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I. INTRODUCTION

In the wake of the Supreme Court's *District of Columbia v. Heller* ("*Heller I*")[1] and *McDonald v. Chicago*[2] decisions that clarify, expand, and protect Second Amendment rights, federal and state inferior courts have been engaging in massive resistance. The *Wall Street Journal* noted in an editorial that politicians have been calling for legislation that would disregard the Supreme Court and would be "not unlike the massive resistance in some Southern states that followed *Brown v. Board of Education* in 1954."[3] After *McDonald*, one circuit court judge labeled Chicago's response as a "thumbing of the municipal nose at the Supreme Court."[4] It is the duty of courts to

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1. 554 U.S. 570 (2008).

2. 130 S. Ct. 3020 (2010).

3. Editorial, *Massive Gun Resistance*, WALL ST. J., April 13–14, 2013, at A14. *Brown v. Board of Education*, 347 U.S. 483 (1954), prompted the massive resistance. *See generally* GEORGE LEWIS, MASSIVE RESISTANCE: THE WHITE RESPONSE TO THE CIVIL RIGHTS MOVEMENT (2006) (providing an account of the white segregationist opposition to the United States civil rights movement from the late 1940s to the mid-1960s).

4. Ezell v. City of Chicago, 651 F.3d 684, 712 (7th Cir. 2011) (Rovner, J.,

prevent such resistance, but the courts have failed thus far. *Massive resistance* may be too strong of a term to apply to the case law from inferior federal and state courts interpreting the civil right to keep and bear arms in the wake of *Heller I* and *McDonald*, but *simple resistance* seems appropriate.[5]

This Article will discuss the holdings in *Heller I* and *McDonald*; examples of the misapplication of those decisions by federal and state inferior courts; the impact of scholarship on the courts; and legislative solutions. This Article will also posit that, with the passage of time and attendant cultural changes, the composition of the bench is likely to result in the Second Amendment no longer being treated as a second class right.

II. HOLDINGS IN *HELLER I* AND *MCDONALD*

A. District of Columbia v. Heller

In *Heller I*, the Court held that a District of Columbia law that banned all handguns and any operable firearm in the home was an unconstitutional infringement of the Second Amendment.[6] The Court reached this conclusion after dissecting the Second Amendment's guarantee—"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed"[7]—and interpreting its words.

The court held that the prefatory clause announces a purpose.[8] However, a prefatory clause does not limit the operative clause where the operative clause is expressed in clear, unambiguous terms.[9] The "Militia" consisted of a subset of "the people."[10] Further,

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concurring).

5. *See Ferguson v. Perry*, 740 S.E.2d 598, 604 (Ga. 2013) (noting that "this Court and other courts have said that the right to possess firearms is indeed a 'civil right'"); *see, e.g.*, United States v. Stone, 139 F.3d 822, 830–31 (11th Cir. 1998) (explaining that felony convictions "'carry disabilities'" including the deprivation of "'civil rights as important as the right to vote, the right to keep and bear arms, and the right to engage in a chosen business or profession'") (quoting United States v. Sharp, 12 F.3d 605, 608 (6th Cir.1993)); Smith v. State, 697 S.E.2d 177, 184 (Ga. 2010) (noting that a criminal conviction may impact the defendant's "civil rights, such as the right to vote or possess firearms"). State courts, interpreting state guarantees to arms, hold that the right to possess a firearm is a civil right. Williams v. State, 402 So.2d 78, 79 (Fla. App. 1981); State v. Trower, 629 N.W.2d 594, 597 (S.D. 2001); Andrews v. State, 50 Tenn. 165, 182 (1871).

6. 554 U.S. at 574–75, 628–29, 635.

7. *Id.* at 576.

8. *Id.* at 599.

9. *Id.* at 577–78, 598.

the Court stated that "[r]eading the Second Amendment as protecting only the right to 'keep and bear Arms' in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as 'the people.'"[11]

"Arms" include modern firearms.[12] The Court dismissed as "bordering on the frivolous" the argument that the Second Amendment protects only "those arms in existence in the 18th century."[13] It held that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[14]

The Court held that "keeping arms" means the right to "possess[] arms, for militiamen and everyone else."[15] The Court stated that "bearing arms" means "carrying for a particular purpose—confrontation."[16] Bearing arms "was unambiguously used to refer to the carrying of weapons outside of an organized militia."[17] The purposes of the Second Amendment are to be "better able to resist tyranny,"[18] to prevent the government from "taking away the people's arms,"[19] "to secure the ideal of a citizen militia, which might

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10. *Id.* at 580.

11. *Id.* at 580–81. Earlier Second Amendment cases from lower courts support this view. United States v. Emerson, 270 F.3d 203, 233 (5th Cir. 2001), *cert. denied*, Emerson v. United States, 536 U.S. 907 (2002); Nunn v. State, 1 Ga. 243, 251 (1846); People v. Liss, 94 N.E.2d 320, 323 (Ill. 1950).

12. *Heller*, 554 U.S. at 581–83.

13. *Id.* at 582.

14. *Id.*; *see* Rinzler v. Carson, 262 So.2d 661, 666 (Fla. 1972) (holding that semi-automatic firearms that are commonly possessed are not machineguns).

15. *Heller*, 554 U.S. at 583.

16. *Id.* at 584.

17. *Id.*

18. *Id.* at 598.

19. *Id.* Totalitarian states are obsessed with disarming designated public enemies. *See generally* STEPHEN P. HALBROOK, GUN CONTROL IN THE THIRD REICH: DISARMING THE JEWS AND "ENEMIES OF THE STATE" (2013) (discussing how strict gun-control laws during the time rendered Jews and political opponents practically defenseless). Disarmament by oppressors is well known. Bostonians surrendered 1,778 muskets, 634 pistols, and 38 blunderbusses to General Gage's forces. RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON, AND OF THE BATTLES OF LEXINGTON, CONCORD, AND BUNKER HILL 95 (6th ed. 1903). "Anybody posting a placard the Germans didn't like would be liable to immediate execution, and a similar penalty was provided for those who failed to turn in firearms or radio sets within twenty-four hours." WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH; A HISTORY OF NAZI GERMANY 782 (1960). The Nazis seized Albert Einstein's bank account for a weapons violation: the possession of a common knife in his home. 1 JOHN TOLAND, ADOLF HITLER 310 (1976). "The repression continued with issuance of a series of harsh edicts[,] . . . such as the one to surrender all arms immediately or

be necessary to oppose an oppressive military force if the constitutional order broke down,"[20] and "for self-defense and hunting."[21] The right to keep and bear arms for self-defense is the most important guarantee of the Second Amendment because a person must be alive to enjoy any right. The "right of self-defense has been central to the Second Amendment right."[22] The home is "where the need for defense of self, family, and property is most acute."[23]

The Second Amendment protects those arms that are "typically possessed by law-abiding citizens for lawful purposes" and those "in common use."[24] This includes the "handgun."[25] Excluded from this protection is the short-barreled shotgun, "dangerous and unusual weapons," and "M-16 rifles and the like."[26]

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be shot." *Id.* at 81. Hitler, however, during the early stages of his climb to power, got a pistol permit from the sympathetic police. *Id.* at 114. "Owning a pistol meant an obligatory conviction for terrorism." 1 ALEKSANDR I. SOLZHENITSYN, THE GULAG ARCHIPELAGO 195 (Thomas P. Whitney trans., 1974). The right to have firearms or other weapons is forbidden and self-defense is also curtailed. *Id.* at 431–32.

