

## ***Heller* in the Lower Courts\***

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**Ludington:** Welcome, everybody. Thanks for joining us this morning. We've got a great topic on deck here and a fantastic panel. *Heller* was decided ten years ago.<sup>1</sup> Since then, there have been some 1,100 cases decided in the lower federal courts about the validity or non-validity of gun control laws. So those lower court cases are our topic for the morning; particularly seeing how *Heller* has been applied, debating whether the lower courts are doing it justice, and whether they are honoring the intent and the language of the *Heller* opinion itself.

So we've got a fantastic panel. We have Brannon Denning, who is the associate dean and a professor of law at Cumberland School of Law, Samford University. Dennis Henigan, former vice president of the Brady Center and current director of the Campaign for Tobacco-Free Kids. David Kopel, who is the research director at the Independence Institute, and an associate policy analyst at the Cato Institute, also an adjunct professor of law at Denver University, Sturm College of Law. And on the end, Hannah Shearer, staff attorney and Second Amendment litigation director at the Giffords Law Center to Prevent Gun Violence.

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\* Panelists made edits to this transcript. Visit [www.campbelllawreview.com](http://www.campbelllawreview.com) to view the full video of *Campbell Law Review's* 2018 symposium: *Heller* After Ten Years.

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

Now, I've introduced them in order from Professor Denning down to Hannah Shearer, but Ms. Shearer is actually going to kick us off, and she will give us a fifteen- to twenty-minute presentation followed by Professor Kopel, Mr. Henigan, and ending with Mr. Denning. So, Hannah?

**Shearer:** Thanks so much to Professor Ludington and to the students and faculty at Campbell Law School. I'm really thrilled to be here. And thanks also to my fellow panelists. It's really great to hear from so many experts in this field. I'm going to start off a little bit about my background and then dive right into our topic.

So I am the Second Amendment litigation director at Giffords Law Center to Prevent Gun Violence. We're based in San Francisco. And one thing I luckily know quite a bit about is *Heller* in the lower courts, because part of the work that I oversee at Giffords is that we actually track and analyze all Second Amendment lawsuits that are filed and decisions that are rendered on a Second Amendment claim, and we've been doing that since *Heller* came down in 2008. So that means that I am at least partly responsible for that statistic you just heard, which is that there have been over a thousand Second Amendment claims decided since *Heller*. And actually, according to the metrics that we use, in 93% of those cases since *Heller*, the court has—the lower court usually—has rejected the Second Amendment claim at issue. As you know, the Supreme Court since *Heller* has only granted review in *McDonald*,<sup>2</sup> the case that held that the Second Amendment was applicable to states, and in another narrow case, where they just reiterated the holding of *Heller* and instructed a lower court to apply it in a case called *Caetano*.<sup>3</sup>

So for my remarks today, I want to spend a little bit of time with *Heller*, and then I'll talk about a few key trends in the lower court decisions since *Heller*. And for each of those trends that I'll talk about, I'll argue my position, which is that the courts applying *Heller* and considering a Second Amendment challenge since then haven't been ignoring the decision. They've been honoring it. And the reason that's true is because the *Heller* decision was by no means any sort of conclusion, or end of the road, when it comes to Second Amendment litigation, or even the historical debates over what the Second Amendment does and doesn't cover. Rather, *Heller* announced the beginning of a really involved task of figuring out what the Second Amendment means for many different types of gun laws.

*Heller* addressed whether a total ban on keeping an operable handgun in the home for self-defense violated the Second Amendment. And that's a

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

3. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

narrow premise that the court considered and ruled on. The plaintiff was seeking to keep and carry a functioning handgun in his home for purposes of self-defense and was barred from doing so by a really restrictive D.C. law. The *Heller* court, in fact, opined that few laws in the history of our nation have come close to the severe restriction of the district's handgun ban.

So, in *Heller*, the court struck down this uniquely severe handgun ban, noting that its historical analysis shows that keeping a handgun in the home for self-defense is a quintessentially lawful purpose for possessing firearms under the Second Amendment. So the court reasoned that the handgun ban would fail constitutional muster under any of the standards that are applied to evaluate enumerated constitutional rights, like strict scrutiny or intermediate scrutiny.

So that's what *Heller* did, but leading up to that holding, the court provided a lot of limiting, qualifying language describing regulations that the opinion was not intended to cast doubt on. I'll try to summarize that quickly because I think this will be discussed by others. The court cautioned that, like other rights, the Second Amendment right is not unlimited. It's not a right to keep and carry any weapon whatsoever for any purpose.

And, as an example of the Second Amendment not being unlimited, the court pointed to the example of concealed carry prohibitions, which it said had been upheld by the majority of nineteenth-century courts to consider that type of law. That's a pretty extreme restriction that doesn't really exist today: a complete prohibition on public concealed carry of firearms. So then the court identified a non-exhaustive list of presumptively lawful types of regulatory measures that would survive the *Heller* decision, or that *Heller* wasn't intended to cast doubt upon.

To further emphasize just these kind of limiters to its decision, and that the permissible regulations the court identified weren't exhaustive, Justice Scalia wrote, "[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . ." In reality, that's not a decision that clarified *much* of the field for lower courts. The decision identified a nearly wide-open field. It raised a lot of new questions for litigants, and for advocates, and for policymakers, and judges. And I think the language in *Heller* that I cited isn't an invitation for courts to strike down many more gun laws after *Heller*, but it's more of an invitation for governments to continue defending some of their existing gun laws; laws in the areas that *Heller* identified as being an example of the Second Amendment not being unlimited.

So following *Heller*, governments took that invitation to vigorously defend their gun laws, and litigants took the rest of *Heller* as an invitation

to bring more Second Amendment challenges, and to really try to get to some of the field that the court opened up to litigation, but didn't clarify or decide. And so I want to talk about just a couple key trends that have emerged in lower court litigation over Second Amendment claims. There are a lot that I could speak about, but the ones I want to mention are some significant methodological choices that lower courts made when they were faced with the task of how to adjudicate a Second Amendment challenge where the challenged law isn't the same as *Heller's* unusually extreme ban on keeping handguns in the home. And so one of the significant methodological choices that lower courts made was to apply something called the "two-step approach" to Second Amendment challenges.

And the other one I'll talk about is the choice generally to apply intermediate constitutional scrutiny to Second Amendment claims. And both of these have achieved a critical level of acceptance among lower courts. It's a near consensus among the circuit courts.

I'll begin with the two-step approach. So that inquiry, which, as I mentioned, it's—and nearly all the federal circuits have adopted this—First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and the D.C. Circuits have all applied a version of this test. And it asks at "step one" of considering a Second Amendment challenge, Does the law being challenged, the firearm law, burden conduct that's actually protected by the Second Amendment? Or does it fall outside of the scope of the amendment, given *Heller's* recognition that this isn't a completely unlimited right?

And so if the answer is that the law doesn't burden Second Amendment protected conduct, courts that apply the two-step approach stop there and they uphold the law. If a court finds a regulation does implicate protected conduct, it moves on to step two, which is to identify a level of constitutional scrutiny to apply to the claim, much like the tiers of scrutiny that are selected and applied in the First Amendment context.

Some people have critiqued the two-step approach, but I think that it comes from *Heller*. Really, it comes from *Heller's* choice to strike down an unusually severe law prohibiting keeping operable handguns in the home completely, while also announcing a vision of the Second Amendment in which there is still flexibility to regulate firearms in a number of specific areas that the court enumerated. But also, in areas beyond that, that the court said were still permissible to regulate, but weren't actually listed in its non-exhaustive list of presumptively lawful gun regulations after *Heller*.

So with that in mind—oh, and the other thing is that the *Heller* majority didn't announce a level of scrutiny that it would apply to the handgun ban it was analyzing. Instead, the court held that the law wouldn't

pass constitutional muster under any of the applicable tiers of scrutiny. But that isn't to say that in a challenge involving a more modest type of gun regulation that it wouldn't be appropriate to apply the traditional levels of scrutiny that are applied when evaluating challenges involving other constitutional rights.

