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Shooting America Straight: Why the Time Is Now for the Supreme Court to Fortify Gun Rights in America Post-Heller

Garrett Cleveland

Texas A&M University School of Law (Student), garrett9@tamu.edu

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SHOOTING AMERICA STRAIGHT: WHY THE TIME IS NOW FOR THE SUPREME COURT TO FORTIFY GUN RIGHTS IN AMERICA POST-HELLER

Garrett Cleveland*

Abstract

Since the landmark cases of District of Columbia v. Heller in 2008 and McDonald v. City of Chicago in 2010, the Supreme Court has declined to hear any of the many current cases that present an opportunity to address the Second Amendment. As a result, the lower courts have largely eroded firearm rights in many regions of the United States. It is thus imperative that the Supreme Court grant certiorari to a Second Amendment-related case to clarify certain aspects of Heller, or the lower courts will continue to treat the Second Amendment as a disfavored right. Essentially, the lower courts have predominantly applied only intermediate scrutiny to the fundamental right. But applying that level of scrutiny makes it too easy to hold that a certain law passes constitutional muster.

The addition of Justices Neil Gorsuch and Brett Kavanaugh provide the opportunity to fortify the Second Amendment. This addition likely provides the Supreme Court the votes needed to grant certiorari and the analysis needed to mandate that heightened scrutiny applies to the Second Amendment. The Supreme Court could even adopt a new and simpler test to apply to Second Amendment-related cases. This Article argues that the Supreme Court has an excellent opportunity to decide to hear a Second Amendment-related case and considers how the Court must rule to effectively preserve the protections offered by the Second Amendment.

* J.D. Candidate, Class of 2020, Texas A&M University School of Law. I would like to thank Professor Meg Penrose for her support and guidance, and the wonderful staff of Texas A&M Law Review for helping me pull this article to the finish line. I would also like to thank my parents, Joan and Patrick Cleveland, for instilling in me an unwavering reverence for the Constitution. Thanks, and Gig 'Em!

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I. INTRODUCTION

On June 26, 2008, legal gun owners in America rejoiced. In *District of Columbia v. Heller*, the United States Supreme Court directly ruled on a Second Amendment issue for the first time since 1939.¹ The decision in *Heller* affirmed the right of the American people to possess a firearm in their home for self-defense.² Respondent Dick Heller had finally succeeded in his case to own a handgun to keep in his home, thus abolishing the general handgun ban in the District of Columbia.³ To rightful gun owners, the common-sense approach was a breath of fresh air. The late Justice Antonin Scalia realized that:

There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. 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.⁴

But the American people still had questions they wanted answered. For instance, does the Second Amendment protect the American people only from gun-rights infringement by the federal government?⁵ Chicago’s general handgun ban, similar to the District of Columbia’s ban, provided an opportunity to answer that very question.⁶ In 2010, two years after *Heller*, the Supreme Court ruled in *McDonald v. City of Chicago* that the Second Amendment is not just “a purely federal constitutional right,” but also provides protection against the infringement of state

¹ Luis Acosta, *United States: Gun Ownership and the Supreme Court*, L. LIBR. OF CONGRESS (last updated Aug. 16, 2019), <https://www.loc.gov/law/help/usconlaw/second-amendment.php> [<https://perma.cc/5FHC-S5H9>].

² *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

³ *Id.*

⁴ *Id.* at 629.

⁵ See Michael P. O’Shea, *Modeling the Second Amendment Right to Carry Arms (1): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U. L. REV. 585, 617–18 (Feb. 2012).

⁶ *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

and local officials.⁷ The Court held that the Second Amendment is a right incorporated by the Due Process Clause of the Fourteenth Amendment.⁸ Again, rightful gun owners relished the respect that the Supreme Court showed for the Second Amendment.

The Second Amendment was on a roll. But even though the Supreme Court, within two years, ruled that the Second Amendment guaranteed the right of the American people to own a gun for self-defense, and that states and municipalities could not infringe upon that right, law-abiding citizens still find themselves in precarious positions.

On December 22, 2011, Tennessee resident Meredith Graves visited the 9/11 Memorial in New York City to pay her respects.⁹ There, Graves “noticed a sign that [simply] said ‘No guns allowed.’”¹⁰ Because she possessed a valid legal permit to carry a handgun in Tennessee, the fourth-year medical student was carrying her .32-caliber pistol.¹¹ Graves attempted to do the right thing and check her pistol in with the security guard.¹² Rather than check it in, police arrested Graves, and “she was charged with second-degree criminal possession of a weapon,” a charge that carries a sentence of up to three years imprisonment.¹³ Graves learned the hard way that the laws regarding gun rights are inconsistent throughout the United States.

Graves is just one of many gun owners in the United States. Guns are present in approximately 42% of households in America.¹⁴ In fact, at least 30% of American adults personally own a firearm.¹⁵ Additionally, approximately 16 million Americans possess concealed-carry permits that allow them to carry a loaded handgun on their person in most places throughout everyday life.¹⁶ Notably, only 182,000 individuals possess a concealed-carry permit in New York and California combined.¹⁷ This disparity highlights the differences in law and culture throughout the country.¹⁸ These are just a few of the many statistics that illustrate the pervasiveness of firearms culture in America.

The unfortunate instance concerning Graves sheds light on just one of the facets of gun rights that are inconsistent throughout the United States. In addition to concealed carry, various jurisdictions in the United States are inconsistent on semi-automatic rifle bans, magazine capacity

⁷ Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 273 (Winter 2011).

⁸ Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What’s a Court to Do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL’Y 489, 492 (Spring 2012).

⁹ Katherine Creag & Katie Honan, *Tenn. Tourist Tries to Check Loaded Gun at 9/11 Memorial: DA*, NBC N.Y. (Dec. 29, 2011, 7:07 AM), <https://www.nbcnewyork.com/news/local/Memorial-911-Gun-Arrest-Woman-Tourist-Pistol-Weapon-Control-136366553.html> [<https://perma.cc/3TED-EPMR>].

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Kim Parker et al., *America’s Complex Relationship with Guns*, PEW RES. CENTER (June 22, 2017), <http://www.pewsocialtrends.org/2017/06/22/the-demographics-of-gun-ownership/> [<https://perma.cc/6WWE-YVJW>].

¹⁵ *Id.*

¹⁶ Kush Desai, *Fact Check: What Percentage of Americans Have Concealed Carry Permits?*, THE DAILY SIGNAL (Mar. 6, 2018), <https://www.dailysignal.com/2018/03/06/fact-check-what-percentage-of-americans-have-concealed-carry-permits/> [<https://perma.cc/3MWP-HZP9>].

¹⁷ *Id.*

¹⁸ See *id.*; see Leslie Shapiro et al., *How Strictly Are Guns Regulated Where You Live?*, WASH. POST (last updated Feb. 20, 2018), https://www.washingtonpost.com/graphics/2017/national/assault-weapons-laws/?utm_term=.996ebdf22a77.

limitations, and the legality of traveling with firearms. In fact, there is evidence that that many jurisdictions have limited the Second Amendment, even after *Heller* and *McDonald*.¹⁹ Since *Heller*, the U.S. Circuit Courts and the U.S. District Courts have also inconsistently ruled on Second Amendment-related issues such as large-capacity magazines,²⁰ firearm-safety requirements,²¹ firearm sales,²² “assault” weapons bans,²³ and even in-home gun restrictions.²⁴ The good news is that all of the inconsistent rulings throughout the United States provide ample opportunity for the Supreme Court to clarify and fortify the Second Amendment.

The other good news is that the coming years provide a fertile political landscape to address the Second Amendment because of Justice Neil Gorsuch and Justice Brett Kavanaugh’s confirmations to the Supreme Court. To hear a case, the Supreme Court requires four of its nine justices to vote in favor of granting certiorari.²⁵ It is a widely held theory that the Supreme Court has not ruled on a Second Amendment-related case since *McDonald* because Justice Anthony Kennedy was reluctant to vote in favor of granting certiorari to such cases.²⁶ Since Justice Kennedy announced his retirement on June 27, 2018, it was almost guaranteed that President Donald Trump would fill the empty seat on the bench with a justice partial to gun rights.²⁷ Indeed, the Senate confirmed Justice Brett Kavanaugh on October 6, 2018.²⁸ In his time on the bench for the U.S. Court of Appeals for the District of Columbia, Justice Kavanaugh has displayed some pro-gun rights-ideals.²⁹ His most influential writing on the subject came in his dissent in *Heller v. District of Columbia* (“*Heller II*”) in 2011.³⁰ Justice Kavanaugh opined that D.C.’s general ban on semi-automatic rifles is unconstitutional because they are commonly used throughout the United States.³¹

President Trump’s replacement of Justice Scalia with Justice Neil Gorsuch may not be as influential since Justice Scalia was fervently in favor of the Second Amendment.³² Justice Gorsuch has, however, shown that he is willing to address a Second Amendment-related case, just like his

¹⁹ See David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 239–40 (Winter 2017).

