

**10
YEARS
LATER**

**THE SECOND AMENDMENT
AND PUBLIC SAFETY
AFTER *HELLER***

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EXECUTIVE SUMMARY

For two hundred years, almost all judges in America agreed that the Second Amendment was intended, as the Framers stated in its text, to protect the “well-regulated militia” that the Framers saw as “necessary to a free state” and nothing more.

But ten years ago, all of that changed. On June 26, 2008, the U.S. Supreme Court issued a 5-4 decision in *District of Columbia v. Heller*, which held for the first time that “law-abiding, responsible Americans” have a right to possess guns in the home – even if they have nothing to do with armies or militias – and they need not possess guns for “the security of a free state,” but are entitled to do so in the home for self-defense.¹

The *Heller* decision was a watershed moment in Second Amendment jurisprudence – and a controversial one. Scholars and jurists, including conservatives, lambasted the Court’s decision as the ultimate in judicial activism. Seventh Circuit Judge Richard Posner, a Reagan appointee, referred to the *Heller* decision as “faux originalism” and a “snow job” that “is questionable in both method and result.”² The debate over the real world effect of *Heller* was no less heated. After all, the scope of the Second Amendment is not an academic issue: it may determine what laws Americans are permitted to enact and enforce to stop the gun violence epidemic that claims over 35,000 lives every year.

Ten years later, debates over the *Heller* decision continue, but two facts are undisputed. One, *Heller* is the law of the land. Two, *Heller* has not ushered in the NRA’s vision of an America where virtually anyone has a right to buy, possess, and carry virtually any guns, anywhere, any time.

In the decade since *Heller*, two narratives have emerged regarding the decision’s application and scope. These two narratives have drawn battle lines over what laws and policies can be implemented to prevent gun violence, and they will continue to define the battle over the Second Amendment into the foreseeable future.

One vision is represented by the Brady Center to Prevent Gun Violence, which has been the leading legal voice of the gun violence prevention movement for over 30 years, as well as other gun violence prevention groups. Since the *Heller* decision, this gun violence prevention (“GVP”) view maintains that *Heller* can and does coexist with reasonable GVP measures and is not a constitutional bar to common-sense gun laws. Indeed, as Justice Antonin Scalia noted in the majority opinion, the right to keep and bear arms is “not unlimited,” and is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”³ Rather, the Court identified a non-exhaustive list of “presumptively lawful” gun restrictions, such as gun sales regulations, bans on public carrying of firearms, bans on dangerous and unusual weapons, and bans on gun possession by certain classes of prohibited persons.⁴ For the

“The right to keep and bear arms is “not unlimited,” and is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”

— Justice Antonin Scalia

last decade, Brady has been on the front lines of Second Amendment litigation promoting this accurate reading of the *Heller* decision.⁵

The second, somewhat contradictory vision of the *Heller* decision belongs to the gun lobby. On the one hand, the gun lobby selectively reads *Heller* as an affirmation of its view that the right to keep and bear arms is extremely broad and almost without limitation. The NRA emphasizes this view by incorrectly referring to the Second Amendment as “America’s First Freedom.”⁶ In the immediate aftermath of the *Heller* decision, Wayne LaPierre, the Executive Vice President of the NRA, claimed that *Heller* would be “the opening salvo in a step-by-step process” of rolling back common-sense gun laws and regulations.⁷ This view has guided the gun lobby’s approach to Second Amendment litigation in the decade since the *Heller* decision.

At other times, the NRA acts as if *Heller* does not exist, claiming that lawmakers it opposes intend to take away the guns of law-abiding Americans – even though not only do the legislators not state that intent, but *Heller*’s Second Amendment ruling prohibits such government action.

In the ten years since *Heller*, courts have almost universally agreed with the Brady view and rejected the NRA view of the Second Amendment. Since *Heller*, state and federal courts have heard over a thousand Second Amendment challenges to gun laws. In over

90% of those cases, the courts have rejected the challenge, essentially adopting the Brady view that *Heller* does not prohibit common-sense gun laws.⁸ The courts have repeatedly held that *Heller* does not provide a basis to overturn bans on the public carry of firearms, assault weapons, and large capacity magazines. They have also overwhelmingly held that *Heller* allows for reasonable restrictions on dangerous people possessing and owning firearms, and has upheld safety regulations regarding firearms training, storage, and design.

These rulings make clear that the Second Amendment is no impediment to enacting the strong, sensible gun laws that Americans want and need to reduce the epidemic of gun violence that injures or kills more than 100,000 people in the United States every year. The reason America does not have common sense gun laws is due to the lack of political will, not Constitutional law.

It is an open question, however, whether this consensus in the courts will remain over the next decade. The gun lobby continues to bring legal challenges to common-sense gun laws, and it has not backed down from its view that the Second Amendment is extremely broad. Should President Trump remake the Supreme Court with justices that are hostile to common-sense gun regulations and are sympathetic to the gun lobby’s goals, the post-*Heller* reality could dramatically shift.

