

TAKING *HELLER* SERIOUSLY:  
WHERE HAS THE ROBERTS COURT BEEN,  
AND WHERE IS IT HEADED, ON THE SECOND  
AMENDMENT?

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### INTRODUCTION

The Second Amendment guarantees the right to “keep arms” without specifying the types, and the right to “bear arms” without limiting it to a specific place: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>1</sup> In *District of Columbia v. Heller* (2008), the U.S. Supreme Court held that the right extends to individuals and invalidated the District’s handgun ban.<sup>2</sup> And in *McDonald v. City of Chicago* (2010), the Court held that the right extends to the states through the Fourteenth Amendment and struck down Chicago’s handgun ban.<sup>3</sup>

Since those decisions, the Court has not decided any more substantial Second Amendment cases, other than summarily to reverse a state high court that seriously bungled *Heller*.<sup>4</sup> Meanwhile, Justice Scalia died and Justice Kennedy retired, and they were replaced by Justices Gorsuch and Kavanaugh. The lower courts have rendered numerous decisions and circuit splits have developed, all without review by the high court. It reminds one of the adage, *when the cat’s away, the mice will play*.

Perhaps to reign in this Wild West atmosphere by the lower

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1. U.S. CONST. amend. II.

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

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

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

courts, at the time of this writing the Court has just granted certiorari in *New York State Rifle & Pistol Association, Inc. v. City of New York* (2<sup>nd</sup> Cir. 2018), which upheld New York City's ban on taking a handgun out of one's dwelling to any location other than a shooting range in the City.<sup>5</sup> It should not raise a ruckus if the Court invalidates this one-of-a-kind restriction, and it will allow the Court to take a prudent step in furthering its Second Amendment jurisprudence.

While *Heller* and *McDonald* relied on text, history, and tradition, many of the lower courts have cast that methodology aside and resorted to a toothless version of intermediate scrutiny. That has allowed courts to conduct a balancing test, the scales of which are usually tipped in favor of the government, to uphold laws granting officials discretion to determine whether citizens have "good cause" to carry a firearm, prohibitions on ordinary rifles labeled as "assault weapons," and other restrictions.

Justice Thomas has been most vocal in dissenting from the Court's denial of petitions for certiorari in Second Amendment cases. He was joined in doing so by Justice Scalia, after whose death Justice Gorsuch has joined with Justice Thomas on the issue. Justice Alito has criticized the Court for not taking a more forceful role in protecting rights under the Amendment. At the time of this writing, since joining the Court Justice Kavanaugh has not opined on the issue, but as a member of the D.C. Circuit he strongly dissented from a decision upholding a ban on commonly possessed rifles and a requirement that all firearms must be registered.

The following analyzes how *Heller* and *McDonald* held Second Amendment rights should be interpreted, how balancing tests deviate from that method, and how individual Justices have urged the Court more actively to supervise the lower courts. It also analyzes Second Amendment opinions of Circuit Court Judges Gorsuch and Kavanaugh. It ends with a discussion of the New York City case on which the Court granted certiorari at the time of this writing. While future action by the Court cannot be predicted, this exercise provides insights into how Justices may

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5. *New York State Rifle & Pistol Association, Inc. v. City of New York*, 883 F.3d 45 (2<sup>nd</sup> Cir. 2018), *cert. granted*, No. 18-280 (Jan. 22, 2019).

approach future Second Amendment cases.

### *HELLER*: TEXT, HISTORY, AND TRADITION

In Justice Scalia's 5-4 *Heller* opinion, the Supreme Court relied on text, history, and tradition to find that "the right of the people to keep and bear arms" is an individual right to have and carry common firearms.<sup>6</sup> Textual analogues include "the right of the people peaceably to assemble" in the First Amendment and "the right of the people to be secure in their persons, places, houses, and effects from unreasonable searches and seizures" in the Fourth Amendment.<sup>7</sup>

Textual interpretation has a historical basis in that the Constitution "was written to be understood by the voters," and its terminology was thus used in its ordinary meaning.<sup>8</sup> Its prefatory clause "a well regulated militia, being necessary for the security of a free state," announces a purpose, but does not limit the operative clause describing the right of the people to have arms.<sup>9</sup> The right was not limited to the militia, which in colonial America consisted of able-bodied males of certain ages, who were thus only a subset of "the people."<sup>10</sup>

Similarly, *Heller* continued, the text of "keep and bear arms" was founded on historical usage. Such sources used "keep arms" to mean "an individual right unconnected with militia service."<sup>11</sup> "At the time of the founding, as now, to 'bear' meant to 'carry.'"<sup>12</sup> In the years just before and after the adoption of the Bill of Rights, several states adopted guarantees of the right of citizens to bear arms for defense of self and state.<sup>13</sup>

Although "bear arms" may be used in a military context, there was no "right to be a soldier or to wage war," which would be an

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

7. *Id.* at 579.

8. *Id.* at 576.

9. *Id.* at 577.

10. *Id.* at 580-81.

11. *Id.* at 582.

12. *Id.* at 584.

13. *Id.* at 584-85.

absurdity.<sup>14</sup> In historical usage, “bearing arms” meant “simply the carrying of arms,” such as “for the purpose of self-defense” or “to make war against the King.”<sup>15</sup> But limiting “bear arms” to an exclusive military usage was inconsistent with other purposes, such as for hunting.<sup>16</sup> As the Court humorously wrote: “The right ‘to carry arms in the militia for the purpose of killing game’ is worthy of the mad hatter.”<sup>17</sup>

Based on the above textual analysis, *Heller* found that the Amendment guarantees “the individual right to possess and carry weapons in case of confrontation,” which the historical background confirmed.<sup>18</sup> The attempts of monarchs to disarm subjects led both to the English Declaration of Rights of 1689 and to the Second Amendment a century later.<sup>19</sup> Although both protected an individual right to have arms, the right was not unlimited.<sup>20</sup> As noted in an antebellum treatise, “in this country the constitution guaranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify people unnecessarily.”<sup>21</sup>

Turning to the prefatory clause, a well regulated militia was seen as necessary to the security of a free polity to repel invasions and suppress insurrections, to render standing armies unnecessary, and to resist tyranny.<sup>22</sup> Historically, “tyrants had eliminated a militia consisting of all the able-bodied men . . . simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents.”<sup>23</sup> Preservation of the militia was thus the Amendment’s stated purpose, although most Americans valued the ancient right more for self-defense and hunting.<sup>24</sup>

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14. *Id.* at 589.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 592.