²⁰ *Duncan v. Becerra*, 742 F. App’x 218, 221 (9th Cir. May 14, 2018).

²¹ *Pena v. Lindley*, No. 2:09-CV-01185-KJM-CKD, 2015 WL 854684, at *14 (E.D. Cal. Feb. 25, 2015).

²² *Mance v. Sessions*, 880 F.3d 183, 185 (5th Cir. 2018).

²³ *Worman v. Healey*, 293 F. Supp. 3d 251, 256 (D. Mass. 2018).

²⁴ *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d 45, 52–53 (2d Cir. 2018).

²⁵ *Supreme Court Procedure*, SCOTUSblog, <http://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/> (last visited Feb. 7, 2020) [<https://perma.cc/SWF7-A2DG>].

²⁶ Michael Wisdom, *Justice Kennedy’s Retirement—Good News or Bad for Gun Rights?*, U.S. LAW SHIELD (June 28, 2018), <https://www.uslawshield.com/justice-kennedy-retires-gun-rights/> [<https://perma.cc/Z7KV-FSAU>].

²⁷ *Id.*

²⁸ Sheryl Gay Stolberg, *Kavanaugh is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/XF8J-EMQB>].

²⁹ Lindsay Colvin, *History, Heller, and High-Capacity Magazines: What is the Proper Standard of Review for Second Amendment Challenges?*, 41 FORDHAM URB. L.J. 1041, 1059 (2014).

³⁰ *Id.*

³¹ *Heller v. District of Columbia*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Semi-automatic rifles fire once per trigger pull and have proven to be extremely popular. Alain Stephens, *Why the AR-15 is America’s Rifle*, NPR (Feb. 15, 2018, 5:14 PM), <https://www.npr.org/2018/02/15/586172062/why-the-ar-15-is-americas-rifle> [<https://perma.cc/K6WE-C66K>].

³² Allen Rostron, *Protecting Gun Rights and Improving Gun Control After District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 386–88 (Summer 2009).

predecessor.³³ And now that President Trump has filled Justice Kennedy's seat with a pro-gun rights justice, it is likely that the Court will have enough votes to grant certiorari to hear a case that provides the chance to clarify the Second Amendment.³⁴

The remaining justices' voting history indicates that the Court will clarify and even strengthen the Second Amendment if given the opportunity. In *Heller* and *McDonald*, Justices Samuel Alito, Clarence Thomas, and John Roberts all voted in favor of Second Amendment protection.³⁵ The dissent consisted of Justices Ruth Bader Ginsburg, Stephen Breyer, David Souter, and John Paul Stevens.³⁶ For the foreseeable future, the Supreme Court will consist of five generally pro-gun rights justices, and four justices in opposition. The makeup of the Supreme Court sets the stage to grant certiorari for a Second Amendment-related case, of which there are many to choose from.

This Article will address why the most recent Supreme Court cases addressing the Second Amendment have not provided the clarity that the American people deserve. Further, this Article argues that the confirmation of two new Supreme Court Justices make it the perfect time to clarify and fortify gun rights in America. In doing so, this Article will discuss the background of firearm rights in America and what the Supreme Court has already done in regard to the Second Amendment. Following, this Article addresses why the most recent rulings regarding the Second Amendment failed to do enough. As an example of a solution, I discuss a case that provides the Supreme Court the ability to address the Second Amendment, and what a ruling in that case would mean for gun rights in the United States.

II. THE BACKGROUND OF FIREARM RIGHTS IN AMERICA

“[T]he right of the people to keep and bear Arms, shall not be infringed.”³⁷ It seems as though everyone in the United States is familiar with the Second Amendment, whether they agree with current gun laws or not.³⁸ But Americans enjoyed the right to bear arms even before the Bill of Rights came to be.³⁹ Colonizers maintained the rights of English citizens, including the right to bear arms outside the home for ornament or self-defense.⁴⁰ The Bill of Rights simply codified the strong sentiments of our earliest citizens.⁴¹ Ever since our Founding Fathers ensured that U.S. citizens would retain their gun rights, the United States has maintained the strongest culture of gun ownership in the world.⁴² While many countries such as the United Kingdom and

³³ Jess Bravin, *The Supreme Court Lets Stand Maryland Assault-Weapons Ban*, THE WALL ST. J. (Nov. 27, 2017, 3:34 PM), <https://www.wsj.com/articles/supreme-court-lets-stand-maryland-assault-weapons-ban-1511814887> [<https://perma.cc/Q8BR-BDLJ>].

³⁴ Wisdom, *supra* note 26.

³⁵ *District of Columbia v. Heller*, 554 U.S. 570, 572, 636 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 748 (2010).

³⁶ *Heller*, 554 U.S. at 636; *McDonald*, 561 U.S. at 858, 912.

³⁷ U.S. Const. amend. II.

³⁸ See Ron Elving, *Repeal the Second Amendment? That's Not So Simple. Here's What it Would Take*, NPR (Mar. 1, 2018, 5:00 AM), <https://www.npr.org/2018/03/01/589397317/repeal-the-second-amendment-thats-not-so-simple-here-s-what-it-would-take> [<https://perma.cc/MWA5-FTPU>].

³⁹ Daniel Peabody, *Target Discrimination: Protecting the Second Amendment Rights of Women and Minorities*, 48 ARIZ. ST. L.J. 883, 887–88 (Fall 2016).

⁴⁰ *Id.* at 887–888.

⁴¹ *Id.* at 888.

⁴² See Michael Kocsis, *Gun Ownership and Gun Culture in the United States of America*, 16 Essays in PHIL. 155, 155 (2015).

Australia have nearly outlawed firearms altogether, the United States has thus far declined such measures.⁴³

In December of 1997, the United Kingdom effectively banned all handguns for private use.⁴⁴ Shortly after, Australia essentially banned all semi-automatic weapons.⁴⁵ In the twenty years since the actions of the United Kingdom and Australia, there are many people in America that have called for similar courses of action.⁴⁶ Mass shootings have certainly sparked that sentiment, but the culture of gun ownership in America has resisted such drastic actions. In fact, legislative members of countries such as Australia recognize that their laws are not fit for implementation in the United States.⁴⁷ For example, former Australian Ambassador to the United States, Joe Hockey, recognizes that “Australia and the United States are completely different situations, and it goes back to each of our foundings. America was born from a culture of self-defense. Australia was born from a culture of ‘the government will protect me.’”⁴⁸

Americans have long held the notion that they have the right to protect themselves, and they certainly exercise that right today. As of 2017, data from the Crime Prevention Center indicates that there are between 15.6 and 16.3 million concealed carry permits throughout the United States, and that number is increasing.⁴⁹ In 2017 alone, the number of concealed carry permits in the United States grew by approximately 1.8 million.⁵⁰ Further, overall gun sales have increased in the United States by approximately 83% since 1999.⁵¹ There are countless reasons for these increasing trends, but the primary one is familiar. Most Americans simply feel safer with firearms than without.⁵² And there is evidence to support that they are correct. In contrast to the increase in carry permits and gun sales, the U.S. gun-related homicides decreased by 39% from 1993 to 2011, according to the Bureau of Justice Statistics.⁵³ Additionally, “[t]here were 4.6 gun murders per 100,000 people in 2017, far below the 7.2 per 100,000 people recorded in 1974.”⁵⁴

⁴³ Andrew Wong, *Why the US is so Different from New Zealand, the UK and Australia When It Comes to Gun Control*, CNBC (Aug. 4, 2019), <https://www.cnbc.com/2018/03/08/gun-control-why-us-is-different-from-uk-and-australia.html> [<https://perma.cc/SK7H-JLJU>]; Molly McClusky, *Australia’s Ambassador Says His Country’s Gun Laws Can’t Save America*, PACIFIC STANDARD (Feb. 9, 2018), <https://psmag.com/news/australia-ambassador-gun-laws>.

⁴⁴ David Barnett, *Firearms Act: Twenty Years on, Has it Made a Difference?*, INDEPENDENT (Dec. 16, 2017), https://www.independent.co.uk/news/long_reads/firearms-act-twenty-years-on-has-it-made-a-difference-dunblane-port-arthur-a8110911.html [<https://perma.cc/7MY6-Z85C>].

⁴⁵ McClusky, *supra* note 43.

⁴⁶ *Id.*; contra Megan Brenan, *Snapshot: Majority in U.S. Now Oppose Ban on Assault Rifles*, GALLUP (Oct. 19, 2018), <https://news.gallup.com/poll/243860/snapshot-majority-oppose-ban-assault-rifles.aspx>.

⁴⁷ McClusky, *supra* note 43.

⁴⁸ *Id.*

⁴⁹ Desai, *supra* note 16.

⁵⁰ *Id.*

⁵¹ Jack Beckwith & Michael Hester, *A Look at Gun Sales by State: How U.S. Gun Statistics Have Changed Since 1999*, THE DATAFACE (Mar. 2, 2018), <http://thedataface.com/2018/03/economy/us-gun-sales> [<https://perma.cc/RN2D-4QVN>].