THE *HELLER* DECISION – A SEISMIC SHIFT IN SECOND AMENDMENT INTERPRETATION

The full text of the Second Amendment states:
“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.”

Prior to the *Heller* decision, the Second Amendment was historically understood to protect the right to possess a firearm in connection with militia service. The Supreme Court’s previous most extensive analysis of the Second Amendment was its 1939 *United States v. Miller* opinion, in which a man claimed that the Second Amendment barred his prosecution for transporting an unregistered sawed-off shotgun across state lines.⁹ In rejecting the challenge, the Supreme Court focused on the relationship of the right to bear arms with militia service, and stated that the Second Amendment “must be interpreted and applied with that end in view.”¹⁰ The Court further stated, “[i]n the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”¹¹

In the decades that followed, the lower courts overwhelmingly agreed that the Second Amendment’s right to bear arms was connected to militia service. In 2001, advocating for the NRA’s view of the Second Amendment in *United States v. Emerson*,¹² the Fifth Circuit broke

ranks from the other federal appellate courts and concluded there was an individual right to possess arms separate from militia service.¹³ However, the Supreme Court denied review of the case, reversing the decision.¹⁴

In 2003, Washington, D.C. resident and special police officer Dick Heller brought a lawsuit in federal district court challenging certain provisions of D.C.’s local code that banned the possession of handguns in the home and required firearms to be stored unloaded and disassembled or bound by a locking device. The district court dismissed Heller’s claims, stating that it “rejects the notion that there is an individual right to bear arms separate and apart from service in the Militia” and holding that “because none of the plaintiffs have asserted membership in the Militia, plaintiffs have no viable claim under the Second Amendment.”¹⁵ On appeal, the United States Court of Appeals

**“Like most rights, the right
secured by the Second
Amendment is not unlimited.”**

– *District of Columbia v. Heller*

for the District of Columbia reversed in a 2-1 decision, concluding that “the Second Amendment protects an individual right to keep and bear arms,” that such a right is subject to “reasonable restrictions,” but the two challenged

D.C. provisions were unconstitutional because they “amount[] to a complete prohibition on the lawful use of handguns for self-defense.”¹⁶ The Supreme Court granted certiorari to determine “whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.”¹⁷

In an opinion Justice Scalia wrote for the five-justice majority, the Supreme Court held for the first time that the Second Amendment gives an individual the right to possess a handgun in the home, separate from militia service. The majority found in favor of an individual right of “law-abiding, responsible citizens” to possess a gun in the home for self-defense.

Importantly, Justice Scalia included extensive language in the majority opinion that made clear that the Second Amendment does not prevent reasonable gun violence prevention laws. Justice Scalia wrote that, “Like most rights, the right secured by the Second Amendment is not unlimited.”¹⁸ The decision lists a series of “presumptively lawful regulatory measures . . . as examples,” and noted that its “list does not purport to be exhaustive.”¹⁹ The list included:

- “prohibitions on carrying concealed weapons”

- “longstanding prohibitions on the possession of firearms by felons and the mentally ill”
- “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings”
- “laws imposing conditions and qualifications on the commercial sale of arms”
- “prohibiting the carrying of ‘dangerous and unusual weapons’” (mentioning machine guns as an example)²⁰
- “fire-safety laws” and “laws regulating the storage of firearms to prevent accidents.”²¹

Although it is often misunderstood, the scope of the right defined in *Heller* is narrow. It held that D.C.’s effective total ban on firearm possession and its requirement to render firearms inoperable in the home violated the Second Amendment’s right to possess guns in the home for self-defense. The decision remains the Supreme Court’s most definitive interpretation of the Second Amendment. Since *Heller*, the only other law that the Supreme Court has struck down on Second Amendment grounds is Chicago’s similar broad firearms ban in *McDonald v. City of Chicago*.²²



GREAT STAKES – WHAT GUN REGULATION IS PERMISSIBLE IN THE AFTERMATH OF *HELLER*

The decision in *Heller* inspired over a thousand legal challenges that tried to strike down gun laws and gun crime prosecutions.

The Gun Lobby View

If there were any doubt how the gun lobby would view the *Heller* decision, it was quickly answered by NRA Executive Vice President Wayne LaPierre's statement in the immediate aftermath of the Court's decision: "This is a great moment in American history. It vindicates individual Americans all over this country who have always known that this is their freedom worth protecting."²³ The gun lobby and its supporters viewed *Heller* as affirmation of their view that the Second Amendment gives citizens the right to own firearms nearly without limitation.

