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Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms

BRANNON P. DENNING*
GLENN H. REYNOLDS**

INTRODUCTION

Nearly one year after the Supreme Court handed down its decision in *District of Columbia v. Heller*,¹ lower courts have had a number of opportunities to apply it in challenges to a myriad of federal and state gun control laws. In earlier articles, we predicted that the true test of *Heller*'s robustness would be in its reception by the lower courts.² The cool reception to prior "landmark" Court decisions, however, left us skeptical of how large an impact a single Supreme Court decision might make.³ After reviewing lower court interpretations of *Heller*, our skepticism appears to have been warranted: courts have not rushed to overturn the federal gun laws that, hypothetically, were vulnerable following the Court's decision that the Second Amendment guaranteed

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1. 128 S. Ct. 2783 (2008).

2. Glenn H. Reynolds & Brannon P. Denning, *Heller's Future in the Lower Courts*, 102 Nw. U. L. REV. 2035, 2038-43 (2008) [hereinafter Reynolds & Denning, *Heller's Future*]; see also Brannon P. Denning & Glenn H. Reynolds, *Five Takes on District of Columbia v. Heller*, 69 OHIO ST. L.J. 671, 688-93 (2008) [hereinafter Denning & Reynolds, *Five Takes*] (discussing the significance of the lower courts' implementation of *Heller*).

3. See Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1262-99 (2003) [hereinafter Denning & Reynolds, *Rulings and Resistance*]; Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 392-99 [hereinafter Reynolds & Denning, *Lower Court Readings*].

an individual right to private gun ownership. Most courts, dutifully following dicta in *Heller* itself, have concluded that regulations short of absolute bans or that ban ownership for discrete classes of persons pass muster.

But it would be a mistake to conclude that *Heller* changed nothing. While no *federal* gun control laws are in serious danger, numerous state and local laws are—like the District of Columbia’s—more draconian. As those cases wend their way through the lower courts, those state and local governments find themselves legislating in *Heller*’s shadow; some have even preemptively repealed their bans, replacing them with something less stringent.⁴ State courts, moreover, are issuing opinions on the merits of Second Amendment challenges to state and local gun laws *in advance* of a Supreme Court decision formally incorporating the Amendment through the Fourteenth Amendment.⁵ This suggests to us that judges are internalizing the fundamental—or at least the individual—nature of the right to keep and bear arms.

And though the federal courts are not striking down federal laws *directly*, they too are adjudicating in the shadow of *Heller*. Now that the right to keep and bear arms is a recognized individual right, due process protections attach, with implications for at least one existing statute.⁶ In addition, some evidence exists that courts will employ the canon of avoidance in construing gun laws, interpreting statutes so as to avoid conflicts with the Second Amendment.⁷ We describe these developments, and use this preliminary data, to refine our earlier predictions about the likely significance of *Heller* for constitutional law.

In Part I, we briefly review the predictions we hazarded about *Heller*’s likely reception in the lower courts. In Part II, we describe how, in *Heller*’s first year, federal and state courts have nearly unanimously rejected constitutional challenges to various gun control regulations—especially regulations that fall within the categories Justice Scalia flagged as presumptively constitutional in the majority opinion—often with little or minimal analysis. That is the bad news. In Part III, however, we note that there is evidence that *Heller*’s unequivocal declaration that the Second Amendment guarantees an individual right is having some impact, not only in the courts, but, perhaps more importantly, on nonjudicial actors. Following *Heller*, gun control policies—even at the state and local level—will be made in the shadow of the Second Amendment. A brief conclusion follows.

4. See *infra* note 99 and accompanying text.

5. See *infra* notes 28–29 and accompanying text.

6. See *infra* notes 102–11, 119–23 and accompanying text.

7. See *infra* notes 112–23 and accompanying text.

I. *HELLER* AND THE LOWER COURTS: EARLY PREDICTIONS

In our earlier article, we wondered whether *Heller* would suffer the same fate as *Lopez*⁸ and *Morrison*,⁹ or whether it would end up being enforced more robustly by lower court judges.¹⁰ We identified a number of factors that made us skeptical: (1) “the institutional prejudices of” lower courts, whose judges want to clear their dockets of troublesome cases and not encourage their proliferation;¹¹ (2) the fact that *Heller* itself seemed to signal that lower courts should not go hog-wild with *Heller*;¹² (3) ambiguity regarding the standard of review that made it difficult to police lower court evasion;¹³ and (4) the inapplicability of *Heller* to state and local gun control regimes, since even after *Heller* the Amendment remained unincorporated.¹⁴ On the other hand, we suggested that public engagement with the issue and the ability of well-funded interest groups to bring good cases might increase the costs to federal judges of foot-dragging or evasion.¹⁵ As we argue in the remainder of this Article, the early evidence is mixed. While few laws have actually been struck down or even called into question, courts do seem to understand *Heller* as a break with the past—how decisive a break, though, is not yet clear.

II. LOWER COURTS AND THE *HELLER* SAFE HARBOR

Justice Scalia’s opinion seemed to anticipate—and seemed inclined to head off—a number of challenges to federal gun control laws that might have looked vulnerable in light of *Heller*. He wrote:

[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.¹⁶

For good measure, he added that his list of “presumptively lawful regulatory measures . . . does not purport to be exhaustive.”¹⁷ Later in the opinion, he seemed to add weapons deemed dangerous or highly unusual to this list.¹⁸ As Justice Breyer noted in his dissent, the basis for excluding

8. *United States v. Lopez*, 514 U.S. 549 (1995).

9. *United States v. Morrison*, 529 U.S. 598 (2000).

10. Reynolds & Denning, *Heller’s Future*, *supra* note 2, at 2039 (“Will *Heller* suffer *Lopez*’s fate, serving more as casebook fodder than as actual authority?”).

11. *Id.*

12. *Id.*; see *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008) (listing presumptively constitutional restrictions on the right to keep and bear arms).

13. Reynolds & Denning, *Heller’s Future*, *supra* note 2, at 2039–40.

14. *Id.* at 2040.

15. *Id.* at 2040–41.

16. *Heller*, 128 S. Ct. at 2816–17.

17. *Id.* at 2817 n.26.

18. *Id.* at 2817 (“*Miller* said . . . that the sorts of weapons protected were those ‘in common use at the time.’ We think that limitation is fairly supported by the historical tradition of prohibiting the

these classes of laws was not clear.¹⁹ As we discuss in this Part, lower court judges have employed Justice Scalia's categorical exclusions—which we refer to collectively as the “*Heller* safe harbor”—with gusto, expanding them in some cases.

A. LONGSTANDING PROHIBITIONS ON POSSESSION BY FELONS AND THE MENTALLY ILL

A long list of persons prohibited from possessing firearms is found at 18 U.S.C. § 922(g).²⁰ By far, the most common challenges following *Heller* are those brought by felons convicted of violating § 922(g)(1), which prohibits the possession of firearms by convicted felons.²¹ The typical defendant is, as one court colorfully put it, “one of many charged or convicted persons who believe that the United States Supreme Court’s decision in [*Heller*] means that no one in possession of a firearm can be convicted of a crime, whatever the kind of gun and whatever the status of the person possessing it. They are wrong.”²² Relying on Justice Scalia’s language in *Heller*, the Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits,²³ along with all the district courts who have addressed the issue to date,²⁴ have concluded that “*Heller* . . . was not intended to open the

carrying of ‘dangerous and unusual weapons.’” (citation omitted)).

19. *Id.* at 2869–70 (Breyer, J., dissenting); see also Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371 (2009). We have elsewhere suggested that *Heller* constitutionalized the popular understanding of the Second Amendment—that it guaranteed an individual right but permitted “reasonable” regulation—and enforced it against an outlier government whose laws were tantamount to a ban on all private gun ownership. Denning & Reynolds, *Five Takes*, *supra* note 2, at 675–78. Justice Scalia has been harshly criticized for his categorical exclusions. See, e.g., Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009).

20. 18 U.S.C. § 922(g)(1) (2006). Indeed, one recent decision described the statute’s scope as “strikingly large” and “that [it] might be arguably called into question by a fair reading of *Heller*’s rationale.” *United States v. Abner*, No. 3:08cr51, 2009 WL 103172, at *1 (M.D. Ala. Jan. 14, 2009).

21. 18 U.S.C. § 922(g)(1).

22. *United States v. Kilgore*, No. 08-cr-66, 2008 WL 4058020, at *1 (W.D. Wis. Aug. 26, 2008) (order denying defendant’s motion to dismiss).

