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The Standardless Second Amendment

Tina Mehr* & Adam Winkler**

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It is often said that there are 20,000 gun control laws in the United States. In *District of Columbia v. Heller*¹ and *McDonald v. City of Chicago*,² the Supreme Court held that the Second Amendment guaranteed individuals a right to possess firearms for personal protection—rulings that called into question the constitutionality of many of those laws, whether enacted by federal, state, or local governments. Predictably, the two Supreme Court decisions triggered a wave of lawsuits across the nation. But the lower courts have discovered that the Supreme Court failed to give them adequate guidance on how to resolve gun control controversies. As a result, courts have used a variety of divergent standards and approaches in Second Amendment cases. Second Amendment doctrine is profoundly unsettled.

Ironically, the only consistency in the lower court cases is in the results. Regardless of the test used, challenged gun laws almost always survive. Since *Heller* federal and state courts have ruled on Second Amendment challenges in over 200 cases, with the government successfully defending gun control in nearly every case. Only the two bans on handguns in Washington, D.C. (*Heller*) and Chicago (*McDonald*) have been invalidated on Second Amendment grounds. One other provision of federal law, which bans gun possession as a condition of bail in child pornography cases, has been invalidated on procedural due process grounds.³

In this Issue Brief, we examine this dichotomy in the lower courts and explain how *Heller* and *McDonald* failed to provide sufficiently clear standards for the resolution of Second Amendment questions. We also analyze the implications of today's unsettled doctrine for the next major set of controversies to confront the courts: whether the Second Amendment right extends beyond the home and, if so, what restrictions on that right are permissible.

I. THE LACK OF SUPREME COURT GUIDANCE

The Supreme Court's landmark rulings in *Heller* and *McDonald* clarified that the right to keep and bear arms was an individual right unrelated to service in state militias. The opinions, which were long on the history of the Second Amendment (guaranteeing an individual right) and the Fourteenth Amendment (incorporating the Second Amendment right to apply to the states), provided limited guidance about how to differentiate gun laws allowed by the Constitution from those that are not. Traditionally, the Supreme Court articulates a standard of review for lower courts to apply to laws burdening fundamental rights. In *Heller* and *McDonald*, however, the Supreme Court declined to establish a clear standard or test for the Second Amendment.

* Attorney Fellow, Los Angeles County District Attorney's Office.

** Professor of Law, University of California Los Angeles.

¹ *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (interpreting the Second Amendment to protect an individual right to possess firearms in the home for self-defense).

² *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (interpreting the Fourteenth Amendment to incorporate the Second Amendment against state and local governments).

³ See *United States v. Arzberger*, 592 F. Supp. 2d 590 (S.D.N.Y. 2008).

The Court did suggest some outer limits to the Second Amendment. In *Heller*, the Court invalidated Washington, D.C.’s ban on handguns in the home because such firearms were in “common use” by “law-abiding” individuals.⁴ While the Court did not articulate a standard for determining whether a weapon is in common use, it did distinguish “dangerous and unusual” weapons like machine guns. The implication is that some firearms or firearms characteristics can be restricted, like plastic guns, large capacity magazines, and perhaps even assault weapons (semi-automatic, military-style guns). Ordinary rifles and shotguns, which are in many places more commonly owned than handguns, are likely protected. The Court also invalidated Washington, D.C.’s requirement that lawfully owned firearms be disassembled or locked at all times in the home, making self-defense with a gun impossible.⁵ From these two holdings, *Heller* makes clear that the Second Amendment guarantees a right to possess a functional handgun (and probably a rifle or shotgun) in the home.