Despite over a thousand failed Second Amendment challenges to gun restrictions in the ten years since *Heller*, the gun lobby and its supporters maintain this view. Indeed, at the 2018 NRA Convention, LaPierre stated of lawmakers that want to pass gun control laws, **"Their goal is to eliminate the Second Amendment and our firearms freedoms, so they can eradicate all individual freedoms"** and that **"They hate the Second Amendment. They hate individual freedom."**²⁴

LaPierre also made the gun lobby's intentions for *Heller* clear immediately after the Court issued its decision. He stated that *Heller* would be "the opening salvo in a step-by-step process" of rolling back common-sense gun laws and regulations.²⁵ Only months after the *Heller* decision, the NRA discussed its desire to "expand its reach."²⁶ This is exactly what the gun lobby and its supporters attempted to do.²⁷ In the first three years after *Heller*, state and federal courts were inundated with over 400 lawsuits asserting, among others, Second Amendment rights:

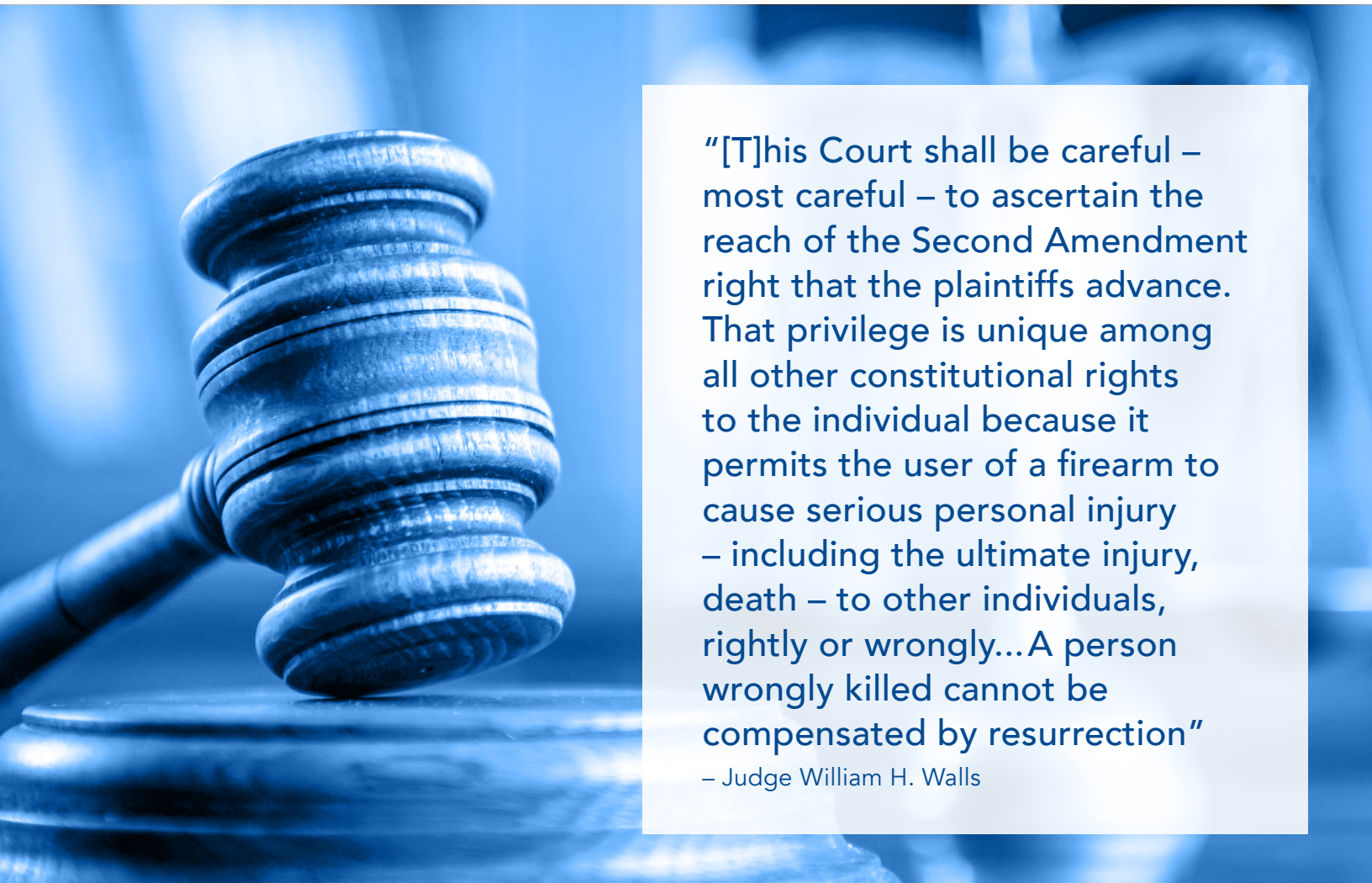
- To carry hidden, loaded guns in public
- To possess military-style assault weapons and assault clips
- For felons and domestic abusers to possess firearms
- To disregard laws requiring the safe storage of guns in homes
- To have unregistered guns
- For teenagers to carry loaded, hidden guns in public
- To carry loaded semi-automatic weapons on the streets of the nation's capital²⁸

The pace of bringing such challenges remains the same to this day.