20. *Heller*, 554 U.S. at 599.

21. *Id.*

22. *Id.* at 628.

23. *Id.*

24. *Id.* at 625.

25. *Id.* at 625, 627, 628.

26. *Id.* at 625, 627. In Daniel Page, *Dangerous and Unusual Misdirection: A look at the common law tradition of prohibiting going armed with dangerous and unusual weapons to the terror of the people as cited in* District of Columbia v. Heller (2008), *available at* http://works.bepress.com/daniel_page/1/, Page examined the label "Dangerous and Unusual Weapons" and concluded that it refers not to a class of weapons, but to a class of behavior. The focus on misbehavior finds support. In the eighteenth century, William Hawkins, English Serjeant-at-Law, explained:

> [Y]et it seems certain, That in some Cases there may be an Affray where there is no actual Violence; as where a Man arms himself with dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People, which is said to have been always an Offence at Common Law, and is strictly prohibited by many Statutes. . . . That no Wearing of Arms is within the Meaning of [Statute of Northampton, 2 Edw. 3, ch. 3 (1328)], unless it be accompanied with such circumstances as are apt to terrify the People; from whence it seems clearly to follow, That Persons of Quality are in no Danger of offending against this Statute by wearing common Weapons, or having their usual Number of Attendants with them, for their Ornament or Defence, in such Places, and upon such Occasions, in which it is the common Fashion to make use of them, without causing the least Suspicion of an Intention to commit any Act of Violence or Disturbance of the Peace.

The Court provided examples of permissible regulation. It held that:

> [T]he right secured by the Second Amendment is not unlimited. . . . [T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . [P]rohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. . . . [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 qualification on the commercial sale of arms.[27]

The Court noted: "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[28]

The Court did not confine the right to bear arms to the home. Bearing arms for the purpose of self-defense is not restricted to the home. Furthermore, there would be no need to mention hunting, bans on concealed carrying of arms, and bans on carrying arms in sensitive places if the right is confined to the home.[29] The Court provided examples of impermissible regulation of the right to carry arms, such as a ban on the open or concealed carrying of a pistol

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2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135–36 (5th ed. 1771). Francis Wharton, an early American authority on criminal law, paraphrasing the eighteenth century English Serjeant-at-Law William Hawkins, explained the provisions in the 1328 Statute of Northampton on using force and carrying arms in public places:

> A [person] cannot excuse wearing such armor [dangerous and unusual weapons, in such a manner as will naturally cause terror to the people] in public by alleging that a particular person threatened him, and that he wears it for safety against such assault; but it is clear that no one incurs the penalty of the [Statute of Northampton, 2 Edw. 3, ch. 3 (1328)] for assembling his neighbors and friends in his own house, to resist those who threaten to do him any violence therein, because a man's house is his castle.

3 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW 2061–62 (11th ed. 1912).

27. *Heller*, 554 U.S. at 626–27. "Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents." *Id.* at 632.

28. *Id.* at 627 n.26.

29. *Id.* at 599, 604, 626–27. Inferior courts are bound by Supreme Court dicta. Peterson v. Martinez, 707 F.3d 1197, 1210 (10th Cir. 2013).

without regard to time, place, or circumstances, or a law requiring arms to be borne as to render them useless for the purpose of defense.[30] Consequently, the Court voided the District of Columbia law that required that firearms in the home be inoperable at all times because it made "it impossible for citizens to use them for the core lawful purpose self-defense and [was] hence unconstitutional."[31]

The Court did not assign a standard of review for Second Amendment cases. It noted that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family' would fail constitutional muster."[32] However, the Court rejected rational basis scrutiny and an "interest-balancing inquiry."[33] The Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in the defense of hearth and home."[34] The Court stated that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table. . . . [I]t is not the role of this Court to pronounce the Second Amendment extinct."[35]

B. McDonald v. Chicago

In *McDonald*, the Court held that the Second Amendment was fully applicable to the States.[36] A four-Justice plurality applied the due process guarantee of the Fourteenth Amendment to reach this result.[37] A fifth Justice reached the same result but applied the Privileges or Immunities Clause of the Fourteenth Amendment.[38] Consequently, a Chicago ordinance and an Oak Park ordinance, both

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30. *Heller*, 554 U.S. at 629 (citing State v. Reid, 1 Ala. 612, 616–17 (1840); Nunn v. State, 1 Ga. 243, 251 (1846); Andrews v. State, 50 Tenn. 165, 187 (3 Heisk. 1871)).

31. *Id.* at 630.

32. *Id.* at 628–29 (footnote omitted) (citations omitted).

33. *Id.* at 628 n.27, 634–35.

34. *Id.* at 635.

35. *Id.* at 636. Early in our nation's history, it was held that the Constitution, rather than the legislature, is supreme. Van Horne v. Dorrance, 28 F. Cas. 1012, 1014 (Cir. Ct. D. Pa. 1795) (Justice William Paterson, the author of the *Van Horne* opinion, was a signer of the U.S. Constitution).

36. McDonald v. City of Chicago, 103 S. Ct. 3020, 3026 (2010).

37. *Id.* at 3050.

38. *Id.* at 3058–59 (Thomas, J., concurring).

of which banned handguns, were unconstitutional infringements of the Second Amendment.[39]

In *McDonald*, the Court noted that self-defense is a basic right, recognized by many legal systems from ancient times to the present.[40] Individual self-defense is the central component of the Second Amendment right.[41] This right applies to handguns.[42]

The Court's plurality concluded that the Second Amendment right to keep and bear arms is incorporated in the concept of due process because the right is fundamental to our scheme of ordered liberty and this right is "'deeply rooted in this Nation's history and tradition.'"[43] An invitation to single out the Second Amendment "for special—and specially unfavorable—treatment" and to treat it "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees" was rejected.[44] The Court stated that the Second Amendment "is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category."[45]

The Court did not establish a standard of review. However, it again referred to its decision in *Heller I* where it "rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing."[46]

The Court repeated *Heller I*'s list of permissible regulations in the face of "doomsday proclamations" and reminded that "incorporation does not imperil every law regulating firearms."[47] However, it also repeated *Heller I*'s holding that "'[t]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.'"[48]

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39. "After the Supreme Court held that the second amendment [sic] applies to the municipalities' ordinances, defendants' position was untenable; neither Chicago nor Oak Park contends that the ordinance in force in 2008 could have been sustained under *Heller*'s substantive standards." Nat'l Rifle Ass'n of America v. City of Chicago, 646 F.3d 992, 994 (7th Cir. 2011).

40. *McDonald*, 130 S. Ct. at 3036.

