The Business of Guns: The Second Amendment & Firearms Commerce

by

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Does the Second Amendment protect commerce in firearms? The simple answer is yes, to an extent. An individual's right to possess and use a gun for self-defense in the home is black-letter law after *District of Columbia v. Heller*. The right to possess and use a gun requires the ability to *obtain* a gun, ammunition, and firearms training. Therefore, gun dealers, servicers, and training providers receive some constitutional protection as facilitators of their customer's Second Amendment rights. Whether these constitutional rights belong to firearms-related businesses independently of their customers is unclear. The scope of the Second Amendment matters as recent, horrific gun violence has launched serious regulation of firearms commerce back into the spotlight. These regulations are constantly challenged must be adjudicated using the precious little guidance the Supreme Court has provided.

Federal circuit courts have coalesced around a two-part Firearms Commerce Test to evaluate laws regulating firearms businesses. First, courts determine if the challenged law burdens conduct protected by the Second Amendment. Second, courts apply some level of heightened scrutiny. The Firearms Commerce Test is widely accepted. It is simple to understand and execute. The results it produces are consistent, fair, and useful. In fact, chances are good that the Supreme Court adopts the test as a national standard when it hears its first firearms commerce case. Even with all these positive attributes, the test could and should function more optimally.

This article argues that the test could be more efficient, effective, and faithful to *Heller* with two substantive modifications. First, courts should assume at step one that the Second Amendment is implicated. This approach is much better than the battle of historical sources courts now use to answer this question. Second, courts should uniformly apply intermediate scrutiny at step two. However, this judicial review should require the government to provide evidence that the law is effective (i.e., substantially related to an important government interest). This stricter level of review would ferret out the effective gun regulations from the rest and protect this often-unpopular constitutional right. This article argues that the vast majority of gun regulations will and should still be upheld because the government always has a compelling interest in reducing crime and protecting the public. With that huge advantage, officials must demonstrate that their law actually promotes these noble goals.

I. Introduction: The Tightrope Walk of Regulating Firearms Commerce

Does the Second Amendment protect commerce in firearms? The simple answer is yes, to an extent. The reasons why are more complicated but follow a logical progression. An individual's right to possess and use a gun[1] for self-defense in the home is black-letter law after *District of*

[1] The word "gun" is used throughout this article in a broad sense as defined in the OXFORD LIVING DICTIONARY: ENGLISH VERSION: "A weapon incorporating a metal tube from which bullets, shells, or other missiles are propelled by explosive force, typically making a characteristic loud, sharp noise." (Apr. 14, 2018), https://en.oxforddictionaries.com/definition/gun [http://bit.ly/GunGlossary]. This article indicates when a similar term – such as semi-automatic weapon or assault weapon - deviates from this broad definition in a legally-significant manner. This choice to use the term "gun" broadly is deliberate as the public is often confused by the many types and names of firearms in existence today. The focus of this article is on the business of guns in general and not whether certain types of guns should be banned from sale or restricted. The broad definition removes confusion from the important issues this article seeks to address. *See e.g.,* Mark Joseph Stern, *The Gun Glossary*, SLATE (Dec. 17, 2012 6:14pm),

Columbia v. Heller.[2] The right to possess and use a gun requires the ability to *obtain* a gun, ammunition, and firearms training. Therefore, gun dealers, servicers, and training providers receive some constitutional protection as facilitators of their customer's Second Amendment rights.[3]

Whether these constitutional rights belong to firearms-related businesses independently of their customers is unclear. This tends to be an issue of first impression upon arrival in federal circuit courts.[4] A definitive answer will require an opinion from a Supreme Court that appears to be dodging controversial Second Amendment cases.[5] In the meantime, firearms commerce is protected - to an extent - as ancillary to core Second Amendment rights. Laws that critically interfere with the ability to purchase guns and ammunition or conduct firearms training rest on shaky legal ground. Such regulations are seen, at a minimum, to interfere with an individual's right to "keep and bear arms."[6]

Less severe regulations also pose complex legal dilemmas left unanswered by the Supreme Court.[7] Do these complexities mean that the government lacks the ability to regulate firearms commerce in substantial ways? The short answer is certainly not. Constitutional rights are rarely absolute. Accordingly, the Supreme Court has limited the scope of the Second Amendment to allow certain regulations that meet important governmental interests like public safety and crime prevention.[8]

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http://www.slate.com/articles/news_and_politics/explainer/2012/12/the_gun_glossary_definitions_of_firearm_lingo_and_types_of_weapons.html [http://bit.ly/DefineGun] (stating that the "terms used by the media [in discussing guns and assault weapons bans] are often confusing and imprecise, and few reporters explain the differences among various types of firearms.").

[2] 554 U.S. 570 (2008). To be specific, the Supreme Court held that the District of Columbia's "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 683.

[3] *See e.g.*, Teixiera v. Cty. Of Alameda, 873 F.3d 670, 677 (9th Cir. 2017), *petition for cert. filed* (U.S. Jan. 8, 2018) (No. 18-982) (discussing this limited protection for firearms commerce and stating that, after *Heller*, "this court and other federal courts of appeals have held that the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense.").

[4] *See id* at 673 (holding that, in this case of first impression in the Ninth Circuit, a "textual and historical analysis of the Second Amendment demonstrates that the Constitution does not confer a freestanding right on commercial proprietors to sell firearms.").

[5] *See e.g.*, Silvester v. Becerra, 843 F.3d 816 (9th Cir. 2016), *cert. denied* 200 L. Ed. 293, 293 (Feb. 20, 2018) (No. 17-342) (Thomas, J., dissenting from the denial of certiorari) (lamenting that "if a lower court treated another right so cavalierly [as the lower court treated the Second Amendment in this case], I have little doubt that this [Supreme] Court would intervene. But as evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this [Supreme] Court. Because I do not believe we should be in the business of choosing which constitutional rights are 'really worth insisting upon,' I would have granted certiorari in this case.") (internal citations omitted).

[6] The Second Amendment reads: "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." U.S. CONST. amend. II (emphasis added).

[7] *See e.g.*, Teixiera, 873 F.3d at 682-83 (stating that the "language in *Heller* regarding the regulation of 'the commercial sale of arms,' . . . is sufficiently opaque with regard to that issue [and] rather than relying on it alone to dispose of Teixeira's claim, we conduct a full textual and historical review.").

[8] The contemporary Supreme Court holds that virtually all constitutional rights are subject to at least some regulation; in other words, they do not offer absolute protection. For example: you cannot yell "Fire!" in a crowded theater (a limit on an individual's First Amendment right to free speech), your home is subject to reasonable searches by the police (a limit on an individual's Fourth Amendment right to privacy), and your private property is subject to seizure after the government pays "just compensation" (a limit on an individual's Fifth Amendment right to control private property). At most, a constitutional right is protected by strict scrutiny, which can be overcome by a "compelling governmental interest." *See e.g.*, Sonja West, *The Second Amendment Is Not Absolute*, SLATE, (Dec. 7, 2015 3:37pm), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/12/second_amendment_allows_for_gun_contr

Even with the benefit of this regulatory wiggle-room, new laws targeting gun sales are inevitably challenged on Second Amendment grounds. Making matters increasingly difficult, these legal battles take place in tumultuous times when it comes to gun violence. A recent plague of mass shootings in safe havens such as churches, concert venues, government buildings, malls, movie theaters, restaurants, and schools has justifiably driven gun regulation back into the spotlight.[9] Tensions are high, and passionate people entrench themselves on their side of the debate.[10] For the well intentioned among the problem-solvers, the dilemma is real. Viable solutions must protect the Second Amendment rights of law-abiding gun owners while also keeping weapons out of the hands of dangerous individuals. Walking this tightrope is merciless. So difficult, it seems that Congress finds itself bombarded by outrage on both sides and spins its wheels.[11]

Inaction at the federal level leaves state and local governments to mind the gap.[12] Because these local officials are closer to the frustrated people they represent, they are motivated to craft workable solutions. As mentioned previously, there are few Supreme Court cases revolving around the Second Amendment to begin with and even fewer that spend any time evaluating firearms commerce.[13]

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ol.html [http://bit.ly/ConstitutionalRights] (stating that "[c]onstitutional rights are not absolute. They never have been and, practically, never can be. In our constitutional democracy, we have always recognized that we can, and must, have our constitutional cake and regulate it too."). The majority in *Heller* limited the Second Amendment right in this manner by stating: "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Heller, 544 U.S. at 626.

[9] *See e.g.*, Mark Berman, *The Parkland Massacre Sparked a Renewed Debate Over Gun Control. Here's What Happens Next*, WASH. POST (Feb. 20, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/02/20/after-parkland-massacre-renewed-debate-over-gun-control-puts-spotlight-on-students-public-officials/?utm_term=.ef3ff5be2420.

[10] *See e.g.*, Jonathan C. Rothermel, *Here's Why the Gun Debate, Ultimately, Leads Nowhere,* PHIL. INQUIRER (Dec. 3, 2015), http://www.philly.com/philly/blogs/thinktank/Heres-why-gun-debate-ultimately-leads-nowhere.html (stating:

> The gun debate is loathsome. First, the debate becomes most heated in the immediate aftermath of senseless gun violence, which lately has come about all too often. The same questions are raised on cable news, and the same guests are brought back to re-tell the all-too-familiar sides of the debate.
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> Secondly, the so-called debate is not really a debate but rather a reaffirmation of entrenched points of view on either side. Nowhere is that discussion more evident than on social media, where any suggestion of the need for changes in our gun laws is likely to be met by an avalanche of posts emphatically defending Second Amendment rights — or vice versa.).