The Gun Violence Prevention View

The Brady Center and others in the gun violence prevention movement take the view that the Second Amendment is fully consistent with sensible gun laws and was not changed by the *Heller* decision. *Heller*'s holding is narrow – that the Second Amendment confers a right for “law-abiding, responsible” citizens to possess guns in the home for self-defense. This right is limited like all other constitutional rights, particularly in the interest of protecting public safety. *Heller* is not the gun lobby's silver bullet to undermine the common-sense gun laws.

This view emphasizes the entirety of the *Heller* decision. Justice Scalia wrote that *Heller*'s core holding does not invalidate many common-sense gun laws, as they are “presumptively lawful regulatory measures.” In the immediate aftermath of the *Heller* decision, Brady's then-president Paul Helmke accurately recognized this reality. He stated, “Our fight to enact sensible gun laws will be undiminished by the Supreme Court's decision in the *Heller* case. While we disagree with the Supreme Court's ruling...the decision clearly suggests that other gun laws are entirely consistent with the Constitution.”²⁹



“[T]his Court shall be careful – most careful – to ascertain the reach of the Second Amendment right that the plaintiffs advance. That privilege is unique among all other constitutional rights to the individual because it permits the user of a firearm to cause serious personal injury – including the ultimate injury, death – to other individuals, rightly or wrongly...A person wrongly killed cannot be compensated by resurrection”

– Judge William H. Walls

BATTLE IN THE COURTS – THE FIRST TEN YEARS

Over the last decade, state and federal courts have considered approximately 1,200 Second Amendment challenges to gun laws.³⁰ Many of these disputes have centered on common-sense gun laws regarding public carry, assault weapons and large capacity magazine bans, prohibited purchasers and background checks, and firearms safety regulations.

The Brady Center has been at the forefront of the most critical cases, promoting its view of *Heller*'s scope and meaning. In well over 90% of these cases, the courts have rejected the Second Amendment challenge and essentially adopted the Brady view of *Heller*.

Brady at the Frontlines

The Brady Center has been in the middle of the most significant Second Amendment cases both before and after the *Heller* decision. Brady has provided and continues to provide direct representation on a *pro bono* basis to localities and other government entities in order to defend common-sense gun restrictions from challenges brought by the gun lobby and others. In countless cases, Brady has advised policymakers and government officials in drafting and implementing common-sense gun laws and defending such laws in court. Brady continues to educate the legal community and the public about *Heller*, the Second Amendment, and common-sense gun laws that make America safer from gun violence.

Moreover, the Brady Center has filed about 100 amicus briefs (friend of the court briefs) in the most significant Second Amendment

and firearms cases since *Heller*. Most of these cases raised critical questions about the Second Amendment's relationship to a variety of common-sense gun laws including, but not limited to:

- Assault weapons and large capacity magazine bans
- Concealed carry restrictions
- Public carry restrictions
- Prohibited purchasers and background checks
- Firearms sales regulations and restrictions
- Safe storage and other firearms safety requirements

"The fundamental right to live necessarily constrains the right to keep and bear arms. When considering arguments to expand Second Amendment rights, courts should consider the overriding constitutional interest in protecting lives and public safety, and should ensure that any expansion of the [the right to keep and bear arms] does not expose the public to an increased risk of being shot."

– The Right Not to Be Shot

- Firearms bans in sensitive locations
- Age limits on firearm possession

In addition, Brady has successfully argued that Americans have a constitutional right to refrain from owning a firearm. In 2013, Brady, along with Covington & Burling, represented a challenger to the City of Nelson, GA's ordinance that required every head of household within the City to keep and maintain a firearm and ammunition (with narrow exceptions). Brady sought a permanent injunction against the City for violating the First, Second, and Fourteenth Amendment rights of individuals who did not want to be forced to own a gun. Brady argued that the Second Amendment also protects the right to protect one's self and family by keeping guns out of the house – indeed, most Americans choose to keep guns out of their homes. The City Council of Nelson ultimately rescinded its ordinance, and conceded that the Constitution protects the right of Americans to choose *not* to possess a firearm. The City amended the Ordinance, adding a clause stating that the requirement of firearm possession shall never be enforced.

Key Developments in Second Amendment Interpretation


Public Carry

In *Heller*, the Supreme Court addressed the right to a gun in the home. The case was not about the use of guns outside the home, an issue that raises different public safety concerns. But *Heller* did discuss guns outside the home in its analysis, and it left intact the Court's ruling from over a century ago that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons."³¹ Nonetheless, challengers seized

on *Heller* as a vehicle to dismantle local laws restricting carrying guns in public spaces. These challenges have largely failed.