19. *Id.* at 592-93.

20. *Id.* at 595.

21. *Id.* at 587 n.10, quoting C. Humphreys, *A Compendium of the Common Law in force in Kentucky* 482 (1822).

22. *Id.* at 597-98.

23. *Id.* at 598.

24. *Id.* at 599.

The *Heller* Court next addressed the public understanding of the Second Amendment from just after its ratification through the end of the nineteenth century.<sup>25</sup> That included post-ratification commentary, antebellum judicial opinions, Reconstruction legislation, and post-Civil War commentary.<sup>26</sup> For instance, the Court discussed precedents upholding the right to carry arms openly<sup>27</sup> and protection in the Freedmen's Bureau Act of 1866 for "the constitutional right to bear arms."<sup>28</sup>

Based on the above, *Heller* declared the District of Columbia's ban on the possession of handguns violative of the Second Amendment. Recalling antebellum State court decisions that declared bans on openly carrying handguns as unconstitutional, the Court noted: "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban."<sup>29</sup>

In his dissenting opinion in *Heller*, Justice Stevens rejected the "collective right" interpretation of the Second Amendment and agreed that "it protects a right that can be enforced by individuals." Although it "protects an individual right," the only right it protects is "the right to use weapons for certain military purposes," not "to possess and use guns for nonmilitary purposes like hunting and personal self-defense . . . ."<sup>30</sup> In short, "the right to keep and bear arms' protects only a right to possess and use firearms in connection with service in a state-organized militia."<sup>31</sup>

While arguing that the prefatory clause served to restrict the right to militia use, Justice Stevens did not particularize in any way exactly how being compelled to bear arms in a militia is a "right." Militia service was and is based on conscription and command, not on an enforceable "right" of an individual to join a militia and to make decisions on possession and use of weapons in

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25. *Id.* at 605.

26. *Id.*

27. *Id.* at 612-13 (citing *Nunn v. State*, 1 Ga. 243, 251 (1846); *State v. Chandler*, 5 La. Ann. 489, 490 (1850).

28. See *Heller*, 554 U.S. at 614-15 (also citing S. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (1998).

29. *Id.* at 629.

30. *Id.* at 636-37 (Stevens, J., dissenting).

31. *Id.* at 646.

a militia. The “collective right” theory of the Second Amendment having been cast aside as indefensible, its replacement “right to bear arms in a militia” is equally without basis.

#### “ARMS” PROTECTED BY THE SECOND AMENDMENT

*Heller* decided that the Second Amendment protects individual rights and that a ban on handguns infringes on the right. The Court’s analysis generally applies to long guns as well as handguns, both of which are “arms.” “The term [‘Arms’] was applied, then [18<sup>th</sup> Century] as now, to weapons that were not specifically designed for military use and were not employed in a military capacity.”<sup>32</sup> Further, the technology of protected arms is not frozen in time: “Just as the First Amendment protects modern forms of communications, . . . and the Fourth Amendment applies to modern forms of search, . . . the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”<sup>33</sup>

*Heller* looked back to the Court’s 1939 opinion in *United States v. Miller*, which held that judicial notice could not be taken that a short-barreled shotgun “is any part of the ordinary military equipment or that its use could contribute to the common defense,” precluding it from deciding “that the Second Amendment guarantees the right to keep and bear such an instrument.”<sup>34</sup> *Heller* explained:

We think that *Miller*’s “ordinary military equipment” language must be read in tandem with what comes after: “[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”<sup>35</sup> The traditional militia was formed from a pool of men bringing arms “in common use at the time”

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32. *Id.* at 581.

33. *Id.* at 582.

34. *United States v. Miller*, 307 U.S. 174, 178 (1939) (quoted in *Heller* at 622). *Miller* reinstated an indictment for an unregistered short-barreled shotgun under the National Firearms Act that had been dismissed by the district court on the basis that the Act violated the Second Amendment.

35. *Heller*, 554 U.S. at 624-27, (quoting *United States v. Miller*, 307 U.S. at 179).

for lawful purposes like self-defense. . . . We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.<sup>36</sup> . . .

*Heller* adds that “the sorts of weapons protected were those ‘in common use at the time.’ We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”<sup>37</sup>

Under these criteria, a type of weapon may be “typically possessed by law-abiding citizens for lawful purposes” and not “unusual,” even though it is not necessarily “in common use.” That would allow innovative products typically used for lawful purposes which would not yet be in common use when introduced to the market.

*Heller* went on to suggest that full automatics like the M-16 machinegun may be restricted as may “sophisticated arms that are highly unusual in society at large.”<sup>38</sup> Elsewhere, the Court referred to certain longstanding restrictions, such as bans on possession by felons and on possession in sensitive places, as presumptively valid, but none involve a prohibition on possession of a type of firearm by law-abiding persons.<sup>39</sup>

#### THE CATEGORICAL APPROACH: REJECTION OF INTEREST BALANCING

*Heller* took a categorical approach and, without any consideration of a committee report that sought to justify the handgun ban or of empirical studies, held:

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

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36. *Id.*

37. *Id.* at 627.

38. *Id.* at 627.

39. *Id.* at 626-27.

home “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” . . . would fail constitutional muster.<sup>40</sup>

Again, the test is what arms are chosen by the public for self-defense and other lawful purposes, not what arms the government chooses for the public. Responding to the District’s argument that rifles and shotguns are good, handguns are bad, the Court stated:

It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon. . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.<sup>41</sup>

*Heller* rejected rational-basis analysis<sup>42</sup> as well as Justice Breyer’s proposed “judge-empowering ‘interest-balancing inquiry’ that ‘asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.’”<sup>43</sup> Relying on such intermediate-scrutiny cases as *Turner Broadcasting v. FCC* (1997), Breyer would have applied a standard under which “the Court normally defers to a legislature’s empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity.”<sup>44</sup>

Under that test, Justice Breyer relied first and foremost on the committee report which proposed the handgun ban in 1976 and which was filled with data on the misuse of handguns to justify banning them.<sup>45</sup> He also cited empirical studies about the alleged role of handguns in crime, injuries, and death.<sup>46</sup> Contrary

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40. *Heller*, 554 U.S. at 628-29 (citation omitted).