[11] *See e.g.*, Nicholas Fandos & Thomas Kaplan, *Frustration Grows as Congress Shows Inability to Pass Even Modest Gun Measures,* N.Y. TIMES. (Feb. 15, 2018), https://www.nytimes.com/2018/02/15/us/politics/congress-inaction-guns.html.

[12] Mind the gap "is an audible or visual warning phrase issued to rail passengers to take caution while crossing the horizontal, and in some cases vertical, spatial gap between the train door and the station platform" so they don't fall under the tracks. Wikipedia, *Mind the Gap*, https://en.wikipedia.org/wiki/Mind_the_gap (as of Apr. 16, 2018 10:42 am). This is an apt analogy for lawmakers seeking to regulate firearms commerce. They must be careful to navigate the space between the gun rights groups and the gun control groups lest they fall under the tracks and find themselves crushed.

[13] *See e.g.*, Donald Scarinci, *Will the US Supreme Court Ever Bring Clarity to the Gun Control Debate?* OBSERVER (Mar. 6, 2018), http://observer.com/2018/03/supreme-court-gun-control-debate-stance/.

In the absence of binding precedent, jurisdictions across the United States experiment with diverse regulations. In the process, a patchwork quilt of laws regulating firearms commerce has evolved. Some regulations are strict (total bans on certain types of guns, ammunition, or firing ranges) and others are more lenient (tightened licensing or background check requirements). When these laws are challenged, the paucity of precedent results in many unanswered questions and a lack of clarity to guide the federal courts. Faced with this reality, judges must interpret dicta as well as the Second Amendment in order to rule on motions and resolve cases.[14]

This is an uncomfortable position for district and circuit court judges wanting to rule appropriately and weary of being overturned on appeal. That said, these courts have done a praiseworthy job in creating a near uniform approach to dealing with these challenges. The result has been a useful two-part Firearms Commerce Test[15] that: (1) evaluates whether the regulation burdens conduct protected under the Second Amendment and, if so, (2) applies some form of judicial scrutiny to balance an individual's right to keep and bear arms with the government's interests in public safety, decreasing gun violence, and preventing crime.

The test is workable but also has some major shortcomings. The judicial analysis would be more efficient and effective if courts were allowed to: (1) avoid parsing scattered and often contradictory history from centuries ago to determine whether the Second Amendment is implicated in the case and, instead, assume it is; (2) rigorously and consistently apply intermediate scrutiny in every case to identify constitutional regulations by requiring evidence of effectiveness from the government and burden from the plaintiffs. No longer is it acceptable for courts to assume that the means the government chooses actually further its ends. This is an especially powerful point when it comes to the Second Amendment – perhaps the most controversial and unpopular Bill of Rights guarantee.

Honing this important legal test forms the focus of this article, which proceeds in five parts. Part I introduces the problem, laments the tightrope upon which legislators operating in good faith are forced to ascend, and narrows this broad area of Second Amendment jurisprudence to improving the Firearms Commerce Test.

Part II evaluates the Supreme Court's limited pronouncements on firearms commerce. Though no case speaks directly to this issue, the justices have hinted at the boundaries of regulating this area beginning with *Heller* in 2008 and proceeding through *McDonald v. Chicago*[16] in 2010. Famously, at least to people immersed in this area, Justice Scalia opined in *Heller* that nothing in the Court's "opinion should be taken to cast doubt on longstanding . . . laws imposing conditions and qualifications on the commercial sale of arms."[17] He went on in a footnote to state: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[18]

That is it - the only real guidance from the two high court cases even marginally touching upon firearms commerce. Part II works hard to demonstrate two common denominators gleaned from this unofficial guidance or dicta:

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[14] Lower courts are "are bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." United States v. Serawop, 505 F.3d 1112, 1122 (10th Cir. 2007) (quotation omitted).

[15] This name is my own and does not come from the case law.

[16] 561 U.S. 742 (2010).

[17] 554 U.S. 570, 626-27 (2008).

[18] *Id.* at fn. 26. The majority in *Heller* also added that, "our list [of ways in which governments can regulate guns] does not purpose to be exhaustive." *Id.* at 627 n. 26.

Common Denominator #1: Firearms-related businesses have (at least) limited Second Amendment rights to engage in commerce. These rights are either their own or derive from their customers' Second Amendment rights. If the Second Amendment did not offer such protection, there would be no need for the Supreme Court to state in *Heller* and reiterate in *McDonald* that "laws imposing conditions and qualifications on the commercial sale of arms . . . [are] presumptively valid regulatory measures."[19] In other words, without a constitutional right to deal in guns, the government could just ban all firearms commerce without worry. Lawmakers would not need the benefit of presumptive validity for laws imposing conditions and qualifications on firearms commerce and the Court's statements in these cases would be oddly superfluous; and

Common Denominator #2: The government remains free regulate the firearms commerce industry . . . to a certain extent. When doing so, the government possesses the benefit of *presumptive validity* for many of its longstanding regulations covering firearms commerce. This legal benefit means that laws which can be traced back far enough in time (precisely how old each law must be is unclear) are very likely to be upheld in a facial challenge. That leaves as-applied challenges as the primary vehicles to enforce Second Amendment rights.

This second Part concludes with a few key questions left unresolved in this line in of cases. For example, *Heller* discussed the presumptive validity of "longstanding regulations" on firearms. But, this prized position for ancient laws was the beginning of a long and awkward sentence ending with phrasing on firearms commerce. If only "longstanding" laws regulating firearms commerce are presumptively valid but newer laws are not, a vast majority of state statutes in this area become vulnerable. This explains why this paragraph from *Heller* is so hotly disputed. There is also the issue of what test lower courts should use to evaluate laws regulating the commercial sale of guns. Is it intermediate scrutiny, strict scrutiny, or something in between?

Part III does the heavy lifting of evaluating how Federal Circuits have handled this line of cases and these tough questions. The analysis begins with answers to the three most difficult firearms commerce questions after Heller: (1) Do firearms related businesses have their own Second Amendment rights? What does it take for a law to be "longstanding" and, thereby, "presumptively valid?" And, what level of scrutiny should lower courts adopt in firearms commerce cases? The answers to these questions are critical, as they are often outcome-determinative. This Part concludes with an evaluation of the Firearms Commerce Test, which has proven to be a very good approach to dealing with most Second Amendment challenges left unresolved after *Heller*.

Part IV forms the diagnostic piece of this article. It attempts to show that the Firearms Commerce Test can be made more effective, efficient, and faithful to the decision in *Heller*. The analysis begins with the two big problems inherent in the current test – one structural and the other practical - and then offers solutions. Briefly:

> PROBLEM #1: Courts are reluctant to make a judgment as to whether the conduct burdened is protected by the Second Amendment as required by the Firearms Commerce Test. This makes sense as the Justices have provided little guidance on how to make these calls other than to conduct an historical analysis. The problem is that the history of early America is voluminous, opaque, and often inconsistent. Some courts venture into this analysis while others just punt and assume that protected conduct is burdened. This assumption allows them to move to the part of the test where they can apply some form of heightened scrutiny and adjudicate the

[19] *Id.*

case under a more familiar formula. In the end, this requirement leads to inconsistencies across the circuits and frustration among judges, the parties, and the general public.

PROPOSED SOLUTION: Current practice renders the first prong of the Firearms Commerce test basically meaningless. So, this article proposes that any discretion here be eliminated and that courts assume the regulations burden protected conduct. Then, the court would move on to apply a familiar Intermediate Scrutiny review to all laws challenged under the Second Amendment: they must be substantially related to an important governmental interest. The Intermediate Scrutiny test in these cases, however, would have some teeth and require evidence from both sides as described in Problem #2.

PROBLEM #2: Some federal circuit courts already use intermediate scrutiny to evaluate laws held to burden conduct protected under the Second Amendment. Others vary the scrutiny level depending upon how drastic an invasion on protected conduct they perceive. These different approaches also lead to inconsistencies across the circuits and frustration among judges, the parties, and the general public. Making matters worse, the intermediate scrutiny standard implemented in these cases has become too deferential to the government. It now approximates the interest balancing that *Heller* prohibited with the scales tipped in favor of firearms commerce regulations. Because the governmental will always have important, if not compelling, interests in reducing crime and protecting the public, a deferential standard when it comes to fit spells doom for all but the most egregious violations of the Second Amendment.

PROPOSED SOLUTION: Uniformly apply the standard intermediate scrutiny formula to each of these cases: Regulations burdening firearms commerce must be substantially related to an important governmental interest. As part of the analysis, courts should impose more stringent burdens on government to show their regulations are effective and plaintiffs to demonstrate how their Second Amendment rights are burdened. Importantly, in reference to the heated national discussion (more appropriately, battle) now occurring on this topic, this modified standard requires officials to regulate based on actual evidence and not animus towards guns. The hope is that this heightened showing requirement will show some good faith on the part of the most powerful party in this fight, the government.

Part IV concludes with a call for a Firearms Commerce Test that is more efficient, effective, and faithful to *Heller*. The hope is that the Supreme Court, upon deciding its first firearms commerce case, will use some form of this modified test to issue stronger guidance in this area. Part V concludes with a call to streamline the firearms commerce test and proposes some areas where further research would be immensely helpful.