Most states require people to get a permit to carry concealed guns in public. The standards for those permits vary significantly from state to state. Some states' laws require a shoring of "good cause" for why someone needs a concealed weapon, and those "good cause" laws have faced the majority of these challenges. And until very recently, "good cause" laws have been uniformly upheld as constitutional by reviewing circuit courts. For instance, in *Peruta v. County of San Diego*, the Ninth Circuit upheld California's concealed carry restrictions and concluded "the Second Amendment does not extend to the carrying of concealed firearms in public by members of the general public."³² This ruling followed a trend in the Second, Third, and Fourth Circuits, all of which upheld "good reason" statutes in New York, New Jersey, and Maryland, as well as a similar decision in the Tenth Circuit in Colorado.³³

In 2017, breaking with every other circuit that had examined this issue, the D.C. Circuit struck down the District's "good cause" concealed carry regulation in *Wrenn v. District of Columbia*.³⁴ Like the laws upheld as constitutional in other circuits, the District's statute required persons applying for a concealed carry license to show "a good reason to fear injury"³⁵ and the general desire for self-defense was insufficient.³⁶ The D.C. Circuit reached the conclusion that such a law was, *per se*, unconstitutional.³⁷ To reach this decision, the D.C. Circuit was the first and only circuit court to conclude that the "core" right to keep and bear arms in self-defense extends to the public sphere.³⁸ And because, as the court saw it, the D.C. law effectively banned that right, it ran afoul of the Second Amendment.³⁹ While the Seventh Circuit struck down Illinois' total ban



“This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.”

– Judge J. Harvey Wilkinson III

on carrying guns in public, the DC Circuit stands as the only circuit court to strike down far more common restrictions that allow public carry under discretionary restrictions. The District declined to seek Supreme Court review.⁴⁰

While *Heller* left many questions open, the Supreme Court made one thing clear—the Second Amendment is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁴¹ And over the past ten years, most circuit courts have recognized that public carry restrictions are constitutional. This is for good reason, for as one court noted, “We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.”⁴²

Lives certainly depend on it. In the decade since *Heller*, social scientists have studied the effects of public carry laws on rates of violence, and one thing has become abundantly clear—more guns in public equals more violence. Prevailing statistical studies suggest that right-to-carry (“RTC”) laws lead to “substantially higher rates of

aggravated assault, rape, robbery and murder.”⁴³ The most notable recent study, published in 2017, estimates that states with less-restrictive RTC laws experience a 13 to 15 percent increase in violent crime within 10 years of enacting the law.⁴⁴ To put that figure in perspective, the study notes that the average RTC state “would have to double its state prison population to counteract the RTC-induced increase in violent crime.”⁴⁵ It is now clear that “[n]o longer can any plausible case be made on statistical grounds that shall-issue laws are likely to reduce crime for all or even most states.”⁴⁶

Assault Weapons and Large Capacity Magazine Bans

As high-profile mass shootings have plagued the country over the last few years, there has been increased public discussion and attention on the common weapon of choice of mass shooters: AR-15 style rifles that were originally designed for military use. Seven states, the District of Columbia, and some localities currently ban these weapons and restrict large capacity magazines that enable many rounds to be fired without reloading. California passed the first of

these laws in 1989 and it has remained in place. In the wake of *Heller*, however, gun enthusiasts and the gun lobby began challenging these laws under the Second Amendment. Since the *Heller* decision, four federal circuit courts have heard Second Amendment challenges to such bans, and they have all reached the same conclusion – that assault weapons bans are constitutional.⁴⁷

Several of these federal courts of appeal have upheld assault weapon bans based on a two-part test that has become the standard for reviewing any law that potentially implicates the Second Amendment. The first part of the test is whether the “restriction burdens conduct protected by the Second Amendment.”⁴⁸ Stated another way, is the possession or sale of an assault weapon conduct that is protected by the Second Amendment in the first place? Several courts have concluded that the answer to the first question depends on whether the weapons in question were “in common use at the time” of the court’s review or instead were “dangerous and unusual.”⁴⁹

In the 2017 case *Kolbe v. Hogan*, the most recent federal appellate court case upholding an assault weapons ban, the Fourth Circuit answered this question in the negative and concluded that assault weapons are not protected by the Second Amendment at all.⁵⁰ The Fourth Circuit focused on the *Heller* court’s acknowledgment that “‘weapons that are most useful in military service—M-16 rifles and the like—may be banned’ without infringement upon the Second Amendment.”⁵¹ The Fourth Circuit characterized assault weapons such as the AR-15 as “exceptionally lethal weapons of war.”⁵² Although only one other court has followed this particular reasoning⁵³, the *Kolbe* case is noteworthy in that it was decided by a veritable judicial landslide: a substantial majority of a fourteen-judge panel rather than the usual

three, with nine judges in the majority (and a tenth agreeing on other grounds).

The Second Circuit and D.C. Circuit focused on whether the regulations imposed a “‘substantial burden’ on Second Amendment rights.”⁵⁴ In addition to the severity, the courts also asked if the law implicates “the core of the Second Amendment’s protections,”⁵⁵ which the Supreme Court has defined as “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”⁵⁶ The highest level of scrutiny is applied only to “regulations that impose a ‘substantial burden’ on Second Amendment rights.”⁵⁷ Any other law is given a lower level of scrutiny, requiring only that the law be “substantially related” to an important governmental interest, like reducing crime and protecting citizens and the police. Citing a lack of guidance from the Supreme Court, the Second and D.C. Circuits assumed without deciding that the New York, Connecticut, and D.C. laws restrict weapons protected by the Second Amendment.⁵⁸ Then each court applied the second part of the test, and came to the same conclusion: that while the law did burden the core of the Second Amendment, the burden was not “substantial.”⁵⁹ Both courts applied intermediate (rather than strict) scrutiny and concluded that the laws were sufficiently related to their stated goals of reducing crime, protecting police officers, and preventing mass shootings, and therefore upheld the bans.