The Supreme Court also emphasized that the arms right is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁶ Recognizing that “gun violence is a serious problem,”⁷ the Court held that the right “is not unlimited”.⁸

[N]othing 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.⁹

These laws—which one lower court termed “well-rooted, public safety-based exceptions”¹⁰—are, the Supreme Court explained, “presumptively lawful.”¹¹ Moreover, the Court explicitly stated that this list of presumptively lawful gun controls “does not purport to be exhaustive.”¹² In *McDonald*, the Court reiterated this list of public safety exceptions.¹³

Because not all gun laws fit comfortably within the public safety exceptions recognized by the Court, the lower courts would benefit from a generally applicable standard of review or test. But even though the question of the appropriate standard was extensively briefed in both *Heller* and *McDonald*, all the Court would say was that two particular methods were inappropriate. First, the Court rejected rational basis review because that standard, which bars arbitrary and capricious laws, already applies to all legislation and would render the Second

⁴ *Heller*, 128 S. Ct. at 2817-18 (“The handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society . . .”).

⁵ *See id.* at 2817.

⁶ *Id.* at 2816.

⁷ *Id.* at 2822.

⁸ *Id.* at 2816.

⁹ *Id.* at 2816-17.

¹⁰ *United States v. Chafin*, No. 2:08-00129, 2008 WL 4951028, at *1 (S.D. W. Va. Nov. 18, 2008).

¹¹ *Heller*, 128 S. Ct. at 2817 n.26.

¹² *Id.*

¹³ *McDonald*, 130 S. Ct. at 3047.

Amendment irrelevant.¹⁴ Second, the Court rejected what it called the “freestanding ‘interest-balancing’ approach”¹⁵ endorsed by Justice Stephen Breyer’s dissent in *Heller*, which would ask whether the burden on the individual is disproportionate to the law’s benefits. The majority did not reject ordinary standards of review like intermediate or strict scrutiny, even though such standards are occasionally referred to, somewhat erroneously, as interest balancing tests. The majority explicitly noted that Justice Breyer’s formulation was distinct from “the traditionally expressed levels” of review and the majority stated that “no other enumerated constitutional right” was subject to such a test.¹⁶ Of course, intermediate and strict scrutiny are widespread in constitutional doctrine.

Finally, as discussed below, the Court also indicated that prohibitions on concealed carry of firearms in public were likely constitutional.¹⁷

But while the Court did offer *some* guidance, the Court’s unwillingness to articulate a generally applicable standard of review or set of guidelines poses a considerable challenge to the lower courts. Scores of gun control laws have been challenged and the lower courts, confronted with a newly recognized right, do not know how to decide whether or not those laws are constitutionally permissible.

II. THE CONFUSION IN THE LOWER COURTS

In the absence of adequate guidance from the Supreme Court, the lower courts take widely divergent approaches to determining the constitutionality of gun control. Regardless of the approach, however, courts tend to give lawmakers considerable leeway to regulate guns given the importance of the underlying government interest in minimizing gun violence.

A. Categorical Approach

The most common approach adopted by the lower courts is what might be termed “categorical”: the courts articulate various categories of activity that are within the scope of the Second Amendment (and thus protected) or outside the scope of the Amendment (and thus unprotected).¹⁸ To determine what categories of gun laws are constitutionally permissible, lower courts usually look to the public safety exceptions listed out in *Heller* and repeated in *McDonald*. In approximately 80% of the more than 200 post-*Heller* cases, the courts upheld gun control by arguing that the challenged law was among those public safety exceptions or was sufficiently similar. Reasoning by analogy to *Heller*’s list, the courts have upheld, for example, bans on

¹⁴ *Heller*, 128 S. Ct. at 2817 n.27.

¹⁵ *Id.* at 2821.

¹⁶ *Id.*

¹⁷ *Id.* at 2816.

¹⁸ See Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009).

possession by substance abusers,¹⁹ illegal aliens,²⁰ and people convicted of domestic violence misdemeanors.²¹

Heller characterized the ban on possession by felons and the mentally ill as “longstanding,” which could be read as an independent requirement for possession bans under the Second Amendment. The lower courts, however, have not read this language to be so limiting.²² Bans on possession of firearms by people involved in domestic violence are not longstanding yet the courts have uniformly upheld the federal law imposing this burden. Indeed, not even the felon and mentally ill possession bans themselves are truly longstanding; the federal ban on *possession* by even nonviolent felons and the mentally ill was enacted in 1968—less than a decade before Washington, D.C.’s invalidated ban on handguns.