So moving on to the next trend I wanted to talk about, which is that many courts have applied this two-step approach that I laid out, and then, at step two, when they're considering a gun regulation that burdens the Second Amendment but doesn't go so far as to completely prohibit keeping an operable handgun in the home. Courts have reached a near-consensus to apply intermediate constitutional scrutiny as opposed to strict scrutiny. This isn't completely uniform. There are some courts that are different.

The Seventh Circuit has sometimes advocated for something in between intermediate scrutiny and strict. And you know, this does still get debated among Second Amendments *litigants*, but in general, most of the *circuits* have applied intermediate scrutiny in sort of like a run-of-the-mill challenge to a gun regulation that is more modest than what was at issue in *Heller*—significantly more modest.

This approach is consistent with *Heller* because it's consistent with *Heller's* articulation of the right of the Second Amendment: that it's not a right to keep and carry any weapon whatsoever, in any manner whatsoever, and for whatever purpose. Many courts have rightly interpreted this language to mean that there are some gun regulations that are going to be subject to intermediate scrutiny because they're not a severe intrusion onto people's core rights under the Second Amendment. They're more modest regulations in the areas that *Heller* acknowledged could persist after the decision. And so, in that respect, they're more like a time, place, and manner restriction under the First Amendment, which is subject to intermediate scrutiny as opposed to strict scrutiny.

In closing, *Heller* acknowledged that the Constitution leaves a variety of tools for combating the problem of handgun violence, including some measures regulating handguns. And then later, *McDonald* recognized that state and local experimentation with reasonable firearm regulations will continue under the Second Amendment. And so I think that the methodological approaches I've described in the lower courts are appropriate to ensure that the government can continue to regulate firearms to combat gun violence while staying within the constitutional limits that *Heller* outlined.

Thanks so much.

[APPLAUSE]

**Kopel:** Well, I'd like to follow up on what Ms. Shearer said. At the level of generality that she spoke about, I think she was exactly accurate, and if this is on the bar exam, you can take her words verbatim, and apply them, and you will get the answer correct. I'd like to follow up and flesh out some of the details of what she accurately says is the approach that most courts have adopted post-*Heller*; so I'm going to just go through the rules.

The purposes of the Second Amendment, as the court understands them—the lower federal courts in post-*Heller* cases—is that, of course, self-defense is at the core of the Second Amendment right, but the right is not limited only to self-defense. It also includes hunting, target shooting, of course the militia, which is in the text, and all other lawful purposes. In terms of what arms are protected, at least the starting premise is, straight from *Heller*, common arms that are typically possessed by law-abiding citizens: handguns, rifles, shotguns, knives, defensive sprays, stun guns, things like that. And things that are not protected are arms that are, from *Heller*, “dangerous and unusual.” It's a conjunctive test. You have to be dangerous and unusual.

Now all weapons are dangerous by definition, so to be so dangerous that you're outside the Second Amendment protection, at the least, has to mean that the arm is more dangerous than a handgun, which, as Dennis can tell you from his long career, those can be quite dangerous things. Some of the things that have been held to be outside the scope of Second Amendment rights—being “dangerous and unusual” rather than common, typically possessed by law-abiding citizens for lawful purposes—grenades, machine guns, pipe bombs—are not Second Amendment arms.

The two-step test that has been adopted by eight of the federal circuits was created by the Third Circuit in *United States v. Marzzarella*.<sup>4</sup> The test has been affirmatively rejected in the First Circuit, which focuses more on text, history, tradition, and precedent. Although, of course, those factors are certainly important in the two-step test as well, at least when properly applied. Likewise, the Eighth Circuit has not, at this point, adopted the two-step test.

Like much Second Amendment jurisprudence in the post-*Heller* era, the two-step test is methodologically borrowed from the First Amendment. If you have a free speech case, the first thing the court has to do is say, “Well, do we actually have a free speech case?” So some students at a public school are wearing black armbands to protest the Vietnam War, and then the school punishes them for doing that.

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

The first question is, well, is this a free speech issue at all? After all, they didn't say anything. They were just dressing up with this clothing. Some people would say, "Well, that's got nothing to do with speech. No words going on here." But the Supreme Court, correctly, in *Tinker v. Des Moines School District*, said this is a free speech issue because these black armbands have communicative content.<sup>5</sup>

Conversely, on the other side, somebody says, "We have a wiretap, and you hear some people conspiring to commit bank fraud, and then they get prosecuted for that." They say, "How can you prosecute me for that? All we were doing was talking. And that's speech, and the First Amendment says, 'Congress shall make no law'—what part of 'no law' don't you understand?" The court will say, "No, actually, you've got no free speech claim in here at all, even though you're being punished solely for the words you said, because conspiring to commit bank fraud is not part of the First Amendment right." Obviously, likewise, using a gun in a violent crime is not part of the Second Amendment right.

So at this step one, the court says, "Is this even a Second Amendment case? We know the plaintiff claimed it was in the pleadings, but is it really a Second Amendment case?" So in step one, the government can win at that stage if the government carries its burden of proof; of proving that whatever this case is about is outside the scope of the right to keep and bear arms as it was traditionally and historically understood. Particularly in 1791, when the Second Amendment was ratified, and then in 1868, when the Fourteenth Amendment was ratified for, among other purposes, making the Second Amendment enforceable against the states.

If the government fails to carry its burden of proof at step one—to prove that it's not really a Second Amendment case—then the case goes on to step two, where the court, will apply some level of heightened scrutiny. What kind it is, is up in the air. In a Second Amendment case, there are—at step one, there are some easy things to see. You disarm an enemy soldier on the battlefield. "You took away my guns. What could be more of a Second Amendment violation than that?" says the enemy soldier. And the answer is, "No, actually the Second Amendment does not apply to enemy combatants on the battlefield." A case called *Johnson v. Eisentrager* from 1950 by Justice Jackson made that point.<sup>6</sup>

But there can be harder things. What about aliens who are unlawfully present in the United States? Does the Second Amendment apply to them? Some courts say, "No, not at all. Look at how *Heller* said, 'Law-abiding citizens,' over and over and over." And other courts have said, "Well,

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5. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

6. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

maybe it does apply to them, particularly if they have longstanding ties to the United States; after all, the Second Amendment text is about the people and not the citizens.” This is based on the implications of a 1989 U.S. Supreme Court case, *United States v. Verdugo-Urquidez*, where the court said, “No, the Fourth Amendment doesn’t apply to a Mexican in Mexico,” but “the people” has some sort of broad meaning of a people who have some affiliation with the United States.<sup>7</sup>

In step one, the courts all look strongly at *Heller*’s tripartite set of examples of presumptively lawful gun controls: prohibiting gun possession by felons and the mentally ill; forbidding carry in sensitive places, such as schools and government buildings; and third, allowing conditions and qualifications on the commercial sale of arms. Of course, each one of these is an exception that reinforces the rule. You can prohibit guns for some people, but that’s an exception to the rule that, generally, law-abiding citizens have a right to possess arms.

Allowing laws forbidding concealed carry at all or in some sensitive places, are exceptions to the general right that there is a right to carry arms. Likewise, the conditions and qualifications on the commercial sale of arms are legitimate limitations on the general right of firearms commerce. Of course, there has to be a right of firearms commerce by implication, because otherwise, the right to keep and bear arms could hardly exist. Just as the courts have unanimously said there’s a right to ammunition. You can’t say, “Well, oh, we’re not going to ban any guns at all. You can buy guns, cash and carry, no background checks at all. We just outlaw ammunition.” The courts would not allow that.

The question for the courts has been what these things I just mentioned, that were called “presumptively lawful,” is whether these are normal presumptions; in normal law, a presumption can be rebutted. It’s the starting point, but you can come in with sufficient evidence to overcome that.

So, for example, even though bans on felons are presumptively lawful, can a person overcome that by showing that he or she, as a convicted felon, is actually not in the slightest bit any more dangerous than anyone else? They were convicted of marijuana possession in 1971, which was a felony at the time, but since then, they’ve never gotten in trouble. They could argue, “As applied to me, this felon ban is unconstitutional.” Courts have sometimes been willing to at least hear those arguments. They have been sometimes successful, more often not. But the North Carolina Supreme Court adopted exactly the position I just told you, which is the guy from

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7. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

1971 with the marijuana conviction; they said, “No, you cannot, thirty years later, or forty years later, prohibit him from possessing arms.”