41. *Id.*

42. *Id.*

43. *Id.* at 3036 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)), 3042.

44. *Id.* at 3043, 3044.

45. *Id.* at 3045.

46. *Id.* at 3047.

47. *Id.*

48. *Id.* at 3050 (quoting District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008)).

Justice Thomas concurred "that the Fourteenth Amendment makes the right to keep and bear arms set forth in the Second Amendment fully applicable to the States."[49] However, he could not "agree that it is enforceable against the States through a clause that speaks only to process. Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause."[50]

III. MISAPPLICATION OF *HELLER I* AND *MCDONALD* BY INFERIOR COURTS

An example of the misapplication of *Heller I* and *McDonald* is lower courts applying intermediate scrutiny to cases where the person making the Second Amendment challenge does not fall into one of the high-risk classes, such as the mentally ill, subject to regulation that the Supreme Court labeled presumptively lawful. To the contrary, the challengers are law-abiding persons. Under intermediate scrutiny, the question becomes whether there is a reasonable fit between the challenged law and a substantial government objective.[51] Thus, the government bears the burden of demonstrating (1) that it has an important governmental end or interest and (2) that the end or interest is substantially served by enforcement of the law.[52]

New York City singled out the Second Amendment for especially unfavorable treatment, a notion that the Supreme Court rejected in *McDonald*.[53] In *Kwong v. Bloomberg*,[54] a court upheld a New York City fee to possess a handgun in the home;[55] the fee is the highest in the state and in the nation.[56] New York City imposes a $340 application fee to obtain a residential handgun license that is valid for three years.[57] There is an additional $94.25 fee for fingerprinting and background checks conducted by the New York State Division of Criminal Justice Services.[58] The court questioned whether the fee was an appreciable restraint, but determined that even if it was, the

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49. *Id.* at 3058 (Thomas, J., concurring) (internal quotation marks omitted).

50. *Id.* at 3059.

51. United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010).

52. *Id.*

53. *McDonald*, 130 S. Ct. at 3043.

54. 723 F.3d 160 (2d Cir. 2013).

55. *Id.* at 161.

56. Brief for Appellants at 53–55, *Kwong*, 723 F.3d 160 (No. 12-1578); *see Kwong*, 723 F.3d at 161, 166.

57. *Id.* at 161.

58. *Id.* at 162 n.5.

law survives intermediate scrutiny and that such fees are comparable to fees charged to hold a rally or parade.[59] The concurring opinion agreed that "although the fee constitutes a substantial burden on the fundamental Second Amendment right to possess a handgun in the home for self-defense, and thereby necessitates intermediate scrutiny, the statute survives such heightened review."[60]

Judicial notice may be taken that rallies and parades do not happen in the home. Therefore, fees for such activities are ill-fitting and not compatible authority to uphold a substantial burden on handgun possession in the home. Possession of a firearm in the home is the core right of the Second Amendment. *Kwong* is a disturbing approval of a substantial fee barrier that discourages and prevents the enjoyment of a core constitutional right. This serves to minimize the number of persons who possess handguns in their homes; however, reducing the numbers of individuals who possess handguns in their homes is not a permissible governmental interest in the wake of *Heller I* and *McDonald*. The imposition of a license and a steep fee to keep a firearm in the home is not a long-standing regulation.[61] The plaintiffs are law-abiding persons, and a fundamental right is involved. The court should have subjected the law to strict scrutiny. Under strict scrutiny, the government must prove that its law furthers a compelling state interest and that the law is narrowly tailored to achieve that interest. A narrowly tailored alternative exists to satisfy the state's compelling interest to deny a license to such persons as the mentally ill. As previously noted, the additional $94.25 fee is for fingerprinting and background checks conducted by the New York State Division of Criminal Justice Services. This background check satisfies the compelling interest of the state.[62]

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59. *Id.* at 165–68.

60. *Id.* at 172 (Walker, J., concurring) (citations omitted).

61. *See* Silvester v. Harris, No. 1:11-CV-2137 AWI SAB, 2013 WL 6415670, at *5 n.3 (E.D. Cal. Dec. 9, 2013) ("The Court notes that Harris has not refuted Plaintiffs' assertion that waiting periods of any duration before taking possession of a firearm were uncommon in both 1791 and 1868."). The waiting period for a license to possess a pistol in the home or to carry is up to six months. N.Y. PENAL LAW § 400.00 subd. 4-a (McKinney 2008).

62. The Fifth Circuit has held that "[a] law that burdens the core of the Second Amendment guarantee—for example, 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home,'—would trigger strict scrutiny." Nat'l Rifle Ass'n of America v. McCraw, 719 F.3d 338, 347 (5th Cir. 2013) (citation omitted). The *McCraw* court noted that in Texas the license fee to bear a handgun in public is $140. *Id.* at 342. A LEXIS search reveals that no state, other than New

National Rifle Ass'n of America v. Bureau of Alcohol, Tobacco, Firearms and Explosives[63] upheld a federal law that denies law-abiding persons over the age of eighteen but under twenty-one the right to purchase a handgun or handgun ammunition from a federally licensed firearm dealer.[64] The court noted that a two-step inquiry has emerged as the prevailing approach: (1) determine whether the challenged law infringes on conduct that falls within the scope of the Second Amendment; (2) if the answer to step one is "yes," determine whether to apply intermediate or strict scrutiny to the law, and then determine whether the law survives the proper level of scrutiny.[65] The court held that even if the asserted conduct is protected by the Second Amendment, the law survives intermediate scrutiny.[66] The court favorably compared the challenged law to laws banning the possession of firearms by felons and the mentally ill.[67]

York, imposes a $340 fee plus $94.25 for fingerprinting and a background check to exercise the core right to keep a handgun in the home. The fundamental right to keep and bear arms requires strict scrutiny rather than intermediate scrutiny. State v. Jorgenson, 312 P.3d 960, 974–75 (Wash. 2013) (Johnson, J., dissenting).

63. 700 F.3d 185, 211 (5th Cir. 2012).

64. Right to arms includes sale and purchase. United States v. Marzzarella, 614 F.3d 85, 92 n.8 (3d Cir. 2010); Kole v. Village of Norridge, 941 F. Supp. 2d 933, 943 (N.D. Ill. 2013). *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 178 (1871), held that:

> [T]he right to keep arms for this purpose involves the right to practice their use[.] . . .
>
> The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair.

Andrews was cited several times in *Heller I.* District of Columbia v. Heller, 554 U.S. 570, 608, 614, 629 (2008). The Second Amendment also protects ammunition, Herrington v. United States, 6 A.3d 1237, 1243 (D.C. 2010), and target practice, Ezell v. City of Chicago, 651 F.3d 684, 710–11 (7th Cir. 2011).

65. The two-step analysis appears to be the majority rule in the circuits. *See, e.g.*, United States v. Chovan, 735 F.3d 1127, 1134–36, (9th Cir. 2013).

66. *Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d at 211.

