **1.6 The Supreme Court’s Follow-on Decision in *McDonald v. City of Chicago***

In 2010, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the Second Amendment applies to state and local governments in addition to the federal government. In doing so, the court characterized the right to keep and bear arms as a fundamental right, “deeply rooted in this Nation’s history and traditions.”<sup>85</sup> The Court reiterated, however, that many gun laws remain constitutionally permissible. Writing for the majority in *McDonald*, Justice Alito stated:

It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose’ . . . 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

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<sup>82</sup> See *United States v. Chovan*, 735 F.3d 1127 (9th Cir.2013) (Bea, J., dissenting), available at [https://scholar.google.com/scholar\\_case?case=15809126724498186784&q=United+States+v.+Chovan&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=15809126724498186784&q=United+States+v.+Chovan&hl=en&as_sdt=6,33). Judge Bea observes that “[p]erhaps the best reading of this footnote is that the presumption is irrebuttable.” *Id.* at 1152 n 4.

<sup>83</sup> See, *infra*, Section 2.3 at 47-53.

<sup>84</sup> See *United States v. Chester*, 628 F.3d 673, 688-89 (4th Cir. 2010) (Davis, J., concurring in the judgment), available at [https://scholar.google.com/scholar\\_case?case=9720276993995512407&q=United+States+v.+Chester&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=9720276993995512407&q=United+States+v.+Chester&hl=en&as_sdt=6,33); see also Ryan Menard, Note, *Aiming Without a Scope: How Courts Scrutinize Gun Laws After District of Columbia v. Heller*, 3 NE. U. L.J. 289, 327 (2011) (describing “inconsistency, confusion, and hesitation” in lower courts’ decisions).

<sup>85</sup> 561 U.S. at 768 (quoting *Washington v. Glucksberg*, 521 US. 702, 721 (1997)), available at [https://scholar.google.com/scholar\\_case?case=5141154246897960488&q=McDonald+v.+City+of+Chicago&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=5141154246897960488&q=McDonald+v.+City+of+Chicago&hl=en&as_sdt=6,33)

arms'. . . . We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.<sup>86</sup>

## 2. Federal Court Decisions Applying *Heller* / *McDonald*

Although the “morass” of opinions may be difficult to characterize, a few themes have emerged:

First, most post-*Heller* / *McDonald* challenges to gun laws have failed. See 2.1, *infra*, pp. 26-31.<sup>87</sup>

Second, the courts often rely on the so-called safe harbor categories in *Heller* as a means of dismissing challenges to gun laws.

Third, the courts generally have applied an intermediate level of scrutiny, which has led to upholding most gun laws.

Fourth, the courts have broadly applied the language in *Heller* permitting restrictions on dangerous firearms and ones that were not in common use at the time of the Second Amendment.

Fifth, with two notable exceptions, courts generally have upheld significant restrictions on concealed carry of firearms including licensing laws that require applicants to demonstrate some type of unusual threat to personal safety in order to obtain a concealed carry permit.

In short, the courts have upheld most of the categories of gun regulation that might be proposed by states. Most gun regulations short of outright bans on the possession of rifles or handguns will likely be upheld under prevailing post-*Heller* case law, although further review in the Supreme Court could fundamentally alter the balance of interests under Second Amendment jurisprudence. The Supreme Court could do so by, for example, requiring a strict scrutiny standard of review for all Second Amendment challenges because the high court considers it a fundamental right, or by substantially expanding Second Amendment protections outside the home even under an intermediate level of scrutiny.

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<sup>86</sup> *Id.* at 786.

<sup>87</sup> The Law Center to Prevent Gun Violence reports that 96% of Second Amendment challenges have been rejected post-*Heller*. LAW CENTER TO PREVENT GUN VIOLENCE, PROTECTING STRONG GUN LAWS: THE SUPREME COURT LEAVES LOWER COURT VICTORIES UNTOUCHED (posted Nov. 12, 2013), available at <http://smartgunlaws.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched/> (collecting and summarizing cases).

## 2.1 Decisions Rejecting Second Amendment Challenges to Gun laws

### 2.1.1 *Heller*'s Safe Harbors

As noted above, the *Heller* decision identifies a number of “presumptively lawful regulatory measures” that lower courts have construed as safe harbors.<sup>88</sup> These “safe harbor” categories provide important guideposts against which to judge challenged laws, but their contours are unclear. In addition, it is unclear whether the safe harbor analysis is, standing alone, enough to remove a case from Second Amendment analysis. In the first few years after *Heller*, more than 80% of courts applied the *Heller* safe harbors.<sup>89</sup> Many of these courts applied the safe harbor without imposing any other level of scrutiny.<sup>90</sup> However, more recently, courts have

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<sup>88</sup> See *Heller*, 554 U.S. at 626-627. See *United States v. Chester*, 628 F.2d 673, 679 (4th Cir. 2010) (referring to presumptively lawful categories as safe harbors); *United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011) (“Accordingly, the Supreme Court’s discussion in *Heller* of the categorical exceptions to the Second Amendment was not abstract and hypothetical; it was outcome-determinative”).

<sup>89</sup> Tina Mehr & Adam Winkler, Issue Brief, *The Standardless Second Amendment*, AM. CONST. SOC’Y FOR L. & POL’Y (Oct. 2010), at 2 (stating that eighty percent of the more than two hundred cases in a little more than a year post-*Heller* upheld firearms regulations based on a *Heller* or other similar categorical exception)), available at [https://www.acslaw.org/sites/default/files/Mehr\\_and\\_Winkler\\_Standardless\\_Second\\_Amendment.pdf](https://www.acslaw.org/sites/default/files/Mehr_and_Winkler_Standardless_Second_Amendment.pdf).

<sup>90</sup> *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010), available at [https://scholar.google.com/scholar\\_case?case=17476562885304152173&q=United+States+v.+White,+593+F.3d+1199%5C&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=17476562885304152173&q=United+States+v.+White,+593+F.3d+1199%5C&hl=en&as_sdt=6,33) (holding a ban on gun possession for domestic violence misdemeanants to be lawful under *Heller*’s “longstanding prohibition” exception, without stating a standard of review); *Swait v. Univ. of Neb. at Omaha*, No. 8:08-CV-404, 2008 U.S. Dist. LEXIS 96665, at \*6-7 (D. Neb. Nov. 25, 2008), available at [https://scholar.google.com/scholar\\_case?case=12812123046244276783&q=Swait+v.+University+of+Nebraska+at+Omaha&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=12812123046244276783&q=Swait+v.+University+of+Nebraska+at+Omaha&hl=en&as_sdt=6,33) (upholding a ban on carrying concealed weapons without stating a standard of review); *United States v. Joos*, 638 F.3d 581, 586 (8th Cir. 2011), available at [https://scholar.google.com/scholar\\_case?case=8664102196698021176&q=United+States+v.+Joos&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=8664102196698021176&q=United+States+v.+Joos&hl=en&as_sdt=6,33) (holding it is well-established in post-*Heller* case law that a federal ban on felons in possession of firearms is constitutional under the Second Amendment, citing to *Heller*’s list, but not discussing why categories on list are constitutional); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009), available at [https://scholar.google.com/scholar\\_case?case=12763136493674134505&q=United+States+v.+Anderson+559+F.3d+348&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=12763136493674134505&q=United+States+v.+Anderson+559+F.3d+348&hl=en&as_sdt=6,33) (relying on *Heller*’s list of presumptively lawful regulations to uphold a statute banning firearm possession by felons); *United States v. Dugan*, 657 F.3d 998, 999-1000 (9th Cir. 2011), available at [https://scholar.google.com/scholar\\_case?case=7218017833405011599&q=United+States+v.+Dugan,+657+F.3d+998&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=7218017833405011599&q=United+States+v.+Dugan,+657+F.3d+998&hl=en&as_sdt=6,33) (upholding “long-standing prohibition” against



imposed a “substantial relation” test finding historically longstanding categories of gun regulation as “presumptively lawful,” but also concluding that such presumptions can be overcome if the government does not demonstrate that, as applied, the category bears a substantial relation to an important governmental objective.<sup>91</sup>

Doctrinally, the categorical approach rests on uncertain footing. Apart from the Court’s assertion that these categories are “longstanding,” there is no test for determining whether a law is sufficiently old to be presumptively valid. The Court did not present any historical evidence to support the history and purpose of the identified longstanding categories of gun regulations.<sup>92</sup> Very few courts have examined the doctrinal underpinnings of these categories. The Seventh Circuit is one of the few courts to do so. That court explained the safe harbors as follows:

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shipping and receiving firearms through interstate commerce while being a user of a controlled substance); *United States v. Hatfield*, 376 F. App’x 706, 707 (9th Cir. 2010) (upholding statute prohibiting the possession of an unregistered short-barreled shotgun); *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010), available at [https://scholar.google.com/scholar\\_case?case=6715810540949617385&q=United+States+v.+Seay,+620+F.3d+919&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=6715810540949617385&q=United+States+v.+Seay,+620+F.3d+919&hl=en&as_sdt=6,33) (upholding “longstanding” statute criminalizing possession of a firearm by unlawful drug users); *United States v. Dorosan*, 350 F. App’x 874, 875-76 (5th Cir. 2009) (holding that a parking lot at a post office is a “sensitive place” from which guns may be banned). *But see Bonidy v. United States Postal Serv.*, 2013 U.S. Dist. LEXIS 95435 (D. Colo. July 9, 2013), available at [https://scholar.google.com/scholar\\_case?case=14992597558781125629&q=Bonidy+v.+United+States+Postal+Service&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=14992597558781125629&q=Bonidy+v.+United+States+Postal+Service&hl=en&as_sdt=6,33) (striking down USPS regulation banning firearms from post office parking lot ) discussed, *infra*, p. 39; *United States v. Davis*, 304 F. App’x 473, 474 (9th Cir. 2008) (upholding statute prohibiting the carrying of a concealed weapon on an aircraft).

<sup>91</sup> See *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011), available at [https://scholar.google.com/scholar\\_case?case=16611349983286832052&q=United+states+v.+staten+666+F.3d+154&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=16611349983286832052&q=United+states+v.+staten+666+F.3d+154&hl=en&as_sdt=6,33) and *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010), available at [https://scholar.google.com/scholar\\_case?case=6997476548671644563&q=United+states+v.+skoien&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=6997476548671644563&q=United+states+v.+skoien&hl=en&as_sdt=6,33) (both holding that categorical approach is permissible, provided that there is a “substantial relation” between the challenged regulation and an important governmental objective); see also *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010), available at [https://scholar.google.com/scholar\\_case?case=8473753174075225521&q=United+states+v.+Williams+616+F.3d+685&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=8473753174075225521&q=United+states+v.+Williams+616+F.3d+685&hl=en&as_sdt=6,33).

<sup>92</sup> *Heller’s Catch-22*, *infra*, note 214 at 1564 (“The Court didn’t give any substantive explanation for why the types of laws mentioned in the [presumptively lawful] list were constitutional aside from a description of them as ‘longstanding.’”); *id.* at 1567 (noting that the presumptively lawful list is “offered up...without any reasoning or explanation”).

This means that some categorical disqualifications are permissible: Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons, nor need these limits be established by evidence presented in court. *Heller* did not suggest that disqualifications would be effective only if the statute's benefits are first established by admissible evidence. Categorical limits on the possession of firearms would not be a constitutional anomaly. Think of the First Amendment, which has long had categorical limits: obscenity, defamation, incitement to crime, and others.<sup>93</sup>

Despite the doctrinal uncertainty of the Supreme Court's "presumptively lawful" categories, particularly in the first few years after *Heller*, many courts relied on them to sustain gun laws often simply by comparing the at-issue gun regulations to one of the "safe harbor" categories.<sup>94</sup> State and federal courts have upheld gun laws involving the possession of firearms by felons, one of the "presumptively lawful" and "longstanding" categories in *Heller*.<sup>95</sup> Similarly, courts have routinely

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<sup>93</sup> *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010). See *United States v. Stevens*, 559 U.S. 468, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010), available at [https://scholar.google.com/scholar\\_case?case=85657697512539256&q=United+States+v.+Stevens+130+S.Ct.+1577&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=85657697512539256&q=United+States+v.+Stevens+130+S.Ct.+1577&hl=en&as_sdt=6,33).

<sup>94</sup> Stephen Kiehl, *In Search of A Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1138 (2011) (citing Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1248 (2009)) (internal quotation marks omitted), available at <http://digitalcommons.law.umaryland.edu/mlr/vol70/iss4/8>.

<sup>95</sup> *E.g.*, *United States v. Pruess*, 703 F.3d 242 (4th Cir. 2012), available at [https://scholar.google.com/scholar\\_case?case=16007235502875419572&q=United+States+v.+Pruess&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=16007235502875419572&q=United+States+v.+Pruess&hl=en&as_sdt=6,33) (possession of ammunition after having been convicted of a crime punishable by imprisonment exceeding one year); *United States v. Moore*, 2012 U.S. App. LEXIS 1335 (4th Cir. Jan. 25, 2012) (possession of firearm by a convicted felon); *United States v. Torres-Rosario*, 658 F.3d 110 (1st Cir. 2011) (same), available at [https://scholar.google.com/scholar\\_case?case=17647943673708289823&q=United+States+v.+Torres-Rosario&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=17647943673708289823&q=United+States+v.+Torres-Rosario&hl=en&as_sdt=6,33); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010) (same); *Anderson*, 559 F.3d 348 (5th Cir. 2009) (same); *United States v. Rhodes*, 2012 U.S. Dist. LEXIS 76363 (S.D. W. Va. June 1, 2012) (same); *United States v. Edge*, 2012 U.S. Dist. LEXIS 15002 (W.D.N.C. Feb. 8, 2012); *United States v. Loveland*, 2011 U.S. Dist. LEXIS 119954 (W.D.N.C. Sept. 7, 2011) (same); *United States v. Kirkpatrick*, 2011 U.S. Dist. LEXIS 82801 (W.D.N.C. July 27, 2011) (possession by one convicted of crime punishable by imprisonment of greater than one year); *United States v. Miller*, 604 F. Supp. 2d 1162, 1164 (W.D. Tenn. 2009), available at [https://scholar.google.com/scholar\\_case?case=16763204542528881668&q=United+States.+v.+Miller,+604+F.+Supp.+1162&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=16763204542528881668&q=United+States.+v.+Miller,+604+F.+Supp.+1162&hl=en&as_sdt=6,33) (possession by one convicted of possession of firearm after committing crime of violence); *State v. Craig*, 826 N.W.2d 789 (Minn. Feb. 27, 2013); *Wisconsin v. Pocian*, 2012 Wisc. App. LEXIS 298 (Wis. Ct. App. Apr.

upheld laws prohibiting drug users from possessing firearms.<sup>96</sup> And the courts have generally upheld bans on guns in “sensitive” places such as universities, airports, and parks.<sup>97</sup>

Courts have upheld gun laws under the presumptively lawful categorical analysis even where the facts of the case did not fit squarely within one of the presumptively safe harbors identified in *Heller* —the courts nonetheless reasoned that the circumstances were “analogous” to the regulations covered by the *Heller*

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11, 2012) (possession by felon); *People v. Spencer*, 2012 Ill. App. LEXIS 82 (Ill. App. Ct. Feb. 6, 2012); *Pohlabel v. Nevada*, 2012 Nev. LEXIS 2 (Nev. Jan. 26, 2012) (possession by felon); *People v. Polk*, 2011 Ill. App. Unpub. LEXIS 2278 (Ill. App. Ct. Sept. 23, 2011) (possession of stolen firearm).

<sup>96</sup> See, e.g., *United States v. Hendrix*, No. 09-cr-56-bbc, 2010 U.S. Dist. LEXIS 33756, at \*1 (W.D. Wis. Apr. 6, 2010) (drug users); *United State v. Emond*, 2012 U.S. Dist. LEXIS 149295 (D. Me. Oct. 17, 2012) (false statement to a federally licensed firearms dealer in connection with the purchase of a Ruger 9 mm semi-automatic pistol); *United States v. Carter*, 2012 U.S. App. LEXIS 1243 (4th Cir. Jan. 23, 2012) (possessing a firearm while being an unlawful user of marijuana); *United States v. Bumm*, 2009 U.S. Dist. LEXIS 34264 (S.D. W. Va. Apr. 17, 2009) (possessing firearms while being an unlawful user of and addicted to a controlled substance); *Piscitello v. Bragg*, 2009 U.S. Dist. LEXIS 21658 (W.D. Tex. Feb. 18, 2009) (knowingly possessing a firearm while unlawfully using a drug).

<sup>97</sup> *Digiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365 (Va. 2011) [https://scholar.google.com/scholar\\_case?case=14718391067166193804&q=Digiacinto+v.+Rector&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=14718391067166193804&q=Digiacinto+v.+Rector&hl=en&as_sdt=6,33) (noting that weapons were prohibited “only in those places where people congregate and are most vulnerable...Individuals may still carry or possess weapons on the open grounds of GMU, and in other places on campus not enumerated in the regulation.”); *Tribble v. State Bd. of Educ.*, No. 11-0069 (Dist. Ct. Idaho December 7, 2011) (upholding a University of Idaho policy prohibiting firearms in University-owned housing); *United States v. Davis*, 304 F. App’x 473, 474 (9th Cir. 2008) (airplanes); *Ohio v. Rush*, 2012 Ohio 5919 (Ohio Ct. App. 2012), available at [https://scholar.google.com/scholar\\_case?case=1638754907219219386&q=Ohio+v.+rush&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=1638754907219219386&q=Ohio+v.+rush&hl=en&as_sdt=6,33). See, e.g., *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011) [https://scholar.google.com/scholar\\_case?case=17013181822166656045&q=United+States+v.+Masciandaro&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=17013181822166656045&q=United+States+v.+Masciandaro&hl=en&as_sdt=6,33) (affirming defendant’s conviction for possession of a loaded weapon in a motor vehicle in a national park), *cert. denied*, 10-11212, 2011 WL 2516854 (2011); *United States v. Parker*, 2013 U.S. Dist. LEXIS 8660 (E.D. Cal. Jan. 22, 2013); *United States v. Lewis*, 50 V.I. 995 (D.V.I. 2008); *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306 (M.D. Ga. 2011), *aff’d*, 687 F.3d 1244 (11th Cir. 2012), available at [https://scholar.google.com/scholar\\_case?case=8688491150043905785&q=GeorgiaCarry+v.+Georgia&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=8688491150043905785&q=GeorgiaCarry+v.+Georgia&hl=en&as_sdt=6,33); *Doe v. Wilmington Hous. Auth.*, 2012 U.S. Dist. LEXIS 104976 (D. Del. July 27, 2012); *Nordyke v. King*, 2012 U.S. App. LEXIS 11076 (9th Cir. June 1, 2012) (en banc). But see *Bonidy v. United States Postal Serv.*, 2013 U.S. Dist. LEXIS 95435 (D. Colo. July 9, 2013) (striking down USPS regulation banning firearms from post office parking lot ) discussed, *infra*, p. 39.

safe harbors.<sup>98</sup> As a result, courts have upheld as “longstanding” and categorically “presumptively valid” the following regulations even though not mentioned in *Heller*:

Possession of firearms by individuals who have been convicted of domestic violence misdemeanors and other misdemeanor crimes of violence.<sup>99</sup>

Bans on the concealed carrying of firearms.<sup>100</sup>

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<sup>98</sup> Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 867 (2013), available at <http://www.yalelawjournal.org/article/text-history-and-tradition-what-the-seventh-amendment-can-teach-us-about-the-second>. See, e.g., *Marzzarella*, 614 F.3d at 93 (describing how statute prohibiting “possession by substance abusers” would be valid “because it presumably serves the same purpose as restrictions on possession by felons”). Regulations preventing possession by “dangerous” people have a good basis for being “presumptively lawful.” See, e.g., *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010) (noting “§ 922(g)(3) has the same historical pedigree as other portions of § 922(g)”; *United States v. Cheeseman*, 600 F.3d 270, 279-80 (3d Cir. 2010), available at [https://scholar.google.com/scholar\\_case?case=16426514951848699260&q=United+States+v.+Cheeseman,+600+F.3d+270&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=16426514951848699260&q=United+States+v.+Cheeseman,+600+F.3d+270&hl=en&as_sdt=6,33) (stating intent behind section 922(g)(3) was “to keep firearms out of the possession of drug abusers, a dangerous class of individuals”).

<sup>99</sup> See, e.g., *United States v. Armstrong*, 706 F.3d 1 (1st Cir. 2013), available at [https://scholar.google.com/scholar\\_case?case=7765561831994951319&q=United+States+v.+Armstrong,+706+F.3d+1&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=7765561831994951319&q=United+States+v.+Armstrong,+706+F.3d+1&hl=en&as_sdt=6,33) (upholding federal statute, 28 U.S.C. § 922(g)(9) which imposes lifetime ban on gun possession for defendants convicted of domestic violence misdemeanors); *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011) (same) [https://scholar.google.com/scholar\\_case?case=4605391521937754596&q=United+States+v.+Booker+644+F.3d+12&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=4605391521937754596&q=United+States+v.+Booker+644+F.3d+12&hl=en&as_sdt=6,33); *United States v. White*, 593 F.3d 1199, 1205 (11th Cir. 2010) (same).

<sup>100</sup> “There can be little doubt that bans on the concealed carrying of firearms are longstanding.” *Peterson v. Martinez*, 707 F.3d 1197, 1210 (10th Cir. 2013), available at [https://scholar.google.com/scholar\\_case?case=5014435033222209909&q=Peterson+v.+Martinez&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=5014435033222209909&q=Peterson+v.+Martinez&hl=en&as_sdt=6,33); *Drake v. Filko*, 2013 U.S. App. LEXIS 15635 (3d Cir. July 31, 2013), available at [https://scholar.google.com/scholar\\_case?case=15778041435731592301&q=Drake+v.+Filko&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=15778041435731592301&q=Drake+v.+Filko&hl=en&as_sdt=6,33); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013), available at [https://scholar.google.com/scholar\\_case?case=15240532380408939329&q=Woolard+v.+Gallagher&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=15240532380408939329&q=Woolard+v.+Gallagher&hl=en&as_sdt=6,33) (upholding Maryland permitting scheme for both concealed and openly-carried pistols). The Second Circuit in *Kachalsky v. County of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012), available at [https://scholar.google.com/scholar\\_case?case=6595725860193302445&q=Kachalsky+v.+Westchester&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=6595725860193302445&q=Kachalsky+v.+Westchester&hl=en&as_sdt=6,33) rejected the categorical approach in addressing a Second Amendment challenge to New York’s public carry laws. Instead, the Second Circuit engaged in a two-step analysis that looked at the nature and extent of the law’s imposition on the individual right to bear arms. *Id.* at 93-99. The *Kachalsky* court employed an

Gun shows on public property<sup>101</sup>

Possession of firearms by anyone “employed for” a convicted felon (such as a bodyguard)<sup>102</sup>

The decision in *Piszczatoski v. Filko*,<sup>103</sup> is instructive. There, the federal district court rejected a Second Amendment challenge to New Jersey’s Handgun Permit Law which requires residents of that state to apply for a permit to carry a concealed firearm in public. The court concluded that the handgun permit law was “presumptively lawful” and stated: “To the extent that New Jersey’s Handgun Permit Law may implicate some narrow right to carry a firearm outside the home, the challenged provisions would not necessarily burden any protected conduct.”<sup>104</sup> The court classified the law as a “longstanding’ licensing provision of the kind that *Heller* identified as ‘presumptively lawful.’”<sup>105</sup> These “longstanding regulations” are “exceptions... so that the regulated conduct falls outside the scope of the Second Amendment.”<sup>106</sup>

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intermediate level of scrutiny and upheld the law as a reasonable exercise of police power (*id.* at 100-101)—*see infra*, § 2.1.2, at 31-33. The Ninth Circuit in *Peruta v. San Diego County*, 742 F.3d 1144, 1178-1179 (9th Cir. 2014), *available at* [https://scholar.google.com/scholar\\_case?case=16699306652731612622&q=Peruta+v.+San+Diego+County&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=16699306652731612622&q=Peruta+v.+San+Diego+County&hl=en&as_sdt=6,33) struck down “San Diego County’s ‘good cause’ permitting requirement” for concealed carry of handguns, finding that it “impermissibly infringes on the Second Amendment right to bear arms in lawful self-defense.” *Peruta* is discussed, *infra*, § 2.2.1, at 35-37) as is the Seventh Circuit’s decision in *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012), *available at* [https://scholar.google.com/scholar\\_case?case=10665754353092136977&q=Moore+v.+Madigan&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=10665754353092136977&q=Moore+v.+Madigan&hl=en&as_sdt=6,33) which invalidated Illinois’ regulatory regime for both open and concealed pistol carry.

<sup>101</sup> *Nordyke v. King*, 2012 U.S. App. LEXIS 11076 (9th Cir. June 1, 2012) (en banc).

<sup>102</sup> *United States v. Weaver*, 2012 U.S. Dist. LEXIS 29613 (S.D. W. Va. Mar. 7, 2012); *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 829 (D.N.J. 2012), *available at* [https://scholar.google.com/scholar\\_case?case=15175365064651571942&q=Piszczatoski+v.+Filko&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=15175365064651571942&q=Piszczatoski+v.+Filko&hl=en&as_sdt=6,33).

<sup>103</sup> *Piszczatoski v. Filko*, 840 F.Supp. 2d at 829.

<sup>104</sup> *Id.* (quoting *Heller*, 554 U.S. at 626-27 n.26).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* (citing *Barton*, 633 F.3d at 172); *United States v. Booker*, 570 F. Supp. 2d 161, 163 (D. Me. 2008), *available at* [https://scholar.google.com/scholar\\_case?case=17206705258237332088&q=United+States+v.+Booker+570+F.Supp+2d+161&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=17206705258237332088&q=United+States+v.+Booker+570+F.Supp+2d+161&hl=en&as_sdt=6,33) (finding a statute barring gun possession by persons convicted of misdemeanor crimes of domestic violence to be

Perhaps the most dramatic application of the “presumptively lawful” categories in *Heller* was undertaken by the D.C. Circuit on remand in that case. The D.C. Circuit held that the D.C. ordinance requiring the registration of firearms was presumptively legal because such regulation was “longstanding” as were the categories in the Supreme Court’s *Heller* decision.<sup>107</sup> Notably, “longstanding” was defined as regulations that have been around for about a century:

[B]asic 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.<sup>108</sup>

In later proceedings in *Heller*, on remand to the district court, the court upheld D.C.’s firearms registration program, which requires residents to register all firearms with local authorities, requires mandatory firearms safety training for registered gun owners and imposes a limit of one pistol registration per month.<sup>109</sup> After applying an intermediate level of scrutiny and considering expert and statistical evidence, the district court found that these laws were sufficiently related to the District’s goals of ensuring public safety and protecting District police.<sup>110</sup>

Given the broad construction of *Heller*’s presumptively lawful categories of gun regulations in the lower courts, the Supreme Court appears to have equipped

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sufficiently similar to prohibitions on possession of guns by felons and the mentally ill to be included in list of “longstanding prohibitions” surviving Second Amendment scrutiny under *Heller*).

