Second Amendment Challenges to Firearms Regulations Post-*Heller*

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Summary

The U.S. Supreme Court in *District of Columbia v. Heller* held that the Second Amendment to the U.S. Constitution protects an individual right to possess a firearm, unconnected with service in a militia, and the use of that firearm for traditionally lawful purposes, such as self-defense within the home. It also held that the Second Amendment applies to the states in *McDonald v. City of Chicago*. Since then, federal and state firearms laws have been challenged under the Second Amendment. Lower courts have been disputed in determining how to evaluate these provisions, given that the *Heller* decision was not an exhaustive analysis of the scope of the Second Amendment.

This report first discusses the two-step inquiry fashioned by the lower courts to analyze provisions under the Second Amendment. It proceeds to highlight how this test has been employed on a select number of firearms laws—namely, the federal age requirement and prohibition on possession by those convicted of a misdemeanor crime of domestic violence; and state requirements to obtain a concealed carry permit and a state assault weapons ban. How courts have applied the test to these categories may provide some indication as to how future firearms regulations may be considered by the Supreme Court. The report concludes with a discussion on how varied interpretations by the lower courts of the *Heller* decision may affect the burden upon the federal government to defend firearms provisions, as well as new analytical frameworks that have been suggested.

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Introduction

In 2008, the U.S. Supreme Court decided *District of Columbia v. Heller*, in which the Court held that the Second Amendment to the U.S. Constitution protects an individual right to possess a firearm, unconnected with service in a militia, and the use of that firearm for traditionally lawful purposes, such as self-defense within the home.[1] Shortly afterward in *McDonald v. City of Chicago*, the Supreme Court held that the Second Amendment also applies to the states, but it did not further explore the scope of the Second Amendment.[2] Although *Heller* did not constitute "an exhaustive historical analysis ... of the full scope of the Second Amendment,"[3] the Court noted that its decision "does not imperil every law regulating firearms," and "[does] not cast doubt [] on longstanding regulatory measures [such] as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'"[4] Since *Heller* and *McDonald*, both federal and state firearms laws have been regularly challenged under the Second Amendment.

This report first discusses the standard of judicial review that the lower courts generally have fashioned to determine if a firearm law is in violation of the Second Amendment. Next, the report examines select categories of firearms laws that have been challenged under the Second Amendment. These include (1) prohibitions on certain persons based on age and on criminal history; (2) state concealed carry laws; and (3) state and local assault weapons bans. An examination of these categories could provide some insight as to how courts might assess future firearms legislation on Second Amendment grounds.

In the 113th Congress, several gun control proposals have been introduced. These include, among others, measures that would ban certain assault weapons and prohibit possession of large capacity magazines (e.g., S. 150/ H.R. 437/ S. 33); and measures that would require background checks on private transfers of firearms or ammunition (e.g., S. 22/ S. 174/ S. 374/ H.R. 141).[5]

What Standard of Judicial Scrutiny Should Be Applied?

A significant question left open by the Court in *Heller* centers on the standard of scrutiny that should be applied to laws regulating the possession and use of firearms. Generally, there are three levels of judicial scrutiny. First, strict scrutiny, the most rigorous, requires a statute to be narrowly

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

[2] 130 S. Ct. 3020 (2010).

[3] *Heller*, 554 U.S. at 626.

[4] *Heller*, 554 U.S. at 626-27. The Court reiterated this dicta in *McDonald*. *See McDonald*, 130 S. Ct. at 3047. However, the Court in *Heller* also noted that "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field ... And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." *Heller*, 554 U.S. at 635.

[5] For more on gun measures introduced in the 113th Congress, *see* CRS Report R42987, *Gun Control Proposals in the 113th Congress: Universal Background Checks, Gun Trafficking, and Military Style Firearms*, by (name redacted).

tailored to serve a compelling state interest.[6] Second, intermediate scrutiny, requires a statute to further a government interest in a way that is substantially related to that interest.[7] Third, the rational basis standard merely requires the statute to be rationally related to a legitimate government function.[8] The Court in *Heller* rejected the rational basis test[9] and also explicitly rejected Justice Breyer's "interest-balancing" inquiry, distinguishing this "judge-empowering" approach from the "traditionally expressed levels" of scrutiny.[10] However, the Court did not establish or clearly apply any judicial standard, declaring instead that the challenged firearms provisions were unconstitutional "[u]nder any of the standards of scrutiny that [the Court has] applied to enumerated constitutional rights."[11]

Lower Court Approaches to the Second Amendment After *Heller*

After *Heller*, some lower courts seemingly did not perform an extensive analysis or apply a particular standard of scrutiny in determining that a challenged federal firearms law was valid under the Second Amendment. Rather, they analogized the challenged firearms provisions to those listed as "presumptively lawful" in *Heller* and found them to be constitutional. Under this approach, courts have upheld bans on possession by felons,[12] by substance abusers,[13] by illegal aliens,[14] and by people convicted of domestic violence.[15] Interestingly, some of these categories, as well as those not listed in the Court's dicta as "presumptively lawful regulatory measures," are not necessarily "longstanding," as they were enacted in the 20th century.[16] As touched upon below,

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[6] F.E.C. v. Wis. Right to Life, Inc., 551 U.S. 449, 465 (2007).

[7] Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

[8] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). *See also* Erwin Chemerinsky, Constitutional Law: Principles and Policies §§6.5, 10.1.2 (3d ed. 2006).

[9] The Court stated "if all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Heller*, 554 U.S. at 628 n.27.

[10] *Id*. at 634. In his dissent, Justice Breyer proposed an "interest-balancing" test, which "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Id*. at 634-35 (quoting Breyer, J. dissenting). The Court in *Heller* rejected it, stating: "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id*.

[11] *Id*. at 628. The challenged provisions were: D.C. Code §7-.....01 (2001); §7-.... (2001); §7-.... (2001).

[12] *See, e.g.*, United States v. Barton, 633 F.3d 168, 171-72 (3d Cir. 2011) (finding the Supreme Court's discussion on categorical exceptions to the Second Amendment binding and not dicta and affirming a lower court's decision that the felon dispossession statute (§922(g)(1)) is presumptively lawful).

[13] *See, e.g.*, United States v. Richard, 350 F. App'x 252, 260 (10th Cir. 2009) (stating that the Second Amendment is subject to appropriate restrictions like those contained in 18 U.S.C. §923(g)(3)).

[14] *See, e.g.*, United States v. Yanez-Vasquez, No. 09-40056-01-SAC, 2010 U.S. Dist. LEXIS 8166, at *1 (D. Kan. January 28, 2010) (upholding 18 U.S.C. §922(g)(5) that prohibits illegal aliens from possessing a firearm).

[15] *See, e.g.*, United States v. White, 593 F.3d 1199, 1205 (11th Cir. 2010) (holding that 18 U.S.C. §922(g)(9) is a presumptively lawful long-standing prohibition on the possession of firearms).