In several cases, the courts have upheld laws that restrict guns in “sensitive places.” Although the Supreme Court did not clarify what made a place too sensitive for guns, lower courts have held that airports,²³ National Parks,²⁴ and post office parking lots²⁵ can be made off limits. As one court explained, sensitive places are “where large numbers of people, often strangers (and including children), congregate for recreational, educational, and expressive activities.”²⁶ Such reasoning would be equally applicable to restaurants, movie theatres, university campuses, public transportation, stadiums, playgrounds, shopping or commercial districts, parking lots, and potentially even sidewalks in densely populated areas.

B. Strict Scrutiny

Given that the Supreme Court held that the Second Amendment protected the “fundamental right” to possess arms in defense of the home, some courts have reasoned that strict scrutiny should apply to gun laws.²⁷ These courts usually argue that fundamental rights automatically trigger strict scrutiny. Descriptively, the courts are wrong; in numerous areas of constitutional doctrine the Supreme Court has held that a right is “fundamental” but that some other, lesser standard of review applies.²⁸ Although nearly all of the Bill of Rights has been applied to the states on the grounds that the rights involved were “fundamental,” strict scrutiny is

¹⁹ See, e.g., *United States v. Richard*, 350 F. App’x 252, 260 (10th Cir. 2009).

²⁰ See, e.g., *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 WL 411112, at *3-4 (D. Kan. Jan. 28, 2010).

²¹ See, e.g., *United States v. White*, 593 F.3d 1199, 1205 (11th Cir. 2010).

²² The Lautenberg Amendment, passed in 1996, bars persons convicted of a domestic violence misdemeanor from possessing firearms. A separate provision prohibits those subject to a domestic order of protection from possessing firearms so long as the order is in effect. 18 U.S.C. 922(g)(9).

²³ *United States v. Davis*, 304 F. App’x 473 (9th Cir. 2008).

²⁴ *United States v. Masciandaro*, 648 F. Supp. 2d 779, 790-91 (E.D. Va. 2009).

²⁵ *United States v. Dorosan*, 350 F. App’x 874 (5th Cir. 2009).

²⁶ *Masciandaro*, 648 F. Supp. 2d at 790-91.

²⁷ See, e.g., *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008); *United States v. Montalvo*, No. 08-CR-004S, 2009 WL 667229, at *3 (W.D.N.Y. Mar. 12, 2009).

²⁸ For a detailed discussion, see Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227 (2006).

only applied in cases arising under the First and Fifth Amendment in the Bill.²⁹ Strict scrutiny is not applied in cases arising under the Fourth, Sixth, Seventh, Eighth, Ninth, or Tenth Amendments. Even in the First and Fifth Amendments, strict scrutiny is only used selectively, with less demanding standards applied to, among other things, restrictions on commercial speech, content-neutral speech laws, sex discrimination, generally applicable laws burdening the free exercise of religion, and takings of property.

Although strict scrutiny is often called “‘strict’ in theory and fatal in fact,”³⁰ to date no court applying strict scrutiny under the Second Amendment has invalidated a gun control law. The underlying governmental end of nearly all gun laws is public safety, which is clearly a compelling government interest. The narrow tailoring prong of strict scrutiny, which is often the greatest hurdle for challenged laws elsewhere in constitutional doctrine, has not proven to be a significant barrier for gun control yet. In some cases, the courts merely conclude the law satisfies the narrow tailoring requirement without much analysis. In other cases, narrow tailoring is satisfied by the fact that the challenged laws are not applied broadly to the public at large but target a narrow class of gun owners. In *United States v. Erwin*, for example, the district court explained that prohibitions on possession by people subject to a domestic violence restraining order are narrowly tailored because the ban only applies after a court determines someone is a “credible threat to the physical safety” of an intimate partner or child.³¹ As a result, the federal law imposed “narrowly crafted limits on when a citizen may possess a firearm.”³² Other courts reason that because the Supreme Court acknowledged the validity of felon possession bans even though many felonies do not involve violence, any law more precisely tailored than the felon ban satisfies strict scrutiny’s fit requirement.³³