<sup>107</sup> See, e.g., *Justice v. Town of Cicero*, 577 F.3d 768, 774 (7th Cir. 2009), available at [https://scholar.google.com/scholar\\_case?case=6333408936252642593&q=Justice+v.+town+of+cicero&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=6333408936252642593&q=Justice+v.+town+of+cicero&hl=en&as_sdt=6,33) (upholding municipal ordinance requiring registration of all firearms), *cert. denied*, 130 S. Ct. 3410 (2010).

<sup>108</sup> *Heller v. Dist of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011), available at [https://scholar.google.com/scholar\\_case?case=8354949939576611637&q=Heller+v.+District+of+Columbia&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=8354949939576611637&q=Heller+v.+District+of+Columbia&hl=en&as_sdt=6,33). See also *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) (upholding ban on concealed carrying of weapons because such bans were “long standing” with origins in the early 20th Century).

<sup>109</sup> *Heller v. District of Columbia*, 2014 U.S. Dist. LEXIS 66569, (D.D.C. May 15, 2014).

<sup>110</sup> *Id.*

state and federal courts with a framework for upholding a wide range of firearms regulations.<sup>111</sup>

### 2.1.2 A Further Word About Public Carry Laws

A number of commentators have argued—and some courts have agreed—that the Second Amendment right does not extend outside the home.<sup>112</sup> But *Heller* itself defined the right to bear arms to include *carrying* for the purposes of confrontation and defense, and the majority opinion strongly suggests that the five

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<sup>111</sup> Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1250 (2009).

<sup>112</sup> See, e.g., Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 231–33 (2008); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1297–1355 (2009), available at <http://columbialawreview.org/wp-content/uploads/2014/04/109-6-Miller.pdf>. See *Shepard v. Madigan*, 863 F. Supp. 2d 774, 785 (S.D. Ill. 2012), available at [https://scholar.google.com/scholar\\_case?case=8380006463164739826&q=Shepard+v.+Madigan&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=8380006463164739826&q=Shepard+v.+Madigan&hl=en&as_sdt=6,33) (“[T]he bearing of a firearm outside the home is not a core right protected by the Second Amendment.”); *Moore v. Madigan*, 842 F. Supp. 2d 1092, 1101 (C.D. Ill. 2012), available at [https://scholar.google.com/scholar\\_case?case=13272582017642073213&q=Moore+v.+Madigan&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=13272582017642073213&q=Moore+v.+Madigan&hl=en&as_sdt=6,33) (holding that *Heller* and *McDonald* do not “recognize[] a Second Amendment right to bear arms outside of the home”), *rev’d*, 702 F.3d 933 (7th Cir.), (striking down Illinois public carry law and explaining “*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one’s home”), *en banc review den.*, 2013 U.S. App. LEXIS 3691 (7th Cir. Feb. 22, 2013) (Hamilton, J. dissenting from denial of rehearing en banc) (“The Supreme Court has not yet decided whether the post-*Heller* individual right to keep and bear arms at home under the Second Amendment extends beyond the home. The panel’s split decision in these cases goes farther than the Supreme Court has gone ... [E]xtending the right to bear arms outside the home and into the public sphere presents issues very different from those involved in the home itself, which is all that the Supreme Court decided in *Heller* and *McDonald*.”); *Piszczatoski, v. Filko*, 840 F.Supp. 2d 813, 829 (D.N.J.2012) (“Given the considerable uncertainty regarding if and when the Second Amendment rights should apply outside the home, this Court does not intend to place a burden on the government to endlessly litigate and justify every individual limitation on the right to carry a gun in any location for any purpose.”); *Williams v. State*, 417 Md. 479, 10 A.3d 1167, 1169, 1177 (2011), available at [https://scholar.google.com/scholar\\_case?case=8255778103863791267&q=Williams+v.+State+417+Md.+479&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=8255778103863791267&q=Williams+v.+State+417+Md.+479&hl=en&as_sdt=6,33) (holding that a statute prohibiting carrying a handgun outside the home without a permit “is outside of the scope of the Second Amendment” and noting that “[i]f the Supreme Court ... meant its holding to extend beyond home possession, it will need to say so more plainly”), *cert. denied*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 93, 181 L. Ed. 2d 22 (2011); *Commonwealth v. Perez*, 80 Mass. App. Ct. 271, 952 N.E.2d 441, 451 (2011) [https://scholar.google.com/scholar\\_case?case=3669339068778538466&q=Commonwealth+v.+Perez+80+Mass+App.+Ct+271&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=3669339068778538466&q=Commonwealth+v.+Perez+80+Mass+App.+Ct+271&hl=en&as_sdt=6,33) (“The Second Amendment does not protect the defendant in this case because he was in possession of the firearm outside his home.”).

justices signing the majority opinion believe the right extends outside the home in some sense, although its contours are unclear.<sup>113</sup> Several courts have explicitly held that Second Amendment protections apply outside the home although not necessarily with the same force.<sup>114</sup> Assuming the Second Amendment is portable to some extent, courts have to balance, on one hand, the individual's constitutional right to carry those arms, and on the other hand, the state's core public safety power to maintain order and keep citizens safe.

To date, five out of seven courts of appeal that have reviewed challenges to restrictions on concealed or open carry have upheld the laws in their entirety, finding public safety interests outweighed any individual right to carry arms outside the home. The decisions come from the First,<sup>115</sup> Second,<sup>116</sup> Third,<sup>117</sup> Fourth,<sup>118</sup> and Tenth Circuits.<sup>119</sup> Unless the Supreme Court wades into the field again to clarify the scope the Second Amendment protections outside the home, it appears

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<sup>113</sup> See Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV., Sidebar 97 (2009). [http://columbialawreview.org/wp-content/uploads/2009/10/97\\_Volokh.pdf](http://columbialawreview.org/wp-content/uploads/2009/10/97_Volokh.pdf).

<sup>114</sup> See *Peruta*, 742 F.3d at 1150-1155, 1166-67; *Moore v. Madigan*, 702 F.3d at 933 (striking down Illinois public carry law and explaining “*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one’s home”) discussed *infra* 2.2.1 at 38-41; see *Kachalsky*, 701 F.3d at 93 (upholding New York public carry law and explaining Second Amendment applies outside home but with less force and subject to greater regulation than in-home possession) discussed, *supra*, note 93. Other courts have rejected Second Amendment challenges to public carry laws without deciding whether the Second Amendment extends outside the home. See *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) (upholding ban on concealed carrying but “we decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home”); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013).

<sup>115</sup> *Hightower v. City of Boston*, 693 F.3d 61 (1st Cir. 2012), available at [https://scholar.google.com/scholar\\_case?case=3164449874554654562&q=Hightower+v.+City+of+Boston&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=3164449874554654562&q=Hightower+v.+City+of+Boston&hl=en&as_sdt=6,33) (“laws prohibiting the carrying of concealed weapons’ are an ‘example[] of ‘longstanding’ restrictions that [are] ‘presumptively lawful’ under the Second Amendment.”) (citing *Dorr v. Weber*, 741 F. Supp. 2d 993, 1005 (N.D. Ia. 2010)) (“[A] right to carry a concealed weapon under the Second Amendment has not been recognized to date”).

<sup>116</sup> *Kachalsky*, 701 F.3d at 93.

<sup>117</sup> *Drake*, 724 F.3d at 431 (upholding ban on concealed carrying of weapons because such bans were “long standing” with origins in the early 20th Century).

<sup>118</sup> *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (assuming without deciding that *Heller* right exists outside the home).

<sup>119</sup> *Peterson v. Martinez*, 707 F.3d 1197, 1220 (10th Cir. 2013).



that even substantially restrictive state licensing laws will survive Second Amendment challenges. Complete bans on public carry will not, however, as made clear by the Seventh Circuit’s decision striking down the Illinois ban on public carry. *See, infra* 2.2.1, at 35.

### 2.1.3 Regulation of Certain Dangerous Firearms

As noted above, laws banning “dangerous and unusual” weapons that were not “in common use” at the time of the Second Amendment’s adoption in 1791 may fall outside the purview of the Second Amendment.<sup>120</sup> The *Heller* court made clear that such restrictions against unusually dangerous firearms are not limited to weapons extant in 1791. Rather, the Second Amendment exception for dangerous and unusual weapons applies to today’s weaponry, measured against firearms that are in common use today. Such “dangerous and unusual” weapons thus would be subject to complete bans. The lower courts, applying this specific aspect of *Heller*, have upheld extensive weapons regulations for short barreled weapons, assault weapons, and large capacity ammunition weapons, finding the right to possess these weapons was not protected by the Second Amendment.<sup>121</sup>

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<sup>120</sup> *Heller*, 554 U.S. at 627.

<sup>121</sup> *See United States v. Henry*, 2012 U.S. App. LEXIS 16615 (9th Cir. Aug. 9, 2012) (upholding ban on machine guns); *United States v. Miller*, 307 U.S. 174, 178, 59 S. Ct. 816 (1939) [https://scholar.google.com/scholar\\_case?case=17128640835628801970&q=Miller+307+U.S.+174&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=17128640835628801970&q=Miller+307+U.S.+174&hl=en&as_sdt=6,33) (holding that short-barreled shotguns are unprotected); *see also United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008), *available at* [https://scholar.google.com/scholar\\_case?case=8119290370082214341&q=United+States+v.+Fincher,+538+F.+3d+868&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=8119290370082214341&q=United+States+v.+Fincher,+538+F.+3d+868&hl=en&as_sdt=6,33) (“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.”), *cert. denied*, 129 S. Ct. 1369 (2009); *Kolbe v. O’Malley*, 2014 U.S. Dist. LEXIS 110976 (D. Md. Aug. 12, 2014) (the court seriously doubts that the banned assault long guns are commonly possessed for lawful purposes, particularly self-defense in the home, which is at the core of the Second Amendment right, and is inclined to find the weapons fall outside Second Amendment protection as dangerous and unusual; court nonetheless assumes that assault weapons are protected by the Second Amendment but nonetheless finds the ban constitutional); *Wilson v. Cook County*, 943 N.E. 2d 768 (Ill. App. 2011), *available at* [https://scholar.google.com/scholar\\_case?case=7388913516106829080&q=Wilson+v+Cook+County&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=7388913516106829080&q=Wilson+v+Cook+County&hl=en&as_sdt=6,33) (upholding ban on possession of assault weapons); *Heller v. District of Columbia*, 698 F. Supp. 2d 179 (D.D.C. 2010), *available at* [https://scholar.google.com/scholar\\_case?case=13897978426558761599&q=Heller+v.+District+of+Columbia&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=13897978426558761599&q=Heller+v.+District+of+Columbia&hl=en&as_sdt=6,33), *aff’d in part and vacated in part*, 670 F.3d 1244 (D.C. Cir. 2011), (upholding semi-automatic rifle ban); *United States v. Upton*, 512 F.3d 394, 404 (7th Cir. 2008), *available at*

Again, doctrinally, the First Amendment provides an analytical underpinning for this analysis:

The categorical exclusion principle can also be used to exclude certain types of firearms from the amendment's definition of arms. Machine guns, grenade launchers, and more high-powered weapons seem to be obvious candidates for categorical exclusion, given their extreme nature. Excluding such arms from the Second Amendment right is justified by using the same reasoning the *Chaplinsky* Court used when excluding fighting words from the ambit of the First Amendment: the value provided by the fighting words/machine gun is so slight that it will always be outweighed by 'the social interest in order and morality.'<sup>122</sup>

In addition, a number of courts have found that assault weapons and large capacity ammunition magazines are protected by the Second Amendment but that the interest in public safety trumps such protection when an intermediate level of scrutiny is applied. *E.g.*, *Fyock v. City of Sunnyvale*, 2014 U.S. Dist. LEXIS 29722, \*30-31 (N.D. Cal. Mar. 5, 2014) ("Although Plaintiffs demonstrate that the Sunnyvale ordinance [ban on assault weapons and high capacity magazines] imposes some burden on Second Amendment rights, that burden is relatively light. The Sunnyvale law passes intermediate scrutiny, as the court—without making a determination as to the law's likely efficacy—credits Sunnyvale's voluminous evidence that the ordinance is substantially tailored to the compelling government

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[https://scholar.google.com/scholar\\_case?case=11710766434811283921&q=United+States+v.+Upton+512+F.3d+394&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=11710766434811283921&q=United+States+v.+Upton+512+F.3d+394&hl=en&as_sdt=6,33) (likening sawed-off shotguns to "other dangerous weapons like bazookas, mortars, pipe bombs, and machine guns"); *United States v. Tagg*, 572 F.3d 1320, 1326 (11th Cir. 2009), available at [https://scholar.google.com/scholar\\_case?case=17907633820331644961&q=United+States+v.+Tagg&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=17907633820331644961&q=United+States+v.+Tagg&hl=en&as_sdt=6,33) (finding no Second Amendment protection for pipe bombs because they could not be used for legitimate lawful purposes); *cf.* *Marzzarella*, 614 F.3d at 94-95 (rejecting categorical ban on unmarked firearms because unmarked firearms are no more damaging than marked firearms); *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo*, 990 F. Supp. 2d 349 (W.D.N.Y. 2013) (largely upholding New York SAFE Act including ban on assault weapons), discussed *infra* at p. 47 .

<sup>122</sup> Jason T. Anderson, Note *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in District of Columbia v. Heller*, 82 S. CAL. L. REV. 547, 578 (2009), available at [http://lawreview.usc.edu/wp-content/uploads/slideshow/Anderson\\_Jason\\_82\\_3.pdf](http://lawreview.usc.edu/wp-content/uploads/slideshow/Anderson_Jason_82_3.pdf).

interest of public safety.”) (denying motion for preliminary injunction against the ordinance).<sup>123</sup>

## 2.2 Decisions Striking Down Gun Laws Based on Second Amendment Violations

### 2.2.1 Public Carry Laws

The Seventh Circuit in 2012 struck down the Illinois state ban on public carry, noted above. In *Moore v. Madigan*<sup>124</sup> the circuit court addressed an Illinois statute that was written so broadly that it would render unlawful the following (hypothetical) conduct: a Northwestern law school professor and avid gun collector residing in Evanston, Illinois could keep her firearms in the house, but could be prosecuted for bringing those guns into her backyard. The Seventh Circuit concluded the state law amounted to a “flat ban on carrying ready-to-use guns

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<sup>123</sup> See also *Friedman v. City of Highland Park*, 2014 U.S. Dist. LEXIS 131363, (N.D. Ill. Sept. 18, 2014), available at [https://scholar.google.com/scholar\\_case?case=4127533917179890291&q=Friedman+v.+City+of+Highland+Park&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=4127533917179890291&q=Friedman+v.+City+of+Highland+Park&hl=en&as_sdt=6,33) (upholding a local ordinance that prohibits military-style assault weapons and large capacity ammunition magazines; opining that “features of the prohibited firearms . . . derive from military weapons with the decidedly offensive purpose of quickly acquiring multiple targets and firing at those targets without a frequent need to reload. Highland Park maintains a strong interest in protecting the public against this potential use.”); *Colo. Outfitters Ass’n v. Hickenlooper*, 2014 U.S. Dist. LEXIS 87021 (D. Colo. June 26, 2014), available at [https://scholar.google.com/scholar\\_case?case=8237395262163143157&q=Colorado+Outfitters+Association+v.+Hickenlooper&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=8237395262163143157&q=Colorado+Outfitters+Association+v.+Hickenlooper&hl=en&as_sdt=6,33) (upholding Colorado’s ban on large capacity magazines and finding intermediate scrutiny applied to a ban on LCMs with more than fifteen rounds because, although touching the core right to bear arms for defense of self and home, it did not severely limit a person’s ability to keep arms for that purpose); *Kolbe v. O’Malley*, 2014 U.S. Dist. LEXIS 110976 (D. Md. Aug. 12, 2014) (even assuming that assault weapons are protected by the Second Amendment, court upholds Maryland’s ban on assault pistols, assault long guns, copycat assault weapons and large capacity ammunition magazines); *Shew v. Malloy*, 994 F. Supp. 2d 234 (D. Conn. 2014) (applying an intermediate level of scrutiny and upholding Connecticut law prohibiting, *inter alia*, the ownership of numerous semiautomatic firearms and large magazines, subject to certain exceptions); *S.F. Veteran Police Officers Ass’n v. City & County of San Francisco*, 2014 U.S. Dist. LEXIS 21370 (N.D. Cal. Feb. 19, 2014) (denying motion for preliminary injunction against a ban on large capacity magazines, applying intermediate scrutiny because the ban “merely burdens” but does not “destroy” the right to self-defense).

<sup>124</sup> 702 F.3d 933 (7th Cir. 2012).

outside the home” and had little trouble declaring the law unconstitutional under *Heller / McDonald*.<sup>125</sup> The Illinois Supreme Court followed suit shortly thereafter.<sup>126</sup>

The Ninth Circuit, in a sharply divided 2-1 opinion, broke ranks with the Second Amendment analysis adopted by the First, Second, Third, Fourth and Tenth Circuits and struck down a concealed carry permit system that required applicants to show “good cause” to obtain a permit.<sup>127</sup> In its decision, the panel majority recognized a broad right to carry a loaded firearm in public that trumped the state’s interest in public safety. The district court in contrast had concluded that the concealed carry permit system survived under intermediate scrutiny in light of the state’s substantial interest in protecting the public, with substantial circuit authority (albeit not Ninth Circuit) supporting that conclusion.

The law struck down by the Ninth Circuit consisted of a San Diego County regulation that required each applicant to demonstrate “circumstances that distinguish [him] from the mainstream in terms of having a pressing need for self-protection.” In this respect, California’s concealed carry permit system is similar to New York’s public carry law, upheld in *Kachalsky*. The Ninth Circuit rejected the reasoning of the Second Circuit in *Kachalsky*, which found that New York had a strong interest in public safety that warranted curtailing the right to carry a concealed loaded firearm in public, and deferring to the legislature’s judgment in making those sensitive judgments. The Ninth Circuit panel majority concluded that the Second Amendment broadly protects the right of “responsible, law abiding citizens” to carry concealed loaded firearms in public for self-defense, and further

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<sup>125</sup> *Id.* at 940. The Seventh Circuit gave the state 180 days to pass a law that allowed concealed carry by permit. *Id.* at 942.

<sup>126</sup> *People v. Aguilar*, 2013 IL 112116 (September 12, 2013), available at [https://scholar.google.com/scholar\\_case?case=9728444217236173130&q=People+v.+Aguilar+2013+IL+112116&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=9728444217236173130&q=People+v.+Aguilar+2013+IL+112116&hl=en&as_sdt=6,33). In addition, the United States District Court for the District of Columbia also ruled that an outright ban on public carry violated *Heller* and *McDonald*. See *Palmer v. District of Columbia*, 2014 U.S. Dist. LEXIS 101945, \*25 (D.D.C. July 24, 2014), available at [https://scholar.google.com/scholar\\_case?case=10770991382526452056&q=Palmer+v.+District+of+Columbia&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=10770991382526452056&q=Palmer+v.+District+of+Columbia&hl=en&as_sdt=6,33).

<sup>127</sup> *Peruta v. San Diego County*, 742 F.3d 1144 (9th Cir. 2014). California prohibits open carry of loaded firearms in public and requires (with few exceptions) all applicants to demonstrate “good moral character” and “good cause.”

concluded that San Diego's concealed carry permit system effectively eliminated the right to carry and thus violated the Second Amendment.

In reaching its conclusion, the Ninth Circuit acknowledged that *Heller* and *McDonald* did not directly address the right to bear arms outside the home, and accordingly undertook a lengthy historical survey regarding public carry laws in England and the United States. That historical summary oddly omits discussion of gun regulations in the colonial era and the confederal period (before the Constitution was ratified in 1789) when the states were loosely organized under the Articles of Confederation, discussed in Section 2, *infra*. That early history confirms that the drafters and adopters of the Second Amendment understood the preexisting right to keep and bear arms was subject to significant restrictions by the states. The Ninth Circuit majority opinion also does not mention the widespread practice in 19th century America to require guns to be checked with the Sheriff and not brought into town. The panel majority also dismisses certain 19th century judicial opinions affirming public carry restrictions, concluding that those courts incorrectly relied on a collective rights view of the Second Amendment that was repudiated in *Heller*. But that reading wrongly discounts the long-standing restrictions on public carry pre-dating the Constitution, and dismisses the contemporaneous judicial approval of those law because the courts did not anticipate the holding in *Heller* more than a hundred years later. But as the Supreme Court noted in *Heller*, the right to keep and bear arms always has been subjected to balancing against other rights, and public safety laws have long restricted public carry of loaded firearms.

The Ninth Circuit, in departing from the analysis in *Kachalsky* and other circuit court decisions upholding restrictions on public carry of loaded concealed firearms, stakes out new ground both in terms of articulating a robust Second Amendment right outside the home and giving less weight to public safety justifications that have been cited in support of long-standing restrictions on concealed carry permits. The Ninth Circuit's decision represents an outlier among the federal circuit courts but could presage the Supreme Court's position on public carry. It does not appear that the Ninth Circuit will rehear the case as a full court (sitting en banc) because the appellant, San Diego County Sheriff, chose not to seek en banc review and the Ninth Circuit denied the State of California's motion to

intervene to pursue full court review.<sup>128</sup> This appears to bring an end to any further review of the panel's decision in *Peruta*, although the State of California has petitioned the full court to review the panel's decision to deny the State intervener status. Moreover, two other Ninth Circuit panels, citing *Peruta*, have upheld Second Amendment challenges<sup>129</sup> and en banc review is expected in one or both of those cases.

A federal district court in North Carolina held that a state law prohibiting the public carrying of firearms during states of emergency violated the Second Amendment.<sup>130</sup> The North Carolina statute at issue, enacted in 1969 as part of the Riot Control Act of 1969, makes it a misdemeanor “for any person to transport or possess off his own premises any dangerous weapon or substances in any area” in which a state of emergency has been declared.<sup>131</sup> The court concluded that the Second Amendment extends outside the home to include use and possession for self-defense and hunting; that the subject law burdens the rights of law abiding citizens to engage in such protected activity; and warranted strict scrutiny.<sup>132</sup> The court struck down the statute finding it “strip peaceable, law abiding citizens of the right to arm themselves in defense of hearth and home, striking at the very core of the Second Amendment.”<sup>133</sup> The court concluded that the law effectively bans citizens

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<sup>128</sup> Numerous organizations had appeared as amici intervenors including the California Police Chiefs' Association, Brady Center to Prevent Gun Violence and the Law Center to Prevent Gun Violence. The Ninth Circuit created a special website to help the public and media follow the case: [http://www.ca9.uscourts.gov/content/view.php?pk\\_id=0000000722](http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000722). The abandonment of the case by the named defendant appears to have eliminated any further review of the case in the Ninth Circuit.

<sup>129</sup> *Baker v. Kealoha*, No. 12-16258 (9th Cir. March 20, 2014), available at [https://scholar.google.com/scholar\\_case?case=9445239344182678068&q=Baker+v.+Kealoha&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=9445239344182678068&q=Baker+v.+Kealoha&hl=en&as_sdt=6,33) (declaring unconstitutional Honolulu's public carry licensing regulation); *Richards v. Prieto*, No. 11-16255 (9th Cir. March 5, 2014), available at [https://scholar.google.com/scholar\\_case?case=1458393094936642934&q=Richards+v.+Prieto&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=1458393094936642934&q=Richards+v.+Prieto&hl=en&as_sdt=6,33) (invalidating Yolo County (California)'s public carry regulations).

<sup>130</sup> *Bateman v. Perdue*, 881 F. Supp. 2d 709 (E.D.N.C. 2012), available at [https://scholar.google.com/scholar\\_case?case=2764132196800259141&q=Bateman+v.+Perdue&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=2764132196800259141&q=Bateman+v.+Perdue&hl=en&as_sdt=6,33).

<sup>131</sup> *Id.* at 711.

<sup>132</sup> *Id.* at 714.

<sup>133</sup> *Id.* at 715-716.

from “engaging in conduct that is at the very core of the Second Amendment at a time when the need for self-defense may be at its greatest.”<sup>134</sup>

### 2.2.2 Chicago City Ban on Shooting Ranges

The Seventh Circuit in *Ezell v. City of Chicago*,<sup>135</sup> declared unconstitutional a Chicago city ordinance that banned shooting ranges within the city’s borders. The court found the ordinance infringed the rights of lawful gun owners because the city simultaneously required gun owners to document training with firearms before registering a firearm for lawful possession in the home.<sup>136</sup>

Upon remand, in *Ezell v. City of Chicago*, 2014 U.S. Dist. LEXIS 136954 (N.D. Ill. Sept. 29, 2014), the court considered three types of restrictions on shooting ranges: 1) zoning restrictions; (2) construction requirements; and (3) business operations. The court declined to apply a uniform level of scrutiny to these restrictions, opining that the restrictions inflicted different levels of burden. *Id.* at \*21. The court invalidated some of the zoning restrictions, while upholding others. “Because the City failed to present sufficient evidence that firing ranges are uniquely suited to manufacturing districts, the current incantation [sic] of the zoning ordinance is not supported by the record and section 17-5-207 is unconstitutional.” *Id.* at \*26. However, the court found that “the City’s regulation requiring ranges to be located at least 500 feet away from residential zoning districts, schools, day-care facilities, places of worship, premises licensed for the retail sale of liquor, children’s activities facilities, libraries, museums, or hospitals is constitutional.” *Id.* at \*28. At the same time, it upheld all of the challenged restrictions on construction, stating that such restrictions “merely regulate” the construction of firing ranges, and subsequently, create only a minor encumbrance on individual Second Amendment rights to maintain proficiency in the use of firearms.” *Id.* at \*30. Finally the court found that the business operation restrictions

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<sup>134</sup> *Id.* at 716.

<sup>135</sup> *Ezell*, 651 F.3d 684 at 690 (7<sup>th</sup> Cir. 2011), available at [https://scholar.google.com/scholar\\_case?case=17044109654189761463&q=Ezell+v.+City+of+Chicago&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=17044109654189761463&q=Ezell+v.+City+of+Chicago&hl=en&as_sdt=6,33); *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110 (N.D. Ill. 2012), available at [https://scholar.google.com/scholar\\_case?case=16894315923770621169&q=Gowder+v.+City+of+Chicago&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=16894315923770621169&q=Gowder+v.+City+of+Chicago&hl=en&as_sdt=6,33).

<sup>136</sup> *Id.* at 1122.

“do not involve the “central self-defense components of the right” (*id.* at \*38) and upheld age restrictions and the requirement that a range master be present at all times, while invalidating restrictions on hours of operation.