There are questions about things that are not on the list but are arguably analogous to it. The Court said “convicted felons,” but what about someone who’s been convicted of a domestic violence misdemeanor? Or what about a person dishonorably discharged from the United States military—another category of persons who have a lifetime gun prohibition by federal statute. Most courts say that, “There’s no longstanding history in tradition of gun bans for those kind of people, so we will take that to the next stage, and go into step two, and analyze the ban on them under some form of heightened scrutiny.”

Heightened scrutiny, by definition, means you’re not doing rational basis. But there are a variety of types of heightened scrutiny. At the high end, something, is just categorically invalid; that’s what the Supreme Court said in *Heller*: that a handgun ban, a ban on the most common arm that is chosen by the American people for self-defense, is just void, end of question.

Likewise, the Seventh Circuit, in *Moore v. Madigan*,<sup>8</sup> struck down the most restrictive anti-carrying statute of any state in the country; the only one that had no provision to allow citizens even to apply for a license to carry a concealed handgun, or openly, for lawful protection. Illinois prohibited anybody except police, security guards, and elected officials from carrying. If you were an alderman, you could carry all over the place—apparently your election being the appropriate background check.

So the courts have struck those down as categorically void, and that has parallels. There are lots of other things in constitutional jurisprudence where we have a categorical rule. For example, a permanent physical trespass on someone’s property, no matter how minor, is a taking, end of question. If you’re permanently on someone else’s property, you’ve got a takings issue; there’s no balancing test or anything else. Or any law that is based on animus against a particular religion is categorically void under the First Amendment.

For lesser restrictions, as Ms. Shearer said, the courts typically go to some form of means-ends balancing, of which the classic versions are strict scrutiny, where there has to be a compelling government interest, and the law has to be necessary to the interest; or the easier standard of intermediate scrutiny, where you need an important government interest, and the law has a substantial relation to advancing that interest. Both of these tests have lots of varieties and subcategories.

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8. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

According to the lower court decisions, the questions about, How tough are we going to be on the scrutiny? What standard do we apply? depend on what the law is about. What's its scope? Does it apply to all law-abiding citizens, or only to people who have already shown themselves to be particularly dangerous? What type of restriction is it? Is it a prohibition or is it a regulation? Where does it apply, in the home or in public places? Does it affect the choice of arms that law-abiding citizens have? And does it affect self-defense or the defense of others?

If strict scrutiny were never to apply, then the Second Amendment would be treated as a second-class right, which *McDonald v. Chicago* says you can't do, although some courts have done it anyway. Intermediate scrutiny has been the most common type of scrutiny applied, often appropriately, sometimes I would suggest not.

In normal intermediate scrutiny, one part of the test is, Is there a substantially less restrictive alternative? That is, Could the government achieve most of the aim while burdening substantially less of the right, especially for people who are not abusing the right? That is a weaker test than you have in strict scrutiny, where there must be no less restrictive alternative. But the substantially less restrictive alternative issue in intermediate scrutiny is still a meaningful test.

An example of the application of that was in a case called *Heller III*, which was a challenge involving the District of Columbia's post-*Heller* gun licensing system. The D.C. Circuit held unconstitutional the rule that people who have registered arms in the district have to keep re-registering them every three years. D.C.'s justification for this was, "Maybe the person's become ineligible to possess arms, so when they re-register, we can do another background check on them." And the D.C. Circuit pointed out, "Well, you've already admitted, D.C. Government, that you can do background checks on anybody at any time. You don't need this registration trigger to do continuing background checks on registered owners." So the D.C. Circuit found that continuing re-registration failed the substantially less restrictive alternative test and was therefore void.

Or in the Tenth Circuit, in *Bonidy v. Postal Service*, the majority and the minority both agreed, and both applied, the substantially less restrictive alternative test, but they disagreed about the result.<sup>9</sup> The majority said, "It's okay to ban guns even in your car in a post office parking lot, because the potential less restrictive alternative would be for the post office to give people licenses to carry guns in post office parking lots. And that's just too administratively burdensome, and difficult, and impossible for the postal

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9. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015).

service to do.” The dissent did think that was a viable approach; they agreed the test applied and disagreed just in its application.

As Ms. Shearer has also pointed out, some courts have used what has been called “elevated intermediate scrutiny,” or also, “not quite strict scrutiny.” That’s the common approach of the Seventh Circuit, which they started in a case called *Ezell*, where Chicago banned all firing ranges open to the public within the jurisdiction.<sup>10</sup> The court there said, “Well, firing ranges, they’re not quite at the core of the Second Amendment, because it’s not actual self-defense, but it’s close enough because it’s about how you practice to use guns for self-defense. And so we will do ‘not quite strict scrutiny,’” or, as they later described it, as a form of “elevated intermediate scrutiny.”

They said, “Of course there are safety issues about firing ranges. You don’t want stray bullets or other things, but those can all be addressed by having safety regulations instead of prohibitions, just like every other jurisdiction in the country, including New York City, and Manhattan does. You can have firing ranges that are open to the public and that operate in a safe way by regulating them, which is less restrictive than prohibition.”

There’s also, finally, a particularly weak version of intermediate scrutiny, which courts choose when they want to disfavor the right; they ignore the substantially less restrictive alternative test. They admit that, by definition, the burden of proof is on the government in any form of heightened scrutiny. But in weak anti-rights intermediate scrutiny—as was applied in *New York State Rifle and Pistol Association v. Cuomo*,<sup>11</sup> upholding the ban on so-called “assault weapons” and on standard size magazines—the court said, “The burden of proof is on the government; it has to come in with some substantial evidence. They’ve got to have some real evidence here. Then once they do, the case is over. We’re not interested in whether the other side can rebut that evidence, and then if the government’s got a response to that. All we ask is the government make a good showing to start with, and that’s enough for the government to win, end of case.”

The only standard under which these kind of restrictions could be upheld is that feeble and hostile reasoning. Even then, the law said, “You can have a magazine up to ten rounds, but you can only load seven rounds in it.” The Second Circuit said, “That is ridiculous. The government effort to prove that to be lawful falls far short. There’s no point in telling law-abiding citizens they can only put seven of ten rounds in the gun because

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

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

certainly criminals are going to put all ten rounds in. You should not put law-abiding citizens at a disadvantage.”

So intermediate scrutiny is malleable, as Justice Rehnquist said when he was opposing the creation of that standard, but it’s there, and it’s what we use sometimes—often applied properly, sometimes applied in a hostile way by courts who are more interested in destroying than upholding the right.

Thank you.

[APPLAUSE]

**Henigan:** Well, it’s very nice to be with you this morning. You know, Justice Thomas has been very disappointed at what the lower courts have done following *Heller*. He has accused the lower courts a couple of times of treating the Second Amendment as a second-class right. You heard Dave Kopel use that term as well. And it is, in fact, true that *Heller* has not proven to be much of a lethal legal weapon against gun control laws as broad categories of those laws have been repeatedly upheld—everything from bans on gun possessions by felons, including non-violent felons, bans on gun possession by domestic violence misdemeanants, waiting periods, background checks, registration of guns, safety training requirements, safe storage requirements, bans on—or licensing concealed carry, et cetera, et cetera.

And obviously, that’s very disappointing to Justice Thomas. It’s disappointing to Dave. It’s disappointing to probably many in this room. But my thesis is that this does not mean that the courts have relegated *Heller*—the *Heller* Second Amendment—to a second-class right. Rather, the lower courts have simply understood what should be obvious. By its very nature, the Second Amendment is a different kind of right. It is, in fact, our most dangerous right.

The exercise of the *Heller* right, which was described in *Heller* as “the right to have a gun in the home for self-defense,” increases the risk of harm to those exercising the right, to their families, and to the community at large. As a result, the Second Amendment is unique among our enumerated rights in its implications for public safety. The lower courts have simply understood this, and they have crafted a jurisprudence that accounts for it.

So let’s talk for a moment about the Second Amendment as a uniquely dangerous right. Those who exercise the right, of course, have no assurance that a gun in the home will be used for the purpose of self-defense, or for other salutary purposes. In fact, the research shows that for every time a gun in the home is used in a self-defense shooting, there are four unintentional shootings, often involving young children; seven

criminal assaults, often involving domestic disputes where women are the victims; and eleven attempted or completed suicides.