II. THE SECOND AMENDMENT & FIREARMS COMMERCE: PRECIOUS LITTLE GUIDANCE FROM THE SUPREME COURT

The line of Supreme Court cases interpreting the Second Amendment is miniscule - especially in comparison to other guarantees in the Bill of Rights.[20] From this handful, only two cases touch upon firearms commerce in a meaningful way: *District of Columbia v. Heller*[21] and *McDonald v. City of Chicago*.[22] This Part evaluates each opinion, focusing on particular passages (often dicta) that bear on regulating firearms commerce. This analysis reveals important issues left unresolved in Second Amendment jurisprudence. The Supreme Court is free to dodge these questions, but inaction by the Justices forces the lower courts to fill in the blanks. This path being blazed by the federal circuits in this realm forms the focus of Part III. The meat of Part II, however, begins with *Heller* and *McDonald* and the precious little guidance to be gleaned from these groundbreaking cases.

A. The Groundbreaking Heller Decision: "Guidance" for Regulating Firearms Commerce

It is difficult to comprehend how the *Heller* case impacts firearms commerce without a somewhat detailed history of the facts and procedural history. This is because lower courts, seeking guidance that is opaque at best, tend to analyze details of the *Heller* saga to adjudicate their Second Amendment cases. For example, lower courts seek to determine whether the firearms commerce regulation at issue burdens conduct protected by the Second Amendment. The Supreme Court has not answered that question, so district judges and appellate panels must scour *Heller* to intuit an answer. They also look to the ratification history of the Second Amendment as well as commentary from the 18th century. All of this is elaborately researched and discussed in each stage of the *Heller* case. With this in mind, it is advisable to possess a thorough understanding of how the courts involved in *Heller* navigated the issues.

1. The Facts

Dick Heller worked as an armed security officer for the federal courts in the District of Columbia (D.C.).[23] He was allowed to carry a gun at work as a "special police officer." However, Mr. Heller desired to carry his weapon outside of work and have it at-the-ready at home for self-defense. So, he applied for a registration certificate for his handgun and was denied.[24] Without a certificate, or a rarely issued one-year license from the chief of police, D.C. law basically forbid

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[20] The small group of major Supreme Court cases interpreting the Second Amendment over the past century include: U.S. v. Miller, 307 U.S. 174, 178-79 (1939) (holding that short-barrel shotguns are not the types of weapons covered under the thrust of the Second Amendment – the "preservation or efficiency" of state militias), District of Columbia v. Heller, 554 U.S. 570 (2008) (finding a Second Amendment right to possess "all instruments that constitute bearable arms," particularly in the home for self-defense), McDonald v. Chicago, 561 U.S. 742 (2010) (incorporating the Second Amendment to states and local governments via the Fourteenth Amendment's Due Process Clause), Caetano v. Massachusetts, 136 S. Ct. 1027 (2016) (per curiam) (vacating and remanding a Massachusetts Supreme Court decision that upheld a state stun-gun ban under the (false) premise that stun guns are not the types of weapons protected by *Heller*), and Voisine v. U.S., 136 S. Ct. 2272 (2016) (holding that convictions for reckless domestic assaults may lead to lifetime gun-ownership bans). The last two cases on this list did not specifically interpret the Second Amendment but have a bearing on its interpretation by the lower courts. Compare this small list to the many dozens of "Landmark" First Amendment cases from the Supreme Court. *See e.g.*, Bill of Rights Institute, *Landmark Supreme Court Cases: Freedom of Speech: General*, BILLOFRIGHTSINSTITUTE.ORG (Apr. 24, 2018 9:52am), http://www.billofrightsinstitute.org/educate/educator-resources/landmark-cases/freedom-of-speech-general/ (linking also to cases classified under many Bill of Rights guarantees).

[21] 554 U.S. 570 (2008).

[22] 561 U.S. 742 (2010).

[23] Heller, 554 U.S. at 575.

[24] See *id.*

Mr. Heller from possessing his handgun outside of work. Mr. Heller, along with five other residents, challenged this ban as well as a regulation requiring all lawfully-owned guns kept in the home to be unloaded and safely stored (basically, disassembled or locked).[25] The plaintiffs argued that these laws violated their *individual* Second Amendment rights to "keep and bear arms."[26]

2. Federal District Court – A Decision in Favor of the Government

A federal District Court in D.C. dismissed the plaintiffs' complaints.[27] Judge Emmet Sullivan felt bound by the 1939 case of *U.S. v. Miller*.[28] There, the Supreme Court unanimously found that short-barreled shotguns were not the types of weapons covered under the thrust of the Second Amendment - the "preservation or efficiency" of state militias.[29] Judge Sullivan joined "the vast majority of circuit courts" at the time to find that *Miller* analyzed the Second Amendment to discover no "individual right to bear arms separate and apart from service in the Militia."[30] This holding, he wrote, combined with "65 years of unchanged Supreme Court precedent and the deluge of circuit case law rejecting an individual right to bear arms not in conjunction with service in the Militia" made dismissal the appropriate choice.[31]

3. D.C. Circuit Court of Appeals – A Reversal & an Individual Right to Possess Firearms

Judge Sullivan's decision was reversed three years later by a divided panel of the District of Columbia Court of Appeals.[32] The panel looked at the case as one of first impression in the Circuit and decided to determine whether the Second Amendment provides an individual right to keep and bear arms or a collective right reserved for members of a state-organized militia.[33] In reaching its conclusion, two of the three judges on the panel, Judges Laurence Silberman[34] and Thomas Griffith[35], found that the:

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[25] *See id.* at 575.
[26] *See id.* at 575-76.
[27] Parker v. District of Columbia, 311 F. Supp. 2d 103, 109 (2004) [hereinafter *Parker I*].
[28] 307 U.S. 174 (1939). Judge Sullivan was appointed by President Bill Clinton in 1994. *See District [Judge] Emmet G. Sullivan*, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA: JUDGES: DISTRICT JUDGES (Apr. 25, 2018 6:43am), http://www.dcd.uscourts.gov/content/district-emmet-g-sullivan (stating also that Judge Sullivan was previously appointed by Presidents Reagan and George W. Bush to local D.C. courts).
[29] *See id.* at 178 (stating that in the "absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. . . . With obvious purpose to assure the continuation and render possible the effectiveness of such forces [the militia] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.").
[30] Parker I, 311 F. Supp. 2d 103, at 109.
[31] *Id.* at 109-10.
[32] Parker v. District of Columbia, 478 F.3d 370, 401 (2007) [hereinafter Parker II]. The panel decision was 2 to 1 with Judge Karen Henderson filing a dissent based on the idea that the District of Columbia is not a "state" with any organized militia within the meaning of the Second Amendment. *See id*. at 372 & 401-02.
[33] *See id.* at 380-81,
[34] Judge Silberman was appointed by President Ronald Reagan in 1985. *See Silberman, Laurence Hirsch*, FEDERAL JUDICIAL CENTER: HISTORY OF THE FEDERAL JUDICIARY: JUDGES (Apr. 25, 2018), https://www.fjc.gov/history/judges/silberman-laurence-hirsch.
[35] Judge Griffith was appointed by President George W. Bush in 2004. *See Griffith, Thomas Beall*, FEDERAL JUDICIAL CENTER: HISTORY OF THE FEDERAL JUDICIARY: JUDGES (Apr. 25, 2018), https://www.fjc.gov/history/judges/griffith-thomas-beall.

Second Amendment protects an individual right to keep and bear arms. That right existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad). In addition, the right to keep and bear arms had the important and salutary civic purpose of helping to preserve the citizen militia.[36]

An opinion of this nature by a federal circuit court needed to distinguish *Miller*, a binding precedent. Contrary to the District Court, the panel majority found *Miller* silent on whether the Second Amendment codifies an individual right to keep and bear arms.[37] They found instead that *Miller* stands for the proposition that short-barreled shotguns are not the type of "Arms" covered by the Second Amendment's text.[38] Therefore, the case had nothing to say about the individual versus collective right question. This reading of *Miller* by one of the most prestigious federal circuit courts helped dramatically change the national conversation on guns.[39] Moving forward, judges (at least in the D.C. Circuit and the Fifth Circuit, which adopted the individual right to keep and bear arms position in 2001)[40] would have to grapple with the major issues surrounding this change in the law without any concrete guidance from the Supreme Court.

A key issue quickly emerged concerning how the individual right to keep and bear arms could be limited by the government, if at all. This issue is relevant to our inquiry as well because the ability to limit someone's right to keep and bear arms certainly limits a gun dealer's ability to conduct commerce in such arms. The panel opinion did recognize that the individual right may be limited by the same types of "reasonable restrictions" that limit First Amendment protections.[41] The court singled out the appropriateness of gun regulations covering intoxication, concealed carry, felony convictions, registration and training requirements, and mental illness.[42] No mention was made, at least in this opinion, of how the government could constitutionally restrict firearms commerce.

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[36] *Id.* at 395.

[37] *See id.* at 392-93.

[38] *Id.* The panel came to this conclusion because the Court in *Miller* was asked by the government (in its primary argument) to find a collective right, but instead took the approach of addressing instead the type of weapon involved (the government's secondary argument). *See id.* at 393.

[39] *See e.g.*, Sandy Froman, *Why You Should Care About Parker v. District of Columbia*, TOWNHALL.COM (May 1, 2007 10:43am), https://townhall.com/columnists/sandyfroman/2007/05/01/why-you-should-care-about-parker-v-district-of-columbia-n1184285 (stating that the "case is monumental. Already the DC Circuit Court opinion - if left untouched - will totally change gun ownership rights in the District of Columbia. And the DC Circuit is one of the most respected and well-credentialed courts in America. Its opinions and rulings have a major impact on courts and lawmakers all over the country.").