### 2.2.3 Chicago City Ban on Sales of Firearms

A federal district court in Chicago (Northern District of Illinois) struck down a highly restrictive Chicago city ordinance that banned virtually all sales and transfers of firearms within the city’s limits, including sales by federally licensed firearms dealers.<sup>137</sup> The court concluded that the stated public interest in reducing gun violence within the city did not justify this “serious burden” on the fundamental right under the Second Amendment to keep and bear arms for self-defense.<sup>138</sup> The district court found that “[t]his right must also include the right to acquire a firearm.”<sup>139</sup> At the same time, the court acknowledged that, “the acquisition right is far from absolute: there are many long-standing restrictions on who may acquire firearms (for examples, felons and the mentally ill have long been banned) and there are many restrictions on the sales of arms (for example, licensing requirements for commercial sales).”<sup>140</sup> In evaluating the constitutionality of the city ordinances in question, the district court applied the teachings of the Seventh Circuit in *Moore* and *Ezel* and applied a form of intermediate scrutiny, articulating a sliding scale.<sup>141</sup>

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<sup>137</sup> *Illinois Ass’n of Firearms Retailers v. City of Chicago*, No. 10 C 04184 (N.D. Ill. Jan. 6, 2014) available PACER Case: 1:10-cv-04184 Document #: 238; also available as a download PDF at <http://ia700501.us.archive.org/19/items/gov.uscourts.ilnd.245065/gov.uscourts.ilnd.245065.238.0.pdf>. Memorandum Opinion and Order Dkt #238 at 1, 3, 8.

<sup>138</sup> *Id.* at 1-2, 20, 16-34.

<sup>139</sup> *Id.* at 2, 20, 34.

<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.* at 6-13. The court laid out the “Second Amendment Analytical Framework” as follows:

For each challenged Municipal Code ordinance, the City bears the burden of first establishing that the ordinance regulates activity generally understood in 1791 to be *unprotected* by the Second Amendment. If the City does not carry that burden, then it must proffer sufficient evidence to justify the ordinance’s burden on Second Amendment rights. And in this means-end analysis, the quantity and persuasiveness of the evidence required to justify each ordinance varies depending on how much it affects the core Second Amendment right to armed self-defense and on whose right it affects. The more people it affects or the heavier the burden on the core right, the



### 2.2.4 Chicago Ordinance Restricting Gun Licenses to People Convicted of Non-Violent Misdemeanor Offenses

Another judge in the Northern District of Illinois struck down a Chicago ordinance that barred not only felons and violent misdemeanants from obtaining a license to possess a handgun in the home, but also barred people convicted of non-violent misdemeanor offenses.<sup>142</sup> The plaintiff had been convicted of possessing a firearm in public, which was originally deemed a felony but reduced to a misdemeanor. He was denied a Chicago city permit to possess a firearm in the home.<sup>143</sup> He challenged the denial of the permit claiming the ordinance was unconstitutionally vague and violated his Second Amendment right to keep a firearm in the home for self-protection. The district court struck down the Chicago ordinance on both grounds.<sup>144</sup> With respect to the Second Amendment challenge, the court noted a “significant lack of evidence indicating a non-violent misdemeanant, like [plaintiff], poses a risk to society analogous to that of a felon or a violent misdemeanant.”<sup>145</sup> The court found the ordinance “directly restricts the core Second Amendment right of armed self-defense in one’s home” and applied strict scrutiny to invalidate the city ordinance, but observed it would not survive review under intermediate scrutiny either.<sup>146</sup>

### 2.2.5 Sensitive Places

Defining *Heller*’s “sensitive places” is not free of doubt as reflected in one district court decision from Colorado addressing a United States Postal Service regulation prohibiting firearms inside all U.S. post offices as well as post office

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stricter the scrutiny. If the City also fails at this second stage, the ordinance is unconstitutional.

*Id.* at 13.

<sup>142</sup> *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110 (N.D. Ill. 2012).

<sup>143</sup> *Id.* at 1114.

<sup>144</sup> *Id.* at 1114-1116; 1125-1126. The court observed that, “[t]he effect of Section (b)(3)(iii) of the Chicago Firearm Ordinance is to forever strip certain persons residing in Chicago of their constitutional right to protect themselves in their own homes, including, for example, a person convicted forty years ago of simply possessing a firearm (and not unlawfully using it against another.)” *Id.* at 1122.

<sup>145</sup> *Id.* at 1125.

<sup>146</sup> *Id.* at 1124-1126.

parking lots.<sup>147</sup> The Second Amendment challenge was brought by a Coloradan who was licensed by the State of Colorado to carry a loaded firearm in public.<sup>148</sup> The district court judge concluded that under Supreme Court and Tenth Circuit law, the plaintiff was lawfully permitted to openly carry his firearm in public; however, concealed carry was banned.<sup>149</sup> The postal regulation prohibited the plaintiff (and every other lawful gun owner) from possessing a firearm in the parking lot. Gun owners could still be prosecuted if they left the firearm locked inside their car while conducting business at the post office.<sup>150</sup>

The particular postal facility was located in rural Colorado. The gun owner had no mail service at his house. He retrieved all of his mail at the post office, which was located several miles from his home.<sup>151</sup>

In support of the federal regulation banning firearms at all postal facilities, the postal service submitted an affidavit describing various security threats that warranted, in the judgment of the postal service, a universal prohibition on firearms both inside and outside the post offices. The government's stated concerns included violence directed at employees working at the facility as well as criminal activity directed at patrons leaving the post office with cash and valuables—who become targets of armed robberies.<sup>152</sup> The government offered examples of such incidents at postal facilities across the country. The postal service presented no evidence as to any security problems at the Colorado facility.<sup>153</sup>

The district court concluded that the areas inside the post office were sensitive areas that were lawfully subject to the firearm prohibition.<sup>154</sup> Specifically, the court found the building is “used for a government purpose by significant numbers of people, with no means of securing their safety; therefore it is a sensitive place, and the USPS Regulation is presumed to be valid as applied to the

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<sup>147</sup> *Bonidy v. United States Postal Serv.*, 2013 U.S. Dist. LEXIS 95435 (D. Colo. July 9, 2013)

<sup>148</sup> *Id.* at \*3-5.

<sup>149</sup> *Id.* at \*7.

<sup>150</sup> *Id.* at \*4, 17-18.

<sup>151</sup> *Id.* at \*4.

<sup>152</sup> *Id.* at \*12-15.

<sup>153</sup> *Id.* at \*11-16.

<sup>154</sup> *Id.* at \*8.

building.”<sup>155</sup> The court held that the gun owner “failed to rebut that presumption of validity.”<sup>156</sup> The analysis differed for the parking lot. The court found that the parking lot was for public use and “that constitutional freedoms do not end at the government property line”—rejecting the position of the postal service that its mere ownership of the property provided a lawful basis to bar firearms from it.<sup>157</sup> The court concluded that the burden was on the federal government to show why the firearm prohibition should extend to this public, non-sensitive space.<sup>158</sup> As noted above, the government’s evidentiary submission detailed the risk criminals preying on patrons leaving the post office with valuables. If anything, that evidence supported the need for gun owners to have access to their lawfully possessed firearms in order to exercise their right to self-defense. The postal service principally relied on the argument that it would be administratively burdensome for the postal service to make case-by-case judgments about individual post office facilities — what areas were sensitive and which were not - to more narrowly tailor its prohibition on firearms.<sup>159</sup>

The court was not sympathetic to the government’s “administrative burden” argument and held that the government had failed to meet its legal burden to justify the broad prohibition of firearms in the public parking lot.<sup>160</sup> It is not clear how this case will be treated on appeal, but if sustained, the case may usher in a new era of nuanced line-drawing for determining whether firearms may be banned from particular public areas.

In *Morris v. United States Army Corps of Eng’rs*,<sup>161</sup> the United States District Court for the District of Idaho invalidated a regulation banning the use of handguns on property owned by the Army Corps of Engineers. The Court ruled that “banning

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at \*8-11 (“There is more to a sensitive place analysis than mere government ownership.”) The court noted that postal workers used a separate employee parking lot behind the building. *Id.* at \*3. Presumably that made the area behind the post office a sensitive area that was properly subject to the firearms prohibition.

<sup>158</sup> *Id.* at \*11-12.

<sup>159</sup> *Id.* at \*15-16.

<sup>160</sup> *Id.*

<sup>161</sup> 2014 U.S. Dist. LEXIS 147541 (D. Idaho October 13, 2014)

the use of handguns on such Corps' property by law-abiding citizens for self-defense purposes violates the Second Amendment. While the Corps retains the right to regulate the possession and carrying of handguns on Corps property, this regulation imposes an outright ban, and is therefore unconstitutional under any level of scrutiny, as set forth in *Heller* and *Peruta*.<sup>162</sup> The Court noted that its opinion conflicts with *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*,<sup>163</sup> a case which upheld a similar ban.<sup>164</sup>

### 2.2.6 Waiting Periods

An Eastern District of California judge ruled that California's 10-day waiting period requirement for firearm purchases violates the Second Amendment, with respect to individuals who already own a gun and who also pass a background check before the 10-day period expires.<sup>165</sup> The court opined that: "As applied to individuals who already possess a firearm as confirmed by the AFS system, Defendant has not established that applying the full 10-day waiting period when the background check is completed prior to 10-days is a 'reasonable fit.'<sup>166</sup> The 10-day waiting period laws as applied to individuals who already lawfully possess a firearm as confirmed by the AFS system, and who pass the background check prior to 10-days, violates the Second Amendment."<sup>167</sup> The court specifically emphasized that it was not challenging the requirement that a purchaser pass a background check. "These individuals must still pass the background check when they attempt to purchase a firearm. They may not, however, be required to wait the full 10-days if the background check is completed and approved prior to 10-days."<sup>168</sup>

### 2.3 A Word About the Standard of Review

Many courts analyze Second Amendment challenges in relatively superficial terms, looking to see if the law can be fit within the categories of gun regulations that are longstanding and presumptively lawful, or involve a type of unusually

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<sup>162</sup> *Id.* at \*11-12.

<sup>163</sup> 2014 U.S. Dist. LEXIS 116662, 2014 WL 4059375 (N.D. Ga. Aug. 18, 2014)

<sup>164</sup> 2014 U.S. Dist. LEXIS 147541 \*12 (D. Idaho).

<sup>165</sup> *Silvester v. Harris*, 2014 U.S. Dist. LEXIS 118284 (E.D. Cal. Aug. 25, 2014).

<sup>166</sup> *Id.* at 90.

<sup>167</sup> *Id.* at 97.

<sup>168</sup> *Id.* at 91 n.38.

dangerous weapon. But where such categorical classifications do not apply, courts confront the much harder task of analyzing the merits of the Second Amendment challenge on a case-by-case basis, which often requires a searching analysis. In those cases the court examines the specific restrictions placed on the person's individual right (whether to own, carry, display, use, buy or transfer firearms) and identifies where along the spectrum of Second Amendment rights those regulations fall—with the greatest protection afforded to the core right of self-defense in the home.<sup>169</sup> A critical threshold issue for these courts is what standard of review to apply. *Heller* itself offers little guidance.<sup>170</sup> As a result, the commentators have advocated a variety of standards that, not surprisingly, vary.<sup>171</sup> The lower federal

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<sup>169</sup> See *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012); *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010); *Kachalsky v. County of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012). See Gould, *supra*, note 32, at 1550 (noting courts can “easily dispose of challenges” falling under *Heller*'s list, “[b]ut when the factual scenarios stray from those listed in *Heller*, the lower federal courts fall into disarray”); Kiehl, *supra*, note 87, at 1149 (“While lower courts have fairly easily disposed of challenges to gun laws specifically mentioned in *Heller*'s laundry list of presumptively lawful regulations, they have struggled more with regulations not included in the *Heller* list or covered by its historical test.”). See *Marzzarella*, 614 F.3d at 101 (noting that “Second Amendment doctrine remains in its nascency, and lower courts must proceed deliberately when addressing regulations unmentioned by *Heller*”); see also *Barton*, 633 F.3d at 172 n.4 (noting difficulty in applying *Heller* to novel problem). For a scholarly treatment of the standard of review in Second Amendment cases, see Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009).

<sup>170</sup> See Glenn H. Reynolds & Brannon P. Denning, *Heller's Future in the Lower Courts*, 102 NW. U. L. REV. 2035, 2042 (2008) (hereinafter “*Heller's Future in the Lower Courts*” (calling *Heller* “reticent[t]” concerning a standard of review), available at <http://colloquy.law.northwestern.edu/main/2008/07/hellers-future.html><https://www.law.northwestern.edu/lawreview/v102/n4/2035/LR102n4Reynolds&Denning.pdf>); Anderson, *supra*, note 116 at 547-48 (noting that the *Heller* majority did not identify what standard it was using). *Heller's Future in the Lower Courts*, at 2039-40, (“*Heller* majority's refusal to be pinned down on a specific standard of review might also leave an opening for lower courts to confine *Heller* to its facts. . . . A more explicit articulation of the standard to be employed could have discouraged lower court evasion of *Heller*, or at least made such evasion somewhat easier to detect if the Court was inclined to monitor lower courts for compliance”); Anderson, *supra* note 116 at 547-48 (“But the Court left the door open for a new debate to begin in the Second Amendment context: what standard of review applies to legislation that restricts an individual's right to bear arms?”); Kiehl, *supra* note 88 at 1132-33.

<sup>171</sup> See, e.g., Ivan E. Bodensteiner, *Scope of the Second Amendment Right—Post-Heller Standard of Review*, 41 U. TOL. L. REV. 43, 66-71 (2009), available at [http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1036&context=law\\_fac\\_pubs](http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1036&context=law_fac_pubs) (enhanced

courts have articulated a number of different standards, although a clear majority of courts have adopted an intermediate scrutiny standard and expressly rejected strict scrutiny.

The First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits have generally applied some form of sliding-scale intermediate scrutiny to Second Amendment challenges.<sup>172</sup>

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rational basis review); Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1379-80 (2009) (something less than strict scrutiny); Calvin R. Massey, *Second Amendment Decision Rules*, 60 HASTINGS L.J. 1431, 1442-43 (2009), available at [http://repository.uchastings.edu/faculty\\_scholarship/503](http://repository.uchastings.edu/faculty_scholarship/503) (regulation must be proven by clear and convincing evidence to advance a compelling governmental objective); Lawrence Rosenthal, *Second Amendment Plumbing after Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 79-84 (2009) (undue burden test); Allen Rostron, *Protecting Gun Rights and Improving Gun Control after District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 407-08 (2009), available at <http://www.lclark.edu/live/files/774> (reasonableness test); Mark V. Tushnet, *Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 423-32 (2009) (strict scrutiny); Volokh, *supra*, note 163 at 1454-61 (regulations imposing a substantial burden on Second Amendment rights should be evaluated by assessing the “magnitude of the burden” in light of its justification); Anderson, *supra* note 116 at 577-87 (intermediate scrutiny); Ryan L. Card, *An Opinion Without Standards: The Supreme Court’s Refusal to Adopt a Standard of Constitutional Review in District of Columbia v. Heller Will Likely Cause Headaches for Future Judicial Review of Gun-Control Regulations*, 23 B.Y.U. J. PUB. INT. L. 259, 286-87 (2009), available at [http://www.law2.byu.edu/jpl/papers/v23n2\\_Ryan\\_Card.pdf](http://www.law2.byu.edu/jpl/papers/v23n2_Ryan_Card.pdf) (same); Lindsay Goldberg, Notes, *District of Columbia v. Heller: Failing to Establish a Standard for the Future*, 68 MD. L. REV. 889, 904-13 (2009), available at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3397&context=mlr> (strict scrutiny); Andrew R. Gould, Comment, *The Hidden Second Amendment Framework within District of Columbia v. Heller*, 62 VAND. L. REV. 1535, 1570-73 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1496369](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1496369) (a “deferential form of strict scrutiny”); Sarah Perkins, *District of Columbia v. Heller: The Second Amendment Shoots One Down*, 70 LA. L. REV. 1061, 1079-90 (2010), available at <http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6350&context=lalrev> (intermediate scrutiny); Jason Racine, Note, *What the Hell[er]? The Fine Print Standard of Review under Heller*, 29 N. ILL. U. L. REV. 605, 617-20 (2009), available at [http://www.niu.edu/law/organizations/law\\_review/pdfs/full\\_issues/29\\_3/racine.pdf](http://www.niu.edu/law/organizations/law_review/pdfs/full_issues/29_3/racine.pdf) (undue burden).

<sup>172</sup> *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (ruling statute prohibiting gun possession by “domestic violence misdemeanants” had “substantial relationship” to “important governmental” interest); *Marzzarella*, 614 F.3d at 89 (3d Cir.) (applying means-ends intermediate scrutiny under a two-step approach that looks first to determine if challenged regulation burdens right protected by Second Amendment); *Masciandaro*, 638 F.3d at 469-471 (4th Cir.) (endorsing a sliding scale approach to determining the level of scrutiny applicable to laws that burden Second Amendment rights depending in part on “the extent to which [Second Amendment] interests are burdened by government

As the Ninth Circuit explained, for cases that do not fall within one of the doctrinal safe harbors that the *Heller* court identified (e.g., for gun laws which the court does not deem to have “longstanding” historical antecedents), the courts have often adopted a two-step analysis, considering whether the law imposes a burden within the scope of the Second Amendment and if so applying an appropriate means-end scrutiny, usually an intermediate level of scrutiny.<sup>173</sup> The Ninth Circuit in *Chovan* agreed with the Fourth Circuit that reviewing the Second Amendment

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regulation”); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (applying “means-ends” intermediate scrutiny to regulations that burden Second Amendment rights under two-part approach); *United States v. Portillo-Munoz*, 643 F.3d 437, 443 n.4 (5th Cir. 2011) available at [http://scholar.google.com/scholar\\_case?case=14159925293329600680&q=United+States+v.+Portillo-Munoz&hl=en&as\\_sdt=6,33#18](http://scholar.google.com/scholar_case?case=14159925293329600680&q=United+States+v.+Portillo-Munoz&hl=en&as_sdt=6,33#18)] (noting “sliding scale test” in *Marzzarella* to determine appropriate standard); *Ezell v. City of Chicago*, 651 F.3d 684, 703-04 (7th Cir. 2011) (stating *Marzzarella*’s two prong approach “has been followed by the Third, Fourth, and Tenth Circuits” and holding that “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” but that “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”); *United States v. Yancey*, 621 F.3d 681, 687 (7th Cir. 2010), available at [http://scholar.google.com/scholar\\_case?case=3630102438353795650&q=United+States+v.+Yancey,+621+F.3d+681&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=3630102438353795650&q=United+States+v.+Yancey,+621+F.3d+681&hl=en&as_sdt=6,33) finding statute prohibiting drug users from possessing firearms passed intermediate scrutiny); *Peruta v. San Diego County*, 742 F.3d 1144 (9th Cir. 2014), available at [http://scholar.google.com/scholar\\_case?case=16699306652731612622&q=Peruta+v.+San+Diego+County&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=16699306652731612622&q=Peruta+v.+San+Diego+County&hl=en&as_sdt=6,33) invalidating public carry licensing scheme under intermediate scrutiny); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010), available at [http://scholar.google.com/scholar\\_case?case=8267951369665549517&q=United+States+v.+Reese,+627+F.3d+792&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=8267951369665549517&q=United+States+v.+Reese,+627+F.3d+792&hl=en&as_sdt=6,33), cert. denied, 131 S. Ct. 2476 (2011); *Heller v. District of Columbia*, 698 F. Supp. 2d 179 (D.D.C. 2010), *aff’d in part and vacated in part*, 670 F.3d 1244 (D.C. Cir. 2011), *Heller v. District of Columbia*, 670 F.3d 1244, 1258 (D.C. Cir. 2011) (finding intermediate scrutiny “the more appropriate standard”). See *Peterson v. LaCabe*, 783 F. Supp. 2d 1167, 1176-77 (D. Colo. 2011), available at [http://scholar.google.com/scholar\\_case?case=15397533675904662079&q=Peterson+v.+LaCabe&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=15397533675904662079&q=Peterson+v.+LaCabe&hl=en&as_sdt=6,33) noting Tenth Circuit adopted two prong approach articulated by Third Circuit); *United States v. Yancey*, 621 F.3d 681, 687 (7th Cir. 2010) (finding statute prohibiting drug users from possessing firearms passed intermediate scrutiny). But see *Tyler v. Hillsdale County Sheriff’s Department*, (6th Cir., December 18, 2014) (reversing dismissal of as-applied Second Amendment challenge to 18 U.S.C. § 922(g)(4), prohibiting possession of firearms “by a person who has been committed to a mental institution.”).

<sup>173</sup> See *United States v. Chovan*, 735 F.3d 1127, 1134, 1136-1138 (9th Cir. 2013) (rejecting categorical approach on basis that the law barring gun possession for those convicted of violent misdemeanors such as domestic violence is not “longstanding”; instead the court engaged in two-step analysis).

challenge to 28 .U.S.C. § 922(g)(9) under “*Heller’s* safe harbor” for presumptively lawful regulations in effect “approximat[es] rational-basis review, which has been rejected by *Heller*.”<sup>174</sup>

The Second Circuit also applied an intermediate level of scrutiny in the principal Second Amendment case before it, although in doing so it used a “substantial burden” test that appears to be somewhat different from the test prevailing in other circuits. Reasoning that “[a] similar threshold showing is needed to trigger heightened scrutiny of laws alleged to infringe other fundamental constitutional rights,” the court in *Kachalsky v. County of Westchester*<sup>175</sup> held that “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).” The court applied an intermediate level of scrutiny to the challenged public carry law and ruled that:

New York’s law need only be *substantially related* to the state’s important public safety interest. A perfect fit between the means and the governmental objective is not required. Here, instead of forbidding anyone from carrying a handgun in public, New York took a more moderate approach to fulfilling its important objective and reasonably concluded that only individuals having a bona fide reason to possess handguns should be allowed to introduce them into the public sphere.<sup>176</sup>

The choice of intermediate scrutiny finds support in First Amendment case law.<sup>177</sup> This standard requires the regulation to be substantially related to an

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<sup>174</sup> *Id.* at 1134 (quoting *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010)).

<sup>175</sup> 701 F.3d 81 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013).

<sup>176</sup> *Kachalsky v. County of Westchester*, 701 F.3d 81, 98-99 (2d Cir. 2012).

<sup>177</sup> See *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (“Given *Heller’s* focus on ‘core’ Second Amendment conduct and the Court’s frequent references to First Amendment doctrine, we agree with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment.”); See *Kachalsky*, 701 F.3d at 91-92; *Marzzarella*, 614 F.3d at 89 n.4; *Skoien*, 587 F.3d 803, 813-14 (7th Cir. 2009), available at [http://scholar.google.com/scholar\\_case?case=8316381792571414217&q=Skoien,+587+F.3d+&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=8316381792571414217&q=Skoien,+587+F.3d+&hl=en&as_sdt=6,33); *Ezell*, 651 F.3d at 702-04 (drawing parallels from the First Amendment context to analyze Second Amendment claims).



important governmental objective.<sup>178</sup> In the First Amendment context, the intermediate level of scrutiny applies to regulation that does not directly target speech but has a substantial impact on it. It applies to time, place and manner restrictions on speech, for example. In the First Amendment context, most regulations subjected to the intermediate level of scrutiny have been upheld:

Turning to another similar intermediate scrutiny First Amendment context, time, place, manner restrictions have been upheld in numerous contexts, including restricting placement of tobacco advertisements, restricting use of sound trucks and amplified music, restricting use of automatic dialing-announcing devices, restricting parades, and restricting locations of adult theaters.<sup>179</sup>

Similarly, in the gun control context, application of this standard has almost invariably resulted in upholding the regulations in question.<sup>180</sup> While a few courts have applied a strict scrutiny standard,<sup>181</sup> that standard does not seem to be supported by *Heller*. As set out above, *Heller* maintains that a number of categories

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<sup>178</sup> See *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 202-04, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999), available at [http://scholar.google.com/scholar\\_case?case=10210971446274004495&q=Buckley+v.+American+Constitutional+Law+Foundation&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=10210971446274004495&q=Buckley+v.+American+Constitutional+Law+Foundation&hl=en&as_sdt=6,33) using this formula for some First Amendment questions).

<sup>179</sup> Andrea M. Matwyshyn, *Hidden Engines of Destruction: The Reasonable Expectation of Code Safety and the Duty to Warn in Digital Products*, 62 FLA. L. REV. 109, 146-47 (2010).

<sup>180</sup> *United States v. Chapman*, 666 F.3d 220, 226 (4th Cir. 2012), available at [http://scholar.google.com/scholar\\_case?case=6047066106699164256&q=United+States+v.+Chapman,+666+F.3d+220&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=6047066106699164256&q=United+States+v.+Chapman,+666+F.3d+220&hl=en&as_sdt=6,33) (applying intermediate scrutiny to statute prohibiting persons who are subject to an order of protection in a domestic proceeding from possessing firearms); *Nordyke*, 644 F.3d at 793, available at [http://scholar.google.com/scholar\\_case?case=16860306062835348173&q=Nordyke+644+F.3d&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=16860306062835348173&q=Nordyke+644+F.3d&hl=en&as_sdt=6,33) (upholding ordinance banning guns on county property under intermediate scrutiny); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (ruling statute prohibiting gun possession by “domestic violence misdemeanants” had “substantial relationship” to “important governmental interest”); *United States v. Yancey*, 621 F.3d 681, 687 (7th Cir. 2010) (finding statute prohibiting drug users from possessing firearms passed intermediate scrutiny).

<sup>181</sup> See *Tyler v. Hillsdale County Sheriff’s Dep’t*, (6th Cir. December 18, 2014) (applying strict scrutiny to 18 U.S.C. § 922(g)(4), prohibiting possession of firearms “by a person who has been committed to a mental institution,”); *Bateman v. Perdue*, 2012 U.S. Dist. LEXIS 47336 (E.D.N.C. Mar. 29, 2012); *United States v. Bay*, 2009 U.S. Dist. LEXIS 106874 (D. Utah Nov. 13, 2009); *United States v. Engstrum*, 2009 U.S. Dist. LEXIS 33072 (D. Utah Apr. 17, 2009); *Ezell*, 651 F.3d at 707-708; *Gowder v. City of Chicago*, 2012 U.S. Dist. LEXIS 84359 (N.D. Ill. June 19, 2012).

of regulation are presumptively legal. Such presumptions cannot coexist with strict scrutiny because that standard of review requires that the initial burden be imposed upon the proponent of the regulation.<sup>182</sup> Moreover, as set out above, *Heller* expressly analogized the Second Amendment to the First Amendment<sup>183</sup> and First Amendment case law embraces an intermediate standard of scrutiny.<sup>184</sup> While almost all district and circuit courts have applied some form of intermediate scrutiny in analyzing challenges to gun regulations, the Sixth Circuit applied strict scrutiny in one Second Amendment challenge.<sup>185</sup> Without further guidance from the Supreme Court on the standard of review, some circuit variation is expected although a strong majority of courts will likely continue subjecting gun regulations to intermediate scrutiny. At the same time, restrictions on the core right to possess a firearm in the home may well attract heightened scrutiny on a sliding scale that approaches strict scrutiny.

