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The Peerless Second Amendment: Why Gun Control Laws Remain Unaffected After Heller and McDonald

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The Peerless Second Amendment: Why Gun
Control Laws Remain Unaffected After *Heller* and
McDonald

Senior Thesis

Presented to the Department of Public Policy and Law *in
partial fulfillment of the requirements for the degree with honors*
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Submitted By:

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Introduction

The Second Amendment 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 (U.S. Const. amend. II).” In 2008 the Supreme Court decided for the first time what, exactly, the Second Amendment means, in *District of Columbia v. Heller*.¹ In a 5-4 decision, the Court held that the Amendment protects an individual right to bear arms for self-defense. Two years later the Supreme Court held in *McDonald v. City of Chicago* that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right, protecting it from state infringement.² Initially these two decisions seemed like enormous victories for proponents of gun rights; they opened the floodgate for challenges to state gun control laws in the lower courts. As lower courts began hearing challenges, however, it became apparent that this initial victory for the gun lobby was not as significant as it first seemed. Since *Heller* and *McDonald* were decided lower courts have consistently rejected challenges to gun control laws. There have been over 1,000 cases challenging gun control laws since 2008 and 94% of these challenges have been

¹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

² *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

rejected.³ This thesis will explore why the overwhelming majority of gun control laws have been upheld after *Heller* and *McDonald* significantly expanded the understanding of the right protected by the Second Amendment. I will argue that the Second Amendment is inherently unique; the right it protects is unlike any other constitutionally protected right. The Second Amendment protects the right to own guns, and the function of guns is to kill people. Guns will always be a public safety issue because of their potential for harm, and the role of the government is to promote public safety. This inevitable conflict between the state's responsibility to protect public safety and the Second Amendment explains why the right to bear arms can be regulated in substantial ways.

The debate on gun rights and gun control is one of the most polarizing issues in the United States. This debate causes so much dispute in our society because guns have an enormous potential for harm. Eighty people die from gun-related injuries every day in the United States, on average. This means that guns kill about thirty thousand people every year.⁴ In a comprehensive study on the leading causes of death in 2013, the Center for Disease Control and Prevention reported that of the 192,945 deaths resulting from injury, 33,636 were caused by firearms.⁵ The study found that guns were used in over half of all homicides and suicides; guns were

³ "Protecting Strong Gun Laws: The Supreme Court Leaves Lower Court Victories Untouched," Law Center to Prevent Gun Violence, accessed March 1, 2016, <http://smartgunlaws.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched/>.

⁴ Brief for Brady Center to Prevent Gun Violence as Amicus Curiae, 33, *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁵ "National Center for Health Statistics," Centers for Disease Control and Prevention, accessed April 18, 2016, <http://www.cdc.gov/nchs/fastats/injury.htm>.

responsible for 11,208 of 16,121 homicides, and 21,175 of 41,149 suicides.⁶ Furthermore, the accidental discharge of firearms caused 505 deaths in 2013.⁷ Because guns are such a pervasive public safety issue, it is important to understand the ways in which they can be regulated. The decisions of courts regarding Second Amendment challenges are so significant because they will impact lives. For this reason it is crucial to understand what the Second Amendment protects.

There are two prevailing theories on the meaning of the Second Amendment. The first is called the individual-rights theory, and it argues that the Second Amendment protects the right to bear arms for nonmilitary use. The second is the collective-right theory, which argues that the Amendment only protects the right to bear arms for the preservation of a well-regulated militia.⁸ Before *Heller* was decided in 2008, the Supreme Court had never before explicitly endorsed one of the theories.

The Supreme Court came close to this question in 1939 in *United States v. Miller*, when they upheld two men's federal convictions for transporting an unregistered short-barreled shotgun over state lines. The Court held that the Second Amendment does not protect the right to keep and bear a sawed-off double barrel shotgun because this firearm does not have a reasonable relationship to the preservation of a well-regulated militia.⁹ Understandably, this opinion was widely interpreted to mean that the Second Amendment protects the right to bear arms

⁶ "National Center for Health Statistics," Centers for Disease Control and Prevention, accessed April 18, 2016, <http://www.cdc.gov/nchs/fastats/injury.htm>.

⁷ <http://www.cdc.gov/nchs/fastats/injury.htm>.

⁸ Mark Tushnet, *Out of Range: Why the Constitution Can't End the Battle Over Guns* (New York: Oxford University Press, 2007), 48.

⁹ "United States v. Miller," Oyez: IIT Chicago-Kent College of Law, accessed October 15, 2015, <https://www.oyez.org/cases/1900-1940/307us174>.

only in conjunction with the preservation of a well-regulated militia.¹⁰ *Miller*, however, did not actually answer the question of who is eligible to bear arms. The opinion decided that the type of weapon at issue was not eligible for Second Amendment protection, not that the Second Amendment doesn't protect the right of individuals to bear arms for nonmilitary use.¹¹

After *Miller* the collective-right interpretation of the Second Amendment was generally accepted in law. This changed, however, when a significant body of scholarship supporting the individual-rights view emerged in the late 1980's and 1990's. The individual-rights theory gained traction and became known as the 'Standard Model.'¹² The Standard Model will be discussed further in Chapter 1.

After the popularization of the Standard Model, *Heller* was deliberately brought by an independent group of lawyers, against the recommendation of the National Rifle Association, to ask the Supreme Court to recognize an individual right to gun ownership. The NRA opposed the case because it was unclear what the Supreme Court would decide. There are strong arguments for both theories of Second Amendment interpretation, and it was not certain that the Court would rule favorably for gun rights.¹³

Heller challenged the constitutionality of D.C.'s handgun regulations. D.C. generally prohibited the possession of usable handguns in the home by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns.

¹⁰ Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," 35.

¹¹ *Heller* 554 U.S. 570, 49.

¹² Saul Cornell, ed., *The Second Amendment on Trial: Critical Essays on District of Columbia v. Heller* (Amherst: UMass Press, 2013), Intro.

¹³ Adam Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America* (New York: W.W. Norton & Company, 2011), 95.

D.C. also required residents to keep lawfully owned firearms unloaded or bound by a trigger lock.¹⁴ Petitioner Dick Anthony Heller was a D.C. police officer who was authorized to carry a handgun while on duty but wished to keep one at home. Heller applied for a registration certificate for a handgun and was denied. He filed a lawsuit challenging D.C.'s laws, claiming that they violated his Second Amendment right to keep a functional firearm in his home.¹⁵ The Supreme Court granted certiorari to the case, and for the first time explicitly answered the question on whether the Second Amendment protects an individual right to keep firearms.

In a 5-4 ruling, the Supreme Court held the Second Amendment does protect an individual right to own firearms for nonmilitary purposes. The majority opinion, authored by Justice Scalia, argued that the history and text of the Amendment prove that it was originally understood to protect an individual right. The bulk of the *Heller* opinion was dedicated to a historical analysis on the meaning of the Second Amendment. After concluding that the Amendment protects an individual right, however, Justice Scalia made it clear that the right is not unlimited. *Heller* outlined certain types of gun control regulations that are constitutional. The opinion then discussed the specific facts of the case before the Court. *Heller* articulated that the 'core' of the Second Amendment right is that of law-abiding citizens to possess handguns in the home for the purpose of self-defense. For this reason the Supreme Court held that D.C.'s handgun ban and trigger-lock requirement are clearly unconstitutional.¹⁶

¹⁴ Heller 554 U.S. 570, 1.

¹⁵ Heller 554 U.S. 570, 2.

¹⁶ Heller 554 U.S. 570, syllabus.

Heller confirmed that the Second Amendment protects an individual right to keep and bear arms for self-defense, but because the District of Columbia falls under federal jurisdiction, *Heller* did not consider whether the right applies to the states. Soon after *Heller*, the Supreme Court was asked to decide whether or not the Second Amendment right is protected from state infringement in *McDonald v. City of Chicago*. In another 5-4 decision, the Court held that the Second Amendment is fully applicable to the states.¹⁷ The *Heller* and *McDonald* opinions will be discussed in greater depth in Chapter 1.

Heller and *McDonald* significantly impacted the understanding of the right protected by the Second Amendment. The Supreme Court held for the first time that the Second Amendment protects an individual right to bear arms for self-defense. Proponents of gun rights were hopeful that this expanded understanding of the Second Amendment right would invalidate a vast array of gun control laws. Since *Heller* and *McDonald* there have been over 1,000 Second Amendment challenges in the lower courts, however, the overwhelming majority have been rejected.¹⁸ This thesis explores why gun control laws remain unaffected after *Heller* and *McDonald*. I will argue that the Second Amendment is unique because of the conflict between what it protects, guns, and the duty of the government, public safety. Because of this relationship, all but the most restrictive gun control laws will survive challenges in the courts.

¹⁷ *McDonald* 561 U.S. 742, syllabus.

¹⁸ <http://smartgunlaws.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched/>.

The goal of this thesis is to understand the right protected by the Second Amendment, as it was codified in *Heller* and *McDonald*, and to analyze why the overwhelming majority of challenges to gun control laws in the lower courts have been rejected following those decisions. The following sections explain the Standard Model interpretation of the Second Amendment and summarize the majority opinions of *Heller* and *McDonald*. Chapter 2 looks at what guidance *Heller* and *McDonald* provided for lower courts to analyze future challenges, and outlines the basic approach that most lower courts have adopted to review Second Amendment challenges. Chapter 3 discusses the outcome of Second Amendment cases in the lower courts following *Heller* and *McDonald*. The chapter then aims to explain the outcome and identify the ways in which the Second Amendment is unique. Following this analysis, Chapter 3 includes case studies of two lower court cases that considered challenges to two very different gun control laws. The first case, *Jackson v. City and County of San Francisco*¹⁹ was decided by the Ninth Circuit Court of Appeals and upheld a San Francisco law that requires firearms to be stored in a locked box or rendered inoperable when not carried on a person. The second case, *Kachalsky v. County of Westchester*²⁰, was heard by the Second Circuit Court of Appeals and upheld New York's law requiring an applicant to demonstrate 'proper cause' in order to obtain a concealed carry permit. These case studies aim to illustrate the unique properties of the Second Amendment in action, and explain why gun control laws remain unaffected after *Heller* and *McDonald*. Finally, I will offer some brief thoughts on how the death of Justice Scalia, the author of the *Heller*

¹⁹ *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), 1.

²⁰ *Kachalsky v. County of Westchester*, 701 F.3d 81 (2nd Cir, 2012), 1.

opinion, might affect the Second Amendment in the Supreme Court, and I conclude that it will not.

Chapter 1: The Meaning of the Second Amendment

There are two schools of thought on the meaning of the Second Amendment. The individual-rights model claims that the Second Amendment was originally understood to protect the individual right to bear arms unconnected to militia service, and the collective-rights model claims that the Second Amendment only protects the right to bear arms in connection to the preservation of a well-regulated militia.²¹ Following the Supreme Court's ruling in *United States v. Miller* (1939), that firearms unrelated to militia service are not protected by the Second Amendment, there was a tendency in law to accept the collective-rights view.²²

In 1983, constitutional law scholar Don B. Kates published an article in the *Michigan Law Review* titled, "Handgun Prohibition and the Original Meaning of the Second Amendment," which provided an extensive historical and textual analysis advocating for the individual-rights interpretation of the Second Amendment.²³ Kates' article did not glean much attention at first, but in 1989 Sanford Levinson, one of the most prominent liberal constitutional law scholars in the country, published an article called, "The Embarrassing Second Amendment," in the *Yale Law Review*, which suggested that the individual-rights theory may be correct and

²¹ Tushnet, *Out of Range*, 48.