⁵² Frank Newport, *Majority Say More Concealed Weapons Would Make U.S. Safer*, GALLUP (Oct. 20, 2015), http://www.gallup.com/poll/186263/majority-say-concealed-weapons-safer.aspx?g_source=concealed%20carry&g_medium=search&g_campaign=tiles [<https://perma.cc/MPS2-U8UF>] (survey shows that 56% of people feel that more concealed carry weapons would make the country safer).

⁵³ Terrence P. Jeffrey, *Gun Homicides in U.S. Down 40% from 1993 to 2014; Lowest Rate in 34 Years*, CNSNEWS (Jul. 11, 2016), <https://www.cnsnews.com/news/article/terrence-p-jeffrey/gun-homicides-us-down-40-1993-2014> [<https://perma.cc/8J4X-VSYL>].

⁵⁴ John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, Pew Res. Center (Aug. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s/>.

Additionally, a culture of frontiersmanship and hunting coincided with a culture of self-defense to shape the ideals of American gun ownership. The use of firearms for hunting and putting food on the table was unquestionably necessary for American colonists.⁵⁵ Although the numbers are gradually declining, America still sees approximately 11.5 million hunters trek into the wilderness each year, indicating that there is still a strong need for the Second Amendment to protect the rights of those citizens.⁵⁶

III. THE SUPREME COURT'S ACTIONS ON THE SECOND AMENDMENT

Even though America is a country founded upon the right to keep and bear arms, the Supreme Court has historically been silent on the Second Amendment.⁵⁷ Before *Heller* in 2008, the leading opinion addressing the constitutional right was born from the bootlegging industry in the late 1930s.⁵⁸ Two bootleggers, Jack Miller and Frank Layton, were prosecuted in 1938 for “possessing a sawed-off shotgun without having paid the required federal tax” that was necessary under the National Firearms Act of 1934.⁵⁹ “The Federal District Court dismissed [their] indictment, [finding] that the National Firearms Act violated the Second Amendment.”⁶⁰ In *Miller v. United States*, the Supreme Court reversed the decision and focused on the militia aspect of the Second Amendment.⁶¹ The Court held that since sawed-off shotguns had not been shown to be ordinary military equipment, the National Firearms Act did not violate the Second Amendment.⁶² Unfortunately, that short explanation is all that the Court said on the matter.⁶³ Over the course of the next eighty years, the Supreme Court dabbled in various issues relating to the fringes of the Second Amendment, but never attempted to directly address it.⁶⁴

For instance, the Supreme Court struck down the Brady Act as unconstitutional in 1997 because it violated states' rights, but only Justice Clarence Thomas discussed the Act's obvious violation of the Second Amendment.⁶⁵ The Brady Act required the U.S. Attorney General to command chief law enforcement officers of each local jurisdiction in the country to conduct background checks on prospective handgun buyers in the country.⁶⁶ In *Printz v. United States*, Justice Thomas wrote in his concurring opinion that “a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession

⁵⁵ Ryan Notarangelo, *Hunting Down the Meaning of the Second Amendment: An American Right to Pursue Game*, 61 S.D. L. REV. 201, 214 (2016).

⁵⁶ Nathan Rott, *Decline in Hunters Threatens How U.S. Pays for Conservation*, NPR (Mar. 20, 2018), <https://www.npr.org/2018/03/20/593001800/decline-in-hunters-threatens-how-u-s-pays-for-conservation> [<https://perma.cc/YYV8-GND6>].

⁵⁷ David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99, 99 (1999).

⁵⁸ *See id.* at 105.

⁵⁹ *Id.*

⁶⁰ *Id.*; *United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939).

⁶¹ *United States v. Miller*, 307 U.S. 174, 178–79, 183 (1939).

⁶² *Id.* at 178.

⁶³ Kopel, *supra* note 57, at 106.

⁶⁴ *Id.* at 108–09.

⁶⁵ Kevin T. Streit, *Can Congress Regulate Firearms?: Printz v. United States and the Intersection of the Commerce Clause, the Tenth Amendment, and the Second Amendment*, 7 WM. & MARY BILL RTS. J. 645, 648–50 (1999).

⁶⁶ *Id.* at 647.

of firearms, runs afoul of that Amendment's protections."⁶⁷ Neither party in the case, however, presented that argument for the Court to address.⁶⁸

The Supreme Court even briefly touched upon the Second Amendment in a case concerning abortion.⁶⁹ In 1992, Justice Sandra Day O'Connor approvingly stated in *Planned Parenthood v. Casey* that certain rights are guaranteed to the individual, referencing the right to keep and bear arms among other liberties.⁷⁰

Overall, however, the Second Amendment remained neglected. But finally, in 2008, the Supreme Court directly addressed the Second Amendment.⁷¹ In its "first in-depth examination of the Second Amendment," the Supreme Court addressed three District of Columbia ordinances: a ban on handguns; a prohibition of an assembled, functional firearm in the home; and the prohibition on the carrying of a gun without a license that applied even inside one's home.⁷² Libertarian attorney Robert Levy was the architect behind the challenge to D.C.'s unconstitutional ordinances.⁷³ He recruited the named plaintiff, Dick Heller, and six others to represent.⁷⁴ Levy recognized that Heller provided an opportunity to illuminate the absurdity of the city's ordinances.⁷⁵ Heller, a D.C. resident and police officer, was authorized to carry a gun as part of his job, but the ban nonetheless barred him from keeping one in his home.⁷⁶ The Supreme Court agreed with Levy and the plaintiffs, and Justice Scalia authored a broad opinion striking down D.C.'s gun bans.⁷⁷

The opinion set forth many of the beliefs that American citizens hold in regard to gun ownership. Justice Scalia understood that "preserving the militia was [not] the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."⁷⁸

Namely, the Supreme Court unequivocally held that the right of self-defense is inherent in the Second Amendment, and that self-defense is especially important in the home.⁷⁹ The Court also held that "the Second Amendment protects arms" that are "in common use," and are "[t]ypically possessed by law-abiding citizens for lawful purposes."⁸⁰ Further, the Court recognized that "[t]he choice of law-abiding citizens to prefer particular types of firearms is conclusive."⁸¹ Thus, a ban on handguns, an extremely common firearm to own for self-defense, clearly violated the Second Amendment. In fact, a ban on handguns so clearly violated the Second

⁶⁷ *Id.* at 650; *Printz v. United States*, 521 U.S. 898, 938 (1997) (Thomas, J., concurring).

⁶⁸ *See id.* at 647.

⁶⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848 (1992).

⁷⁰ *Id.*

⁷¹ *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008).

⁷² Kopel & Greenlee, *supra* note 19, at 196–97; *Heller*, 554 U.S. at 635.

⁷³ Robert Barnes, *Justices Reject D.C. Ban on Handgun Ownership*, WASH. POST (Jun. 27, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/26/AR2008062600615.html?noredirect=on&sid=ST2008070500624>. [<https://perma.cc/ESC7-ZMDA>].

⁷⁴ *Id.*; Linda Greenhouse, *Justices, Ruling 5-4, Endorse Personal Right to Own Gun*, N.Y. TIMES (June 27, 2008), <https://www.nytimes.com/2008/06/27/washington/27scotus.html> [<https://perma.cc/JF22-8ZDE>].

⁷⁵ *See Barnes*, *supra* note 73.

⁷⁶ Jeff Golimowsky, *Pulling the Trigger: Evaluating Criminal Gun Laws in a Post-Heller World*, 49 AM. CRIM. L. REV. 1599, 1602 (Summer 2012); *Heller*, 554 U.S. at 575.

⁷⁷ *Heller*, 554 U.S. at 636.

⁷⁸ *Id.* at 599.

⁷⁹ Kopel & Greenlee, *supra* note 19, at 198–200.

⁸⁰ *Id.* at 197.

⁸¹ *Id.* at 198.

Amendment that the Court did not even resort to detailing a level of scrutiny that the ban fell under.⁸² *Heller*, however, bound only the federal government.⁸³

Two years later, the Supreme Court again directly addressed the Second Amendment and held that the Second Amendment also applies to states.⁸⁴ In *McDonald*, the Court ensured that the Second Amendment right to keep and bear arms is a fundamental right incorporated through the Due Process Clause of the Fourteenth Amendment.⁸⁵ Following the ruling in *Heller*, Otis McDonald and several other Chicago residents that wished to keep handguns in their home for self-defense brought an action challenging the city's handgun ban.⁸⁶ McDonald, then in his late-seventies, lived in a high-crime neighborhood and rightly wanted to protect himself and his home.⁸⁷ The city incorrectly maintained that the handgun ban did not run afoul of the *Heller* decision because it was a local ordinance and not a federal law.⁸⁸ Justice Samuel Alito, writing for the majority, connected the obvious dots. Finding that “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day,” in addition to already ruling that self-defense is integral to the Second Amendment, the Court determined the Second Amendment is indeed incorporated through the Fourteenth Amendment.⁸⁹

Although *Heller* and *McDonald* did more for the Second Amendment than over eighty years of past American jurisprudence, the Circuit Courts of Appeals have taken advantage of what the rulings did not fully address to limit the Second Amendment.