C. Intermediate Scrutiny

Some courts have held that intermediate scrutiny is the appropriate standard for Second Amendment challenges.³⁴ One factor influencing these courts is that the public safety exceptions recognized in *Heller* would not have satisfied a higher level of review.³⁵ Felon possession bans are not really narrowly tailored because nonviolent felons, like people convicted of perjury or obstruction of justice, are disarmed. In addition, by calling the public safety exceptions

²⁹ Outside of the Bill of Rights, strict scrutiny also applies in cases arising under the Fourteenth and Fifteenth Amendment. *See, e.g.,* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (Fourteenth Amendment); *Rice v. Cayetano*, 528 U.S. 495 (2000) (Fifteenth Amendment).

³⁰ The classic statement belongs to Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). In fact, strict scrutiny is not really fatal in fact in any area of constitutional law. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

³¹ *United States v. Erwin*, No. 1:07-CR-556 (LEK), 2008 WL 4534058, at *1 (N.D.N.Y. Oct. 6, 2008).

³² *Id.* at *2.

³³ *See* *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008).

³⁴ *See, e.g.,* *United States v. Schultz*, No. 1:08-CR-75-TS, 2009 WL 35225, at *5 (N.D. Ind. Jan. 5, 2009) (felon possession ban “substantially related” to that important governmental objective of public safety); *United States v. Radencich*, No. 3:08-CR-00048(01)RM, 2009 WL 127648, at *4-5 (N.D. Ind. Jan. 20, 2009) (same); *United States v. Tooley*, No. 3:09-00194, 2010 WL 2380878, at *12, *15 (S.D.W. Va. June 14, 2010) (domestic violence misdemeanor ban “is reasonably tailored in proportion to the important interest it attempts to further”).

³⁵ *See, e.g.,* *United States v. Bumm*, No. 2:08-cr-00158, 2009 WL 1073659, at *3 (S.D.W. Va. Apr. 17, 2009); *United States v. Chafin*, No. 2:08-00129, 2008 WL 4951028, at *2 (S.D.W. Va. Nov. 18, 2008).

“presumptively constitutional,” *Heller* appeared to reject strict scrutiny, which presumes that challenged laws are unconstitutional.

*Heller v. District of Columbia (Heller II)*³⁶ is illustrative. The district court upheld multiple provisions of Washington, D.C.’s strict gun laws, which were revised in the wake of the Supreme Court’s decision striking down the District’s handgun ban. Rejecting strict scrutiny, the court held that burdens on the “core Second Amendment right” must be “substantially related to an important government interest.”³⁷ Under intermediate scrutiny, legislatures are permitted “to paint with a broader brush” than required by strict scrutiny.³⁸ The court found that District’s detailed registration requirements, which among other things mandated applicants to submit to fingerprinting, firearms training, and a vision test, satisfied this standard.

After recognizing the “‘levels of scrutiny’ quagmire,” the Seventh Circuit, ruling en banc in *United States v. Skoien*,³⁹ also applied intermediate scrutiny. The court explained that the interest underlying the federal law banning gun possession by individuals convicted of a domestic violence misdemeanor—“preventing armed mayhem”—was “an important governmental objective.” Given that domestic violence involving a gun poses significant dangers, the court also held that there was a “substantial relation between [the law] and this objective.”⁴⁰

Under intermediate scrutiny, one question is how much evidence is necessary to support the challenged laws. In *Heller II*, the court stated that “‘quantum of empirical evidence needed . . . [varies] up or down with the novelty and plausibility of the justifications raised.’”⁴¹ In that case, the evidence was mainly testimony offered in legislative hearings before the Council of the District of Columbia; the court asked whether the lawmakers had sufficient evidence to conclude that the restrictions substantially furthered public safety. In *Skoien*, the court relied instead on empirical social science studies that showed the danger of firearms in domestic violence incidents.⁴² The court did not require that those studies be irrefutable or require that the challenger have the opportunity to counter them with studies of his own. Indeed, it is not even clear that the government should bear any burden of proof. The Supreme Court said that its examples of public safety exceptions were presumptively lawful, suggesting the burden should be placed on the challenger to prove the laws go too far.