²² Tushnet, *Out of Range*, 63.

²³ Don B. Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review* (1983): 204-273, accessed October 15, 2015, <http://www.constitution.org/2l/2ndschol/57mich.pdf>.

endorsed Kates' article.²⁴ Levinson's article changed the entire arena of Second Amendment interpretation; his endorsement made the individual rights argument respectable.²⁵ In the wake of Kates' and Levinson's articles, scholarly work on the Second Amendment took off.²⁶ Much of the emerging body of literature favored the individual-rights model; over 125 law review articles supporting the individual-rights model were published by 1999.²⁷ The individual-rights model became known as the 'Standard Model.'²⁸

The Supreme Court had never officially considered the meaning of the Second Amendment until they agreed to hear *District of Columbia v. Heller*. When the Court granted certiorari to *Heller*, it was unclear what they would decide. Both the Standard Model and collective-right interpretation of the Second Amendment are grounded by strong arguments. Mark Tushnet, a prominent constitutional law scholar and professor at Harvard Law School, argues that the 'correct' interpretation of the Second Amendment right varies by judicial philosophy. He says that the Standard Model is a slightly stronger argument from an originalist perspective, meaning in terms of what the Second Amendment was originally understood to protect when it was adopted, but that the collective-right interpretation is favored when considering other components that go into legal arguments, such as Supreme

²⁴ Sanford Levinson, "The Embarrassing Second Amendment," *Yale Law Review* (1989): 637-639, accessed October 15, 2015, <http://www.constitution.org/mil/embar2nd.htm>.

²⁵ Winkler, *Gunfight*, 95.

²⁶ Cornell, *The Second Amendment on Trial*, Introduction.

²⁷ Winkler, *Gunfight*, 95.

²⁸ Tushnet, *Out of Range*, 3.

Court precedents. Tushnet makes the point that it is impossible to discern which interpretation is 'correct.'²⁹

In a 5-4 decision, the *Heller* Court held that the Second Amendment does protect an individual right to bear arms for purposes unrelated to militia service, endorsing the Standard Model. Justice Scalia, who is known for his unwavering dedication to originalism as a legal theory, wrote the majority opinion.³⁰ The opinion undertook a thorough historical and textual analysis of the Second Amendment to determine what the original meaning of the Amendment was when it was drafted and ratified. Justice Scalia argued that the well-established English right of an individual to bear arms was fundamental to the colonists at the time of the Second Amendment's conception, and that the specific text and the relationship between the clauses in the Amendment further support that the right was not only protected in the context of militia service.³¹

It is important to note that there is a considerable amount of disagreement on the Standard Model and that there were two significant dissenting opinions in *Heller*. Justice Stevens issued a dissenting opinion in *Heller* in which he argued that the Second Amendment only protects the right to keep and bear arms for certain military purposes. He disputed the historical and textual analysis of the *Heller* majority, and insisted that the collective-rights theory is both the most natural

²⁹ Tushnet, *Out of Range*, xvi.

³⁰ Nelson Lund, "The Second Amendment, *Heller*, and Originalist Jurisprudence," in *The Second Amendment on Trial: Critical Essays on District of Columbia v. Heller*, ed. Saul Cornell et al. (Amherst: University of Massachusetts Press, 2011), 148-186.

³¹ Joyce Lee Malcolm, "Brief of the Cato Institute and History Professor Joyce Lee Malcolm as Amici Curiae in Support of Respondent [The Right Inherited From England]," in *The Second Amendment on Trial: Critical Essays on District of Columbia v. Heller*, ed. Saul Cornell et al. (Amherst: University of Massachusetts Press, 2011), 31-52.

reading of the text of the Amendment and the interpretation most faithful to its drafting history.³² Justice Breyer joined Justice Stevens' dissent on the rejection of the Standard Model.³³ Even though the *Heller* Court was sharply divided, because the majority opinion adopted the Standard Model, it is the interpretation of the Second Amendment that will apply in all cases after *Heller*. Therefore, for the purpose of this thesis, it is important to explain the Standard Model. It is crucial to understand what the Second Amendment protects, as interpreted by the majority in *Heller*, in order to understand how the right may be regulated after *Heller*.

The Standard Model

A Right Inherited from England

When drafting the Bill of Rights, the Founding Fathers drew upon concepts from English law and the rights guaranteed to English citizens. The origin of the Second Amendment can be traced back to fifteenth century England.³⁴

In 1671 King Charles II instituted the Game Act, which banned most people, except an elite few, from owning firearms. When Catholic King James II took the throne in 1685, he enforced the Game Act in regions home to his Protestant enemies to effectively disarm his political opponents.³⁵ James II was overthrown during the Glorious Revolution of 1688, at which point Parliament made a list of grievances against him, later to be turned into a Bill of Rights. Parliament then appointed

³² *Heller* 554 U.S. 570, 2 (Stevens, J. Dissenting).

³³ *Heller* 554 U.S. 570, 1 (Breyer, J. Dissenting).

³⁴ Nicholas J. Johnson, et al., *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* (New York: Wolters Kluwer Law & Business, 2012).

³⁵ Tushnet, *Out of Range*, 16.

William and Mary of Orange to power, contingent on their acceptance of the Bill of Rights.³⁶

After the previous two tyrants, the English were wary of too much military power in the hands of the state. Because of this, the British Declaration of Rights, adopted in 1689, specifically included the right of Protestants to own arms. Article 7 of the Declaration stated, "That the Subjects which are Protestants, may have Arms for their Defense suitable to their Condition, and as allowed by Law."³⁷ This language is understood to protect an individual right to own firearms for self-defense. The Standard Model argues that the right to keep and bear arms was fundamental to English subjects by the time of American colonization, and thus was recognized by the colonists.³⁸

Drafting History

Just as the Stuart Kings Charles II and James II tried to disarm political opponents in England in the 1600's, British authorities tried to disarm the colonists as their opposition to Britain grew in the late 1700's. In 1774 Britain banned the export of arms and ammunition to the colonies and British soldiers began to confiscate ammunition that belonged to the militia in Massachusetts, one of the most rebellious areas. Britain's attempts at disarmament provoked confrontations

³⁶ Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," 26.

³⁷ Tushnet, *Out of Range*, 16.

³⁸ Stephen Bradbury, "Whether the Second Amendment Secures an Individual Right," *Memorandum Opinion for the Attorney General, Opinions of the Office of Legal Counsel*, (Volume No. 28), retrieved from <http://www.justice.gov/sites/default/files/olc/opinions/2004/08/31/op-olc-v028-p0126.pdf>, 174; Kates, 10.

and eventually ignited the Revolutionary War when British soldiers tried to seize colonists' arms in Concord and Lexington.³⁹

For several years after the Revolutionary War, the new nation was troubled by a weak central government.⁴⁰ When the Constitution was framed the Founders needed to create a representative government that was also strong enough to enforce treaties and take a place on the international stage. The proposed Constitution that emerged from the Constitutional Convention in 1787 created a strong central government, but did not provide security for a free people.⁴¹ Anti-federalists opposed the Constitution in its original form, fearing that it gave the central government too much power. They proposed a series of amendments to be made to the body of the Constitution that would reduce the federal government's power. Federalists, on the other hand, pushed for ratifying the Constitution in its original form and agreed to consider the addition of further guards for private rights afterwards.⁴² Several states proposed bills of rights during their ratifying conventions.⁴³

The militia and the right to bear arms was one of the topics covered during the ratification debates. The proposed Constitution divided powers over the militia in Article 1 Section 8, giving the federal government the power to organize, arm, and call the militia to action, and giving the states the power to appoint officers and train the militia.⁴⁴ Anti-federalists feared that the proposed Constitution gave the central

³⁹ Bradbury, "Whether the Second Amendment Secures an Individual Right," 176-177.

⁴⁰ Tushnet, *Out of Range*, 13.

⁴¹ Tushnet, *Out of Range*, 13-15.

⁴² Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," 16.

⁴³ Tushnet, *Out of Range*, 15.

⁴⁴ Tushnet, *Out of Range*, 14.

government too much power over the militia and argued that they would easily be able to destroy it. Anti-federalists proposed an amendment to go in the body of the Constitution to protect states' ability to maintain militias.⁴⁵ Many of the proposed bills of rights from the states included protection for the right to bear arms. The states' proposals used language that supported an individual right to arms but also praised the citizen militia.⁴⁶

The Federalist-dominated first Congress was not keen on decreasing the power of the central government. They rejected the Anti-federalists' proposed revisions and it was the states' proposals that became the stepping-stone for the Second Amendment.⁴⁷ Proponents of the Standard Model rely on this analysis to argue that because the Second Amendment was based on the states' proposals, not the Anti-federalists', the Second Amendment protects an individual right to bear arms, not the ability of states to maintain militias.⁴⁸

State Constitutions that both preceded, and immediately followed the ratification of the Second Amendment included language about the right to bear arms as an individual right. Before the Bill of Rights was ratified, four states had analogues to the Second Amendment. Of these four states, two states, Pennsylvania and Vermont, specifically established an individual right to gun ownership unconnected to militia service.⁴⁹ The two other states, North Carolina and Massachusetts, specified the right for public safety reasons and common defense. In

⁴⁵ Bradbury, "Whether the Second Amendment Secures an Individual Right," 186-187.

⁴⁶ Bradbury, "Whether the Second Amendment Secures an Individual Right," 185-186.

⁴⁷ Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," 18.

⁴⁸ Bradbury, "Whether the Second Amendment Secures an Individual Right," 186.

⁴⁹ Tushnet, *Out of Range*, 22.

each instance, in the early to mid 1800's the state's Supreme Court interpreted the provision to refer to individual rights.⁵⁰

Between 1789 and 1820, nine states adopted provisions analogous to the Second Amendment. Kentucky, Ohio, Indiana, and Missouri referred to the right of *the people* to, "bear arms in defense of himself and the state." Mississippi, Connecticut, and Alabama used the wording that *each citizen* has the, "right to bear arms in defense of himself and the state." Tennessee and Maine both used language about common defense similar to Massachusetts' Constitution.⁵¹ Proponents of the Standard Model argue that the existence of so many Second Amendment analogues in states' Constitutions that explicitly guarantee an individual right to gun ownership for purposes other than militia service, proves that this right was a common value at the time of the Founding.⁵²

Text

Proponents of the Standard Model argue that the text of the Second Amendment further supports the view that it protects an individual right to bear arms for purposes other than militia service. They argue that the prefatory clause announces the purpose of the Amendment, and the operative clause states the actual right. The prefatory clause reads, "A well regulated Militia, being necessary to the security of a free State..." When the Second Amendment was ratified, the Revolution was still fresh in the minds of the colonists and they recognized the importance of the citizen militia as one of the most relevant reasons to protect the

⁵⁰ Tushnet, *Out of Range*, 23-24.