And given that we have long known that attacks with guns are far more lethal than attacks with other weapons, it is not surprising that a gun in the home increases the risk of homicide in the home by three-fold, and the risk of suicide in the home by five-fold. And that increased risk from the exercise of the *Heller* right is also borne by the community at large. Residents of states with the highest rates of gun ownership are more than two-and-a-half times more likely to be homicide victims than those in the states with the lowest rates of gun ownership.

As one study concluded, “An increase in gun prevalence causes an intensification of criminal violence, a shift towards greater lethality, and hence greater harm to the community.” So the more Americans who decide to exercise their Second Amendment right, the more deadly violence becomes. And certainly, any extension of the right beyond the home would simply expose more people to the risk.

Now, it will be argued that the exercise of other constitutional rights, particularly freedom of expression under the First Amendment, may create a risk of violence or physical injury. But according to our First Amendment jurisprudence, if that risk becomes sufficiently great, the courts simply deny the protection of the First Amendment. Moreover, the exercise of freedom of expression is simply unlikely to pose a serious risk of physical harm, particularly lethal harm, and the same cannot be said for the exercise of Second Amendment rights.

So the Second Amendment is unique in the risks created by its exercise. It is our most dangerous right. But what’s the legal significance of this fact? Well, I believe it is misguided for courts to reflexively apply to the Second Amendment the same constitutional standards and reasoning developed in First Amendment cases. The unique nature of the Second Amendment right demands its own unique jurisprudence. That’s not to say that First Amendment jurisprudence is irrelevant to the development of Second Amendment doctrine. *Heller* itself makes use of the First Amendment in a number of different ways.

For example, as *Heller* observes, “Like most rights, the Second Amendment is not unlimited.” But the development of Second Amendment doctrine must recognize, on every issue, the unique dangerousness of the *Heller* right and its unique implications for public safety.

And I would contend that *Heller* itself recognizes the unique danger of the right, and that is the real significance of the now-famous passage in *Heller*, reiterated in the *McDonald* opinion, where the court limited the scope of its own opinion. And you heard Hannah discuss this. Dave has

discussed it. I'd like to actually quote the key passage. The court wrote, "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

Now, Dave mentioned that he thinks that these are exceptions that prove some kind of rule, but it's not at all clear how broad that rule is because the court added that, "these presumptively lawful regulatory measures" are given "only as examples; [and this] list does not purport to be exhaustive." And as Hannah noted, the court also indicated that nineteenth-century court decisions upholding prohibitions on carrying concealed weapons—that's not just licensing, that's prohibition—as well as, the court noted, "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"

This passage represents an extraordinary effort by the Supreme Court to go beyond the issue before it to communicate to the lower courts that the application of the Second Amendment to gun laws must recognize the unique public safety concerns inherent to the exercise of the right. Just as the *Heller* court found that the right to be armed in the home for self-defense is rooted in our history, so it also found that laws regulating that right in the interest of public safety are also rooted in our history.

But the nature of these restrictions in *Heller* do suggest limits on an analogy to First Amendment jurisprudence. For example, the First Amendment would not tolerate a prohibition of freedom of expression by felons or the mentally ill, yet these restrictions on gun possession by such groups were seen in *Heller* as presumptively valid. So I think it's the unique dangerousness of the Second Amendment right that accounts for this remarkable passage in *Heller*.

Well, how have the lower courts applied *Heller*, particularly that passage limiting the scope of the *Heller* decision itself? Well, as you've already heard, the lower courts have reached a virtual consensus on the analytical framework in Second Amendment cases, and it's described as a two-step inquiry. The first being that the courts must determine whether the challenged law burdens conduct protected by the Second Amendment based on the historical understanding of the scope of the right. And if conduct by the statute is unprotected, then the inquiry ends there; the law is upheld without further review. The second step being that if the statute does burden conduct within the right, as historically understood, then the

court must determine the appropriate level of scrutiny and subject the law to that level of scrutiny.

So let's talk about that first step for a moment. The lower courts may have been influenced by First Amendment doctrine in this two-step inquiry, but I think the first step was derived from *Heller*'s reference to historical analysis, listing those longstanding gun restrictions not called into question by the decision. Now, some lower courts have implemented this first step by determining that *Heller*'s presumptively lawful regulatory measures are simply categorical exclusions from the scope of the right. Others have held that these longstanding restrictions are simply presumed to be valid.

And generally, lower courts have had some difficulty applying this first step, and I think for two reasons. One, some of the restrictions listed in *Heller* don't date back to the founding era, which raises the question about just how longstanding restrictions must be in order to qualify. And second, as has been noted, the courts have had to address gun restrictions not specifically mentioned in *Heller*, and it's difficult to determine, often, whether those restrictions have a sufficiently rich history so as to be constitutional without further inquiry. And this has led the lower courts to pursue frequently futile searches for historical answers on these particular kinds of restrictions. And so they often throw up their hands and assume that the restrictions at issue affect protected conduct and then just move on to step two.

But it's clear that, to the extent that step-one analysis has been important, it has been to impose categorical limitations on the scope of the right. So I would cite as examples, the Ninth Circuit en banc decision in the *Peruta* case, finding that there is no right under *Heller* to carry concealed weapons;<sup>12</sup> and the Fourth Circuit decision in the *Kolbe* case—another en banc decision—finding that assault weapons and high-capacity magazines are wholly unprotected by the Second Amendment.<sup>13</sup>

Lower courts have not adopted the view that history and tradition alone should determine the constitutionality of gun restrictions; that is, they have not determined that a restriction must be longstanding in order to be constitutional. Although that has been the view adopted by some federal circuit court judges—Judge Kavanaugh of the D.C. Circuit comes to mind—but the consensus view is, if the restriction does burden conduct within the scope of the right as traditionally understood, courts should then proceed to the second step and evaluate the law under the appropriate level of scrutiny.

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12. *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016), *cert. denied sub nom. Peruta v. California*, 137 S. Ct. 1995 (2017).

13. *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir.), *cert. denied*, 138 S. Ct. 469 (2017).

So let's talk about the second step. In determining the level of scrutiny and applying it to specific laws, I think the lower courts have, with few exceptions, recognized either explicitly or implicitly that the Second Amendment is fundamentally different than our other enumerated rights. In contrast to First Amendment jurisprudence—which has applied strict scrutiny to broad categories of laws restricting speech, including laws restricting the content of speech—the circuit courts in Second Amendment cases have not applied strict scrutiny to gun regulations. Instead, as you have heard, they have applied a version of intermediate scrutiny, which requires a showing that the challenged law is substantially related to the achievement of an important governmental interest.

Now, in applying intermediate scrutiny, several consistent themes emerge from the circuit court opinions. First of all, that the prevention of gun violence is an important governmental interest; that seems to be rather well-accepted. Second, that the fit between the challenged regulation and the government interest need only be reasonable, not perfect; a contrast to strict scrutiny, as Dave explained.

Third, that the law must be supported only by evidence “reasonably believed to be relevant to the problem addressed.” And that is language taken from the *Jackson* case in the Ninth Circuit, which upheld a local safe-storage law and a ban on hollow-point ammunition.<sup>14</sup> The courts have basically said, “The law can be upheld, even if the evidence is conflicting.” And finally, that the court should give substantial deference to the predictive judgments of legislative bodies because they are better equipped than the judiciary to make the sensitive public policy judgments that are really inherent in the gun control issue.

So generally speaking, lower courts have applied intermediate scrutiny in a manner that is highly deferential to legislative judgments. And some opinions have made explicit the distinction between the Second Amendment and other constitutional guarantees. Let me quote from the Tenth Circuit decision in the *Bonidy v. U.S. Postal Service* case, which upheld the regulations prohibiting guns on postal service property. The court wrote, “The risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test, such as the right to marry and the right to be free from viewpoint discrimination, which can be exercised without creating a direct risk to others.”

So, in effect, the lower courts have moved very close to the standard employed for decades by state courts, applying state right to bear arms provisions, where those provisions clearly guaranteed individual rights

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

divorced from the militia. There's a rich history of state court adjudication of right to bear arms provisions. And those state courts universally rejected strict scrutiny, instead invoking a highly deferential, reasonable regulation standard.