D. Hybrid Scrutiny

In a handful of cases, courts have held that the standard of review varies depending on the nature of the burden on Second Amendment rights. These courts generally hold that when a

³⁶ *Heller v. District of Columbia (Heller II)*, 698 F. Supp. 2d 179 (D.D.C. 2010).

³⁷ *Id.* at 188.

³⁸ *Id.* at 191.

³⁹ *United States v. Skoien*, No. 08-3770, 2010 WL 2735747, at *3 (7th Cir. July 13, 2010) (en banc).

⁴⁰ *Id.* at *12.

⁴¹ *Heller II*, 698 F. Supp. 2d at 191 (quoting *Nat’l Ass’n of Mfrs. v. Taylor*, 582 F.3d 1, 15 (D.C. Cir. 2009)). *See also* *United States v. Miller*, 604 F. Supp. 2d 1162, 1172 (W.D. Tenn. 2009) (“Also, because the government objective is exceptionally compelling in this area, Congress must have wider latitude to combat the great social harm inflicted by gun violence.”).

⁴² *Id.* at *5-6.

law burdens the “core” right of self-defense in the home with a firearm, a higher standard of review applies than when a law burdens more peripheral elements of the Second Amendment. In *United States v. Chester*, for example, the circuit court held that strict scrutiny was appropriate for laws that limited the core right recognized in *Heller* but intermediate scrutiny applied to other burdens on gun rights.⁴³ In other cases, courts hold that burdens on core Second Amendment rights only trigger intermediate scrutiny and some lesser standard (or none at all) applies to the rest. *Heller II* was of this latter sort: the district court applied intermediate scrutiny to registration and training requirements because they impacted the core right to possess a firearm in the home.⁴⁴

In distinguishing core Second Amendment rights from peripheral ones, the courts hold that most gun laws only impact the outer edges of the Second Amendment. No state or major city still bans handguns or otherwise prohibits a person from having a functional firearm in one’s privately owned home—the basic core right in *Heller*. Among those laws held not to impact core Second Amendment rights are laws banning assault weapons and large capacity magazines⁴⁵ and laws banning possession of firearms with obliterated serial numbers.⁴⁶

Still other courts have looked to whether the law in question amounted to a “substantial” or “direct” burden on the right to bear arms.⁴⁷ If so, then a heightened form of scrutiny may apply. If the law is only an “incidental and minimal” burden, however, the law will be upheld. This type of reasoning—often termed “undue burden” analysis—is found elsewhere in constitutional law, most notably in cases involving the right to marry, abortion, religious freedom, and expressive association.⁴⁸ In the Second Amendment context, courts have held that laws regulating guns and the manner in which they are possessed are not substantial burdens on the right. For example, the Indiana Court of Appeals recently asked whether a gun law was a “material burden on a core value.”⁴⁹

E. Reasonable Regulation

Prior to *Heller*, state courts interpreting state constitutional provisions on the right to bear arms consistently adjudicated gun laws under a “reasonable regulation” standard.⁵⁰ In fact, this has been the preferred standard under state law since the 1800s, and no state traditionally applied strict scrutiny or even intermediate scrutiny to gun control. The reasonable regulation standard asks whether a law effectively destroys or nullifies the ability of law-abiding people to possess firearms for self-defense. If so, the law is unconstitutional; if not, the law is deemed to be only a regulation, not a prohibition, of the right.

⁴³ *United States v. Chester*, 367 F. App’x 392, 398-99 (4th Cir. 2010).

⁴⁴ *Heller II*, 698 F. Supp. 2d at 191.

⁴⁵ *Id.* at 195.