⁵¹ Heller 554 U.S. 570, 29-30.

⁵² Bradbury, "Whether the Second Amendment Secures an Individual Right," 185.

individual right to bear arms. The prefatory clause explains that the Second Amendment is being included in the Bill of Rights in response to the Revolution, but it does not limit the scope of the right in the operative clause.⁵³ It is necessary to analyze the language of the operative clause to determine what the protected right is. If the operative clause does protect an individual right to gun ownership, then the prefatory clause does not limit that right to be only in relation to militia service.

The operative clause of the Second Amendment states, “...the right of the people to keep and bear Arms, shall not be infringed.” The phrase, “the right of the people” is used exactly in the First and Fourth Amendments and very similar language is used in the Ninth Amendment. All three of these other instances refer to individual rights.⁵⁴ Wherever rights are attributed to “the people” elsewhere in the Constitution, the rights are individual rights.⁵⁵ The phrase “the people” is only used three times in the Constitution to refer to people as a collective entity, and in all three of these instances it is in terms of the exercise or reservation of powers, not rights. For these reasons, proponents of the Standard Model argue that the phrase ‘the right of the people’ in the Second Amendment refers to an individual right. When “the people” is used elsewhere in the Constitution it refers to all members of a political community, not a specified subset. At the time of the Founding, the militia was defined as all able-bodied men between the ages of eighteen and forty-five. Proponents of the Standard Model assert that it would be an anomaly if the right

⁵³ Kates, “Handgun Prohibition and the Original Meaning of the Second Amendment,” 12.

⁵⁴ Levinson, *The Embarrassing Second Amendment*, 645.

⁵⁵ Kates, “Handgun Prohibition and the Original Meaning of the Second Amendment,” 12.

contained in the operative clause of the Second Amendment were only meant to apply to this specific subset of “the people,” and not to all law-abiding citizens.⁵⁶

The term “Arms” is commonly understood to mean weapons of offense or defense and does not only specifically refer to weapons designated for military use. “Keep” means to retain; to have in custody. When the phrase “keep arms” is used, the most natural interpretation is to “possess weapons.” The word “bear” means to carry for the purpose of confrontation, but this does not need to be in relation to military participation. Proponents of the Standard Model maintain that the phrases “keep arms” and “bear arms” have commonly been used in reference to military participation, but this does not mean that military participation the only context in which they may be interpreted.⁵⁷ The nature of the phrases causes them to be used often in a military context, but does not exclude them from also applying to individual self-defense.⁵⁸

In *Heller* the Supreme Court relied on the historical and textual analysis presented above, and thus concluded that the Standard Model is the proper interpretation of the Second Amendment. While the bulk of the opinion was dedicated to this analysis, the latter part of the opinion is extremely important for understanding *Heller’s* impact, or lack thereof, on gun control laws.

District of Columbia v. Heller

A substantial portion of the *Heller* opinion was dedicated to an analysis on the original meaning of the Second Amendment, which was explained in the

⁵⁶ Tushnet, *Out of Range*,

⁵⁷ Kates, “Handgun Prohibition and the Original Meaning of the Second Amendment,” 13.

⁵⁸ Tushnet, *Out of Range*, 7.

previous section of this Chapter. The Court concluded that the Second Amendment protects an individual right to keep and bear arms for purposes other than militia service. While this conclusion is significant because it clarified the meaning of the Second Amendment, the end of the opinion is arguably the most important part for understanding what the Second Amendment protects and the ways in which the right can be regulated.

After concluding that the Second Amendment does protect an individual right, the *Heller* opinion included a section on the limitations of the right. The Court made it clear that the Second Amendment does not invalidate all gun regulations.

Justice Scalia wrote:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, 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.⁵⁹

Justice Scalia also specified in the opinion that prohibitions on carrying ‘dangerous and unusual weapons’ are constitutional.⁶⁰ The opinion specifically identified that these types gun control laws that are constitutional, but it made clear that the list is not exhaustive.

After establishing the right protected by the Second Amendment and certain limitations, the *Heller* opinion assessed the constitutionality of D.C.’s laws, which banned handgun possession in the home and required any lawfully owned firearms

⁵⁹ *Heller* 554 U.S. 570, 54.

⁶⁰ *Heller* 554 U.S. 570, 55.

in the home to be unloaded or bound by a trigger lock.⁶¹ The Supreme Court identified that the right of self-defense is central to the Second Amendment right, handguns are the most popular class of firearms chosen for self-defense, and the need for defense of self, family, and property is most acute in the home.⁶² For these reasons the Court determined that the ‘core’ of the Second Amendment right is that of law-abiding citizens to keep and bear arms in the home for self-defense.⁶³

Because D.C.’s laws, “...ban from the home the most preferred firearm in the nation to keep and use for protection of one’s home and family,” the Supreme Court held that they would fail constitutional muster under any standard of scrutiny applied to enumerated constitutional rights.⁶⁴ D.C.’s laws were so severe that they banned the exercise of the core right of the Second Amendment, so the Court found them to be clearly unconstitutional.

McDonald v. City of Chicago

Heller confirmed that the Second Amendment protects an individual right to keep and bear arms for self-defense, but because the District of Columbia falls under federal jurisdiction, *Heller* did not consider whether the right applies to the states. Soon after *Heller*, the Supreme Court was asked to decide whether or not the Second Amendment right is protected from state infringement in *McDonald v. City of Chicago*. This case was brought by Otis McDonald and three other petitioners, all residents of Chicago who wished to keep handguns in their homes for self-defense. The petitioners challenged Chicago’s firearm laws, which banned the possession of

⁶¹ *Heller* 554 U.S. 570, 1.

⁶² *Heller* 554 U.S. 570, 56.

⁶³ *Heller* 554 U.S. 570, 58.

⁶⁴ *Heller* 554 U.S. 570, 56-57.

handguns in the home, just like the laws struck down in *Heller*. Chicago argued that their handgun ban is constitutional because the Second Amendment only restricts the power of the federal government. The petitioners argued that the Second Amendment does apply to the states and therefore Chicago's handgun ban violates the Second and Fourteenth Amendments. The Supreme Court decided the case in 2010, holding that like most of the other provisions of the Bill of Rights, the Second Amendment right is fully applicable to the states.⁶⁵

The petitioners made two claims, first that the Second Amendment right is protected by the Privileges and Immunities Clause of the Fourteenth Amendment, which provides that a state may not abridge the "privileges or immunities of the United States." In 1873 in the *Slaughter-House Cases*⁶⁶, the Supreme Court held that the Second Amendment is not protected by the Privileges and Immunities Clause, and the petitioners asked the Court to overturn this precedent. Second, the petitioners argued that the Due Process Clause of the Fourteenth Amendment, which says that a state may not deprive, "any person of life, liberty, or property without due process of law," applies the Second Amendment right to the states.⁶⁷

The Supreme Court rejected the petitioners' first argument and refused to reconsider their previous interpretation of the Privileges and Immunities Clause in the *Slaughter-House Cases*. Since the late 19th century, the Court has considered whether specific rights in the Bill of Rights are protected from state infringement

⁶⁵ McDonald 561 U.S. 742, 1.

⁶⁶ Slaughterhouse-Cases 83 U.S. 36.

⁶⁷ McDonald 561 U.S. 742, 6.

under the Due Process Clause,⁶⁸ so the Supreme Court could decide the case without overturning precedent. The Court stuck to their established approach and considered whether the Due Process Clause incorporates the Second Amendment right.

In order to determine if the Second Amendment right was protected by the Due Process Clause of the Fourteenth Amendment, the Supreme Court adopted the approach from previous cases that applied rights from the Bill of Rights to the states.⁶⁹ Over time the Supreme Court has adopted a theory of selective incorporation; that the Due Process Clause incorporates particular rights contained in the first eight Amendments.⁷⁰ The governing standard to determine if a right is incorporated is whether the right is fundamental to our Nation's scheme of ordered liberty and system of justice.⁷¹ The Court has also accepted a relaxed standard that considers whether a right is 'deeply rooted in this Nation's history and tradition'.⁷²

After establishing the framework for reviewing the challenge, the Supreme Court analyzed whether the Second Amendment fit the criteria to be incorporated by the Due Process Clause. The Court relied on the historical analysis from the majority opinion in *Heller* to show that the Second Amendment right is deeply rooted in our Nation's history and tradition.⁷³ The Court also concluded that the

⁶⁸ McDonald 561 U.S. 742, 10-11.

⁶⁹ McDonald 561 U.S. 742, 11.

⁷⁰ McDonald 561 U.S. 742, 15.

⁷¹ McDonald 561 U.S. 742, 16.

⁷² McDonald 561 U.S. 742, Syllabus.

⁷³ McDonald 561 U.S. 742, 19-20.

Fourteenth Amendment's Framers counted the right to keep and bear arms as fundamental to the Nation's system of ordered liberty.⁷⁴

After concluding that the Second Amendment right is incorporated by the Due Process Clause, the *McDonald* opinion included a brief section re-emphasizing the point made in *Heller*, that the Second Amendment right is not unlimited. Justice Alito wrote, "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 repeat those assurances here."⁷⁵

Heller and *McDonald* held that the Second Amendment protects an individual right to bear arms and that this right is incorporated against the states, but the decisions left open many questions. *Heller* articulated that the core of the Second Amendment right is that of law-abiding citizens to keep a handgun in the home for the purpose of self-defense. The challenged laws in both *Heller* and *McDonald* completely prohibited the ability of law-abiding citizens to keep handguns in the home for self-defense. Because these laws were among the strictest in the nation, the Supreme Court found them to be clearly unconstitutional. The Supreme Court's decisions left lingering questions about the constitutionality of gun control laws that are not so restrictive. The Court failed to articulate a method of review for lower courts to use to review Second Amendment challenges, and they failed to clarify the scope of the Second Amendment's protections beyond what *Heller* identified as the

⁷⁴ *McDonald* 561 U.S. 742, 22.

⁷⁵ *McDonald* 561 U.S. 742, 39-40.

'core' right. Inundated with Second Amendment challenges after *Heller* and *McDonald*, the lower courts were tasked with answering these questions and developing Second Amendment doctrine.

Chapter 2: Developing Second Amendment Doctrine

Heller and *McDonald* opened the floodgate for challenges to state gun control laws, but the opinions did not provide a significant amount of guidance for lower courts to resolve these challenges. The Supreme Court did not establish a test or standard of review for lower courts to use to evaluate the constitutionality of gun control laws.⁷⁶ The *Heller* opinion implied that a form of ‘heightened scrutiny’ may be appropriate, but did not specify what form. In general, heightened scrutiny evaluates the relationship between a challenged law and a government interest in order to determine if the law is constitutional. Different levels of heightened scrutiny have different requirements for how close the relationship between the law and the government’s interest must be. The most demanding form of heightened scrutiny is called strict scrutiny. Under strict scrutiny the challenged law must further a compelling state interest and it must be narrowly tailored to achieve that interest.⁷⁷ The lesser form of heightened scrutiny, intermediate scrutiny, requires that there is a reasonable fit between the challenged law and a substantial government objective.⁷⁸

⁷⁶ Tina Mehr and Adam Winkler, “The Standardless Second Amendment,” *American Constitution Society* (2009): 1.