23. See *Triplett v. Roy*, No. 08-40904, 2009 WL 1154892, at *1 (5th Cir. Apr. 30, 2009) (per curiam) (“In *Heller*, the Court specifically noted that possession of a firearm by a convicted felon did not fall within the protection of the Second Amendment right to bear arms.”); *United States v. Brye*, No. 08-12578, 2009 WL 637553, at *1 (11th Cir. Mar. 13, 2009); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009); *United States v. Brunson*, 292 F. App’x 259, 261 (4th Cir. 2008) (per curiam) (characterizing the Court as having “recently upheld the ‘longstanding prohibition on the possession of firearms by felons’”); *United States v. Irish*, 285 F. App’x 326, 327 (8th Cir. 2008) (per curiam); *United States v. Frazier*, No. 07-6135, 2008 WL 4949153, at *5 (6th Cir. Nov. 19, 2008) (rejecting constitutional challenge to § 922(g)(1)); see also *United States v. McRobie*, No. 08-4632, 2009 WL 82715, at *1 (4th Cir. Jan. 14, 2009) (per curiam) (rejecting challenge based on *Heller* to 18 U.S.C. § 922(g)(4)’s prohibition on possession of weapons by mental patients).

24. See *United States v. Miller*, No. CR 108-122, 2008 WL 5170440, at *2 (S.D. Ga. Dec. 9, 2008) (order denying defendant’s motion to dismiss); *Holter v. United States*, Nos. 2:05-cr-12, 2:08-cv-100, 2008 WL 5100846, at *1 (D.N.D. Dec. 1, 2008) (order denying defendant’s motion to dismiss under 28 U.S.C. § 2255); *United States v. Baron*, Nos. CR-06-2095, CV-08-3048, 2008 WL 5102307, at *2 (E.D.

door to a raft of Second Amendment challenges to § 922(g) convictions.”²⁵ Nor have courts been inclined to distinguish between violent and nonviolent felons.²⁶ Courts are even beginning to rule that it

Wash. Nov. 25, 2008) (order denying defendant’s § 2255 motion); *United States v. Borgo*, No. 1:08CR81, 2008 WL 4631422, at *2 (W.D.N.C. Oct. 17, 2008) (order denying defendant’s motion to dismiss); *United States v. Battle*, No. 2:07-cr-307, 2008 WL 4571560, at *2 (M.D. Ala. Oct. 14, 2008) (order denying defendant’s motion to dismiss); *Lineberry v. United States*, No. 5:08cv136, 2008 WL 4542882, at *1–2 (E.D. Tex. Oct. 7, 2008) (order denying petition for writ of habeas corpus); *United States v. Whisnant*, No. 3:07-CR-32, 2008 WL 450018, at *1 (E.D. Tenn. Sept. 30, 2008) (order denying defendant’s motion to dismiss) (“The *Heller* decision expressly recognizes that felon in possession laws are valid limitations to the Second Amendment, and the *Heller* decision does not change the constitutionality of the statutes that Defendant challenges in his motion to dismiss.”); *United States v. Westry*, No. 08-20237, 2008 WL 4225541, at *2 (E.D. Mich. Sept. 9, 2008) (order denying defendant’s motion to dismiss); *Tate v. United States*, Nos. 08-C-0440, 06-CR-321, 2008 WL 4104027, at *1 (E.D. Wis. Sept. 4, 2008) (order denying defendant’s motion for a certificate of appealability); *Doshier v. Roy*, No. 5:08cv133, 2008 WL 4148251, at *2 (E.D. Tex. Aug. 29, 2008) (order denying petition for writ of habeas corpus); *United States v. LePage*, Nos. 08-cv-363, 05-cr-147, 2008 WL 4058523, at *2 (W.D. Wis. Aug. 26, 2008) (order denying defendant’s § 2255 motion); *United States v. Burris*, No. 1:07cr76, 2008 WL 4000635, at *1–2 (W.D.N.C. Aug. 26, 2008) (order denying defendant’s motion to dismiss); *Triplett v. Roy*, No. 5:08cv123, 2008 WL 4056564, at *1–2 (E.D. Tex. Aug. 25, 2008) (order denying petition for writ of habeas corpus); *United States v. Loveland*, No. 1:08CR54, 2008 WL 3925271, at *1–2 (W.D.N.C. Aug. 21, 2008) (order denying defendant’s motion to dismiss); *United States v. Singletary*, No. 5:08-CR-12, 2008 WL 3843517, at *1 (M.D. Ga. Aug. 11, 2008) (order denying defendant’s motion to dismiss) (“*Heller* does not draw into question the constitutionality of the felon in possession statute. Not only did the majority in [sic] make it clear that its decision did not affect the constitutional validity of the felon in possession statute, but all courts that have considered the issue since the *Heller* decision have reached the same conclusion as this court: the felon in possession statute does not violate the Second Amendment.”) *United States v. Henry*, No. 08-20095, 2008 WL 3285842, at *1 (E.D. Mich. Aug. 7, 2008) (order denying defendant’s motion to dismiss) (“Given the clear pronouncement by the *Heller* majority, the Court declines Defendant’s invitation to adopt the minority’s position and overrule the United States Supreme Court.”); *United States v. Hall*, No. 2:08-00006, 2008 WL 3097558, at *1 (S.D. W. Va. Aug. 4, 2008) (order denying defendant’s motion to suppress); *United States v. Woodington*, No. 07-CR-222, 2008 WL 2915420, at *1 (E.D. Wis. July 25, 2008) (order and recommendation of magistrate judge that defendant’s motion to dismiss be denied); *United States v. Robinson*, No. 07-CR-202, 2008 WL 2937742, at *2 (E.D. Wis. July 23, 2008) (order denying defendant’s motions to withdraw his plea and to dismiss) (noting defendant’s argument that the exclusionary language was dicta, but commenting that “I cannot so quickly dismiss this explicit limitation on the Court’s holding.”); *see also* *Minotti v. Whitehead*, 584 F. Supp. 2d 750, 760 n.12 (D. Md. 2008) (rejecting reliance on *Heller* for claim of impropriety in the Bureau of Prisons’ exclusion from eligibility for one-year sentence reduction for completion of drug rehabilitation program for those convicted of felony involving firearm, and stating that “the firearm was in [defendant’s] car, while the focus of the decision in *Heller* was on the inherent right of self-defense central to the Second Amendment in the context of defense one’s home”).

25. *Baron*, 2008 WL 5102307, at *2.

26. *See, e.g.*, *United States v. Schultz*, No. 1:08-CR-75, 2009 WL 35225, at *2 (N.D. Ind. Jan. 5, 2009) (denying motion to dismiss felon-in-possession indictment where felony was failure to pay child support required by state law) (“[T]he Supreme Court in *Heller* was not casting doubt on the constitutional validity of laws banning the possession of firearms by felons. This Court can only follow that clear, unambiguous instruction”); *Westry*, 2008 WL 4225541, at *2 (rejecting arguments the court should distinguish between violent and nonviolent felonies, noting that *Heller* did not mention such a distinction). But for history, one wonders whether a law on firearms possession by nonviolent felons could pass heightened scrutiny, which is probably why lower courts were grateful for *Heller*’s sweeping approval of felon-in-possession bans.

is not ineffective assistance of counsel to refuse to raise a constitutional challenge to the felon-in-possession statute.²⁷ State courts, too, are rejecting similar challenges to bars on felons possessing firearms,²⁸ with one state court of appeals opining that such a ban would even survive strict scrutiny.²⁹

Courts have also rejected challenges, often without much analysis, from other disqualified persons by analogy to felons and the mentally ill. For example, the Lautenberg Amendment, passed in 1996, bars persons convicted of a domestic violence misdemeanor from possessing firearms.³⁰ A separate provision prohibits those subject to a domestic order of protection from possessing firearms as long as the order is in effect.³¹ Neither provision was specifically mentioned by the *Heller*

27. See, e.g., *LePage*, 2008 WL 4058523, at *2 (also rejecting ineffective assistance claim).

28. See, e.g., *State v. Rosch*, No. 59703-5, 2008 WL 4120052, at *4 n.6 (Wash. Ct. App. Sept. 8, 2008) (upholding state felon-in-possession law under state constitution, and noting that *Heller* stated felon-in-possession laws are presumptively constitutional).

29. *State v. Hunter*, 195 P.3d 556, 563 (Wash. Ct. App. 2008) (rejecting a challenge to state ban on possession of firearms by felony sex offenders; concluding that such a law could even survive strict scrutiny, assuming that the Second Amendment applies to the states: “[B]ecause it imposes permanent firearm restrictions only on that class of criminals that the legislature has deemed to be the most dangerous . . . the statutory scheme addresses a legitimate governmental interest (protecting the public by precluding felons from possessing firearms) and is narrowly tailored (the lifetime ban applies only to the most dangerous of those felons, as defined by the legislature). This meets the ‘strict scrutiny’ test.”).