67. *Id.* at 196, 203. However, courts have stated:

> [W]e do not hold that any person committing any crime automatically loses the protection of the Second Amendment. The *Heller* Court's holding that defines the core right to bear arms by law-abiding, responsible citizens does not preclude some future determination that persons who commit some offenses might nonetheless remain in the protected class of "law-abiding, responsible" persons.

United States v. Carpio-Leon, 701 F.3d 974, 981 (4th Cir. 2012) (upholding the

Comparing young adults to felons and the mentally ill is unfair and irrational.

The petition for rehearing in *National Rifle Ass'n of America v. Bureau of Alcohol, Tobacco, Firearms and Explosives* was denied by an eight-to-seven vote. The dissent warned that "the implications of the decision—that a whole class of adult citizens, who are not as a class felons or mentally ill, can have its constitutional rights truncated because Congress considers the class 'irresponsible'—are far-reaching."[68] The dissent argued:

> First, the panel's treatment of pertinent history does not do justice to *Heller's* tailored approach toward historical sources. A methodology that more closely followed *Heller* would readily lead to the conclusion that 18- to 20-year old individuals share in the core right to keep and bear arms under the Second Amendment. Second, because they are partakers of this core right, the level of scrutiny required to assess the federal purchase/sales restrictions must be higher than that applied by the panel. Finally, even under intermediate scrutiny, the purchase restrictions are unconstitutional.[69]

The dissent also reminded that "[n]ever in the modern era has the Supreme Court held that a fundamental constitutional right could be abridged for a law-abiding adult class of citizens."[70]

Law-abiding persons making a Second Amendment challenge to laws banning the carrying of arms openly or concealed outside the home without obtaining a discretionary permit or license have fared even worse. Most courts have held that the right to bear arms

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statute governing possession of a firearm by an illegal alien); *see also* Gowder v. City of Chicago, 923 F. Supp. 2d 1110, 1125–26 (N.D. Ill. 2012) (holding that the arms ban on all misdemeanants infringes on Second Amendment rights). Additionally, as-applied challenges are available to persons convicted of a felony or violent misdemeanor. *See* Schrader v. Holder, 704 F.3d 980, 989 (D.C. Cir. 2013); United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010).

68. Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 714 F.3d 334, 335 (5th Cir. 2013).

69. *Id.* at 336. Subjecting law-abiding gun owners to vicious stereotypes is nothing new, and commentators have condemned it. Anthony J. Dennis, *Clearing the Smoke From the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57, 61–64 (1995); Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 72 & n.227 (1992); Douglas Laycock, *Vicious Stereotypes in Polite Society*, 8 CONST. COMMENT. 395, 397–98 (1991); L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1376–77 (1997).

70. *Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 714 F.3d at 336.

outside the home is not supported by *Heller I* and *McDonald*, and even if it is supported, intermediate scrutiny applies and the issuance of a permit or license is left to the discretion of the issuing official.[71] Consequently, the Second Amendment's right to "bear arms" has been judicially repealed or reduced from a constitutional right to an administrative privilege.[72]

The following types of decisions have been criticized: those that (1) require a person to show a special need for self-defense distinguishable from that of the population at large; (2) hold that the Second Amendment is confined to the home; (3) hold that such laws are longstanding regulations exempt from Second Amendment scrutiny; (4) fail to distinguish open carrying from concealed carrying of arms; and (5) misapply intermediate scrutiny.[73] One court bluntly criticized the judicial opposition to the right to bear arms:

> The fact that courts may be reluctant to recognize the protection of the Second Amendment outside the home says more about the courts than the Second Amendment. Limiting this fundamental right to the home would be akin to limiting the protection of First Amendment freedom of speech to political speech or college campuses.[74]

Another court held that "[a]lthough considerable uncertainty exists regarding the scope of the Second Amendment right to keep and bear arms, it undoubtedly is not limited to the confines of the home."[75]

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71. Drake v. Filko, 724 F.3d 426, 431–32 (3rd Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 878–81 (4th Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 98–99 (2nd Cir. 2012) (law is a "moderate approach" because applicant has chance to prove "an actual and articulable—rather than merely speculative or specious—need for self-defense"); Williams v. State, 10 A.3d 1167, 1177 (Md. 2010) ("If the Supreme Court, in this dicta, meant its holding to extend beyond home possession, it will need to say so more plainly.").

72. Applying strict scrutiny, a law that bans concealed carrying without a license and transporting a loaded firearm in a vehicle without a license is narrowly tailored and is constitutional because of the compelling interest of the state. *Cf.* Commonwealth v. McKown, 79 A.3d 678 (Pa. Super. Ct. 2013) (stating that a license is not needed for open carrying and transporting unloaded in a vehicle).

73. *Drake*, 724 F.3d at 440–42 (Hardiman, J., dissenting).

74. United States v. Weaver, Criminal No. 2:09-cr-00222, 2012 WL 727488, at *12 n.7 (S.D. W. Va. March 6, 2012).

75. Bateman v. Perdue, 881 F. Supp. 2d 709, 714 (E.D. N.C. 2012).

Today, only eight states have laws that require the showing of a special need for a permit or license to carry a firearm.[76] Therefore, such laws are not common in the nation as a whole. *Heller I* and *McDonald* apply to the whole nation without exception. Thus, courts should find such outlier statutes to be infringements of the Second Amendment's guarantee to bear arms.[77]

A minority of courts have held that the Second Amendment guarantees a right to bear arms outside the home. Consequently, the Illinois Supreme Court and the Seventh Circuit struck down an Illinois statute banning the carrying of loaded firearms outside the home.[78] The Seventh Circuit observed that "*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home."[79] The example from *Heller* that concealed carrying laws were upheld logically means that all carrying cannot be banned and that open carrying of a firearm is within the scope of the Second Amendment's protection. One court held:

> [O]penly carrying a firearm outside the home is a liberty protected by the Second Amendment. . . . The parking lot adjacent to the building is not a sensitive place and the

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76. *Drake*, 724 F.3d at 450 n.16 (Hardiman, J., dissenting).

77. Like the Supreme Court, inferior courts can learn from state courts. Self-defense is a constitutionally proper reason for obtaining a license to carry a handgun. Schubert v. DeBard, 398 N.E.2d 1339, 1341 (Ind. Ct. App. 1980). The right to bear arms outside of the home belongs to the law-abiding. Hertz v. Bennett, 751 S.E.2d 90, 95 (Ga. 2013) ("Given this criminal history, we hold that the probate judge did not violate Hertz's Second Amendment right to bear arms by denying his application for a license to possess a weapon in public."). The concurring opinion in *Hertz* states:

> [N]o one should misunderstand the Court to suggest that the constitutional guarantees extend only as far as the home. To the contrary, the Court today applies intermediate scrutiny to OCGA § 16-11-129, and in so doing, it acknowledges that the constitutional guarantees secure a right to carry firearms in public places, even if that right might be more limited than the right to keep firearms in the home.