41. *Id.* at 629.

42. *Id.* at 629 n.27.

43. *Id.* at 634.

44. *Id.* at 690 (Breyer, J., concurring) (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-96 (1997)).

45. *Id.* at 693.

46. *Id.* at 696-99.

empirical studies questioning the effectiveness of the handgun ban and focusing on lawful uses of handguns, in his view, would not suffice to overcome the legislative judgment.<sup>47</sup> Justice Breyer concluded: “There is no cause here to depart from the standard set forth in *Turner*, for the District’s decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make.”<sup>48</sup>

*Heller* rejected the dissent’s use of interest balancing reliance based on the committee report and empirical studies as follows:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.<sup>49</sup>

While *Heller* invalidated the District’s handgun ban under the categorical common-use test, it characterized the Second Amendment as recognizing a fundamental right: “By the time of the founding, the right to have arms had become fundamental for English subjects. . . . Blackstone . . . cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen.”<sup>50</sup> While the Court did not discuss a standard of scrutiny, had it been necessary, precedent was clear: a right is “fundamental” if it is “explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.”<sup>51</sup>

In sum, *Heller* held as a categorical matter that handguns are typically or commonly possessed by law-abiding persons for lawful purposes and may not be prohibited. It did not consider any committee report or empirical study under which to weigh whether asserted governmental interests outweighed the benefits of recognizing the right. While the subject was handguns, the same approach would be equally applicable to long guns. In the future, however, lower courts would not take the same approach in

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47. *Id.* at 699-703.

48. *Id.* at 705.

49. *Id.* at 634.

50. *Id.* at 593-94 (majority opinion) (citations omitted).

51. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17, 33 (1973).

considering bans on long guns that were pejoratively called “assault weapons.”

*MCDONALD AND HELLER II: A FUNDAMENTAL, NON-FUNDAMENTAL RIGHT?*

As if to get revenge against gun owners for losing in the Supreme Court, the District of Columbia enacted a new law with new restrictions. First, it flip-flopped and decided that long guns were not so good after all, banning numerous rifles and magazines that hold over ten rounds. Second, it made registration of any firearm more difficult than ever before.

The District’s ban on rifles aka “assault weapons” and its stringent registration requirements were challenged in a new case with the same lead plaintiff, *Heller v. District of Columbia*, which would become known as *Heller II* and then *Heller III*. What might be called massive resistance to the Supreme Court’s *Heller* decision began with that case. The district court avoided application of strict scrutiny by holding that the right is not fundamental. Repeating the two above references to fundamental rights by the Supreme Court in *Heller*, the district court wrote: “If the Supreme Court had wanted to declare the Second Amendment right a fundamental right, it would have done so explicitly. The court will not infer such a significant holding based only on the *Heller* majority’s oblique references to the gun ownership rights of eighteenth-century English subjects.”<sup>52</sup>

The district court proceeded to uphold the gun prohibitions and registration requirements based solely on the allegations of a committee report.<sup>53</sup> It made no reference to plaintiffs’ evidence other than to refer in a single sentence to their arguments that the banned firearms “are not made or designed for offensive military use,” “are not disproportionately used in crime,” and “are commonly used for lawful purposes such as target shooting, hunting and personal protection . . . .”<sup>54</sup> Evidence of these arguments would be disregarded because “the court is compelled

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52. *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 187 (D.D.C. 2010).

53. *Id.* at 192-93.

54. *Id.* at 193-94.

to defer to the Council's findings" that the banned guns and magazines "are not in common use, are not typically possessed by law-abiding citizens for lawful purposes and are 'dangerous and unusual' within the meaning of *Heller*."<sup>55</sup>

The district court added that the prohibitions and restrictions did not even "implicate the core Second Amendment right" and thus it had no need to decide whether they passed the intermediate scrutiny test, but even if they did, the test would be met because "the Committee Report amply demonstrates that there is at least a substantial fit between that goal [of public safety] and the bans . . ."<sup>56</sup>

Next came the Supreme Court's decision in *McDonald v. Chicago* (2010), which characterized the right as fundamental too many times to be disregarded.<sup>57</sup> It held that "the right to keep and bear arms is fundamental to *our* scheme of ordered liberty" and is "deeply rooted in this Nation's history and tradition," and thus that the Second Amendment is applicable to the states through the Fourteenth Amendment.<sup>58</sup> Tracing the right through periods of American history from the founding through current times, the Court called the right "fundamental" at least ten times.<sup>59</sup>

*McDonald* rejected the view "that the Second Amendment should be singled out for special – and specially unfavorable – treatment," to be treated as "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees . . ."<sup>60</sup> It invalidated Chicago's handgun ban without according Chicago's legislative findings any deference or even discussion.<sup>61</sup>

In dissent, Justice Breyer objected that the decision would require courts to make all kinds of empirical decisions such as: "What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? . . . When do registration requirements become severe to the point that they amount to an

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55. *Id.* at 194.

56. *Id.* at 195.

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

58. *Id.*

59. *Id.* at 767-91.

60. *Id.* at 780.

61. *Id.* at 750-51 (quoting Journal of Proceedings of the City Council).

unconstitutional ban?”<sup>62</sup> The Court responded that it “is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus, to make difficult empirical judgments in an area in which they lack expertise.”<sup>63</sup> *Heller* had rejected an interest-balancing test and held that “[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”<sup>64</sup>

*McDonald* was decided by the time the challenge to the District’s new law banning “assault weapons” and making registration more difficult worked its way up to the D.C. Circuit. Since *Heller* had called the right fundamental only twice, the district court ruled that while the ban did not even implicate the Second Amendment, intermediate scrutiny would be appropriate if any test applied. Now, *McDonald* had called the right fundamental ten times.