[40] *See* United States v. Emerson, 270 F.3d 203, 264-265 (5th Cir. 2001) (stating that "[w]e agree with the district court that the Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons and are not of the general kind or type excluded by Miller, regardless of whether the particular individual is then actually a member of a militia."). The *Emerson* court did, however, uphold the gun regulation at issue (a temporary restraining order in a divorce case that barred Emerson from possessing a gun) as a narrowly tailored deprivation of this newly found individual right to keep and bear arms. *Id.* The *Emerson* court also distinguished *Miller* as standing for something other than a collective right to keep and bear arms. *Id.* at 225-26.

[41] *See Parker* II, 478 F.3d 370, at 399. These were the only two circuits in the United States, prior to *Heller*, to have adopted the idea that the Second Amendment guaranteed an individual right to keep and bear arms.

[42] *See id.*

After reversing the dismissal, the D.C. Circuit ordered Judge Sullivan to grant summary judgment in favor of Mr. Heller.[43] The other petitioners were dismissed from the case for lack of standing.[44] The government had not charged them with violations of the laws at issue and, therefore, none had suffered a concrete injury. The District of Columbia appealed to the D.C. Circuit for an *en banc* hearing, which was denied,[45] and then to the United States Supreme Court.[46]

4. Heller at the Supreme Court

The Supreme Court granted certiorari in *District of Columbia v. Heller* on November 20, 2017 - its first major Second Amendment case in nearly 70 years! The case resulted in a bitterly contested five-to-four affirmance of the D.C. Circuit.[47] Justice Scalia's opinion, a "tour de force" of originalism[48] full of history from the eighteenth century and beyond, adopted the appellate panel's view that the Second Amendment protects an individual right to "possess and carry weapons in case of confrontation."[49] In lieu of overruling *Miller*, the court agreed with the D.C. Circuit that the case merely held that short-barreled shotguns were not the types of weapons covered by the Second Amendment.[50] More specifically, Justice Scalia wrote that *Miller* "stands only for the proposition that the Second Amendment right, *whatever its nature*, extends only to certain types of weapons."[51] Unencumbered by precedent, the majority held that bans on handgun possession in the home and requirements that guns kept at home be rendered inoperable *violate* an individual's right to keep and bear arms under the Second Amendment.[52]

This holding was controversial and included nearly 90 pages in dissent.[53] Each dissenting justice joined both dissents in full. Their points were clear: "Majority, you read the history wrong. The Second Amendment is 'most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia'" (Justice Steven's dissent).[54] "And, even on the unlikely assumption that you read the history correctly, the proper test is to balance the interests. Here, the District's interests in safety outweigh an individual's right to 'keep loaded handguns in the house in crime-ridden urban areas'" (Justice Breyer's dissent).[55]

The majority spent many pages rebutting these dissents and also recognized the monumental nature of the opinion. Justice Scalia issued this disclaimer:

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[43] *See id.* at 401.
[44] *See id.* at 374-78 (stating that the appellants other than Mr. Heller failed to establish an injury-in-fact). This is why the case named changed at the Supreme Court to District of Columbia v. Heller. Shelly Parker and the five appellants, other than Mr. Heller, were no longer parties to the case.
[45] 2007 U.S. App. LEXIS 11029 (2007) (showing that four out of the ten D.C. Circuit judges voting for rehearing (Judges Randolph, Rodgers, Tatel, and Garland) desired to grant the petition to hear the *en banc* appeal).
[46] 552 U.S. 1035 (2007) (stating that the issue the Court voted to hear was limited to the following question: "Whether the [D.C. laws discussed above] violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?").
[47] District of Columbia v. Heller, 554 U.S. 570 (2008).
[48] Worman v. Healey, 2018 U.S. Dist. LEXIS 59357, 2 (D. Mass. 2018).
[49] *Id.* at 592.
[50] *See id.* at 621-22.
[51] *Id.* at 623 (emphasis added).
[52] *See id.* at 635.
[53] *Id.* at 636-723
[54] *Id.* at 637 (stating "there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.") and 651.
[55] *Id.* at 722.

> We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by many *amici* . . .The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include absolute prohibitions of handguns held and used for self-defense in the home.
>
> * * *
>
> [W]hat is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.[56]

This was an important inflection point in American Constitutional Law. After *Heller*, the Second Amendment would not join the Third Amendment in the graveyard of Bill of Rights guarantees. With the individual right to keep and bear arms fully adopted, a large part of the public policy debate over the Second Amendment shifted to how governments could constitutionally regulate guns. And, a large part of that regulatory effort has been to restrict or ban firearms commerce (think: assault weapons bans, large capacity magazine bans, gun show regulations, firing range bans / restrictions, gun dealer licensing and commercial restrictions).[57] With this in mind, this Part turns to how the *Heller* court touched upon firearms commerce.

5. Heller's Guidance for Firearms Commerce

Firearms commerce played a small but very important role in the *Heller* case – both in the majority opinion and Justice Breyer's dissent. Justice Scalia opined that nothing in the Court's "opinion should be taken to cast doubt on longstanding . . . laws imposing conditions and qualifications on the commercial sale of arms."[58] He went on in a footnote to state: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[59] For example, governments are seemingly able to require licenses and background checks to deal in guns. These would be "conditions" or "qualifications" on the commercial sale of arms. Whether these laws count as "longstanding" conditions and qualifications and whether that temporal distinction even matters requires some reading between the lines and is the focus of Part III.[60]

Justice Scalia continued on in *Heller* to seemingly eliminate "rational basis" as the test to evaluate laws imposing conditions and qualifications on firearms commerce.[61] He argued that rational basis is never the proper standard to judge a law that burdens a "specific, enumerated right be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms."[62] But, in eliminating the most regulatory-permissive test, he did not lay down a

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[56] *Id.* at 636.
[57] *See e.g.*, Leslie Shapiro, Sahil Chinoy and Aaron Williams, *How Strictly Are Guns Regulated Where You Live*, WASH POST (Feb. 20, 2018 10:01pm), https://www.washingtonpost.com/graphics/2017/national/assault-weapons-laws/ (showing seven types of gun control laws, state-by-state).
[58] *Id.* at 626-27.
[59] *Id.* at fn. 26. The majority in *Heller* also added that, "our list [of ways in which governments can regulate guns] does not purpose to be exhaustive." *Id.* at fn. 26.
[60] *See infra* Part III.
[61] *See id.* at fn. 27.
[62] *Id.*

tougher standard that should be used to evaluate these regulations. Instead, he argued that the District's laws in this case would fail any standard of scrutiny.[63] Beyond that, he left the proper test for another case. Absent also is any mention of whether gun dealers have any Second Amendment rights subject to Second Amendment means-ends scrutiny.

And there you have it. This is the only guidance from the majority in *Heller* with any bearing upon firearms commerce.

Of the two dissents in *Heller*, Justice Breyer's stands out as the most applicable to the regulation of firearms commerce. He begins by stating his position that the Second Amendment is a collective right – the right to keep arms for militia, not self-defense, purposes.[64] He then moves to the key part of his dissent for our purposes – the idea that a "Balancing of Interests" test should be used to judge laws that burden Second Amendment rights.[65] Strict scrutiny will always be met in gun regulation cases, he argues, because the government always has a compelling interest in the "safety and lives if its citizens."[66] This means that every analysis of a gun regulation will turn into a balancing of the government's compelling interest in safety versus the burden on an individual's Second Amendment rights.[67]

To avoid this sleight of hand, Justice Breyer claimed: "I would simply adopt such an interest-balancing inquiry explicitly."[68] This interest balancing approach is important because it (slightly) resembles the analysis the circuit courts resort to in firearms commerce cases.[69] The big question, discussed in Part III, will be whether the majority of justices, in a future firearms commerce case at the Supreme Court, will reject the circuit court balancing test just as the majority rejected Justice Breyer's approach in *Heller*.[70]

With the evaluation of *Heller* complete, the next section briefly evaluates how the *McDonald v. Chicago* case reiterated this guidance from *Heller* and made the Second Amendment applicable to evaluate state and local laws.

a. McDonald v. Chicago: Incorporation of the Second Amendment to the States & Guidance for Firearms Commerce Cases

McDonald v. Chicago[71] is the second most influential case in the recent development of Second Amendment jurisprudence. When it comes to evaluating the constitutionality of firearms commerce regulations, however, this groundbreaking case is a bit less pertinent.[72] *McDonald's* key contributions, for our purposes, stem from: (1) the principles it reiterates from *Heller* on the commercial sale of arms, (2) its disclaimer that interest balancing cannot be the judicial approach

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[63] *See id.* 628-29.
[64] *See id.* at 681.
[65] *See id.* at 689.
[66] *Id.* (internal citations omitted).
[67] *Id.*
[68] *Id.*
[69] *See infra* Part III.
[70] *See id.*
[71] 561 U.S. 742 (2010).
[72] *See e.g.*, New York State Rifle and Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 254 (2nd Cir. 2015) [hereinafter *Cuomo*] (stating *McDonald* was a landmark case in one respect - the Court held for the first time that the Fourteenth Amendment "incorporates" the Second Amendment against the states. Otherwise, *McDonald* did not expand upon *Heller's* analysis and simply reiterated *Heller's* assurances regarding the viability of many gun-control provisions. Neither *Heller* nor *McDonald*, then, delineated the precise scope of the Second Amendment or the standards by which lower courts should assess the constitutionality of firearms restrictions.").

to evaluating gun regulations, and (3) the fact that the Supreme Court, for the first time, applied the Second Amendment protections surfaced in *Heller* to state and local legislation. With this in mind, the *McDonald* analysis is briefer. But, *McDonald* still matters because it too guides lower court interpretation when gun dealers invoke the Second Amendment to challenge state and local firearms regulations.