Id. at 96 (Blackwell, J., concurring). Many courts have voided restrictions on carrying arms. *See In re* Brickey, 70 P. 609 (Idaho 1902); State v. Kerner, 107 S.E. 222 (N.C. 1921); Glasscock v. City of Chattanooga, 11 S.W.2d 678 (Tenn. 1928); State v. Rosenthal, 55 A. 610 (Vt. 1903); State *ex rel.* City of Princeton v. Buckner, 377 S.E.2d 139 (W.Va. 1988); City of Las Vegas v. Moberg, 485 P.2d 737 (N.M. Ct. App. 1971); Doe v. Wilmington Housing Authority, 2014 Del. LEXIS 122 (March 18, 2014).

78. People v. Aguilar, 2 N.E.3d 321 (Ill. 2013); Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012). *Accord* Peruta v. County of San Diego, 742 F.3d 1144 (9th Cir. 2014).

79. *Moore*, 702 F.3d at 935–36.

> Defendants have failed to show that an absolute ban on firearms is substantially related to their important public safety objective. The public interest in safety and Mr. Bonidy's liberty can be accommodated by modifying the Regulation to permit Mr. Bonidy to "have ready access to essential postal services" provided by the Avon Post Office while also exercising his right to self-defense.[80]

Another court observed that the open carrying of an electronic self-defense arm (stun gun or Taser) is protected by Second Amendment.[81]

Then there is the question of which arms, other than handguns, are protected. Ignored is *Heller I*'s holding that

> [s]ome have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.[82]

Not only are lower courts ignoring this holding, but they usually are applying a diluted form of intermediate scrutiny.[83]

An example of such resistance to the Supreme Court's *Heller I* decision is the subsequent case of *Heller v. District of Columbia*

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80. Bonidy v. U.S. Postal Serv., No. 10-cv-02408-RPM, 2013 WL 3228130, at *6 (D. Colo. July 9, 2013); *see also* Peterson v. Martinez, 707 F.3d 1197, 1209 (10th Cir. 2013) (stating that the Second Amendment does not protect concealed carry, and thus a nonresident is not entitled to a concealed carry license but a nonresident can carry openly).

81. People v. Yanna, 824 N.W.2d 241, 243 (Mich. Ct. App. 2012); *see also* State v. Kessler, 614 P.2d 94, 100 (Or. 1980) (holding that the defendant's possession of a billy club in his home was protected by the right to bear arms provision of the Oregon Constitution); David B. Kopel, Clayton E. Cramer & Joseph Edward Olson, *Knives and the Second Amendment*, 47 U. MICH. J.L. REFORM 167 (2013) (discussing how few U.S. households possess firearms, but almost every U.S. household possesses several knives).

82. District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (citations omitted).

83. Some courts apply intermediate scrutiny that is not rational basis in disguise. One court noted that the government cannot justify infringing on a defendant's Second Amendment right to possess a handgun in his home simply because a defendant was intoxicated in the general vicinity of the firearm. People v. DeRoche, 829 N.W.2d 891, 897 (Mich. Ct. App. 2013).

("*Heller II*").[84] *Heller II* involved a Second Amendment challenge to statutes that included a ban on certain semiautomatic firearms and a ban on ammunition magazines having a capacity of more than ten rounds of ammunition.[85] This statute is an example of applying the label "assault firearm" or "assault weapon" to the class of firearms targeted for banning. However, according to a report from an organization opposed to the civil right to keep and bear arms, these labels are based on the exploitation of confusion.[86] "The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons."[87]

It is helpful to review how semiautomatic and fully automatic firearms are defined by experts so as to avoid being confused by deceptive or emotionally charged labels.[88]

An automatic firearm is a firearm design that feeds cartridges, fires, and ejects cartridge cases as long as the trigger is fully depressed and there are cartridges available in the feed system. It is also called a full auto or machine gun.[89] A semiautomatic firearm is a repeating firearm requiring a separate pull of the trigger for each shot fired; it uses the energy of discharge to perform a portion of the

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84. 670 F.3d 1244 (D.C. Cir. 2011).

85. *Id.* at 1249.

86. JOSH SUGARMANN, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA 26 (1988), *available at* http://www.vpc.org/studies/awaconc.htm.

87. *Id.* The pejorative term "assault weapon" and the confusion over firearms were exploited to enact legislation in California. Bruce H. Kobayashi & Joseph E. Olson, In Re 101 California Street*: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of "Assault Weapons,"* 8 STAN. L. & POL'Y REV. 41, 45–47 (1997). Opponents of gun ownership also exploit this. "Powerful and emotionally-engaging images are vitally important reinforcers of strong messages. For example, intimidating images of military-style weapons help bring to life the point that we are dealing with a different situation than in earlier times." FRANK O'BRIEN, JOHN BEFFINGER, MATTHEW KOHUT & AL QUINLAN, PREVENTING GUN VIOLENCE THROUGH EFFECTIVE MESSAGING 5 (2012). This booklet provides "language dos and don'ts" and advises to focus on emotion. *Id.* at 6, 9.

88. Confusing a fully automatic firearm with a semiautomatic firearm is not always confined to the public at large and courts. "The International Association of Chiefs of Police recently labeled as fully-automatic a firearm which FBI sources identified as semi-automatic. Unfortunately, this misinformation was contained in a letter sent to the U.S. Congress." James Jay Baker, *Assault on Semi-Autos*, AMERICAN RIFLEMAN, Apr. 1987, at 44.

89. GLOSSARY OF THE ASSOCIATION OF FIREARM AND TOOL MARK EXAMINERS 2 (1st ed. 1980).

operating or firing cycle (usually the loading portion).[90] The military defines assault rifles as "short, compact, selective-fire weapons that fire a cartridge intermediate in power between submachinegun and rifle cartridges. Assault rifles have mild recoil characteristics and, because of this, are capable of delivering effective full automatic fire at ranges up to 300 meters."[91] This is in contradistinction to a submachinegun, which is a full automatic or selective fire firearm chambered for a pistol cartridge, and an automatic rifle, which is a full automatic or selective fire rifle chambered for a full power rifle cartridge.[92] Machine pistols differ from submachine guns only in size; they are quite compact.[93]

In *Heller II*, the court concluded that semiautomatic rifles and high-capacity magazines are in "common use."[94] However, it did not decide whether the prohibition of certain semiautomatic rifles and magazines holding more than ten rounds "meaningfully affect the right to keep and bear arms."[95] The majority stated, "[w]e need not resolve that question, however, because even assuming they do impinge upon the right protected by the Second Amendment, we think intermediate scrutiny is the appropriate standard of review and the prohibitions survive that standard."[96] Thus, the court upheld a total ban on the possession of commonly possessed firearms and magazines by law-abiding persons in their homes.[97] It even questioned whether semiautomatic pistols are protected by the Supreme Court's *Heller I* decision.[98]

Semiautomatic firearms are commonly possessed by law-abiding people. For example, handgun manufacturing statistics for 1987 to 2010 from the Bureau of Alcohol, Tobacco, Firearms and Explosives show that the semiautomatic handgun is the most commonly

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90. *Id.* at 3.