⁷⁷ Alice Marie Beard, “Resistance by Inferior Courts to Supreme Court’s Second Amendment Decisions,” *Tennessee Law Review* Vol. 81:673 (2014): 681.

⁷⁸ Beard, “Resistance by Inferior Courts to Supreme Court’s Second Amendment Decisions,” 680.

The standard of scrutiny that a court uses to evaluate the constitutionality of a law is important because it can impact the outcome of the case. If strict scrutiny is applied in Second Amendment cases gun control laws will be more vulnerable to challenges, and if intermediate scrutiny is applied, the laws are more likely to be upheld. This is why it is so significant that *Heller* sparked an influx of Second Amendment challenges but didn't specify how to determine what level of scrutiny to apply. In the absence of explicit directions from the Supreme Court, lower courts have established a method for reviewing Second Amendment challenges based on implications in *Heller* and *McDonald* that a form of heightened scrutiny is appropriate, and have drawn on First Amendment doctrine to determine the correct level of scrutiny to apply.⁷⁹

Implications in *Heller* and *McDonald*

The Supreme Court in *Heller* and *McDonald* did not articulate a specific standard of review as is customary when evaluating a challenge to an enumerated constitutional right, because the laws in question were so extreme that they failed constitutional muster under all standards of scrutiny.⁸⁰ Justice Scalia explains in *Heller*:

The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose [self-defense]. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep'

⁷⁹ Nelson Lund, "Second Amendment Standards of Review in a Heller World," *Forham Urban Law Journal* Vol. 39:1617 (2012): 1617.

⁸⁰ *Heller* 554 U.S. 570, 56-57.

and use for protection of one's home and family," would fail constitutional muster.⁸¹

The opinion then references Second Amendment case law from 1840 in *State v. Reid* to further justify why the Court does not need to apply a form of heightened scrutiny:

A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional.⁸²

The challenged laws in *Heller* and *McDonald* did amount to a destruction of the Second Amendment right, and thus were 'clearly unconstitutional,' so the Supreme Court didn't need to apply a standard of review to determine the laws' constitutionality. As a result, the Court failed to create a specific framework for lower courts to use to determine the appropriate standard of review when a challenged law is not as restrictive as the laws struck down in *Heller* and *McDonald*.

Even though the Supreme Court did not make explicit what standard of review to apply in Second Amendment cases, the *Heller* and *McDonald* opinions did provide some guidance for lower courts. By reasoning that they did not need to apply a form of heightened scrutiny because the challenged laws were so restrictive that they would fail constitutional muster under any standard of scrutiny, the Supreme Court implied that in cases where the challenged law doesn't impose such a restrictive burden, heightened scrutiny would be appropriate. If the Court did not believe that heightened scrutiny is the appropriate way to analyze Second Amendment challenges, they would not have even mentioned that the challenged

⁸¹ *Heller* 554 U.S. 570, 56-57.

⁸² *State v. Reid*, 1 Ala. 612, 35 Am. (1840): 616-617.

laws in *Heller* and *McDonald* failed all levels; the argument would have been irrelevant.

In addition to suggesting that applying a form of heightened scrutiny is the appropriate method of review for Second Amendment challenges, the Supreme Court specifically rejected two methods of review: rational basis review and what is called an “interest-balancing” inquiry.⁸³

Rational basis review is the most lenient form of heightened scrutiny. It only requires that the challenged law be rationally related to a legitimate government purpose.⁸⁴ The Supreme Court rejected this form of review because it is usually only used to analyze laws that do not implicate constitutional rights.⁸⁵ There are specific constitutional provisions that prohibit irrational laws, so if a gun control law only needs to be ‘rational’ to pass constitutional muster, the Second Amendment wouldn’t be necessary.⁸⁶ Irrational gun control laws could be invalidated by the aforementioned constitutional provisions instead of the Second Amendment.

Justice Breyer issued a dissenting opinion in *Heller* in which he endorsed using an “interest-balancing” inquiry to determine the constitutionality of challenged laws in Second Amendment cases. This approach would consider whether the challenged law burdens a protected interest to an extent that is disproportional to the law’s positive impact on other important governmental

⁸³ Mehr and Winkler, “The Standardless Second Amendment,” 1-2.

⁸⁴ David D. Pelaez, “The Cost to Carry: New York State’s Regulation on Firearm Registration,” *Touro Law Review* Vol. 30:No. 4(2014): 16.

⁸⁵ Dave Kopel, “Is Heller Hollow?,” *Independence Institute*, accessed April 1, 2016, <http://www.davekopel.com/2A/Mags/is-heller-hollow.html>.

⁸⁶ *Heller* 554 U.S. 570, note 27.

interests.⁸⁷ The majority opinion in *Heller* explicitly rejected this approach, arguing that it places too much power in the hands of the judiciary. Justice Scalia wrote that an interest-balancing inquiry gives the judiciary, “...the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”⁸⁸ He argued that an interest-balancing inquiry would give judges the power to protect or deny constitutional rights based on their usefulness. Justice Alito reiterated this rejection of judicial interest-balancing in the *McDonald* opinion.⁸⁹

In the absence of any explicit directions from the Supreme Court, lower courts have mimicked the structure of the analyses in *Heller* and *McDonald* to develop a basic framework for reviewing Second Amendment challenges. Many lower courts interpreted the Supreme Court opinions to suggest a two-prong test. The first prong asks whether the challenged law burdens conduct within the scope of the Second Amendment.⁹⁰ The Second Amendment does not protect any and all conduct relating to guns, so the first step in assessing the constitutionality of a gun control law is to determine if it even interferes with the protected right. If the challenged law does not interfere with the Second Amendment right, then the law is constitutional and the analysis is over. If the challenged law does burden the Second Amendment right, courts proceed to the second prong of the test and apply a level of heightened scrutiny to determine if the law is constitutional.⁹¹ Even when a law burdens a constitutionally protected right it will be upheld if the government can

⁸⁷ *Heller* 554 U.S. 570 (Breyer, J. Dissenting), 10.

⁸⁸ *Heller* 554 U.S. 570, 63.

⁸⁹ *McDonald* 561 U.S. 742, 39.

⁹⁰ Matthew Sipf, “Valid Constitutional Restrictions on the Right to Bear Arms,” *Tennessee Law Review* Vol. 82:715 (2015):726.

⁹¹ Justine E. Johnson-Makuch, “Statutory Restriction on Concealed Carry: A Five-Circuit Shoot-Out,” *Fordham Law Review* Vol. 83 (2015): 7.

demonstrate a relationship between the law and an important government objective. Although *Heller* and *McDonald* suggest this two-prong framework, the opinions fail to provide instructions on how to determine what level of heightened scrutiny to apply. Because of this, lower courts have had to look to other constitutional areas for guidance and have drawn on First Amendment doctrine.⁹²

The Marzzarella Test

The two-prong test was first articulated by the United States Court of Appeals for the Third Circuit in 2010 in *United States v. Marzzarella*, and thus is known as the Marzzarella test.⁹³ *Marzzarella* considered the constitutionality of a Pennsylvania law that criminalized the possession of a firearm with an obliterated serial number.⁹⁴ The Third Circuit looked to the Supreme Court's opinion in *Heller* to assess the challenge and develop a method of review.⁹⁵

The first prong of the Marzzarella test considers whether the burden imposed by the challenged law falls within the scope of the Second Amendment's protections. In *Marzzarella* the Third Circuit compared this prong to the process used by courts to evaluate First Amendment challenges, writing, "... the preliminary issue in a First Amendment challenge is whether the speech at issue is protected or unprotected."⁹⁶ Similarly, because *Heller* and *McDonald* made it clear that the right to bear arms is not absolute and that there are significant restrictions on the scope of the right,⁹⁷ Second Amendment cases must first determine whether the burdened

⁹² *United States v. Marzzarella*, 614 F.3d (3rd Cir. 2010), 25.

⁹³ Sipsf, "Valid Constitutional Restrictions on the Right to Bear Arms," 727.

⁹⁴ *Marzzarella* 614 F.3d, 4.

⁹⁵ *Marzzarella* 614 F.3d, 6.

⁹⁶ *Marzzarella* 614 F.3d, 6-7.

⁹⁷ *Heller* 554 U.S. 570, 54-55.

conduct is protected by the Amendment. If the burdened conduct does not fall within the scope of the Amendment's guarantee, then the analysis ends and the challenged law is upheld.⁹⁸

If the burdened conduct is within the scope of the Amendment, then the court proceeds to the second prong and applies a level of heightened scrutiny.⁹⁹ In order to determine what level of scrutiny to apply in *Marzzarella*, the Third Circuit drew on First Amendment doctrine. The court relied on the First Amendment because *Heller* made multiple analogies between the First and Second Amendment.¹⁰⁰ In First Amendment doctrine, the level of scrutiny differs by case and depends on the type of law that is being challenged and the type of speech at issue. Strict scrutiny is invoked when a law considerably burdens the central protection of the right, and intermediate scrutiny is applied when a law only burdens the time, place, or manner in which a First Amendment right may be exercised.¹⁰¹ The Third Circuit concluded that the same principles should be applied in Second Amendment cases; the level of scrutiny should depend on the type of law that is being challenged and the type of conduct at issue.¹⁰² Laws that considerably burden the central right protected by the Amendment, the right of law-abiding citizens to keep and bear arms in the home for self-defense, should be subjected to strict scrutiny and laws that only burden the manner of exercising the right should be assessed under intermediate scrutiny.

⁹⁸ *Marzzarella* 614 F.3d, 7.

⁹⁹ *Marzzarella* 614 F.3d, 7.

¹⁰⁰ *Marzzarella* 614 F.3d, note 4.

¹⁰¹ *Marzzarella* 614 F.3d, 25.

¹⁰² *Marzzarella* 614 F.3d, 25.

The two-prong Marzzarella test quickly became the prevailing method of review among federal circuit courts of appeals for evaluating Second Amendment challenges.¹⁰³ The Third, Fourth, Fifth, Seventh, Ninth, and Tenth circuits have all explicitly interpreted *Heller* to suggest a two-prong approach.¹⁰⁴

While most¹⁰⁵ lower courts agree that *Heller* and *McDonald* suggest a two-prong approach, a few courts have disagreed that applying varying forms of heightened scrutiny is the appropriate way to evaluate Second Amendment challenges that are within the scope of the Amendment.¹⁰⁶ Courts have taken alternative approaches; some have held that strict scrutiny should be universally applied in Second Amendment cases¹⁰⁷ while others have held intermediate scrutiny should be universally applied.¹⁰⁸ Courts have also applied hybrid forms of scrutiny that fall somewhere between intermediate and strict scrutiny.¹⁰⁹ Some courts didn't use heightened scrutiny at all and instead applied an undue burden test, which considers if there is a substantial obstacle in the path of exercise of the right.¹¹⁰

¹⁰³ Beard, "Resistance by Inferior Courts to Supreme Court's Second Amendment Decisions," 682.