So if history is important here, this history of state adjudication of right to bear arms cases should reinforce the deferential treatment of gun laws being given by the federal courts. But the question can be raised: Is this highly deferential level of scrutiny consistent with *Heller*, or is it precisely the "interest balancing" that Justice Breyer advocated in his *Heller* dissent, and that was clearly rejected by the *Heller* majority.

Well, I believe that *Heller*'s rejection of interest balancing should not be read as an instruction to lower courts to disavow any consideration of the government's public safety interest in Second Amendment cases. After all, *Heller* addressed a D.C. law that the court regarded not as a regulation of the right, but as the destruction of the right. The court defined the right as, "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." And the D.C. law banned possession of a weapon which the court regarded as—and these are Justice Scalia's words—"the quintessential self-defense weapon," that is, the handgun. That's what Justice Scalia thought, and there's a wonderful passage in *Heller* where he waxes poetic about the self-defense utility of handguns, providing the possibility of actually calling 911 while you're holding the gun on the bad guy. You may remember that passage.

So by virtue of the court's definition of the right, and the breadth of the D.C. law itself, the *Heller* court was simply saying that the enumeration of the right itself precludes any argument that the government's interest can be so substantial to justify nullification of the right. In fact, the *Heller* majority itself indicated that it did not regard Justice Breyer as proposing any of the traditional levels of scrutiny for Second Amendment cases. And nothing in *Heller* suggests that the regulation of guns should be subject to strict scrutiny. The court did not adopt strict scrutiny for the D.C. law, even though the *Heller* plaintiffs urged it to do so. And the court's listing of a broad range of presumptively lawful gun restrictions is, I believe, itself inconsistent with strict scrutiny.

Though most federal courts have applied this highly deferential form of intermediate scrutiny, I must acknowledge the outlier court here, which I believe is the D.C. Circuit. For example, in the *Heller III* case that Dave discussed, the court purported to be applying intermediate scrutiny, but I must say that decision reads like a markup of legislation in a legislative body, with the court picking and choosing provisions of the D.C. law that it liked or didn't like; even striking down a provision that would simply require D.C. gun owners to know something about D.C. gun laws. So I

would say it's not the kind of intermediate scrutiny that other courts have used. It certainly doesn't reflect much deference.

And also, the court's decision in *Wrenn v. District of Columbia* last year in which the court struck down, in a two-to-one vote, the D.C. requirement that concealed weapon licenses be issued only to gun owners showing good reason for guns in public; that is, some special self-defense need by that person.<sup>15</sup> In that case, the court extended the *Heller* right beyond the home, and then it defined that right in such a way—and the right it defined was, the “right to carry a gun in the face of ordinary self-defense needs”—that the good reason requirement inherently nullified the right, similar to what *Heller* itself had done.

So, as in *Heller*, the court struck down the law as a nullification of the right without having to adopt a particular standard of review. Though the court did not adopt strict scrutiny in the *Wrenn* case, in extending the *Heller* right outside the home and striking down the good-cause requirement, there is little indication of any deference to legislative decision-making. But *Wrenn* was the only decision to strike down a concealed weapon licensing requirement. So it is an outlier in many ways.

But at this point in the development of Second Amendment jurisprudence, that case is an outlier, but either explicitly or implicitly, the lower courts have generally recognized that the Second Amendment, as defined in *Heller*, is our most dangerous right, and have crafted a jurisprudence to reflect that fact. And perhaps the single most eloquent recognition of the unique nature of the *Heller* right, and the real-world consequences of failing to understand its uniqueness comes from J. Harvie Wilkinson of the Fourth Circuit, who was actually my con law professor at the University of Virginia Law School.

He wrote in a 2011 opinion refusing to extend *Heller* outside the home, these words: “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.”<sup>16</sup> And it is precisely this inherent risk of unspeakably tragic acts of mayhem that has compelled the lower courts to treat the Second Amendment not as a second-class right, but rather, as our most dangerous right.

Thank you.

[APPLAUSE]

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

16. *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011).

**Denning:** Thank you. I wanted to thank Dean Leonard, and Spencer, and the rest of the law review staff—excuse me—Professor Wallace and Professor Ludington for moderating. And I want to thank my distinguished panelists and the other guests, many of whom are sort of—could be considered Second Amendment OGs. [LAUGHTER] We’ve been at this for a long time. In fact, last night at dinner, Glenn Reynolds mentioned that he first got interested in the Second Amendment when he did an article on the right to keep and bear arms under the Tennessee Constitution, and it just so happens that I was his research assistant for that article, which dates both of us.

Well, I’m going to step back, for my part, this morning. We’ve been sort of looking at a bunch of trees, and I want to draw back a little bit and look at the forest. And what I want to do is discuss the Second Amendment as, “ordinary constitutional law,” which is a phrase that Glenn used in an article that he and I wrote when *Heller* was decided. *Heller* and *McDonald*, where the court recognizes the core right, and then incorporates it, and applies it to state and local governments, was the sort of breakthrough that broke the trench warfare between the individual rights camp and the collective rights camp that had dominated the debate for many, many years.

Now we’re talking about how *Heller* should be read; how it should be applied in a lower court. But what do I mean by “ordinary constitutional law?” I mean, we’re watching the development of constitutional doctrine—of the law of the Second Amendment. So you have the Supreme Court opinions. We’re talking about standards of review, what Bob Nagel called “The Formulaic Constitution,” right? Many of you who either had or are in constitutional law know that there’s all this memorization of tests—three-part tests, balancing tests—that really make up the warp and woof of constitutional law. And you get the sense that in constitutional law, once decisions are made, the evolution of doctrine proceeds in a kind of common law manner.

We don’t resort to first principles every time we have a constitutional question arise. Mostly it’s particularly when you have competing lines of doctrine that the argument turns on, “Well, which of these two lines is this particular case more like?” But even to say that is incomplete, because I think it’s fair to say that there’s different kinds of constitutional law, or different kinds of constitutional doctrine. You have tests, like strict scrutiny, that are less deferential. You have various forms of rational basis tests, which are more deferential. And then sort of floating there in between, hovering, you’ve got intermediate scrutiny, which I think the panelists had pointed out, could be more or less deferential, depending on who’s putting what thumb on which side of the scale. And then you have

various forms of just outright interest balancing, something that looks more like the proportionality doctrines that are so popular with other constitutional courts around the world.

But you'll notice something funny about even standards of review—this is a great frustration to my students and probably to you, too. Even within standards of review that purport to travel by the same label, you see instances in which courts, or the court, applies them differently. For example, strict scrutiny in the analysis of racial preferences in government contracting looks very different from the strict scrutiny of race-based preferences in higher education and very different from strict scrutiny of content-based speech regulations. Also, rational basis of, “ordinary economic and social regulation,” under the Due Process Clause, looks very different than the rational basis that the court has applied to cases like *USDA v. Moreno*<sup>17</sup> or in *Lawrence v. Texas*.<sup>18</sup>

Now, I'll get back to the question of why there are these inter- and intra-doctrinal differences, and that is, in and of itself, an interesting question, and I'll come back to it. But let me spin this out a little more. I think that you could be able to—it's a little reductive, but it will work—I think that you could map various constitutional law doctrines on two axes, with the x-axis being more or less deferential. And then the y-axis—I hope I have those directions going right—less frequency with which the court will hear those types of cases and more frequency. And I think you could pick out various places. There are plenty of doctrines where the court employs less deferential tests, but they don't hear very many of those cases. Likewise, you could have a more deferential application of various tests that the court hears with some regularity.

Further, and with all respect to Alan Gura, I think that there is a much more subtle interplay between the Supreme Court and the lower courts. The standard account is that the court issues its decision and those decisions are dutifully implemented by the lower courts. However, the lower courts have tremendous amount of discretion in applying Supreme Court precedent, especially where the court leaves open a number of important questions that the lower courts eventually have to face.