30. 18 U.S.C. § 922(g)(9) (2006). For more on the history of the Lautenberg Amendment, see John M. Skakun III, Comment, *Violence and Contact: Interpreting “Physical Force” in the Lautenberg Amendment*, 75 U. CHI. L. REV. 1833, 1834-39 (2008). Several cases have rejected challenges to 18 U.S.C. § 922(g)(9). See, e.g., *United States v. Booker*, 570 F. Supp. 2d 161, 162-65 (D. Me. 2008); *United States v. Li*, No. 08-CR-212, 2008 WL 4610318, at *6 (E.D. Wis. Oct. 15, 2008) (order denying defendant’s motion to dismiss); *United States v. Chester*, No. 2:08-00105, 2008 WL 4534210, at *2 (S.D. W. Va. Oct. 7, 2008) (denying defendant’s motion to dismiss, and concluding that the statute “survives Second Amendment scrutiny, whether deemed intermediate or strict, both facially and as here applied”); *United States v. Skoien*, No. 08-cr-12, 2008 WL 4682598, at *1 (W.D. Wis. Aug. 27, 2008) (denying defendant’s motion to dismiss, assuming that § 922(g)(9) would satisfy strict scrutiny, and finding that persons found guilty of domestic violence “have shown that it is they and not any outside intruders that pose the greater danger to their families”); *United States v. White*, No. 07-00361, 2008 WL 3211298, at *1 (S.D. Ala. Aug. 6, 2008) (order denying defendant’s motion to dismiss); see also *Range v. Indiana*, No. 3:08CV-435, 2008 WL 4852679, at *1 (N.D. Ind. Nov. 6, 2008) (rejecting challenge to state statute prohibiting one convicted of domestic battery from carrying handgun without a license); *People v. Flores*, 86 Cal. Rptr. 3d 804, 806-09 (Cal. Ct. App. 2008) (upholding state ban on firearms possession by one convicted of misdemeanor assault).

31. 18 U.S.C. § 922(g)(8). Several cases have considered challenges to this statute. See, e.g., *United States v. Luedtke*, 589 F. Supp. 2d 1018, 1023-24 (E.D. Wis. 2008) (rejecting challenge); *United States v. Knight*, 574 F. Supp. 2d 224, 226 (D. Me. 2008) (denying motion to dismiss indictment for falsely answering a question on a form about being subject to order of protection, the court found that “[r]educing domestic violence is a compelling governmental interest . . . and [§] 922(g)(8)’s temporary prohibition, while the state court order is outstanding, is narrowly tailored to that compelling interest”); *United States v. Lippman*, No. 4:02-cr-082, 2008 WL 4661514, at *2 (D.N.D. Oct. 20, 2008) (rejecting the defendant’s challenge to his conviction on the basis of improper entry of the order of protection that gave rise to his conviction); *United States v. Erwin*, No. 1:07-CR-556, 2008 WL 4534058, at *2 (N.D.N.Y. Oct. 6, 2008) (denying defendant’s motions to dismiss and suppress, and

Court, and neither is much of a “longstanding” prohibition. Nevertheless, no court has had much trouble rejecting challenges to those provisions.³² To be fair, several of the court decisions are not as dismissive as those involving the ban on possession by felons. Courts mention, for example, that the ban is more narrowly drawn, focusing as it does on those who have committed a violent crime, as opposed to the felon-in-possession ban, which makes no such distinction.³³ As a Maine district judge noted, “[i]f anything, as a predictor of firearm misuse, the definitional net cast by § 922(g)(9) is tighter than the net cast by § 922(g)(1).”³⁴ Those courts that bothered with applying any standard of review took it for granted that reducing domestic violence would qualify as a compelling governmental interest, and felt that barring possession was narrowly tailored to that interest.³⁵ Thus those statutes, one court concluded, “survive[] Second Amendment scrutiny, whether deemed intermediate or strict.”³⁶

And one may add drug dealers to the list of individuals whose Second Amendment challenges to various federal laws have been uniformly rejected by the courts. There are a number of statutes that penalize mixing guns and drugs.³⁷ Those who unlawfully use or are addicted to controlled substances, for example, are barred from possessing firearms.³⁸ In other cases, penalties for drug trafficking are enhanced if a gun is used in connection with those crimes.³⁹ One court termed the ban on possession by illegal drug users as another example of a longstanding prohibition on firearm possession that *Heller* permits, adding that “[n]othing in *Heller* restricts the federal government from criminalizing the possession of firearms by unlawful users of controlled

holding that ban was narrowly tailored to a compelling governmental interest; noting that ban was temporary).

32. See *supra* notes 30–31 and accompanying text.

33. See, e.g., *Booker*, 570 F. Supp. 2d at 164.

34. *Id.*

35. See, e.g., *id.* (“[T]he manifest need to protect victims of domestic violence and to keep guns from the hands of people who perpetuate such acts is well-documented and requires no further elaboration.”); *Knight*, 574 F. Supp. 2d at 226 (“Reducing domestic violence is a compelling government interest . . . and [§] 922(g)(8)’s temporary prohibition, while the state court order is outstanding, is narrowly tailored to that compelling interest.”); *Skoien*, 2008 WL 4682598, at *1 (“These persons have shown that it is they and not any outside intruders that pose the greater dangers to their families.”).

36. *Chester*, 2008 WL 4534210, at *2.

37. See, e.g., 18 U.S.C. §§ 922(d)(3), (g)(3), (q)(1)–(2), 924(c)(1)(A) (2006 & Supp. 2008).

38. *Id.* § 922(g)(3).

39. See, e.g., *id.* § 924(c); see also *id.* § 924(j) (increasing penalties for gun crime in connection with violation of § 924(c)); *United States v. Williams*, No. CR-05-920, 2008 WL 4644830, at *8 (C.D. Cal. Oct. 15, 2008) (order denying defendant’s motion to preclude capital prosecution) (“The Second Amendment right to bear arms . . . does not make 18 U.S.C. §§ 924(c),(j), unconstitutional because [they] constitute reasonable limitations on Defendant’s Second Amendment rights.”).

substances.”⁴⁰ Another judge distinguished *Heller*, stating that the decision “does not deal with statutes prohibiting possession or use of firearms in connection with criminal behavior.”⁴¹ Other courts upheld the enhanced penalties for firearm use in the course of drug crimes by simply expanding the “well-rooted, public-safety-based exceptions to the Second Amendment right that appear consistent with Congress’ determination that those unlawfully using or addicted to controlled substances should not have firearms at the ready.”⁴²

B. LAWS FORBIDDING THE CARRYING OF FIREARMS IN SENSITIVE PLACES

Justice Scalia mentioned schools and government buildings specifically as part of the *Heller* safe harbor.⁴³ Not surprisingly, then, challenges to the Gun Free School Zones Act (“GFSZA”)⁴⁴ and to regulations prohibiting the possession of firearms on the grounds of the Post Office,⁴⁵ have been rejected. A Virgin Islands district court held emphatically that “*Heller* unambiguously forecloses a Second

40. *United States v. Yancey*, No. 08-cr-103, 2008 WL 4534201, at *2 (W.D. Wis. Oct. 3, 2008) (order denying defendant’s motion to dismiss).

41. *Angelos v. United States*, Nos. 2:07-CV-936, 2:02-CR-708, 2008 WL 5156602, at *8 n.19 (D. Utah Dec. 8, 2008) (order denying defendant’s § 2255 motion).

42. *United States v. Chafin*, No. 2:08-000129, 2008 WL 4951028, at *2 (S.D. W. Va. Nov. 18, 2008) (denying defendant’s motion to dismiss and rejecting a challenge to 18 U.S.C. § 924(a)(1)(A), which penalizes false statements made in connection with firearms purchase, as applied to an illegal marijuana user). The *Chafin* court also distinguished *Heller* on the ground that “the Supreme Court addressed only the constitutionality of a sweeping District of Columbia firearm regulation—one that included a total ban on handguns—that was far more restrictive than the statutes allegedly violated.” *Id.*; see also *United States v. Rhodes*, No. 08-4161, 2009 WL 990579, at *7 n.3 (4th Cir. Apr. 14, 2009) (rejecting argument that weapon enhancement for sentence of defendant convicted of conspiracy to manufacture methamphetamine did not violate the Second Amendment); *United States v. Jackson*, 555 F.3d 635, 636 (7th Cir. 2009) (rejecting challenge to conviction under 18 U.S.C. § 924(c), which prohibits possession of a firearm in furtherance of a drug-trafficking offense, and stating that “[t]he Constitution does not give any the right to be armed while committing a felony”); *United States v. Bowers*, No. 8:05CR294, 2008 WL 5396630, at *2 (D. Neb. Dec. 23, 2008) (“Nothing in the *Heller* decision prohibits the Court from considering possession of a gun in connection with another crime in determining what the appropriate sentence for the offense conduct should be. . . . Even if the defendant had a permit for the ownership of this gun, it would not prohibit the Court from considering the possession of that gun in connection with the crime charged in fashioning an appropriate sentence for the defendant.”); *United States v. Heredia-Mendoza*, No. CR08-5125, 2008 WL 4951051, at *1–2 (W.D. Wash. Nov. 18, 2008) (denying defendant’s motion to dismiss indictment under 18 U.S.C. § 924(c)(1)(A)); *United States v. Potter*, No. CR07-5683, 2008 WL 4779744, at *3 (W.D. Wash. Oct. 31, 2008) (same).

43. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008).

44. 18 U.S.C. § 922(q)(2)(A); *United States v. Lewis*, No. 2008-45, 2008 WL 5412013, at *2 (D.V.I. Dec. 24, 2008) (rejecting a challenge to the GFSZA and denying defendant’s motion to dismiss); *United States v. Walters*, No. 2008-31, 2008 WL 2740398, at *1 n.1 (D.V.I. July 15, 2008) (rejecting, on strength of pre-*Heller* case, a challenge to the GFSZA, and reciting that *Heller* does not constitute an “unfettered” right to keep and bear arms).

45. *United States v. Dorosan*, No. 08-042, 2008 WL 2622996, at *6 (E.D. La. June 30, 2008) (order denying defendant’s motion to dismiss).

Amendment challenge to [the GFSZA] under any level of scrutiny.”⁴⁶ In the case of the Post Office regulations, the court noted that the restrictions were—again in contrast with the District of Columbia’s gun ban at issue in *Heller*—narrowly drawn to foster workplace safety, which was again assumed to be of great governmental importance.⁴⁷ And though they were not mentioned specifically in *Heller*, one New York court added airports to the “sensitive places” list.⁴⁸ While one could readily agree with that addition, the conclusion of a California court that a private drive was a “sensitive place,” thus bringing a conviction for carrying a concealed weapon under the *Heller* safe harbor,⁴⁹ seems a stretch.

C. LAWS IMPOSING CONDITIONS ON THE SALE OF ARMS

Federal law imposes numerous restrictions on the sale of arms,⁵⁰ including a federal firearms licensing regime⁵¹ and import restrictions on certain weapons.⁵² Recently, the government has attempted to interdict so-called “straw purchases,” where disqualified persons use a cut-out to make an otherwise lawful purchase on their behalf.⁵³ Federal law also prohibits the purchase of stolen weapons,⁵⁴ and “untraceable” weapons, like those with obliterated serial numbers.⁵⁵ The handful of challenges

46. *Lewis*, 2008 WL 5412013, at *3. As Eugene Volokh points out in his article, however, the gun in *Lewis*, though within a school “zone,” was not possessed by the defendant on school grounds; it was apparently in his car, which was within the requisite number of feet from the school. 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, 1528 n.345 (2009). We thank Eugene for bringing this to our attention.

47. *Dorosan*, 2008 WL 2622996, at *6 (concluding that *Heller* does not require invalidation of CFR § 232.1(i), which prohibits possession of firearms on postal facility property without official purpose, and stating that “[t]he ban at issue does not affect the right of all individuals to bear arms at home or traveling in a vehicle to and from work through high crime areas. It does not extend beyond the noticed, gated confines of United States Postal Services’ property. It is narrowly tailored to effect public and workplace safety solely on postal property . . .”).

48. *New York v. Ferguson*, No. 2008QN036911, 2008 WL 4694552, at *4 (N.Y. Crim. Ct. Oct. 24, 2008) (denying motion to dismiss indictment for carrying gun in airport, in part because *Heller* “identified certain presumptively lawful regulatory measures which would survive a constitutional challenge including the carrying of firearms in ‘sensitive places.’ Licensing is an acceptable regulatory measure and an airport falls within the scope of a ‘sensitive place.’”).

49. *People v. Yarbrough*, 86 Cal. Rptr. 3d 674, 682–83 (Cal. Ct. App. 2008) (rejecting challenge to conviction for carrying concealed weapon, and stating that “[t]reating as criminal defendant’s concealment of a firearm under his clothing on a residential driveway that was not closed off from the public and was populated with temporary occupants falls within the ‘historical tradition’ of prohibiting the carrying of dangerous weapons in publicly sensitive places”).

50. See, e.g., 18 U.S.C. §§ 922–923 (2006 & Supp. 2008).

51. See *id.* § 923.

52. See, e.g., *id.* § 922(a)(4), (a)(7), (p), (o).

53. *Id.* § 922(a)(6).

54. *Id.* § 922(j).

55. *Id.* § 922(k).

brought here have given courts little pause,⁵⁶ with one court not even bothering to discuss *Heller* itself, relying instead on pre-*Heller* case law that *rejected* the individual right reading of the Second Amendment.⁵⁷

As the court pointed out in *United States v. Marzzarella*, though, the ban on possession of firearms with obliterated serial numbers is much narrower than the law in *Heller*.⁵⁸ In addition, the court found that “[t]he Defendant’s possession of a firearm in connection with its private sale to another is inherently inconsistent with an intention to possess the firearm for defense of the Defendant’s home, since the Defendant cannot protect himself with a weapon that he sells away.”⁵⁹ The court added that “untraceable firearms are of no particular use to the ordinary law-abiding citizen who intends to possess the firearm for common lawful purposes (such as defense of hearth and home). Rather, such weapons hold special value only for those individuals who intend to use them for unlawful activity.”⁶⁰

The *Marzzarella* court took some pains to parse *Heller*, and rejected the defendant’s argument that strict scrutiny applied, stating that the categorical exclusions like those in the *Heller* safe harbor were inconsistent with strict scrutiny,⁶¹ and that the restrictions—like the ban at issue—functioned more like content-neutral “time, place, and manner” restrictions on speech.⁶² Whatever the validity of the analogy, the judge did not simply dismiss the defendant’s challenge out of hand.

Likewise, a Texas district court, rejecting a challenge to the ban on straw purchases, adopted intermediate scrutiny, concluding that “the

56. See *United States v. Marzzarella*, 595 F. Supp. 2d 596, 597–600 (W.D. Pa. 2009) (rejecting challenge to ban on possession of weapon with obliterated serial numbers); *LaRoche v. United States*, Nos. CV 407-54, CR 402-234, 2008 WL 4222081, at *2 (S.D. Ga. Sept. 15, 2008) (rejecting challenge to 18 U.S.C. § 922(j) and denying defendant’s § 2255 motion); *United States v. Bledsoe*, No. 8A-08-CR-13(2), 2008 WL 3538717, at *4 (W.D. Tex. Aug. 8, 2008) (rejecting challenge to straw-purchase ban and denying defendant’s motion to dismiss); *Mullinix v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, No. 5:07-CV-154, 2008 WL 2620175, at *2 (E.D.N.C. July 2, 2008) (rejecting challenge to import restrictions as applied to plaintiff’s efforts to import a World War II-era German machine gun).

57. *United States v. Lewis*, No. 2008-21, 2008 WL 2625633, at *1 (D.V.I. July 3, 2008) (denying defendant’s motion to dismiss and rejecting challenge to 18 U.S.C. § 922(k), under *Heller*, based on pre-*Heller* precedent that denied individual right).

58. *Marzzarella*, 595 F. Supp. 2d. at 599–600.

59. *Id.* at 600.

60. *Id.* at 602–03.

61. *Id.* at 604–06. This is not quite true. The Supreme Court’s First Amendment doctrine, while applying strict scrutiny to content-based restrictions on speech, also contains content-based exclusions (incitement, obscenity, etc.) that are excluded from the scope of the First Amendment *because of* their content. See generally CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 790 (3d ed. 2009) (“[S]ome categories of speech—defined by the content of the speech—are treated as unprotected by the free speech guarantee. This seeming paradox comes about because the Court has concluded that the societal interest in suppressing such speech outweighs the value of the speech.”).

62. *Marzzarella*, 595 F. Supp. 2d. at 605–06.

public safety concerns discussed in the Court's previous order constitute important governmental objectives and, furthermore, that the statutes challenged by Defendant are substantially related to addressing those ends."⁶³ Specifically, the court argued that "[t]o assert . . . that regulations governing the sale of handguns for the 18–20 year-old age group do not further a substantial governmental interest is meritless, given the statistics suggesting that the vast majority of guns confiscated from 18–20 year old criminal defendants are handguns" and given the fact that "the likely reason Congress passed the statute was to reduce handgun use in the commission of crimes in the United States."⁶⁴

D. PROHIBITIONS OF DANGEROUS AND UNUSUAL WEAPONS

One of the surprising filings during the *Heller* litigation was the government's brief, which urged reversal of the court of appeals' decision, and recommended that the Supreme Court remand the case for reconsideration using intermediate scrutiny as the standard of review.⁶⁵ Commentators have speculated that the Bush Administration's position was crafted to safeguard the federal ban on machine gun possession.⁶⁶

63. *United States v. Bledsoe*, No. 8A-08-CR-13(2), 2008 WL 3538717, at *4 (W.D. Tex. Aug. 8, 2008).