The Seventh Circuit used a different approach altogether in upholding an assault weapon ban in Highland Park, Illinois.⁶⁰ Instead of applying the two-part test, the court asked two different questions: first, whether the weapons were common at the time of the Second Amendment’s ratification and bear a relation to use in the militia; and second, whether the law leaves adequate means for self-defense. On the first

question, the court determined that the “features prohibited by Highland Park’s ordinance were not common in 1791.”⁶¹ Also, despite the relation of the weapons to use in the militia, the court acknowledged that states regulate militias and “should be allowed to decide when civilians can possess military-grade firearms, so as to have them available when the militia is called to duty.”⁶² Finally, the court determined that adequate alternative means exist for self-defense. The court therefore deferred to the legislature and upheld the law.

Prohibited Purchasers and Background Checks

Another important issue that has been frequently litigated in the wake of *Heller* is whether regulations prohibiting dangerous people – such as felons and domestic violence abusers – from possessing firearms comports with the Supreme Court’s interpretation of the Second Amendment. Criminal defendants have repeatedly argued that such categorical exclusions are unconstitutional. Indeed, in the first three years after *Heller*, there were over 30 federal circuit court cases, over 60 federal district court cases, and over 20 state court cases that upheld prosecution of felons for illegally possessing firearms.⁶³ The courts have overwhelmingly found that laws restricting categories of dangerous people like felons from possessing firearms are “presumptively lawful regulatory measures” within the meaning of *Heller*.

Without exception, laws limiting access to firearms by domestic violence offenders have survived post-*Heller* challenges. The Fourth, Eighth, and Tenth circuits have upheld a law prohibiting gun ownership by domestic abusers subject to restraining orders.⁶⁴ Similarly, the Fourth, Seventh, Ninth, and Eleventh Circuits have upheld a federal law barring misdemeanants of domestic violence from owning or possessing

guns.⁶⁵ In the Seventh Circuit case *United States v. Skoien*, the court explained that “some categorical disqualifications are permissible: Congress is not limited to case-by-case exclusions of persons who have shown to be untrustworthy with weapons.”⁶⁶ Because those who have been convicted of violent crimes are more likely to use violence again and guns are far deadlier than other weapons, the Court found that the statute was reasonably related to the important government objective of preventing armed violence.

Social scientists have repeatedly demonstrated the necessity of limiting access to guns for domestic violence offenders. According to a NIH study, the presence of a gun in a domestic violence situation multiplies the risk that the woman will be killed by five.⁶⁷ The simple presence of guns in the home is associated with an eight-fold increased risk that violence between intimate partners will be fatal.⁶⁸ Simply put, guns turn domestic conflicts into deadly conflicts. And courts in the past decade have upheld reasonable restrictions on domestic violence offenders’ access to guns, saving lives as a result.

Background checks on firearm sales are necessary to enforce laws that prohibit categories of individuals from purchasing and possessing firearms. In 1993, the Brady Handgun Violence Prevention Act (“The Brady Bill”) created a nationwide criminal background check system for gun sales by federally licensed firearms dealers. Though the law has effectively blocked more than 3 million gun sales to prohibited purchasers, the fact that federal law only requires background checks for sales by licensed dealers leads to one out of every five guns being sold without a background check. Declining to wait for Congress to act, some states have expanded their background check systems to

cover additional high-risk transactions and close this gap. Courts have found that such state expansions of background checks do not violate the Second Amendment.⁶⁹

Firearms Safety Laws and Regulations

Heller also approves of a variety of other types of gun regulations. The majority opinion in *Heller* specifically states, “Nor...does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.”⁷⁰ Indeed, such safety regulations “do not remotely burden the right of self-defense” and are therefore permissible after *Heller*.⁷¹ Despite this language, gun rights advocates have brought constitutional claims challenging a variety of state and municipal gun safety laws and regulations, including those that address safe storage, safety standards, and mandatory safety trainings.

Since *Heller*, courts have upheld a variety of laws that govern the safe storage of guns in the home and in vehicles.⁷² Such laws are critical to protecting the safety and well being of children, as studies have found a direct correlation between unsafe gun storage and unintentional

shooting deaths. States with safe storage laws have seen a significant decrease in unintentional deaths among children.⁷³ These laws survive Second Amendment scrutiny because, unlike the D.C. law the Court struck down in *Heller* that required guns in the home to be inoperable even for self-defense purposes, they generally require safe storage when the gun is not in use and under the control of the owner.