Yet in its 2-1 *Heller II* decision of 2011, the D.C. Circuit said that “the Supreme Court often applies strict scrutiny to legislation that impinges upon a fundamental right,” but “it does not logically follow, that strict scrutiny is called for whenever a fundamental right is at stake.”<sup>65</sup> The Court rendered a mixed decision on the registration requirements, upholding basic handgun registration and remanding long gun registration for further factfinding.<sup>66</sup> But it upheld the “assault weapon” and magazine bans based on the allegations in a committee report and disregarded plaintiffs’ sworn expert and lay evidence.<sup>67</sup>

#### THE KAVANAUGH DISSENT IN *HELLER II*

“After *Heller*, . . . D.C. seemed not to heed the Supreme Court’s message. Instead, D.C. appeared to push the envelope again with

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62. *Id.* at 923 (Breyer, J., dissenting).

63. *Id.* at 790-91.

64. *Id.* at 791 (citation omitted) (emphasis added).

65. *Heller v. District of Columbia*, 670 F.3d 1244, 1256 (D.C. Cir. 2011) (“*Heller II*”).

66. *Id.* at 1257-58.

67. *Id.* at 1261. See S. Halbrook, *Reality Check: The ‘Assault Weapon’ Fantasy & Second Amendment Jurisprudence*, 14 GEO. J. L. & PUB. POL’Y. 47 (2016).

its new ban on semi-automatic rifles and its broad gun registration requirement.”<sup>68</sup> These were the words of D.C. Circuit Judge Brett Kavanaugh, dissenting from the *Heller II* opinion. Since he is now a Justice in the Supreme Court, Kavanaugh’s dissent warrants special attention.

*Heller* and *McDonald*, the dissent argued, evaluated restrictions “based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”<sup>69</sup> Applying that categorical test, the Supreme Court “determined that handguns had not traditionally been banned and were in common use – and thus that D.C.’s handgun ban was unconstitutional.”<sup>70</sup> The Supreme Court rejected Justice Breyer’s interest-balancing method, which was indistinguishable from intermediate scrutiny.<sup>71</sup> The dissent added: “It is ironic, moreover, that Justice Breyer’s dissent explicitly advocated an approach based on *Turner Broadcasting*; that the *Heller* majority flatly rejected that *Turner Broadcasting*-based approach; and that the majority opinion here nonetheless turns around and relies expressly and repeatedly on *Turner Broadcasting*.”<sup>72</sup>

Even if an analysis based on a level of scrutiny applied, the dissent continued, given that the right to keep and bear arms is an enumerated, fundamental right, it would be strict, not intermediate, scrutiny.<sup>73</sup> “Whether we apply the *Heller* history- and tradition-based approach or strict scrutiny or even intermediate scrutiny, D.C.’s ban on semi-automatic rifles fails to pass constitutional muster.”<sup>74</sup>

Buttressing the majority’s acknowledgment that semi-automatic rifles are in common use, the dissent noted that they accounted for 40 percent of rifles sold in 2010; two million AR-15s,

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68. *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

69. *Id.* at 1271.

70. *Id.* at 1273.

71. *Id.* at 1276-79.

72. *Id.* at 1280. *See Heller*, 554 U.S. at 690 (Breyer, J., dissenting) (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-96 (1997)).

73. *Id.* at 1284-85.

74. *Id.* at 1285.

America's most popular rifle, had been manufactured since 1986.<sup>75</sup> The website of the popular gun seller Cabela's illustrated how common such rifles are.<sup>76</sup> The dissent cited the declaration of firearms expert Harold E. Johnson for the proposition that: "Semi-automatic rifles are commonly used for self-defense in the home, hunting, target shooting, and competitions. . . . And many hunting guns are semi-automatic."<sup>77</sup> The majority had denied those facts about lawful use based on the unsworn allegations of Brady Center lobbyist Brian Siebel.<sup>78</sup> Judge Kavanaugh contended that both semi-automatic rifles and handguns were not traditionally banned and "are in common use by law-abiding citizens for self-defense in the home, hunting, and other lawful uses."<sup>79</sup>

The dissent took the majority to task for suggesting that "semi-automatic handguns are good enough to meet people's needs for self-defense and that they shouldn't need semi-automatic rifles," which is "like saying books can be banned because people can always read newspapers."<sup>80</sup> If semiautomatic handguns may not be banned, neither may semiautomatic rifles, which are also effective for self-defense. Referring to rifles that can be used for self-defense in the home as "assault weapons" adds nothing, in that "it is the person, not the gun, who determines whether use of the gun is offensive or defensive," and in any event handguns are used most often in violent crime.<sup>81</sup>

The dissent would have remanded the issue of the ban on magazines holding more than ten rounds to determine whether such magazines "have traditionally been banned and are not in common use."<sup>82</sup> Actually, the majority had conceded that they were in common use.<sup>83</sup> And they were not traditionally banned, as the District's prohibition was then only three years old.

The dissent would have also invalidated the requirement to

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75. *Id.* at 1287 (citing researcher Mark Overstreet).

76. *Id.* (citing <http://www.cabelas.com>).

77. *Id.* at 1287-88.

78. *Id.* at 1261 (majority opinion).

79. *Id.* at 1269-70 (Kavanaugh, J., dissenting).

80. *Id.* at 1289.

81. *Id.* at 1290 (Kavanaugh, J., dissenting).

82. *Id.* at 1296 n.20.

83. *Id.* at 1261 (majority opinion).

register all firearms, which was not traditionally required in the U.S. and is very uncommon.<sup>84</sup> Record-keeping requirements are common for gun sellers, but not owners.<sup>85</sup> The claim that registration records allow police to know if residents have guns when executing a search or arrest warrant “is at best a Swiss-cheese rationale because police officers obviously will assume the occupants might be armed regardless of what some central registration list might say.”<sup>86</sup>

The context of the above was the committee’s claim that registration was critical, as it “allows officers to determine in advance whether individuals involved in a call may have firearms . . . .”<sup>87</sup> The *Heller II* majority did question the validity of that claim and other claims, and remanded the case to address long-gun registration and a number of the specific registration requirements under intermediate scrutiny.<sup>88</sup>

On remand, the District admitted that the police did “not routinely check registration records prior to responding to a call for service . . . .”<sup>89</sup> In the second appeal after that remand, the D.C. Circuit in *Heller III* thus rejected that explanation but upheld basic registration of all firearms on the basis that it allows for continuing background checks on and identification of firearm owners.<sup>90</sup>

However, *Heller III* declared four of the registration requirements violative of the Second Amendment even under intermediate scrutiny. They included, first, the requirement that a person must bring the firearm to the police station to register it, which could cause the person to be “arrested or even shot by a police officer seeing a ‘man with a gun’ (or a gun case).”<sup>91</sup> Second, the cancellation of registrations every three years and the

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84. *Id.* at 1291 (Kavanaugh, J., dissenting).