¹⁰⁴ Sipf, "Valid Constitutional Restrictions on the Right to Bear Arms," 726-727. (See Marzzarella 614 F.3d, *United States v. Chester* 628 F.3d 673 (4th Cir. 2010), *NRA v. Bureau of ATF* 700 F.3d 185, (5th Cir 2012), *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), *United States v. Chovan* 735 F.3d 1127 (9th Cir. 2013), *United States v. Reese*, 627 F.3d 792 (10th Cir 2010).

¹⁰⁵ A small coalition of Judges argue that heightened scrutiny and any other means-end analyses are always inappropriate and that Second Amendment challenges must always be answered on the basis of text, history, and tradition. Allen Rostron, "The Continuing Battle over the Second Amendment," *Albany Law Review* Vol. 78.2 (2015): 12.

¹⁰⁶ Mehr and Winkler, "The Standardless Second Amendment," 2.

¹⁰⁷ See *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008); *United States v. Montalvo*, No. 08-CR-004S, 2009 WL 667229.

¹⁰⁸ See *Heller v. District of Columbia (Heller II)*, 698 F. Supp. 2d 179 (D.D.C. 2010).

¹⁰⁹ See *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

¹¹⁰ See *Nordyke v. King*, 319 F.3d 1185, (9th Cir. 2003).

This disagreement on the appropriate level of scrutiny is important to note, but the approach adopted in *Marzzarella* is the appropriate way to determine heightened scrutiny in Second Amendment cases. The First and Second Amendments are similar because they can both be burdened to varying degrees.¹¹¹ For this reason, there is no one level of heightened scrutiny that should always be applied. It is appropriate for courts to use First Amendment doctrine to develop a way to review Second Amendment challenges because of this similarity that both rights can be burdened in multiple ways, but the actual protections of the rights themselves are extremely different. The differences between the First and Second Amendment rights will be discussed further in Chapter 3.

The method of review that a court uses to evaluate the constitutionality of a law usually impacts the outcome of the case, but in Second Amendment cases laws have been almost uniformly upheld no matter how they are reviewed.¹¹² Even when courts have applied strict scrutiny, gun control laws have been upheld.¹¹³ This peculiarity is attributable to the unique properties of the Second Amendment. The function of guns is to harm people and the government's job is to protect people. For this reason public safety will always be a compelling government interest in Second Amendment cases. Furthermore, the government, not the judiciary, is the expert on public safety and crime prevention, so courts must give a high deference to the legislature's findings when evaluating the fit between a challenged law and the

¹¹¹ David B. Kopel, "The First Amendment Guide to the Second Amendment," *Tennessee Law Review* [Vol. 81:417], 447.

¹¹² Mehr and Winkler, "The Standardless Second Amendment," 1.

¹¹³ Mehr and Winkler, "The Standardless Second Amendment," 4.

stated government interest.¹¹⁴ The relationship between the government's duty to promote public safety and the Second Amendment right to own guns has had a significant impact on the outcome of challenges to gun control laws in the lower courts after *Heller* and *McDonald*.

¹¹⁴ Allen Rostron, "Justice Breyer's Triumph in the Third Battle Over the Second Amendment," *The George Washington Law Review* Vol. 80:703 (2012): 703.

Chapter 3: Second Amendment Challenges in the Lower Courts

Since *Heller* was decided in 2008, there have been over 1,000 Second Amendment cases challenging gun laws in courts nationwide.¹¹⁵ Gun regulations of all kinds have been challenged after *Heller* and *McDonald*, including concealed and open carry regulations, laws banning the possession of firearms by suspect classes of individuals, firearm ownership regulations, firearm safety regulations, and regulations on particularly dangerous weapons and accessories.¹¹⁶ Even though the conduct regulated by the challenged laws is vastly different and lower courts have used different methods of review, the majority of challenges have had the same result: the challenge is rejected and the statute upheld.¹¹⁷ Of the 1,000 cases since 2008, a whopping 94% have upheld the challenged law.¹¹⁸

Esteemed Supreme Court litigator Paul Clement and other gun rights advocates condemn this trend, arguing that the lower courts have undertaken a “...widespread, determined resistance to enforcing the enumerated, fundamental constitutional right to keep and bear arms.”¹¹⁹ This theory, however, is discredited by the Supreme Court’s silence on Second Amendment issues after *Heller* and

¹¹⁵ <http://smartgunlaws.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched/>.

¹¹⁶ “Post-*Heller* Litigation Summary (2015),” *Law Center to Prevent Gun Violence*, 6-10.

¹¹⁷ “Post-*Heller* Litigation Summary (2015),” 6.

¹¹⁸ <http://smartgunlaws.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched/>.

¹¹⁹ Paul Clement for Writ of Cert. at 32 Nat’l Rifle Ass’n of Am. V. Bureau of Alcohol Tobacco Firearms and Explosives, 134 S. Ct. 1364.

McDonald. In the past seven years the Supreme Court has refused to grant certiorari in over 60 Second Amendment cases.¹²⁰ The Court has refused to grant certiorari to cases of all kinds, including cases that have upheld some of the most restrictive gun laws. The Supreme Court refused to rule on the constitutionality of concealed carry restrictions and denied certiorari to *Kachalsky v. Cacace*¹²¹, in which the Second Circuit upheld New York's proper cause requirement. They also denied certiorari to *United States v. Reese*¹²², in which the Tenth Circuit upheld a federal law prohibiting people subject to domestic violence restraining orders from possessing firearms. The Seventh Circuit upheld a law banning the possession of assault weapon and high-capacity magazines in *Friedman v. Highland Park*¹²³, and a law requiring the registration of all firearms *Justice v. Town of Cicero*¹²⁴, and the Supreme Court denied certiorari in both cases. The Court also refused to hear *Jackson v. City and County of San Francisco*¹²⁵, in which the Ninth Circuit upheld a local law requiring handguns in the home to be stored in a locked container or disabled when not carried on the person, and *United States v. Masciandaro*¹²⁶, in which the Fourth Circuit upheld a law prohibiting the possession of a loaded weapon in a national park.¹²⁷

The same five justices formed the majority in both *Heller* and *McDonald*, and until very recently, all remained on the Supreme Court. Four votes are required for

¹²⁰ <http://smartgunlaws.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched/>.

¹²¹ *Kachalsky v. Cacace*, 701 F.3d 81 (2d Cir. 2012).

¹²² *United States v. Reese*, 627 F.3d 792 (10th Cir 2010).

¹²³ *Friedman v. Highland Park*, 784 F. 3d 406, (7th Cir. 2015).

¹²⁴ *Justice v. Town of Cicero*, 577 F.3d 768 (7th Cir. 2008).

¹²⁵ *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014).

¹²⁶ *United States v. Masciandaro*, 648 F. Supp. 2d 779, (E.D. Va. 2009).

¹²⁷ <http://smartgunlaws.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched/>.

the Court to grant certiorari to a case, so at least two justices (although not necessarily the same two) from the *Heller* and *McDonald* majority have voted to refuse certiorari in each of the 60 Second Amendment cases brought before the Court in the past seven years.¹²⁸ The Supreme Court's repeated rejection of Second Amendment cases proves that the lower courts are not engaging in a widespread resistance to precedent, but rather *Heller* and *McDonald* are very limited and don't contradict most gun laws in America.¹²⁹

Moreover, the fact that nearly all Second Amendment challenges have been rejected even after the vast expansion of the understanding of Second Amendment rights in *Heller* and *McDonald* is not a 'widespread, determined resistance' by the lower courts, but rather a result of the inevitable conflict between the state's responsibility to protect public safety and the Second Amendment. The Second Amendment is inherently unique given the function of guns and the role of the government; the function of guns is to harm people while one of the main responsibilities of the government is to protect people. Because guns cause injury and death, most state laws regulating the Second Amendment right will survive constitutional challenges.

The Unique Second Amendment

It is undisputed that guns harm people. On average, eighty Americans die from gunshots everyday.¹³⁰ This amounts to about thirty thousand deaths every

¹²⁸ Matt Ford "Have Justices Gone Gun Shy?" *The Atlantic*, Dec 7, 2015, <http://www.theatlantic.com/politics/archive/2015/12/supreme-court-gun-rights/419160/>.

¹²⁹ Adam Winkler, "Second Amendment Update, 2016" *Weekly Constitutional*, http://ywc.podomatic.com/entry/2016-02-26T06_51_39-08_00.

¹³⁰ Brief of The Brady Center to Prevent Gun Violence as Amicus Curiae, *District of Columbia v. Heller* 554 U.S. 570 (2008), 33.

year. Suicide, homicide, and deaths resulting from firearm-related accidents are more common in homes that have guns and in communities with a higher prevalence of guns.¹³¹ Because of the inherently harmful nature of guns, the government's regulation of Second Amendment rights is unique; it is a matter of life and death.¹³² No other right protected by the Constitution compromises public safety as much as the right to own a gun. While it is true that speech can cause harm, and at times even injury or death, it is obvious that the harm caused by guns is of an entirely different magnitude.¹³³ As a First Amendment scholar said, "If words actually killed eighty people each day, there would be much higher demand for regulation, and that demand would beget a supply."¹³⁴ Legislatures have drawn on the empirical evidence surrounding gun-related injuries and deaths and have developed laws to prevent gun violence.

When gun control laws are challenged, as discussed in Chapter 2, lower courts usually apply a form of heightened scrutiny to evaluate the laws' constitutionality. Under heightened scrutiny the government must demonstrate that they have an interest in regulating the right and that the challenged law is related to this interest.¹³⁵ Because guns cause injuries and deaths, in most Second Amendment cases the government automatically has an important interest in regulating guns: public safety. The government's substantial interest in promoting public safety is

¹³¹ Brief of The American Public Health Association as Amicus Curiae, *District of Columbia v. Heller* 554 U.S. 570 (2008), 8.

¹³² Brief of The Brady Center to Prevent Gun Violence as Amicus Curiae, *District of Columbia v. Heller* 554 U.S. 570 (2008), 33.

¹³³ L.A. Powe Jr., "Guns, Words, and Constitutional Interpretation," *William and Mary Law Review* Vol. 38:1311 (1997): 1390.

¹³⁴ Powe, "Guns, Words, and Constitutional Interpretation," 1390.

¹³⁵ Sif, "Valid Constitutional Restrictions on the Right to Bear Arms," 730.

considered “self-evident,”¹³⁶ so the government only bears the burden of proving the relationship between that interest and the challenged law.

When evaluating the relationship between the government’s interest and a challenged law, courts have long recognized the policymaking expertise of the legislature and have afforded substantial deference to their judgments.¹³⁷ It is the government’s job to determine what laws will further their interests; they are the experts on effective crime prevention, not the courts.¹³⁸ Furthermore, the government must have, “...a reasonable opportunity to experiment with solutions to admittedly serious problems...”¹³⁹ This is especially true, however, when the ‘problem’ involves injury and death.

When applying heightened scrutiny in Second Amendment cases, deference to legislative findings on the relationship between a challenged law and the government’s interests leads to the survival of all but the most extreme gun control laws. The government has a self-evident, substantial interest in public safety, and there is significant empirical evidence on the prevalence of gun-related injuries and deaths. For these reasons, it is not difficult for the government to demonstrate a reasonable fit between a law regulating guns and an interest in increasing public safety.¹⁴⁰ Because of this relationship, the vast majority of gun control laws have survived challenges.