I think this discretion increases, or at least becomes more salient, as the rate at which the Supreme Court grants certiorari continues to decline. I think the court is at an all-time low in the number of full-dressed opinions that it issues each term, while the number of petitions for certiorari has remained the same over the last several years, at about 10,000. The court's full-dress opinions have dwindled to below 75. I think it may have been 70

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17. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

18. Lawrence v. Texas, 539 U.S. 558 (2003).

last year. And you can see this discretion in how it affects the evolution of doctrine in these post-*Heller* cases. So the law of the Second Amendment is largely being left to the lower courts with infrequent, you might even say nonexistent, review by the court.

So keeping all this in mind, then I come back to the question, “Well, what kind of constitutional law is Second Amendment doctrine?” And with a nod to my sometime co-author and Campbell Law Professor Mike Kent, I’m going to argue that it most resembles the Takings Clause. Now, if you remember anything about the Takings Clause, you know that the Takings Clause covers a broad variety of takings. As Dave mentioned, physical occupation—or its effective equivalent—is a taking, and the government has to compensate you no matter how minor or how even temporary the actual physical occupation is.

But of course, there are many ways to skin a cat. Government could simply not physically seize property, but effectively seize it by subjecting it to onerous regulations. So the court developed—to prevent easy evasion of that physical evasion rule—the doctrine of regulatory takings; acknowledging that there is some point at which government regulation of private property becomes the effective equivalent of a physical taking. But the court has been sort of circumspect in making sure that this doesn’t go too far.

So, basically, regulatory takings will be held to be the physical equivalent of takings, and thus requiring the provision of just compensation mainly in two categorical instances. One, where the regulation has basically destroyed the value of your property. Right? This is a *Lucas* case.<sup>19</sup> A guy buys some islands in South Carolina, wants to develop them, the state legislature says, “No development.” Well, now he’s got some islands that you can’t do anything on. Certainly, you can’t develop it, and put condos on it, whatever. And the court said, “Yeah, in that case, you’ve got to compensate that owner.”

In addition, unfair conditional takings. So you want to develop your property in some way. The government says, “Fine, but you need to donate a bunch of your other land somewhere else so we can make a park.” And these are the *Nollan*<sup>20</sup> and *Dolan*<sup>21</sup> cases. And the court says, “You’ve got to demonstrate that there is a nexus between the condition and the request for development, and then there has to be some kind of proportionality.” In other words, the condition can’t—they can’t say, “Well, donate property

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19. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

20. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

21. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

worth a million dollars,” when what you want to do is extend a driveway or something.

Most other regulatory takings are subject to what’s called “Penn Central balancing.” And there are a number of factors—investment-backed expectations, public good—it’s just a whole variety of factors that just get weighed. And the way the factors are listed, and they’re weighted—it’s more deferential, less categorical, more solicitous of public needs and plaintiffs—those are difficult to win, in other words. And again, to avoid evasion, the courts recently recognized that the judicial branch, too, could affect a taking under certain circumstances.

I think it’s fair to say that after some real enthusiasm among Takings Clause enthusiasts, like Richard Epstein, that *Lucas*, and *Nollan*, and *Dolan* heralded new possibilities for using the Takings Clause to affect a much broader deregulatory jurisprudence. The court and the lower courts have never gone as far as those enthusiasts have wanted. But the court has been careful to prevent outright evasion of the Takings Clause by creating these regulatory takings doctrines.

These are an example of something that Mike Kent and I have written about, that we call “anti-evasion doctrines,” that are sort of trans-substantive. They go across various doctrines, and they’re developed to prevent governments from paying lip service to a constitutional rule and then circumventing it. So what you end up with in the Takings Clause is a modest restriction on the worst abuses of regulation of and attempts to regulate private property, in the name of the public good, and make private property owners internalize those costs when the benefits are spread out over a community.

So why do I say that the Second Amendment is very much like the Takings Clause? I think there are some interesting parallels here. The Supreme Court says that bans on private possessions of guns for self-defense in the home are unconstitutional. The court then came back, in the *Caetano* case, and slapped down an attempt by the Massachusetts Supreme Judicial Court to basically nullify *Heller* outright, or close to it, by adopting the kind of obtuse position that, “Well, weapons that weren’t known at the time the Second Amendment was ratified aren’t protected, so therefore stun guns aren’t protected.”

And I’m being a little unfair in the characterization of that holding, but essentially, if you read the Massachusetts Supreme Judicial Court’s opinion, you get the sense that they were basically daring the Supreme Court to reverse them. Which it did, because the Supreme Court really doesn’t like to let lower courts get away with outright resistance.

The lower courts, moreover, for their part, have generally developed their own anti-evasion doctrines to prevent evasion or frustration outright

of *Heller*'s core purpose. For example, Dave mentioned the *Ezell* case. So, the Seventh Circuit says, "Come on, Chicago. You can't require people to train with the weapons that they possess so that they know how to handle them and then remove the opportunity to do so by banning all gun ranges within the city. That's just not going to work. We know you don't like *Heller*. We get it. But you don't have the choice of just creating conditions that make it impossible for people to lawfully possess weapons under your regulatory regime."

Bans on ammunition—I actually think that certain types of onerous taxes on the purchase of firearms and the purchase of ammunition might similarly trigger a kind of anti-evasion response by lower courts.

But having said that, I think that lower courts have tended to read *Heller* narrowly. I think with the exception of *Moore v. Madigan*, that Seventh Circuit opinion written by Judge Posner, where he struck down Illinois's ban on public carrying. I think Posner was being deliberately provocative himself. I think that he, who is a vociferous critic of *Heller*, really just excoriates the decision, and its author, for that matter.

And I think Judge Posner was sort of being what two Columbia Law professors have called "uncivilly obedient." [LAUGHTER] I think that he was—much like the aggravated taxpayer who attempts to pay their taxes in pennies, or the drivers who, in 1992, protested the 55-mile-an-hour speed limit by driving exactly 55 miles an hour during rush hour—I think Judge Posner was doing that. And I think there are other examples where courts do this to try to bait the Supreme Court into granting cert in either adopting their expansive reading or trimming their sails.

So the Supreme Court, having recognized the right and incorporated it, has withdrawn into the clouds and is content to let the lower courts monitor things. Well, what does this signal? Well, I argue that the choice of a less deferential standard, relatively speaking, and the disinclination of the Supreme Court to supervise the lower courts' administration and evolution of the doctrine by not granting cert in cases and known events of outright resistance means that the court is making a kind of inchoate, rough judgment—that the standard review being employed is sufficient to guard against egregious abuses. In general, I think that the court's approval and the lower courts' adoption of this more deferential standard of review means that the court itself is content that the political safeguards—the political safeguards for the Second Amendment's core principle—are sufficiently robust to prevent egregious abuses and do not warrant judicial intervention. And the judicial branch, of course, can't do everything. It needs to have some mechanism by which to triage cases. And I think this is where doctrine comes in, and this is where less deferential and more deferential choices—what those kinds of things signal.

While the Supreme Court has not tolerated outright resistance to its decision, it seems content to permit the continued percolation in the lower courts and seems content that the Courts of Appeals have been alert to, and quick to stymie, blatant or subtle evasion of *Heller*'s core holding. Now, whether this is salutary, whether this is the proper function of the court, is a separate question. But I think it is—since doctrine as we know it has sort of evolved—it's actually fairly recent. It dates only to, really, the early to mid-1960s. So we're really only talking about standards of review that are fifty years old.

And I think that that has been the role that the court has settled into—choosing standards based on its assessment of risk to constitutional principle, and whether the risk is such that the political safeguards can't be trusted to police abuses, and thus requires judicial intervention. And I think right now the court isn't in the position where—well, as it is with rational basis—we assume that if these laws affect enough people that, if they get really abusive, political process will take care of it.

Nor are they at the point where they say, "The risk to constitutional principle is so serious that we need to constantly monitor the actions of political branches and be ready to step in and intervene." I think they're somewhere in between. And again, whether this is normatively a good thing is a separate question, but descriptively, I would argue that's maybe some of what's going on. And that's why I say the Second Amendment looks to me very much like, doctrinally, on the course of where the Takings Clause has ended up.

Thank you.

[APPLAUSE]

**Ludington:** All right. Thanks, everybody. Thanks to our panelists. So, panelists, I have a question for you to begin with. I would love to hear the rest of the panel comment or respond to Dennis's assertion that the Second Amendment is a uniquely dangerous right and therefore cannot be treated, say, in the same terms as a First Amendment right, which ceases at the level of violence.