IV. *HELLER'S* SHORTCOMINGS: WHY *HELLER* AND *MCDONALD* DID NOT DO ENOUGH FOR THE AMERICAN PEOPLE AND THE SECOND AMENDMENT

Perhaps the most significant shortcoming of the facts in *Heller* is that the D.C. handgun ban was so clearly unconstitutional.⁹⁰ Although the case directly addressed the Second Amendment, the Court did not necessarily have an opportunity to articulate the standard of review for firearm laws because a complete ban of handguns is unconstitutional under any standard of review.⁹¹

In *Heller*, the Court debated whether a categorical approach or a balancing approach is the most appropriate standard of review for evaluating firearms laws.⁹² The majority concluded that a categorical approach is the more usable approach.⁹³ Categoricalism and balancing doctrines are common approaches in constitutional law, not just firearms laws.⁹⁴ Generally, categoricalism

⁸² *Id.* at 197.

⁸³ Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 900 (2011).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

⁸⁷ *Id.* at 751.

⁸⁸ *See id.* at 749.

⁸⁹ *Id.* at 767.

⁹⁰ Elke C. Meeùs, *The Second Amendment in Need of a Shot in the Arm: Overhauling the Courts' Standards of Scrutiny*, 45 W. ST. L. REV. 29, 49–50 (2017).

⁹¹ *Id.* at 50.

⁹² Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 375 (2009); *see* *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

⁹³ Blocher, *supra* note 92, at 375.

⁹⁴ *Id.* at 383.

assesses only whether a certain case conforms to certain “predetermined, outcome-determinative lines.”⁹⁵ For example, fraud and crime-facilitating speech are clearly outside the bounds of First Amendment protection to free speech.⁹⁶ In contrast, a balancing approach weighs “an individual’s interest in asserting a right against the government’s interest in regulating” that right.⁹⁷ In this approach, these interests are weighed in a manner that is appropriate for context, and the heavier side is the successful one.⁹⁸

In its categorical holding, the Court essentially determined that a general handgun ban does not conform to the predetermined and outcome-determinate lines drawn by the Framers in the Second Amendment.⁹⁹ Thus, the case made it difficult to go further and articulate the difference between protected and unprotected types of firearms, people, and arms-bearing purposes.¹⁰⁰ The majority also defended their refusal to adopt a balancing approach in *Heller*.¹⁰¹

The dissent advocated for a balancing approach.¹⁰² But a balancing approach is far too narrow in light of the facts of the case. In *Heller*, a balancing approach had the potential to uphold a violation of America’s Second Amendment right based solely upon the circumstances of the ban in D.C.¹⁰³ This is evident in Justice Stephen Breyer’s dissent. Writing for the minority, Justice Breyer concluded that because handgun violence is a problem in urban areas, and because the handgun ban was restricted to an urban area (D.C.), a balancing approach results in the handgun ban being constitutional.¹⁰⁴ But citizens of the District of Columbia are still citizens of the United States, and the circumstances of that urban area should not dictate how the Second Amendment is interpreted and applied to them.

In fact, the majority noted that there is:

no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.¹⁰⁵

It is important to realize that although the Court adopted a primarily categorical approach in *Heller*, the majority did not rule that lower courts should use a categorical approach for every Second Amendment challenge. And while the Court did not deem the Second Amendment to be unlimited, the majority failed to provide an adequate outline for the scope of the right.¹⁰⁶ The

⁹⁵ *Id.* at 381.

⁹⁶ *Id.* at 389.

⁹⁷ *Id.* at 381.

⁹⁸ *Id.* at 381.

⁹⁹ *District of Columbia v. Heller*, 554 U.S. 570, 635.

¹⁰⁰ Blocher, *supra* note 92, at 375.

¹⁰¹ *Heller*, 554 U.S. at 634–35.

¹⁰² *Id.* at 689 (Breyer, J., dissenting).

¹⁰³ *See id.* at 682 (Breyer, J., dissenting).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 634–35.

¹⁰⁶ *See id.* at 626.

majority referenced several instances, however, in which firearms laws might not violate the Second Amendment, such as: the possession of firearms by felons or the mentally ill, laws forbidding the carrying of firearms in certain areas such as schools or government buildings, or laws providing qualifications on the commercial sale of firearms.¹⁰⁷ Additionally, the majority noted that “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons’” might not violate the Second Amendment.¹⁰⁸ These instances are what the Court deemed to be “presumptively lawful.”¹⁰⁹

This is where the Court made a critical mistake. This vague suggestion of “presumptively lawful” measures allowed the lower courts to fervently chip away at the Second Amendment despite the rulings in *Heller* and *McDonald*.¹¹⁰ The majority in *Heller* failed to adequately outline the Second Amendment because they provided a vague list of “presumptively lawful” measures, but did not explain why those measures would be presumptively lawful.¹¹¹ Without further guidance, the lower courts have generally split into two camps.¹¹² The first camp concludes that the list of measures provided by the Court in *Heller* is “‘presumptively lawful’ because they regulate conduct outside the scope of [the] Second Amendment.”¹¹³ The second camp has concluded that the “measures are ‘presumptively lawful’ because they [can withstand] any level of scrutiny.”¹¹⁴

For example, the Third Circuit in *United States v. Marzzarella* held that all presumptively lawful measures listed in *Heller* regulated conduct outside the scope of the Second Amendment.¹¹⁵ Thus, the Third Circuit held that firearms with destroyed serial numbers are not afforded Second Amendment protection, because they fall outside the scope of the Second Amendment.¹¹⁶

In contrast, a three-judge panel of the Seventh Circuit utilized the second approach in *United States v. Skoien*.¹¹⁷ The court held a statute prohibiting misdemeanor domestic violence offenders from possessing firearms to be constitutional because the measure withstood a heightened level of scrutiny.¹¹⁸ The Seventh Circuit explained its decision to use the second approach to interpret the presumptively lawful measures, stating, “We take our cues about the appropriate standard of review from the language of *Heller's* holding and that enigmatic reference to ‘presumptively lawful’ gun regulations.”¹¹⁹ Thus, the three-judge panel decided that the statute must be analyzed under intermediate scrutiny (a heightened level of scrutiny), and would be

¹⁰⁷ Rebecca L. Trump, Comment, *Keep Your Powder Dry and Your Standards High: Protect the Second Amendment's Core with Strict Scrutiny Review*, 120 W. VA. L. REV. 723, 734–35 (2017).

¹⁰⁸ *Heller*, 554 U.S. at 627.

¹⁰⁹ *Id.* at 626–27.

¹¹⁰ Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 Duke L.J. 1433, 1446–51 (2018) (“Perhaps the most widely accepted characterization of Second Amendment challenges as a whole is that they have been overwhelmingly rejected.”).

¹¹¹ Frank Zonars, Comment, *Shooting Heller in the Foot?: Applying and Misapplying District of Columbia v. Heller's “Presumptively Lawful” Dicta in United States v. Skoien*, 52 B.C. L. REV. E-SUPPLEMENT 83, 83–84 (2011).

¹¹² Katherine L. Judkins, *Navigating the Second Amendment Crossfire: The Third Circuit Triggers Working Methodology in United States v. Marzzarella and United States v. Barton*, 57 VILL. L. REV. 711, 719 (2012).

¹¹³ *Id.*

¹¹⁴ *Id.* at 719–20.

¹¹⁵ *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010).

¹¹⁶ *Id.* at 93–94.

¹¹⁷ Zonars, *supra* note 111, at 86–88.

¹¹⁸ *Id.* at 87.