#### **2.4 Western District of New York Decision on New York SAFE Act**

In *New York State Rifle and Pistol Ass’n, Inc. v. Cuomo*,<sup>186</sup> the district court applied intermediate scrutiny and largely upheld the New York Secure Ammunition and Firearms Enforcement (“SAFE”) Act of 2013<sup>187</sup> against constitutional challenge. In particular, the court sustained the SAFE Act’s “one-feature” prohibition on the purchase of assault weapons, i.e. “semiautomatic weapons that have only *one* feature ‘commonly associated with military weapons’ and, in the case of rifles and pistols, have the ability to accept a detachable magazine,” noting that “assault weapons are often used to devastating effect in mass shootings” and that “the military features of semiautomatic assault weapons ‘serve specific, combat-functional ends’ and are ‘designed to enhance the capacity to shoot multiple human

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<sup>182</sup> Golimowski, *supra* note 74 at 1622. (“Because laws evaluated under strict scrutiny are generally presumptively unconstitutional the identification of several broad categories of “presumptively lawful” measures implicitly rejects strict scrutiny in all Second Amendment cases.”).

<sup>183</sup> 554 U.S. at 595.

<sup>184</sup> See *supra* p. 51 and note 170.

<sup>185</sup> *Tyler v. Hillsdale County Sheriff’s Dep’t*, (6th Cir. December 18, 2014).

<sup>186</sup> 990 F. Supp. 2d 349 (W.D.N.Y. 2013).

<sup>187</sup> The content of the SAFE Act is examined *infra* at p. 105-109.

targets rapidly.”<sup>188</sup> The court also upheld the ban on magazines (clips) holding more than ten rounds, noting that large-capacity magazines were associated with higher casualties in mass shootings. But the ban on *loading* such ten-round clips with more than seven rounds, except at a firing range, did not withstand intermediate scrutiny: “It stretches the bounds of this Court’s deference to the predictive judgments of the legislature to suppose that those intent on doing harm (whom, of course, the Act is aimed to stop) will load their weapon with only the permitted seven rounds.”<sup>189</sup>

The court also rejected most of plaintiffs’ vagueness challenges to the SAFE Act, but struck down as “unintelligible” an “if” clause added to the prohibition on large-capacity magazines, to which the Legislature had apparently neglected to append a “then,” as well as a prohibition on muzzle “breaks” which was intended to refer to muzzle “brakes.”<sup>190</sup> The court further found a provision regulating semiautomatic pistols that have an ability to accept a detachable magazine and that are “semiautomatic version[s] of an automatic rifle, shotgun or firearm” to be unintelligible and therefore excessively vague.<sup>191</sup> Finally, the court upheld against dormant Commerce Clause challenge a provision of the SAFE Act that effectively prohibited New Yorkers from buying ammunition over the Internet and required that ammunition transfers “must occur in person.”<sup>192</sup> Plaintiffs promptly filed a notice of appeal, and defendants filed a notice of cross-appeal, to the United States Court of Appeals for the Second Circuit. Oral argument was held on December 10, 2014, with the court hearing at the same time a challenge to Connecticut’s strengthened guns laws, which were passed in the wake of the Newtown school shootings. The SAFE Act appeal drew numerous amici on both sides of the gun debate, with 22 attorneys general signing an amicus brief seeking its invalidation and nine attorney generals supporting the SAFE Act.<sup>193</sup>

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<sup>188</sup> *Id.* at \*3, 15 (internal citations omitted).

<sup>189</sup> *Id.* at 17-19.

<sup>190</sup> *Id.* at \*23.

<sup>191</sup> *Id.* at \*24.

<sup>192</sup> *Id.* at \*24-26.

<sup>193</sup> Mary Lou Byrd, *Twenty-Two States Support Lawsuit Against Cuomo’s SAFE Act, AGs File Amicus Brief Opposing Gun Control Legislation*, WASHINGTON FREE BEACON, May 8, 2014,

## 2.5 Southern District of New York Decision Upholding New York City Premise Residence Firearm Licensing Law

The Southern District of New York in *New York State Rifle & Pistol Ass’n v. City of New York*<sup>194</sup> upheld New York City’s handgun licensing laws (Title 38, Chapter Five, Section 23 of Rules of the City of New York) against Second Amendment and other constitutional challenges, including impairment of the right to travel and free association, and a Dormant Commerce Clause challenge. The Second Amendment challenge focused on the burdens associated with City’s issuance of a Premises Residence firearms license that allows a gun owner to keep a handgun in his home but prohibits public carry subject to a narrow exception to transport (with City pre-approval) a handgun to a firing range located in the City.<sup>195</sup> The plaintiffs were gun enthusiasts who liked to participate in shooting competitions both in state and out of state, and wanted to participate in a specific competition in New Jersey. They contacted the City License Bureau and were told that they could not transport the handguns except to in-state firing ranges.<sup>196</sup> Another plaintiff wanted to take a handgun from his City residence to a second home he owned in the Catskills—“a remote area” that apparently “presents a threat to the safety of his family when they stay there.”<sup>197</sup> Because of the License Bureau’s advice concerning the New Jersey gun competition, that gun owner believed he could not take his handgun to the second home.<sup>198</sup> The plaintiffs characterized the

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available at <http://freebeacon.com/issues/twenty-two-states-support-lawsuit-against-cuomos-safe-act/>.

<sup>194</sup> 2015 U.S. Dist. LEXIS 13956 (S.D.N.Y. Feb. 4, 2015). A copy of the case can be found on the New York Law Journal website at <http://www.newyorklawjournal.com/id=1202717605502/The-New-York-State-Rifle-amp-Pistol-Association-Romolo-Colantone-Efrain-Alvarez-and-Jose-Anthony-Irizarry-Plaintiffs-v-The-City-of-New-York-and-the-New-York-City-Police-Department--License-Division-Defendants-13-Civ-2115-RWS?slreturn=20150212085034>.

<sup>195</sup> *Id.*, 2015 U.S. Dist. LEXIS 13956, \*3-5. The City’s transportation restrictions focus on handguns; long arms can be taken outside the home, and transported within New York State, for hunting or target shooting purposes, provided the rifles are carried in a gun case with ammunition separate.

<sup>196</sup> *Id.* at \*11.

<sup>197</sup> *Id.* at \*12.

<sup>198</sup> *Id.*

City's restrictions as categorical prohibitions that effectively prohibit the right to keep and bear arms<sup>199</sup> as well as impair the right to travel and freely associate.<sup>200</sup>

The district court rejected the constitutional challenges and upheld the City licensing scheme in all respects. The district court cited *Heller's* "presumptively lawful prohibitions"; the Second Circuit's decision in *Kachalsky* upholding New York state's public carry licensing laws; and applied intermediate scrutiny to the Second Amendment challenge because the challenged regulations did not address the core Second Amendment right to possess a firearm in the home for self-defense.<sup>201</sup> The district court distinguished the Seventh Circuit's decision in *Ezell* which had invalidated a Chicago City ordinance that required license holders to receive firearms training at a shooting range but no shooting ranges were located in Chicago. The district court rejected the plaintiffs argument, based on *Ezell*, that their Second Amendment right was unduly burdened because the firing ranges in New York City require paid membership and payment for time on range.<sup>202</sup> The district court observed that the small number of shooting ranges in the City, and the cost to access them, reflect market forces, not governmental action.<sup>203</sup> The court also noted that plaintiffs can obtain separate licenses for weapons to be kept in homes located outside the City.<sup>204</sup> The district court emphasized that the City has a "substantial, indeed compelling, governmental interests in public safety and crime prevention" outside the home (citing *Kachalsky*)<sup>205</sup> and concluded that the City's restriction on transportation of firearms is integral to keeping firearms off the streets.<sup>206</sup>

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<sup>199</sup> *Id.* at \*19-28.

<sup>200</sup> *Id.* at \*28-35.

<sup>201</sup> *Id.* at \*16-18.

<sup>202</sup> *Id.* at \*21.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at \*24-25.

<sup>205</sup> *Id.* at \*24.

<sup>206</sup> *Id.* at \*26-28.

### 3. New York State Court Post-*Heller* Challenges to Gun Laws

#### 3.1 Case Decided Before *McDonald v. City of Chicago*

Post-*Heller* challenges to New York’s criminal possession and gun licensing laws<sup>207</sup> in the New York State courts have produced similar results to those in the federal courts, with the same themes emerging: namely, challenges have been unsuccessful; *Heller* safe harbors have been utilized; intermediate level of scrutiny has been applied; the limited nature of the Second Amendment rights have been acknowledged; and the gun licensing restrictions have been found to be reasonable restraints.

Some twenty published decisions by state courts in New York have, post-*Heller*, have addressed Second Amendment challenges to state and municipal laws regulating the possession and use of guns. Eleven of those decisions predated the Supreme Court’s *McDonald* decision holding that the Second Amendment applied to the States, as well as to federal legislative action. Of those eleven, five predicted that *Heller* would be applied only to federal action,<sup>208</sup> although only one court based its decision exclusively on the limitation of *Heller* to federal action.<sup>209</sup> In the four decisions that did not rely exclusively on the federal action limitation, the courts

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<sup>207</sup> The most recent state law is the New York Secure Ammunition and Firearms Enforcement Act of 2013 (“SAFE Act”) (L. 2013, ch. 1). Penal Code §§ 400.00(1) - (3) govern the eligibility for issuance of gun possession or sale licenses, identify the types of licenses available, and the application process. Penal Code §§ 265.01 - (3) are the criminal possession provisions, each in a different degree. In addition to the state statutes, New York City’s Administrative Code has been challenged in court, namely NYC Admin Code § 10-131(a)(2), which addresses the issuances of licenses to carry or possess a pistol or revolver, and NYC Admin Code § 10-312, which requires a lawful owner of a weapon to safeguard it when it is out of her possession or control. Finally, 38 RCNY 5-22(13) makes it a crime for a lawful gun owner or custodian to fail to employ a safety lock when the weapon is out of his custody or control.

<sup>208</sup> *Steinfeld v. Kelly*, 2009 N.Y. Misc. LEXIS 5929, 2009 N.Y. Slip OP 31382(U) (Sup. Ct. N.Y. Cnty. 2009); *Matter of Torres v. Prasso*, 2009 N.Y. Misc. LEXIS 5499, 2009 N.Y. Slip OP 31688(U) (Sup. Ct. N.Y. Cnty. 2009); *Matter of Vasiliou v. Kelly*, 2009 N.Y. Misc. LEXIS 5734, 2009 N.Y. Slip OP 31201(U) (Sup. Ct. N. Y. Cnty. 2009); *Matter of Llanes v. Kelly*, 2009 N.Y. Misc. LEXIS 5787, 2009 N.Y. Slip OP 31237 (U) (Sup. Ct. N.Y. Cnty. 2009); and *People v. Kirby*, 2009 N.Y. Misc. LEXIS 2552.

<sup>209</sup> *People v. Kirby*, 2009 N.Y. Misc. LEXIS 2552.

distinguished *Heller* factually and noted the limitations of the Second Amendment.<sup>210</sup>

The analyses employed in most of the other cases (also decided pre-*McDonald*) in which the court did not consider *Heller* to be limited to federal action, likewise recognize the limited nature of Second Amendment rights under *Heller* and the constitutionality of reasonable gun regulation; factually distinguish *Heller*; and employ the safe harbors identified in *Heller*.<sup>211</sup> One case did not even address the Second Amendment and disposed of the case on procedural grounds.<sup>212</sup>

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<sup>210</sup> *Steinfeld v. Kelly*, 2009 N.Y. Misc. LEXIS 5929 (in sustaining revocation of pistol permit, the court also noted that *Heller* affirmed long-standing prohibition on possession by felons); *Matter of Torres v. Prasso*, 2009 N.Y. Misc. LEXIS 5499 at 6-7 (in sustaining a denial of a residence permit, the court also noted the *Heller* court's observation that the right to bear arms was limited and that the *Heller* decision did not reach the issue of "whether and under what circumstances a pistol licensing scheme is constitutional"); *Matter of Vasiliou v. Kelly*, 2009 N.Y. Misc. LEXIS 5734 at 14 (in dismissing the petition to overturn a denial of a home premise handgun license, the court also acknowledged that the *Heller* held that the right conferred by the Second Amendment is not absolute and may be "limited by reasonable governmental restrictions"); *Matter of Llanes v. Kelly*, 2009 N.Y. Misc. LEXIS 5734 (similar to *Matter of Torres v. Prasso*, 2009 N.Y. Misc. LEXIS 5499, the court acknowledged the *Heller* court's recognition of the limitation to the right to bear arms and that the decision did not reach the issue of when a licensing scheme is constitutional).

<sup>211</sup> *People v. Ferguson*, 21 Misc. 3d 1120(A), 873 N.Y.S.2d 513 (Crim. Ct. Queens Cnty. 2008) at 3 (in denying a motion to dismiss a charge of criminal possession, the court noted that an airport was a "sensitive place[]" and that New York's gun licensing scheme was not a total ban and therefore was not a "severe restriction"); *People v. Lynch*, 2008 N.Y. Misc. LEXIS 4587 (Sup. Ct. Kings Cnty. 2008) (in denying a motion to dismiss criminal possession charges against a defendant who was carrying a weapon in a restaurant without a license, the court observed that the Second Amendment was not "unfettered" and that reasonable regulations for possession of weapons outside the home should be allowed); *People v. Abdullah*, 23 Misc. 3d 232, 870 N.Y.S.2d 886 (Crim. Ct. Kings Cnty. 2008) available at [http://scholar.google.com/scholar\\_case?case=4407662012725673030&q=People+v.+Abdullah,+23+Misc.+3d+232&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=4407662012725673030&q=People+v.+Abdullah,+23+Misc.+3d+232&hl=en&as_sdt=6,33) (in denying defendant's motion to dismiss criminal possession charges for possession of a handgun in his residence, the court simply distinguished *Heller* on the grounds that New York's gun regulation scheme is not a complete ban on possession); *Matter of Bastiani*, 23 Misc. 3d 235 (Crim. Ct. Rockland Cnty. 2008) available at [http://scholar.google.com/scholar\\_case?case=707992713928592320&q=Matter+of+Bastiani,+23+Misc.+3d+235&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=707992713928592320&q=Matter+of+Bastiani,+23+Misc.+3d+235&hl=en&as_sdt=6,33) (in denying petitioner's application to upgrade her permit to a full carry permit on the basis of insufficient need shown. The court noted the *Heller* court's recognition that the right to bear arms is limited and that reasonable regulation of handgun possession was not undermined by *Heller*); *People v. Perkins*, 62 A.D.3d 1160, 1161, 880 N.Y.S.2d 209 (3d Dep't 2009) available at [http://scholar.google.com/scholar\\_case?case=12488659930765087783&q=People+v.+Perkins,+62+A.D.3d+1160&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=12488659930765087783&q=People+v.+Perkins,+62+A.D.3d+1160&hl=en&as_sdt=6,33) (on appeal from a conviction for possession of a

### 3.2 Cases Decided After *McDonald v. City of Chicago*

As with the pre-*McDonald* cases, about half of the post-*McDonald* cases are Article 78 proceedings, and half are challenges to criminal possession charges or convictions. And the post-*McDonald* decisions, not surprisingly, are remarkably similar in their analyses and holdings to those that pre-date *McDonald*.<sup>213</sup> The cases acknowledge *Heller*'s determination that the Second Amendment is limited and find that with respect to the Second Amendment challenges that New York's gun regulation scheme is a reasonable restraint.<sup>214</sup> Only one of the cases addresses the

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pistol without a license, the Appellate Division affirmed the judgment, noting that, unlike the laws in *Heller*, laws that do not effect a complete ban on handguns are not "severe restriction[s]" and holding that "New York's licensing requirement remains an acceptable means of regulating the possession of firearms."

<sup>212</sup> The Appellate Division, Second Department in *Velez v. DiBella*, 77 A.D.3d 670, 909 N.Y.S.2d 83 (2d Dep't 2009) available at [http://scholar.google.com/scholar\\_case?case=12102444646817307650&q=Velez+v.+DiBella,+77+A.D.+3d+670&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=12102444646817307650&q=Velez+v.+DiBella,+77+A.D.+3d+670&hl=en&as_sdt=6,33) (rejected an Article 78 proceeding seeking to overturn a denial of petitioner's pistol license application simply on the grounds that a declaratory judgment action, rather than an Article 78 proceeding, was the proper vehicle for challenging the constitutionality of a statute).

<sup>213</sup> Only one, and the most recent decision, *Osterweil v. Bartlett*, 2013 N.Y. LEXIS 2807, 2013 N.Y. Slip OP 6637 (Ct. App. 2013), available at [http://scholar.google.com/scholar\\_case?case=2978574426488145735&q=Osterweil+v.+Bartlett&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=2978574426488145735&q=Osterweil+v.+Bartlett&hl=en&as_sdt=6,33) never reaches the constitutional issue. The Court of Appeals accepted from the Second Circuit Court of Appeals certification of the question of whether the use of the term "resides" in the licensing provisions of Penal Law 400.00(3)(a) meant residence or domicile. The plaintiff in a federal action to compel acceptance of his pistol license application argued that the Schoharie County Court Judge Bartlett had improperly denied his application by holding that "resides" meant domiciled. The Court of Appeals did not address the constitutional issue. Instead, the Court of Appeals concluded that the term "resides" meant just that, or residence, replying on the plain language of the statute as well as its legislative history.

<sup>214</sup> *People v. Foster*, 30 Misc. 3d 596, 915 N.Y.S.2d 449 (Crim. Ct. Kings Cnty. 2010), [http://scholar.google.com/scholar\\_case?case=5542891185670330246&q=People+v.+Foster,+30+Misc.+3d+596&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=5542891185670330246&q=People+v.+Foster,+30+Misc.+3d+596&hl=en&as_sdt=6,33) (on defendant's motion to dismiss a misdemeanor accusatory instrument charging criminal possession of an unlicensed firearm inside his home, the court denied the motion, quoting *Heller*'s observation that "...the right secured by the Second Amendment is not unlimited ..." and citing *People v. Perkins*, 62 A.D.3d 1160, 1161, 880 N.Y.S.2d 209 (3d Dep't 2009) for the proposition that since its laws did not effect a complete ban, New York's licensing requirement was an acceptable means of gun regulation); *People v. Hughes*, 83 A.D.3d 960, 921 N.Y.S.2d 300 (2d Dep't 2011), available at [http://scholar.google.com/scholar\\_case?case=17925276628269070076&q=People+v.+Hughes,+83+A.D.+3d+960&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=17925276628269070076&q=People+v.+Hughes,+83+A.D.+3d+960&hl=en&as_sdt=6,33) (on appeal from a conviction for criminal possession, the court affirmed the judgment below, noting that Second Amendment rights are not unlimited, that since Penal Law 265 did not effect a complete ban on handguns, it was not a



SAFE Act, and that decision, with minimal substantive analyses, dismissed the complaint for failure to state a cause of action.<sup>215</sup> One other decision upheld the SAFE Act against a state constitutional challenge to its method of enactment, on

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“severe restriction” infringing on the defendant’s Second Amendment rights, and that the *Heller* decision upheld the constitutionality of prohibitions on possession of firearms by felons and the mentally ill (e.g., safe harbors); *People v. Nivar*, 30 Misc. 3d 952, 915 N.Y.S.2d 801 (Sup. Ct. Bronx Cnty. 2011), available at [http://scholar.google.com/scholar\\_case?case=13902232453321152613&q=People+v.+Nivar.+30+Misc.+3d+952&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=13902232453321152613&q=People+v.+Nivar.+30+Misc.+3d+952&hl=en&as_sdt=6,33) (on motion to dismiss criminal weapons charges under Penal Law § 265.01(1), the court cited the *Heller* court’s determination that the Second Amendment is not unlimited, quoted that part of the decision that made clear that the U.S. Supreme Court was not undermining the “longstanding...laws imposing conditions and qualifications on the sale of arms” [at p. 955], and distinguished *Heller* on the grounds that New York does not have a complete ban on guns in the home); *Matter of Lederman v. NYPD*, 2011 N.Y. Misc. LEXIS 1343, 2011 N.Y. Slip OP 30765(U) (Sup. Ct. N.Y. Cnty. 2011), available at [http://scholar.google.com/scholar\\_case?case=1641633307520323674&q=Matter+of+Lederman+2011+NY+Slip+OP+30765&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=1641633307520323674&q=Matter+of+Lederman+2011+NY+Slip+OP+30765&hl=en&as_sdt=6,33) (in an Article 78 proceeding challenging the denial of a full carry permit, the court denied the petition on the grounds that *Heller* stood for the proposition that reasonable government restrictions did not run afoul of the Second Amendment right to bear arms); *Matter of Kelly v. Klein*, 96 A.D.3d 846, 946 N.Y.S.2d 218 (2d Dep’t 2012), available at [http://scholar.google.com/scholar\\_case?case=11087857925080323614&q=Matter+of+Kelly+v.+Klein&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=11087857925080323614&q=Matter+of+Kelly+v.+Klein&hl=en&as_sdt=6,33) (denial of permit application based upon poor moral character affirmed on basis of *Heller* being distinguished because of its application to possession of handguns only in the home); *Matter of Tessler v. City of New York*, 38 Misc. 3d 215, 952 N.Y.S.2d 703 (Sup. Ct. N.Y. Cnty. 2012), available at [http://scholar.google.com/scholar\\_case?case=3857865164941286333&q=Matter+of+Tessler,+952+NYS2d+703&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=3857865164941286333&q=Matter+of+Tessler,+952+NYS2d+703&hl=en&as_sdt=6,33) (in granting a motion to dismiss petition seeking reversal of a permit revocation, the court sustained New York City Administrative Code requiring safeguarding of licensed weapons on the basis of reasonable licensing and regulatory restrictions on handguns being constitutionally permissible); *Zadek v. Kelly*, 37 Misc. 3d 1208(A) (Sup. Ct. N.Y. Cnty. 2012) (on petition to reverse a permit revocation, the court rejected the Second Amendment challenge, distinguishing *Heller* since New York law did not create an outright ban and relying on *Heller*’s dicta that reasonable gun licensing and regulatory provisions were constitutional).

<sup>215</sup> *Mongiello v. Cuomo*, 40 Misc. 3d 362, 363-364, 366, 968 N.Y.S.2d 828 (Sup. Ct. Albany Cnty. 2013) (the plaintiffs challenged the SAFE Act and Articles 265 and 400 of the Penal Law, *inter alia*, as “repugnant to the Second Amendment”). In dismissing the complaint for failure to state a cause of action, and after noting the *Heller* decision’s recognition that the Second Amendment rights were not unlimited, the court observed that no particular provision of the SAFE Act or Penal Law Articles 265 and 400 was challenged and held that the plaintiffs “cannot demonstrate that the laws they challenge are unconstitutional in all respects and under all applications, ....”. See p. 105-109 *infra* for a discussion of the SAFE Act.

the ground that it had supposedly not been passed pursuant to a valid message of necessity from the Governor.<sup>216</sup>

One of the more interesting cases is *In the Matter of Tessler v. City of New York*<sup>217</sup> in part because it involved guns - one loaded - kept in an unlocked cabinet within the home. The weapons were noticed by police officers when they were summoned to the petitioner's home because petitioner's wife was attacking his daughter. Petitioner had licenses for both guns. Nonetheless, the officers issued an appearance ticket for the criminal offense of violating New York City Administrative Code § 10-312 for failure to properly safeguard the weapons,<sup>218</sup> and the Petitioner was later given notice that his handgun license had been suspended because of "your domestic incident." The court engaged in an extensive review of the traditional standards of review under C.P.L.R. § 7803<sup>219</sup> and then addressed the constitutional challenge. At first blush the Code provision appeared very similar to that of the District of Columbia under consideration in *Heller*, and the New York Supreme Court noted that "insofar as [it] would require that lawfully owned firearms be kept inoperable in the home at all times, the statute and rule would be unconstitutional."<sup>220</sup> But the court focused on the differences between the two ordinances:

... nor does the evidence in this record demonstrate, that handguns in the home be 'kept inoperable at all times,' ... so 'as to render them wholly useless,' ... and make 'it impossible for citizens to use them for the core lawful purpose of self-defense' in the home. ... Unlike the local laws addressed in *Heller* and

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<sup>216</sup> *Schulz v. State Executive*, 108 A.D.3d 856, 969 N.Y.S.2d 195 (3d Dep't 2013), available at [http://scholar.google.com/scholar\\_case?case=5950850698927003424&q=Schulz+v.+State+Executive,+108+A.D.+3d+856&hl=en&as\\_sdt=6,33](http://scholar.google.com/scholar_case?case=5950850698927003424&q=Schulz+v.+State+Executive,+108+A.D.+3d+856&hl=en&as_sdt=6,33).

<sup>217</sup> 38 Misc. 3d 215, 952 N.Y.S.2d 703 (Sup. Ct. N.Y. Cnty. 2012).

<sup>218</sup> The Code provision made it a criminal offense for the lawful owner of a handgun "to store or otherwise place or leave such weapon in such a manner or under circumstances that it is out of [the owner's] immediate possession or control, without having rendered such weapon inoperable by employing a locking device." *Id.* at 231. Petitioner alleged that his wife had unlocked the gun cabinet and told the police officers of the guns' location.

<sup>219</sup> 38 Misc. 3d at 222-230, 952 N.Y.S.3d at 709-715. In an Article 78 proceeding, agency action will not be disturbed unless it violates a lawful procedure, was affected by an error of law, was arbitrary and capricious, or an abuse of discretion. N.Y. C.P.L.R. 7803(3).

<sup>220</sup> *Id.* at 38 Misc. 3d at 231, 952 N.Y.S.2d at 715.

*McDonald*, the New York City statute and regulation do not require a licensee to ‘keep any firearm *in his possession* unloaded and disassembled or bound by a trigger lock or similar device.’ ... Instead, the New York City requirement to render a ‘weapon inoperable by employing a safety locking device’ applies only when the weapon ‘is out of the control of [the owner’s] immediate possession or control.’ (Administrative Code § 10-312[a]; 38 RCNY 5-22[a][13].)

It is the circumstances of storing, placing, or leaving the weapon *out of the owner’s possession* or control, if anything, that may prevent a handgun from being ‘readily accessible in any emergency.’ ... To keep handguns unlocked, readily accessible, and operable for immediate use, licensed handgun owners in New York City may keep their handguns in their possession or control.<sup>221</sup>

The court also observed that the petitioner had not demonstrated that the use of a trigger lock prevented the handguns use for self-defense. Accordingly, the court found that the ordinances withstood petitioner’s Second Amendment challenge.