[16] *White*, 593 F.3d at 1206 ("We see no reason to exclude §922(g) from the list of long-standing prohibitions on which *Heller* does not cast doubt."). *See also* United States v. Booker, 570 F. Supp. 2d 161, 163 (D. Me. 2008) (stating, "persons who have been convicted of a misdemeanor crime of domestic violence must be added to the list of 'felons and the mentally ill' against whom the 'longstanding prohibitions on the possession of firearm' survive Second Amendment scrutiny"); United States v. Luedtke, 589 F. Supp. 2d 1018, 1021 (E.D. Wis. 2008) (noting that while 18 U.S.C. §§922(g)(8)-(9) do not represent "'longstanding prohibition on the possession of firearms,' nothing in *Heller*
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courts have wrestled with how to interpret and incorporate the "presumptively lawful" language from *Heller* with an analytical framework that involves application of means-end scrutiny.

However, the U.S. Court of Appeals for the Third Circuit (Third Circuit), in *United States v. Marzzarella*,[17] attempted to establish a framework for how to evaluate firearms laws that did not fall within those identified as "presumptively lawful." The statute at issue in *Marzzarella* was 18 U.S.C. Section 922(k), which is the federal ban on the possession of unmarked firearms.[18] In the Third Circuit's view, there are two possibilities of how the "presumptively lawful" categories are to be treated. The first possibility is that these types of firearms regulations could be those which regulate "conduct outside the scope of the Second Amendment," meaning that they would not be subject to any heightened judiciary scrutiny. Or, the language "may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny."[19] The Third Circuit favored its first interpretation, finding it more consistent based on the text and structure of the *Heller* decision.[20]

With this view, the Third Circuit noted that *Heller* suggested a two-step approach: "First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee (citations omitted). If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under the standard, it is constitutional. If it fails, it is invalid."[21]

With respect to scope, the Court in *Heller* seemed to indicate that the "core" Second Amendment right protects "the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home."[22] It is less clear, however, the types of regulation that might burden conduct protected by the Second Amendment. The defendant, Marzzarella, argued that firearms without serial numbers must come within the scope of the Second Amendment because firearms in common use in 1791 did not have serial numbers. The Third Circuit rejected this because it found that "it would make little sense to categorically protect a class of weapons [under the Second Amendment] bearing a certain characteristic wholly unrelated to their utility."[23] The court was further skeptical of the defendant's argument that "possession in the home is conclusive proof that §922(k) regulates protected conduct [under the Second Amendment]."[24] Due to a lack of

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suggests the Court intended to permit only those *precise* regulations accepted at the founding").

[17] United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010), *cert. denied* Marzzarella v. United States, 131 S. Ct. 958 (2011).

[18] 18 U.S.C. §922(k) ("It shall be unlawful for any person, knowingly ... to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.").

[19] *Id*. at 91.

[20] As discussed *infra*, other lower courts have had difficulty understanding what the Supreme Court meant by characterizing certain long-standing gun control measures as "presumptively lawful."

[21] *Marzzarella*, 614 F.3 at 89.

[22] *Id*. at 94.

[23] *Id*. ("The mere fact that some firearms possess a nonfunctional characteristic should not create a categorically protected class of firearms on the basis of that characteristic.").

[24] *Id*.

historical evidence, however, the court could not conclude with certainty that the Second Amendment did not protect possession of unmarked firearms in the home.[25]

The Third Circuit, therefore, proceeded to assume that the federal ban burdened the defendant's Second Amendment right and examined the law under "some form of means-end scrutiny." Looking to First Amendment jurisprudence for guidance,[26] the court noted that even an enumerated, fundamental right may be subjected to varying levels of scrutiny depending on the circumstances.[27] The court chose to apply an intermediate scrutiny standard to evaluate Section 922(k) finding that, similar to content-neutral time, place, and manner restrictions on speech, the firearms provision also regulated the manner in which persons could lawfully exercise their Second Amendment rights.[28] Although the intermediate scrutiny standard in the First Amendment context is articulated in different ways, "[t]hey all require the asserted governmental end to be more than just legitimate, either 'significant,' 'substantial,' or 'important," and require "the fit between the challenged regulation and the asserted objective be reasonable, not perfect."[29] With respect to Section 922(k), the Third Circuit held that the statute passes muster under intermediate scrutiny because it does not "severely limit the possession of firearms," and reasonably fits to achieve the government's substantial and important interest in preserving serial numbers for tracing purposes.[30]

As discussed below, many courts generally have employed the Third Circuit's two-part inquiry when determining if a challenged federal or state firearms provision violates the Second Amendment, including those the Court in *Heller* determined to be presumptively lawful.[31]

Are Certain Individuals Not Protected by the Second Amendment?

Both federal and state laws have long prohibited certain categories of individuals from possessing firearms.[32] Congress enacted the Gun Control Act of 1968[33] (GCA or Act) to "keep firearms out

[25] *Id*. 94-5.

[26] For example, content-based restrictions on speech in a public forum trigger strict scrutiny, whereas content-neutral time, place, manner restrictions on speech in a public forum trigger intermediate scrutiny. *Id*. at 96.

[27] *Id*. at 97-100 ("In sum, the right to speech, an undeniably enumerated fundamental right, [citation omitted] is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue. We see no reason why the Second Amendment would be any different." *Id*. at 96-7.).

[28] *Id*. at 96 ("Discrimination against particular messages in a public forum is subject to the exacting scrutiny. [citation omitted] Regulations of the manner in which that speech takes place, however, receive intermediate scrutiny, under the time, place, and manner doctrine. [citation omitted] Accordingly, we think §922(k) also should merit intermediate, rather than strict scrutiny." *Id*. at 97.).

[29] *Id*. at 98 (citing Turner Broad Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) and Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) and Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 526 (2001)).

[30] *Id*. at 97. The Third Circuit also held that the statute would still pass muster under strict scrutiny because it is "narrowly tailored to serve a compelling state interest." *Id*. at 99.

[31] *See, e.g.*, United States v. Greeno, 679 F.3d 510 (6th Cir. 2012) (applying two-step inquiry to determine if sentencing enhancement violates Second Amendment); Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011) (applying two-step inquiry to determine if class training requirement necessary to lawfully obtain firearm and firing range prohibition violates Second Amendment); United States v. Reese, 627 F.3d 792 (10th Cir. 2010) (applying two-step inquiry to review whether 18 U.S.C. §922(g)(8)—prohibiting those subject to a certain court order—is constitutional).

[32] The Federal Firearms Act of 1938, 52 Stat. 1250 (1938), was the first federal firearms law to regulate the possession, (continued...)

of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the states and their subdivisions in combating the increasing prevalence of crime in the United States."[34] The GCA establishes a comprehensive statutory scheme that regulates the manufacture, sale, transfer, and possession of firearms and ammunition.[35] For instance, the GCA prohibits federal firearms licensees (or licensed dealers) from selling handguns to any person under the age of 21 and long guns (i.e., rifles and shotguns) to any person under the age of 18.[36]

Licensed dealers are also subject to several requirements designed to ensure that a firearm is not transferred to an individual disqualified from possession under the act.[37] Under federal law there are nine categories of persons who prohibited from possessing, receiving, or transferring a firearm.[38] The individuals targeted by this provision include (1) persons convicted of a crime punishable by a term of imprisonment exceeding one year; (2) fugitives from justice; (3) individuals who are unlawful users or addicts of any controlled substance; (4) persons legally determined to be mentally defective, or who have been committed to a mental institution; (5) aliens illegally or unlawfully in the United States, as well as those who have been admitted pursuant to a nonimmigrant visa; (6) individuals who have been discharged dishonorably from the Armed Forces; (7) persons who have renounced United States citizenship; (8) individuals subject to a pertinent court order; and, finally, (9) persons who have been convicted of a misdemeanor domestic violence offense.