85. *Id.* at 1292.

86. *Id.* at 1294-95.

87. *Id.* at 1258 (majority opinion).

88. *Id.* at 1264.

89. *Heller v. District of Columbia*, 801 F.3d 264, 275 (D.C. Cir. 2015). See also S. Halbrook, *The Empire Strikes Back: The District of Columbia’s Post-Heller Firearm Registration System*, 81 TENN. L. REV. 571 (2014).

90. See *Heller*, 801 F.3d at 275.

91. *Id.* at 277.

requirement of re-registration was unnecessary for periodical background checks, which could be done anytime.<sup>92</sup> Third, the District offered no evidence that a required test on the gun laws promoted public safety.<sup>93</sup> Fourth, the ban on registering more than one handgun per month did nothing to repress gun trafficking, as traffickers did not register guns.<sup>94</sup>

As one of the first appellate decisions after the Supreme Court decided *Heller*, the D.C. Circuit decision in *Heller II* adopting intermediate scrutiny was highly influential in encouraging other circuits to adopt the same low standard of review.<sup>95</sup> While *Heller II* upheld a ban on an entire category of firearms under intermediate scrutiny, *Heller III* actually invalidated a few provisions under that standard. Now that most circuits apply intermediate scrutiny to restrictions on the Second Amendment, one would have to look far and wide for any decision upholding Second Amendment rights and invalidating a restriction under that standard.<sup>96</sup>

#### THE FEINSTEIN-KAVANAUGH EXCHANGE IN THE SENATE CONFIRMATION HEARINGS

Since it was a dissent, Judge Kavanaugh's 2011 opinion in *Heller II* could not influence majority opinions in other circuits, which have by-and-large upheld restrictions under intermediate scrutiny. But with his nomination to the Supreme Court in 2018, the opinion was subjected to widespread scrutiny. In hearings on his nomination in the Senate Judiciary Committee, Senator Diane Feinstein asked several pointed questions about the *Heller II*

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92. *Id.* at 277-78.

93. *Id.* at 279.

94. *Id.* at 280.

95. *E.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2nd Cir. 2015), *cert. denied*, *Shew v. Malloy*, 136 S. Ct. 2486 (2016); *Kolbe v. Hogan*, 849 F.3d 114 (4<sup>th</sup> Cir. 2017) (*en banc*), *cert. denied*, 38 S. Ct. 469 (2017) (both upholding bans on semiautomatic rifles). *See also* *Woollard v. Sheridan*, 712 F.3d 865 (Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014) (upholding carry bans).

96. To be sure, carry bans were invalidated in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); and *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018).

dissent. The dialogue is summarized below with some added comments.<sup>97</sup>

Senator Feinstein began by stating: “My office wrote the [federal] assault weapons legislation in 1993. . . . And it essentially prohibited the transfer, sale, and manufacture of assault weapons. It did not, at the time, affect possession. I happen to believe that it did work . . . .” Actually, the enactment made it “unlawful for a person to manufacture, transfer, or *possess* a semiautomatic assault weapon.”<sup>98</sup> Further, a Department of Justice study concluded when the law expired after ten years: “Should it be renewed, the ban’s effects on gun violence are likely to be small at best and perhaps too small for reliable measurement. AWs [assault weapons] were rarely used in gun crimes even before the ban.”<sup>99</sup>

Feinstein then noted Kavanaugh’s opinion “that the D.C. assault weapons ban was unconstitutional” on the basis that “these weapons were in common use. What did you base your conclusion that assault weapons are in common use and what evidence or study did you use to do that?” She added that “assault weapons are not in common use.”<sup>100</sup>

Kavanaugh responded that “Justice Scalia’s opinion used that phrase,” adding that “the Supreme Court struck down a D.C. ban on handguns. Now most handguns are semiautomatic. . . .”<sup>101</sup> He noted that semiautomatic rifles could not be distinguished from semiautomatic handguns and that “semiautomatic rifles are widely possessed in the United States. There are millions and millions and millions . . . of semiautomatic rifles that are possessed so that seemed to fit common use and not being . . . a dangerous and unusual weapon.”<sup>102</sup>

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97. Transcript at <http://www.cnn.com/TRANSCRIPTS/1809/05/cnr.03.html>. For video, see <https://globalnews.ca/video/4428398/brett-kavanaugh-grilled-on-his-stance-on-weapons-and-school-shootings>.

98. 18 U.S.C. § 922(v)(1) (enacted 1994 and expired 2004) (emphasis added).

99. Christopher S. Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003* at 3 (Report to the National Institute of Justice, U.S. Dep’t. of Justice 2004). [http://www.sas.upenn.edu/jerrylee/research/aw\\_final2004.pdf](http://www.sas.upenn.edu/jerrylee/research/aw_final2004.pdf).