Also of note is *People v. Nivar*, 30 Misc. 3d 952, 915 N.Y.S.3d 801 (Sup. Ct. Bronx Cnty. 2011), which addressed a police response to a domestic violence call. The officers came to the defendant’s apartment and observed a handgun in a bedroom closet. The defendant, who was charged, *inter alia*, with criminal possession in the fourth degree (Penal Law § 265.01), moved to dismiss the weapons charge, advancing several constitutional challenges: (a) that the Penal Law was an unconstitutional prohibition on his right to possess firearms; (b) that under the strict scrutiny test, the state laws on gun ownership are overly broad; (c) that the state’s gun licensing scheme is arbitrary and capricious; and (d) that the licensing fees effectively prevent indigent citizens from lawfully possessing firearms. The Bronx Supreme Court found that Penal Law §§ 265.01 and 400.00 operated together to allow a person to whom a permit has been issued to possess a pistol or a revolver in his dwelling, that in fact hundreds of applications had been filed and approved, and that accordingly the two sections were constitutional and did not conflict with

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<sup>221</sup> *Id.* at 231 (some citations omitted); *see also id.* at 716.

*Heller* insofar as they did not effect a “complete ban on the possession of handguns in the home.”<sup>222</sup> As to the challenge that the licensing scheme was arbitrary and capricious and under the complete control and discretion of the New York City Police Commissioner, the court dismissed the argument, noting that unsuccessful applicants have an administrative appeal available to them and if still unsatisfied can pursue an Article 78 proceeding in which one of the court’s responsibilities is to determine whether the denial of a license was arbitrary or capricious.<sup>223</sup> As to the claim that the licensing scheme is unconstitutional because all applicants, even the indigent, must pay for background checks, the court noted that the defendant was not arguing that the fees were unrelated to the cost of conducting the background check and dismissed the argument because the defendant did not argue that the fee had prevented him from applying for a license.<sup>224</sup> Finally, citing *Heller* for the proposition that the intermediate scrutiny was the appropriate standard of review for firearms regulation, the court held that the two Penal Code sections were substantially related to the important government interests of promoting public safety and protecting the community from crime perpetrated by those who have demonstrated lack of appropriate temperament or character.<sup>225</sup>

The upshot of the approximately twenty state court decisions since *Heller* is that the New York State and local firearm licensing schemes have withstood, and likely will withstand, Second Amendment challenges because they do not impose absolute bans on the possession of handguns and firearms, and the restrictions they do impose are likely to be deemed reasonably related to the state interest in public safety and protection of the community from irresponsible individuals.<sup>226</sup> The courts in New York seem to be striving to preserve the State’s legislative and regulatory

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<sup>222</sup> *Nivar*, 30 Misc. 3d at 958; *see also id.* 915 N.Y.S.2d at 806.

<sup>223</sup> *Id.* at 961; *see also id.* at 808.

<sup>224</sup> *Id.* at 961; *see also id.* at 808. So the issue of whether licensing fees might be the basis for a successful Second Amendment challenge to the licensing provisions has yet to be fully addressed.

<sup>225</sup> *Id.* at 961-962; *see also id.* at 808-809.

<sup>226</sup> The court decisions post-*McDonald* have observed that the *Heller* decision carved safe harbors out from its holding in support of Second Amendment rights, including prohibitions on the possession of firearms by criminals and laws prohibiting the carrying of firearms in sensitive places such as government buildings and schools, and finally, laws imposing conditions on the sale of firearms.

scheme for controlling the possession and use of firearms, including in cases involving the possession of weapons in the home, relying on the safe harbors noted in *Heller* and Justice Scalia’s dictum that “Like most rights, the right secured by the Second Amendment is not unlimited.”<sup>227</sup> The case law developing in New York suggests few avenues for successful Second Amendment challenges. Only *Nivar* provides a hint of an avenue for a license applicant too poor to pay for the application fee and who, not otherwise falling within the safe harbors of the *Heller* decision, might therefore be effectively barred from obtaining a license.<sup>228</sup>

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<sup>227</sup> 554 U.S. at 626, 128 S. Ct. at 2816, 171 L. Ed. 2d at 678.

<sup>228</sup> “This case is simply unsuited to deciding the question of whether the application fees must be changed in light of *Heller* and *McDonald* because defendant does not claim that the fees prevented him from applying for a license.” *Nivar*, 30 Misc. 3d at 961.

**REPORT SECTION TWO:**

**THE HISTORY OF THE SECOND AMENDMENT**

**AND**

**ITS JUDICIAL INTERPRETATION BEFORE *HELLER***

*“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”*

## 1. Contours of the Current Debate Over the Second Amendment

Three centuries after James Madison and his Federalist colleagues penned the words of the Second Amendment, debate rages over its meaning and application. Commentators today variously identify in the language of the Second Amendment a collective right of the “people” to form well regulated state militias to put down slave, tax and other domestic insurrection, as well as to address external threats of invasion<sup>229</sup> —or something very different: an individual’s right to self-defense, with some proposing that the amendment was intended to arm the people to forcibly resist tyranny of their own government (the so-called “insurrectionist view” of the Second Amendment).<sup>230</sup> One writer has even suggested that “the right envisioned was not only the right to be armed, but to be armed at a level equal to the government.”<sup>231</sup> Given these widely varying treatments of the Second Amendment, it is hardly surprising that arguments about the constitutionality of gun laws often have the feel of ships passing in the night.<sup>232</sup>

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<sup>229</sup> See, e.g., Paul Finkelman, *A Well Regulated Militia: The Second Amendment in Historical Perspective*, 76 CHICAGO-KENT L. REV. 195 (2000) (hereinafter “*A Well Regulated Militia*”), available at <http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=3291&context=cklawreview>; Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHICAGO-KENT L. REV. 291 (2000) (Columbia Law School, Public Law, Working Paper No. 6, 2000), available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1092&context=facpub>; Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998) (hereinafter “Bogus”), available at [http://lawreview.law.ucdavis.edu/issues/31/2/Articles/DavisVol31No2\\_Bogus.pdf](http://lawreview.law.ucdavis.edu/issues/31/2/Articles/DavisVol31No2_Bogus.pdf); see also S. Cornell & N. DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 487-90 (2004) (hereinafter “*A Well Regulated Right*”), available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4021&context=flr>.

<sup>230</sup> See, e.g., *Primer on the Constitutional Right*, supra note 46; *The Commonplace Second Amendment*, supra note 73; David E. Vandercoy, *The History of The Second Amendment*, 28 VAL. L. REV. 1007 (1994) (hereinafter “*The History of the Second Amendment*”), available at <http://www.constitution.org/21l/2ndscho/89vand.pdf>; STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT, THE INDEPENDENT INSTITUTE* (1984) (hereinafter “*THAT EVERY MAN BE ARMED*”).

<sup>231</sup> *The History of the Second Amendment*, supra note 210, at 1008.

<sup>232</sup> The authors of *A Well Regulated Right*, supra, note 209, espouse a “holistic view” that the “right protected by the Second Amendment is neither a private right of individuals nor a collective right of states” that is best described as a civic right. “The right to bear arms is one exercised by citizens, not individuals (an important distinction in the Founding Era), who act together in a collective manner, for a distinctly public purpose: participation in a well regulated militia.” 73 FORDHAM L. REV. at 491. Under this view, “[c]itizens had both a

What follows is an abbreviated history of the Second Amendment that explores the heated debate over its meaning, although given the starkly different interpretations by scholars examining the same language and history we largely summarize the competing contentions.<sup>233</sup> But most Second Amendment scholars—whether supporting the collective rights or individual rights view—believe that the right to bear arms is not absolute and never has been.<sup>234</sup> No matter what right to

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right and a duty to arm themselves so that they might participate in a militia.” *Id.* at 493. “Each individual had a responsibility to help secure the collective rights of all by sacrificing some measure of their liberty to participate in a well regulated militia.” *Id.* at 494. “The right to bear arms was a perfect example of a civic right, a ‘right[] of the people at large,’ a right that citizens exercised when they acted together for a distinctly public purpose.” *Id.* at 497. The authors believe the text [of the Second Amendment] “fits a civic rights model better than either the individual or collective rights paradigms.” *Id.* at 491.

<sup>233</sup> The rhetoric employed is sometimes strident. One scholar supporting the individual right view of the Second Amendment refers to the “collective rights” theory as “not a theory” but “gibberish falsely garbed as a legal claim” that no “honest person—much less a scrupulous legal scholar” could “seriously propose”—it is “a paradigm of pseudointellectual gibberish.” Don B. Kates, *A Modern Historiography of The Second Amendment*, 56 *UCLA L. REV.* 1211, 1227 (2011), available at <http://www.uclalawreview.org/pdf/56-5-5.pdf>. Stephen Halbrook, author of *THAT EVERY MAN BE ARMED*, *supra* note 210, likewise is dismissive of those who interpret the Second Amendment to establish a collective right, calling them “prohibitionists.” Halbrook describes himself as “outside counsel for the National Rifle Association” who has argued three U.S. Supreme Court gun cases on behalf of the NRA (see [http://www.stephenhalbrook.com/Testimony\\_Halbrook\\_on\\_Sotomayor.pdf](http://www.stephenhalbrook.com/Testimony_Halbrook_on_Sotomayor.pdf); <http://www.stephenhalbrook.com/>) and has a long connection to the NRA with some of his Second Amendment work funded by the NRA. See *NRA Money*, *supra* note 46. Halbrook calls himself and others who read the Second Amendment “to mean what it says” (as he does) “constitutionalists.” See *THAT EVERY MAN BE ARMED*, *supra* note 210, at ix-x (preface). In contrast, the scholarly writings of two law professors at UCLA (Eugene Volokh and Adam Winkler) who interpret the Second Amendment quite differently from one another and occasionally engage in public debates with each other, recognize the text and context of the Second Amendment are reasonably susceptible to differing interpretations. See *The Commonplace Second Amendment*, *supra* note 73, at 812 (“For better or worse, interpreting legal texts is a mushy business.”); ADAM WINKLER, *GUNFIGHT, THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* (2011) at 4 (hereinafter “GUNFIGHT”) (“The Second Amendment is maddeningly ambiguous.”). Cornell Law Professor Michael Dorf, who reads the Second Amendment as guaranteeing the right of states to form citizen militias as part of a then-ongoing serious federal-state power struggle (Dorf, *supra* note 209) finds the language of the Second Amendment “puzzling” (*id.* at 294) and “ambiguous” (*id.* at 303), and an “odd” and “awkward” way to express an individual right to possess firearms for self-defense (*id.* at 303, 304), although he acknowledges the language does not preclude that reading.

<sup>234</sup> Adam Winkler, *Heller’s Catch-22*, 56 *UCLA L. REV.* 1551, 1575 (2009) (hereinafter “*Heller’s Catch-22*”), available at <http://www.uclalawreview.org/pdf/56-5-13.pdf> (“[t]here is a right, but it can and should be subject to regulation—and perhaps quite a bit of it”).



bear arms is fairly divined in the language of the Second Amendment, it is heavily qualified by the core right of government to ensure the protection of its citizens, including significant restrictions on public carry (concealed or open) of loaded firearms. Indeed, the Supreme Court’s decision in *Heller*<sup>235</sup> makes that point. We include the history of gun regulations in our historical treatment of the Second Amendment because it helps to demonstrate that the Second Amendment, like other constitutional rights, is subject to balancing against other rights and interests, and is not an inviolate “shall not be infringed” right as some seek to portray it.

The relevant history includes English statutes and common law that informed Founding Era laws in this country, along with colonial and confederal era laws enacted before or contemporaneous to the adoption of the Second Amendment in 1791. That history is discussed below in Section 2.1.2. Historical and legal developments after 1791, including enactment of the Fourteenth Amendment, are summarized in Section 2.14 below. History remains at the crux of the debate between gun rights advocates and those who seek to promote public safety through limitations on gun rights.

## **2. Historical Analysis of the Second Amendment: Pre-Enactment (Before 1791) Historical Record**

### **2.1 English Statutes and Common Law Regulating Right to Keep Arms**

The right of Englishmen to keep arms—and the corresponding right of the King or Parliament to regulate the use of those arms—are both long-standing and well documented.<sup>236</sup> English laws variously prohibited drawing of any weapon “in

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<sup>235</sup> *Heller*, 554 U.S. 570.

<sup>236</sup> See generally John Brabner-Smith, Firearm Regulation, 1 Law and Contemporary Problems 400 (1934), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1723&context=lcp>; Patrick J. Charles, *Scribble Scrabble, the Second Amendment, And Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NORTHWESTERN L. REV. 227, 228 (2011), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1153&context=nlr>, (“Since the Norman Conquest, restrictions began appearing on the carrying or using of ‘arms’ as a means to prevent public injury.”); *The History of the Second Amendment*, *supra* note 210, at 1009-1015 (detailing mustering obligations imposed on English citizens); *id.* at 1017 (describing use limitations including laws providing for confiscation of arms if used to

the King's hall" and likewise prohibited "little short handguns and little hagbuts" which were a "great peril and continual fear and danger of the King's loving subjects."<sup>237</sup> Other laws imposed militia service requirements, authorized confiscation of firearms for various offenses such as poaching game, banned firearms altogether for certain classes of people including religious and racial limitations, and prohibited public carry of dangerous weapons.<sup>238</sup> In each instance, the individual right to keep and bear arms was circumscribed.

The English Declaration of Rights in 1689 is often cited as a seminal document for the Bill of Rights in the U.S. Constitution and as a source of the right of citizens to keep arms to offset the forces of a tyranny.<sup>239</sup> But the Declaration of Rights, while restoring arms to Protestants who had been disarmed, reinforced the long-standing governmental right to regulate the use of those arms: "[T]hat the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law."<sup>240</sup> Moreover, commentators have linked the re-arming of Protestants "to the belief that an armed Protestant population would safeguard the realm against a Catholic restoration. It did not establish a general

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poach game); THAT EVERY MAN BE ARMED, *supra* note 210, at 37 ("The laws of the ancient English Kings proscribed violent acts with arms, from brandishing to murder, but recognized as rightful the mere possession and carrying of arms."); *id.* at 37-38 (recounting that "laws of Alfred (871-899) prohibited fighting or drawing a weapon in the king's hall, lending a weapon with evil intent to another for purpose of murder, the use by a sword polisher of another's weapon to commit a crime, and disturbing a public meeting by drawing a weapon.").

<sup>237</sup> Charles, *supra* note 216, at 228.

<sup>238</sup> GUNFIGHT, *supra* note 213, at 113-117; CRAIG R. WHITNEY, LIVING WITH GUNS, A LIBERAL'S CASE FOR THE SECOND AMENDMENT, PublicAffairs, (2012), at 45-47, 49, 545-55. One of the earliest statutes enacted for public safety, the Statute of Northampton 2 Edw. 3, c. 3 (1328), available at <http://press-pubs.uchicago.edu/founders/documents/amendIIs1.html>, prohibited "force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in present of the justices or other ministers, nor in no part elsewhere upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure."

<sup>239</sup> Nelson Lund, *The Past and Future of the Individual Right to Bear Arms*, 31 GEORGIA L. REV. 1, 4-10 (1996), available at <http://www.constitution.org/2ll/2ndschol/72lund.pdf>; *The History of the Second Amendment*, *supra* note 210, at 1017, 1031.

<sup>240</sup> *The History of the Second Amendment*, *supra* note 210, at 1017.

right of all persons to keep weapons, and especially firearms, for purposes of individual defense.”<sup>241</sup>

The venerable William Blackstone Commentaries identified both a public and private purpose to the Englishmen’s individual right to keep arms: “Blackstone described the right to keep arms as absolute or belonging to the individual, but ascribed both public and private purposes to the right. The public purpose was resistant to restrain the violence of oppression; the private was self-preservation. Blackstone described this right as necessary to secure the actual enjoyment of other rights which would otherwise be in vain if not protected only by the dead letter of the laws.”<sup>242</sup>

While many commentators view the English Bill of Rights as the predecessor to the Second Amendment,<sup>243</sup> some commentators see in the American Bill of Rights a distinctly American document with its own peculiar history. Commentators in this category point out that the Second Amendment does not adopt the English Declaration of Right’s “have arms for their defence” or the individual rights language used in some state bills of rights. (*See, infra* 1.2.2).

Before turning to the historical record as it relates to the drafting of the Second Amendment, we look first at gun regulations in existence in the colonies leading up the adoption of the constitutional amendments, which provide the essential historical context for recognizing any right. The Second Amendment codified a preexisting right and was not intended to create any new rights.<sup>244</sup> This

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<sup>241</sup> Brief of Amicus Curiae Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schworer et al, in Support of Petitioners, *District of Columbia v. Heller*, No. 07-290 (hereinafter “Historians Brief”) at 6, available at [http://www.scotusblog.com/wp-content/uploads/2008/01/07-290\\_amicus\\_historians.pdf](http://www.scotusblog.com/wp-content/uploads/2008/01/07-290_amicus_historians.pdf). The Historians Brief further points out that, “when a new Game Act was adopted in 1693, the House of Commons rejected (169-65) a proposal allowing ‘every Protestant to keep a musket in his House for his defence notwithstanding this or any other Act.’” and the member of Parliament “evidently did not read Article VII as establishing a broad gauged right all Protestants could claim.” *Id.* at 6-7.

<sup>242</sup> *The History of the Second Amendment*, *supra* note 210, at 1020.

<sup>243</sup> W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 122 (1829), available at <http://www.constitution.org/wr/rawle-00.htm> (cited by *Heller* majority); *The History of the Second Amendment*, *supra* note 210, at 1016-1017, 1033.

<sup>244</sup> *Heller*, 554 U.S. at 592, 603, 693 (dissent). Indeed the Bill of Rights was believed to apply only to actions of the federal government and not to those of the states. The application of

necessarily means that existing state regulation of firearms was left untouched by passage of the Second Amendment, and continued to qualify that existing right.

## 2.2 Colonial and Confederal Laws Regarding Firearms

“Gun safety regulation was commonplace in the American colonies from their earliest days.”<sup>245</sup> Threats of Indian attacks led colonists in Jamestown, Virginia, to declare “settlers’ muskets were part of the colony’s public arsenal.”<sup>246</sup> Both Massachusetts and Connecticut outlawed certain firearms that were ineffective in battle to ensure readiness of their citizens to defend against Indian attacks and other foreign or domestic threats.<sup>247</sup> As one commentator observed, “[t]he right to bear arms in the colonial era was not a libertarian license to do whatever a person wanted with a gun. When public safety demanded that gun owners do something, the government was recognized to have the authority to make them do it.”<sup>248</sup> Public safety concerns led Boston to require all loaded firearms be kept outside of buildings, given the hazards of gunpowder.<sup>249</sup> The record is silent as to any complaints that the regulations unduly burdened colonists’ rights to keep and bear arms.<sup>250</sup> James Madison proposed a Commonwealth of Virginia bill, designed to prevent the killing of deer, that penalized a person who “bears a gun out of his inclosed ground, unless whilst performing military duty”—drawing a clear line between “bearing a gun for personal use and bearing arms for the common defense.”<sup>251</sup> The right of self-defense—long recognized at common law—was always

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the Second Amendment to the states was not determined until the Supreme Court’s decision in *McDonald v. City of Chicago*, 561 U.S. 724 (2010); see, *supra*, Section 1.6, at 25.

<sup>245</sup> GUNFIGHT, *supra* note 213, at 113; *id.* at 117 (“The founding fathers had numerous gun control laws that responded to public safety needs of their era ... the basic idea that gun possession must be balanced with gun safety laws was one the founders endorsed.”). See generally WHITNEY, *supra* note 218, at 45-62 (describing Colonial era gun laws).

<sup>246</sup> *Id.* at 115.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 117.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 117.

<sup>251</sup> *A Well Regulated Right*, *supra* note 209, at 500.

subject to balancing.<sup>252</sup> As one commentator observed: “Neither the constitutional right to bear arms nor the common law right of self-defense trumped the right of the state to regulate firearms, including prohibitions on certain types of weapons. In this sense, firearms were subject to a level of prior restraint that would have been unthinkable for the free exercise of religion or freedom of the press.”<sup>253</sup>

### 2.3 Colonial / State Constitutions Enshrining Right to Bear Arms

As noted above, *supra* 1.2.2, state constitutions and declaration of rights, both before and after the Second Amendment was adopted, contained equivalent provisions respecting the “right to bear arms.” Sometimes the right was expressed in reference to “defence of the State” or “common defence” (with most commentators viewing that language as supporting a collective right or obligation) but other states used the phrase “in defence of themselves and the state” and “in defence of himself and the state” (which most commentators view as bespeaking an individual right as well as a collective right).<sup>254</sup> Some commentators view the latter formulation “as proof positive that the right to bear arms in the Founding Era was thought of as an individual right;”<sup>255</sup> other commentators disagree. For example, commentators reviewing such a provision in the Pennsylvania Declaration of Rights— “defence of themselves and the State”—concluded the text and structure “support a civic, military reading of the right to bear arms, not an individual right for personal protection.”<sup>256</sup>

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<sup>252</sup> *Id.* at 500-502; *id.* at 505 (“If one simply looks at the gun laws adopted in the Founding Era and early Republic, the evidence for robust regulation is extensive.”); *id.* at 506 (detailing 18th century statutes regulating the use of firearms); at 508-510 (describing militia laws that imposed obligations to keep muskets and turn out for regular musters); *id.* at 510-512 (Boston law regulating safe storage of gunpowder). See GUNFIGHT, *supra* note 213, at 117.

<sup>253</sup> *A Well Regulated Right*, *supra* note 209, at 515.

<sup>254</sup> *Id.* at 494-500.

<sup>255</sup> David E. Young, *The American Revolutionary Era Origin of the Second Amendment’s Clauses*, JOURNAL ON FIREARMS & PUBLIC POLICY, Volume 23 (2011), available at <http://www.secondamendmentinfo.com/Journal/index.html>.

<sup>256</sup> Historians Brief, *supra* note 221, at 12 (the phrase “for the defence of themselves” referred to “not a personal right of self-defense but to the community’s capacity to protect itself against threats raised by Native Americans or the British Army”). The Historians Brief reviewed all of the first American bills of rights and concluded: “None of the modest variations among formulae used by different states suggest that the right to bear arms vested in individual citizens for private purposes.” *Id.* at 11.

Even if one were to conclude that the contemporaneous use of the phrase “defence of themselves” or “defence of himself” in state constitutions enshrined an individual right to self-defense in those states which used that specific phraseology, the Second Amendment does not employ any similar language. Commentators who support the collective rights perspective observe that “explicit references to the private ownership of firearms were few and scattered” in convention debates and writings, and forcefully argue that any number of clear, express statements of support for an individual right to keep and bear arms were available to the drafters of the Second Amendment, including “Congress shall never disarm any Citizen” or “Congress shall never prevent the people of the United States, who are peaceable citizens, from keeping their own arms”<sup>257</sup> or “No freeman shall ever be debarred the use of arms within his own lands or tenements”—the latter formulation proposed by Thomas Jefferson for the Virginia Declaration of Rights some years earlier.<sup>258</sup> No such language was included in, or even proposed for, the Second Amendment.

Various commentators reason that the drafters of the Second Amendment did not use any such language respecting an individual right of self-defense because there was no need to protect that right in the federal constitution.<sup>259</sup> The right of self-defense was long recognized at common law, perhaps enshrined under state bills of right, and was not at risk of being trampled upon.<sup>260</sup> Rather, “Americans

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<sup>257</sup> *A Well Regulated Militia*, *supra* note 209, at 202-203. Historians Brief *supra* note 221, at 22. The Historians also point out that Parliament in 1693 considered a proposal to allow “every Protestant to keep a musket in his House for his defence notwithstanding this or any other Act.” Historians Brief at 7. The right to keep a musket at home for self-defense can be easily and economically expressed in a few words.

<sup>258</sup> *Heller*, (Stevens, J, dissenting) at 24. “With all of these sources upon which to draw, it is strikingly significant that Madison’s first draft omitted any mention of nonmilitary use or possession of weapons.” *Id.* at 25. Madison “considered and rejected formulations that would have unambiguously protected civilian uses of firearms.” *Id.*

<sup>259</sup> See Historians Brief, *supra* note 221, at 2-4, 13, 22-24; *A Well Regulated Militia*, *supra* note 209, at 196, 202-203.

<sup>260</sup> See Historians Brief, *supra* note 221, at 2-4, 13, 22-24; *A Well Regulated Militia*, *supra* note 209, at 196, 202-03. The Historians Brief quotes comments by Noah Webster ridiculing the idea of enshrining under the Constitution a well-understood right at common law: Why not say “[t]hat Congress shall never restrain any inhabitant of America from eating and drinking, at seasonable times, or prevent his lying on his left side, in a long winter’s night ...” Historians Brief, *supra* note 221, at 24. Even so, some advocates argue that there is a constitutionally protected right to hunt. See Stephen Halbrook, *The Constitutional Right to Hunt: New Recognition of an Old Liberty in Virginia*, 19 WILLIAM & MARY BILL OF RIGHTS

drafted their constitutional protections for the right to bear arms in response to their fear that government might disarm the militia, not restrict the common law right of self-defense.”<sup>261</sup> In that circumstance, there was no need to elevate that right of self-defense to a federally protected right under the U.S. Constitution.

But invoking the broad recognition of the individual right to bear arms in state constitutions, some conclude (as did the majority in *Heller*) that the Second Amendment necessarily embodies an analogous right or the amendment would become an “odd outlier.”<sup>262</sup> One commentator further argued with some force that “a true collective right [to form citizen militias] ... could only be protected by guaranteeing the individual right [to keep and bear arms].”<sup>263</sup> Moreover, one commentator favoring the individual right view has argued that Anti-Federalists would have vigorously and publicly protested “had anyone hinted that the right applied only to the much feared select militia.”<sup>264</sup> This commentator seeks to explain

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JOURNAL 197 (2010), available at

<http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1561&context=wmborj>.

Halbrook states “that the right to have weapons for nonpolitical purposes, such as self-protection or hunting—but never for aggression— appeared so obviously to the heritage of a ‘free people’ as never to be questioned.” *THAT EVERY MAN BE ARMED*, *supra*, note 210, at 69. While Halbrook correctly points out the long-standing *common law* rights to possess and use weapons, that well-established legal protection for those rights is viewed by other commentators as why the Framers did not enshrine them as a constitutional rights—there was no need to do so.

<sup>261</sup> *A Well Regulated Right*, *supra* note 209, at 499.

<sup>262</sup> *Heller*, 554 U.S. at 603.

<sup>263</sup> *The History of the Second Amendment*, *supra* note 210, at 1019. See WHITNEY, *supra* note 218, at 77 (asking rhetorically, “how could ‘the people’ bears arms for the common defense if individuals had no personal right to have arms for their own purposes?”); *id.* at 95 (“And the framers knew the militias would be useless to either the federal or the state governments unless the citizens who served in them had the right to have arms in their homes and knew how to use them.”).