⁴⁶ *United States v. Marzarella*, 595 F. Supp. 2d 596 (W.D. Pa. 2009).

⁴⁷ *See, e.g., United States v. Hendrix*, No. 09-cr-56-bbc, 2010 WL 1372663 (W.D. Wis. 2010).

⁴⁸ *See Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1454-55 (2009).

⁴⁹ *Lacy v. State*, 903 N.E.2d 486 (Ind. Ct. App. 2009).

⁵⁰ *See Adam Winkler, Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007).

There is considerable confusion in the courts about the nature of this test, which is easily confused with rational basis review. Under rational basis, even a complete ban on all civilian firearms might be constitutional because a legislator could rationally believe that the prohibition furthers the government's legitimate objective of reducing gun violence. Under reasonable regulation, however, a complete ban on firearms would be unconstitutional because it effectively destroys, rather than merely regulates, the right. Reasonable regulation requires that law-abiding people have some ability to access firearms to use for self-defense. Compared to rational basis, reasonable regulation is a heightened form of review.

Even in the wake of *Heller*, state courts continue to use the reasonable regulation standard.⁵¹ One of the questions posed by *Heller* is whether this well-established state constitutional law jurisprudence will be completely displaced by the Second Amendment. If the courts hold that a more stringent form of review applies to gun control under the Second Amendment, lawyers will eventually stop raising challenges on the basis of state law. The case law developed in more than 40 states over the course of the past century would be rendered irrelevant. So far, however, the difference is only procedural given that lower courts continue to uphold gun control regardless of the standard applied.

III. THE RIGHT OUTSIDE OF THE HOME

The confusion in the lower courts makes it difficult to know how one should analyze the most important questions that remain open after *Heller* and *McDonald*: does the Second Amendment right extend beyond the home and, if so, what limits on public possession of firearms are constitutionally permissible?

Because both *Heller* and *McDonald* only addressed the constitutionality of laws banning private possession of handguns in the home, the Supreme Court did not believe it necessary to determine if individuals have a right to bear arms in public. Indeed, the Supreme Court in *Heller* stressed the importance of self-protection in the home throughout its opinion, leading lower courts to read the right recognized in that case narrowly. This was part of the reasoning behind one court's decision to uphold a ban on loaded firearms in vehicles traveling in National Parks.⁵² A California appellate court also held that a gun owner did not have a Second Amendment right to possess firearms in his own driveway because that area of his property was "accessible to the public."⁵³

Yet there remains considerable controversy. Some language in *Heller* might be read to suggest a right to possess a weapon in public. For example, the Court referred to the "individual[']s right to possess and carry weapons in case of confrontation."⁵⁴ The text's

⁵¹ See, e.g., *Students for Concealed Carry on Campus v. Regents of the Univ. of Colo.*, No. 09CA1230, 2010 WL 1492308, at *11 (Colo. Ct. App. Apr. 15, 2010) ("the reasonable exercise test . . . not the rational basis test, is the appropriate test"); *State v. Whitaker*, 689 S.E.2d 395, 404-05 (N.C. Ct. App. 2009) (law "is a reasonable regulation which is fairly related to the preservation of public peace and safety") (internal quotations omitted); *Wilson v. State*, 207 P.3d 565 (Alaska Ct. App. 2009).

⁵² See *United States v. Masciandaro*, 648 F. Supp. 2d 779, 790-91 (E.D. Va. 2009).

⁵³ *People v. Yarbough*, 86 Cal. Rptr. 3d 674 (Ct. App. 2008).

⁵⁴ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008).

reference to “bear” arms also might imply a right to possess arms in public, although guns can be borne and carried within the home for self-defense.