The following section reviews judicial decisions that have evaluated the constitutionality of the federal age requirement to purchase firearms, as well as the federal prohibition on misdemeanants of domestic violence from possessing firearms. While these and other categorical restrictions on certain individuals can be likened to the long-standing, presumptively lawful regulatory measures identified in *Heller*, reviewing courts have generally employed the two-step inquiry fashioned in *Marzzarella*.

Federal Age Requirement

Section 922(b)(1) of title 18 prevents licensed dealers from selling handguns to any individual under the age of 21 and long guns to any individual under the age of 18. The constitutionality of

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manufacture, and sale of firearms. It also made it unlawful at the federal level for certain individuals with criminal history to possess firearms.

[33] P.L. 90-618 (1968).

[34] S. Rept. No. 90-1097 (1968).

[35] 18 U.S.C. §§922 *et seq*.

[36] 18 U.S.C. §922(b)(1). Furthermore, the GCA places significant restrictions on the transfer to, and possession of, firearms by persons under the age of 18. 18 U.S.C. §922(x). *See also* United States v. Rene E., 583 F.3d 8 (1st Cir. 2009) (upholding federal ban on juvenile handgun possession).

[37] For example, federal firearms licensees (FFLs) must verify the identity of a transferee by examining a government-issued identification document bearing a photograph of the transferee, such as a driver's license; conducting a background check on the transferee using the National Instant Criminal Background Check System (NICS); maintaining records of the acquisition and disposition of firearms; reporting multiple sales of handguns to the Attorney General; responding to an official request for information contained in the licensee's records within 24 hours of receipt; and complying with all other relevant state and local regulations. *See* 18 U.S.C.§§922(t); 923.

[38] 18 U.S.C. §922(g). Individuals who are under indictment for a felony are also prohibited from receiving or transporting firearms or ammunition. 18 U.S.C. §922(n).

this law and its attendant regulations were challenged for violating "the right of 18-to-20-year-old adults to keep and bear arms under the Second Amendment" in *Nat'l Rifle Assoc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*.[39] The U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) adopted the two-step approach from *Marzzarella*.[40] To determine if the law burdens protected conduct as historically understood, the Fifth Circuit relied on a "wide array of interpretive materials to conduct a historical analysis" to determine if the "law harmonizes with the historical traditions associated with the Second Amendment guarantee."[41] After reviewing both founding-era attitudes toward gun restrictions on certain groups,[42] as well as the laws and jurisprudence of the 19th century,[43] the Fifth Circuit concluded "the present ban is consistent with a longstanding tradition of targeting select groups' ability to access and to use arms for the sake of public safety." The court believed that the first step of the inquiry was satisfied, such that the regulation did not burden conduct protected by the Second Amendment, given the "considerable historical evidence of age- and safety- based restrictions on the ability to access arms."[44]

However, in "an abundance of caution," the Fifth Circuit proceeded to analyze the federal law under intermediate scrutiny (the second step) primarily due to two factors. First, the age restriction is similar to the other "longstanding, presumptively lawful bans on possession by felons and the mentally ill" identified in *Heller*[45]; second, the prohibition does not "disarm an entire community" like the D.C. ban in *Heller*.[46] In applying intermediate scrutiny, the court concluded that the government satisfied its burden of demonstrating that Congress "deliberately adopted a calibrated, compromise approach" to achieve an important government interest.[47]

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[39] 700 F.3d 185 (5th Cir. 2012). The other related regulations challenged were 18 U.S.C. §922(c)(1) and 27 C.F.R. §§478.99(b)(1), 478.124(a), and 478.96(b), all of which relate to firearm sales by a licensed dealer to persons of the requisite age. The appellants also asserted that the federal law denied them equal protection under the Due Process Clause of the Fifth Amendment of the U.S. Constitution. *NRA*, 700 F.3d at 188. The court rejected the equal protection claim, holding that age is not a suspect classification and that appellants failed to show the federal laws are not rationally related to a legitimate state interest. *Id*. at 212.

[40] *Id*. at 194-98 (reviewing the two-step test and discussing why the Fifth Circuit will adopt it).

[41] *Id*. at 194.

[42] *Id*. at 200-02 ("If a representative citizen of the founding era conceived of a 'minor' as an individual who was unworthy of the Second Amendment guarantee, and conceived of 18-to-20-year-olds as 'minors,' then it stands to reason that the citizen would have supported restricting an 18-to-20-year-old's right to keep and bear arms." *Id*. at 202.).

[43] *Id*. at 202-03 (reviewing state laws from the 19th century that prohibited selling deadly weapons to minors and state cases that upheld the validity of laws prohibiting weapons ownership by minors).

[44] *Id*. at 204.

[45] *Id*. at 205. Similar to the Third Circuit in *Marzzarella*, the Fifth Circuit opined that it is "difficult to map *Heller's* 'longstanding' ... 'presumptively lawful regulatory measures' ... onto [the] two-step framework," because it is unclear whether the long-standing regulations "(i) presumptively fail to burden conduct protected by the Second Amendment, or (ii) presumptively trigger and pass constitutional muster under a lenient level of scrutiny." *Id*. at 196. Notwithstanding this confusion over how to approach evaluating long-standing prohibitions, the Fifth Circuit concluded that 18 U.S.C. §922(b)(1) would probably fall outside the protection of the Second Amendment or would probably only trigger and pass muster under intermediate scrutiny. *Id*.

[46] The Fifth Circuit also justified applying intermediate scrutiny because *Heller's* identification of certain long-standing, presumptively valid prohibitions indicates that the "Second Amendment permits 'categorical regulation of gun possession by classes of persons.'" *Id*. at 205 (citations omitted). Moreover, 18-to-20-year-old individuals will be temporarily be affected by the age qualification, and are not otherwise prohibited from possessing handguns for lawful purposes or acquiring them from parents or guardians. *Id*. at 206-07.

[47] *Id*. at 207-10. ("Overall, the government has marshaled evidence showing that Congress was focused on a particular problem: *young persons under 21*, who are immature and prone to violence, easily accessing *handguns*, which facilitate violent crime, primarily by way of *FFLs*. Accordingly, Congress restricted the ability of *young persons under 21* to (continued...)