<sup>264</sup> *THAT EVERY MAN BE ARMED*, *supra* note 210, at 80. Halbrook’s criticism here is misguided because the question is not whether the Second Amendment protects a “select militia” (i.e., one made up of elite troops under the control of the federal government) but whether the Framers intended, when protecting the right of states to keep citizen militias and the attendant right of citizens to keep and bear arms for that purpose, to also protect the common law individual right to own a gun and use it for self-defense and hunting. While Halbrook, Kates and some other commentators think the answer to that question is obvious, the absence of language concerning an individual right in the Second Amendment and the paucity of contemporaneous statements from the Framers and Ratifiers about an individual right, leaves the historical record open for debate. And it seems unlikely that the historical record would be so bare if Congress had intended to impose a major limitation

the lack of an explicit textual guarantee of an individual right to bear arms on the ground that “those whose adopted the Bill of Rights” were not “willing to clutter it with detail.”<sup>265</sup>

#### **2.4 The Second Amendment As a Drafting Exercise: What Contemporaneous Records Show About the Evolution of the Text**

As noted above, Madison, the principal author of the Second Amendment, did not employ any of the conventional language of private rights or even the weaker private rights formulations found in some state bills. Some commentators, however, point out that the Senate deleted the phrase “common defence” from the final versions of the amendment, and suggest the change indicates a rejection of the collective right.<sup>266</sup> The congressional record does not indicate anything specific about that change. One commentator believes the deletion squares with a collective rights view of the Second Amendment:

In the absence of recorded debate, or even knowledge of who moved the amendment, two other explanations are more compelling. One is that the phrase was superfluous, redundant of the militia’s manifest purpose. Second, and more important, the adoption of such a qualification could conflict with the Militia Clauses of Article I, implying that other authorized uses of the militia, such as the suppression of insurrections, had become constitutionally suspect. Federalists intent on preserving the authority of Congress over the use of the militia would have seen the amendment as a problematic limiting qualification.<sup>267</sup>

One aspect of the drafting history that supports the collective rights view—and overlooked by many supporting the individual rights view—is the fact that the

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on federal authority by elevating a long-held common law property right regarding gun possession to a new constitutionally-protected status, a matter previously left to the states. Likewise, “[n]othing in the ratification debates of 1787-1788 . . . indicated that the exercise of [the right to keep and bear arms] required limiting the customary police powers of state and local government.” Historians Brief, *supra* note 221, at 3. The popular right to keep and bears arms remained where it was: a strongly-held value that was well protected by the common law. *Id.* at 4, 24.

<sup>265</sup> THAT EVERY MAN BE ARMED, *supra* note 210 at 84.

<sup>266</sup> Lund, *supra* note 219 at 35; See *The History of the Second Amendment*, *supra* note 210, at 1032-1033.

<sup>267</sup> Historians Brief, *supra* note 221, at 30.



House of Representatives put forth a version of the amendment that recognized conscientious objector status. The draft, as amended, read as follows:

A well-regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.<sup>268</sup>

This draft appears to link conscientious objector status to militia service in keeping with modern precepts about religious objections to military service. Reading the proposed amendment as relating to militia service is supported by two related proposed amendments from North Carolina and Virginia that also dealt with religiously scrupulous persons: “That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead.”<sup>269</sup> The militia connection is explicit in the case of the objector who is permitted to pay someone else to take his place in the militia.<sup>270</sup>

The congressional record contains substantial statements on the floor regarding the conscientious objector exception, which appears to have been removed because they raised a number of problems regarding the readiness and reliability of citizen militias that were that were better left to the states.<sup>271</sup>

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<sup>268</sup> *A Well Regulated Militia*, *supra* note 209, at 212. The *Heller* majority acknowledged that “[c]ertainly their second use of the phrase (“bear arms in his stead”) refers, by reason of context, to compulsory bearing of arms for military duty. But their first use of the [scrupulous] phrase (“any person religiously scrupulous of bearing arms”) assuredly did not refer to people whose God allowed them to bear arms for defense of themselves but not for defense of their country.” 554 U.S. at 590 n.13.

<sup>269</sup> *A Well Regulated Militia*, *supra* note 209, at 212-13.

<sup>270</sup> *Id.* One commentator who supports the individual rights view acknowledges the conscientious objector status refers to an objection to militia service and that the Federalists objected to it as undermining an effective fighting force (THAT EVERY MAN BE ARMED, *supra*, note 210, at 78-79) but argues that Samuel Adams submitted a proposal, without any reference to the militia, that “Congress could not disarm any peaceable citizen.” *Id.* at 79. It is not clear how the Adams proposal does anything to the Second Amendment analysis, given that Adams’ language was not included. Moreover, according to another commentator, while Adams “recognized ... that citizens could use arms ‘at individual discretion’ in ‘private self-defense’... he mainly saw the right to have firearms in connection to the civic duty of militia service.” WHITNEY, *supra* note 218 at 74.

<sup>271</sup> THAT EVERY MAN BE ARMED, *supra* note 210 at 76-79.

The majority and dissenting opinions in *Heller* treated this evidence very differently.<sup>272</sup>

After the House modification, the Second Amendment's text also stated that the militia is "composed of the body of the people." Some commentators contend that Anti-Federalists intended to insulate state militias from federal control.<sup>273</sup> They believe the language further demonstrates the collective right of the people to form citizen militias free of federal control, as opposed to an individual right of individual citizens to keep or carry arms for self-defense.<sup>274</sup> The Senate eliminated the "composed of the body of the people" phrase.<sup>275</sup> Some commentators believe the deletion of that language shows the Senate rejected the collective rights view.<sup>276</sup> Other commentators see the deletion as a reaction of the Federalist majority to a potential dilution of the federal government's shared involvement in state militias as permitted under Article I, Section 8.<sup>277</sup> They conclude that the congressional record shows the drafters were concerned with the federal-state allocation of power with respect to citizen militias, and framed the discussion about the right to bear arms expressly in relation to militia service.<sup>278</sup>

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<sup>272</sup> Justice Stevens placed heavy emphasis on this language. 554 U.S. at 655-656; 660-661. In contrast, the majority acknowledged that two related conscientious objector provisions from North Carolina and Virginia were necessarily limited to militia service but concluded the Second Amendment language was different, and was broad enough to cover pacifists, such as Quakers, who did not want to pick up a gun for any reason, whether or not related to militia duty. 554 U.S. at 590 n 12.

<sup>273</sup> *A Well Regulated Militia*, *supra* note 209 at 199-202; Historians Brief, *supra* note 221 at 17-20.

<sup>274</sup> *Id.*

<sup>275</sup> Historians Brief, *supra* note 221 at 28.

<sup>276</sup> *The History of the Second Amendment*, *supra* note 210 at 1032-33; Historians Brief, *supra* note 221 at 29 (citing Joyce Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right*, HARVARD UNIVERSITY PRESS, (1996) at 161).

<sup>277</sup> Historians Brief, *supra* note 221, at 28-29. "These Federalists shared Washington's and Hamilton's view that the defense needs of the nation required a militia system not constitutionally yoked to the impracticable idea of keeping 'the body of the people' trained in arms." *Id.* at 29.

<sup>278</sup> *Id.* at 14-22. "The central question was ... whether Congress would make the militia completely its creature, depriving the states of any residual authority over its use or even existence, and leaving it dependent on federal largesse for its arms." *Id.* at 20.

Commentators who support the individual right view point to the following statement by James Madison in *The Federalist* No. 48 as indicating Madison's recognition of the individual American's right to keep and bear arms:

Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone they would not be able to shake off their yokes.<sup>279</sup>

One "individual rights" scholar contends that both Federalists and Anti-Federalists agreed that the "federal government should not have any authority at all to disarm the citizenry."<sup>280</sup> But even if that is true as a matter of historical fact, the right to keep and bear arms can be articulated narrowly to mean keeping arms in the home for self-defense but permitting use outside the home only when serving in the militia<sup>281</sup>—and even that right protects only the right against federal regulation. As one commentator concluded:

Neither the constitutional right to bear arms nor the common law right to self-defense trumped the right of the state to regulate firearms, including prohibitions on certain types of weapons. In this sense, firearms were subject to a

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<sup>279</sup> *Primer on the Constitutional Right*, *supra* note 46, at 10. The Historians Brief contends this reading of Madison's statement is unsound textually and contextually and points out Madison did not include the right to bear arms among those right deemed "most valuable" and proposed to insert in Article 1 Section 10. *Historians Brief*, *supra* note 221, at 26-27. Halbrook's reliance on the statement by Patrick Henry, "that every man be armed" (even using it as the title of his pro-individual right book) is misplaced. That line is taken out of context in what is otherwise a discourse about the need for states to control and arm their own militias. See *Patrick Henry, The Militia, and the Right to Keep and Bear Arms*, available at <http://mikeb302000.blogspot.com/2012/02/henry-mayer-patrick-henry-scholar.html> (quoting Patrick Henry's "That every man be armed" speech found at *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (3 Elliot's Debates 384-7), Virginia, Saturday, June 14, 1788 (pages 386-7).

<sup>280</sup> *Primer on the Constitutional Right*, *supra* note 46 at 10.

<sup>281</sup> *A Well Regulated Right*, *supra* note 209, at 615. That distinction was drawn by Madison in his draft Virginia law making unlawful use of a musket outside the home except for militia service. See *GUNFIGHT*, *supra* note 213, at 110.

level of prior restraint that would have been unthinkable for the free exercise of religion or freedom of the press.<sup>282</sup>

## 2.5 The Second Amendment in the Context of The Times

With so little legislative history, scholars look to the bigger picture of what evils motivated the adoption of the Second Amendment. One camp emphasizes English history with respect to the disarming of Protestants, while the other camp places substantial weight on the domestic unrest occurring in America at the time of the Second Amendment's adoption.

One commentator argues that in English history “the collective organization intended to protect all subjects’ liberty, the militia, became an instrument of governmental tyranny.”<sup>283</sup>

He further states:

The collective rights of all subjects could not be guaranteed if the government had the power to vest enforcement in one collective organization because the government controlled the organization. Accordingly, the government’s power to appoint the officers of the militia and select its membership meant that the militia could become an instrument of the government, not the people. Thus, the people’s collective rights were enforceable only if the power of enforcement, force of arms, was universally dispersed.<sup>284</sup>

According to this commentator, “a true collective right, however, could only be protected by guaranteeing the individual right.”<sup>285</sup>

Other commentators reject this view of Second Amendment because the common law right of self-defense already was protected under common law and possibly enshrined in certain state constitutions. They reason that ardent Federalists like Madison had no interest in incorporating an individual right of self-defense into the Second Amendment.<sup>286</sup> The Federalists did not believe any amendments were necessary and agreed to pursue amendments at the request of some moderate Anti-Federalists to thwart more extreme Anti-Federalist who

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<sup>282</sup> *A Well Regulated Right*, *supra* note 209, at 615.

<sup>283</sup> *The History of the Second Amendment*, *supra* note 210, at 1019.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Historians Brief*, *supra* note 221, at 3-4.

sought to re-allocate rights to the states and thereby weaken the central government.<sup>287</sup> Federalists in Congress, who held a strong majority, believed sufficient structural barriers were in place to prevent the federal army from becoming an oppressive force.<sup>288</sup> The Constitution provided for shared federal-state responsibilities to create and train state militias. While the federal government specified the number of militia men needed and officer-to-troop ratios, issued weapons and specified exercise, the states selected the officers and conducted the training.<sup>289</sup> Moreover Madison believed the limitations on federal military power found in Article I Section 8 (restricting Congressional funding of the national army to two years and placing it under civilian control) adequately guarded against the emergence of a tyrannical central government. Commentators argue that Madison's role in authoring the amendments was to protect the federal interests as framed under the Constitution and to not concede authority to the states, and that he and his fellow Federalists in Congress had no reason, thought, or interest in decentralizing power to individual musket-bearing citizens.<sup>290</sup> Such a libertarian concept was anathema to Federalists who were protective of the nascent national government and its long-term security in the face of Indian attacks, slave rebellions and civil unrest relating to taxation and other unpopular policies.<sup>291</sup>

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<sup>287</sup> *Id.* at 3-4, 29.

<sup>288</sup> *Id.* at 3-4, 11-24, 29. In the inaugural Senate, Federalists outnumbered Anti-Federalists 20 to 2. *Id.* at 29.

<sup>289</sup> See *The History of the Second Amendment*, *supra* note 210, at 1020-1023 (“The States were to be in control of the militia by reason of the power to appoint officers and provide for the actual training. The national government would be in control of the militia only when the militia was called out for national service and, even then, would have to rely on the State appointed officers to execute its orders.”). In this way the country could avoid a standing army yet not be defenseless.

<sup>290</sup> *A Well Regulated Militia*, *supra* note 209, at 203-205.

<sup>291</sup> *Id.* at 203, 205-209. Violent Indian encounters were common, sometimes fomented by British forces. See Richard W. Steward, ed., *American Military History, Volume 1: The United States Army and the Forging of a Nation, 1775-1917* (2<sup>nd</sup> Edition, 2009) at 116-120 (noting substantial security threat to nascent federal government from violent Indian encounters), available at [http://www.history.army.mil/html/books/030/30-21/CMH\\_Pub\\_30-21.pdf](http://www.history.army.mil/html/books/030/30-21/CMH_Pub_30-21.pdf). During the years of the Confederation, Indians had killed or captured over 1,500 settlers in the Kentucky Territory alone, and the new national government faced Indians fighting “settlers all along the frontier.” *Id.* at 116. But other commentators disagree saying the libertarian mindset was prevalent among Federalists. See THAT EVERY MAN BE ARMED, *supra* note 210, at 8-9.

The internal threats to the newly-created national government and nation were not academic. Shays' Rebellion, a serious domestic uprising, occurred in Massachusetts shortly before the Constitutional Convention in Philadelphia, which was held in the summer of 1787.<sup>292</sup> That uprising exposed the country's weakness to armed conflict whether internal or foreign in origin.

### 2.5.1 Shays' Rebellion

Many treatments of the Second Amendment forget that Shays' Rebellion had occurred in New England starting in the summer of 1786 and ending in April 1787, just months before the Philadelphia Convention. Some historians believe the convention was prompted by concerns about Shays' Rebellion.<sup>293</sup> The record shows the uprising was on the minds of convention delegates who voiced concern about the Nation's vulnerability to domestic insurrections, slave rebellions, Indian attacks and foreign invasions, following the dispersal of the Colonial army at the conclusion of the Revolutionary War.<sup>294</sup> Without the Colonial Army or organized militias at the state level, security was lacking at the national, regional and local level.<sup>295</sup> Virginia Governor Edmund Randolph "commented on the difficulty of the crisis" facing the nation and spoke of "the necessity of preventing the fulfillment of the prophecies of the American downfall."<sup>296</sup> Randolph noted the "rebellion" that had appeared in Massachusetts; and observed that the federal government "could not check the

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<sup>292</sup> ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789-1878* (1988) (hereinafter "MILITARY HISTORY") at 4-10, *available at* [http://www.history.army.mil/html/books/030/30-13-1/CMH\\_Pub\\_30-13-1.pdf](http://www.history.army.mil/html/books/030/30-13-1/CMH_Pub_30-13-1.pdf); *A Well Regulated Militia*, *supra* note 209, at 204, 207-208; Bogus, *supra* note 209, at 43.

<sup>293</sup> MILITARY HISTORY, *supra* note 272, at 7 ("the shock effect of the rebellion had much to do with the movement for a constitutional convention.").

<sup>294</sup> *Id.* at 7-15; *A Well Regulated Militia*, *supra* note 209 at 195-196 ("The delegates to the Philadelphia Convention met with this event fresh in their memories and with the knowledge that the government under the Articles of Confederation would probably be helpless in a similar situation.").

<sup>295</sup> MILITARY HISTORY, *supra* note 272, at 7-15.

<sup>296</sup> JONATHAN ELLIOT, *ELLIOT'S DEBATES, EDMUND RANDOLPH, OPENING SPEECH AT THE CONSTITUTIONAL CONVENTION: PHILADELPHIA, 1787*, (J.B. Lippincott: Philadelphia 1859), *available at* <http://declaringamerica.com/randolph-opening-speech-at-the-constitutional-convention-1787-summary/>.

quarrel between states, nor a rebellion in any, not having constitutional power, nor means, to interpose according to the exigency.”<sup>297</sup>

Shays’ Rebellion started as an armed insurrection by farmers in Western Massachusetts who revolted against the Commonwealth of Massachusetts.<sup>298</sup> These debt-ridden farmers, struck by the economic depression that followed the American Revolution, petitioned the Massachusetts senate to issue paper money and to halt foreclosure of mortgages on their property and their own imprisonment for debt as a result of high land taxes. Sentiments were particularly high against the commercial interests in the Eastern part of the state.<sup>299</sup> In September 1786, when the state senate failed to undertake reforms, armed insurgents led by Daniel Shays and others, descended on Springfield and forced the state court to adjourn to prevent entry of any further judgments of debt.<sup>300</sup> Shays returned to Springfield in December 1786 and interrupted court again, which prompted Gov. James Bowdoin to appoint Gen. Benjamin Lincoln to raise a force of 5,000 state militia men to put down the rebellion.<sup>301</sup> But militia men in the Western part of the state were unpredictable and tended to sympathize with the rebels.<sup>302</sup> In January 1787, while Gen. Bowdoin was still trying to muster a force of eastern militia men to put down the rebellion, Shays and 1500 rebels marched on the federal arsenal located in Springfield, demanding weapons.<sup>303</sup> This was one of the more important national arsenals, containing muskets, canon, ammunition and other military supplies.<sup>304</sup> The arsenal was defended by nine hundred Hampshire County militia men who were able to repel the rebels with canon fire. The rebels lost several men, and dispersed.<sup>305</sup> General Lincoln’s troops later tracked down the rebel forces and eventually routed them,

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<sup>297</sup> *Id.*

<sup>298</sup> MILITARY HISTORY, *supra* note 272, at 4-7.

<sup>299</sup> *Id.* at 4-5.

<sup>300</sup> *Id.* at 4.

<sup>301</sup> *Id.* at 5

<sup>302</sup> *Id.* at 6.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 5.

<sup>305</sup> *Id.* at 6.

with some rebels finding sanctuary in adjacent states.<sup>306</sup> The military campaign against the rebels extended into April 1787.<sup>307</sup> Throughout the uprising, “the Confederation government remained powerless to aid” the military effort undertaken by Massachusetts.<sup>308</sup>

Shays’ Rebellion “profoundly influenced the Federalist movement.”<sup>309</sup> As stated by the amici historians in *Heller*:

Under the Articles of Confederation, Congress lacked authority to lend military assistance to the Massachusetts government as it sought to suppress the uprising. These two clauses—the Second Amendment and the Republican Guarantee Clause of Article IV—were the Framers’ direct answer to the deficit of authority that the Massachusetts rebellion exposed.<sup>310</sup>

The federal government’s demonstrated impotence in this crisis influenced not only Massachusetts’s ratification of the U.S. Constitution<sup>311</sup> but also delegates attending the Philadelphia Convention as noted above.<sup>312</sup>

### 2.5.2 Slave Rebellions

Violent slave uprisings were an ever present concern for Southerners—including Virginian James Madison. Dramatic outbreaks of violence were kept in check only by the exertion of force in the form of slave patrols—armed groups of

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<sup>306</sup> *Id.* at 6. The course of the rebellion might have been very different had the attack on the federal arsenal been successful. *Id.* at 5.

<sup>307</sup> *Id.* at 6.

<sup>308</sup> *Id.*

<sup>309</sup> Historians Brief, *supra* note 221, at 32-33.

<sup>310</sup> *Id.* at 32-33. The Republican Guarantee Clause empowers “the national government ‘on Application’ by a state, to intervene within it ‘against domestic Violence.’” *Id.* at 32. “The clear inspiration for this provision was Shays’s Rebellion in Massachusetts, which occurred only months before the Federal Convention met.” *Id.* at 32-33. “The need to provide the federal government with the power to deal with similar eruptions in the future acted as an effective counterbalance to the fears of the use of federal military force in domestic emergencies.” MILITARY HISTORY, *supra* note 272, at 7.

<sup>311</sup> See G. R. MINOT, HISTORY OF THE INSURRECTIONS IN MASSACHUSETTS IN 1786 (1788, repr. 1971); R. J. TAYLOR, WESTERN MASSACHUSETTS IN THE REVOLUTION (1954, repr. 1967); M. L. STARKEY, A LITTLE REBELLION (1955); D. P. SZATMARY, SHAYS’ REBELLION (1980).

<sup>312</sup> *A Well Regulated Militia*, *supra* note 209 at 203-204; MILITARY HISTORY, *supra* note 272 at 7.



white citizens functioning as a racial militia.<sup>313</sup> For Virginians, the slave patrols controlled 44% of the state's population.<sup>314</sup> The Constitutional Conventions made Southern states nervous as Federalists sought to substantially strengthen the central government and Northerners expressed growing dismay at the practice of slavery.<sup>315</sup> Delegates from Southern states feared the changing national structure could force an end to slavery, especially since the ratification of the Constitution required only nine out of thirteen state to become effective.<sup>316</sup> According to one scholar,

The Second Amendment was not enacted to provide a check on government tyranny; rather, it was written to assure the Southern states that Congress would not undermine the slave system by using its newly acquired constitutional authority over the militia to disarm the state militia and thereby destroy the South's principal instrument of slave control. In effect, the Second Amendment supplemented the slavery compromise made at the Constitutional Convention in Philadelphia and obliquely codified in other constitutional provisions.<sup>317</sup>

Academic treatments that adopt the insurrectionist / anti-tyranny view of the Second Amendment typically do not address the evidence of domestic insurrections occurring close in time to the Constitutional Conventions and the stated fears that underlay expressions of support for a well-regulated militia to protect against such unrest. The delegates' concerns in 1787 proved prescient as the Whiskey Rebellion erupted four years later. Tax protests in Pennsylvania turned violent and were not quelled until 1794 when President George Washington led 13,000 militia, provided by four neighboring states, into the rebel stronghold in Pennsylvania.<sup>318</sup>

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<sup>313</sup> Bogus, *supra* note 209 at 337. ("The militia remained the principal means of protecting the social order and preserving white control over an enormous black population.").

<sup>314</sup> *Id.* at 332.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 328-34.

<sup>317</sup> *Id.* at 321.

<sup>318</sup> See generally MILITARY HISTORY, *supra* note 272, at 28-42 (Origins and Outbreak of the Whiskey Rebellion) and at 43-68 (The Whiskey Rebellion: Military Expedition).

## 2.6 Contemporaneous (1786) Musings About the Limited Nature of the Constitutional Right Enshrined

A possible insight into how Madison and other Federalists may have viewed the Second Amendment comes from a public exchange between a member of Congress and an anonymous author of an editorial published in a Portland (Maine) newspaper in 1786. The editorial criticized the spreading practice of assemblages of men exploring political separation from Massachusetts—characterizing them as “mobs” not unlike those involved in Shays’ rebellion.<sup>319</sup> The Congressman objected to that characterization and in the course of the public debate had occasion to address the purpose and meaning of the Massachusetts Declaration of Rights’ provision relating to the right to keep and bear arms: “The people have a right to keep and to bear arms for the common defence.”<sup>320</sup> The Congressman explained that the right enshrined was for the public good, to support the common defense of the people of Massachusetts; and that the Commonwealth of Massachusetts could never deprive the people from participating in the “common defence.” But that protection did not by negative implication prohibit citizens from using arms for other lawful purposes, albeit not armed insurrection. The Congressman conceded that Massachusetts could pass laws restricting or prohibiting those “unprotected” uses of arms without running afoul of the Declaration of Rights, which protected citizens only when bearing arms for the common defense.<sup>321</sup>

In this way the Second Amendment could be read to elevate to constitutional protection only the civic duty to muster for common defense—for the public good—while leaving undisturbed the pre-existing individual right of self-defense, which was otherwise protected by familiar precepts in the criminal law and perhaps specifically protected under state constitutional provisions.<sup>322</sup>

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<sup>319</sup> Charles, *supra* note 216, at 227-30.

<sup>320</sup> *Id.* at 232.

<sup>321</sup> *Id.* at 233-235.

<sup>322</sup> Such a distinction has been widely recognized by the courts construing the Second Amendment: “Most jurists recognized a fundamental distinction between guns kept in conjunction with a civic obligation to participate in a well regulated militia, and those kept for purely private purposes.” *A Well Regulated Right*, *supra* note 209, at 526.

### 3. An Aside: The Modern Constructions of the Second Amendment Based on Old Dictionaries and Rules of Grammar

Whether or not that specific interpretation of the Second Amendment is historically sound and in keeping with the Federalist framers' prevailing conceptions of civic duty, the meaning of the Second Amendment does not appear to be readily divined by resorting to a dictionary or by citing to rules of grammar. The grammatical analysis offered by Prof. Lund and ultimately adopted by a majority of the Supreme Court in *Heller*<sup>323</sup> imposes a clear meaning only by treating the first clause "A well regulated militia being necessary to the security of a free state" as surplusage. This reading was heavily criticized by the four dissenting judges in *Heller* who cited the work of historians, linguists and law professors who gave the opposite reading.<sup>324</sup> Even if an objective grammarian would agree to the parsing and labeling of the two clauses ("introductory" and "operative"), the analysis seems to be materially incomplete because it is divorced from the historical context in which the drafters actually proposed language that specifically linked the people's right to bear arms to militia service,<sup>325</sup> and the limited textual analysis divorces the "operative" clause from the history of public muster and militia duty that was an integral part of American life in the early years of the Republic.<sup>326</sup> A linguistic analysis of the Second Amendment would seem to lead the reader to conclude that the drafters—more likely than not—intended to define the right to bear arms in

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<sup>323</sup> See discussion of *Heller*, *supra*, at 19-21.

<sup>324</sup> See Brief for Professors of Linguistics and English ("Linguistics Brief") at 2-5 (Summary) et seq.; See also D. Baron, *Guns and Grammar: The Linguistics of the Second Amendment*, available at <http://www.english.illinois.edu/-people-/faculty/debaron/essays/guns.pdf>.

<sup>325</sup> See discussion of *Heller*, *supra*, at 21-22.