**Kopel:** Sure. This takes me back to the 1990s when, if you'd been around then, you could have heard Dennis and me on various talk radio shows and things like that, arguing about this. I think he's partly right, but for the wrong reasons. This litany of statistics he showed are partly junk science, and partly a failure to disaggregate law-abiding, normal people from others. I would agree that in the home of someone who's got a long record of violence, alcoholism, spousal abuse, that you put a gun in that guy's hands, the data are unmistakable that you substantially increase the

risk that someone else in the home is going to get shot. And he's also got his arguments about why self-defense hardly ever happens, and things like that.

I think it's a weak premise for him to base his theory on because suppose we have an empirical debate on a different panel and suppose he doesn't prevail in that debate? Does that then mean the courts should change their approach to Second Amendment jurisprudence?

I think the easier point for his theory, which, by the way, he's very good at what he does. He was in *McDonald v. Chicago*, which was about incorporating the Second Amendment to make it apply to the states. Everybody else on the pro-gun-control side was filing these briefs which were as it turned out, an exercise in futility of saying, "Oh, no, don't incorporate the Second Amendment. Yeah, you incorporate just about everything else, but don't do this." They ran up against history, where Congress clearly intended to incorporate the Second Amendment in enacting the Fourteenth Amendment.

Dennis, instead of going down that useless road, filed a brief in support of neither party, and argued for—as he did here, to say, "I'm not saying incorporate it or don't, but make sure to say that the standard of review should be on the lower end in general." The court did not adopt that. Justice Breyer thought it was wonderful and talked about that kind of thing in his dissent. We've seen, sort of a hyper version of Justice Jackson's *Steel Seizure Case's* concurrence<sup>22</sup> being treated as if it were the opinion of the Court. The Breyer dissents have filtered down and been de facto adopted by some lower courts.

Instead of saying, "Guns are bad. You're more likely to shoot your wife because she burned the chicken than you are to ever defend your home against an invader," the simpler thing is, guns are different. Arms are different from speech. You can kill people with speech. Hitler did, and the Holocaust started with words. However, the cause and effect is a lot tighter and shorter with deadly weapons.

I think it is permissible to say that you have different rules for that. For example, we would never say that when you get out of prison for having committed fraud—a word offense—that you're thereby prohibited from speaking, or after you've been convicted of criminal libel. People don't lose their rights of speech, but people do, at least for a period, I think properly, have restrictions after a conviction on ownership of a deadly weapon. It's likewise why I think it's not unconstitutional to require permits to carry deadly weapons in public, as long as there's a fair licensing process that reasonable people can go through.

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22. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

So I guess I think he's right in a way, but it's not on the junk science statistics and sort of the Bloomberg line that, "Oh, if you own a gun, you're stupid, because you're too incompetent to do that. If you need to shoot a criminal, call the government, and they'll send someone over who can do it for you five minutes later after you've already been killed." [LAUGHTER] The social science data are not the point. It's that it's just the nature of arms themselves that support having stricter rules for the exercise of that right compared to the right of free speech.

**Shearer:** I have a response to that. So I don't agree that it's just junk science. You know, these are all published studies. They're relied on by legislatures. They make sense to a lot of people. It's not coming out of nowhere.

And I just point out that earlier in our discussion of intermediate scrutiny, it was pointed out that there are some courts that are applying a version of intermediate scrutiny that isn't rigorous enough because they're being deferential to the legislature. And I actually think that that makes a whole lot of sense when we're talking about gun laws because there often are empirical debates over the evidence.

There are competing studies, and they're both—it's hard to say that one of them is a junk study and the other one isn't. It's two different perspectives being presented, and I think that usually in intermediate scrutiny analysis—this is how it works oftentimes in the First Amendment context. I'm thinking of cases involving zoning disputes over First Amendment protected businesses. In those instances, courts recognize there can be competing evidence, but that's kind of a legislative judgment. And it's for the legislature to weigh the different evidence, and so long as that they're reasonably relying on evidence that hasn't been completely, definitively debunked, that that is a legislative judgment.

And so, especially here when it's competing evidence over something that affects people's lives and people's safety, in that case, the intermediate scrutiny analysis is working exactly as it should.

**Denning:** I'd just like to make a point that the Supreme Court is very inconsistent about how it treats conflicting evidence. In cases involving abortion, in cases involving free speech—I'm thinking of the California video games case the court has actually rejected;<sup>23</sup> has said, "We do not rely on legislative judgments where there's conflicting scientific evidence. Rather we should look to findings of fact by the district court." And so which view the court should adopt, we could debate that. But I think it's

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23. *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786 (2011).

fair to point out that the court and lower courts are quite inconsistent when they talk about when you have conflicting scientific studies and what is deferential.

As to the question about the most dangerous right, I think it's an extraordinary right and one that is not quite unique in the world. There are a couple of other countries that recognize a right to keep and bear arms. I mean, think about what it means. It represents a particular view of the relationship of the individual to the state, wherein the individual does not rely on the state, and the individual does not cede to the state a monopoly on instruments of violence. And that is a very different view of the relationship with the individual and the state that is at work in the rest of the Western world.

**Henigan:** First of all, on the question of my citing junk science, all of the studies I cited were peer-reviewed studies, published in major journals. And I suspect there'd be a lot more of them, except that the gun lobby has done a very, very effective job of shutting down continued research on gun violence. These studies were actually so threatening to the gun lobby that they went to Congress and got appropriations riders attached to bills saying that CDC and NIH could not fund these kinds of studies in the future. So this is all part of the gun lobby's master strategy of choking off academic research on guns. Nevertheless, the studies still exist. They're peer-reviewed. I don't think they've been effectively refuted.

But I did not mean to suggest that in order to recognize the *Heller* right as the most dangerous right, you need to agree with the particular studies or particular statistics, although I was saying that those statistics do support that proposition. I think it's simply obvious, and it has been obvious to the lower courts, that guns aren't like books at all. And that is precisely what led the *Heller* court to explain that this long tradition of individual right to be armed has been accompanied by an equally long tradition of regulation of the right, which recognized its dangerousness.

Also, I would point out that, yes, it may be true that the introduction of a gun in certain homes increases the risk more than in other homes, but it is awfully difficult to figure out the differences between good guys and bad guys. A tenet of the NRA's ideology has always been that it's very easy to do that, and you just make sure that the good guys have the guns, and the bad guys don't. But of course, every bad guy was at once a good guy, in the sense that they had not yet committed their first crime, and so it's very difficult to do this.

So generally speaking, introducing guns into the home for self-defense increase the risk in those homes, some more than others, and increases the risk to society at large. And yes, the Holocaust came about in part because

of an ideology, well-articulated by a madman, but I believe there were arms involved in enforcing the Holocaust.

**Ludington:** There's been a question from the audience. They were hoping you might comment a little more specifically on the way that the lower federal courts have relied on state court jurisprudence, and whether there is actually an alignment between those two strands of law, or whether the federal courts are significantly more supportive of restrictive gun laws.

**Denning:** What you have to realize—I alluded to this a few minutes ago, this business of tiered scrutiny—strict scrutiny, intermediate scrutiny, rational-basis scrutiny, is very recent. It simply didn't exist in the nineteenth century. The job of the courts in the nineteenth century was more one of boundary tracing, and the boundary was between reasonable and unreasonable regulations of property, of rights, of whatever. But those were more conclusions than they were modes of analysis.

So I think it compares apples to oranges to say, “Well, there was a reasonableness standard in the nineteenth century, in these right to keep and bear arms cases.” That's true, but that was the only game in town. They didn't have a choice. There was no strict-scrutiny tradition to draw on. The choices were binary. These were either constitutional or unconstitutional, and they didn't have the doctrinal apparatus that courts have today. And whether something that looks more like that reasonableness standard is something that ought to be adopted is a separate question, but I just point that out as a descriptive matter.