100. Transcript at <http://www.cnn.com/TRANSCRIPTS/1809/05/cnr.03.html>.

101. *Id.*

102. *Id.*

Feinstein responded: “Common use is an activity. It’s not common storage or possession, it’s use. So what you said was that these weapons are commonly used. They’re not.”<sup>103</sup> Actually, the Supreme Court in *Heller* equated “arms ‘in common use at the time’ for lawful purposes like self-defense” with arms “typically possessed by law-abiding citizens for lawful purposes.”<sup>104</sup> Further, in upholding the D.C. rifle ban, the majority in *Heller II* conceded: “We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in ‘common use,’ as the plaintiffs contend.”<sup>105</sup>

Kavanaugh replied simply: “They’re widely possessed in the United States, Senator, and they are used and possessed.”<sup>106</sup> He added: “Guns, handguns, and semiautomatic rifles are weapons used for hunting and self-defense, but as you say, Senator, you rightly say they’re used in a lot of violent crime and cause a lot of deaths.”<sup>107</sup> He concluded that “as a judge my job, as I saw it, was to follow the Second Amendment opinion of the Supreme Court whether I agreed with it or disagreed with it,” noting that at the end of the dissent he quoted Justice Kennedy’s opinion in *Texas v. Johnson* as “the guiding light” for judges.<sup>108</sup> That case held that flag burning constitutes symbolic speech that is protected by the First Amendment.<sup>109</sup>

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103. *Id.*

104. *District of Columbia v. Heller*, 554 U.S. 570, 624-25 (2008) (emphasis added).

105. “Approximately 1.6 million AR–15s alone have been manufactured since 1986, and in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market.” *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (majority opinion).

106. Transcript at <http://www.cnn.com/TRANSCRIPTS/1809/05/cnr.03.html>.

107. *Id.*

108. “The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.” *Texas v. Johnson*, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring), quoted in *Heller II*, 670 F.3d at 1296 (Kavanaugh, J., dissenting).

109. *Id.*

THE THOMAS-SCALIA DISSENTS FROM DENIAL OF  
CERTIORARI: REQUIRING HANDGUNS TO BE LOCKED  
AND BANNING COMMON RIFLES

After *McDonald* was decided in 2010, the Supreme Court went silent on the Second Amendment. In 2015, Justice Thomas, joined by Justice Scalia, dissented from the denial of certiorari in a challenge to a San Francisco ordinance prohibiting the keeping of a handgun in a residence unless it is either locked or being carried on the person.<sup>110</sup> “The law thus burdens their right to self-defense at the times they are most vulnerable – when they are sleeping, bathing, changing clothes, or otherwise indisposed.”<sup>111</sup> *Heller* did not suggest that only an absolute prohibition would be a “substantial burden” on the right, and “courts may not engage in this sort of judicial assessment as to the severity of a burden imposed on core Second Amendment rights.”<sup>112</sup>

Tellingly, Justice Thomas, noted that the post-*Heller* courts of appeals “have disagreed about whether and to what extent the tiers-of-scrutiny analysis should apply to burdens on Second Amendment rights.”<sup>113</sup> He then referred to the two opinions in *Heller II* – the majority view of asking whether a law impinges on a Second Amendment right, and if so, applying a level of scrutiny, and the dissenting view of looking at text, history, and tradition, not a balancing test.<sup>114</sup> But, Thomas commented: “One need not resolve that dispute to know that something was seriously amiss in the decision below.”<sup>115</sup>

Not long after the above denial of certiorari, it was *déjà vu* – the Supreme Court denied certiorari in the challenge to a Highland Park, Illinois, “assault weapon” and magazine ban, and once again Justice Thomas, joined by Justice Scalia, dissented

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110. *Jackson v. City & County of San Francisco*, 135 S. Ct. 2799 (2015) (Thomas, J., dissenting from denial of cert.). See *Jackson v. City & County of San Francisco*, 746 F.3d 953 (9th Cir. 2014).

111. *Id.* at 2801.

112. *Id.* at 2802.

113. *Id.* at 2801.

114. *Id.*

115. *Id.*

from the denial.<sup>116</sup> The ordinance banned common firearms “which the city branded ‘assault weapons,’” but which are “modern sporting rifles (e.g., AR-style semiautomatic rifles), which many Americans own for lawful purposes like self-defense, hunting, and target shooting.” Justice Thomas noted that *Heller* “excluded from protection only ‘those weapons not typically possessed by law-abiding citizens for lawful purposes.’”<sup>117</sup> The Seventh Circuit erroneously asked whether the banned firearms were common in 1791, when the Second Amendment was adopted, but *Heller* recognized protection for bearable arms generally without regard to whether they existed at the founding.<sup>118</sup> The Seventh Circuit also asked whether the banned firearms relate to a well regulated militia, which states and localities would decide. That ignored that the scope of the Second Amendment “is defined not by what the militia needs, but by what private citizens commonly possess,” and that States and localities do not have “the power to decide which firearms people may possess.”<sup>119</sup>

It did not suffice that other alternatives allegedly existed for self-defense. The ban was suspect based on the following: “Roughly five million Americans own AR-style semiautomatic rifles. . . . The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting.”<sup>120</sup> Nor could the ban be upheld “based on conjecture that the public might *feel* safer (while being no safer at all) . . . .”<sup>121</sup> Declining to review a decision that flouted *Heller* and *McDonald*, according to Justice Thomas, contrasted with the Court’s summary reversal of decisions that disregarded other constitutional precedents.<sup>122</sup>

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116. *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from denial of cert.).

117. 136 S. Ct. at 448 (citation omitted).

118. *Id.*

119. *Id.* at 449.

120. *Id.*

121. *Id.*

122. *Id.* at 449-50.

## THE CAETANO STUN GUN CASE

The Supreme Court's intervention after a hiatus from the subject for six years suggests that, to paraphrase Mark Twain, reports of *Heller's* demise had been greatly exaggerated. A unanimous *per curiam* decision after Justice Scalia's death, *Caetano v. Massachusetts* (2016), reversed and remanded a decision of the Massachusetts Supreme Judicial Court that upheld a ban on stun guns.<sup>123</sup> The Massachusetts court erred in holding stun guns not to be protected because they were not in common use when the Second Amendment was adopted, contrary to *Heller's* holding that the Amendment "extends . . . to . . . arms . . . that were not in existence at the time of the founding." It erred in concluding that stun guns were "unusual" because they are a modern invention, for the same reason. And it erred in asserting "that only those weapons useful in warfare are protected," a test that *Heller* explicitly rejected.<sup>124</sup>

Justice Alito, joined by Justice Thomas, concurred. Jaime Caetano got the stun gun for protection against her abusive former boyfriend. "By arming herself, Caetano was able to protect against a physical threat that restraining orders had proved useless to prevent. And, commendably, she did so by using a weapon that posed little, if any, danger of permanently harming either herself or the father of her children."<sup>125</sup>

While stun guns did not exist at the end of the 18th century, neither did revolvers or semiautomatic pistols, or for that matter, electronic communications.<sup>126</sup> "A weapon may not be banned unless it is *both* dangerous *and* unusual."<sup>127</sup> Stun guns are not unusual.<sup>128</sup> Also, "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes."<sup>129</sup> "If *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are

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123. *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (*per curiam*).