64. *Id.*

65. See Brief for the United States as Amicus Curiae at 8, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 157201, at *8 (summarizing the Bush Administration's argument); see also Brannon P. Denning, *The New Doctrinalism in Constitutional Scholarship and District of Columbia v. Heller*, 75 TENN. L. REV. 789, 789–90 (2008) (briefly describing the controversy over the Bush Administration's amicus brief).

66. 18 U.S.C. § 922(o) (2006); see, e.g., Michael P. O'Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 362 (2009). The Court's own treatment of the issue, aside from announcing the presumptive ability to regulate "dangerous and unusual weapons," is interesting:

It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

Heller, 128 S. Ct. at 2817. Justice Scalia seemed to be saying that the linkage between the "arms" and the reason for which arms were guaranteed—i.e., to enable the militia to serve as a military counterweight to government soldiers—need not stay constant over time; that the armed citizenry is not constitutionally guaranteed the means to be an *effective* military counterweight. At the time of the Framing, rifles and pistols were common (not "dangerous and unusual") and the common weaponry of militia members, as well as useful for self-defense. *Id.* But that does not guarantee that all arms in common use by modern military units are protected. Now that such arms are considered "dangerous and unusual," they are presumptively subject to regulation by the government, even if—vis-à-vis government soldiers—the counterweight thus becomes less effective. Clearly the stress of *Heller* is on individual, as opposed to collective, self-defense.

Two early decisions concerning machine guns involved defendants who wished to argue to the jury their belief that the Second Amendment guaranteed their right to own machine guns.⁶⁷ In one, *United States v. Gilbert*, the defendant was not allowed to testify as to his belief in the Second Amendment's scope.⁶⁸ The defendant complained that the judge both issued a jury instruction saying that the defendant did not possess that right and rejected the defendant's jury instruction that tracked the testimony he unsuccessfully sought to give in court.⁶⁹ The Ninth Circuit rejected his argument in a single sentence: "Under *Heller*, individuals still do not have the right to possess machineguns or shortbarreled rifles . . . and convicted felons . . . do not have the right to possess any firearms."⁷⁰

The defendant in *United States v. Fincher* fared no better in the Eighth Circuit.⁷¹ Adding insult to injury, that panel really decided the case under pre-*Heller* case law that rejected the individual right theory of the Second Amendment.⁷² Specifically, the court held that, contrary to the defendant's argument, prior case law had *not* created an affirmative defense to the ban on machine gun possession where possession of the machine gun was reasonably related to the maintenance of a well-regulated militia.⁷³

Upholding his conviction, the court said that it had "taken into account [the *Heller* decision]," but noted (1) that the Supreme Court also held that "the right to possess firearms is not beyond the reach of all government regulation," and (2) the existence of the *Heller* safe harbor for categories of weapons.⁷⁴ It concluded: "Accordingly, under *Heller*, Fincher's possession of the guns is not protected by the Second Amendment. Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use."⁷⁵ As they tend to do,⁷⁶ other courts have seized upon

67. *United States v. Gilbert*, 286 F. App'x 383, 386 (9th Cir. 2008); *see also* *United States v. Fincher*, 538 F.3d 868, 873 n.1 (8th Cir. 2008) (discussing how even if the defendant had claimed "an individual right to possess a machine gun," his possession is "not protected under *Heller*").

68. 286 F. App'x at 386.

69. *Id.*

70. *Id.* The court also upheld the exclusion of the defendant's testimony regarding his beliefs about the Second Amendment's scope. *Id.*

71. 538 F.3d at 870-71.

72. *Id.* at 872-74.

73. *Id.*

74. *Id.* at 873-74.

75. *Id.* at 874.

76. *See generally, e.g.*, Brannon P. Denning, *Can the Simple Cite Be Trusted? Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1996) (discussing lower court interpretations of *Miller*).

Fincher—and little else—in concluding that machine guns⁷⁷ or other “unusual” weapons are beyond the scope of the Second Amendment’s right to keep and bear arms.⁷⁸ At least one federal court⁷⁹ relied on language in *Heller* that seemed to indicate that state bans on the carrying of concealed weapons would remain similarly undisturbed.⁸⁰

E. INCORPORATION AND CHALLENGES TO STATE AND LOCAL GUN LAWS

Given the District of Columbia’s unique status, the Court was able to put the incorporation question to one side.⁸¹ And, so far, only the Ninth Circuit has been willing to “underrule” the Court’s creaky precedents⁸² that render the Second Amendment inapplicable to the

77. See *United States v. Ross*, No. 08-1120, 2009 WL 1111544, at *2 (3d Cir. Apr. 27, 2009) (“Nothing in *Heller* supports Ross’s challenge to the constitutionality of a statute criminalizing the possession of a machine gun.”); *Hamblen v. United States*, No. 3:08-1034, 2008 WL 5136586, at *4 (M.D. Tenn. Dec. 5, 2008) (“The conclusion that the *Heller* Court did not extend Second Amendment protection to machine guns, in particular, is supported by the lower federal courts that have addressed the issue.”); *Salter v. Roy*, No. 5:08-CV-145, 2008 WL 4588629, at *2 (E.D. Tex. Oct. 6, 2008) (order denying petition for writ of habeas corpus) (“The Supreme Court did not find that possession of machine guns is also protected by the Second Amendment.” (citing *Fincher*, 538 F.3d 868)).

78. See *United States v. Perkins*, No. 4:08CR3064, 2008 WL 4372821, at *4 (D. Neb. Sept. 23, 2008) (order denying defendant’s motions to dismiss and suppress) (“I have no doubt . . . that if confronted with the issue, the Eighth Circuit would apply the same rationale as that applied in *Fincher*. That is, silencer/suppressors ‘are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.’” (quoting *Fincher*, 538 F.3d at 874)).

79. *Swait v. Univ. of Neb. at Omaha*, No. 8:08CV404, 2008 WL 5083245, at *3 (D. Neb. Nov. 25, 2008) (order dismissing plaintiff’s complaint, with leave to amend) (“[S]tates can prohibit the carrying of a concealed weapon without violating the Second Amendment.”).

80. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 (2008) (noting that nineteenth-century commentators considered “prohibitions on concealed weapons” to be constitutional); see also *Sims v. United States*, 963 A.2d 147, 150 (D.C. 2008) (refusing to reverse conviction for carrying unlicensed handgun, possessing unregistered handgun and unlawful possession of ammunition under “clear error” standard in light of *Heller*, where Second Amendment claims were not raised at trial, and stating that “[i]mportant questions about the reach of *Heller* remain to be answered, but what assuredly is not ‘clear’ and ‘obvious’ from the decision is that it dictates an understanding of the Second Amendment which would compel the District to license a resident to carry and possess a handgun outside the confines of his home”).

81. See *Heller*, 128 S. Ct. at 2813 n.23.

82. As this Article was in production, the Ninth Circuit decided *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), in which it held that the U.S. Supreme Court’s “selective incorporation” decisions support the incorporation of the Second Amendment through the Fourteenth Amendment and its application to the states. Surveying Founding-era history, and that surrounding the ratification of the Fourteenth Amendment, the court concluded that

the right to keep and bear arms is ‘deeply rooted in this Nation’s history and tradition.’ . . . The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited.

Id. at 457. It nevertheless went on to uphold a county ordinance prohibiting the possession of firearms on county property, which prevented promoters from holding gun shows in Alameda County. *Id.* at 460 (“[T]he Ordinance does not meaningfully impede the ability of individuals to defend themselves in their homes with usable firearms, the core of the right as *Heller* analyzed it.”).

states.⁸³ Rejecting a challenge to a state ban on nunchakus, for example, the Second Circuit observed that *Presser v. Illinois* was good law until the Supreme Court itself said otherwise.⁸⁴ An Illinois district court went out of its way to emphasize that stare decisis alone dictated the dismissal of a suit challenging the gun control laws of a Chicago suburb: “This Court should not be misunderstood as either rejecting or endorsing the logic of plaintiffs’ argument, it may well carry the day before a court that is unconstrained by the obligation to follow the unreversed precedent of a court that occupies a higher position in the judicial firmament.”⁸⁵

While a few courts, acknowledging the lack of incorporation, have proceeded to analyze gun laws under *Heller* anyway, no court to date has indicated that, but for the lack of incorporation, many of these laws would be vulnerable.⁸⁶ In general, judges seem to share Judge Jack

83. See, e.g., *Presser v. Illinois*, 116 U.S. 252, 265 (1886). For a discussion of the incorporation issue, see Denning & Reynolds, *Five Takes*, *supra* note 2, at 679–88; and Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of Inferior Courts*, 59 SYRACUSE L. REV. 185, 191–99 (2008).