<sup>326</sup> See *A Well Regulated Right*, *supra* note 209, at 494-502. The first version of the Second Amendment arguably reflects a common understanding that the right to bear arms was limited to militia service. The fact that the conscientious objector language was dropped does not mean that link to public muster was dropped. Given the inclusion of the militia language in the first clause of the final version, the better view appears to be that the link remained. Reading "people" to mean individual people (as interpreted by Lund and adopted by the majority in *Heller*) rather than the collective citizenry, is not persuasive because the first version of the amendment used people in a collective public duty sense. Historians Brief, *supra* note 221, at 25-28. Again, the historical and linguistic treatment of the Second Amendment as advocated by Lund and adopted by the court in *Heller* is one way to read the Second Amendment, but the justifications offered for reading it that way are not the most persuasive.

relation to militia service given the long-standing practice of forming civilian militias by mustering able-bodied male citizens, the common (at the time) use of the phrase “bear Arms” to mean “serve as a soldier, do military service, fight or wage war,”<sup>327</sup> and the early drafts of the Second Amendment linking conscientious objector status to the bearing of arms in the context of militia service. This appears to be the better reading even with evidence that contemporary legal sources sometimes or even frequently used “bear arms” in nonmilitary contexts.<sup>328</sup> As one commentator put it, while the language of the Second Amendment does not preclude an individual rights reading, the language used in the amendment makes such a reading “awkward.”<sup>329</sup>

Opponents of the insurrectionist / anti-tyranny view of the Second Amendment criticize it as “paint[ing] a dismal picture” and find that perspective “animated by a profound mistrust of government.”<sup>330</sup> These commentators see the insurrectionist view of the Second Amendment as being directly at odds with: Federalist dogma regarding the virtues of a strong central government; the Federalist agenda that sought to limit the effect of the constitutional amendments including the Second Amendment; and the wishes of the Federalist majority in Congress.<sup>331</sup> The insurrectionist view appears to rest principally on Anti-Federalist writings that represent the dissenting view and the minority position in Congress.<sup>332</sup>

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<sup>327</sup> See *Heller* dissent, 554 U.S. at 644-62; Linguistics Brief, *supra* note 304, at 24.

<sup>328</sup> The majority in *Heller* cited a number of such legal sources to support reading “bear arms” in a nonmilitary way. 554 U.S. at 582-92.

<sup>329</sup> Dorf, *supra* note 209, at 304. The language of the Second Amendment is an “odd” way to express an individual right. Given the many other easy formulations to express an individual right, it is hard to imagine the drafters intended to enshrine that right in the constitution using this language.

<sup>330</sup> Bogus, *supra* note 209, at 313. See *id.* at 340-348 (record shows Founders did not share insurrectionist view). “The insurrectionist theory presumes what those at the time could not have fathomed: that national and state governments, both elected by the people, would collude to deny the people their fundamental rights.” Historians Brief, *supra* note 221, at 32.

<sup>331</sup> Historians Brief, *supra* note 221, at 3-4, 11-24. In the Senate, Federalists outnumbered Anti-Federalists 20-2. *Id.* at 29.

<sup>332</sup> Bogus, *supra* note 209, at 396 (“Jefferson’s insurrectionism is irrelevant to the Second Amendment for at least two reasons: Jefferson’s views on this subject were not shared by the Founders generally, and Jefferson was not involved in drafting, proposing, or ratifying the Second Amendment.”).

Moreover, as noted above, that dissenting view focuses almost exclusively on the distant offenses of the King of England in disarming Protestants in the 17th Century, rather than on the immediate threats to the Nation from slave rebellions and civil insurrections-including Shays' rebellion that likely prompted the holding of the Philadelphia Convention in 1787 and no doubt influenced the views of those in attendance.<sup>333</sup>

#### 4. Post-Enactment Developments (After 1791) That Bear On The Interpretation Of the Second Amendment

##### 4.1 Nineteenth Century Gun Regulations

Guns were part and parcel of the Wild West but so were gun control laws, reflecting the continued balancing of gun rights and public safety.<sup>334</sup>

Almost everyone carried firearms in the untamed wilderness, which was full of dangerous Natives, outlaws, and bears. In the frontier towns, however, where people lived and businesses operated, the law often forbade people from toting their guns around. Frontier towns handled guns the way a Boston restaurant today handles overcoats in winter New arrivals were required to turn in their guns to authorities in exchange of something like a metal token.<sup>335</sup>

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<sup>333</sup> See MILITARY HISTORY, *supra* note 272, at 7; Historians Brief, *supra* note 221, at 12-15. Correcting the impotency of the Confederation to act in the case of Shays' Rebellion, the second Congress passed two Acts in 1792 that provided for the organization of state militias. MILITARY HISTORY at 22-23. These militias could be called into service by the President to address foreign or domestic threats. *Id.* These organized state/federal militias were called into action in 1794 to put down the Whiskey Rebellion in Pennsylvania. See *id.* at 43-68. Subsequent federal legislation built upon the militia acts by creating the Home Guards, the precursor of today's state National Guard, in 1916. Those state defense forces were later permanently recognized under Title 32, Section 109, of the United States Code in 1956.

<sup>334</sup> GUNFIGHT, *supra* note 213 at 165.

<sup>335</sup> *Id.* at 165; *Heller*, 554 U.S. at 610 (noting that "[m]any early 19<sup>th</sup>-century state cases indicated that the Second Amendment right to bear arms was an individual right unconnected to militia service, though subject to certain restrictions."); *id.* at 612 ("No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose." (quoting *United States v. Sheldon*, in 5 Transactions of the Supreme Court of the Territory of Michigan 337, 346 (W. Blume ed. 1940)); *id.* at 626 ("the majority of 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.").

A visitor to Wichita Kansas in 1873 would have seen signs declaring: “LEAVE YOUR REVOLVER AT POLICE HEADQUARTERS AND GET A CHECK.”<sup>336</sup> Similarly, residents of Dodge City in 1879 were advised by a large billboard in the center of town: “THE CARRYING OF FIREARMS IS STRICTLY PROHIBITED.”<sup>337</sup>

#### **4.2 Nineteenth Century Jurisprudence – Mostly Upholding State Restrictions on Firearms**

The several States continued to enact gun laws in keeping with their long-recognized and exercised police power, including restrictions on public carry of firearms.<sup>338</sup> Judicial challenges to guns laws, whether premised under state laws (before enactment of the 14th Amendment) or under the Second Amendment (after the 14th Amendment made the Bill of Rights applicable to the states) were generally, although not uniformly, unsuccessful.<sup>339</sup>

The Kentucky Supreme Court was one of the few courts to declare a state law unconstitutional. The ordinance at issue prohibited carrying a sword concealed in a cane. In citing a provision in the Commonwealth’s constitution that states: “The right of the citizens to bear arms in defense of themselves and the state, shall not be questioned,” the court overturned the conviction and ruled the law unconstitutional and void.<sup>340</sup> The decision was criticized by the Kentucky legislature and was not widely followed. In contrast, the Georgia Supreme Court upheld time, place and manner restrictions, while the Tennessee Supreme Court upheld robust state gun regulations that included barring classes of weapons.<sup>341</sup> The recognition of the right of states to regulate guns pursuant to long-exercised police powers proved to be the more influential judicial view.<sup>342</sup>

But even though much state gun regulation remained on the books, “[t]here can be little doubt about the emergence of a more individualistic conception of arms

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<sup>336</sup> GUNFIGHT, *supra* note 213, at 165.

<sup>337</sup> *Id.* and photo of Dodge City, Kansas in 1879 (between pages 146 and 147).

<sup>338</sup> *Id.* at 157-173; *A Well Regulated Right*, *supra* note 209, at 512-516.

<sup>339</sup> *A Well Regulated Right*, *supra* note 209, at 516-517.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 517.

bearing over the course of the nineteenth century.”<sup>343</sup> One development that appears to have fueled individualistic treatment of the Second Amendment right to keep and bear arms was the passage of the Fourteenth Amendment and related litigation to enforce Second Amendment rights against the States.<sup>344</sup> The debates over the framing and ratification of the Fourteenth Amendment reflect confusing cross-currents in history in post-bellum America, with the right to bear arms construed in the Reconstruction South.<sup>345</sup> The Civil War brought about the destruction of state militias with confederate sympathizers, and in the Reconstruction South, new state militias arose manned by freed blacks.<sup>346</sup> In seditious opposition, numerous all-white paramilitary organizations were formed, including the Ku Klux Klan.<sup>347</sup> South Carolina sought to disarm the freed negroes who were serving in the state militia.<sup>348</sup> The guns confiscated by the state were not privately owned by the freed slaves but were issued to South Carolina blacks because they were members of the militia.<sup>349</sup> The federal government brought suit to restore the rights of the blacks to be armed, citing the Second Amendment made applicable to the states by the Fourteenth Amendment.<sup>350</sup> While some commentators see in this history evidence of the ratifiers’ intent to make the Second Amendment apply to states with a specific focus on individual rights,<sup>351</sup> others do not.<sup>352</sup> Indeed, restoring arms to disarmed

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<sup>343</sup> *Id.* at 518. See WHITNEY, *supra* note 218, at 105 (“After the turn of the [18th] century as they became more easily available, guns came to be seen less as adjuncts to civic duty than as means of individual empowerment and self-defense.”).

<sup>344</sup> See generally, *A Well Regulated Right*, *supra* note 209, at 517-525.

<sup>345</sup> *Id.* at 520-521.

<sup>346</sup> *Id.* at 522-523.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 524.

<sup>350</sup> *Id.* at 523-524.

<sup>351</sup> Akhil R. Amar, *The Bill of Rights: Creation and Reconstruction* 145-62 (1998) (cited in *A Well Regulated Right* at 503, 517-520). See *Dred Scott v. Sandford*, 60 U.S. 393 (1857), 19 How. 393, 1856 WL 8721 (U.S. Mo.), 15 L. Ed. 691 (observing that Second Amendment right to bear arms would apply to freed slaves should they be deemed citizens who enjoy “full rights of citizenship”; this would include the right “to keep and carry arms wherever they went.”).

<sup>352</sup> *A Well Regulated Right*, *supra* note 209, at 518-520.

individual blacks—returning the state-owned firearms to freed blacks so they could resume serving in state militias—seems fully consistent with a collective rights view of the Second Amendment. Moreover, it is not clear how a development with respect to enactment of the Fourteenth Amendment could alter the meaning of the Second Amendment. As one commentator concluded, the impact of the Fourteenth Amendment “was to force states to treat all citizens equally” and left unchanged the “notion of citizens keeping and bearing arms as part of their obligation to participate in a well regulated militia has had a long history, stretching back to the eighteenth century.”<sup>353</sup>

The Supreme Court of the United States had occasion to address the Second Amendment in *United States v. Cruikshank*,<sup>354</sup> The Court considered the appeal of three defendants convicted for their participation in a mass murder incident known as the Colfax Massacre. The state brought federal charges under the Enforcement Act of 1870 (also known as the Ku Klux Klan Act) against several members of the mob who killed more than 100 black individuals assembled at the Colfax Parish Courthouse.<sup>355</sup> The Act prohibited two or more people from conspiring to deprive anyone of their constitutional rights. Additional charges included violation of the Fourteenth Amendment, hindering the victims’ First Amendment right to freely assemble, and their Second Amendment right to keep and bear arms.<sup>356</sup>

The Court dismissed all federal charges finding that there were no viable state action claims asserted against the defendants.<sup>357</sup> The Fourteenth Amendment claims were deemed inapplicable because the amendment “add[ed] nothing to the rights of one citizen as against another.”<sup>358</sup> The Court similarly rejected the application of the Second Amendment noting that while the “Amendment declares that the right to bear arms shall not be infringed, . . .this . . . means no more than

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<sup>353</sup> *Id.* at 524.

<sup>354</sup> 92 U.S. 542 (1875), available at [http://scholar.google.com/scholar\\_case?case=9699370891451726349&hl=en&as\\_sdt=6&as\\_v\\_is=1&oi=scholar](http://scholar.google.com/scholar_case?case=9699370891451726349&hl=en&as_sdt=6&as_v_is=1&oi=scholar); See GUNFIGHT, *supra* note 213, at 142-145.

<sup>355</sup> GUNFIGHT, *supra* note 213, at 142-145.

<sup>356</sup> *Id.* at 548.

<sup>357</sup> *Id.* at 556-57.

<sup>358</sup> *Id.* at 554-55



that it shall not be infringed by Congress.”<sup>359</sup> The Court further ruled that the Second Amendment only restricted the powers of the national government and did not specifically grant private citizens the right to keep and bear arms.<sup>360</sup>

Subsequently, the Supreme Court reaffirmed in *Presser v. Illinois*<sup>361</sup> its earlier decision in *Cruikshank* (where it upheld the States’ authority to regulate the militia), finding that citizens had no right to create their own militias or to own weapons for semi-military purposes. The Court in *Presser* also commented on the dual role of state militias in providing for state and national security, including the duty of state militia to “respond to the call of the nation to enforce its laws, suppress insurrection, and repel invasion”<sup>362</sup> and the right of states to direct their militia within their borders to “disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine.”<sup>363</sup> The Court concluded that the Illinois Militia Act did not conflict with, but complemented, the right to muster under the Second Amendment. The Court noted, however, that “the States cannot . . . prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.”<sup>364</sup>

In *Miller v. Texas*,<sup>365</sup> Franklin Miller was convicted and sentenced to death for shooting and killing a police officer with an illegal handgun in violation of Texas law.<sup>366</sup> Miller sought to overturn his conviction asserting violation of his Second

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<sup>359</sup> *Id.* at 553.

<sup>360</sup> *Id.* at 556-57.

<sup>361</sup> 116 U.S. 252 (1886), available at [http://scholar.google.com/scholar\\_case?case=4596878248056996108&q=presser+v.+illinois&hl=en&as\\_sdt=40000006](http://scholar.google.com/scholar_case?case=4596878248056996108&q=presser+v.+illinois&hl=en&as_sdt=40000006).

<sup>362</sup> *Id.* at 261-262.

<sup>363</sup> *Id.* at 268.

<sup>364</sup> *Id.* at 265.

<sup>365</sup> 153 U.S. 535 (1894) (hereinafter “*Miller v. Texas*”), available at [http://scholar.google.com/scholar\\_case?case=7735014691628913926&q=Miller+v.+Texas&hl=en&as\\_sdt=40000006](http://scholar.google.com/scholar_case?case=7735014691628913926&q=Miller+v.+Texas&hl=en&as_sdt=40000006).

<sup>366</sup> For an interesting (and detailed) account of the fatal shooting, and what precipitated it, see David B. Kopel, *Miller versus Texas: Police Violence, Race Relations, and Gun-Toting in*

Amendment rights and that the Bill of Rights should be applied to state law. The Supreme Court again ruled that the Second Amendment did not apply to state law and that Miller had not been denied due process of law.<sup>367</sup> The Supreme Court also commented on the Second Amendment in *Robertson v. Baldwin*,<sup>368</sup> in dicta, rejecting a constitutional challenge to state laws regulating concealed arms, finding the laws did not infringe upon the right to keep and bear arms.

### 4.3 Early Twentieth Century Gun Laws and Judicial Rulings

The National Rifle Association (NRA) supported restrictive gun laws of the early twentieth century.<sup>369</sup> The NRA president at the time, Karl T. Frederick, was a prominent gun enthusiast and proponent of “reasonable, sensible and fair legislation” but not laws that would “restrict the ability of the law abiding citizens to defend themselves in his home.”<sup>370</sup> As Vice President of the U.S. Revolver Association, Frederick had helped to draft the Revolver Act in 1923.<sup>371</sup> That act sought to restrict access to handguns and was passed by Congress after pistols were used to assassinate President McKinley in Buffalo, New York in 1901 and shoot (but not kill) the mayor of New York City.<sup>372</sup>

In 1934 the United States Congress passed the National Firearms Act<sup>373</sup> as the first major federal effort to more broadly restrict possession of firearms. The Act was a direct response to the rise of gangster violence in general, and the Saint Valentine’s Day massacre in particular. The National Firearms Act sought to control firearms through a tax excise (\$200 for each gun sale), targeting fully-automatic weapons, short-barreled shotguns and rifles, pen and cane guns, and other firearms defined as “gangster weapons.”

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*Texas in the Nineteenth Century – and Today*, available at [http://www.stephenhalbrook.com/law\\_review\\_articles/miller\\_v\\_texas.htm](http://www.stephenhalbrook.com/law_review_articles/miller_v_texas.htm).

<sup>367</sup> *Miller v. Texas*, 153 U.S. at 539.

<sup>368</sup> 165 U.S. 275 (1897), available at [http://scholar.google.com/scholar\\_case?case=18282083162276349747&hl=en&as\\_sdt=40000006&scfhb=1](http://scholar.google.com/scholar_case?case=18282083162276349747&hl=en&as_sdt=40000006&scfhb=1).

<sup>369</sup> GUNFIGHT, *supra* note 213, at 210.

<sup>370</sup> *Id.* at 211.

<sup>371</sup> *Id.*

<sup>372</sup> *Id.* at 206-207.

<sup>373</sup> Title 26, United States Code, 26 U.S.C.A. 1132.

In 1938 Congress expanded federal oversight of firearms by enacting the Federal Firearms Act which required anyone selling or shipping firearms to be licensed through the U.S. Department of Commerce. The Federal Firearms License (FFL) stipulated that guns could not be sold to persons convicted of certain crimes and required sellers to log the names and addresses of anyone they sold guns to.

The Supreme Court in *United States v. Miller*<sup>374</sup>, addressed a Second Amendment challenge to the National Firearms Act. Jack Miller and Frank Layton were charged with unlawfully transporting in interstate commerce an unregistered double barrel [sawed-off] shotgun. The Court upheld the federal statute and rejected arguments that the Act abrogated the state's police power, noting that the argument was "plainly untenable." As the Court explained, "[i]n the absence of any evidence tending to show that [the] possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to any 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."<sup>375</sup> The Court found that the Act was not an unconstitutional invasion of the reserved powers of the States and not violative of the Second Amendment.

#### 4.4 Modern Era Legislation and Judicial Decisions Pre-*Heller*

Following the assassination of President Kennedy in 1963, Congress re-examined the adequacy of federal gun laws and ultimately enacted the Gun Control Act of 1968. That Act prohibited mail order sales of rifles and shotguns (the means by which Oswald had obtained the rifle to kill President Kennedy), increased license

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<sup>374</sup> 307 U.S. 174 (1939), available at [http://scholar.google.com/scholar\\_case?case=17128640835628801970&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=17128640835628801970&hl=en&as_sdt=6&as_vis=1&oi=scholar).

<sup>375</sup> The Supreme Court's decision in *Miller* is doctrinally ambiguous because it can be read to support an individual right to possess a firearm although not for self-defense—the constitutionally-protected right is to possess a limited class of firearm that are appropriate for citizen militia service. See Dorf, *supra* note 209, at 297. Or the court could have been imprecisely describing a collective rights view of the Second Amendment. *Id.* at 297-298. What the court did not do was use language explicitly acknowledging an individual right to possess firearms for self-defense in or outside the home.

requirements for sellers and broadened the list of persons prohibited from owning a firearm to include convicted felons, drug users and the mentally incompetent.

The attempted assassination of President Reagan—and mortal wounding of Press Secretary James Brady<sup>376</sup>—spawned additional federal gun legislation, culminating in the passage of the Brady Handgun Violence Protection Act and the Assault Weapons Ban (officially entitled the Violent Crime Control and Law Enforcement Act) in 1994. These two bills represent hallmark pieces of federal legislation regarding firearms. The Brady Act requires a five-day waiting period and background check for the sale of handguns, while also requiring a National Instant Criminal Background Check System to be created. The Assault Weapons Ban banned a number of rifles defined as “assault weapons,” including many semi-automatic, military-style rifles such as the AK-47 and SKS.

In light of the Supreme Court’s decision in *Miller*, state and federal circuit courts almost universally rejected Second Amendment challenges to federal and state gun laws, finding the right to be a collective right tied to militia service.<sup>377</sup> Starting in the 1960s, with funding from the NRA, Second Amendment scholarship began to appear challenging the status quo assessment of the Second Amendment.<sup>378</sup> This alternative view of the Second Amendment found traction in the Fifth Circuit’s 2001 decision in *U.S. v. Emerson*<sup>379</sup>, in which the court wrote “it appears clear that ‘the people,’ as used in the Constitution, including the Second Amendment, refers to

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<sup>376</sup> Brady died 23 years later on August 4, 2014; the cause of death was found to be a result of the gunshot wound. *Medical examiner rules James Brady’s death a homicide*, WASHINGTON POST, August 8, 2014, see [http://www.washingtonpost.com/local/crime/james-bradys-death-ruled-homicide-by-dc-medical-examiner/2014/08/08/686de224-1f41-11e4-82f9-2cd6fa8da5c4\\_story.html](http://www.washingtonpost.com/local/crime/james-bradys-death-ruled-homicide-by-dc-medical-examiner/2014/08/08/686de224-1f41-11e4-82f9-2cd6fa8da5c4_story.html).

<sup>377</sup> See *Heller*, 554 U.S. 638-39 (Stevens J., dissenting); Spitzer, *supra* note 67, at 60.

<sup>378</sup> See *NRA Money*, *supra* note 46. See *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 19, 21 U.S. Conn. (1972) (Douglas J., dissenting) (“A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment, which reads, ‘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...[t]he Second Amendment, ‘must be interpreted and applied’ with the view of maintaining a ‘militia.’”).

<sup>379</sup> 270 F.3d 203 (5th Cir. 2001), available at [http://scholar.google.com/scholar\\_case?case=14262752073118297274&q=U.S.+v.+Emerson&hl=en&as\\_sdt=40000006](http://scholar.google.com/scholar_case?case=14262752073118297274&q=U.S.+v.+Emerson&hl=en&as_sdt=40000006).

individual Americans.”<sup>380</sup> The Court went on to note that “[s]everal other Supreme Court opinions speak of the Second Amendment in a manner plainly indicating that the right which it secures to ‘the people’ is an individual or personal, not a collective or quasi-collective, right in the same sense that the rights secured to ‘the people’ in the First and Fourth Amendments, and the rights secured by the other provisions of the first eight amendments, are individual or personal, and not collective or quasi-collective, rights.”<sup>381</sup> After concluding that the Second Amendment protected individual rights to keep and bear arms, the Fifth Circuit rejected the plaintiff’s challenge to a state court order that had led to the confiscation of his gun based on a domestic violence charge.<sup>382</sup>

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<sup>380</sup> *Id.* at 229.

<sup>381</sup> *Id.* (citing to *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 2805, 120 L. Ed. 2d 674 (1992); *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S. Ct. 1932, 1937, 52 L. Ed. 2d 531 (1977); *Scott v. Sandford*, 60 U.S. (19 How.) 393, 417, 450-51, 15 L. Ed. 691, 705, 719 (1856), as well as Justice Black’s concurring opinion in *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 1456, 20 L. Ed. 2d 491 (1968)).

<sup>382</sup> *Id.* at 260-65.

**REPORT SECTION THREE**

**BEYOND THE LAW: MISSING GUN VIOLENCE DATA**

## 1. Introduction

Lawmakers and policy makers seeking to address gun violence in America face a dearth of publicly funded data on gun violence. The missing information materially impairs the ability of elected representatives to be responsive to this critical problem. As set out below, Congressional actions have removed gun research funding and imposed gag rules on federal agencies that collect the relevant data. The result is an unworkable situation where proposals abound to strengthen guns laws and to take other steps to reduce gun violence but these proposals are made without the benefit of large-scale studies to show what laws or intervention strategies are, or might be, effective.

## 2. Background: Congressional Actions That Block Gun Violence Research and Information Sharing

### 2.1 1996 Appropriations Act

Congress blocked research on gun violence in 1996 by stripping \$2.6 million from the budget for the Centers for Disease Control (“CDC”) - the amount used by CDC’s National Center for Injury Prevention and Control (NCIPC) to conduct gun violence research during the previous year. The specific legislation [PL 104-208, Omnibus Consolidated Appropriations Act, Center for Disease Control and Prevention, Disease Control, Research and Training] was an amendment to an omnibus spending bill. It was sponsored by Rep. Jay Dickey (Arkansas). The Dickey amendment provides in part: “That none of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used to advocate or promote gun control.” The Amendment did not specifically ban research on gun violence; however, the virtual elimination of funding that the CDC had previously invested for said research was now earmarked by Congress for other research. The result was that the CDC essentially withdrew from the field of firearms research.<sup>383</sup>

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<sup>383</sup> According to The New York Times, funds became available in 2002 to restart the National Violent Death Registry Systems apparently when the CDC expanded its data collection beyond gun violence. *Children and Guns: The Hidden Toll*, *supra* note 14 at 5. The System is operating only in 18 states. *Id.*

## 2.2 Tiahrt Amendments

Representative Todd Tiahrt (Kansas) authored various pieces of legislation, known as the Tiahrt Amendments, that seek to restrict the use of firearm trace data and other information gathered by the Bureau of Alcohol Tobacco and Firearms (“ATF”) and other federal agencies.<sup>384</sup> Prior to the imposition of these restrictions, ATF gathered and shared information with law enforcement, academics and policy makers that informed strategies for combating urban violence. For example, the City of Boston, in collaboration with the National Institute of Justice, in the late-1990’s “embarked on a series of innovative safety strategies focuses on violent youth and illicit gun markets.”<sup>385</sup> The Boston study reported that:

The researchers were fortunate in having access to a very rich gun data set from [ATF]. Every gun that had been used in a crime and which had come into police hands since 1991 had been traced and included in the ATF data set. Out of 1,550 records of guns from youth ages 21 and under, 809 were traceable to Federal firearms licensees, first retail purchases, or both. ATF analyzed the type, caliber, make, geographic origin and ‘time-to-crime’ age for each gun; the proportion of guns with obliterated serial numbers; the number of guns that had been used in substantive crimes versus those seized by police on possession charges; and adult versus youth gun patterns. In addition ATF determined that at least half of the guns came from very small and infrequent purchases by straw purchasers and these purchasers rarely received law enforcement attention.<sup>386</sup>

The type of data collection and sharing in the Boston study was limited by the Tiahrt Amendments which precluded the release of trace data and other information to the public and law enforcement agencies. However, in 2007 (effective for the 2008 Fiscal Year), Congress relaxed the Tiahrt Amendments as they related to disclosing and sharing trace data. As a result, the ATF may disclose certain

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<sup>384</sup> See *Access Denied, How the Gun Lobby Is Depriving Police, Policy Makers and The Public of The Data We Need to Prevent Gun Violence*, MAYORS AGAINST ILLEGAL GUNS, available at <http://everytown.org/documents/2014/10/access-denied.pdf> (hereinafter “Access Denied”) (surveying Tiahrt legislative history from 2003 through 2010).

<sup>385</sup> See *Promising Strategies to Reduce Gun Violence Report*, Profile No. 2, Boston Strategy to Prevent Youth Violence - Boston, MA, U.S. DEPARTMENT OF JUSTICE (February 1999), available at [http://www.cops.usdoj.gov/html/cd\\_rom/solution\\_gang\\_crime/pubs/PromisingStrategiestoReduceGunViolence.pdf](http://www.cops.usdoj.gov/html/cd_rom/solution_gang_crime/pubs/PromisingStrategiestoReduceGunViolence.pdf) at 26.