¹¹⁹ *United States v. Skoien*, 587 F.3d 803, 810–11 (7th Cir. 2009).

constitutional if the government could prove that there was a reasonable fit between “the important objective of reducing domestic gun violence” and the “permanent disarmament of all domestic-violence misdemeanants.”¹²⁰

The conflict in how to evaluate the term “presumptively lawful” is part of the reason the lower courts have come to such contrasting rulings on firearm-related cases.¹²¹ The lower courts have also come to different conclusions on the level of scrutiny applicable to Second Amendment violation challenges.¹²² The Court in *Heller* appeared to leave the door open for the application of intermediate or strict scrutiny in Second Amendment related cases.¹²³ Perhaps surprisingly, most circuit courts have adopted the application of intermediate scrutiny, even though the Second Amendment protects a fundamental right.¹²⁴ For example, the Seventh Circuit held in *Skoien* that “applying strict scrutiny to *all* restrictions on gun rights is obviously incompatible with *Heller's* dicta about ‘presumptively lawful’ firearms laws.”¹²⁵ By doing this, they applied intermediate scrutiny to the statute barring misdemeanor domestic abuse offenders from possessing firearms.¹²⁶

The Court’s failure to set forth the appropriate standard of review in *Heller* and *McDonald* and to fully outline the Second Amendment allowed the lower courts to come to decidedly different conclusions on the outlook of our country’s most important right pertaining to self-defense.¹²⁷ The time is appropriate for the Supreme Court to grant certiorari to another case that directly addresses the Second Amendment so the unanswered questions left by *Heller* are clarified. Most importantly, the Supreme Court needs to answer the questions in a way that shields the Second Amendment from lower courts that take advantage of the ambiguities set forth in *Heller*.¹²⁸

V. HOW THE LOWER COURTS HAVE INFRINGED UPON THE SECOND AMENDMENT

In the absence of adequate Supreme Court guidance, a majority of the circuit courts have created their own two-step approach that conspicuously leads to the validation of laws that infringe upon the Second Amendment.¹²⁹ The first step is to assess whether the Second Amendment applies to the challenge before the court.¹³⁰ To do this for particular types of firearms and firearm components, the circuit courts ask whether the Second Amendment protects weapons that are in “common use” and that are “typically possessed by law-abiding citizens for lawful purposes.”¹³¹ This narrow and limited question is a mistake because different firearms and firearm components naturally have varying levels of popularity in different regions of the United States. For instance, suppressors are much more popular in Texas than in Delaware.¹³² In 2017, Texas residents

¹²⁰ *Id.* at 815–16.

¹²¹ Judkins, *supra* note 112, at 719.

¹²² Kopel & Greenlee, *supra* note 19, at 274–78.

¹²³ Meeus, *supra* note 90, at 49–50.

¹²⁴ *Id.* at 50.

¹²⁵ *Skoien*, 587 F.3d at 811.

¹²⁶ *Id.* at 816.

¹²⁷ Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1145 (2011).

¹²⁸ *Id.*

¹²⁹ Trump, *supra* note 107, at 737.

¹³⁰ *Id.*

¹³¹ *Id.* at 737–38.

¹³² BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES: ANNUAL STATISTICAL UPDATE 15 (2017), <https://www.atf.gov/resource-center/docs/undefined/firearms-commerce-united-states-annual-statistical-update-2017/download> [<https://perma.cc/6CH6-6EL2>].

registered over 242,000 suppressors.¹³³ In Delaware, that number was just 326.¹³⁴ Thus, asking simply whether a firearm or firearm component is in common use and typically possessed for law-abiding purposes may not serve justice to firearms or components that are not in common use, but are still used for law-abiding purposes.

The second step is to determine the appropriate level of scrutiny to apply to the challenged legislation.¹³⁵ Because *Heller* at least made clear that mere rational basis is too low of a scrutiny to apply to legislation regarding the Second Amendment, courts have the option of applying intermediate or heightened scrutiny.¹³⁶ In determining whether heightened scrutiny applies, many circuit courts “consider two factors: (1) ‘how close the law comes to the core of the Second Amendment right’ and (2) ‘the severity of the law’s burden on the right.’ Laws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny.”¹³⁷

Once a court determines that intermediate scrutiny is appropriate, it is relatively easy for a circuit court to infringe upon the Second Amendment. Intermediate scrutiny asks only whether the legislation at issue is “substantially related to the achievement of an important governmental interest.”¹³⁸ The nexus between the challenged legislation and the supposed government interest need only be substantial and not perfect.¹³⁹ This is a critical distinction as applied to the Second Amendment, or any constitutional right for that matter, because it means that the government need not ensure that the challenged legislation is the “least restrictive available means to serve the stated governmental interest.”¹⁴⁰ Thus, there is a wider avenue for the legislature and courts to chip away at the Second Amendment because “[s]o long as the [government] produce[s] evidence that ‘fairly support[s]’ their rationale, the laws will pass constitutional muster.”¹⁴¹ Certainly, the Framers did not intend for constitutional rights, especially the one most important to American citizens’ self-defense, to be subjected to such a vague and assailable standard.

VI. THE TWO-STEP APPROACH HAS LED TO INCONSISTENCY AND DIFFERING RIGHTS BETWEEN AMERICAN CITIZENS

The Second Circuit Court of Appeals articulated the commonly adopted two-step approach in the 2015 case, *New York State Rifle & Pistol Ass’n v. Cuomo*.¹⁴² The challenged legislation in that case consisted of state-wide semi-automatic rifle bans in Connecticut and New York.¹⁴³ Both states also issued legislation that banned magazines with a capacity of over ten rounds of ammunition.¹⁴⁴ In discussing the first step of the test, the Second Circuit concluded that semi-automatic rifles and magazines that carry more than ten rounds are in common use throughout

¹³³ *Id.*

¹³⁴ *Id.* (even considering their population sizes, guns are more widely-used in Texas than in Delaware—the number of silencers relative to their respective population is still *proportionally* more in Texas than in Delaware.).

¹³⁵ Trump, *supra* note 107, at 738.

¹³⁶ *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 258–59 (2d Cir. 2015).

¹³⁷ *Id.* at 258.

¹³⁸ *Kachalsky v. City of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012).

¹³⁹ *Id.* at 97.

¹⁴⁰ *Id.*

¹⁴¹ *Cuomo*, 804 F.3d at 261.

¹⁴² *Id.* at 254.

¹⁴³ *Id.* at 249–51.

¹⁴⁴ *Id.*

America, because millions of Americans own those instruments.¹⁴⁵ The court also concluded that the instruments are typically used by law-abiding citizens for lawful purposes.¹⁴⁶ Thus, the bans impinged on the Second Amendment.¹⁴⁷ Despite this reasoning, the Second Circuit refused to declare these bans unconstitutional.¹⁴⁸

Even after concluding that the bans impinged on Second Amendment rights, the majority upheld the bans because these justices applied intermediate scrutiny to the statutes.¹⁴⁹ Despite acknowledging that semi-automatic rifles and their accompanying “large-capacity” magazines are present in the homes of millions of Americans, the court concluded that the bans did not come close to the core of the Second Amendment.¹⁵⁰ The majority came to this conclusion because semi-automatic rifles are not *as* popular as handguns, and thus did not come as close to the core of the Second Amendment as the bans in *Heller* and *McDonald*.¹⁵¹

Further, the majority decided that the outright, state-wide bans on instruments owned by millions of Americans were not “severe” enough to deserve heightened scrutiny.¹⁵² Once the court determined intermediate scrutiny was the appropriate standard, the interests of the Second Amendment stood no chance.¹⁵³ The court, of course, reasoned that there was a substantial relationship between the prohibition of semi-automatic rifles and large-capacity magazines and the important state interests of New York and Connecticut to control crime.¹⁵⁴

The laws upheld in *Cuomo* conflict with the clear majority of the laws of other states. Only nine states and the District of Columbia have restrictions on magazine capacities.¹⁵⁵ Additionally, only seven states and the District of Columbia have bans on semi-automatic rifles.¹⁵⁶ As a result, citizens of New York and Connecticut have significantly less firearms rights than citizens in Texas, for example, where there is no magazine restriction or semi-automatic rifle ban.¹⁵⁷ The citizens of the two areas certainly do not have such drastically different rights when it comes to the First or Fourth Amendments.

The two-step test has also led to the upholding of Second Amendment-related regulations that focus on the person, rather than the type of firearm. For example, concealed carry regulations are painfully inconsistent throughout the United States. In New Jersey, citizens must demonstrate

¹⁴⁵ Trump, *supra* note 107, at 737.

¹⁴⁶ *Id.* at 737–38; See also Amy Swearer, *8 Times Law-Abiding Citizens Saved Lives With an AR-15*, THE DAILY SIGNAL (Mar. 14, 2018), <https://www.dailysignal.com/2018/03/14/8-times-law-abiding-citizens-saved-lives-ar-15/> [<https://perma.cc/N2YQ-L7BS>] (explaining how legal owners of AR-15’s saved the lives of fellow citizens. For example, “After a gunman opened fire on congregants inside First Baptist Church [in Sutherland Springs, TX], a man living near the place of worship grabbed his AR-15 and engaged the shooter. The shooter subsequently dropped his own firearm and fled the scene as the courageous neighbor pursued him.”).

¹⁴⁷ Trump, *supra* note 107, at 738.

¹⁴⁸ *Id.* at 739.

¹⁴⁹ *Id.* at 738–39.

¹⁵⁰ N.Y. State Rifle & Pistol Ass’n v. Cuomo, 804 F.3d 242, 258 (2d Cir. 2015).

¹⁵¹ *Id.*

¹⁵² *Id.* at 260.

¹⁵³ *Id.* at 261–64.

¹⁵⁴ *Id.*

¹⁵⁵ David Maccar, *Magazine Capacity Restrictions by State*, RANGE365 (Oct. 27, 2017), <https://www.range365.com/magazine-capacity-restrictions-by-state#page-8> [<https://perma.cc/4PQK-3SB3>].