91. HAROLD E. JOHNSON, DEFENSE INTELLIGENCE AGENCY, SMALL ARMS IDENTIFICATION AND OPERATION GUIDE—EURASIAN COMMUNIST COUNTRIES 105 (1976); *see, e.g.*, Keith R. Fafarman, *State Assault Rifle Bans and the Militia Clauses of the U.S. Constitution*, 67 IND. L.J. 187 (1991); Eric C. Morgan, *Assault Rifle Legislation: Unwise and Unconstitutional*, 17 AM. J. CRIM. L. 143 (1990); *see also* GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 65 (1991) (discussing pro-control groups' insistence on controlling "various special weapon categories").

92. IAN V. HOGG & JOHN WEEKS, MILITARY SMALL ARMS OF THE 20TH CENTURY 13, 69, 78, 158–59 (5th ed. 1985).

93. *Id.* at 11, 31, 40, 53, 67.

94. Heller v. District of Columbia, 670 F.3d 1244, 1261 (D.C. Cir. 2011).

95. *Id.*

96. *Id.*

97. *Id.* at 1247–48.

98. *Id.* at 1267.

manufactured handgun in the United States.[99] Semiautomatic firearms are not machineguns and they are commonly possessed and used for lawful purposes such as self-defense. Consequently, semiautomatic firearms are protected by the "common use test" enunciated in *Heller I*. *Heller I* forbids banning commonly possessed firearms to achieve the goal of not making them commonly possessed. *Heller* also protects modern firearms.

The majority in *Heller II* confused record keeping requirements at the point of sale of a pistol and the requirement that a pistol, in order to be lawfully possessed, must be registered to the possessor of the pistol.[100] New York serves as an example for the latter. In New York, the pistol license contains a description of the license holder and a description of the pistol, such as "calibre, make, model, manufacturer's name and serial number."[101] There is no evidence that pistol registration is longstanding. It is an outlier law that cannot serve as a justification for rejecting a constitutional challenge.[102]

The dissenting opinion in *Heller II* noted that the Supreme Court rejected Justice Breyer's form of intermediate scrutiny, but that the majority employed it to uphold the challenged law. The dissent stated, "*Heller* was resolved in favor of categoricalism—with the categories defined by text, history, and tradition—and against balancing tests such as strict or intermediate scrutiny or reasonableness."[103] The dissent also noted:

> No court of appeals decision since *Heller* has applied intermediate scrutiny to a ban on a class of arms that have not traditionally been banned and are in common use. A ban on a class of arms is not an 'incidental' regulation. It is equivalent to a ban on a category of speech. Such restrictions on core enumerated constitutional protections are *not* subjected to mere intermediate scrutiny review. The majority opinion here is in uncharted territory in suggesting that intermediate scrutiny can apply to an outright ban on

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99. U.S. DEP'T OF JUSTICE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FIREARMS COMMERCE IN UNITED STATES: ANNUAL STATISTICAL UPDATE 1 (2012), *available at* http://www.atf.gov/files/publications/firearms/050412-firearms-commerce-in-the-us-annual-statistical-update-2012.pdf.

100. *Heller II*, 670 F.3d at 1253–54.

101. N.Y. PENAL LAW § 400.00(7) (McKinney 2008).

102. *Heller II*, 670 F.3d at 1292 (Kavanaugh, J., dissenting).

103. *Id.* at 1282.

possession of a class of weapons that have not traditionally been banned.[104]

Deceptive and emotionally charged labels have also led state courts to flawed results. *People v. Zondorak* held that the ban on specified semi-automatic firearms labeled "assault weapons" does not violate the Second Amendment.[105] It claimed that "assault weapons are at least as dangerous and unusual as the short-barreled shotgun" previously found to be "outside the scope of the Second Amendment's guarantee."[106] Because the assault weapon law does not impose a burden on conduct falling within the scope of the Second Amendment's guarantee, it was not necessary to analyze the validity of the law under either strict scrutiny or intermediate scrutiny. It also was not necessary to make an exception for possession of assault weapons within the homes of otherwise law-abiding citizens for self-defense.[107] Neither the place in which an arm is stored nor the purposes for which it might be used is relevant when the arm falls outside the class of arms that is entitled to Second Amendment protections. The fact that some firearm models with characteristics similar to the defendant's weapon may have escaped the assault weapons ban did not invalidate the ban. The conclusory opinion failed to analyze so-called "assault weapons." It also failed to justify its conclusion that assault weapons were like machineguns and sawed-off shotguns. A detailed analysis would have revealed that the label "assault weapon" is irrational and vague.[108] In one pre-*Heller I* and pre-*McDonald* case, the court approved a conventional appearance versus menacing appearance test in a so-called "assault weapon" case.[109] Thus, in the eyes of

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104. *Id.* at 1285.

105. 220 Cal. App. 4th 829, 831 (Cal. Ct. App. Oct. 21, 2013).

106. *Id.* at 836 (internal quotation marks omitted).

107. *Cf.* N.Y. State Rifle and Pistol Ass'n v. Cuomo, No. 13-CV-291S, 2013 WL 6909955, at *1–2 (W.D.N.Y. Dec. 31, 2013) (discussing the New York Secure Ammunition and Firearms Enforcement Act of 2013 and the constitutionality of its amendments to New York law).

108. Peoples Rights Org. v. Columbus, 152 F.3d 522, 536 (6th Cir. 1998) (holding that the definition of assault weapon was irrational and unconstitutionally vague); Springfield Armory v. City of Columbus, 29 F.3d 250, 252 (6th Cir. 1994) (holding that because of the definition of assault weapon, a Columbus, Ohio, ordinance was irrational and impossible to apply consistently); *see also* David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381, 386 (1994) (examining the unique physical characteristics of assault weapons and analyzing "whether any of them creates a classification that can survive meaningful rational basis scrutiny").

109. Harrott v. Cnty. of Kings, 25 P.3d 649, 653 (Cal. 2001).

judicial beholders, is a firearm banned if it is ugly but constitutionally protected if it is beautiful or not menacing in appearance?

IV. THE IMPACT OF SCHOLARSHIP ON THE COURTS

For a court to find scholarship convincing, the scholarship must rest on a solid foundation. That foundation was built by the framers of the Second and Fourteenth Amendments, by case law that was faithful to that intent, and by scholarship. The result was *Heller I* and *McDonald*.

In 1846, the Supreme Court of Georgia considered the right to keep and bear arms so fundamental that, despite the absence of a right to bear arms in Georgia's constitution, the court extended the Second Amendment to the state. The court voided a statute forbidding the sale, keeping, or having about the person a pistol, "save such pistols as are known and used as horseman's pistols."[110] In regard to this, the court stated:

> It is true, that these adjudications are all made on clauses in the State Constitutions; but these instruments confer no *new rights* on the people which did not belong to them before. . . .
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> . . . .
>
> The language of the *second amendment* [sic] is broad enough to embrace both Federal and State governments—nor is there anything in its terms which restricts its meaning. . . . [D]oes it follow that because the people refused to delegate to the general government the power to take from them the right to keep and bear arms, that they designed to rest it in the State governments? Is this a right reserved to the *States* or to *themselves*? Is it not an unalienable right, which lies at the bottom of every free government? We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures. . . .
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> . . . .
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> . . . The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to

110. Nunn v. State, 1 Ga. 243, 246 (Ga. 1846) (internal quotation marks omitted).

> be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of free State.[111]

Although this decision contravened the United States Supreme Court's holding that the Bill of Rights restrained only the national government, the Georgia Supreme Court's view would ultimately prevail in the language and logic of the Fourteenth Amendment. The opinion should be given great weight because its author, Chief Justice Joseph Henry Lumpkin, started practicing law at a time when several of the Framers were still alive, and he grew up in a prominent Georgia family surrounded by members of the generation that conceived of and drafted the United States Constitution and its Bill of Rights. He was known as a reformer.[112]

State courts interpreted the right to bear arms for the "common defense" as an individual right. Writing for the court in a libel case, Massachusetts Supreme Court Chief Justice Parker wrote: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in cases of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction."[113] The analogy makes no sense if firearms could not be used for any individual purpose at all.