124. *Id.*

125. *Id.* at 1029 (Alito, J., concurring).

126. *Id.* at 1030-31.

127. *Id.* at 1030.

128. *Id.*

129. *Id.* at 1031.

dangerous.”<sup>130</sup>

While *Heller* rejected a test that an arm must be suitable for militia use, stun guns are used by the police and the military.<sup>131</sup> Nor did it matter for the common-use test that there are more firearms than stun guns; that handguns are the most popular weapon for self-defense would not justify a ban on all other weapons.

Justice Alito noted that Massachusetts prosecuted Caetano “for arming herself with a nonlethal weapon that may well have saved her life,” the court below “affirmed her conviction on the flimsiest of grounds,” and “[t]his Court’s grudging *per curiam* now sends the case back to that same court.”<sup>132</sup> Her conviction now barred her from having arms for self-defense.<sup>133</sup> “If the fundamental right of self-defense does not protect Caetano, then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe.”<sup>134</sup>

#### JUDGE NEIL GORSUCH’S TENTH CIRCUIT OPINIONS

Justice Neil Gorsuch was elevated to the Supreme Court from the U.S. Court of Appeals for the Tenth Circuit. The following addresses two of his circuit court opinions of relevance here.

*United States v. Pope* upheld the denial of a motion to dismiss an indictment where the relevant facts were in dispute.<sup>135</sup> The defendant had been convicted of a misdemeanor crime of domestic violence, which under federal law disqualified him from firearm possession.<sup>136</sup> He claimed that he possessed a gun solely to defend himself and his family from an alleged threat by a neighbor stemming from a dispute over a dog. The federal ban, he argued, was void as applied under the Second Amendment.<sup>137</sup>

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130. *Id.*

131. *Id.* at 1032.

132. *Id.* at 1033.

133. *Id.*

134. *Id.*

135. *United States v. Pope*, 613 F.3d 1255 (10th Cir. 2010).

136. *Id.*

137. *Id.* at 1257.

Judge Gorsuch wrote for the court that the indictment could not be dismissed based on disputed facts: “All the material facts on which Mr. Pope’s motion to dismiss relies are outside the indictment, hotly disputed by the government, and intimately bound up in the question of Mr. Pope’s guilt or innocence.”<sup>138</sup> While the court could have simply held that no Second Amendment as applied defense could apply under any circumstances, the opinion left open that possibility by concluding: “The hard reality of the case for Mr. Pope is that the material facts that might shed light on whether his gun possession was really and only for the defense of self, others, or property are outside the indictment and fiercely disputed.”<sup>139</sup>

While Judge Gorsuch joined in opinions rejecting Second Amendment challenges in routine felon-in-possession cases,<sup>140</sup> in *United States v. Games-Perez*, he dissented from the denial of a rehearing *en banc* regarding the *mens rea* for such prosecutions.<sup>141</sup> At his sentencing, a defendant was advised by a state court judge that he would have a deferred judgment and would not end up with a felony record.<sup>142</sup> It is unlawful for a person convicted of a crime punishable by imprisonment for more than one year to possess a firearm, but it applies only if the person “knowingly violates” that provision.<sup>143</sup>

Tenth Circuit precedent applied the “knowing” requirement only to possession of the firearm, not to knowledge of the felony conviction. In the panel opinion, Judge Gorsuch acknowledged such precedent but explained why it was wrongly decided.<sup>144</sup> In his dissent from the denial of rehearing, he explained that the defendant should be able to show lack of knowledge as an affirmative defense but could not do so: “People sit in prison

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138. *Id.* at 1257.

139. *Id.* at 1263.

140. *United States v. Molina*, 484 Fed. Appx. 276, 2012 WL 3065281 (10th Cir. 2012); *United States v. Nolan*, 342 Fed. Appx. 368, 2009 WL 2488159 (10th Cir. 2009).

141. *United States v. Games-Perez*, 695 F.3d 1104 (10th Cir. 2012).

142. *Id.*

143. 18 U.S.C. § 922(g), 924(a)(2).

144. *United States v. Games-Perez*, 665 F.3d 1104, 1117 (10th Cir. 2012) (Gorsuch, J., concurring in the judgment).

because our circuit’s case law allows the government to put them there without proving a statutorily specified element of the charged crime.”<sup>145</sup>

Noting the normal rule that firearm possession is protected under the Second Amendment, Judge Gorsuch wrote:

Together §§ 922(g) and 924(a)(2) operate to criminalize the possession of any kind of gun. But gun possession is often lawful and sometimes even protected as a matter of constitutional right. The only statutory element separating innocent (even constitutionally protected) gun possession from criminal conduct in §§ 922(g) and 924(a) is a prior felony conviction. So the presumption that the government must prove *mens rea* here applies with full force.<sup>146</sup>

In short, as a matter of due process, all elements of an offense – in this case knowledge – must be proven, and that is all the more the case when a constitutional right is at stake.

JUSTICE GORSUCH JOINS JUSTICE THOMAS IN DISSENT:  
LIMITING CONCEALED CARRY PERMITS TO “GOOD  
CAUSE”

Justice Thomas, joined by Justice Gorsuch, dissented from the denial of certiorari in *Peruta v. County of San Diego*,<sup>147</sup> a Ninth Circuit decision upholding California’s restriction of gun carry permits to “good cause.”<sup>148</sup> Based on *Heller*’s rendition of the right to “bear arms,” Justice Thomas wrote that the Court “has already suggested that the Second Amendment protects the right to carry firearms in public in some fashion.”<sup>149</sup> He found it “extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen.”<sup>150</sup> Given the historical evidence and precedents, the

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145. *Games-Perez*, 695 F.3d at 1116.

146. *Id.* at 1119.