¹⁵⁶ Lois Beckett, *Supreme Court Pick Could Make Assault Weapons Ban Unconstitutional*, THE GUARDIAN (Jul. 10, 2018), <https://www.theguardian.com/law/2018/jul/10/supreme-court-brett-kavanaugh-assault-weapons-ban-unconstitutional> [<https://perma.cc/6RP5-AJQY>].

¹⁵⁷ Dennis Silverman, *States That Ban Assault Weapons*, ENERGY BLOG (Feb. 19, 2018), <https://sites.uci.edu/energyobserver/2018/02/19/states-that-ban-assault-weapons/> [<https://perma.cc/VQU2-KHU3>].

a “justifiable need” to receive a concealed carry permit.¹⁵⁸ In upholding this requirement, the Third Circuit determined in the 2013 case, *Drake v. Filko*, that the first step of the test was to ask whether the “justifiable-need” requirement qualifies as a presumptively lawful and longstanding regulation, as provided by the dicta in *Heller*.¹⁵⁹ The Third Circuit held that it was, and thus the regulation did not burden conduct within the Second Amendment’s scope.¹⁶⁰

That ruling upheld a law that is wildly inconsistent with the majority approach in the United States.¹⁶¹ Only seven other states have similar “justifiable-need” requirements to obtain a concealed-carry permit.¹⁶² As such, New Jersey does not recognize valid concealed-carry permits from any other state.¹⁶³ The inconsistency led to forty days in jail for Pennsylvania resident Shaneen Allen.¹⁶⁴

Allen, a single mother of two, obtained a concealed-carry permit in Pennsylvania after being robbed twice in her Philadelphia neighborhood.¹⁶⁵ She was driving on the Atlantic City expressway in New Jersey on October 1, 2013 when a police officer pulled her over for allegedly making an unsafe lane change.¹⁶⁶ Allen, possessing both a firearm and a valid Pennsylvania concealed-carry permit, properly informed the officer of both items.¹⁶⁷ “I thought [my concealed-carry license] was like a driver's license,” she said.¹⁶⁸ Unfortunately for Allen, New Jersey is one of the few states that does not recognize Pennsylvania concealed-carry permits.¹⁶⁹ The officer arrested Allen, and she eventually spent forty days in jail before then-Governor Chris Christie pardoned her.¹⁷⁰

Although most of the Circuit Courts have adopted the two-step test described above, the Fifth Circuit had endorsed strict scrutiny.¹⁷¹ In the 2001 case, *United States v. Emerson*, the Fifth Circuit held first that the Second Amendment protects an individual’s right to possess firearms

¹⁵⁸ *Drake v. Filko*, 724 F.3d 426, 428 (3d Cir. 2013).

¹⁵⁹ *Id.* at 429.

¹⁶⁰ *Id.* at 429–30.

¹⁶¹ See *Concealed Carry*, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/> (last visited Feb. 21, 2020) [<https://perma.cc/PAF3-5LFC>].

¹⁶² *Id.*

¹⁶³ *New Jersey Concealed Carry Reciprocity Map and Gun Laws*, U.S. CONCEALED CARRY ASS’N, https://www.usconcealedcarry.com/resources/ccw_reciprocity_map/nj-gun-laws/.

¹⁶⁴ Jacqueline L. Uργο, *Christie Pardons Woman Arrested Under Gun Law*, THE INQUIRER (Apr. 2, 2015), http://www.philly.com/philly/news/new_jersey/20150403_Christie_pardons_Philadelphia_mom_snagged_by_N_J_gun_law.html [<https://perma.cc/GV7H-9V5W>].

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Jason Nark, *S. Phila. Mom Bought Gun, Made Mistake: She Took it to N.J.*, THE INQUIRER (Aug. 4, 2014), http://www.philly.com/philly/news/new_jersey/20140804_S_Philadelphia_mom_bought_gun_made_mistake_She_took_it_to_N_J.html [<https://perma.cc/8UVW-T5FS>].

¹⁶⁹ Joel Shannon, *These 32 States Will Honor Pa. Concealed Carry. Most of Our Neighbors Aren’t on the List.*, YORK DAILY REC. (Apr. 18, 2018, 9:22 AM), <https://www.ydr.com/story/news/2018/04/18/these-32-states-honor-pa-concealed-carry-most-our-neighbors-arent-list/523902002/> [<https://perma.cc/267R-KDH9>].

¹⁷⁰ Nigel Roberts, *Meet Shaneen Allen, the Black Woman Behind a Gun Rights Bill that Republicans Love*, NEWSONE (Dec. 28, 2017), <https://newsone.com/3766471/shaneen-allen-new-jersey-nra-black-gun-rights-advocate-republican-bill/> [<https://perma.cc/T9JH-XF4P>].

¹⁷¹ John W. Whittlesey, *Second-Amendment Scrutiny: Firearm Enthusiasts May Win the Battle but Ultimately Lose the War in District of Columbia v. Heller*, 58 CASE W. RES. L. REV. 1423, 1432–33 (Summer 2008).

(seven years before even the Supreme Court recognized that right in *Heller*).¹⁷² Second, it held “that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.”¹⁷³ Thus, this is a test that “implicitly measures the constitutionality of Second-Amendment restrictions by whether such restrictions are narrowly tailored to the government interest.”¹⁷⁴ In 2012, the Fifth Circuit adopted the more common two-step test in *NRA v. BATFE*.¹⁷⁵

But the Supreme Court has the opportunities, and now the Justices, to call for strict scrutiny to clarify the mess of conflicting Second Amendment laws throughout the United States.

VII. THE SUPREME COURT HAS THE RIGHT JUSTICES TO FORTIFY THE SECOND AMENDMENT

The Supreme Court, despite the gross inconsistencies regarding the Second Amendment in the circuit courts, has neglected to hear a case regarding the Second Amendment since *McDonald* in 2010.¹⁷⁶ The hesitancy to grant certiorari to another Second Amendment case has largely been attributed to Justice Anthony Kennedy.¹⁷⁷ Before his retirement, Justice Kennedy was typically recognized as the “swing vote” for the bench, siding with both conservative and liberal justices on many key issues.¹⁷⁸ In both *Heller* and *McDonald*, however, Justice Kennedy sided with the majority holdings.¹⁷⁹ Despite his history of those votes, questions remained about his commitment to the Second Amendment because he did not offer a written opinion for either case.¹⁸⁰ This uncertainty about Justice Kennedy resulted in a reluctance from both conservative and liberal justices on the bench to take up a Second Amendment case because there was certainly no guarantee on how he might vote.¹⁸¹

Justice Kennedy’s retirement has opened an unprecedented window for the Supreme Court to address another Second Amendment-related case. In the last two years, the Senate confirmed Justices Neil Gorsuch and Brett Kavanaugh to the Supreme Court.¹⁸² Each of the new additions are potentially good news for American gun rights.

Justice Gorsuch, in his ten-year career on the Tenth Circuit Court of Appeals, wrote only one opinion regarding gun rights.¹⁸³ The opinion declared that “The Second Amendment protects an individual’s right to own firearms and may not be infringed lightly.”¹⁸⁴ There is also evidence

¹⁷² *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001).

¹⁷³ *Id.*

¹⁷⁴ Whittlesey, *supra* note 171, at 1431.

¹⁷⁵ *Nat’l Rifle Ass’n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012).

¹⁷⁶ Matt Ford, *The Gun Control Movement’s Silent Ally: The Supreme Court*, THE NEW REPUBLIC (Feb. 26, 2018), <https://newrepublic.com/article/147189/gun-control-movements-silent-ally-supreme-court> [<https://perma.cc/46ZR-ZL8G>].

¹⁷⁷ Wisdom, *supra* note 26.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Rebecca Shabad, *Kavanaugh Sworn in as Associate Justice to the U.S. Supreme Court*, NBC NEWS (Oct. 6, 2018, 8:38 AM), <https://www.nbcnews.com/politics/congress/senate-readies-final-vote-kavanaugh-supreme-court-nomination-n917216> [<https://perma.cc/CQ9S-5MC8>].

¹⁸³ Mike Spies, *Why are Gun Rights Advocates So Sure About Neil Gorsuch?*, THE TRACE (Mar. 24, 2017), <https://www.thetrace.org/2017/03/neil-gorsuch-gun-rights-advocates/> [<https://perma.cc/38ZF-4XKD>].