1. The Facts

The facts in *McDonald* are strikingly similar to *Heller*. A group of plaintiffs found themselves basically banned by local laws in the cities of Chicago and Oak Park, Illinois from possessing handguns in their homes for self-defense.[73] Joined by the NRA, they challenged these laws as interfering with their individual Second Amendment right to keep and bear arms.[74] These suits were filed a mere one day after *Heller* was decided and were eventually consolidated in the Northern District of Illinois.[75]

2. McDonald, The Lower Courts & The Incorporation Doctrine

The *McDonald* plaintiffs encountered an immediate problem. *Heller's* ruling applied to gun regulations promulgated under federal law. This is because the District of Columbia is a constitutionally-created federal enclave which makes D.C. law akin to federal law.[76] The Second Amendment had never before been used as a tool to strike down state and local laws like those at issue in *McDonald*. In fact, longstanding Supreme Court precedent (circa 1833) claimed that the Bill of Rights was intended to bind only the federal government.[77]

The ratification of the Fourteenth Amendment in 1868, however, changed the rules. Arguments began to circulate that the Due Process Clause in the Fourteenth Amendment – which reads "nor shall any state deprive any person of life, liberty, or property, without due process of law"[78] – was meant to protect rights that are "deeply rooted in the nation's tradition" from invasion. These rights are so fundamental, the theory goes, that neither the federal government *nor* state and local governments can take them away.

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[73] *See id.* at 750. Chicago's ordinance banned possession of firearms without a valid registration certificate from the city, a certificate that was basically banned by another section of the law. Chicago, Ill., Municipal Code § 8-20-040(a) & 050(c) (2009). The Village of Oak Park banned the possession of any firearm. Oak Park, Ill., Village Code §§ 27-2-1 (2007), 27-1-1 (2009).

[74] *See McDonald,* 561 U.S. 742, at 752 (stating the plaintiffs' argument that the laws at issue violate the Second and Fourteenth Amendments to the United States Constitution and that all the filed cases were consolidated under one District Court judge).

[75] NRA of Am., Inc. v. Vill. of Oak Park, 617 F. Supp. 2d 752 (2008) [hereinafter *Oak Park*]

[76] The District of Columbia is governed under the authority of the federal government. *See DC Home Rule*, COUNCIL OF THE DISTRICT OF COLUMBIA (Apr. 25 1:03pm), http://dccouncil.us/pages/dc-home-rule (stating that, under the Home Rule Act, "Congress reviews all legislation passed by the [D.C.] Council before it can become law and retains authority over the District's budget. Also, the President appoints the District's judges, and the District still has no voting representation in Congress.").

[77] Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. 243, 247 (1833) (holding, in an opinion by Chief Justice John Marshall, that Justice Marshall, explained that the question of whether the Bill of Rights applied to the federal government exclusively was "of great importance" but "not of much difficulty.").

[78] U.S. CONST. amend. XIV, §1.

The Supreme Court agreed and slowly began to hold that certain guarantees in the Bill of Rights also bind on the states via the Fourteenth Amendment's Due Process Clause.[79] This process is called "selective incorporation" because only some of the Bill of Rights protections are found to be deeply rooted enough (i.e., evaluated and selected by the justices as such) to bind state and local governments.[80]

The *McDonald* plaintiffs needed to convince the courts hearing their case that the individual right to keep and bear arms from *Heller* is a liberty interest deeply rooted in the tradition of the United States. If successful, the Second Amendment would be applied (or incorporated) to judge the constitutionality of state and local laws. Courts would then be far more likely to hold that individual gun owners are protected from excessively burdensome gun regulations enacted by state and local governments. And, the *McDonald* plaintiffs could then argue that the regulations enacted by Chicago and Oak Park were of the excessively burdensome type which violate the Second Amendment.[81]

Perhaps obviously, federal district and circuit courts lack the authority - or at least the willingness - to make this type of incorporation decision on their own. These judges are bound by the Supreme Court and, lacking guidance from the Justices, by circuit precedent. It is frowned upon for a lower court to anticipate what the Supreme Court will (or perhaps should) do and act accordingly.[82] This rule holds unless circuit precedent is overruled or the case is one of first impression in the circuit.[83] The Seventh Circuit, hearing the *McDonald* case, had clear circuit precedent reiterating this general rule: "The Supreme Court has told the lower courts that they are not to anticipate the overruling of a Supreme Court decision, but are to consider themselves bound by it until and unless the Court overrules it, however out of step with current trends in the relevant case law the case may be."[84]

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[79] *See McDonald*, 561 U.S. 742 at 758-759.

[80] For example, the Supreme Court has used selective incorporation to make the following guarantees applicable to the states: the First Amendment's protection of free expression (Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); the First Amendment's Establishment Clause (Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 226-27 (1963)); the First Amendment protection of freedom of the press (Near v. Minnesota, 283 U.S. 697, 722-23 (1931)); the First Amendment protection of the freedom of assembly (DeJonge v. Oregon, 299 U.S. 353 (1937)); the Fourth Amendment protection against unreasonable searches and seizures (Mapp v. Ohio, 367 U.S. 643, 660 (1961)); the Fifth Amendment right against self-incrimination (Miranda v. Arizona, 384 U.S. 436, 444 (1966)); the Sixth Amendment right to counsel for indigent defendants (Gideon v. Wainwright, 372 U.S. 335, 339-45 (1963)). This is just a taste; there are other guarantees selectively incorporated by the Supreme Court. Conversely, other guarantees have not been selectively incorporated. *See e.g.,* Barron v. Baltimore, 32 U.S. 243, 250-51 (1883) (declining to incorporate the Fifth Amendment guarantee of "just compensation" for taking of property).

[81] *See Oak Park*, 617 F. Supp. 2d 752, at 753.

[82] *See* Saban v. United States DOL, 509 F.3d 376, 378 (2007).

[83] District Court Judge Milton Shadur stated this well in his opinion declining to incorporate the Second Amendment in this case: "the judge's duty [is] to follow established precedent in the Court of Appeals to which he or she is beholden, even though the logic of more recent caselaw may point in a different direction."). *Oak Park*, 617 F. Supp. 2d 752, at 753. Recall that this case-of-first-impression angle is what the D.C. Circuit panel used to find the individual right to keep and bear arms in *Heller*.

[84] Saban, 509 F.3d 376, at 378.

Predictably, the plaintiffs lost in both the District Court[85] and the Seventh Circuit on appeal.[86] Neither court was willing to overrule circuit precedent and ignore a footnote in *Heller* that clearly stated that the Supreme Court had not incorporated the Second Amendment to the states.[87] The Seventh Circuit did foreshadow the Supreme Court's upcoming opinion by reiterating that incorporation for the Second Amendment is "open to reexamination by the Justices themselves when the time comes."[88] The plaintiffs only remaining hope was that the Supreme Court would take their case and extend the Second Amendment to states and local jurisdictions via incorporation.

3. McDonald at the Supreme Court

And . . . the plaintiffs' efforts were rewarded. The Supreme Court took the case[89] and agreed that the right to keep and bear arms for self-defense was deeply rooted not only in the American tradition but also "recognized by many legal systems from ancient times to the present day."[90] From the English Bill of Rights, to Blackstone, and through the Civil War period, Justice Alito's opinion demonstrated how important the individual right was to average Americans, framers of the Constitution, families on the frontier, freed slaves, abolitionists, etc.[91] Justice Alito concluded with the statement: "We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."[92]

Like *Heller*, the outcome in *McDonald* was controversial – even among the justices who eventually formed a majority. Only part of Justice Alito's controlling opinion became binding precedent joined by five justices - Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.[93] The remainder was joined by a mere plurality of the Court as Justice Thomas declined to join in full.[94] Instead, Justice Thomas thought it proper to incorporate the Second Amendment through the Privileges and Immunities Clause of the Fourteenth Amendment as opposed to the Due Process Clause.[95]

As in *Heller*, the *McDonald* opinion garnered two long dissents from the same two justices. Justice Stevens' dissent proved to be his last on the Court as this was the final case decided before

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[85] *See Oak Park*, 617 F. Supp. 2d 752, at 754 (holding that "this Court - duty bound as it is to adhere to the holding in [a Seventh Circuit case upholding the laws in question] rather than accepting plaintiffs' invitation to 'overrule' it (!) - declines to rule that the Second Amendment is incorporated into the Fourteenth Amendment so as to be applicable to the Chicago or Oak Park ordinances.").

[86] *See* NRA of Am., Inc. v. City of Chicago, 567 F.3d 856, 860 (2009) (holding that the Second Amendment had not been incorporated by the Supreme Court and that "arguments of this kind . . . are for the Justices rather than a court of appeals.").

[87] *Id.* at 858 (citing the footnote from Justice Scalia's opinion in *Heller* which made clear that prior Supreme Court cases had not incorporated the Second Amendment to the states).

[88] *Id.*

[89] McDonald v. City of Chicago, 130 S. Ct. 48 (U.S., 2009).

[90] McDonald, 561 U.S. 742, at 767.

[91] *See id.* at 767-778.

[92] *Id.* at 791.

[93] *See id.* at 747 (showing that the "opinion for the Court" in *McDonald* contains Parts I, II-A, II-B, II-D, and III and the plurality is formed by the remaining Parts II-C, IV, and V).

[94] *See id.* at 747 (showing that Justice Thomas did concur in part and in the judgment, which allows for *McDonald* to be binding precedent).