<sup>386</sup> *Id.* at 28.



statistical information to the public, and local law enforcement agencies may share more detailed information with each other. But even so, local police departments report being hamstrung by restrictions placed on gun trace data.<sup>387</sup> And according Access Denied, a 2013 report prepared by Mayors Against Illegal Guns,<sup>388</sup> serious gaps in data continue to exist:

Some of the questions we can't answer are startlingly simple. For example Americans rely almost entirely on background checks to keep guns out of dangerous hands. And yet, we do not know clearly how many buyers avoid these checks by purchasing them through private sales—though it likely approaches 50 percent. The federal research on this important topic was conducted more than two decades ago, before the internet fundamentally altered the market for firearms, legal and illegal alike.<sup>389</sup>

The Access Denied report points to the National Research Council's 2004 report entitled "Firearms and Violence: A Critical Review,"<sup>390</sup> and observes that the Council's "landmark assessment of the state of the knowledge in the field" (some 325 pages in length) identified serious shortcomings then existing in firearms research:

The inadequacy of data on gun ownership and use is among the most critical barriers to a better understanding of gun violence [...] If policy makers are to have a solid empirical and research base for decisions about

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<sup>387</sup> See *ATF Gun-Tracking Data a Mystery: Gun Debate Lacks Accurate Data on Origin of Guns Used in Crime*, BALTIMORE SUN, Feb. 5, 2013, available at [http://articles.baltimoresun.com/2013-02-05/news/bs-md-sun-investigates-guns-20130204\\_1\\_tiahrt-amendment-gun-trace-data-gun-research](http://articles.baltimoresun.com/2013-02-05/news/bs-md-sun-investigates-guns-20130204_1_tiahrt-amendment-gun-trace-data-gun-research) (reporting that Baltimore Police Department is unable to trace guns "because of a federal blockage of gun tracing data."). See also *Bureau Under Siege Pro-gun groups, Lawmakers Complicate Agency's Efforts to Enforce Existing Laws*, ALBANY TIMES UNION, Nov. 12, 2013, available at <http://www.timesunion.com/news/article/Bureau-under-siege-4973754.php> (noting NRA's efforts to restrict ATF funding continue to hamstring the agency, preventing ATF from building a national gun registry).

<sup>388</sup> *Access Denied*, *supra* note 364.

<sup>389</sup> *Access Denied*, *supra* note 364, at 7. The problem of felons evading background checks by purchasing guns online is detailed in, MAYORS AGAINST ILLEGAL GUNS, FELON SEEKS FIREARM, NO STRINGS ATTACHED (September 2013), available at [https://s3.amazonaws.com/s3.mayorsagainstillegalguns.org/images/FELON\\_SEEKS\\_FIREARM\\_REPORT.pdf](https://s3.amazonaws.com/s3.mayorsagainstillegalguns.org/images/FELON_SEEKS_FIREARM_REPORT.pdf).

<sup>390</sup> National Research Council. *Firearms and Violence: A Critical Review*. Washington, DC: THE NATIONAL ACADEMIES PRESS, 2004 available for purchase at <http://www.nap.edu/catalog/10881.html> (hereinafter "Firearms and Violence").

firearms and violence, the federal government needs to support a systematic program of data collection and research on that specifically addresses that issue.<sup>391</sup>

### 2.3 2013 Effort to Improve Knowledge

President Obama signed an executive order in January 2013 directing the CDC to resume studying “the causes of gun violence.” This was part of a broader initiative by the President (consisting of some 23 executive orders) directing “federal agencies to improve knowledge of the causes of firearm violence, the interventions that might prevent it, and strategies to minimize its public health burden.”<sup>392</sup> Action #14 is the executive order pertaining to the CDC, which notes that “in addition to being a law enforcement challenge, firearm violence is also a serious public health issue that affects thousands of individuals, families and communities across the Nation.”<sup>393</sup> The CDC and other federal agencies were tasked with immediately identifying firearm-related violence research problems.<sup>394</sup> The CDC requested that the Institutes of Medicine (IOM), in collaboration with the National Research Council (NRC), “convene a committee of experts to develop a potential research agenda focusing on the public health aspects of firearm-related violence . . . to produce impacts in 3-5 years.”<sup>395</sup> The IOM/NRC prepared a 69-page report identifying and prioritizing areas for research into gun violence. Among the areas identified as research priorities:

Characterize the scope of and motivations for gun acquisition, ownership, and use, and how they are distributed across subpopulations.

Characterize differences in nonfatal and fatal gun use across the United States.

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<sup>391</sup> *Access Denied*, *supra* note 364, at 7 (quoting *Firearms and Violence* at 4). *See Firearms and Violence*, *supra* note 370 at 19, 20-21 (“It is axiomatic that reliable and valid surveys on violence, offending, and victimization are critical to an understanding of violence and crime in the United States and for any assessment of the quality of activities and programs aimed at reducing violence (National Research Council, 2003). Detailed data on firearm-related death, injury and risk behaviors are limited.”).

<sup>392</sup> *See PRIORITIES FOR RESEARCH*, *supra* note 1, at 1-2, 11-12.

<sup>393</sup> *Id.* at 12.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 2.

Identify factors associated with youth having access to, possessing, and carrying guns.

Evaluate the potential health risks and benefits (e.g. suicide rates, personal protection) of having a firearm in the home under a variety of circumstances (including storage practices) and settings.

Improve understanding of risk factors that influence the probability of firearm violence in specific high-risk physical locations.

Improve understandings of whether interventions intended to diminish the illegal carrying of firearms reduce firearm violence.

Improve understanding of whether reducing criminal access to legally purchased guns reduces firearm violence.

Improve understanding of the effectiveness of actions directed at preventing access to firearms by violence-prone individuals.

Determine the degree to which various childhood education or prevention programs reduce firearm violence in childhood and later in life.

[Determine whether] programs to alter physical environments in high-crime areas result in a decrease in firearm violence.

Identify the effects of different technological approaches to reduce firearm-related injury and death.

Examine past consumer experiences with accepting safety technologies to inform the development and uptake of new gun safety technologies.

Explore individual state and international policy approaches to gun safety technology for applicability to the United States as a whole.

Examine the relationship between exposure to media violence and real-life violence.<sup>396</sup>

## **2.4 Change of Heart Since 1996**

Jay Dickey is the former congressman whose 1996 amendment de-funded federal research into gun violence. He now believes federal research into the causes of gun violence should be undertaken and can be done “without encroaching on the rights of legitimate gun owners.” Dickey acknowledges the steady toll from gun violence:

“Listen to the facts. It’s like rain coming down. It’s a constant factor in our society that we’re losing people through gun violence. Now maybe we

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<sup>396</sup> See PRIORITIES FOR RESEARCH, *supra* note 1, at 4, 5, 7-9.

can't do anything about it, but we ought to at least know more about it from an objective standpoint.<sup>397</sup>

## 2.5 Proposed Policy Statement

The Task Force supports lifting current funding and programmatic restrictions that effectively keep the CDC and other federal agencies from undertaking research relating to firearm violence and interfere with federal agencies sharing information about gun violence. The Task Force supports non-partisan, scientific inquiry to analyze, assess and provide information on the causes and trends of gun violence in America. The collection and distillation of this evidence is necessary for decision makers (law enforcement, law makers, policy makers, and the public) to make informed judgments about how to respond to the problem of gun violence in our society, and how to expend resources to try to reduce it. Many different kinds of intervention strategies may be considered. Many different laws can be drafted. But in weighing various options, what does the data show? What is the most efficacious approach? How do we prioritize intervention strategies?

Only by having hard data with respect to the causes and manifestations of firearm violence can decision makers develop informed policies and laws that will have a better chance to reduce gun violence and make Americans safer.

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<sup>397</sup> *Access Denied*, *supra* note 364, at 16; Paul D. Thacker, *How Congress Blocked Research on Gun Violence: The Ugly Campaign by the NRA to Shut Down Studies at the CDC*, SLATE (December 19, 2012), available at [http://www.slate.com/articles/health\\_and\\_science/science/2012/12/gun\\_violence\\_research\\_nra\\_and\\_congress\\_blocked\\_gun\\_control\\_studies\\_at\\_cdc.html](http://www.slate.com/articles/health_and_science/science/2012/12/gun_violence_research_nra_and_congress_blocked_gun_control_studies_at_cdc.html).

## **APPENDIX A**

### **Plain English Summary of Second Amendment Law**

“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.”

These words, constituting the entire Second Amendment to the United States Constitution, have become the subject of often heated debate and controversy. References to the Amendment in the public discourse are all too often made without any understanding of what it means and what the courts have said in interpreting its words. Thus, we provide an informational discussion of this Amendment, focusing on what restrictions it does and does not place on state and federal governments in regulating ownership, possession, sale or use of firearms.

#### **Short History Lesson**

Whether in distant ages when knights carried swords at their side, or in the early colonial days in this country or even on the streets of Dodge City during “the Wild West” when citizens carried guns at their side, governments have always thought it proper—within their basic responsibility to protect public safety—to regulate the time, place and manner of carrying weapons. From the Statute of Northampton in 1328 to colonial era gun regulations in Boston in late 1700s to Dodge City ordinances in the mid nineteenth century requiring visitors to surrender their firearms to the sheriff before entering town, laws have restricted the ownership and use of weapons. The Second Amendment was drafted in 1788 with full knowledge of the history of gun regulations in England and America as of that date. Moreover, the principal drafter of the Second Amendment, James Madison, together with fellow Federalists in Congress (who held a strong majority) were uninterested in securing individual rights under the Second Amendment, or for that matter under any of the other amendments. The Federalists were seeking to ensure passage of the Constitution with its promise of a strong federal government and viewed the Bill of Rights (the original amendments to the Constitution) as a means of compromise to secure the enactment of the Constitution. Madison and other Federalists advocated for a strong central government to deal with foreign threats, Indian hostilities and the present risk of domestic rebellion. The Constitutional convention in Philadelphia, called in 1787, followed closely on the heels of a

significant rebellion in Western Massachusetts, led by Daniel Shays, that had threatened the federal arsenal in Springfield, required a large force of state militia men to overcome, and exposed the weakness of the colonies as loosely federated states operating under the Articles of Confederation. The states had no ability to undertake joint military action to address any such domestic insurrections. Several constitutional amendments, including the Second Amendment, addressed this gap in power. The Federalist drafters and adopters of the Second Amendment (along with other provisions) intended to clarify how a national armed force would be made up by state militias, with state officers leading local forces—but subject to national call-up and directed by the President. The Second Amendment was never intended to allow private citizens to wage war against the federal government. There is no indication that the Second Amendment drafters and adopters intended to alter the existing common law and statutory schemes restricting public carry of dangerous weapons while recognizing individual right of self-defense. Indeed, there was no need to enshrine the common law right of self-defense as a constitutionally protected right under the Second Amendment as there was no suggestion to take that common law right away.

### **Recent Decisions by Supreme Court**

The question of whether this Amendment applies to government restrictions and regulations imposed on individuals was first answered by the United States Supreme Court in 2008 in what is known as the *Heller* decision, *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Court held that it does apply to these types of restrictions and regulations. In a 2010 decision, the Supreme Court held that the amendment applied not only to federal government regulation but also to state government regulation, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Thus, we now know that the federal and state governments are subject to the restrictions of the Second Amendment in regulating firearms. But what does that mean?

While the Court in *Heller* declared invalid, under the Second Amendment, a law in the District of Columbia that prohibited its residents from possessing a useable handgun in the home, the Court made clear that the Second Amendment does not prohibit all government restrictions and regulations. It said: “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the

possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualification on the commercial sale of arms.”

The question, then, is which restrictions and regulations on firearms are prohibited by the Second Amendment and which are not. This is the question that is all too often ignored in the public dialogue, and no legal conclusion can be reached without considering this question. Admittedly, the answer has not, as of today, been made clear by the courts.

### **Decisions of Lower Courts Applying *Heller***

There have been numerous lower court decisions since *Heller* was decided, with each court trying to determine whether the *Heller* decision permits or does not permit the regulation that the court is considering in the case before it. In the overwhelming number of cases since *Heller* was decided, the courts have found that the government regulation in question was permitted. For example, courts have said that the Second Amendment does not prevent a government from prohibiting:

Possession of firearms by individuals who have been convicted of a misdemeanor, including those convicted as a result of domestic violence

Possession of firearms by anyone who is under indictment for a felony or “employed for” a convicted felon (such as a bodyguard) or an unlawful user of a controlled substance.

The concealed carrying of firearms in public

The providing of a firearm to a fugitive felon.

All of these decisions have been issued by lower courts, as they attempt to determine what is and is not permitted under *Heller*. Because the Supreme Court has not further explained which restrictions and regulations are prohibited and which are not, there is room for fair debate. However, what cannot be debated is that the *Heller* decision was clear in that the Second Amendment does not prohibit any and all government regulation of firearms. All too often, public statements have been made that under *Heller* the Second Amendment precludes any government restrictions. This is simply incorrect. All courts recognize that the government has an important obligation to protect and promote public safety, and that the individual right to possess a firearm for self-defense must be weighed against

those governmental interests. To further complicate the legal state of affairs, we need to realize that even if the Second Amendment covers a particular regulation, that is not the end of the inquiry. The Amendment itself is not absolute. This can best be illustrated by a well-known case under the First Amendment. That Amendment guarantees freedom of speech. However, it does not authorize yelling “Fire” in a crowded theatre. Nor does the First Amendment protect advertisements, a form of speech, which include a fraudulent misrepresentation. In other words, even though freedom of speech is guaranteed, it is not an absolute guarantee. The government may, in some instances, restrict or regulate speech. The same is true with respect to government regulation of firearms under the Second Amendment.

### **The Standard of Review**

In general, when a government action of any kind is challenged, the court must first determine the standard of review it is going to apply to the action in question. This is very often critical to the eventual outcome of the challenge. The courts have, over many years, developed several well recognized standards that they apply. When the government seeks to regulate a fundamental right, the standard of review places a heavy burden on the government seeking to uphold the action. When the right affected is less important, there is less of a burden placed on the government and more of a burden on the challenging plaintiff to demonstrate that the action in question cannot meet the standard.

The critical question, then, is what standard should be used when a court reviews a government action falling within the Second Amendment. In other words, how heavy is the burden on the government in defending its action? Since the Supreme Court has not, to this date, defined which standard should be applied, the lower courts have differed. Eventually, the Supreme Court needs to determine this question.

### **Public Carry Laws in New York and Other States**

In New York, the highest federal court below the Supreme Court that covers the state is the Second Circuit Court of Appeals. When it considered a challenge to New York’s public carry law, the Court declined to apply what is known as “strict scrutiny” —the standard imposing the greatest burden on the government — because the statute “does not burden the ‘core’ protection of self-defense in the home....” It said that, to be upheld, the law “need only be substantially related to



the state’s important public safety interest.” *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012). The Court said that “ instead of forbidding anyone from carrying a handgun in public, New York took a more moderate approach...and reasonably concluded that only individuals having a bona fide reason to possess handguns should be allowed to introduce them into the public sphere.” Thus, in New York, this is how the federal courts will consider laws and regulations affecting firearms.

However, other Circuit Courts covering other states have come to different conclusions based on the laws in effect in those other states. For example, an Illinois gun carry law that prohibited public carry of loaded firearms in public—without any licensing scheme to permit law abiding Illinois citizens to lawfully possess a loaded firearm outside the home—was determined by the Seventh Circuit (and Illinois Supreme Court) to be unconstitutional. The Ninth Circuit has invalidated concealed carry permit licensing schemes in California. Thus, until the Supreme Court of the United States resolves the issue, lower courts will continue to differ on both the standard to be applied when reviewing firearms regulation and the results when challenges are brought. However, whatever the differences, all courts recognize that not every government regulation or restriction of firearms results in the violation of the rights granted by the Second Amendment.

### **New York SAFE Act**

This brings us to New York’s Secure Ammunition and Firearms Enforcement Act, commonly known as the SAFE Act, most of which was upheld by a federal judge in Buffalo and the correctness of that decision was recently argued in the Second Circuit. The judge in Buffalo upheld the SAFE Act’s ban on “assault weapons”—semi-automatic pistols, rifles and shotguns with certain military features—as well as the Act’s ban on mail-order purchases of ammunition. The court struck down a few provisions of the Act, including the ban on loading more than seven rounds into a magazine, which still may be sold with capacity of up to ten rounds.

## APPENDIX B

### Summary of New York SAFE Act

The 2013 SAFE Act plugs some of the holes in federal law as to purchases in the State of New York. It adds a new Article 39-DDD to the General Business Law, requiring a NICS background check before any private sale or disposal of pistols, rifles or shotguns, covering sales or disposals that are not conducted by Federal Firearm Licensed dealers (who are already required to perform background checks by federal law) and which are not between members of an immediate family. The background check is performed by a licensed dealer, who can charge up to \$10 for such service and who must keep records of the check. Although it does not mention gun shows by name, this provision requires background checks of all purchasers at gun shows, as well as all other private, non-immediate-family purchasers. See also Appendix B-1 hereto, New York State Attorney General Model Gun Show Procedures for gun shows operators in New York.

Other provisions of the SAFE Act relating to gun and ammunition trafficking and mental healthcare summarized below.

**Section 3** amends Correction Law § 404, to ensure that inmates released to the community from a state correctional facility or from a Department of Mental Hygiene hospital have undergone clinical assessment to determine whether they meet the criteria for assisted outpatient treatment pursuant to Mental Hygiene Law § 9.60(c).

**Section 16** amends Executive Law § 837, so that names and other non-clinical identifying information about patients may be provided to the New York State Division of Criminal Justice Services pursuant to Mental Hygiene Law § 9.46. Such information must be destroyed after five years or pursuant to a CPLR Article 78 proceeding determining that the individual is eligible for a firearm license.

**Section 18** amends Judiciary Law § 212, so that any records of persons with guardians appointed due to mental illness or incapacity that are transmitted to the FBI, must also be transmitted to the Division of Criminal Justice Services. The records received by such Division may be checked against the statewide license and record database.

**Section 19** amends Mental Hygiene Law § 7.09, so that the Commissioner of Mental Health may re-disclose data and records to the Division of Criminal Justice Services for the purpose of determining whether a firearm license should be denied, suspended or revoked, or to determining whether a person is no longer permitted under federal and state law to possess a firearm. The administrative process within the Office of Mental Health allowing people disqualified from owning firearms to petition for the right to do so, now extends to persons who were disqualified because they had been involuntarily committed or civilly confined to a facility under the jurisdiction of the Commissioner of Mental Health.

**Section 20** adds section 9.46 to the Mental Hygiene Law, requiring mental health professionals to report to the Director of Community Services that a patient is likely to engage in conduct that would result in serious harm to him/herself or others. If the Director of Community Services agrees that the person is likely to engage in such conduct, the Director of Community Services transmits only the patient's name and non-clinical identifying information to the Division of Criminal Justice. Such information is to be used only to determine whether the person's firearm license should be suspended or revoked, or whether the person is ineligible for a license, or whether the person is no longer permitted under state or federal law to possess a firearm. Mental health professionals are immune from civil or criminal liability for their reasonable, good-faith decisions either to disclose, or not to disclose, information pursuant to this statute.

**Section 21** amends Mental Hygiene Law § 9.47, to require the Director of Community Services of the patient's county of residence to ensure evaluation of the need for ongoing assisted outpatient treatment prior to the expiration of any assisted outpatient treatment order. If the Director believes the outpatient has changed or will change his or her county of residence during the pendency of the outpatient treatment order, the Director of the new county of residence shall become the appropriate director. Section 22 of the SAFE Act makes a similar amendment to Mental Hygiene Law § 9.48.

**Section 23** amends Mental Hygiene Law § 9.60 to refer to the "appropriate director" as the Director of Community Services of the county where an assisted outpatient resides, even if this is a different country from where the treatment order was originally issued. This section also directs the appropriate director to

review, prior to expiration of an order for treatment, and to notify the program coordinator whether a petition for continued outpatient treatment is warranted.

**Section 24** amends Mental Hygiene Law § 13.09 to require the Commissioner of Mental Health to transfer to the Division of Criminal Justice Services data and records necessary to determine whether a firearm permit should be denied, suspended or revoked, or to determine whether a person is no longer permitted under federal or state law to possess a firearm. The Commissioner is also required to establish a procedure whereby persons who are disqualified from possessing firearms due to an involuntary commitment or a civil confinement, may petition to be relieved of such disability.

**Section 25** amends Mental Hygiene Law § 33.13 to require the Director of Community Services to disclose names and non-clinical identifying information to the Division of Criminal Justice Services for the sole purpose of implementing that Division's duties under sections 400.00 and 400.02 of the Penal Law.

**Section 31** adds Penal Law § 115.20, making it a Class A misdemeanor to make available, sell, exchange, give or dispose of a "community gun" that aids another person in committing a crime. A "community gun" is defined as "a firearm<sup>398</sup> that is actually shared, made available, sold, exchanged, given or disposed of among or between two or more persons, at least one of whom is not authorized pursuant to law to possess such firearm." "Made available" includes "knowingly placing such firearm at a location accessible and known to one or more other persons." Note that anyone who resells a pistol to another who is not authorized to possess it, and who uses it to commit a crime, will be guilty of a Class A misdemeanor. The first person need not know that second person intends to commit a crime, or that the second person is not authorized to possess the firearm. The stakes have been raised for "straw purchasers."

The SAFE Act also enacts several important provisions relating to mental hygiene, including prevention of people with documented mental health issues from obtaining a firearm license, creating a statewide license and record database, which will include information relating to mental hygiene, and increasing ongoing assisted

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<sup>398</sup>A "firearm" is defined in the Penal Law as any pistol or revolver, a "sawed off" shotgun with a barrel less than an 18 inches long, a "sawed off" rifle with less than a 16-inch barrel, any modified or altered shotgun or rifle less than 26 inches in an overall length, and an "assault weapon." Penal Law § 265.00(3). "Assault weapons" are defined in Penal Law § 265.00(22).

outpatient treatment for those who need it. Section 1 of the SAFE Act Amends Criminal Procedure Law § 330.20, so that upon a verdict or plea of not responsible by reason of mental disease or defect, or a finding that a defendant is an incapacitated person under Criminal Procedure Law § 730, the court must revoke any firearm license held by the defendant, and require that any firearms, rifles or shotguns owned by the defendant be surrendered.

**Section 43** amends Penal Law § 265.17 to prohibit criminal disposal of a weapon, as well as criminal purchase as under the prior statute. A defendant who “disposes of a firearm [pistol], rifle or shotgun” to another person knowing that such other person is barred from possessing same by reason of prior conviction or other disability, is guilty of a Class D felony. Section 43 of the SAFE Act also amends Penal Law § 400 to require, among other things, that all licenses be recertified by the State Police after five years. Under prior law, gun licenses never expired.

**Section 48** amends Penal Law § 400.00 to bar the issuance of a firearm license to anyone who has involuntarily committed to a facility under the jurisdiction of an office of the Department of Mental Hygiene or who has been civilly confined in a secure treatment facility, or who has had a guardian appointed for him or her pursuant to any provision of state law, based on a determination that as a result of marked subnormal intelligence, mental illness, incapacity, condition or disease, he or she lacks the mental capacity to contract or manage his or her own affairs.

**Section 49** adds Penal Law § 400.02, creating a statewide license and record database, for use both in pending applications and also to “be periodically checked by the division of criminal justice services against criminal conviction, mental health, and all other records as are necessary to determine their continued accuracy as well as whether an individual is no longer a valid license holder.”

**Section 50** adds Penal Law § 400.03, requiring sellers of ammunition who are not already licensed as dealers in firearms pursuant to Penal Law § 400.00, to register with the Superintendent of State Police. This section also requires both dealers and sellers to verify the identity of and run background checks on purchasers of ammunition; to keep records of ammunition sales; and to notify the State Police of the completed sale. “Commercial” sales of ammunition may only be conducted if a “licensed dealer in firearms or registered seller of ammunition acts as

an intermediary between the transferor and the ultimate transferee of the ammunition for the purposes of contacting the statewide license and record database pursuant to this section,” thereby restricting, if not eliminating, off-the-books ammunition sales.

**Section 51** amends Penal Law § 400.10 to require reporting of any loss or theft of ammunition by any ammunition seller or dealer in firearms. Section 53 of the SAFE Act adds Surrogate’s Court Procedure Act § 2509 requiring that any list of assets of a decedent’s estate “must include a particularized description of every firearm, shotgun and rifle ... that are part of such estate.” Such list must be filed with the Surrogate’s Court and a copy must be filed with the Division of Criminal Justice Services. As a private seller of a firearm, rifle or shotgun, an executor may not transfer such weapon except to an immediate family member without a federal criminal background check of the buyer.<sup>399</sup>

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<sup>399</sup> C. Raymond Radigan and Peter K. Kelly, *Disposal of Decedent's Firearms Under Gun Control Law*, NEW YORK LAW JOURNAL (3/10/2014), available at <http://www.newyorklawjournal.com/id=1202646099123/Disposal-of-Decedent%27s-Firearms-Under-Gun-Control-Law#ixzz2ycNOF7qB>

## **APPENDIX B-1**

### **Model Gun Show Procedures**

The Office of the New York State Attorney General

(April 17, 2013 press release)

“While Washington has failed to act the Office of the New York State Attorney General has partnered with the gun show industry to develop and implement a set of Model Gun Show Procedures to ensure universal background checks at gun shows in New York, a model that other states can use.”

Earlier this month, Attorney General Schneiderman announced that 26 gun show operators have agreed to follow the Model Gun Show Procedures developed by the Attorney General’s Office to promote uniform gun show operations across the state. As a result of these new voluntary agreements, at least 55 gun shows in New York this year will implement model procedures designed to ensure that legally required background checks are completed on every sale of a firearm.

The development of the Model Procedures grew out the Attorney General’s 2011 investigation of gun shows around the state. This investigation uncovered the frequent occurrence of private sales without background checks. Following that discovery, the Attorney General’s Office and several gun show operators worked together to develop the Model Procedures, which balance the rights of the sportsmen and gun collectors with the need to protect the public from the sale of guns to people who cannot pass a background check, also known as a “National Instant Criminal Background Check System” or “NICS.” The Model Procedures require operators to do the following:

Post conspicuous signs throughout the shows, and give written notice to all dealers that New York State law requires that a National Instant Criminal Background Check be completed before the transfer of a gun at a gun show, including on the grounds of the show.

Require that all guns brought into the gun show by private sellers are tagged so that, upon exiting, the operator can determine if the guns were sold and a NICS was performed.

Provide access to a dealer who is authorized to conduct a NICS at cost. The dealer performing the NICS shall complete and file the ATF Form 4473 and maintain the forms for inspection by law enforcement agencies for ten years, per the Gun Show Law.

Limit the number of access doors at the show so that sellers and buyers have to enter and exit through an area where the NICS procedures can be monitored.

Use reasonable means to prevent illegal gun sales outside of the building, including the parking lot.

Alert local law enforcement that a show will be held in their area, request periodic patrols in the parking lots to deter illegal sales, and call them if illegal sales are observed or suspected.



**APPENDIX C**

**New York State Bar Association**

**Task Force on Gun Violence**

**LIST OF MEMBERS**

David H. Tennant, Co-Chair

Earamichia Brown, Co-Chair

Samuel F. Abernethy

Michael S. Barone

Derek P. Champagne

Vincent Ted Chang

Elena DeFio Kean

Xavier Robert Donaldson

Donna England

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Guy Hamilton Mitchell

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