Misdemeanants of Domestic Violence

The following two cases demonstrate the federal appellate courts' treatment of the GCA provision that prohibits misdemeanants of domestic violence from possessing or transporting firearms. Notably, this provision—codified at 18 U.S.C. Section 922(g)(9)—was enacted into law in 1996.[48]

The U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) in *United States v. Skoien* (*Skoien I*) vacated and remanded for further proceedings a defendant's conviction under 18 U.S.C. Section 922(g)(9).[49] The court noted the limiting language in *Heller* regarding presumptively lawful measures and declared it "would be a mistake to uphold this or other gun laws simply by invoking the Court's reference to these ... measures ... without more."[50] The court favored an analytical framework not unlike the two-step approach from *Marzzarella*.[51] It stated: "[C]onstitutional text and history come first, then (if necessary) an analysis of the public-benefits justification for the regulation follows.... If the first inquiry into the founding-era scope of the right doesn't resolve the case, then the second inquiry into the law's contemporary means-end justification is required."[52] The court moved to evaluate the prohibition under means-end scrutiny, given that the first inquiry did not resolve whether an individual who falls under Section 922(g)(9) is "categorically excluded from exercising the Second Amendment right as a matter of founding-era history and background legal assumptions."[53] Consequently, it applied intermediate scrutiny because the challenged provision "is several steps removed from the core constitutional right identified in *Heller*."[54] This is not to say that "domestic-violence misdemeanants have no Second Amendment rights, but it does support the application of a more lenient standard of review."[55] However, the Seventh Circuit in *Skoien I* vacated the charges against the defendant because the government "made little effort to discharge its burden of demonstrating the relationship between §922(g)(9)'s means and its end" and instead "rested nearly its entire case on *Heller*'s reference to felon-dispossession laws, asserting, without analysis, that 'Congress permissibly concluded that a narrow additional range of serious criminal offenses should likewise result in the forfeiture of the right to possess a firearm, even though the offenses are defined as misdemeanors under applicable law.'"[56] Because the government did not carry its burden of

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purchase *handguns* from *FFLs*." *Id*. at 208 (emphasis in the original)).

[48] P.L. 104-208 (1996).

[49] United States v. Skoien (Skoien I), 587 F.3d 803 (7th Cir. 2009), *vacated by, rehearing granted, en banc*, by United States v. Skoien, No. 08-3770, 2010 U.S. App. LEXIS 6584, at *1 (7th Cir. February 22, 2010).

[50] *Skoien I*, 587 F.3d at 808.

[51] *Id*. at 809.

[52] *Id*.

[53] *Id*. at 810 (noting that scholars disagree about whether and to what extent persons convicted of crimes—more specifically, felons—were considered excluded from the right to bear and keep arms during the founding era).

[54] *Id*. at 812 (stating that strict scrutiny cannot be applied to all gun restrictions as doing so would be incompatible with *Heller's* dicta about "presumptively lawful" firearms laws. *Id*. at 811.).

[55] *Id*.

[56] *Id*. at 814 ("In fairness, because *Heller* did not establish a standard of review, the government did not know what its burden would be. Like the district court, it proceeded on the assumption that the highest standard of scrutiny applied and then relied almost entirely on conclusory reasoning by analogy from *Heller's* reference to the 'presumptive' constitutionality of felon-dispossession laws.... In any event, our discussion here of the appropriate standard of review should provide guidance for the proceedings on remand." *Id*. at 815.).

establishing a reasonable fit between the important objective of reducing domestic gun violence and Section 922(g)(9)'s permanent disarmament of all domestic-violence misdemeanants, the court vacated the defendant's charges but gave the government time to make its case.

Upon rehearing, the Seventh Circuit, sitting en banc, resisted delving "more deeply into the 'levels of scrutiny' quagmire."[57] It rejected the Second Amendment challenge to 18 U.S.C. Section 922(g)(9) on the basis that the government apparently met its burden by demonstrating that "logic and data establish a substantial relation between §922(g)(9) and [an important governmental] objective."[58]

In *United States v. Chester*, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) issued a decision to provide district courts in its circuit guidance on the framework for deciding Second Amendment challenges.[59] The Fourth Circuit followed the two-step approach delineated in *Marzzarella*: first, a historical inquiry "seek[ing] to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification;" and second, if the regulation burdens conduct within the scope of the Second Amendment as historically understood, "... mov[ing] up to the second step of applying the appropriate form of means-end scrutiny."[60]

The Fourth Circuit remanded the case to the district court but noted that, under the first prong, Section 922(g)(9)—like the GCA provision prohibiting convicted felons from possession—should be evaluated based on whether a person, rather than a person's conduct, is unprotected by the Second Amendment, and that "the historical data is not conclusive on the question of whether the Founding era understanding was that the Second Amendment did not apply to felons."[61] Thus, as in *Marzzarella*, the Fourth Circuit assumed, due to a lack of historical evidence, that the defendant was entitled to some Second Amendment protection to keep and possess firearms in his home for self-defense. For this defendant and other similarly situated persons, the court declared that the government, upon remand, must meet the intermediate scrutiny standard and not strict scrutiny, because the defendant's claim "was not within the 'core right' identified in *Heller*—the right of a *law-abiding*, responsible citizen to possess and carry a weapon for self-defense—by virtue of [the defendant's] criminal history as a domestic violence misdemeanant."[62] Upon remand, the government presented empirical evidence to support its contention that the ban on misdemeanants of domestic violence is a reasonable fit in achieving the important government objective at stake, namely decreasing firearm use in domestic violence incidents.[63] The U.S. District Court for the Southern District of West Virginia upheld the statute, concluding the government demonstrated a reasonable fit between the statute and the substantial governmental objective at stake.[64]

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[57] United States v. Skoien (Skoien II), 614 F.3d 638, 642 (7th Cir. 2010) (en banc).

[58] *Id*. at 641.

[59] United States v. Chester (Chester I), 628 F.3d 673 (4th Cir. 2010).

[60] *Id*. at 680.

[61] *Id*.

[62] *Id*. at 683 (emphasis in the original).

[63] United States v. Chester (Chester II), 847 F. Supp. 2d 902, 906-08 (S.D.W.Va. 2012).

[64] *Id*. at 906 (relying on *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012), in declaring that there is no precise formula the government must follow to make the required showing and that the government "may resort to a wide range of sources, such as legislative text and history, empirical evidence, case law, common sense, as circumstances and context require").

These decisions indicate there may be variation with respect to how courts apply the two-step inquiry to assess whether a class of persons is entitled to protection under Second Amendment. As seen above, the Fifth Circuit did not find it necessary to its holding to analyze the federal age requirement under the second prong of the two-step analysis, because it concluded that historical evidence indicated individuals under a certain age are not entitled Second Amendment protection. The Fourth Circuit in *Chester*, on the other hand, could not determine if domestic violence misdemeanants are entitled to protection under the Second Amendment as historically understood, and therefore, it assumed they were protected, stating that application of intermediate scrutiny under the second prong would be appropriate upon remand. When faced with a Second Amendment challenge to prohibition on a category of persons that does not have a historical basis, it seems that a reviewing court will proceed with analysis of a regulation under a heightened means-end scrutiny and place even more emphasis on the responsibility of the government to meet its burden under intermediate scrutiny.[65]

Does the Second Amendment Extend Beyond the Home?