[95] *See id.* at 858.

he retired at the end of the October 2009 term.[96] Justice Stevens's thesis statement in dissent can be boiled down to these thoughts: "By its terms, the Second Amendment does not apply to the States; read properly, it does not even apply to individuals outside of the militia context. The Second Amendment was adopted to protect the States from federal encroachment."[97] Justice Breyer's separate dissent claimed that he could "find nothing in the Second Amendment's text, history, or underlying rationale that could warrant characterizing it as 'fundamental' insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes."[98] This meant, at least to four members on the Court, that the Second Amendment does not qualify for incorporation.

4. McDonald's Guidance on Firearms Commerce

As noted in the introduction to this Part, *McDonald's* key guidance on firearms commerce stems from: (1) the principles it reiterates from *Heller* on the commercial sale of arms, (2) its disclaimer that interest balancing cannot be the judicial approach to evaluating gun regulations, and (3) the fact that the Supreme Court, for the first time, applied the Second Amendment protections surfaced in *Heller* to state and local legislation. With the context of the case in mind, this section addresses each piece of guidance.

#1: REITERATION OF KEY PRINCIPLES FROM *HELLER*: *McDonald* is important because it echoes, and often states more clearly, key pronouncements from *Heller*. For example, Justice Alito reiterated: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as . . . laws imposing conditions and qualifications on the commercial sale of arms."[99] The difference between the two cases when it comes to this statement is subtle but important - in *McDonald*, the Court appeared to clarify that the word "longstanding" at the beginning of the list also applies to laws imposing conditions and qualifications on the commercial sale of arms. That is an important distinction. To compare:

HELLER: [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.[100]

MCDONALD: We made it clear in *Heller* that our holding did not cast doubt on such **longstanding regulatory measures as** "prohibitions on the possession of firearms by felons and the mentally ill," "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. We repeat those assurances here."[101]

Notice the subtle difference in the way the word "longstanding" is used in each case. In *Heller*, it appears that "longstanding" is best read to modify only the prohibition for felons and the mentally ill. That means the word "longstanding" does not apply to "laws imposing conditions or qualifications on the commercial sale of arms." In contrast, in *McDonald,* the word "longstanding"

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[96] *See John Paul Stevens,* OYEZ.ORG (May 1, 2018 8:45am), https://www.oyez.org/justices/john_paul_stevens.
[97] *Id.* at 911.
[98] *Id.* at 913.
[99] *Id.* at 786.
[100] *Heller*, 554 U.S. at 626-27 (emphasis added).
[101] *McDonald*, *supra* note 561 U.S. 742, at 786 (emphasis added).

seems to modify the entire list. There is certainly a more transparent way to make this point. The wording in *McDonald* is still a bit opaque and the quotation mark placement is odd. But, the sense in *McDonald*, is that *only* longstanding "laws imposing conditions and qualifications on the commercial sale of arms" are a part of the group of regulations permissible, or even presumptively valid, under *Heller*. This is an important distinction, as we will see in Part III, because many firearms commerce laws are of a recent vintage as opposed to longstanding regulations. Does that place them on less stable constitutional ground? Are they more likely to be struck down or judged more harshly as outside of the scope of *Heller's* presumptive validity?

#2: NO INTEREST BALANCING: Justice Alito reiterated that interest balancing tests - where a judge weighs the government's interests against the Second Amendment interests of the challengers - were rejected in *Heller*.[102] This is a direct response to the arguments from the city respondents in *McDonald*[103] and Justice Breyer's dissents in *Heller* and *McDonald* advocating just such an approach.[104] Justice Alito quoted *Heller* again to reiterate this point: "The very enumeration of the [individual] right [to keep and bear arms] takes out of the hands of government - even the Third Branch of Government - the power to decide on a case-by-case basis whether the right is really worth insisting upon."[105] At this point, it would be risky for circuit courts to create an interest balancing test for firearms commerce cases. But, as Part III will demonstrate, these judges must deal at some level with Justice Breyer's compelling point that all levels of judicial scrutiny are *de facto* interest balancing tests.[106]

#3: THE SECOND AMENDMENT NOW BINDS THE STATES: Before *McDonald*, states could regulate firearms commerce in various ways. State and local governments were not constrained by the Second Amendment and this provided them leeway to tinker with gun control legislation. After the *McDonald* decision, this authority narrowed considerably. Moving forward, challenges to gun control regulations heard in state and local courts are strengthened by the language of *McDonald* and *Heller* and the powerful individual right to keep and bear arms.

b. Conclusions & Common Denominators: What We Know After Heller & McDonald

Heller looms large as the most important case in Second Amendment jurisprudence. For the first time, the Justices focused solely on interpreting the intent behind the Framer's convoluted language. Though an analysis of the Amendment's breadth was tabled for future cases,[107] it is clear that litigants battling over firearms commerce must deal squarely with *Heller* and the individual

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[102] *See id.* at 790-91 (stating that "Justice Breyer is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion.").

[103] *See* Brief for the Respondents at 23-31, *McDonald v. Chicago*, No. 08-1521 (U.S. Dec. 30, 2009).

[104] *See id.* at 785-786.

[105] *Id.* at 791 (quoting *Heller*, 554 U.S. at 634.).

[106] *See infra* Part III.

[107] Heller, 554 U.S. at 625 (stating "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.") (internal citations omitted).

right to keep and bear arms.[108] These challenges will often implicate *McDonald* as well because state and local laws are now appraised under Second Amendment principles. Besides . . . state and local lawmakers are the parties neck-deep in the struggle to navigate the firearms commerce tightrope.[109] Congress has apparently fallen off.[110]

In conclusion, Part II unearthed two common denominators gleaned from the history, context, arguments, and series of opinions in *Heller* and *McDonald*:

Common Denominator #1: Firearms-related businesses have (at least) limited Second Amendment rights to engage in commerce. These rights are either their own or derive from their customers' Second Amendment rights. If the Second Amendment did not offer such protection, there would be no need for the Supreme Court to state in *Heller* and reiterate in *McDonald* that "laws imposing conditions and qualifications on the commercial sale of arms . . . [are] presumptively valid regulatory measures."[111] In other words, without a constitutional right to deal in guns, the government could just ban all firearms commerce without worry. Lawmakers would not need the benefit of presumptive validity for laws imposing conditions and qualifications on firearms commerce and the Court's statements in these cases would be oddly superfluous; and

Common Denominator #2: The government remains free regulate the firearms commerce industry . . . to a certain extent. When doing so, the government possesses the benefit of *presumptive validity* for many of its longstanding regulations covering firearms commerce. This legal benefit means that laws which can be traced back far enough in time (precisely how old each law must be is unclear) are very likely to be upheld in a facial challenge. That leaves as-applied challenges as the primary vehicles to enforce Second Amendment rights.

Part III utilizes these common denominators as a foundation from which to evaluate critical questions left unaddressed by the Supreme Court after *Heller* and *McDonald*. The centerpiece of this analysis will be the work of the Federal Circuits and their attempt to adjudicate firearms commerce cases in accordance with the small amount of Supreme Court guidance provided to date.

B. RAYS OF LIGHT FROM THE CIRCUIT COURTS: ANSWERS TO TOUGH QUESTIONS & A WORKABLE SOLUTION

When it comes to firearms commerce, the Supreme Court has positioned the country much like a law student after a Property lecture – desperately wanting more clarity, unsure on the actual state of the law, and bickering about who has the best answer. There is no doubt that best practices covering how to regulate and conduct business in this area are convoluted, heavily disputed and in flux. Amidst all this uncertainty, however, shine rays of clarity from Federal Circuit Courts. Part III evaluates the front lines in this lower court battle to articulate acceptable rules regulating firearms commerce.

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[108] *See e.g.*, U.S. v. Marzzarella, 614 F.3d 85, 88 (3rd Cir. 2010) (analyzing a federal law criminalizing possession of guns with obliterated serial numbers and stating that to "determine whether [the law in question] impermissibly burdens Marzzarella's Second Amendment rights, we begin with *Heller*.").

[109] *See e.g.*, Joseph Blocher, *We Can Regulate Guns at the Local Level, Too*, N.Y. TIMES (Dec. 10, 2015), *available at* https://www.nytimes.com/2015/12/10/opinion/we-can-regulate-guns-at-the-local-level-t.html (stating that "[a]lthough the gun debate is national in scope, a vast majority of gun regulation happens at the local level.").

[110] *See e.g.*, James Davenport, *The Four Reasons Congress Won't Do Anything About Gun Control*, NEWSWEEK (Feb. 23, 2018 10:19am), http://www.newsweek.com/four-reasons-congress-wont-do-anything-about-gun-control-818075.

[111] *Id.*

The first half of this analysis begins with some positive and perhaps unlikely news: the federal circuits have coalesced around the common denominators surfaced in Part II. This consensus matters because these principles form a platform from which judges tackle difficult questions pending after *Heller* and *McDonald*. Confusion at this foundational level would only multiply the uncertainty for regulators, business owners, and the general public. We will see, however, that this consensus breaks down once these courts begin to answer the three most critical questions in this arena:

(1) Do firearms businesses possess Second Amendment rights of their own?

(2) When is a regulation "longstanding" (and, thereby, presumptively lawful)?

(3) What level of heightened scrutiny should be used to evaluate the constitutionality of laws governing firearms commerce?

The remainder of this first section exposes the different approaches these courts take to answer these tough questions.