¹⁸⁴ *Id.*

that he respects the settled law in *Heller* and *McDonald* and understands that there is more work to do in protecting America's right.¹⁸⁵ During his confirmation proceedings, the Senate repeatedly inquired into his views on the Second Amendment, and Justice Gorsuch responded by simply stating that he would respect the precedent set forth by *Heller* and that it is now the "law of the land."¹⁸⁶

Additionally, in his time on the Supreme Court, Justice Gorsuch has joined Justice Clarence Thomas in his desire to hear another Second Amendment case.¹⁸⁷ In 2017, the Supreme Court declined to grant certiorari to a case out of the Ninth Circuit, *Peruta v. California*.¹⁸⁸ The case challenges California's requirement of documented proof of a safety concern greater than a general concern in order to carry a firearm outside the home.¹⁸⁹ Essentially, California law mandates that a citizen must prove that he or she has a heightened safety concern before being issued a permit to carry a concealed firearm.¹⁹⁰ The en banc Ninth Circuit concluded that "carrying a firearm for personal protection requires proof of 'documented threats, restraining orders and other related situations where an applicant can demonstrate they are a specific target at risk . . . [s]elf-protection and protection of family (without credible threats of violence)' is not enough."¹⁹¹ Justice Thomas authored the dissent for himself and Justice Gorsuch, arguing that the approach taken by the Ninth Circuit is indefensible and that California's law is part of a "distressing trend" of treating the Second Amendment "as a disfavored right."¹⁹²

Justice Kavanaugh has perhaps an even more encouraging history in defending the Second Amendment.¹⁹³ Three years after the original *Heller*, Dick Heller filed a challenge to D.C.'s general ban on semi-automatic rifles.¹⁹⁴ In *Heller v. District of Columbia* ("*Heller II*"), the D.C. Circuit ruled in 2011 that the District of Columbia's ban on semi-automatic rifles passed constitutional muster.¹⁹⁵ The vote of the three-judge panel was two to one.¹⁹⁶ The dissenting justice was Justice Kavanaugh, who authored a convincing rebuttal to the majority.¹⁹⁷ "Justice Kavanaugh disagreed with both the majority's conclusions and its [application of the] two-step" test utilized by the majority and other circuit courts.¹⁹⁸ The two-step test, Justice Kavanaugh argued, is based upon a misreading of the *Heller* opinion.¹⁹⁹ He correctly noted that "[s]trict and intermediate

¹⁸⁵ John-Michael Seibler & Abigail Slagle, *In Dissent, Justices Thomas and Gorsuch Defend the Second Amendment*, DAILY SIGNAL (July 3, 2017), <https://www.dailysignal.com/2017/07/03/dissent-justices-thomas-gorsuch-defend-second-amendment/> [<https://perma.cc/T3XG-6Y5T>].

¹⁸⁶ *Confirmation Hearing on the Nomination of Hon. Neil Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary United States S.*, 105th Cong. 84 (2017) (statement of Neil Gorsuch, Nominee, Supreme Court).

¹⁸⁷ Seibler & Slagle, *supra* note 185.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See Colvin, *supra* note 29, at 1059.

¹⁹⁴ *Heller v. District of Columbia*, 670 F.3d 1244, 1244 (D.C. Cir. 2011).

¹⁹⁵ *Id.* at 1264.

¹⁹⁶ Michael Kunzleman & Larry Neumeister, *Supreme Court Nominee Kavanaugh's Gun Views are Clear*, ASSOCIATED PRESS (July 29, 2018), <https://apnews.com/01c9c2ffcf294493a269286f1a56b173> [<https://perma.cc/Y397-H57B>].

¹⁹⁷ *Heller*, 670 F.3d at 1269 (Kavanaugh, J., dissenting).

¹⁹⁸ Colvin, *supra* note 29, at 1062.

¹⁹⁹ *Id.*

scrutiny are balancing tests and thus are necessarily encompassed by *Heller's* more general rejection of balancing.”²⁰⁰ Instead, the opinion in *Heller* calls for an “examination of ‘text, history, and tradition’ to both determine the scope of Second Amendment rights and assess gun legislation.”²⁰¹ Justice Kavanaugh further articulated that *Heller* set forth obvious guidance for courts faced with challenges to firearm legislation, which fall into two categories: bans on categories of guns or regulations on guns.²⁰² For bans on categories of guns, the appropriate test is simply the “common-use” test.²⁰³ For gun regulations, the appropriate test is the “presumptively lawful” test.²⁰⁴ This analysis indicates that Justice Kavanaugh has a plan for how he wants the Supreme Court to tackle Second Amendment-related cases in the future.

As for the remaining Supreme Court justices, much of their inclinations are evident in the voting records of *Heller* and *McDonald*. Of the remaining justices, Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito were in the majority in both *Heller* and *McDonald*.²⁰⁵ Justices Ruth Bader Ginsburg and Stephen Breyer were both in the dissent in *Heller* and *McDonald*.²⁰⁶

Justices Elena Kagan and Sonia Sotomayor have less of a paper trail when it comes to their interpretations of the Second Amendment. There are fears among gun owners that Justice Kagan, an appointee of the Obama Administration, interprets the Second Amendment to allow for strict gun control because she was a central component of the Clinton Administration that enacted several strict gun control measures.²⁰⁷ She has indicated, however, that she has the appropriate respect for the rulings in *Heller* and *McDonald*. During her confirmation hearings, Democratic Senators asked Justice Kagan if *Heller* and *McDonald* are settled law,²⁰⁸ appearing to coax Justice Kagan into taking a stance against the rulings. Justice Kagan responded by recognizing “[t]hat [*Heller* and *McDonald* are] binding precedent entitled to all the respect of binding precedent in any case. So that is settled law.”²⁰⁹

Justice Sotomayor had similar sentiments in her confirmation hearings, saying, “I understand the individual right fully that the Supreme Court recognized in *Heller*,” and “I understand how important the right to bear arms is to many, many Americans.”²¹⁰ Her vote in *McDonald*, however, suggests otherwise. She joined Justice Breyer’s dissent, which ominously stated that “[i]n sum, the Framers did not write the Second Amendment in order to protect a private right of armed self-defense.”²¹¹

²⁰⁰ *Heller*, 670 F.3d at 1280 (Kavanaugh, J., dissenting).

²⁰¹ Colvin, *supra* note 29, at 1062.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *District of Columbia v. Heller*, 554 U.S. 570, 572 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 742 (2010).

²⁰⁶ *Heller*, 554 U.S. at 572; *McDonald*, 561 U.S. at 742.

²⁰⁷ James Oliphant, *Gun Rights Could Pose Problem for Kagan*, L.A. TIMES (May 27, 2010, 12:00 AM), <http://articles.latimes.com/2010/may/27/nation/la-na-kagan-guns-20100528> [<https://perma.cc/233V-7UBG>].

²⁰⁸ Awr Hawkins, *Flashback 2010: Justice Kagan Says ‘Fundamental Right’ to Own Gun is ‘Settled Law’*, BREITBART (Feb. 15, 2016), <https://www.breitbart.com/politics/2016/02/15/flashback-2010-justice-kagan/> [<https://perma.cc/233V-7UBG>].

²⁰⁹ *Id.*

²¹⁰ David Kopel, *Kopel: Sotomayor Targets Guns Now*, THE WASH. TIMES (Jun. 29, 2010), <https://www.washingtontimes.com/news/2010/jun/29/sotomayor-targets-guns-now/> [<https://perma.cc/XK3G-Y8FG>].

²¹¹ *Id.*

Based upon the evidence available on the current Supreme Court Justices' respective approaches to the Second Amendment, it is not hyperbole to anticipate a fresh case, depending on the circumstances, resulting in a majority favoring the fortification of the Second Amendment. In this hypothetical situation, the majority would likely consist of Justices Roberts, Thomas, Alito, Gorsuch, and Kavanaugh. The dissent in this hypothetical would consist of Justices Ginsburg, Breyer, Sotomayor, and Kagan.

Perhaps more importantly, the addition of Justice Kavanaugh may result in enough votes to at least hear a Second Amendment-related case, allowing the Court to clarify the Second Amendment one way or another.²¹²

VIII. THE SUPREME COURT HAS GRANTED CERTIORARI FOR *NEW YORK STATE RIFLE & PISTOL ASSOCIATION* AND HOW THE COURT SHOULD RULE

Currently before the Supreme Court is the case of *New York State Rifle & Pistol Ass'n v. City of New York*.²¹³ The case deals with the legality of the New York City's premises licensing scheme for handguns.²¹⁴ It is important to note, however, that New York City repealed the law in question and replaced it with a similar state law, and is currently arguing that the case is now moot.²¹⁵ This discussion proceeds under the assumption that the Supreme Court should and will decide the case on its merits.

On February 23, 2018, in *New York State Rifle & Pistol Ass'n v. City of New York*, the Second Circuit upheld what was one of the most restrictive firearms laws in the nation.²¹⁶ Under the New York City licensing scheme for firearms, a citizen of New York City must be issued a premises license in order to own a handgun.²¹⁷ The premises license, at the time it was upheld by the Second Circuit, provided that the individual must not remove the handgun from the address listed on the premises license, except to "transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately."²¹⁸ This New York City law went on to state, however, that the only "authorized" facilities were those in New York City.²¹⁹ So what the law really provided is lawful gun owners in New York City could not transport their handguns outside of the city. The lawful gun owners could not even, for example, transport their guns to properties that they own in other parts of New York, or even to gun ranges outside the city.²²⁰

The Second Circuit utilized the previously discussed two-step approach to uphold the restrictive law.²²¹ First, the court touched on whether the law impinges on conduct protected by the Second Amendment with only three sentences, concluding that they proceed on the assumption

²¹² Todd Ruger, *With Kavanaugh, Court Could Take Aim at Gun Control Laws*, ROLL CALL (Jul. 26, 2018, 5:04 AM), <https://www.rollcall.com/news/politics/with-new-justice-court-could-take-aim-at-gun-control-laws> [<https://perma.cc/6M6X-AM6E>].