Traditionally, states have regulated concealed carrying of firearms and generally, they are categorized as either "shall-issue" or "may-issue" states. Among these states, some issue permits only to residents, while others issue permits to both residents and non-residents. In "shall-issue" jurisdictions, the issuing authority is required to grant the applicant a concealed carry permit (CCP) if he or she meets the statutory requirements. In "may-issue" jurisdictions, the issuing authority generally has the discretion to grant or deny a CCP based on a variety of statutory factors. Furthermore, each state decides which out-of-state permits to recognize.[66] Since *Heller*, several states' concealed carry laws have been challenged under the Second Amendment. For the most part, challenged concealed carry laws have been those in may-issue states that require an applicant to show good or proper cause in order to be eligible for a CCP.

Both *Heller* and *McDonald* emphasized 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."[67] *Heller* also indicated that mere regulation of a right would not sufficiently infringe upon, or burden, the Second Amendment right, when it pointed out that certain colonial-era ordinances did not "remotely burden the right of self-defense as much as an absolute ban on handguns."[68] In other words, it appears that to be burdensome, a regulation must also substantially infringe on the self-defensive right. Notably, *Heller* declared that the pre-ratified Second Amendment right was "understood to be an individual right protecting against both *public* and private violence,"

[65] *Id*. at 906 (citing United States v. Carter, 669 F.3d 411 (4th Cir. 2012) (vacating and remanding the decision on basis that the government did not present sufficient evidence to demonstrate that 18 U.S.C. §922(g)(3)—prohibiting drug users from possessing firearms—was a substantial fit to achieve the important government interest)). *See also* District of Columbia v. Heller (Heller II), 670 F.3d 1224, 1254-59 (D.C. Cir. 2011) (holding that District's "novel registration" requirements were subject to intermediate scrutiny but remanding the case on this issue because the government did not meet its burden under the standard as it did not present any "meaningful evidence ... to justify its predictive judgments").

[66] For more on concealed carry and federal laws that regulate concealed carry for certain professions, *see* CRS Report R42099, *Federal Laws and Legislation on Carrying Concealed Firearms: An Overview*, by (name redacted).

[67] *McDonald*, 130 S. Ct. at 3047 (Alito, J., plurality) (citing Heller, 554 U.S. at 626).

[68] *Heller*, 554 U.S. at 632.

perhaps suggesting that the Second Amendment right extends beyond the home.[69] Yet the Court listed measures that forbid the carrying of firearms in sensitive places as presumptively lawful, perhaps suggesting that these are the types of regulatory measures excepted from the Second Amendment.

Therefore, with respect to concealed carry laws, courts have been confronted with determining whether the Second Amendment's protections extend beyond the home and, if so, whether concealed carry laws substantially burden the right of self-defense. Not surprisingly, courts have evaluated the challenged provisions differently, given the nuances of each state's concealed carry provisions. The following decisions indicate how reviewing courts have evaluated the constitutionality of concealed carry laws, and thus, how courts may assess future challenges to these laws.

For example, in *Peruta v. County of San Diego*, the U.S. District Court for the Southern District of California turned to the text and structure of *Heller* to determine whether California's concealed carry laws burden the Second Amendment. The court determined that the law, which requires an applicant for a CCP to be a resident and demonstrate "good cause," does not violate the Second Amendment.[70] Although the court raised the issue whether the Second Amendment right as delineated in *Heller* extends to the right to carry a loaded handgun in public, either openly or concealed, the court concluded it did not need to decide the issue.[71] It found California's CCP scheme similar to the 19th century cases cited in *Heller* that upheld state prohibitions on carrying concealed weapons because alternative forms of carrying arms were available.[72] To the extent that California's concealed carry scheme burdened the Second Amendment, the court declared this burden mitigated by California's open carry provisions, which, although generally restrictive, permit the open carry of a loaded firearm under certain circumstances for immediate self-defense.[73] The court also concluded that California's concealed carry measure passes muster under intermediate scrutiny.[74] Similarly, in *Williams v. Maryland*, the Maryland Court of Appeals upheld the state provision which prohibits the wearing, carrying, or transporting of a handgun openly or concealed without a permit.[75] The court reached this conclusion on the basis that the general ban on carrying a firearm includes an exception for home possession of a handgun without obtaining a permit. According to the court, the exception for the home "takes the statutory scheme outside the scope of the Second Amendment, as articulated in *Heller* and *McDonald*."[76] This reading is "wholly consistent with *Heller's* proviso that handguns are 'the most preferred firearm in the nation to keep and use for protection of one's home and family.'"[77]

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[69] *Id*. at 594 (emphasis added).

[70] Peruta v. County of San Diego, 758 F.Supp.2d 1106 (S.D. Cal. 2010).

[71] *Id*. at 1115.

[72] *Id*. at 1114 (citing State v. Chandler, 5 La. Ann. 489, 490 (1850) (holding that a ban on carrying concealed weapons "interfered with no man's right to carry arms ... in full open view."); Nunn v. State, 1 Ga. 243, 251 (1846) (holding a ban on carrying concealed weapons to be valid so long as it does not impair the right to bear arms altogether)). Notably, the court emphasized that concealed weapons bans "cannot be viewed in isolation; they must be viewed in the context of the government's overall scheme." *Id*.

[73] *Id*. at 1114-15 (citing Cal. Penal Code §12031 (2010)).

[74] The court found that the good cause requirement reasonably relates and is adapted to serving the government's "important and substantial interest in public safety and in reducing the rate of gun use in crime." *Id*. at 1117.

[75] Williams v. Maryland, 10 A.3d 1167, 1169 (Md. 2011) (referencing Md. Crim. Code §4-203(a)(1)(i) (2002)).

[76] *Id*. at 1178.

[77] *Id* (citing *Heller*, 554 U.S. at 628).

On the other hand, the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) used a two-step inquiry to analyze Colorado's concealed carry provision. The court, in *Peterson v. Martinez*, held that the carrying of concealed firearms is not protected by the Second Amendment.[78] The challenger, a resident from the State of Washington, sought review of Colorado's concealed carry law, which only issues CCPs for handguns to residents of the state.[79] After reviewing both early 19th century decisions and regulations on concealed carry cases, the court concluded that restrictions on concealed carry qualify as long-standing, and therefore fit within the Supreme Court's "presumptively lawful regulatory measures."[80] Moreover, because "the law harmonizes with the historical traditions associated with the Second Amendment guarantee," the challenger's claim "fail[ed] at step one" of the two-step analysis. As such, the Tenth Circuit did not engage in a means-end analysis of the provision.[81]

Other decisions have proceeded to the second prong of the two-step inquiry and have reached opposite conclusions after applying an intermediate scrutiny analysis on substantially similar concealed carry regulations that require an applicant to show proper cause. For instance, the U.S. District Court for the District of Maryland in *Woollard v. Sheridan* analyzed the requirement in the State of Maryland's statute that an applicant demonstrate "good and substantial reason" in order to obtain a CCP.[82] Although the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) has since reversed the judgment of the court,[83] this report proceeds to review the district court's decision as it could be an approach that other courts may follow. In *Woollard I*, the district court was mindful of an earlier Fourth Circuit decision that had refrained from concluding whether the scope of the Second Amendment as recognized in *Heller* applies outside the home.[84]

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[78] Peterson v. Martinez, No. 11-1149, 2013 U.S. App. LEXIS 3776, at *1 (10th Cir. February 22, 2013).