147. *Peruta v. County of San Diego*, 824 F.3d 919, 942 (2016) (en banc), *cert. denied*, 137 S. Ct. 1995 (2017).

148. *Peruta v. California*, 137 S. Ct. 1995, 1997 (2017) (Thomas, J., dissenting from denial of cert.).

149. *Id.* at 1998.

150. *Id.*

denial of certiorari “reflects a distressing trend: the treatment of the Second Amendment as a disfavored right.”<sup>151</sup> Justice Thomas concluded:

For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it.<sup>152</sup>

#### JUSTICE THOMAS IN DISSENT AGAIN: WAITING PERIOD FOR PERSONS WHO ALREADY POSSESS FIREARMS

Justice Thomas dissented from the denial of certiorari yet again, this time in *Silvester v. Becerra*, regarding the Ninth Circuit’s affirmance of California’s 10-day waiting period as applied to persons who already owned handguns.<sup>153</sup> Background checks were normally completed in as little as two hours, and no basis existed for a “cooling-off” period for persons who already owned guns.<sup>154</sup> “Common sense suggests that subsequent purchasers contemplating violence or self-harm would use the gun they already own, instead of taking all the steps to legally buy a new one in California.”<sup>155</sup> Observing that “the lower courts are resisting this Court’s decisions in *Heller* and *McDonald*,” Justice Thomas added that the Supreme Court would take comparable cases about “its favored rights” like abortion, speech, and the Fourth Amendment, but that “the right to keep and bear arms is apparently this Court’s constitutional orphan.”<sup>156</sup>

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151. *Peralta*, 137 S. Ct. at 1999.

152. *Id.* at 1999-2000.

153. *Silvester v. Becerra*, 138 S. Ct. 945, 946 (2018).

154. *Id.* at 946.

155. *Id.* at 949.

156. *Id.* at 950-52.

CERTIORARI GRANTED: NEW YORK STATE RIFLE AND  
PISTOL ASSOCIATION V. CITY OF NEW YORK

The Supreme Court has granted a petition for a writ of certiorari in *New York State Rifle & Pistol Association, Inc. v. City of New York* (2<sup>nd</sup> Cir. 2018) (“*NYSRPA*”).<sup>157</sup> The petitioners challenge a New York City rule providing that a person with a license to possess a handgun at one’s dwelling may not take it outside the dwelling other than to an authorized shooting range in the City. They wish to transport their handguns outside the City to second homes or to shooting ranges and competitions.<sup>158</sup>

Applying intermediate scrutiny, the Second Circuit held that the restriction does not violate the Second Amendment. A person with a second home could simply keep another handgun there.<sup>159</sup> The court made no mention of the risks of leaving guns in vacant houses.

A person who wants to practice or enter competitions at ranges outside the City, the court speculated, could simply rent or borrow guns in those places.<sup>160</sup> However, it cited no evidence in the record that ranges generally rent or loan firearms. While some commercial ranges rent firearms, generally one must bring one’s own firearms to practice at club or other non-commercial ranges and to compete in shooting matches.

Further, the court saw no evidence “that practicing with one’s own handgun provides better training than practicing with a rented gun of like model . . . .”<sup>161</sup> Persons who train and compete seriously may find this assertion to be devoid of reality – handgun sights must be set to accommodate each person’s eyesight and holding techniques – and the chances of finding a “gun of like model” out of the thousands of models available would seem to be nil.

In granting summary judgment for the City, the court relied on a declaration by a police official that allowing licensees to

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157. *New York State Rifle & Pistol Association, Inc. v. City of New York*, 883 F.3d 45 (2<sup>nd</sup> Cir. 2018), *cert. granted*, No. 18-280 (Jan. 22, 2019).

158. *Id.* at 52.

159. *Id.* at 57-58.

160. *Id.* at 61.

161. *Id.* at 64.

transport handguns to second homes or to competitions was “a potential threat to public safety,” speculating that they would be susceptible to stress, road rage, and other disputes such that it would be better not to have a firearm.<sup>162</sup> No actual incidents or statistics were cited.

Concluding that its review required “difficult balancing” of the constitutional right with the governmental interests, the court balanced the right away and upheld the rule.<sup>163</sup> This appears to be the same type of weighing that the Supreme Court in *Heller* forbade.<sup>164</sup>

The petition for a writ of certiorari poses the questions presented to be: “Whether the City’s ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel.”<sup>165</sup> While the Court thus has alternative grounds on which it could decide the case, the commerce clause and travel issues seem secondary to the more significant and directly applicable Second Amendment issue.

Although the City’s restriction appears to be the only one of its kind nationwide, potentially invalidating such an outlier law seems consistent with the seeming policy of the Roberts Court to take smaller, prudent steps in deciding the contours of a constitutional right. By avoiding the larger issues such as carrying outside the home or bans on commonly-owned rifles labeled “assault weapons,” the Court has an opportunity to delve into the standards of review and to render guidance to the lower courts on how to apply those standards to the more hot-button issues.

## CONCLUSION

It would be hazardous to predict how the Court will rule in any future Second Amendment cases, although it seems difficult to understand why it would grant certiorari in *NYSRPA* unless it

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162. *Id.* at 63.

163. *Id.* at 64.

164. *Heller*, 554 U.S. at 634.

165. Petition for a Writ of Certiorari, *New York State Rifle & Pistol Association, Inc. v. City of New York*, No. 18-280.

intends to reverse the Second Circuit. Given the broad parameters of the right to keep and bear arms explained in *Heller* and *McDonald*, and the further insights provided by *Caetano*, it would not be an uncharted leap forward to decide basic issues such as whether “the people” really have a right to “bear arms,” or whether prohibiting commonly possessed rifles infringes on the right to keep arms. Review is particularly warranted where the circuits are in conflict.

But the Court has prudently decided to allow these tougher issues to wait pending the guidance it may render in *NYSRPA*. The Court could summarily reverse and remand the handgun-carry and rifle-ban issues for reconsideration in light of how it decides *NYSRPA*. At any rate, to maintain its reputation as the non-political branch of government and its role as the court of last resort, the Supreme Court should correct any deviance by the lower courts from its precedents on the Second Amendment.