The courts have also rejected Second Amendment challenges to other common-sense gun safety laws. For example, the D.C. Circuit held that a local statute that required firearm license applicants to complete a one-hour safety-training course was constitutionally sound.⁷⁴ Citing “history, consensus, and simple common sense” that training promotes public safety by reducing unintentional shootings, the D.C. Circuit held that the provision did not violate the Second Amendment.⁷⁵ Moreover, courts have upheld laws mandating safety standards and safety features for firearms, such as firing and drop testing, as well as the inclusion of load indicators (which indicate to users that a gun is loaded) and magazine safety disconnects (making a gun inoperable when the magazine is disconnected).⁷⁶

THE NEXT TEN YEARS

Second Amendment litigation shows no signs of slowing down over the next decade. The gun lobby can be expected to challenge common-sense gun laws, and the Brady Center will continue to advocate for a complete and nuanced reading of the *Heller* decision that recognizes that other rights – most importantly the right to live – must be considered by courts. The status quo, however, is certainly not guaranteed to persist over the next ten years, even though the Supreme Court has declined to take on a substantive Second Amendment case since *Heller* and *McDonald*.

There is also a real concern that a new composition of the Supreme Court, molded from appointees of President Trump, could extend the reach of *Heller* and the Second Amendment far beyond what its original authors intended and imperil sensible gun laws that Americans need and broadly support. The gun lobby is surely frustrated that *Heller* has not become “the opening salvo in a step-by-step process” to dismantle common-sense gun laws, and that the limiting language in *Heller* itself has restrained the lower courts from helping the gun lobby realize its aspirations. However, a future Second Amendment case before a more conservative Supreme Court could yet again substantially alter the Second Amendment landscape.

ENDNOTES

1 *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Two years later, the Supreme Court in *McDonald v. City of Chicago* predictably extended the *Heller* decision to apply to state and local laws. *McDonald v. City of Chicago*, 562 U.S. 742 (2010).

2 Richard A. Posner, *In Defense of Looseness*, *The New Republic* (Aug. 27, 2008), <https://newrepublic.com/article/62124/defense-looseness/>

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

4 *Id.* at 626-27

5 Brady also has explained that the Constitution has always protected a right to live that properly limits the scope and breadth of the Second Amendment so as not to unduly place the lives and safety of Americans at risk. In “The Right Not To Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties,” Brady attorneys Jonathan Lowy and former Brady attorney Kelly Sampson argue that all rights are constrained by public safety concerns, and those interests merit even more weight when considering how far to extend the right to lethal firearms.

6 For example, the NRA’s “official journal” is entitled “America’s 1st Freedom.” See, <https://www.americas1stfreedom.org>.

7 Anahad O’Connor, *Gun-Control Supporters Show Outrage*, *The New York Times*, (Jun. 27, 2008), <https://www.nytimes.com/2008/06/27/washington/27React.html>

8 Law Center to Prevent Gun Violence, *Post-Heller Litigation Summary* (Apr. 2017), <http://lawcenter.giffords.org/wp-content/uploads/2017/04/Post-Heller-Litigation-Summary-2017-April.pdf>. See also Eric Ruben and Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller* (*Duke Law Journal*, 2018), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3938&context=djl>

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

10 *Id.* at 178

11 *Id.*

12 <https://www.nytimes.com/2002/05/07/politics/justice-dept-reverses-policy-on-meaning-of-second-amendment.html>

13 *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001)

14 *United States v. Emerson*, 536 U.S. 907 (2002)

15 *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109 (2004)

16 *Parker v. District of Columbia*, 478 F.3d 370, 395, 399, 401 (2007)

17 *Heller*, 554 U.S. at 573

18 *Id.* at 626

19 *Id.* at 627 n.26

20 *Id.* at 626-27

21 See *id.* at 632. “[F]ire-safety laws” and “laws regulating the

storage of firearms to prevent accidents” do not appear in Part III of *Heller* with the rest of the non-exhaustive list, but rather appear in Part IV as a response to Justice Breyer’s dissent.

22 *McDonald v. City of Chicago*, 562 U.S. 742 (2010).

23 NRA-ILA, *Heller: The Supreme Decision*, (Jun. 27, 2008), <https://www.nra.org/articles/20080627/heller>

24 NRA CEO Speaks at Conservative Forum after School Massacre; NRA Chief: Schools are “Wide-Open” Target, CNN Transcripts, (Feb. 22, 2018), <http://www.cnn.com/TRANSCRIPTS/1802/22/cnr.03.html>

25 Anahad O’Connor, *Gun-Control Supporters Show Outrage*, *The New York Times*, (Jun. 27, 2008), <https://www.nytimes.com/2008/06/27/washington/27React.html>

26 See Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. Rev. 1171 at 1199 (2009) (quoting Chris Cox, *The Court Speaks, and the Fight Goes On*, AM.’S 1ST FREEDOM, Sept. 2008, at 51).

27 Criminal defense lawyers have participated in raising Second Amendment challenges in order to invalidate statutes under which their clients are being prosecuted.