The laws under attack in *Heller I* and *McDonald* were enacted because the courts refused to recognize an individual constitutional right to keep and bear arms. They ignored history and early case law and pronounced the Second Amendment extinct. However, by 1995, scholars adopted a "Standard Model" when interpreting the Second Amendment; it meant that an individual has a right to keep and bear arms.[114]

Joyce Lee Malcolm, historian, noted:

> The Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual's right to have arms for self-defence and self-preservation. . . .

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111. *Id.* at 249–51. Additionally, women did not serve in the militia, but women are part of the "people" in the Second Amendment.

112. Judge Lumpkin In Memoriam, 36 Ga. 19, 31 (Ga. 1867); *see also* AMERICAN HISTORICAL SOCIETY, STORY OF GEORGIA 243 (1938); 6 DICTIONARY OF AMERICAN BIOGRAPHY 502 (Dumas Malone ed., 1933).

113. Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313–14 (Mass. 1825). The right to keep arms for the common defense "is a private individual right, guaranteed to the citizen, not the soldier." Andrews v. State, 50 Tenn. (3 Heisk.) 165, 182 (Tenn. 1871). *Blanding* and *Andrews* were both cited in *Heller I.*

114. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463 (1995).

> . . . .
>
> The second and related objective concerned the militia, and it is the coupling of these two objectives that has caused the most confusion. The customary American militia necessitated an armed public . . .
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> . . . .
>
> The clause concerning the militia was not intended to limit ownership of arms to militia members, or return control of the militia to the states, but rather to express the preference for a militia over a standing army.[115]

Pulitzer Prize winning historian Leonard W. Levy explained thusly:

> Believing that the [second] amendment does not authorize an individual's right to keep and bear arms is wrong. The right to bear arms is an individual right. The military connotation of bearing arms does not necessarily determine the meaning of a right to bear arms. If all it meant was the right to be a soldier or serve in the military, whether in the militia or the army, it would hardly be a cherished right and would never have reached constitutional status in the Bill of Rights. The "right" to be a soldier does not make much sense. Life in the military is dangerous and lonely, and a constitutionally protected claim or entitlement to serve in uniform does not have to exist in order for individuals to enlist if they so choose. Moreover, the right to bear arms does not necessarily have a military connotation, because Pennsylvania, whose constitution of 1776 first used the phrase "the right to bear arms," did not even have a state militia. In Pennsylvania, therefore, the right to bear arms was devoid of military significance. Moreover, such significance need not necessarily be inferred even with respect to states that had militias. Bearing arms could mean having arms. Indeed, Blackstone's *Commentaries* spoke expressly of the "right to have arms." An individual could bear arms without being a soldier or militiaman.[116]

Laurence H. Tribe, the influential modern liberal constitutional law expert at Harvard Law School, concluded:

> Perhaps the most accurate conclusion one can reach with any confidence is that the core meaning of the Second

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115. JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162–63 (1994).

116. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 134–35 (1999).

> Amendment is a populist/republican/federalism one: Its central object is to arm "We the People" so that ordinary citizens can participate in the collective defense of their community and their state. But it does so not through directly protecting a right on the part of states or other collectivities, assertable by them against the federal government, to arm the populace as they see fit. Rather, the amendment achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes—not a right to hunt for game, quite clearly, and certainly not a right to employ firearms to commit aggressive acts against other persons—a right that directly limits action by Congress or by the Executive Branch and may well, in addition, be among the privileges or immunities of United States citizens protected by § 1 of the Fourteenth Amendment against state or local government action.[117]

In view of history, early case law, and scholarship, the concerted effort to nullify an explicit constitutional right was finally rejected by the Supreme Court in *Heller I* and *McDonald*.

V. LEGISLATIVE SOLUTIONS

Congress has the power to enact legislation to protect constitutional rights. The Necessary and Proper Clause in Article I, Section 8 of the Constitution gives Congress the power to enforce the enumerated powers listed in Article I, Section 8, and the enforcement clause of the Fourteenth Amendment grants Congress this power. Congress exercised its powers to protect the Second Amendment and other rights in the Firearms Owners' Protection Act:

> (b) Congressional Findings.—The Congress finds that—
> (1) the rights of citizens—

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117. LAURENCE H. TRIBE, I AMERICAN CONSTITUTIONAL LAW 901–02 n.221 (3d ed. 2000); *see also* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876 69 (1998) (discussing how during Reconstruction, debates raged over whether "the right to keep and bear arms" was "the core guarantee of the Second Amendment" as a personal right).

> (A) to keep and bear arms under the second amendment to the United States Constitution;
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> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
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> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
>
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments;
>
> require additional legislation to correct existing firearms statutes and enforcement policies; and
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> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on lawabiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by lawabiding citizens for lawful purposes."[118]

In the Firearms Owners' Protection Act, Congress protected the transportation of unloaded firearms, notwithstanding state and local laws.[119] It also restricted the establishment of a firearms registration system.[120] Congress could enact further protective legislation prohibiting states from imposing high fees to acquire, possess, and bear firearms. High fees are not an incidental burden; rather, they prevent the exercise of a fundamental right. *Heller I* already teaches that the right is not limited to the technology of the eighteenth century, a lesson that is lost on the courts. Thus, Congress could also bar the banning of modern firearms by the legislative or executive expedient of labeling a firearm an assault firearm or assault weapon. A semiautomatic firearm is not a machinegun, no matter what the outward appearance may be.[121]

The states have also protected the right to arms through legislation.

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118. Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (codified as amended at 18 U.S.C. § 921 (1986)). The findings are in § 921 note. Congress recently also has acted to protect First Amendment rights. *See* Freedom to Display the American Flag Act of 2005, 109 Pub. L. No. 243, 120 Stat. 572 (2006).

119. 18 U.S.C. § 926A (2013).

120. 18 U.S.C. § 926(a) (2013).

121. Machineguns, sawed off shotguns, destructive devices, and similar arms already are covered by 26 U.S.C. § 5801 (2006).