The final half of Part III demonstrates that, despite these difference, the federal circuits have coalesced around a two-part test to evaluate regulations dealing with firearms commerce. The test results vary based on how each court approaches the tough questions above, but most structure the test similarly. This section breaks down each component of this Firearms Commerce Test, evaluates its effectiveness, and argues it generates a workable approach. Part IV makes the case that the test can be made more efficient, effective, and faithful to *Heller*. But, first things first.

a. In the Wake of Heller & McDonald: Major Unanswered Questions

Part II codified common denominators from these seminal cases which are useful to evaluate regulations on firearms commerce. Firearms related businesses are entitled to some Second Amendment protection. However, the government may impose conditions and qualifications on the business of guns. Some of these regulations even receive the benefit of the doubt (they are "presumptively lawful" in legalese) when challenged under the Second Amendment. This: (1) means that these laws are much more likely to survive facial challenge and (2) leaves as-applied challenges as the primary vehicles by which gun regulations will be scrutinized. From there, the details become murkier and the inquiries more complicated. The search for clarity begins with an analysis of the three most critical questions for firearms commerce left open after *Heller* and *McDonald.*

1. Do Firearms Businesses Possess Second Amendment Rights?

This important question was neither presented in *Heller* or *McDonald* nor addressed in the opinions. Such an omission was predictable as the Justices prefer to avoid proclamations on issues outside the sphere of the Questions Presented.[112] The Court would rather legislators (i.e., those officials accountable to voters) make law and set public policy. This constitutional avoidance is certainly an appropriate and careful approach to the law. However, proclaiming that the Second

[112] *See e.g.*, Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105 (1944) (stating this principle in a majority opinion by Justice Frankfurter: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

Amendment protects an individual right to keep and bear arms while leaving the details for another day opened a wide chasm for legislators to bridge. Unsurprisingly, difficult questions surrounding the right to *deal in and around guns* (think of businesses like gun manufacturers, gun sellers, gun repair shops, gun training providers, and firing ranges) quickly emerged. These questions each revolve around the question of whether firearms related businesses have Second Amendment rights:

- Are gun dealers akin to booksellers under the First Amendment with similar constitutional rights to conduct business?
- Do people have a right to sell guns in close proximity to where their customers live?
- How many gun dealers, gun repair stores, or firing ranges are allowed to locate in a certain jurisdiction, commercial area, or shopping center? Or, like bookstores, are there few limits?
- Is it legal to regulate in-store gun sales differently from online gun sales?
- Can excessively dangerous weapons and ammunition now be prohibited from commerce?

Making matters more difficult, *Heller* and *McDonald* were handed down around the same time as horrific gun violence overtook the Virginia Tech campus in 2007, a military base in Fort Hood, Texas in 2009, and a Tucson, Arizona supermarket in 2011.[113] These mass shootings rocketed firearms commerce back into the public consciousness. Lacking clarity from the judicial branch and facing great pressure, jurisdictions began to regulate firearms businesses in a multitude of ways.[114]

The government's objectives in regulating commerce in guns are certainly compelling in the moral and legal sense – stem gun violence, keep guns out of the hands of dangerous individuals, protect and calm a nervous public. Lacking guidance from the Supreme Court, however, these laws are passed in many forms and always end up in court. Some regulations seem over-inclusive (total bans on running a firing range anywhere in the City of Chicago)[115] and others under-inclusive (imposition of $340 handgun registration fees solely on New York City residents to "promote public safety and prevent gun violence").[116] Some laws take the form of zoning restrictions which prohibit the establishment or expansion of new gun dealers at all or within a certain distance from schools, neighborhoods, churches, and liquor stores.[117] Some prohibit the manufacture, sale, transfer, or possession of certain types of guns (assault-style weapons) or

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[113] *See e.g.*, Los Angeles Times Staff, *Deadliest U.S. mass shootings, 1984-2017*, L.A. Times (Oct. 2, 2017 5:26pm), http://timelines.latimes.com/deadliest-shooting-rampages/. These were just a few of the most publicized mass shootings over this period. *See id.*

[114] *See e.g.*, Cristian Farias, *The Second Amendment Is No Barrier to Stricter Gun Laws,* N.Y. MAG (Feb. 25, 2018 10:20am), http://nymag.com/daily/intelligencer/2018/02/the-second-amendment-is-no-barrier-to-stricter-gun-laws.html (stating, "[i]n the wake of the Sandy Hook Elementary School massacre in Newtown, Connecticut, legislators there and in New York sprang to action and passed stringent bans on assault-style rifles and high-capacity magazines - the very kind Adam Lanza, the school shooter, had in his possession at the time of the rampage.").

[115] *See* Ezell v. City of Chicago, 651 F.3d 684, 689-90 (7th Cir. 2011) [hereinafter *Ezell I*] (discussing two conflicting city laws – one that "mandates one hour of range raining as a prerequisite to lawful gun ownership" and another that "prohibits all firing ranges in the city" of Chicago) (internal citations omitted).

[116] *See* Kwong v. Bloomberg, 723 F.3d 160, 162-69 (2nd Cir. 2013) (discussing how fees for handgun registration in the state of New York range from $3 - $10 while similar registration fees in New York City exceed $300). This law purports to "promote public safety and prevent gun violence" (*Id.* at 168-69), but its requirement of a $300 fee-increase to register a handgun only in New York City seems under-inclusive when compared to these lofty goals.

[117] *See e.g.*, Teixeira v. Cty. of Alameda, 873 F.3d 670, 673 (9th Cir. 2017) (*en banc*) [hereinafter *Teixeira II*].

ammunition (high-capacity magazines).[118] Others establish very strict business licensing and background check requirements.[119]

Whether these laws effectuate the government's objectives and stem gun violence and/or protect the public is the subject of a great national debate.[120] Many people are convinced that gun violence decreases as the number of guns available to purchase decreases.[121] A great number of others believe that law-abiding citizens with the ability to readily buy/obtain guns create a safer environment and are often the last line of defense for the defenseless in places of refuge like schools or churches.[122] Regardless of who dominates the public debate, each of these regulations above is subject to being struck down if firearms businesses have Second Amendment rights.

Amidst all the confusion, one position remains clear – on emotional, ever-changing, and important matters of public policy such as firearms commerce regulation, judges are forced to sit uncomfortably in the middle as independent, neutral arbitrators of the cases and Constitution.[123] Certainly aware of this national discussion and their personal opinions on it, judges wrestle with these issues and enter the debate with lengthy, often emotional opinions.[124] Through these

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[118] *See e.g.*, Kolbe v. Hogan, 849 F.3d 114, 120 (2nd Cir. 2017) (*en banc*).

[119] *See e.g.*, *Gun Dealer Regulation and Licensing*, LAW CENTER TO PREVENT GUN VIOLENCE (May 9, 2018 10:08am), http://lawcenter.giffords.org/wp-content/uploads/2017/04/Dealer-Regs-Factsheet-2015.pdf (collecting federal and state laws on this issue).

[120] *See infra,* Part IV, for an analysis of the potential bias people bring to this debate.

[121] *See e.g.*, Christopher Ingraham, *It's Time to Bring Back the Assault Weapons Ban, Gun Violence Experts Say*, WASH. POST WONKBLOG (Feb. 15, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/02/15/its-time-to-bring-back-the-assault-weapons-ban-gun-violence-experts-say/?utm_term=.a323392b3604 (quoting an expert who studied mass shootings before, during, and after the expired federal assault weapons ban and found: "Compared with the 10-year period before the ban, the number of gun massacres during the ban period fell by 37 percent, and the number of people dying from gun massacres fell by 43 percent. But after the ban lapsed in 2004, the numbers shot up again - an astonishing 183 percent increase in massacres and a 239 percent increase in massacre deaths."); John J. Donohue III, *Facts Do Not Support Claim That Guns Make Us Safer,* STANFORD UNIVERSITY (Oct. 12, 2015) (stating that guns are "a bit like chest x-rays. If you really need them, they can be helpful to have around, and even save lives. If you don't need them, and yet are constantly exposed to them, they represent a constant threat while conferring little or no benefit. Most Americans recognize that guns have both potential costs and benefits, and that for most people, having a gun creates more risks than benefit. On the other hand, if one happens to be in a particularly high-risk category, then having a gun for personal protection could make sense. One reason that gun ownership in the United States is *declining* is that more and more Americans recognize that for them guns are unlikely to be confer benefits that exceed their costs.").

[122] *See e.g.*, Rick Jervis, *For Gun-Control Activists, NRA Convention in Dallas is Ground Zero for Protests*, USA TODAY (May 4, 2018 7:38pm), https://www.usatoday.com/story/news/2018/05/04/nra-convention-gun-control-activists-dallas-ground-zero/580735002/ (discussing a 2018 speech to the National Rifle Association by President Donald Trump who dismissed "calls to ban guns as a way to reduce terrorism or gun deaths, by noting the outbreak of incidents in which terrorists used trucks to ram pedestrians" and Vice President Mike Pence who "offered a vigorous defense of the Second Amendment in his address to the convention . . . [and] mentioned the notion of arming teachers, saying 'the quickest way to stop a bad guy with a gun is a good guy with a gun.'").

[123] *See e.g.*, *Code of Conduct for United States Judges: Canon 1:A*, U.S. COURTS.GOV (May 8, 2018 12:29pm), http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#b (stating: "An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.").

[124] *See e.g.*, Kolbe, 849 F.3d 114, 120-163 (reproducing 43 pages of opinions including emotional paragraphs like this: "On the morning of December 14, 2012, in Newtown, Connecticut, a gunman used an AR-15-type Bushmaster rifle and detachable thirty-round magazines to murder twenty first-graders and six adults in the Sandy Hook Elementary School. Two additional adults were injured by gunfire, and just twelve children in the two targeted classrooms were not shot. Nine terrified children ran from one of the classrooms when the gunman paused to reload,

opinions, lower courts answer the question of whether firearms-related businesses have Second Amendment rights using two different approaches. The approach chosen almost always determines whether a law targeting firearms commerce is upheld.