[79] Colo. Rev. Stat. §18-12-203. The State of Colorado recognizes out-of-state CCPs as long as the other state recognizes its CCP. The State of Washington does not recognize out-of-state CCPs and therefore a Washington CCP is not honored in Colorado. While the challenger also had other non-resident, out-of-state CCPs, Colorado only recognizes CCPs that are issued by an individual's state of residence. Colo. Rev. Stat. §18-12-213.

[80] *Peterson*, 2013 U.S. App. LEXIS 3776, at *33.

[81] *Id*. at *34.

[82] Woollard v. Sheridan (Woollard I), 863 F. Supp. 2d 462 (D. Md. 2012), *rev'd sub nom.* Woollard v. Gallagher (Woollard II), No. 12-1437, slip op. at 6 (4th Cir. March 21, 2013). Similarly, the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) also determined that the Second Amendment "implies a right to carry a loaded gun outside the home" as "[c]onfrontations are not limited to the home." Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012), *rehearing denied*, Moore v. Madigan, No. 12-1269(L) (7th Cir. February 22, 2013). The Seventh Circuit declared the Illinois carrying ban unconstitutional because it simply goes too far in that it is "a blanket prohibition on carrying [a] gun in public [and] prevents a person from defending himself anywhere except inside his home." *Id*. at 940. However, the court did not apply a standard of scrutiny, but primarily found that Illinois "did not make strong showing" to justify the law and that the "empirical literature on the effects of allowing the carriage of guns in public fails to establish a pragmatic defense of the Illinois law." *Id*. at 939-40.

[83] *Woollard II*, No. 12-1437, slip op. at 20 ("We hew to a judicious course today, refraining from any assessment of whether Maryland's ... requirement for obtaining a handgun permit implicates Second Amendment protections. That is, we merely assume that the *Heller* right exists outside the home and that such right of Appellee Woollard has been infringed. We are free to make that assumption because the good-and-substantial reason requirement passes muster under what have deemed to be the applicable standard—intermediate scrutiny.").

[84] *Woollard I*, 863 F. Supp. 2d. at 469. In *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), the Fourth Circuit upheld a conviction under a Department of Interior regulation that prohibited the possession or carrying of a loaded firearm in a motor vehicle within national park areas. Judge Niemeyer, writing for court, applied and upheld the regulation under intermediate scrutiny because the regulation did not burden the "'fundamental,' core right of self-defense in the home by a law-abiding citizen." *Id*. at 471. However, he was alone in his opinion regarding the scope of the Second Amendment. Judge Wilkinson, writing for the court only on this issue, stated that it was unnecessary to decide this issue and would await direction from the Supreme Court itself because "it is not clear what places public authorities may ban firearms altogether without shouldering the burdens of litigation." *Id*. at 475 (Wilkinson, J.
(continued...)

However, the district court in *Woollard I* found it necessary to conduct this analysis so as to determine if Maryland's restriction on handgun possession burdens any Second Amendment right. The district court concluded that *Heller* itself suggests the Second Amendment applies beyond the home, when it declared the right applicable to the home where the need "for defense of self, family, and property is most acute."[85] This particular language "suggests that the right also applies in some form 'where that need is not 'most acute.'"[86] The district court also reasoned that the Second Amendment must extend beyond the home because it protects lawful purposes such as hunting and militia training, neither of which are household activities.[87] Having determined that the regulation burdens conduct protected by the Second Amendment, the district court in *Woollard I* applied intermediate scrutiny and held that the "good and substantial reason" requirement infringes upon the Second Amendment because it is not reasonably adapted to a substantial government interest. Although public safety and crime prevention are considered substantial and compelling governmental interests, the district court found the state's good cause requirement overly broad and that it did nothing to advance the interests of public safety.[88]

In contrast, the U.S. Court of Appeals for the Second Circuit (Second Circuit) in *Kachalsky v. County of Westchester* upheld the State of New York's law which provides that a license to carry a concealed handgun shall only be issued when "proper cause exists."[89] The Second Circuit also determined that the Second Amendment "*must* have some application in the very different context of public possession of firearms."[90] Because the regulation places "substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public," some form of heightened scrutiny is appropriate. The court declared that it made "eminent sense" to apply intermediate scrutiny because the regulation does not touch upon the "core" protection of self-defense in the home.[91] Unlike the Maryland regulation in *Woollard I*, the Second Circuit decided that the New York proper cause requirement passes muster under intermediate scrutiny. Deferring to the state legislature's policy judgments, the court concluded that rather than forbidding anyone from carrying a handgun in public, New York took "a more moderate approach to fulfilling its

(...continued)

majority). "The whole matter strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree." *Id*.

[85] *Woollard I*, 863 F. Supp. 2d at 469 (citing *Heller*, 554 U.S.at 628).

[86] *Id*. at 469. The district court's analysis built upon Judge Niemeyer's reasoning in *Masciandaro* where he also opined that "if the Second Amendment right were confined to self-defense *in the home*, the Court not would not have needed to express reservation for 'sensitive places' outside of the home." *Masciandaro*, 638 F.3d at 468 (Niemeyer, J. Part III.B).

[87] *Woollard I*, 863 F. Supp. 2d at 469.

[88] *Id*. at 474-75 (The State "does not ban handguns from places where the possibility of mayhem is most acute, ... It does not attempt to reduce accidents, as would a requirement that all permit applicants complete a safety course. It does not even, as some other States' laws do, limit the carrying of handguns to persons deemed 'suitable' by denying a permit to anyone 'whose conduct indicates that he or she is potentially a danger to the public if entrusted with a handgun.'" *Id*.).

[89] Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012) (citing N.Y. Penal Law §400.00(2)(f)).

[90] *Id*. at 89 ("The plain text of the Second Amendment does not limit the right to bear arms to the home." *Id*. at n.10.).

[91] *Id*. at 93 (reviewing historical state regulation of firearms outside the home and declaring that "[S]tates have long recognized a countervailing and competing set of concerns with regard to handgun ownership and use in public. Understanding the scope of the constitutional right is the first step in determining the yard stick by which we measure the state regulation." *Id*. at 95-6.).

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."[92]

Are Certain Types of Weapons Not Protected by the Second Amendment?

Courts have employed a mixed approach when evaluating whether the Second Amendment protects certain types of weapons. Unlike other laws that have been scrutinized before the courts, the Supreme Court in *Heller* briefly addressed whether certain types of weapons would fall outside the protection of the Second Amendment. It declared that the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[93] The Court found that its prior 1939 decision in *United States v. Miller*[94] supported this conclusion. Relying on *Miller*, the Court acknowledged that this limitation is supported by the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'" and that the "sorts of weapons protected were those 'in common use at the time'" because those capable of service in the militia at the time of ratification would have brought "the sorts of lawful weapons that they possessed at home to militia duty."[95]

Since *Heller*, cases that have evaluated the constitutionality of state assault weapons bans have generally found them to be valid under the Second Amendment. These courts have relied on either, or both, the "common use" language found in *Heller* and the two-step inquiry set forth in *Marzzarella* to evaluate bans on assault weapons.