> It is a personal, individual liberty, entitled to protection like other constitutional rights. Like any civil right established in the state or federal constitutions, the legislative branch may choose to pass laws designed to facilitate its exercise or protect against its infringement, which Florida's legislature has done repeatedly over the past fifty years on the specific topic at issue: safely-secured firearms in motor vehicles.[122]

This protection may take the form of imposing strict scrutiny in construing a statute.[123] Protection of the right to bear arms may also be achieved by amending the state guarantee to arms so that strict scrutiny is imposed.[124] A reason for doing this is the fear that a subsequent United States Supreme Court decision will overturn *Heller I* and *McDonald*.[125] This is a well-supported fear. One sitting Supreme Court Justice has said that "the disappearance of that purpose [the need for a militia] eliminates the function of the Second Amendment."[126] In other words, the command that "the right of the people to keep and bear arms shall not be infringed" would be judicially repealed.[127]

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122. Florida Carry, Inc. v. Univ. of North Florida, No. 1D12-2174, 2013 WL 6480789, at *15 (Fla. Dist. Ct. App. Dec. 10, 2013) (Makar, J., concurring) (footnotes omitted).

123. MINN. STAT. ANN. § 624.714, Subd. 22 (West 2009) ("This section may be cited as the Minnesota Citizens' Personal Protection Act of 2003. The legislature of the state of Minnesota recognizes and declares that the second amendment of the United States Constitution guarantees the fundamental, individual right to keep and bear arms. The provisions of this section are declared to be necessary to accomplish compelling state interests in regulation of those rights. The terms of this section must be construed according to the compelling state interest test.").

124. State v. Draughter, No. 2013-KA-0914, 2013 WL 6474419, *1 (La. Dec. 10, 2013).

125. *Id.* at *6.

126. The Takeaway, *Ginsburg draws connection between immigration reform, fair pay for women*, PUBLIC RADIO INTERNATIONAL (September 18, 2013), http://www.pri.org/stories/2013-09-18/ginsburg-draws-connection-between-immigration-reform-fair-pay-women.

127. Also, academics have been criticized for flawed attempts to reduce the Second Amendment into something that has no place in modern times and protects no individual rights. *See, e.g.*, Stephen P. Halbrook, *St. George Tucker's Second Amendment: Deconstructing "The True Palladium of Liberty,"* 3 TENN. J.L. & POL'Y 120 (2007); David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. 1527 (2009); David T. Hardy, 15 WM. & MARY BILL RTS. J. 1237 (2007) (reviewing SAUL CORNELL, A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGIN OF GUN CONTROL IN AMERICA (2006)); David B. Kopel & Clayton E. Cramer, *The Keystone of the Second*

VI. THE PASSAGE OF TIME IS LIKELY TO PRODUCE A BENCH LESS LIKELY TO TREAT THE SECOND AMENDMENT AS A SECOND-CLASS RIGHT

Generational changes on the bench often lead to a robust recognition of rights. The United States Supreme Court's "separate but equal" interpretation of the Fourteenth Amendment applied to railroad cars, to schools, voting rights, and drinking fountains.[128] Fifty-eight years later, that tortured interpretation of the Fourteenth Amendment was unanimously discarded by the Supreme Court.[129]

What happened? Basically, the national culture changed and grew less and less willing to grant traditional racist and discriminatory practices the sanction of national law and policy. Those practices lost the kind of official support that they had garnered in past generations. This change in national culture was reflected in the Supreme Court's decision.[130] In turn, lower courts stepped in and exercised supervisory powers to ensure compliance.[131]

The impact of time and culture is not restricted to race. It also applies to private sexual behavior among consenting adults. Sodomy was a capital offense in North Carolina until 1869 and in South Carolina until 1873.[132] The first attempt to challenge such laws before the Supreme Court failed in 1986.[133] The second attempt, seventeen years later, succeeded.[134]

Amendment: The Quakers, the Pennsylvania Constitution, and the Flawed Scholarship of Nathan Kozuskanich, 19 WIDENER L.J. 277 (2010); Glenn H. Reynolds & Brannon P. Denning, *How to Stop Worrying and Learn to Love the Second Amendment: A Reply to Professor Magarian*, 91 TEX. L. REV. 89 (2013). The worst attack on the individual rights interpretation of the Second Amendment involved an almost unprecedented number of discrepancies, errors, and omissions and caused a scandal. *See* James Lindgren, *Fall from Grace:* Arming America *and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002) (reviewing MICHAEL A. BELLESILES, ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE (2000)).

128. Plessy v. Ferguson, 163 U.S. 537, 544, 550–51 (1896).

129. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

130. ROBERT J. COTTROL, RAYMOND T. DIAMOND, & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE, AND THE CONSTITUTION 100, 237 (2003).

131. *Id.* at 226.

132. Louis Crompton, *Homosexuals and the Death Penalty in Colonial America*, 1 J. HOMOSEXUALITY 277, 287–88 (1976), *available at* http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1061&context=englishfacpubs.

133. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

134. *See* Lawrence v. Texas, 539 U.S. 558, 586 (2003).

One year after the Supreme Court found Texas's sodomy law unconstitutional, the Massachusetts Supreme Court interpreted the state constitution to guarantee the right to same-sex marriage.[135] However, that court does not favor the civil right to keep and bear arms. Instead, that court judicially repealed the right to arms in its state constitution in the year of the Bicentennial[136] —a decision it still supports[137]—and it gives a narrow reading to *Heller I* and *McDonald*.[138] If the Massachusetts type of generational change happens, it would result in the loss of rights.

VII. CONCLUSION

Supreme Court decisions holding that a right is fundamental require obedience by lower courts if the rule of law is to continue to prevail. The Supreme Court rejected a balancing test when determining whether a law infringes the right to keep and bear arms. One would have expected a reconsideration of existing firearms laws to have happened. It has not. Inferior courts have adopted the rejected test, have labeled it intermediate scrutiny, and apply this intermediate scrutiny to all challengers and to all laws being challenged. Consequently, a law-abiding person wishing to exercise the core right to keep a handgun in his or her home is subjected to a six-month waiting period and $434.25 in fees (New York), and courts approved that state's resistance to a Supreme Court mandate. Also, inferior courts have mostly judicially repealed the right "to bear arms" outside the home. The Supreme Court can grant review in another case and reassert its authority to this stubborn resistance. Absent that, there are available legislative fixes, and the passage of time and a change in the culture on the bench may end the resistance to the clear import of two landmark decisions on the right to keep and bear arms.

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135. *See* Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2004).

136. *See* Commonwealth v. Davis, 343 N.E.2d 847, 848–49, 851 (Mass. 1976).

137. *See* Commonwealth v. DePina, 922 N.E.2d 778, 790 n.12 (Mass. 2010).

138. *See generally* Commonwealth v. McGowan, 982 N.E.2d 495 (Mass. 2013) (storage law upheld even when only adults are in home); Chardin v. Police Comm'r of Boston, 989 N.E.2d 392 (Mass. 2013) (holding that juvenile adjudication for a non-violent offense at age 14 is a bar to right to arms for life). However, the Massachusetts Supreme Court unanimously voided life in prison without parole for juvenile murderers. Diatchenko v. Suffolk Dist., 466 Mass. 655, 658–59 (Mass. 2013).

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