84. *Maloney v. Cuomo*, 554 F.3d 56, 58–59 (2d Cir. 2009); see also *United States v. Lewis*, No. 2008-45, 2008 WL 5412013, at *5 (D.V.I. Dec. 24, 2008) (rejecting argument that *Heller* renders the Second Amendment applicable to the Virgin Islands); *People v. Abdullah*, 870 N.Y.S.2d 886, 886–87 (N.Y. Crim. Ct. 2008) (rejecting challenge on incorporation grounds).

85. *NRA v. Oak Park*, Nos. 08 C 3696, 08 C 3697, 2008 WL 5111163, at *3 (N.D. Ill. Dec. 4, 2008). The judge in this case seemed to have a good time writing the opinion; he could not help but characterize counsel who challenged the local law the morning *Heller* was announced as being “quick on the trigger” and as having come “loaded for bear.” *Id.* at *1. Plaintiffs, in another challenge to a Chicago suburb’s strict gun control laws, sought the recusal of Judge Marvin Aspen, who had once penned an article in favor of national handgun control legislation, under 28 U.S.C. § 455(a). See *NRA v. Evanston*, No. 08 C 3693, 2008 WL 3978293, at *1 (N.D. Ill. Aug. 22, 2008). Judge Aspen declined. *Id.* at *6 (“While I disagreed with gun lobbyists opposing federal handgun legislation in 1976, no reasonable person would be convinced by the Article that I am today prejudiced against these specific plaintiffs with a bias so deep that it cannot be readily set aside to enable me to fairly judge the specific issues presented in this litigation.”). The litigation was later mooted because Evanston amended its gun-control ordinance. See *NRA v. Evanston*, No. 08 C 3693, 2008 WL 5070358, at *2–4 (N.D. Ill. Nov. 24, 2008) (dismissing plaintiff’s complaint, with leave to amend, thus mooting a challenge to Evanston, Illinois’ handgun ban where offending ordinance was amended to permit handgun possession for “self-protection” where possessor had valid state Firearm Owner’s Identification card).

86. See, e.g., *Bruley v. Vill. Green Mgmt. Co.*, 592 F. Supp. 2d 1381, 1387 (M.D. Fla. 2008) (refusing to imply an exception to state employment at-will doctrine for use of a firearm at work because “whatever Second Amendment right Bruley may have to possess a firearm in his apartment, it cannot be stretched to create a wrongful discharge cause of action under Florida law against a private employer which fires an employee for carrying a firearm on company property. Moreover, there is no state action involved.” (footnote omitted)); *People v. Flores*, 86 Cal. Rptr. 3d 804, 806 n.4 (Cal. Ct. App. 2008) (noting that the Amendment has not been incorporated, but rendering a decision on the merits anyway); *In re Bastiani*, 2208 N.Y. Slip Op. 28529, 2008 WL 5455690, at *3 (N.Y. County Ct. Dec. 15, 2008) (rejecting challenge to state concealed-carry licensing scheme requiring showing of “special need,” and stating: “Putting aside the question of whether the Second Amendment’s ‘individual’ right to bear arms is in fact extended to the individual states as a fundamental right . . . it is clear that . . . a regulatory scheme would not run afoul of the *Heller* Court’s holding. . . . Reasonable regulation of handgun possession survives the *Heller* decision.”). But see Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205 (2009) (noting possible unintended

Weinstein's opinion that "[i]t cannot be concluded that *Heller* places in doubt all state and local control of guns required to protect citizens, particularly in urban communities."⁸⁷ Of course, *Heller* does not mean that *none* are vulnerable either.

On the one hand, the foregoing seems to confirm our pessimistic predictions about the effect of *Heller*.⁸⁸ As was true following *Lopez*,⁸⁹ courts sometimes strain to distinguish the challenged law from the one invalidated in *Heller*, with courts frequently remarking that this or that challenged law sweeps much more narrowly than did the District of Columbia's ordinance.⁹⁰ Similarly, one often sees little analysis—a grudging acknowledgement of *Heller* as a new fact of life, quickly followed by the conclusion that the case did not really change anything.⁹¹ And while lower courts sometimes lament the lack of clarity in *Heller* regarding, say, what the standard of review actually was,⁹² few judges seem interested in figuring it out on their own.

And yet it seems that this is precisely what the Supreme Court wanted. Political scientists and law professors alike have written extensively on signaling and agenda-setting by the Supreme Court.⁹³ Despite being dicta—the issues mentioned were not before the Court and were not necessary to resolve those that were before it—the *Heller* safe harbor seems to us to have been a clear signal, clearer perhaps than any sent in *Lopez*, that lower courts should not declare open season on

consequences for state and local law after *Heller*).

87. *New York v. Bob Moates' Sport Shop, Inc.*, 253 F.R.D. 237, 242 (E.D.N.Y. 2008) (rejecting challenge to personal jurisdiction in nuisance suit against gun dealers alleged to facilitate illegal arms purchases that ended up in New York, and adding that "[t]o transmuted *Heller* into an inhibition on long standing ancient nuisance powers of the state to control nuisances, the power of the federal government to regulate firearms that flow through the stream of interstate commerce, and the power of the federal judiciary in diversity cases to enforce that state substantive law is almost inconceivable"). For a characteristically thoughtful analysis of *Heller* and its application to a number of gun-control laws in various contexts, including some addressed in this Part, see Volokh, *supra* note 46.

88. See *supra* notes 10–14 and accompanying text.

89. For examples, see Denning & Reynolds, *Rulings and Resistance*, *supra* note 3; and Reynolds & Denning, *Lower Court Readings*, *supra* note 3.

90. See *supra* notes 33–34, 58–59 and accompanying text.

91. See *supra* notes 20–80 and accompanying text.

92. See, e.g., *People v. Flores*, 86 Cal. Rptr. 3d 804, 809 n.5 (Cal. Ct. App. 2008) ("The majority opinion in *Heller* provides little guidance with respect to how courts are to determine whether the numerous firearm restrictions not explicitly addressed in the opinion should be evaluated in light of the Second Amendment right recognized in that case. The parties in the instant case provide little assistance." (citation omitted)).

93. See, e.g., Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Dockets*, 16 SUP. CT. ECON. REV. 1, 1–17 (2008); see also Andrew P. Morriss et al., *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63, 63–65, 96–97 (2005).

any and all federal gun laws. It seems to us that the lower courts have certainly heeded this signal.

If the *Heller* safe harbor was indeed intended as a signal to lower courts (and litigants, perhaps), then it tends to confirm an earlier observation we made about *Heller*: that it is another example of the Court's tendency to constitutionalize the national consensus on certain hot button issues and then enforce it against outliers.⁹⁴ Whether this is a role that the Court ought to be undertaking is a subject for another day, but the early returns from the lower courts ought at least to allay the fears of those who foresaw a blizzard of cases coming, each potentially undermining gun control laws at all levels of government.⁹⁵

The lack of lower court enforcement, though, might leave gun rights advocates feeling cheated. After all, when you win in the Supreme Court, that is supposed to mean something, right? Well, in the silver lining department, we were somewhat surprised to see so many courts acknowledge that the Second Amendment had not been incorporated, then proceed to apply *Heller* anyway.⁹⁶ Perhaps they would not have done so had they not felt confident the measure would survive scrutiny; on the other hand, it might simply reflect acceptance of the fact that incorporation is a matter of time and that perhaps it would not be the apocalypse if it occurred.

And there is more: In the next Part, we discuss some interesting developments, both in and out of the courts, that suggest that the new right to keep and bear arms may end up being more robust than the decisions discussed above might have you believe. The recognition of an individual right, we argue, has caused legislators and judges to render decisions in *Heller*'s shadow, with some interesting results.

III. LEGISLATION AND ADJUDICATION IN THE SHADOW OF *HELLER*

While *Heller*-based frontal assaults on firearms convictions have not been particularly successful to date, this is not to say that *Heller* has not influenced courts and legislators. With the recognition of firearms possession as an enumerated constitutional right, courts are now discovering that they must take notice of that fact in a number of

94. Denning & Reynolds, *Five Takes*, *supra* note 2, at 676–79.

95. *See, e.g.*, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2846–47 (2008) (Stevens, J., dissenting); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 321 (2009) (criticizing *Heller*, *inter alia*, on the ground that by constitutionalizing the gun-control debate, the Court “subjects every state and local regulation to federal court review,” with the consequence that “the national controversy over gun policy will intensify”). *But see* Nordyke v. King, 563 F.3d 439, 457 (9th Cir. 2009) (concluding that the Supreme Court’s selective-incorporation jurisprudence compelled the Second Amendment’s incorporation).

96. *See supra* notes 86–87 and accompanying text.

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settings, sometimes—though far from always—to the benefit of defendants.