California

In 2009, the California Court of Appeals decided *People v. James*, which held that possession of an assault weapon in California remains unlawful and is not protected by the Second Amendment.[96] California's Roberti-Roos Assault Weapons Control Act of 1989, like the 1994 federal assault weapons ban, defines "assault weapons" by providing a list of proscribed weapons and through characteristics "which render these weapons more dangerous than ordinary weapons typically possessed by law-abiding citizens for lawful purposes."[97] Relying on *Heller*'s brief

[92] *Id*. at 98.

[93] *Heller*, 554 U.S. at 625.

[94] United States v. Miller, 307 U.S. 174 (1939) (holding that the Second Amendment did not protect an individual's right to transport an unregistered short-barreled shotgun in interstate commerce).

[95] *Heller*, 540 U.S. at 627. The Court recognized that "it may be true that no amount of small arms could be useful against modern-day bombers and tanks." However, it noted that modern day developments "cannot change our interpretation of the right." *Id*.

[96] People v. James, 94 Cal. Rptr. 3d 576 (Cal. Ct. App. 2009), *rev. denied* by People v. James, 2009 Cal. LEXIS 9895 (Cal. September 17, 2009), *cert. denied* James v. Cal. 2010 U.S. LEXIS 1284 (U.S., February 22, 2010). Notably, a petitioner challenging an assault weapons ban could make an argument that civilian versions of military weapons, like the AR-15, should be differentiated from military weapons, like the M16, which the Supreme Court does not considered protected under the Second Amendment. However, the Supreme Court's denial of certiorari in the *James* case could indicate that the Court does not distinguish between military and civilian versions of military style weapons, considering both beyond the scope of the Second Amendment's guarantee.

[97] *James*, 94 Cal. Rptr. 3d at 579-580 (citing Cal. Penal Code §§12276, 12276.1).

discussion that the Second Amendment does not protect a military weapon, such as an M16 rifle, the court in *James* declared that the prohibited weapons on the state's list "are not the types of weapons that are typically possessed by law-abiding citizens for lawful purposes such as sport hunting or self-defense; rather these are weapons of war."[98] It concluded that the relevant portion of the act did not prohibit conduct protected by the Second Amendment as defined in *Heller* and therefore the state was within its ability to prohibit the types of dangerous and unusual weapons an individual can use.[99]

District of Columbia

The District of Columbia amended its firearms regulations after the *Heller* decision and enacted new firearms regulations including an assault weapons ban that is similar to California's. In 2011, the D.C. Circuit issued its decision in *Heller v. District of Columbia* (*Heller II*) which upheld the District's ban on certain semiautomatic rifles and large capacity ammunition feeding devices (LCAFD).[100] Under the "common use" factor delineated in *Heller*, the D.C. Circuit acknowledged that "it was clear enough in the record that certain semi-automatic rifles and magazines holding more than 10 rounds are indeed in 'common use.'"[101] However, the court could not conclude definitely whether the weapons are "commonly used or are useful specifically for self-defense or hunting" such that they "meaningfully affect the right to keep and bear arms."[102] Therefore, the court went on to analyze the bans under the two-step approach to determine their validity under the Second Amendment.[103]

Assuming that the ban impinged on the right protected under *Heller* (i.e., to possess certain arms for lawful purposes such as individual self-defense or hunting), the court found that such regulations should be reviewed under intermediate scrutiny because the prohibition "does not effectively disarm individuals or substantially affect their ability to defend themselves."[104] Under intermediate scrutiny, the government has the burden of showing that there is a substantial relationship or reasonable "fit" between the regulation and the important governmental interest "in protecting police officers and controlling crime."[105] The D.C. Circuit held that the District carried this burden and that the evidence demonstrated that a ban on both semiautomatic assault rifles and LCAFDs "is likely to promote the Government's interest in crime control in the densely populated urban area that is the District of Columbia."[106]

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[98] *Id*. at 585-86 (quoting Cal. Penal Code §122275.5(a) (West 2006)).

[99] *James*, 94 Cal. Rptr. 3d at 586 (citing the Cal. Penal Code §§12280(b)-(c) which imposes penalties for possession of assault weapon or .50 BMG rifle).

[100] Heller v. District of Columbia (Heller II), 670 F.3d 1244 (D.C. Cir. 2011) (affirming in part and vacating in part the lower court's decision, remanding to the lower court the petitioner's challenge to the District's "novel registration requirements").

[101] *Id*. at 1261.

[102] *Id*.

[103] The D.C. Circuit adopted from other circuits a two-step approach to determining the constitutionality of the gun laws at issue. *See, e.g.*, *Marzzarella*, 614 F.3d at 89. This D.C. Circuit indicated that this two-step approach is taken if the challenged regulation is not one that the *Heller* decision identified as a "longstanding" regulation that is "presumptively lawful." *Id*. (citing *Heller*, 554 U.S. at 626-27, n.26).

[104] *Heller II*, 670 F.3d 1261-62. The court did not resolve the question of whether the ban on certain long gun assault weapons or high capacity magazines impinged on the Second Amendment right as historically understood. *Id*. at 1261.

[105] *Id*. at 1262.

[106] *Id*. at 1263.

Illinois—Cook County

In 2012, the Supreme Court of Illinois decided *Wilson v. Cook County*, a case that evaluated the constitutionality of the Blair Holt Assault Weapons Ban of Cook County, a long-standing ordinance that was amended to similarly reflect provisions of the 1994 Assault Weapons Ban.[107] Among other claims, the plaintiffs argued that the ordinance violates the Second Amendment. With respect to the Second Amendment claim, the court indicated that it would follow the two-step approach similar to the *Heller II* court. While the court acknowledged that the ordinance banned only a subset of weapons with particular characteristics similar to other jurisdictions, it found that it could not "conclusively say ... that assault weapons as defined in the [o]rdinance categorically fall outside the scope of the rights protected by the [S]econd [A]mendment."[108] The court ultimately remanded the Second Amendment claim to the trial court for further proceedings, because unlike the *James* and *Heller II* decisions, the county did not have an opportunity to present evidence to justify the nexus between the ordinance and the governmental interest it seeks to protect.[109]

Summary

These cases demonstrate that courts evaluating various assault weapons bans, and to a limited extent LCAFD bans, have looked to the *Heller* decision and the general framework that has developed in the lower courts for analyzing claims under the Second Amendment. Based on the *Heller* decision where the Supreme Court indicated that certain weapons fall outside the protection of the Second Amendment, lower courts have examined whether the prohibited weapons are considered in "common use" or "commonly used" for lawful purposes or "dangerous and unusual." It is uncertain whether, to be protected under the Second Amendment, the weapon must be in "common use" by the people and if so, whether it must be in "common use" for self-defense or hunting; it is likewise uncertain what constitutes "dangerous and unusual." *Heller* could arguably be taken to indicate that if the prohibited weapons do not meet these criteria then they are not protected by the Second Amendment, in which case no heighted judicial scrutiny would be applied.