Whether individuals have a right to possess a firearm outside the home is currently being litigated most prominently in a series of cases filed since *McDonald* challenging restrictions on concealed carry of firearms, including in New York and California. Restrictions on concealed carry are among the oldest, most longstanding restrictions on firearms. First enacted in the early 1800s, limits on hidden firearms have been commonplace ever since.⁵⁵ As the *Heller* Court itself recognized, “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”⁵⁶ This language appears to condone outright *prohibitions* on concealed carry—far more burdensome than most current state laws, which allow concealed carry conditioned on a permit. It is no surprise therefore that lower courts since *Heller* have upheld restrictions on concealed carry without a permit.⁵⁷

Even if states or cities completely ban concealed carry, it is possible that the courts will require that individuals be allowed to carry firearms openly as an alternative method of armed self-defense in public. Some of the nineteenth century cases relied upon in *Heller* reasoned that concealed carry bans were acceptable because individuals could still open carry. Yet by the beginning of the twentieth century, several states barred both open and concealed carry without any constitutional difficulty.⁵⁸

Licensing for concealed carry presents the courts with another challenge. While courts have uniformly upheld licensing for possession of firearms generally since *Heller*, some licensing policies for concealed carry give government officials, typically the chief of police, discretion to determine whether an applicant has sufficiently good reason or cause to carry. These laws continue a long tradition of conditioning gun rights on a public showing of trustworthiness and reliability. Colonial governments, for example, disarmed persons unwilling to swear an oath of loyalty to the Revolution. In the early twentieth century, many states enacted the Uniform Firearms Act, promoted by the National Rifle Association, which limited permits to suitable persons. States like Missouri and North Carolina restricted gun permits to people “of good moral character.”⁵⁹ Still, if the right to carry a weapon in public is constitutionally protected—a question that remains far from clear—laws providing a government official unfettered discretion to issue licenses are problematic. Such discretion is subject to abuse and states should at a minimum provide adequate avenues to appeal the rejection of an application in a timely and inexpensive manner.

⁵⁵ See CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM (1999).

⁵⁶ *Heller*, 128 S. Ct. at 2816.

⁵⁷ *United States v. Hall*, No. 2:08-00006, 2008 WL 3097558, at *1 (S.D. W. Va. Aug. 4, 2008) (“[T]he prohibition, as in West Virginia, on the carrying of a concealed weapon without a permit, continues to be a lawful exercise by the state of its regulatory authority notwithstanding the Second Amendment.”); *Swaitt v. Univ. of Neb.*, No. 8:08CV404, 2008 WL 5083245, at *2 (D. Neb. Nov. 25, 2008); *People v. Flores*, 86 Cal. Rptr. 3d 804 (Ct. App. 2008).

⁵⁸ See, e.g., WYO. COMP. LAWS ch. 52, § 1 (1876) (prohibiting anyone from “bear[ing] upon his person, concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village.”).

⁵⁹ See, e.g., MO. REV. STAT. §§ 564, 630 (1959); N.C. GEN. STAT. § 14-404 (Supp. 1965).

IV. CONCLUSION

Justice Breyer's dissent in *McDonald* pointed to the many difficult questions left unanswered by the Court's two Second Amendment decisions:

Consider too that countless gun regulations of many shapes and sizes are in place in every State and in many local communities. Does the right to possess weapons for self-defense extend outside the home? To the car? To work? What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? When is a gun semi-automatic? Where are different kinds of weapons likely needed? Does time-of-day matter? Does the presence of a child in the house matter? Does the presence of a convicted felon in the house matter? Do police need special rules permitting patdowns designed to find guns? When do registration requirements become severe to the point that they amount to an unconstitutional ban? Who can possess guns and of what kind? Aliens? Prior drug offenders? Prior alcohol abusers? How would the right interact with a state or local government's ability to take special measures during, say, national security emergencies?⁶⁰

His prediction of disorder in the courts has come true: the lower courts are struggling with Second Amendment cases, using a wide variety of approaches to determine the constitutionality of gun control. Nevertheless, even in the absence of sufficient guidance about how to analyze Second Amendment controversies, the lower courts have consistently read *Heller* and *McDonald* to permit lawmakers wide latitude to protect public safety through gun laws.

⁶⁰ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3126-27 (2010) (Breyer, J., dissenting).