**Henigan:** I think it's interesting that the Supreme Court in *Heller* and the lower federal courts have not made much reference to this long tradition of state court adjudication, because this is a tradition of state court adjudication of rights to bear arms provisions that were always regarded as guaranteeing individual rights, in most states, not connected to the militia. So we have this rich jurisprudence that has not been drawn on, and I think it's odd. There would have been no necessary reason for the lower courts to begin to look at these tiers of scrutiny, but they have. They've borrowed much more from the First Amendment in that way than from state court adjudication of right to bear arms cases.

It is interesting that the state courts have continued to decide these cases to the present time, and they've continued to invoke this reasonable regulation standard. They did not jump at First Amendment case law and say, “Oh, now we should really start looking at this at a higher level of scrutiny,” at all. They could have done that, but they have not done that.

And yet here you have the federal courts who have not at all looked at the state courts for any kind of guidance, so it's peculiar. But I do believe that that rich history of state court adjudication should be drawn on by the federal courts. And before *Heller* and *McDonald*, the gun lobby would file lawsuits under these state provisions against local and state gun laws. We were involved a great number of them as amicus, supporting the government, and these reasonable regulation standards were not toothless. There was some risk that we might lose. It wasn't the equivalent of rational basis review. But that standard makes a lot more sense than doing this historical inquiry into whether this is protected conduct and then invoking all these tiers of scrutiny.

**Kopel:** We all agree that the state courts' decisions have not been very big in post-*Heller* jurisprudence. My coauthor and I read every federal circuit court decision, including the unpublished ones, post-*Heller*, on the Second Amendment and found the state precedents are surprisingly small. Except for occasionally, say, on history of the right to carry, they'll go back and look at nineteenth-century cases, but you don't see a lot of it.

One reason is there is a fundamental structural difference. Under the U.S. Constitution, once you get any issue into heightened scrutiny, then the burden of proof is on the government to prove that the law is constitutional. How tough that burden is can vary, but the burden of proof is absolutely on the government. In Colorado and in many other state courts, the standard on constitutional challenges, amazingly, shockingly, and improperly, but well-established, is that the plaintiff has the burden of proving the law unconstitutional beyond a reasonable doubt. As if infringements on your civil liberties get the same protection as does someone whom the state is trying to execute. I think that's wrong, but that is a very big difference between a lot of state constitutional jurisprudence and U.S. Constitution jurisprudence. That's one of the major barriers that makes it difficult for courts applying the U.S. Constitution to draw on these state precedents.

**Shearer:** I'll just add that it goes the other way as well, particularly in some states that don't have a very old right to bear arms provision. I worked on a case recently in Delaware. Delaware's Supreme Court has interpreted its state right to bear arms as actually being broader than the Second Amendment. And in this case, the court ended up striking down Delaware's prohibition on guns in state parks. And although the court had interpreted its state right to bear arms as being broader than the Second Amendment, the opinion really heavily drew on Second Amendment jurisprudence in the area of public carry. So it's influencing state courts in the other direction as well.

**Ludington:** Panelists, I was wondering if you could comment a bit more on how courts have used history, particularly in terms of determining whether a restriction is longstanding. Is history the only way to determine that? Or are there any other criteria that the courts can draw on?

**Henigan:** Well, I'll just comment that it is not at all clear what lower courts are supposed to do under step one; what "longstanding" means. It has sent the lower courts down serious historical rabbit holes trying to figure out the history of particular kinds of arms provisions. One of the problems I have with step one is that it is yet another invitation to lawyers to do history, and it was lawyers doing history that led to the mistakes in *Heller* in the first place. Because, as I articulated last night, I think the *Heller* court got the history terribly wrong, and the vast majority of historians would agree with that proposition.

So the invitation to these courts and lawyers to do this historical analysis is [LAUGHS] an invitation to folly. And I think that's why a lot of lower courts have kind of thrown up their hands and said, "Well, we're not sure. Let's go to step two." And that's where the deference comes in, and that's where they have upheld the vast majority of gun laws. But the fact of the matter is, step one seems to have been used only to limit the scope of the right, so from the point of view of someone who wants deferential review, that's not such a bad thing. At least the lower courts have not gone in the direction of Judge Kavanaugh, which would be to say that history is the only determinant and you shouldn't look at governmental interests at all.

**Kopel:** To follow up, there are only a few cases where the government has won by saying, "Oh, this is a longstanding"—convincing the court this is a longstanding regulation when it wasn't something in the specific *Heller* list. They prevailed on that argument for handgun registration in the D.C. Circuit, and for restrictions on gun possession by juveniles in the First Circuit. The latter had more of a genuine longstanding history, in some states dating back to before the Civil War.

As Dennis said, it's hard to tell exactly how long does "longstanding" have to be. And of course, laws that have been repealed, and that were seen as too restrictive, they may have been "long," but they're no longer "standing," [LAUGHTER] so they wouldn't count. So I think, as he says, most courts are reluctant to give the government a win on the longstanding theory at step one and instead will proceed to step two and test the law under heightened scrutiny.

**Denning:** One other thing to note is that Scalia’s list of what Glenn and I have called “the *Heller* safe harbor”—not even many things in those lists were particularly longstanding. [LAUGHS] Okay? It’s not clear where he got them, other than—there’s a theory that most of them check off prohibited persons under federal law, and he wanted to make sure that it was a signal to lower courts, to like, “Look, you know, be cool. Don’t go crazy, okay? “We’ll—something you’re striking down, we’ll eventually get around to doing it.”

And also, incidentally, the Supreme Court was very much listening. One of the reasons they didn’t adopt an explicit standard of review is, if you recall the history of the litigation, the U.S. government intervened—the Bush Administration intervened. And Paul Clement filed a brief that basically said, “Hey, you know, we’re really worried if you adopt strict scrutiny that a ban on machine guns would stand. And so, please don’t do that. Whatever you do, don’t do that.” And I think that probably shaped both the absence of an explicit standard of review and this sort of *Heller* safe harbor that, again, the language got repeated in *McDonald*.

But it’s not clear where he got those or what timeframe he was referring to when he referred to them as “longstanding.”

**Ludington:** Staying on the topic of scrutiny for a minute, I was struck by the sort of slogan that to use intermediate scrutiny turns the Second Amendment right into a second-class right because there certainly are other important rights. Perhaps I’m thinking of rights to be free of gender bias that are where the Supreme Court employs an intermediate level of scrutiny.

**Kopel:** I don’t think intermediate scrutiny is per se making it a second-class right. It all depends. In the First Amendment, some things are tested under strict scrutiny, and time, place, and manner things get tested under what is now known as “intermediate scrutiny.” It’s the question of what things get tested under it. I would suggest that gun bans ought to be strict scrutiny at least, if not categorically prohibited, but it’s also the form of strict scrutiny.

We talked about the zoning cases, which is exactly the precedent, with the *Alameda Books* case, where the Supreme Court set out the standard of review.<sup>24</sup> This was intermediate scrutiny, and it was zoning time, place, and manner. So the government has its justification for this zoning law, a First Amendment restriction, says the court. So we think, “Does the government have good enough evidence for it so far?” Okay, well, maybe

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24. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

then it looks like the government's going to win, but then the Supreme Court says, "The other side gets to put in its evidence, and they may undermine the evidence that the government put in. Then if so, you've got to go back and see whatever the government has to counter that." The back and forth of normal fact-finding is not treating the First Amendment as a second-class right, and when you apply that in a Second Amendment case, that's just treating it fairly.

What is treating it as a second-class right is what the Second Circuit did, which is, you can do a gun ban, and let's make sure the government has some good evidence for it, and then we're done. And they even cited the *Alameda* case, but it happens to be exactly the opposite of what they did, because *Alameda* says, "Look at the evidence on both sides," and the Second Circuit's methodology was, "No. We look at the evidence on one side, and if it's good enough, then we're done."

**Denning:** One other thing, just to point out, there's intermediate scrutiny, and there's intermediate scrutiny. I mean, the point about intra-doctrinal variety—gender classifications are a perfect example. So the version of intermediate scrutiny that the court employs there, particularly in recent cases, is nearly indistinguishable from strict scrutiny.

And on the other hand, the intermediate scrutiny in some of the Second Amendment cases and some of the other cases looks as deferential as rational basis; it looks awfully deferential. Certainly, it looks—let me put it this way, it looks less deferential than, say, the court's application of intermediate scrutiny to regulations of commercial speech.