¹³⁶ *United States v. Chovan* 735 F.3d 1127 (9th Cir. 2013), 25.

¹³⁷ *Turner Broadcasting System v. Federal Communications Commission*, 512 U.S. 622 (1994), 666.

¹³⁸ *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), 20-21.

¹³⁹ *City of Renton v. Playtime Theaters*, 475 U.S. 41 (1986), 52.

¹⁴⁰ Rostron, “Justice Breyer’s Triumph in the Third Battle Over the Second Amendment,” 703.

A closer study of two lower court cases that rejected Second Amendment challenges, and were denied certiorari by the Supreme Court, will illuminate how the Second Amendment's protections are unique and often limited. I chose two very different cases in order to illustrate how the overwhelming majority of cases have had the same results, the law upheld and the challenge rejected, no matter the type of law that is challenged. The first case, *Jackson v. City and County of San Francisco*, considered a law that required handguns to be kept in a locked box or otherwise disabled when not carried on the person. This law is very similar to the trigger lock requirement struck down in *Heller*, but the Ninth Circuit held that the law in *Jackson* is constitutional. The second case, *Kachalsky v. County of Westchester*, considered a law that regulated conduct in an entirely different sphere than the laws struck down in *Heller* and *McDonald*. In *Kachalsky*, the Second Circuit upheld New York's law requiring individuals to demonstrate a heightened need in order to obtain a license to carry concealed firearms in public. A study of these two cases on opposite ends of the gun control spectrum will demonstrate why 94% of all Second Amendment cases after *Heller* and *McDonald* have had the same result, the challenge thrown out and law upheld.¹⁴¹

¹⁴¹ <http://smartgunlaws.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched/>.

Jackson v. City and County of San Francisco

Firearm safety storage laws have been among some of the most disputed because these laws regulate conduct that *Heller* and *McDonald* deemed to be at the core of the Second Amendment right, that of law-abiding citizens within the home to use handguns for self-defense. Even given their close relation to the core right, lower courts have consistently found firearm storage regulations constitutional. One case in particular, *Jackson v. City and County of San Francisco*, garnered a lot of attention. An analysis of the decision will illustrate why even after *Heller* and *McDonald* the overwhelming majority of Second Amendment challenges have been thrown out. Laws that regulate firearm storage in the home do not represent a resistance to *Heller* and *McDonald*, but rather are a recognition of the Second Amendment's unique properties. Unlike other constitutionally protected rights, guns function to cause injury and death, so the ways in which the right to bear arms can be regulated are more substantial than in the case of other rights, like free speech.

Jackson v. City and County of San Francisco was heard by the Court of Appeals for the Ninth Circuit in 2013. A woman named Espanola Jackson brought a suit against the City and County of San Francisco, challenging the constitutionality of two San Francisco regulations under the Second Amendment.¹⁴² The first law, San Francisco Police Code 4512, required handguns to be stored in a locked container at home or disabled with a trigger lock when not carried on the person. The second law, San Francisco Police Code 613, prohibited the sale of hollow point ammunition

¹⁴² Sipf, "Valid Constitutional Restrictions on the Right to Bear Arms," 715-716.

within San Francisco. Jackson argued that the laws obstructed her ability to keep a handgun in her home in a manner ready for immediate use for self-defense, and therefore violated her Second Amendment right.¹⁴³ The focus of this analysis is on Police Code 4512, the firearm safety storage regulation, given its similarity to the trigger-lock requirement struck down in *Heller*.

In *District of Columbia v. Heller*, the Supreme Court invalidated a D.C. law that required firearms to be kept unloaded and disassembled or bound by a trigger lock when in the home.¹⁴⁴ The challenged law in *Jackson* requires handguns to be stored in a locked container or disabled with a trigger lock when not carried on a person.¹⁴⁵ These two laws initially seem analogous, as they regulate the same conduct and serve the same purpose, but the exception to the San Francisco law allowing individuals to keep a loaded handgun on their person is a crucial distinction. The trigger lock requirement struck down in *Heller* constituted an absolute ban on the core Second Amendment right, the right to keep and use a handgun in the home for self-defense, while the law in *Jackson* only regulates the manner in which a person may exercise this right. Because the challenged law in *Jackson* was significantly less burdensome than the law struck down in *Heller*, the Ninth Circuit could not rely entirely on the *Heller* opinion to determine the constitutionality of San Francisco Police Code 4512. The Ninth Circuit followed the approach of many of its sister circuits and adopted the two-prong Marzzarella test, as discussed in Chapter 2. The Ninth Circuit first considered whether section 4512 regulated conduct within the

¹⁴³ *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), 6.

¹⁴⁴ *Heller* 554 U.S. 570.

¹⁴⁵ *Jackson* 746 F.3d, 2.

scope of the Second Amendment’s protections, and then considered whether it passed the appropriate level of heightened scrutiny.

The Ninth Circuit first undertook the task of determining if section 4512 regulated conduct within the scope of the Second Amendment. The court found that the regulated conduct fell within the scope of the Second Amendment because it did not resemble any conduct barred by longstanding prohibitions or regulatory measures that are presumptively lawful. Founding-era laws regulating firearm and gunpowder storage served only as fire-safety regulations, not gun-safety regulations, and did not ban keeping loaded weapons. Because section 4512 serves an entirely different purpose than the founding-era laws, it is not historically longstanding and the regulated conduct falls within the scope of the Second Amendment’s protection.¹⁴⁶ The Ninth Circuit proceeded to determine the appropriate level of scrutiny to apply to section 4512.¹⁴⁷

As discussed in Chapter 2, the Supreme Court did not apply a level of heightened scrutiny in *Heller* because the challenged laws imposed such severe restrictions on the core Second Amendment right that they, “amount to a destruction of the [Second Amendment] right,” and thus failed constitutional muster under all levels of scrutiny.¹⁴⁸ Because the handgun storage regulation imposed by section 4512 in *Jackson* was less restrictive than the trigger lock requirement in *Heller*, the Ninth Circuit needed to apply a level of heightened scrutiny to determine

¹⁴⁶ Jackson 746 F.3d, 15-16.

¹⁴⁷ Jackson 746 F.3d, 16.

¹⁴⁸ Jackson 746 F.3d, 12.

its constitutionality.¹⁴⁹ Since *Heller* and *McDonald* offered no instruction on how to determine what level of heightened scrutiny to apply, the Ninth Circuit used a test they developed in a previous Second Amendment case, *United States v. Chovan*.¹⁵⁰

When developing the test in *Chovan*, the Ninth Circuit followed the approach used by the Third, Fourth, and Seventh Circuits, and looked to the First Amendment as a guide.¹⁵¹ They wrote, “We agree with these courts’ determination that, just as in the First Amendment context, the level of scrutiny in the Second Amendment context should depend on ‘the nature of the conduct being regulated and the degree to which the challenged law burdens the right.’”¹⁵² The Ninth Circuit specifically determined that, the level of scrutiny depends upon, “(1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law’s burden on the right.”¹⁵³ In *Jackson*, the Ninth Circuit articulated that intermediate scrutiny would be appropriate if the challenged law doesn’t implicate a core Second Amendment right *or* doesn’t place a substantial burden on the Second Amendment right.¹⁵⁴

In *Jackson* the Ninth Circuit considered whether section 4512 implicated the core of the Second Amendment right and the severity of the burden it placed on the Second Amendment right to determine the appropriate level of scrutiny. The court found that section 4512 does implicate the core of the Second Amendment right because it impacts the ability of a person to use a firearm in his or her home for self-

¹⁴⁹ Rostron, “Justice Breyer’s Triumph in the Third Battle Over the Second Amendment,” 703.

¹⁵⁰ *Jackson* 746 F.3d, 21.

¹⁵¹ *United States v. Chovan* 735 F.3d 1127 (9th Cir. 2013), 21.

¹⁵² *United States v. Chovan* 735 F.3d, 21.

¹⁵³ *United States v. Chovan* 735 F.3d, 21.

¹⁵⁴ *Jackson* 746 F.3d, 12.

defense. The Ninth Circuit then determined, however, that even though section 4512 burdens the core of the Second Amendment right, it does not place a substantial burden on the right.¹⁵⁵ The court wrote:

Section 4512 does not impose the sort of severe burden imposed by the handgun ban at issue in *Heller* that rendered it unconstitutional. Unlike the challenged regulation in *Heller*, section 4512 does not substantially prevent law-abiding citizens from using firearms to defend themselves in the home. Rather, section 4512 regulates how San Franciscans must store their handguns when not carrying them on their persons. This indirectly burdens the ability to use a handgun... But because it burdens only the *manner* in which persons may exercise their Second Amendment rights, the regulation more closely resembles a content-neutral speech restriction that regulates only the time, place, or manner of speech. ...Further, section 4512 leaves open alternative channels for self-defense in the home, because San Franciscans are not required to secure their handguns while carrying them on their person.¹⁵⁶

Because section 4512 implicates the core of the Second Amendment right but does not impose a substantial burden on the right, the Ninth Circuit concluded that intermediate scrutiny should be applied.¹⁵⁷ After determining the appropriate level of scrutiny, the Ninth Circuit applied it to the facts of the case before them.

In order to survive intermediate scrutiny a challenged law must serve a government objective that is significant, substantial, or important, and there must be a reasonable fit between the challenged law and the asserted government objective.¹⁵⁸ The stated objective of the San Francisco Board of Supervisors was to reduce the number of gun-related injuries and deaths that result from having an unlocked handgun in the home.¹⁵⁹ The Ninth Circuit wrote that it is “self-evident”

¹⁵⁵ Jackson 746 F.3d, 19.

¹⁵⁶ Jackson 746 F.3d, 17-18.

¹⁵⁷ Jackson 746 F.3d, 19.

¹⁵⁸ Jackson 746 F.3d, 20.

¹⁵⁹ Jackson 746 F.3d, 20.

that public safety is an important government interest,¹⁶⁰ grounding this claim in text from two Supreme Court opinions: *Nat'l Treasury Emps. Union v. Von Raab* (1989), holding that the government's compelling interest in public safety justifies drug testing of boarder agents who carry firearms, and *Madsen v. Women's Health Ctr., Inc.* (1994), that "The State also has a strong interest in ensuring the public safety and order..."¹⁶¹ Because the government's compelling interest in public safety is self-evident and guns fundamentally compromise public safety, it is not difficult for the government to demonstrate a compelling interest in most Second Amendment cases. In *Jackson*, the legislature provided evidence that having an unlocked or gun in the home is associated with increased gun-related injuries and deaths.¹⁶² Because there is evidence that having unlocked guns in the home is associated with gun-related injuries and deaths, and it is self-evident that the government has an important interest in public safety, the Ninth Circuit held that San Francisco appropriately demonstrated that section 4512 serves an important interest.¹⁶³

Given San Francisco's important interest in reducing gun-related injuries and deaths from having an unlocked handgun in the home, the government needed to demonstrate that section 4512 was substantially related to this interest. When considering the question of fit, the Ninth Circuit gave substantial deference to the legislature's findings, writing, "In considering a city's justifications for its ordinance, we do not impose 'an unnecessarily rigid burden of proof... so long as whatever

¹⁶⁰ Jackson 746 F.3d, 20-21.