As seen above, a reviewing court could evaluate such measures under the two-step inquiry. If the restriction to certain types of firearms and firearms accessories imposes a burden on conduct protected by the Second Amendment, then a heightened level of judicial scrutiny will be applied to determine the ban's constitutionality. Yet how the "common use" and "dangerous and unusual"

[107] Wilson v. Cook County, 968 N.E.2d 641 (Ill. 2012). The challengers in *Wilson* also argued that the ordinance violates the Due Process and Equal Protection Clauses of the U.S. Constitution. Regarding the due process claim, the court concluded that the ordinance is not unconstitutionally vague such that it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Id.* at 650-53. The court also dismissed the equal protection claim, finding that the "[o]rdinance does not arbitrarily differentiate between two owners with similar firearms because the banned firearms are either listed, a copy or duplicate, or fall under the characteristics-based test." *Id*. at 658.

[108] *Id*. at 655.

[109] *Id*. at 657. ("Without a national uniform definition of assault weapons from which to judge these weapons, it cannot be ascertained at this stage of the proceedings whether these arms with these particular attributes as defined in this [o]rdinance are all well suited for self-defense or support or would be outweighed completely by the collateral damage resulting from their use, making them 'dangerous and unusual' as articulated in *Heller*. This question requires us to engage in an empirical inquiry beyond the scope of the record and beyond the scope of judicial notice about the nature of weapons that are banned under this [o]rdinance and the dangers of these particular weapons." *Id*. at 656.).

criteria should be read, if at all, in connection with the two-step approach remains unclear. Neither the *James*, *Heller II*, nor *Wilson* courts appear to have fully explained the connection between the two approaches.

Implications for Future Second Amendment Challenges

Although many firearms laws have been upheld as constitutional, the differences in how courts interpret the text of *Heller*, insofar as providing some guidance on the scope of the Second Amendment, as well as how they apply the two-step inquiry may impact the burden upon the government to prove its case. For instance, courts have reached different conclusions on how to interpret the language on presumptively lawful restrictions. As noted above, it could be that these presumptively lawful measures are "so ingrained in our understanding of the Second Amendment that there is little doubt that they withstand the applicable level of scrutiny. Alternatively, the right itself can be seen as failing to extend into areas where, historically, limitations were commonplace and well accepted."[110]

While the court in *Woollard* believed the former reading was correct,[111] the Third Circuit in *Marzzarella* believed the latter was the correct interpretation for how to treat measures identified as presumptively lawful by the Court in *Heller*.[112] In each case, the court went on to apply intermediate scrutiny; however, the potential impact in selecting the latter interpretation—i.e., exceptions to the Second Amendment—may mean that as long as a challenged regulation was included among, or analogous to, the provisions noted in *Heller*,[113] there would be no burden imposed on the government to submit evidence demonstrating that the firearms regulation is a narrow fit to meet a substantial government interest. As such, this interpretation arguably would favor the government, and there could be a greater chance that a firearms regulation would be upheld. In contrast, the alternative interpretation is arguably not as favorable to the government, and a reviewing court could be less likely to uphold the constitutionality of a provision, unless the government is able to provide "meaningful evidence," as some courts have required. Moreover, the interpretation of the presumptively lawful language likely affects how lower courts define the nature of the right conferred by the Second Amendment and thus the level of scrutiny, if any, that should be applied.

[110] *Woollard I*, 863 F. Supp. 2d at 470.

[111] *Id*. ("[I]t did seem to indicate that the former reading is more likely correct than the latter: 'The Court's use of the word 'presumptively' suggests that the articulation of sensitive places may not be a limitation on the scope of the Second Amendment, but rather on the analysis to be conducted with respect to the burden on that right.'" (citing *Masciandaro*, 638 F.3d at 472)).

[112] *Marzzarella*, 614 F.3d at 91 ("[W]e think the better reading based on the text and structure of *Heller*, is ... that these longstanding prohibitions are exceptions to the right to bear arms."). Notably, some courts do not resolve or address this text from *Heller*. For example, the Second Circuit in *Kachalsky* stated, "We do not view this language as a talismanic formula for determining whether a law regulating firearms is consistent with the Second Amendment. While we find it informative, it simply makes clear that the Second Amendment right is not unlimited." *Kachalsky*, 701 F.3d at 90 n.11.

[113] The measures identified by the *Heller* Court were "prohibitions on the possession of firearms by felons and the mentally ill, or laws for 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." *Heller*, 554 U.S. at 626-27.

Other Tests to Evaluate the Second Amendment

Although the prevailing test to evaluate challenges under the Second Amendment is the two-step inquiry, at least one judge, through dissent, has proposed a different approach. In *Heller II*, Judge Kavanaugh opined: "In my view, *Heller* and *McDonald* leave little doubts that courts are to assess gun bans and regulations based on the text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."[114] Under this test, he would have found that D.C.'s ban on semiautomatic rifles to be unconstitutional. However, the Second Circuit in *Kachalsky* seemed to implicitly reject this test. After reviewing the history of concealed carry laws and accompanying jurisprudence, the court stated: "History and tradition do not speak with one voice here. What history demonstrates is that states often disagreed as to the scope of the right to bear arms, whether the right was embodied in a state constitution or the Second Amendment."[115]

Moreover, some parties challenging firearms laws, such as the proper cause requirement for concealed carry, have also started to advocate that the court take a different approach to evaluate gun measures. They suggest applying First Amendment prior restraint doctrine instead of means-end scrutiny. In the First Amendment context, any law that makes "freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."[116] Thus far, this argument has been rejected and no court has taken this "quantum leap" of "import[ing] substantive First Amendment principles wholesale into Second Amendment jurisprudence."[117]

Conclusion

Firearms laws, both existing and new, will undoubtedly continue to be challenged under the Second Amendment. The Supreme Court's decision in *Heller* appears to have provided limited guidance on how to analyze firearms regulations under the Second Amendment. Yet lower courts have fashioned and primarily applied a two-step inquiry, which asks whether the regulated conduct burdens the Second Amendment right, and if so, whether it passes muster under means-end scrutiny. Although several firearms provisions have been upheld, it remains difficult to discern if there is a better understanding of the scope of the Second Amendment outside the "core" right identified in *Heller*, as courts have evaluated firearms provisions differently under the two-part test. As the post-*Heller* challenges to firearms provisions continue to percolate through the lower courts, it remains to be seen if any begin to use other analytical frameworks proposed, such as the "history, text, and tradition" test from the *Heller II* dissent or the prior restraints analysis suggested by parties challenging regulations under the Second Amendment.

[114] *Heller II*, 670 F.3d at 1271 (Kavanaugh, J. dissent).

[115] *Kachalsky*, 701 F.3d at 91.

[116] Staub v. City of Baxley, 335 U.S. 313, 322 (1958).

[117] *Kachalsky*, 701 F.3d at 91-93. *See also Woollard I*, 863 F. Supp. 2d at 472; Piszczatoski v. Filko, 840 F. Supp. 2d 813, 835-36 (D.N.J. 2012).

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