28 Brady Center to Prevent Gun Violence, *Hollow Victory?*, (2011), <https://www.bradycampaign.org/sites/default/files/Hollow-Victory.pdf>.

29 Paul Helmke, *My Formal Statement On Today’s Decision In The Heller DC Gun Case, Plus Remarks In Front Of The Supreme Court*, *The Huffington Post*, (July. 4, 2008), https://www.huffingtonpost.com/paul-helmke/my-formal-statement-on-to_b_109492.html

30 Law Center to Prevent Gun Violence, *Post-Heller Litigation Summary* (Apr. 2017), <http://lawcenter.giffords.org/wp-content/uploads/2017/04/Post-Heller-Litigation-Summary-2017-April.pdf>

31 *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897)

32 *Peruta v. County of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (citation omitted)

33 See, e.g., *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013) (upholding Maryland’s “good and substantial reason” requirement to obtain concealed carry permit as constitutional); *Drake v. Filko*, 724 F.3d 426, 429-30, 440 (3d Cir. 2013) (holding that New Jersey’s “justifiable need” restriction “does not burden conduct within the scope of the Second Amendment’s guarantee” and, even if it did, is constitutional); *Kachalsky*, 701 F.3d at 99-100 (upholding New York’s “proper cause” requirement to obtain a concealed carry permit as constitutional); see also *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013).

34 *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017).

35 D.C. Code §22-4506(a).

36 See *id.*; § 7-2509.11(1)(A) (“[A] good reason to fear injury... shall at minimum require a showing of a special need for self-protection distinguishable from the general community[.]”).

37 Wrenn, 864 F.3d at 657.

38 *Id.*

39 *Id.*

40 See Ann E. Marimow & Peter Jamison, *D.C. Will Not Appeal Concealed Carry Gun Ruling to Supreme Court*, Wash. Post (Oct. 5, 2017), https://www.washingtonpost.com/local/dc-politics/dc-will-not-appeal-gun-law-to-supreme-court/2017/10/05/e0e7c054-a9d0-11e7-850e-2bdd1236be5d_story.html?utm_term=.9fc7b8edbfd9.

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

42 Masciandaro, 638 F.3d at 475.

43 Clifton B. Parker, *Right-to-carry gun laws linked to increase in violent crime*, Stanford News (Nov. 14, 2014), <https://news.stanford.edu/2014/11/14/donohue-guns-study-111414/>.

44 Abhay Aneja, John J. Donohue, et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data, the LASSO, and a State-Level Synthetic Controls Analysis* (Nat'l Bureau of Econ. Research Working Paper No. 23510, 2017), <http://www.nber.org/papers/w23510>.

45 *Id.*

46 John J. Donohue III & Ian Ayres, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 Stan. L. Rev. 1193, 1296 (2003).

47 *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*"); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017).

48 *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 259.

49 *Heller*, 554 U.S. at 627.

50 *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017).

51 *Id.* at 131 (quoting *Heller*, 554 U.S. at 627).

52 *Id.* at 124, 142

53 *Worman v. Healey*, 293 F. Supp. 3d 251 (D. Mass. 2018).

54 *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 259.

55 *Id.* at 258.

56 *Heller*, 554 U.S. at 634–35.

57 *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 259.

58 *Id.* at 257; *Heller II*, 670 F.3d at 1261.

59 *Heller II*, 670 F.3d at 332.

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

61 *Id.* at 411.

62 *Id.*

63 Brady Center to Prevent Gun Violence, *Hollow Victory?* at 8, (2011), <https://www.bradycampaign.org/sites/default/files/Hollow-Victory.pdf>.

64 For reference, the relevant law was codified as § 922(g)(8); See *United States v. Chapman*, 666 F.3d 220, 226 (4th Cir. 2012) (applying intermediate scrutiny to uphold the law). *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011) (concluding that the law is presumptively constitutional); *United States v. Reese*, 627 F.3d 792, 802-04 (10th Cir. 2010) (applying intermediate scrutiny to uphold the law).

65 For reference, the relevant law was codified as § 922(g)(9). See *United States v. Staten*, 666 F.3d 154, 167-68 (4th Cir. 2011) (concluding that there is a reasonable fit between § 922(g)(9) and the important government interest of reducing domestic gun violence); *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (applying intermediate scrutiny to uphold the law); *United States v. Chovan*, 735 F.3d 1127, 1136-42 (9th Cir. 2013) (applying intermediate scrutiny to uphold the law); *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010) (concluding that the law is presumptively constitutional).

66 *Skoien*, 614 F.3d at 641-42.

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70 *Heller*, 554 U.S. at 632.

71 *Id.*

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75 *Id.* at 279.

76 *Draper v. Healey*, 98 F.Supp.3d 77 (D. Mass. 2015) *aff'd* on other grounds 827 F.3d 1 (1st Cir. 2016); *Pena v. Lindley*, 2015 U.S. Dist. LEXIS 23575 (E.D. Cal. Feb. 27, 2015) (upholding all aspects of California's Unsafe Handgun Act), currently on appeal with the Ninth Circuit.



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