²¹³ Matthew Richmond, *The Supreme Court May Dismiss a Gun Case, but Others Wait in the Wings*, OBP (Dec. 9, 2019, 9:47 AM), <https://www.opb.org/news/article/us-supreme-court-gun-regulations-rights-control-cases/>.

²¹⁴ See *New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 45 (2d Cir. 2018).

²¹⁵ Richmond, *supra* note 213.

²¹⁶ *New York State Rifle & Pistol Ass'n*, 883 F.3d at 52.

²¹⁷ *Id.* at 52–53; 38 RCNY § 5-23(a)(1).

²¹⁸ § 5-23(a)(1).

²¹⁹ *New York State Rifle & Pistol Ass'n*, 883 F.3d at 52.

²²⁰ See *id.*

²²¹ *Id.* at 55.

that the rule restricts conduct protected by the Second Amendment.²²² Second, the Court discussed which type of scrutiny to apply to the law, and predictably decided upon intermediate scrutiny rather than strict scrutiny.²²³

In deciding that the premises-license law deserved intermediate scrutiny, the Second Circuit analyzed the two factors under that prong of the test: “(1) ‘how close the law comes to the core of the Second Amendment,’ and (2) ‘the significance of the law’s burden on that right.’”²²⁴ As to the first factor, the court decided the restrictions are “trivial limitations on the ability of law-abiding citizens to possess and use firearms for self-defense.”²²⁵ Further, the court stated that the law “does nothing to limit th[e] lawful use” of weapons in defending one’s home, even though the law does not allow citizens to bring their firearms to their second homes.²²⁶ As to the second factor, the court eventually reasoned that the law did not deserve strict scrutiny as it did not impose a substantial burden upon the “core” of the Second Amendment.²²⁷ It came to this conclusion by suggesting that citizens could go through the arduous and rather expensive process of obtaining a premises license for their second homes, or renting firearms at shooting ranges outside the city.²²⁸ But the Second Amendment unequivocally states that American citizens have the right to keep and bear arms, not to rent them or pay the government for that right.²²⁹

The Supreme Court has a prime opportunity to decide *New York State Rifle & Pistol Ass’n v. City of New York* on its merits and, at the very least, apply a common-sense approach to premises license laws under the two-step approach. At most, however, the Supreme Court has the opportunity to demand that the circuit courts adopt a strict scrutiny standard to laws impinging upon the Second Amendment.

If the Supreme Court applied the two-step approach used by the Second Circuit, among other circuit courts, the result would likely be different than the result reached by the Second Circuit. First, the Supreme Court should find that the premises license certainly does impinge upon the core of the Second Amendment because it directly limits a New York City citizen’s lawful use of a firearm in their home. This is the type of impingement on the Second Amendment that *Heller* explicitly overruled.²³⁰ Further, the premises-license law substantially burdens that core right. The Supreme Court should find that a policy requiring a citizen to complete two different and lengthy premises-license applications for two of his or her own different homes clearly burdens the Second Amendment right of a citizen to possess a firearm in the home for protection. Thus, the Supreme Court should find that the premises-license law does indeed deserve strict scrutiny.

The Court should then find that the overly restrictive law does not survive strict scrutiny. Strict scrutiny places the burden on the government to prove a restriction is “narrowly tailored to achieve a compelling governmental interest.”²³¹ Such a restrictive law concerning traveling with locked and unloaded handguns does not mesh with the laws in the rest of the United States. The

²²² *Id.*

²²³ *Id.* at 55–62.

²²⁴ *Id.* at 56 (quoting *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 258 (2d Cir. 2015)).

²²⁵ *Id.* at 57.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 58–61.

²²⁹ U.S. Const. amend. II.

²³⁰ *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008) (“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 home ‘the most preferred firearm in the nation to “keep” and use for protection of one’s home and family,’ would fail constitutional muster.”)

²³¹ *Id.* at 688 (Breyer, J., dissenting).

current Supreme Court, with the additions of Justices Gorsuch and Kavanaugh, would likely result in a majority that would overrule the New York City's premises license law because the "city's restrictions amount to a 'near-complete ban' on gun transport."²³²

The Court, however, may also formulate a new test for considering Second Amendment-related cases. Perhaps the Court could adopt the suggestion articulated by Justice Kavanaugh in his dissent in *Heller II*. Recall that Justice Kavanaugh advocated for a different test than the two-step approach adopted by many circuit courts. He argued that *Heller* did not call for any sort of balancing test when examining the Second Amendment.²³³ Justice Kavanaugh suggested that for bans on categories of guns, the appropriate test should be the "common-use" test.²³⁴ This simply means that if a category of weapon is found to be in common use throughout the United States, a ban on that category of firearm or firearm component would be unlawful.²³⁵ For gun regulations, the appropriate test should be the "longstanding regulation" test.²³⁶ As for this test, Justice Kavanaugh noted that "*Heller* . . . said the government may continue to impose regulations that are traditional, 'longstanding' regulations in the United States."²³⁷ An example of this would be the "presumptively lawful" regulations listed in the *Heller* decisions.²³⁸ Both tests analyze the text, history, and tradition of the Second Amendment.²³⁹

Because the premises-license law of New York City is a gun regulation, rather than a ban on categories of guns, the longstanding regulation test would apply. Thus, the Supreme Court would analyze whether the ban on transporting an unloaded, locked-up, and lawfully owned firearm is a traditional gun regulation in the United States. Undoubtedly, the Court would find that it is not a traditional gun regulation within the United States. First, there is nothing in the text of the Second Amendment about the transportation of firearms.²⁴⁰ Second, it is not listed in the "presumptively lawful" measures in *Heller*, nor is any regulation in that list remotely similar.²⁴¹ Lastly, the premises license law of New York City is in no way traditional. In fact, the city's brief to the Second Circuit did not identify a single other jurisdiction that had such a similarly restrictive law.²⁴² Surely, if the Court were to adopt the approach articulated by Justice Kavanaugh, the premises-license law of New York City would not survive. Nothing in the text, history, and tradition of the Second Amendment supports its constitutionality.

Justice Kavanaugh's "text, history, and tradition" approach to the Second Amendment is simply more consistent than the two-step approach adopted by many of the circuit courts. Consistency needs to be the focus on future rulings of Second Amendment-related cases, as it is apparent that the circuit courts are coming to vastly different conclusions on gun rights throughout the United States. The Second Amendment deserves a new test, not one that almost always allows

²³² Jonathan Stempel, *New York City Law Survives Gun Rights Group's Legal Challenge*, REUTERS (Feb. 23, 2018), <https://www.reuters.com/article/us-usa-guns-new-york/new-york-city-law-survives-gun-rights-groups-legal-challenge-idUSKCN1G72KB> [<https://perma.cc/9RJV-AKYK>].

²³³ Colvin, *supra* note 29, at 1062.

²³⁴ See *Heller v. District of Columbia*, 670 F.3d 1244, 1271–80 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

²³⁵ Colvin, *supra* note 29, at 1062.

²³⁶ *Heller*, 670 F.3d at 1280 (Kavanaugh, J., dissenting).

²³⁷ *Id.* at 1272.

²³⁸ Colvin, *supra* note 29, at 1062.

²³⁹ See *Heller*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

²⁴⁰ U.S. Const. amend. II.

²⁴¹ *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008)

²⁴² See Brief for Appellees, *New York State Rifle & Pistol Ass'n. v. City of New York*, (2d Cir. 2015) (No. 15-638) 2015 WL 5476324 (2d Cir. Sep. 15, 2015).

circuit courts to chip away at a fundamental American right behind the guise of intermediate scrutiny.

With its new make-up, the Supreme Court has before it the opportunity to save the Second Amendment and United States citizens from a barrage of inconsistent rulings. After all, there is no reason to treat the Second Amendment as a “disfavored right,” or as the Supreme Court’s “constitutional orphan.”²⁴³

²⁴³ Melissa Quinn, *Clarence Thomas Rips High Court’s Decision not to Hear Case Challenging California Gun Law: Second Amendment is ‘Disfavored Right’*, WASH. EXAMINER (Feb. 20, 2018, 10:32 AM), <https://www.washingtonexaminer.com/clarence-thomas-rips-high-courts-decision-not-to-hear-case-challenging-california-gun-law-second-amendment-is-disfavored-right> [<https://perma.cc/VU5H-Q6KZ>].