¹⁶¹ Jackson 746 F.3d, 20-21.

¹⁶² Jackson 746 F.3d, 20.

¹⁶³ Jackson 746 F.3d, 21.

evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses,”¹⁶⁴ and that, “[the city must have,] ...a reasonable opportunity to experiment with solutions to admittedly serious problems,”¹⁶⁵ It is necessary for courts to give high deference to legislative findings when considering the fit between a challenged law and a government interest because the government is the expert on public safety, not the court.¹⁶⁶ In *Jackson*, the Ninth Circuit examined the legislative findings accompanying section 4512 to determine its fit with the stated government interest. Their analysis was a concise three sentences:

In the legislative findings accompanying section 4512, San Francisco concluded that firearm injuries are the third-leading cause of death in San Francisco, and that having unlocked firearms in the home increases the risk of gun related injury, especially to children. The record contains ample evidence that storing handguns in a locked container reduces the risk of both accidental and intentional handgun-related deaths, including suicide. Based on the evidence that locking firearms increases safety in a number of different respects, San Francisco has drawn a reasonable inference that mandating that guns be kept locked when not carried will increase public safety and reduce firearm casualties.¹⁶⁷

Gun control advocates argue that the Ninth Circuit too readily deferred to legislative findings.¹⁶⁸ This criticism is misplaced because it is not the court’s job to determine what evidence is accurate or not. It is the government’s job, rather, to gather information about public policy problems. The courts job then, is to make sure the challenged law is reasonably related to the stated government interest, given the evidence provided by the government.¹⁶⁹

¹⁶⁴ *Jackson* 746 F.3d, 20.

¹⁶⁵ *Jackson* 746 F.3d, 21.

¹⁶⁶ Rostron, “Justice Breyer’s Triumph in the Third Battle Over the Second Amendment,” 719.

¹⁶⁷ *Jackson* 746 F.3d, 21.

¹⁶⁸ Sipsf, “Valid Constitutional Restrictions on the Right to Bear Arms,” 741.

¹⁶⁹ Rostron, “Justice Breyer’s Triumph in the Third Battle Over the Second Amendment,” 719.

It was appropriate for the Ninth Circuit to rely on the legislature's findings in *Jackson*. The government provided empirical evidence that gun injuries and deaths in the home are a problem and that storing handguns in locked containers or otherwise disassembled reduces gun-related injuries and deaths in the home. Therefore, the Ninth Circuit appropriately held that San Francisco had demonstrated a reasonable fit between section 4512 and their asserted objective.

The Ninth Circuit's decision in *Jackson* has also been criticized by gun rights advocates for holding that the home is not entitled to an absolute protection when it comes to Second Amendment rights.¹⁷⁰ Even though section 4512 is not a complete ban like the D.C. trigger-lock requirement invalidated in *Heller*, it still encroaches on rights in a private, protected area.¹⁷¹ This criticism is misplaced because of the unique character of the Second Amendment and the government's role in promoting public safety.

While it is true that section 4512 regulates the conduct of individuals within a private, protected sphere, it is crucial that the government regulates this area when it comes to firearm safety. The home is the sphere in which children, mentally ill, or other vulnerable classes of people will be in the closest proximity to firearms. Easy access leads to both accidents and suicide. 90% of firearm-related deaths among children occurred in the victim's home or at the home of a relative or friend, and these occurred when children had access to loaded guns.¹⁷² Adolescents who commit suicide successfully are twice as likely to have a gun in their home as

¹⁷⁰ Sipf, "Valid Constitutional Restrictions on the Right to Bear Arms," 741-742.

¹⁷¹ Sipf, "Valid Constitutional Restrictions on the Right to Bear Arms," 738.

¹⁷² Brief of The Brady Center for Gun Violence as Amici Curiae, *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), 6.

compared to those who unsuccessfully attempt suicide.¹⁷³ It is important that firearms are stored safely because there exists no other regulation in the home to protect these vulnerable classes of individuals from accessing them. Handling a firearm does not become less dangerous in a private sphere, so there is no reason that safety regulations should only apply in the public sphere when the objective of the government is to increase safety and reduce firearm related injuries and deaths.

Jackson considered the constitutionality of a law that was similar to the trigger-lock requirement struck down in *Heller*. In both cases, the challenged laws regulated conduct in the home, which is at the core of the Second Amendment's protections. Bearing arms in public, on the other hand, does not implicate the core Second Amendment right and thus is subject to more regulations. The ways the Second Amendment right may be regulated in public will be illustrated in the following analysis.

¹⁷³ Brief of The Brady Center for Gun Violence as Amici Curiae, *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), 7.

Kachalsky v. County of Westchester

Heller and *McDonald* established that the core of the Second Amendment right is that of law-abiding citizens to keep and bear handguns in the home for the purpose of self-defense. Unlike firearm safety storage laws, which affect the conduct of an individual in his or her home, concealed carry laws only regulate conduct outside of the home and thus do not implicate the core of the Second Amendment. The conduct regulated by the challenged laws in *Heller* and *McDonald* was only that of individuals in the home and for this reason the Supreme Court provided little indication of the scope of the Second Amendment outside of the home. Because of the lack of guidance from the Supreme Court, lower courts have arrived at different conclusions as to whether carrying firearms in public is protected by the Second Amendment. A circuit split has emerged with the Second, Seventh, and Ninth Circuits finding that the Second Amendment's protections do extend outside the home, the Tenth Circuit finding that they do not, and the Third and Fourth Circuits choosing to avoid this question and proceeding directly to apply heightened scrutiny.¹⁷⁴ Even though lower courts have reached conflicting opinions on whether carrying arms in public is within the scope of the Second Amendment, all but the most extreme concealed carry laws have been upheld.¹⁷⁵

New York has one of the most restrictive licensing schemes for carrying arms in public,¹⁷⁶ and it requires that an applicant demonstrate proper cause, or a need distinguishable from that of the general public, to obtain a license to carry a

¹⁷⁴ Johnson-Makuch, "Statutory Restriction on Concealed Carry: A Five-Circuit Shoot-Out," 7.

¹⁷⁵ Johnson-Makuch, "Statutory Restriction on Concealed Carry: A Five-Circuit Shoot-Out," 1.

¹⁷⁶ Johnson-Makuch, "Statutory Restriction on Concealed Carry: A Five-Circuit Shoot-Out," 6.

concealed firearm in public for self-defense.¹⁷⁷ New York’s law was challenged in 2012 in *Kachalsky v. County of Westchester*, and was upheld. The Second Circuit’s opinion in *Kachalsky* demonstrates how the rights protected by the Second Amendment are unique, and specifically how they differ from the rights protected by the First Amendment. The opinion also exemplifies why it is appropriate for courts to give considerable deference to legislative findings when applying heightened scrutiny in Second Amendment cases. *Kachalsky* is especially important for my larger argument because the court’s opinion captures the unique properties of the right to bear arms, which explains why the overwhelming majority of Second Amendment cases have upheld gun control laws after *Heller* and *McDonald*.

In *Kachalsky* five Plaintiffs filed an action to challenge New York’s concealed carry law after applying for and being denied full-carry concealed-handgun licenses by licensing officers for failing to establish proper cause.¹⁷⁸ New York Penal Law section 400.00 is the only statute that regulates firearm licensing in New York State.¹⁷⁹ The plaintiffs specifically challenge section 400.00 (2) (f) which states that a license, “...shall be issued to... have and carry [a firearm] concealed... by any person when proper cause exists for the issuance thereof.”¹⁸⁰ New York State courts have defined proper cause as needing a firearm for target practice, hunting, or self-defense. If an applicant demonstrates proper cause for target practice or hunting, the resulting license is restricted to allow the carrying of a firearm only for that purpose. To obtain a carry license without restrictions, an applicant must

¹⁷⁷ *Kachalsky v. County of Westchester*, 701 F.3d 81 (2nd Cir, 2012), 9.

¹⁷⁸ *Kachalsky* 701 F.3d, 3.

¹⁷⁹ *Kachalsky* 701 F.3d, 8.

¹⁸⁰ *Kachalsky* 701 F.3d, 9.

demonstrate proper cause for self-defense. In order to demonstrate proper cause for self-defense, the applicant must show a need for protection distinguishable from that of the general public. The license made available by section 400.00 (2) (f) is the only one that allows a person to carry a concealed handgun without regard to employment.¹⁸¹

Four of the five plaintiffs in *Kachalsky* made no claim that they had a proper cause for self-defense when they applied for concealed carry licenses, and for that reason, their applications were denied. One plaintiff, a transgender female, did claim that she had proper cause, but failed to demonstrate that need because she did not, “report... any type of threat to her own safety anywhere.”¹⁸²

Rather than arguing that they were wrongfully denied proper cause, Plaintiffs argue that the proper cause requirement violates the Second Amendment. They assert that *Heller* established the right to carry arms in public for self-defense, and therefore it is unconstitutional to require a law-abiding citizen to demonstrate proper cause in order to exercise this right.¹⁸³ Plaintiff Kachalsky argued that the Second Amendment, “entitles him to an unrestricted permit without further establishing proper cause.”¹⁸⁴ In order to evaluate the Plaintiffs’ claim and determine the constitutionality of section 400 (2) (f), the Second Circuit adopted the two-prong Marzzarella test and first asked whether the law burdened conduct within the scope of the Second Amendment and then applied heightened scrutiny.

¹⁸¹ Kachalsky 701 F.3d, 9-10.

¹⁸² Kachalsky 701 F.3d, 14.

¹⁸³ Kachalsky 701 F.3d, 13-15.

¹⁸⁴ Kachalsky 701 F.3d, 13.

In order to begin their analysis of the constitutionality of section 400.00 (2) (f), the Second Circuit first needed to determine whether the scope of the Second Amendment's protections extends to public places. Plaintiffs argued that *Heller* established that the Second Amendment does guarantee a right to possess and use firearms in public for self-defense, and that requiring an individual to demonstrate a *need* to exercise this right is unconstitutional. In contrast, Defendants also invoked *Heller*, but argued that the opinion limits the right to bear arms for self-defense to the home, and therefore New York's proper cause requirement does not burden conduct within the scope of the Amendment.¹⁸⁵

The Second Circuit examined the opinions in *Heller* and *McDonald* but concluded that they provided no clear answer as to whether the scope of the Second Amendment extends outside of the home. The challenged laws in *Heller* and *McDonald* only regulated conduct within the home, so, the judges reasoned, there was no need for the Supreme Court to analyze whether the Second Amendment also protects the right to keep and bear arms in public.¹⁸⁶ In the absence of clear evidence, the Second Circuit drew on implications made by the Supreme Court in *Heller* and *McDonald* to determine whether the scope of the Second Amendment extends beyond the home, writing:

Although the Supreme Court's cases applying the Second Amendment have arisen only in connection with prohibitions on the possession of firearms in the home, the Court's analysis suggests, as Justice Stevens's dissent in *Heller* and Defendants in this case before us acknowledge, that the Amendment must have **some** application in the very different context of the public possession of firearms.¹⁸⁷

¹⁸⁵ Kachalsky 701 F.3d, 15.

¹⁸⁶ Kachalsky 701 F.3d, 15-16.