In *Heller*, the Supreme Court recognized that possessing firearms, including handguns, in the home for purposes of self-defense is protected as part of the individual right to arms guaranteed by the Second Amendment—a right that all nine Justices recognized as belonging to individuals, rather than to the states.⁹⁷ This has two effects that matter: First, firearms possession now acquires the protections that go with a constitutional right, even one whose scope remains less than fully defined. Second, firearms possession is also *normalized*: post-*Heller*, it is impossible to characterize gun ownership as an activity that is somehow suspect, deviant, or marginal when it has been recognized as a constitutional right. Both of these effects have turned out to make a difference in cases already, and it seems likely that they will influence future cases as well.

A. LEGISLATIVE RESPONSES

Immediately following the *Heller* decision, suits were filed against a number of state and local governments whose gun laws were as strict, or nearly so, as the District of Columbia's.⁹⁸ Absent incorporation, the suits were clear losers, and yet, rather than defend them, some cities amended their gun control ordinances, replacing what had been near-total bans on handguns with licensing schemes.⁹⁹ In San Francisco, the city settled a lawsuit brought by the National Rifle Association and now permits residents of San Francisco housing projects to possess arms.¹⁰⁰ Tenant leases previously had provisions “prohibiting the possession of guns and ammunition.”¹⁰¹ Given the stress state and local budgets currently face as a result of the economic downturn, more cities—and even some states—might decide that discretion is the better part of valor, and amend restrictive gun laws, rather than risk expensive lawsuits that they might ultimately lose. No such hydraulic pressure to amend these laws, however, would have been possible without the *Heller* decision.

97. Reynolds & Denning, *Heller's Future*, *supra* note 2, at 2035 (“What *Heller* is most notable for is its complete and unanimous rejection of the ‘collective rights’ interpretation [of the Amendment].”).

98. *See, e.g.*, Maura Dolan, *Gun Advocates Armed for Legal Fight*, L.A. TIMES, June 27, 2008, at A19.

99. *See, e.g.*, Deborah Horan & Brian Cox, *Evanston Amends Its Gun-Ban Law; Supreme Court Ruling, NRA Suit Force City Move*, CHI. TRIB., Aug. 12, 2008, Metro, at 2, available at <http://archives.chicagotribune.com/2008/aug/12/local/chi-evanston-gunaug12> (noting that both Evanston and Morton Grove, Illinois repealed their handgun bans following *Heller*).

100. Bob Egelko, *Housing Authority Settles Gun Lawsuit*, S.F. CHRON., Jan. 14, 2009, at B3, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/13/BALM15A1SG.DTL>.

101. *Id.*

B. THE ADAM WALSH ACT

In 2006, Congress passed the Adam Walsh Child Protection and Safety Act,¹⁰² named for the murdered son of *America's Most Wanted* host John Walsh.¹⁰³ The Adam Walsh Act imposed additional bail requirements on those charged with possession of child pornography, including a requirement that the accused “refrain from possessing a firearm, destructive device, or other dangerous weapon.”¹⁰⁴ Since *Heller*, this requirement has been treated differently in at least some federal courts. In *United States v. Kennedy*, the defendant was arrested after his laptop, examined upon his reentry to the United States at Seattle’s Sea-Tac airport, was found to contain child pornography.¹⁰⁵ Ultimately charged with “transportation of child pornography,” he was subjected to the automatic requirements of the Adam Walsh Act, including the requirement that he refrain from possessing a firearm.¹⁰⁶ The district court found that without a particularized finding of danger on the part of the defendant, such a requirement violated the Excessive Bail Clause¹⁰⁷ and made the following comment regarding *Heller*:

Pretrial Services recommends that Defendant be prohibited from possessing a firearm, which is a mandatory condition under the Walsh Act. In *District of Columbia v. Heller*, . . . the Supreme Court held that the Second Amendment created an individual right to possess firearms. . . . Justice Scalia noted that a law regulating a specific, enumerated right such as the right to keep and bear arms was subject to more than a rational basis level of scrutiny. If the government’s position in this case is sustained, this constitutional right would be taken away not because of a conviction, but merely because a person was charged. This right would be lost notwithstanding a lack of showing that Defendant is a potentially violent individual, or that he even owns firearms. Certainly no particularized need has been established in this case that the Defendant should be prohibited [sic] from possessing a firearm.¹⁰⁸

This requirement of a particularized showing of danger would seem to undermine the automaticity of the Adam Walsh Act; such a particularized showing in the *Kennedy* case would have been difficult, as the court found that:

The Defendant is 31 years old and has lived in the Seattle area his entire life, with the exception of 10 months in Vail, Colorado. He has

102. The Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 18 and 42 U.S.C.).

103. See *Police: 1981 Killing of Adam Walsh Solved*, MSNBC.COM, Dec. 16, 2008, <http://www.msnbc.msn.com/id/28257294/>.

104. 18 U.S.C. § 3142 (c)(1)(8)(viii) (2006).

105. 593 F. Supp. 2d 1221, 1223–24 (W.D. Wash. 2008).

106. *Id.* at 1224–25.

107. *Id.* at 1226–29.

108. *Id.* at 1231 n.4 (citations omitted).

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no prior record of criminal activity. Defendant has maintained regular, gainful employment with the local Longshoreman's Union, and he began working with the Union when he was 18 years old.¹⁰⁹

Likewise, in *United States v. Arzberger*, the Southern District of New York found *Heller* a bar to an automatic ban on firearms possession.¹¹⁰ Judge James Francis wrote:

A year ago, I might well have taken for granted the authority of Congress to require that a person charged with a crime be prohibited from possessing a firearm as a condition of pretrial release. The Second Amendment to the United States Constitution . . . had [been] routinely interpreted . . . as a right limited to the possession of weapons for certain military purposes. . . .

This all changed with *District of Columbia v. Heller*. There, the Court stated that “[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.” . . .

To the extent, then, that the Second Amendment creates an individual right to possess a firearm unrelated to any military purpose, it also establishes a protectible liberty interest. And, although the Supreme Court has indicated that this privilege may be withdrawn from some groups of persons such as convicted felons, there is no basis for categorically depriving persons who are merely accused of certain crimes of the right to legal possession of a firearm.

. . . .

Accordingly, the Adam Walsh Amendments violate due process by requiring that, as a condition of release on bail, an accused person be required to surrender his Second Amendment right to possess a firearm without giving that person an opportunity to contest whether such a condition is reasonably necessary in his case to secure the safety of the community. Because the Amendments do not permit an individualized determination, they are unconstitutional on their face. The Government's application to impose as a condition of bail that Mr. Arzberger not possess a firearm is therefore denied.¹¹¹

These cases suggest that, as an enumerated right, the right to possess firearms is not something that can be withdrawn at legislative whim. Rather, it is sufficiently important to trigger individualized due process protections, and to be impaired only when there is an individualized risk of firearms crime. (One suspects that the nexus between child pornography possession and firearms crime is likely to be slight; certainly these two cases do not suggest otherwise.)

109. *Id.* at 1225.

110. 592 F. Supp. 2d 590, 601–03 (S.D.N.Y. 2008).

111. *Id.* (alteration in original) (citation omitted).

C. SYMPATHY FOR THE FELON

As noted earlier, *Heller* has proven to be anything but a get-out-of-jail-free card for felons in possession of firearms. Nonetheless, even here some federal courts are finding that the characterization of the right to arms as an individual right affects their analysis, though, at this point, not always sufficiently to get the accused off the hook. Nonetheless, the discussion raises some interesting points.

In *United States v. Kitsch*, the defendant was in the anomalous position of being unaware that he was a convicted felon; he was (or at least claimed to be) under the impression that the conviction had been expunged and, in fact, it had not shown up on a background check.¹¹² In discussing defendant's motion to require the government to prove scienter with regard to his status as a felon, the district court held:

In *Heller*, the Court found for the first time that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." The Court acknowledged that long-standing limitations on the ownership and use of weapons, including Section 922(g)(1), were consistent with that guarantee. Nevertheless, because the Constitution directly guarantees the right, such limitations are subject to some level of increased scrutiny. . . .

A statute that imposes criminal penalties for the exercise of an enumerated constitutional right despite defendant's reasonable belief in good faith that he has complied with the law must, at the very least, raise constitutional doubts. Post-*Heller*, the Government's desired construction of Section 922(g)(1) imposes just such a burden on defendants who, for whatever reason, reasonably believe that they are not felons within the statutory definition. Faced with a statute that raises this sort of doubt, it is "incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress."

. . . Accordingly, we find that the word "knowingly" in 18 U.S.C. § 924(a)(2), when applied to the offense in 18 U.S.C. 922(g)(1), modifies both the elements of possession of the firearm and the status as a convicted felon. We will therefore grant defendant's motion as to this issue and will instruct the jury that, in order to convict Kitsch, the Government must prove beyond a reasonable doubt that he knew or was willfully blind to the fact that he had a prior felony conviction that had not been set aside or expunged.¹¹³

Furthermore, in another felon-in-possession case, *United States v. Skeens*, the defendant, a felon, was found to be in constructive possession of a number of firearms nominally owned by his wife.¹¹⁴ The court did,

¹¹² No. 03-594-01, 2008 WL 2971548, at *1 (E.D. Pa. Aug. 1, 2008).