¹⁸⁷ Kachalsky 701 F.3d, 17-18.

The Second Circuit continued its analysis based on this assumption that the scope of the Second Amendment extends to the public.¹⁸⁸

Before determining the appropriate level of scrutiny to apply to the challenge of section 400.00 (2) (f), the Second Circuit disputed an argument made by the Plaintiffs that the court should apply First Amendment prior restraint analysis instead of means-end scrutiny to assess the constitutionality of section 400.00 (2) (f). Prior restraint in the First Amendment context is a government action that prohibits certain speech before it can take place. Prior restraint can be exercised either through a law that requires speakers to obtain a license before speaking, or through a judicial injunction that prohibits certain speech.¹⁸⁹ Prior restraint of speech is almost never constitutional; the government bears an extremely heavy burden of justifying a restraint.¹⁹⁰

Prior restraints on speech are usually only applied to publications, and are applied with the intent to protect national security.¹⁹¹ The relationship between prior restraint and national security was put to the test in *New York Times Co. v. United States*, in which the Nixon Administration tried to prevent the New York Times from publishing a study regarding United States activities in Vietnam, arguing that prior restraint was necessary to protect national security.¹⁹² The Supreme Court held that the threat to national security in this case didn't overcome the

¹⁸⁸ Kachalsky 701 F.3d, 18.

¹⁸⁹ "Prior Restraint," Legal Information Institute, accessed April 1, 2016, https://www.law.cornell.edu/wex/prior_restraint.

¹⁹⁰ *New York Times Co. v. United States*, 403 U.S. 713 (1971), 714.

¹⁹¹ Douglas Lee, "Prior Restraint," *First Amendment Center*, accessed April 1, 2016, <http://www.firstamendmentcenter.org/prior-restraint>.

¹⁹² "New York Times Company v. United States," *Oyez: IIT Chicago-Kent College of Law*, accessed April 1, 2016, <https://www.oyez.org/cases/1970/1873>.

“heavy presumption against” prior restraint of the press.¹⁹³ Justice Stewart wrote in a concurring opinion that prior restraint is only permitted when speech, “...will surely result in direct, immediate, and irreparable damage to our Nation or its people.”¹⁹⁴ The reason prior restraint of speech is held to such a high standard is because free speech is, “...the very foundation of constitutional government.”¹⁹⁵ Free speech is regarded as a necessary component in maintaining a democracy, so speech cannot be censored in anything other than the most extreme circumstances.

Plaintiffs in *Kachalsky* argue that the rights protected by the First and Second Amendments are identical in nature and thus they should be treated equivalently. The Second Circuit summarized the logic of the Plaintiffs as, “One has a right to speak and a right to bear arms. Thus, just as the First Amendment permits everyone to speak without obtaining a license, New York cannot limit the right to bear arms to only some law-abiding citizens.”¹⁹⁶ The Second Circuit rejected this logic, articulating that, “...there are salient differences between the state’s ability to regulate each of these rights.”¹⁹⁷ The Second Circuit’s rejection of prior restraint illuminates important distinctions between the rights protected by the First and Second Amendments, and shows how the Second Amendment is unique.

Unlike the First Amendment, the Second Amendment is not the foundational element of democracy itself.¹⁹⁸ The First Amendment fulfills a fundamental role in our democracy because it places a check on the government’s power to censor its

¹⁹³ <https://www.oyez.org/cases/1970/1873>.

¹⁹⁴ *New York Times Co. v. United States*, 403 U.S. 713 (Stewart, J. Concurring).

¹⁹⁵ *New York Times Co. v. United States*, 403 U.S. 713 (Black, J. Concurring)

¹⁹⁶ *Kachalsky* 701 F.3d, 23.

¹⁹⁷ *Kachalsky* 701 F.3d, 24-25.

¹⁹⁸ Rodney Smolla, *Free Speech in an Open Society* (New York: Alfred A. Knopf, Inc., 1992) 5.

opponents, preserving free political discussion. To quote Benjamin Franklin, “Whoever would overthrow the liberty of a nation must begin by subduing the freedom of speech.”¹⁹⁹ Bearing arms, on the other hand, does not have such a special status. The restriction of a person’s right to bear arms will not affect the overall functioning of democracy. Because of these properties, the Second Amendment can be regulated in ways the First Amendment cannot be.

After discrediting the Plaintiffs’ argument that prior restraint should be applied, the court proceeded to the second prong of the Marzzarella test to determine what level of heightened scrutiny to apply. The Second Circuit followed the approach of many of their sister circuits and considered to what extent the core of the Second Amendment right was burdened by the challenged law. The court wrote, “Although we have no occasion to decide what level of scrutiny should apply to laws that burden the ‘core’ Second Amendment protection identified in *Heller*, we believe that applying less than strict scrutiny when the regulation does not burden the ‘core’ protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits.”²⁰⁰ The Second Circuit determined that section 400.00 (2) (f) does not burden the core Second Amendment right identified in *Heller*, that of law-abiding individuals to keep and bear firearms in the home for self-defense, because it only regulates conduct that takes place in

¹⁹⁹ Benjamin Franklin, “Silence Dogood, No. 8,” *The New England Courant*, July 9, 1722, <http://founders.archives.gov/documents/Franklin/01-01-02-0015>.

²⁰⁰ *Kachalsky* 701 F.3d, 28.

public, and therefore concluded that it should be subjected to intermediate scrutiny.²⁰¹

Intermediate scrutiny requires that a challenged law be substantially related to the achievement of an important government interest to pass constitutional muster.²⁰² Both Plaintiffs and Defendants agreed that New York had substantial government interests in public safety and crime prevention, so the only remaining question was whether section 400.00 (2) (f) was substantially related to those interests.²⁰³ The Second Circuit gave considerable deference to the legislature to determine this fit. They explained, “In the context of firearm regulation, the legislature is ‘far better equipped than the judiciary’ to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks. Thus, our role is only ‘to assure that, in formulating its judgments, [New York] has drawn reasonable inferences based on substantial evidence.’”²⁰⁴

In *Kachalsky* the government provided evidence that New York identified the dangers of carrying handguns in public over one-hundred years ago. Ever since 1913, New York officials have decided that a proper cause requirement was a reasonable method for combating these dangers.²⁰⁵ The legislative record explained that the state decided to regulate handgun possession because they thought it would increase public safety and crime control by preventing violent crimes before they

²⁰¹ *Kachalsky* 701 F.3d, 36.

²⁰² *Kachalsky* 701 F.3d, 36.

²⁰³ *Kachalsky* 701 F.3d, 37.

²⁰⁴ *Kachalsky* 701 F.3d, 38.

²⁰⁵ *Kachalsky* 701 F.3d, 38-39.

occur.²⁰⁶ The Second Circuit deferred to these legislative findings of the past one-hundred years and concluded that New York's proper cause requirement was substantially related to New York's important interests in public safety and crime prevention and thus Penal Code section 400 (2) (f) was constitutional.²⁰⁷

The Second Circuit's deference to legislative findings in *Kachalsky* exemplifies why the vast majority of Second Amendment cases have had the same results, namely the challenge dismissed and the law upheld, after *Heller* and *McDonald*. Even though New York's concealed carry licensing scheme is one of the most restrictive in the country, the Second Circuit found that it was constitutional. This is because the Second Amendment right can be regulated to a much greater extent than other constitutionally protected rights because of the nature of what it protects, the right to own guns. The function of guns is to injure and kill people, so their possession always intersects with issues of public safety. For this reason, as the Second Circuit stated, it is appropriate for the court to give the legislature substantial leeway to make public policy decisions on how to combat the dangers of firearms.²⁰⁸

Jackson and *Kachalsky* specifically demonstrated why safety storage regulations and concealed carry regulations are constitutional, but the analyses in these decisions can be applied to any type of gun control law. In all Second Amendment challenges the government will have an interest in promoting public safety and the courts will have a responsibility to defer to legislative findings, which

²⁰⁶ *Kachalsky* 701 F.3d, 39.

²⁰⁷ *Kachalsky* 701 F.3d, 41.

²⁰⁸ *Kachalsky* 701 F.3d, 38.

explains why the overwhelming majority of gun control laws have been unaffected by *Heller* and *McDonald*.

Concluding Thoughts: A Change on the Supreme Court and the Second Amendment

As this thesis has made clear, the vast majority of Second Amendment challenges have been unsuccessful in the lower courts in the years since *Heller* and *McDonald*. The Supreme Court has reaffirmed that this trend is legitimate by refusing to grant certiorari in over sixty Second Amendment cases since *Heller*. As explained in Chapter 3, the same five Justices formed the majority in *Heller* and *McDonald* and only four votes are needed for a case to be granted certiorari, so at least two Justices from the *Heller* and *McDonald* majorities have refused certiorari in all of the 60 Second Amendment challenges brought before the Supreme Court. The five Justices that formed the *Heller* and *McDonald* majorities all remained on the Court until the recent death of Justice Scalia, the author of the *Heller* opinion. I will briefly examine what Justice Scalia's death and a change on the Supreme Court might mean for the Second Amendment going forward.

Justice Scalia was a staple vote for the Court's conservative coalition and was known for his unwavering adherence to originalism as a judicial theory.²⁰⁹ Prior to Justice Scalia's death, there was a five-Justice conservative majority on the Supreme Court. Now, absent a ninth Justice, the ideology of the Court is split down the middle. Because a new Justice may not be appointed until after the next Presidential

²⁰⁹ "Antonin Scalia Biography," Biography, accessed April 19, 2016, <http://www.biography.com/people/antonin-scalia-9473091#synopsis>.

election, it is presently unclear what will happen to the ideological composition of the Supreme Court.

Some conservative politicians predict that if the Court appoints one more liberal Justice the liberal majority will take aim at conservative precedents of recent years, including *Heller* and *McDonald*.²¹⁰ Republican presidential candidate Ted Cruz said that Justice Scalia's death, "...leaves us one Justice away from the Second Amendment being written out of the Constitution altogether."²¹¹ I disagree and argue that regardless of the ideology of the next Justice, the Court will maintain their silence on the Second Amendment. The curious trend examined by this thesis, the lower courts' consistent rejection of Second Amendment challenges, demonstrates why.

Even with a liberal majority, the Supreme Court will not overturn *Heller* and *McDonald* because the decisions have had a negligible impact on gun control laws. The decisions were initially a huge victory for proponents of gun rights because they codified that the Second Amendment protects an individual right to own firearms for self-defense, however, it has become clear that this interpretation doesn't compromise the vast majority of gun regulations. There is no motivation for the dissenting Justices in *Heller* and *McDonald* to take a Second Amendment case because they do not take issue with the results in lower courts. Going forward, the Supreme Court will continue to let lower courts forge Second Amendment doctrine,

²¹⁰ "The Supreme Court After Scalia," Wall Street Journal, accessed April 19, 2016, <http://www.wsj.com/articles/the-supreme-court-after-scalia-1455580665>.

²¹¹ "The Second Amendment Without Scalia," Reason, accessed April 19, 2016, <http://reason.com/archives/2016/02/17/the-second-amendment-without-scalia>.

and gun control laws will remain unaffected by the Supreme Court for the foreseeable future.

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