¹¹³ *Id.* at *7 (alteration in original) (footnote omitted) (citations omitted) (quoting *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994)).

¹¹⁴ 589 F. Supp. 2d 757, 758 (W.D. Va. 2008).

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however, observe with regard to a firearm kept in the wife's bedside table that "[w]hile the Second Amendment does not immunize the possession of a firearm by a convicted felon, it does seem incongruous to sentence Mr. Skeens more harshly in part because of his wife's constitutionally-protected possession of a firearm."¹¹⁵ As forty-seven other firearms were also involved, however, this made no difference to the outcome.¹¹⁶

Finally, in *Jennings v. Mukasey*, a defendant sought a declaratory judgment that his right to possess firearms was not impaired by an expunged conviction for misdemeanor domestic violence.¹¹⁷ In rejecting the government's motion to dismiss, the court observed:

Assuming, as the Court must at this stage in the proceedings, that Plaintiff's conviction was duly expunged, it seems that he would clearly fall within the statutory exception in § 921(a)(33) (B)(ii) [sic] and would not be subject to prosecution under § 922(g)(9). Furthermore, in light of *District of Columbia v. Heller*, Plaintiff raises a viable claim that the violation of his Second Amendment right to bear arms also deprives him of the right to earn a livelihood. Taken together, the Court concludes that Plaintiff's allegations fall within the very limited exception to the general principle of immunity, that Plaintiff is otherwise without an adequate remedy at law, and that Plaintiff would suffer irreparable harm if not permitted to proceed in the instant action.¹¹⁸

These cases hardly represent a sea change in the constitutional law of firearms possession. They do, however, indicate that lower courts are taking cognizance of the *Heller* decision in a way that did not happen with regard to such decisions as *Lopez* or *Morrison*. Though these are not cases on all fours with *Heller*, the emergence of firearms possession as an individual constitutional right has plainly entered into the courts' consciousness and reasoning process; decisions on other topics are being made in the shadow of *Heller*.

There is even some evidence that this is happening at the state level. In *Cleveland v. Fulton*, the defendant, who had been charged with and acquitted of various disorderly conduct offenses, sought return of his seized handgun.¹¹⁹ The city, meanwhile, sought forfeiture on the ground that an unregistered handgun was "contraband."¹²⁰ The Ohio Court of Appeals held that:

Fulton's handgun was not a legally banned handgun, nor was he prohibited from owning or possessing it. The United States Supreme

115. *Id.* at 759 n.3 (citation omitted).

116. *See id.* at 758 (affirming the guideline calculation formulated under the sentencing guidelines).

117. No. 6:08-cv-833-Orl-31GJK, 2008 WL 4371348, at *1 (M.D. Fla. Sept. 22, 2008).

118. *Id.* at *2 (citation omitted).

119. 898 N.E.2d 983, 984 (Ohio Ct. App. 2008).

120. *Id.* at 985.

Court recently settled a long-standing debate as to the meaning of the Second Amendment. The court [sic] made clear that the Second Amendment, although not unfettered, guarantees the individual right of every American to possess and carry weapons unconnected to militia service.

This court certainly understands and shares the trial court's concerns about dangerous guns in our society and the damage and violence they can cause. That does not entitle the city, however, to deprive a person of his private property without due process of law.

Fulton's unregistered handgun not being contraband per se, he was entitled to have his property returned to him upon dismissal of the charges.¹²¹

The *Fulton* case demonstrates an important consequence of *Heller*'s individual right holding: the normalization of firearms possession. In the past sometimes treated as a deviant act, something not to be permitted without the indulgence of the sovereign,¹²² firearms possession is now something contemplated by the Constitution—something not deviant, but normal, with the burden shifting from those who would possess firearms to those who would deny their possession.¹²³ This burden-shift may turn out to be the most consequential result of *Heller*, at least in the day-to-day work of state and federal courts.

D. THE FUTURE

Though concrete discussion will await a later installment of our post-*Heller* survey, it seems possible that the shadow cast may be long enough to affect interpretation of the right-to-arms provisions in state constitutions. Although state constitutional interpretation is nominally—and, in recent years, often actually—independent of federal constitutional interpretation, there is no question that the United States Supreme Court has a powerful influence over the thinking of state court judges.¹²⁴ Though in some cases state courts have interpreted their state right-to-arms provisions more strongly than the Supreme Court has interpreted the Second Amendment¹²⁵—just as, before *Lawrence v.*

121. *Id.* at 989.

122. For examples of the old attitude among federal judges, see generally Denning, *supra* note 76.

123. See *supra* notes 102–21 and accompanying text.

124. Indeed, the growing independence of state courts in state constitutional interpretation may trace, in part, to the granting of “permission”—or at least encouragement—by Justice Brennan. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498–504 (1977) (calling for greater independence in state constitutional interpretation).

125. See, e.g., *Stillwell v. Stillwell*, No. E2001-00245-COA-R3-CV, 2001 WL 862620, at *4 (Tenn. Ct. App. July 30, 2001) (striking down visitation order barring ex-husband from having guns in home when children were present as violating right to arms). For further discussion, see Glenn Harlan Reynolds, *Guns and Gay Sex: Some Notes on Firearms, The Second Amendment, and “Reasonable Regulation,”* 75 TENN. L. REV. 137, 143–46 (2007).

Texas,¹²⁶ some state courts protected rights to privacy under their state constitutions more strongly than the United States Supreme Court did under the Federal Constitution¹²⁷—it seems likely that many courts will find pro-individual rights interpretations of state right-to-arms provisions easier, or at least politically less threatening, post-*Heller*.

At this stage, it remains unclear how that will shake out. One interesting aspect of the *Heller* decision is that—unlike *Lopez* or *Morrison*—it addresses issues not strictly federal in nature. There is no state analog to the enumerated powers doctrine, but the right to bear arms remains very much alive among state courts. At present forty-four states have right-to-arms provisions in their state constitutions,¹²⁸ provisions that have been enforced with varying degrees of enthusiasm on the part of state judiciaries.¹²⁹ Perhaps those states whose right-to-arms provisions have been subject to lackluster enforcement will begin to enforce them more vigorously; perhaps those states that have already enforced their right-to-arms provisions with some degree of vigor will begin to scrutinize legislation and regulation that trench on firearms possession even more closely. Or, perhaps, protection at the federal level will encourage state courts to slack off in their protection of state constitutional rights.

CONCLUSION

As we write this Article, *Heller* remains less than a year old, and it is surely too early to issue pronouncements regarding its legacy in the lower courts. Nonetheless, it appears to us that—compared with our experience following lower-court reactions to *Lopez* and *Morrison*—the *Heller* decision is getting more early response from the lower courts than either of those cases did. While the majority of invocations, as with those earlier cases, come from the sort of hopeful felons who tend to get short shrift from federal courts, not all responses have been dismissive, and there appear to be a number of courts that are conscientiously attempting to adjust their reasoning in light of new Supreme Court case law.

In part, this may say something about our legal culture, which tends to take positively enumerated individual rights more seriously than limits on governmental power, a view which is something of a departure from that which prevailed at the time of the framing.¹³⁰ At any rate, both

126. 539 U.S. 558 (2003).

127. See Reynolds, *supra* note 125 (comparing these lines of cases).

128. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 192–204 (2006).

129. See, e.g., Reynolds, *supra* note 125, at 138–43; Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 715–25 (2007).

130. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 430–38, 547–

courts and lawyers have a ready-made template, in the form of recent history, for understanding judicial expansions of individual rights, a template that is notably absent when it comes to internal limits on government power.

Unlike the Commerce Clause cases, the *Heller* case also has analogs in state constitutional law in the large majority of states that have their own right-to-arms provisions, and it is likely to produce at least something of a gravitational effect in state right-to-arms cases. It is even possible that—as with other areas, such as sodomy laws¹³¹—we will see cross-fertilization and even competition among states and between the states and the federal courts as this case law develops. It should, at any rate, be fascinating to observe—which is a good thing, as we plan to continue observing it.

64 (1969). For some more modern thoughts on structure in this context, see generally Glenn Harlan Reynolds, *Is Democracy Like Sex?*, 48 VAND. L. REV. 1635 (1995).

131. See, e.g., Stephen Gardbaum, *State and Comparative Constitutional Law Perspectives on a Possible Post-Roe World*, 51 ST. LOUIS U. L.J. 685, 689 (2007) (noting that, before *Lawrence v. Texas*, state courts in Georgia and Kentucky struck down sodomy laws under state constitutional provisions); Reynolds, *supra* note 125, at 145 (making the same point about the Tennessee Court of Appeals).