The Commercial Rights Approach:

This approach posits that firearms related businesses possess Second Amendment rights of their own.[125] So, the right to conduct firearms commerce is on par with the individual right to keep and bear arms.[126] Under the Commercial Rights approach, serious restrictions on where firearms-related businesses may open/operate, what they sell, and the services they provide are subject to heightened judicial scrutiny and rest on less-certain constitutional ground. Under this approach, outright bans on the ability to sell guns would be struck down just like the ban on handguns in *Heller*.[127]

Advocates of this approach claim that the right to conduct firearms commerce is akin to the right of free expression; gun dealers must be treated like booksellers.[128] It would violate the First Amendment and free speech principles for the authorities to ban or seriously restrict booksellers from operating in commercial areas. This would be true even if there were a bookstore on every city block.[129] Ergo, it violates the Second Amendment when firearms businesses are banned or serious restricted from operating in commercial areas.

Proponents look to American and English history for support.[130] They argue that the American colonists understood that the right to keep and bear arms included the right to conduct firearms commerce.[131] They cite many historical examples including a 1676 Virginia law which held that all persons have "liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony."[132] They also look to comments from Framers like Thomas Jefferson who touched upon this topic in 1793: "Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them."[133] The fact that the Framers did not express this right on paper is not a problem, the argument concludes:

Common sense dictates that the Framers were not required to spell out every possible dimension of an enumerated right . . . It does not matter that the Framing Era lacked "commentary

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while two youngsters successfully hid in a restroom. Another child was the other classroom's sole survivor. In all, the gunman fired at least 155 rounds of ammunition within five minutes, shooting each of his victims multiple times.").

[125] *See e.g.*, David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?* 127 HARV. L. REV. F. 230, 230 (Apr. 11, 2014), *available at* https://harvardlawreview.org/2014/04/does-the-second-amendment-protect-firearms-commerce/ (arguing that even though "this question has divided the federal courts, the answer is quite clear: operating a business that provides Second Amendment services is protected by the Second Amendment.").

[126] *See, e.g.*, Petition for Writ of Certiorari at 28, Teixeira v. Cty. of Alameda, 873 F.3d 670 (9th Cir. 2017) (No. 17-982) [hereinafter *Teixeira Cert. Petition*].

[127] Teixeira v. Cty. of Alameda, 822 F.3d 1054, 1063 (9th Cir. 2016) [hereinafter *Teixeira I*] (stating that if the "evidence does confirm that the Ordinance, as applied, completely bans new gun stores (rather than merely regulates their locations), something more exacting than intermediate scrutiny will be warranted.").

[128] *Teixeira II*, 873 F.3d at 688.

[129] *Id.* at 681 (stating that the plaintiff's "contention is that even if there were a gun store on every square block in unincorporated Alameda County and therefore prospective gun purchasers could buy guns with exceeding ease, he would still have a right to establish his own gun store somewhere in the jurisdiction.").

[130] *See e.g.*, *Teixeira Cert. Petition*, *supra* note 126, at 29 (arguing that the "historical record supports the Second Amendment's protection of a right to sell arms.").

[131] *Teixeira I*, 822 F.3d at 1056.

[132] *Id.* (citing the Laws of Va., Feb. 1676-77, Va. Stat. At Large, 2 Hening 403 (1823)).

[133] *Id.* (citing Thomas Jefferson, 3 Writings 558 (H.A. Washington ed., 1853)).

[suggesting] that the right codified in the Second Amendment independently created a commercial entitlement to sell guns if the right of the people to obtain and bear arms was not compromised." The Framers could not have anticipated every argument of twenty-first century judges hostile to the Second Amendment right. Individuals seeking to enforce their rights need not disprove, as an historical matter, every negative proposition concocted by the right's opponents.[134]

The Commercial Rights approach was accepted recently by a Ninth Circuit panel in a prominent firearms commerce case styled *Teixeira v. County of Alameda, California*.[135] In *Teixeira*, a gun dealer alleged that Alameda County's zoning requirements, mandating 500 feet between gun stores and neighborhoods, interfered with his Second Amendment rights to *sell* guns. He argued: "As a logical matter, commerce inherently involves buyers as well as sellers, who may have equal constitutional rights in the transaction."[136]

The District Court declined the plaintiff's invitation to adopt the Commercial Rights approach.[137] However, that decision was overruled by a divided three-judge panel hearing the appeal.[138] After an extensive historical analysis, the panel majority inferred that people who possess the right to keep and bear arms must also be able to acquire those arms commercially.[139] The opinion concluded that "Alameda County has offered nothing to undermine our conclusion that the right to purchase and to sell firearms is part and parcel of the historically recognized right to keep and to bear arms."[140] With the Commercial Rights approach adopted, it becomes easy to predict the eventual reversal on Second Amendment grounds.[141] As in *Heller*, Alameda County would now have to offer much more than "unsubstantiated assertions" to overcome the heightened scrutiny that accompanies this constitutional guarantee.[142] This position would change to the Ancillary Rights approach in the Ninth Circuit's *en banc* opinion discussed below.

This is a drastic approach to take to the Second Amendment – especially after the little guidance offered on the subject in *Heller* and *McDonald*. This might explain why only a few opinions have adopted the Commercial Rights approach[143] and why some such opinions are overruled by an *en banc* court. Accordingly, this approach has not been memorialized in any binding circuit court precedent. Instead, the circuits to opine on this issue tend to take the Ancillary rights approach – the focus of the next section.

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[134] *Teixeira Cert. Petition*, *supra* note 126, at 29 (citing Teixeira v. Cty. of Alameda, 873 F.3d 670, 686 (9th Cir. 2017) [hereinafter *Teixeira II*].

[135] *Teixeira II*, 873 F.3d 670.

[136] *Teixeira Cert. Petition*, *supra* note 126, at 29 (citing Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 850 (7th Cir. 2000)).

[137] *See* Teixeira v. County of Alameda, 2013 U.S. Dist. LEXIS 128435, at 20 (N.D. Cal. 2013) (stating that while "both the Supreme Court and the Ninth Circuit left unanswered precisely how broad the scope of the Second Amendment is . . . they have not extended the protections of the Second Amendment to the sale or purchase of guns.") (internal citations omitted).

[138] Teixeira v. Cty. of Alameda, 822 F.3d 1047, 1056 (9th Cir. 2016) [hereinafter *Teixeira I*].

[139] Teixeira, 822 F.3d at 1055.

[140] Teixeira, 822 F.3d at 1056.

[141] *See id.* at 1064.

[142] *See id.* at 1063-64.

[143] *See e.g.*, Radich v. Guerrero, 2016 U.S. Dist. LEXIS 41877, at 19 (D.N. Mar. I. 2016) (holding that if "the Second Amendment individual right to keep and bear a handgun for self-defense is to have any meaning, it must protect an eligible individual's right to purchase a handgun, as well as the complimentary right to sell handguns."); Mance v. Holder, 74 F. Supp. 3d 795, 807 n.8 (N.D. Tex. 2015), *rev'd on other grounds*, Mance v. Sessions, 880 F.3d 183 (5th Cir. 2018) (holding that "operating a business that provides Second Amendment services is generally protected by the Second Amendment, and prohibitions on firearms sales are subject to similar scrutiny.").

The Ancillary Rights Approach:

Under this approach, Second Amendment rights belong to gun owners and not gun dealers. Firearms businesses are protected just enough to provide community members with adequate (not convenient) access to guns, gun repair, and gun training. In other words, these businesses act as advocates for the constitutional rights of their customers, a legal concept called "derivative standing."[144] Past the point where individuals can adequately purchase guns, the government may regulate or perhaps even prohibit firearms commerce. This is especially true where "restrictions on a commercial actor's ability to enter the firearms market may . . . have little or no impact on the ability of individuals to exercise their Second Amendment right to keep and bear arms."[145]

The crux of this argument is that the Second Amendment speaks of "the right of the people to keep and bear Arms."[146] The people's keeping and bearing of arms is much different from the selling of arms, which is neither mentioned in nor easily inferred from the text. Additionally, proponents read the history much differently than advocates for the Commercial Rights approach. They argue that the American colonies promulgated all kinds of restrictions on the commercial sale of guns.[147] Whether it was a ban on selling guns to Native Americans or firearms commerce outside colony boundaries, these laws demonstrate that eighteenth-century Americans did not believe that they possessed an unfettered right to sell guns.[148]

Proponents of this approach also argue that the First Amendment is not a great analogue, especially when it comes to dealing in and around guns versus selling books. They argue that the First Amendment does not mention whose rights are protected when it says, "Congress shall make no law . . . abridging the freedom of speech" (this could include readers *or* booksellers) while the Second Amendment is more specifically geared to the right of the "people to keep and bear arms" (i.e., gun owners).[149] Additionally, the selling of books is itself an expressive activity in itself and booksellers are "not in the position of mere proxies arguing another's constitutional rights."[150] A better analogy, the argument goes, is to medical service providers who advocate for patients' rights to reproductive health services.[151] Patients certainly have constitutional rights to obtain contraceptives or abortion procedures, but the cases do not hold that medical providers possess independent rights to sell or provide these services.[152] Medical providers merely exercise derivative standing on behalf of their patients as do firearms business on behalf of their customers.

The *Teixeira* case from the Ninth Circuit, discussed above, shows this approach in action. Sitting *en banc*, that court rejected the Commercial Rights approach adopted by the divided appellate panel.[153] After reading the text and history much differently than the majority below, the *en banc* court found that historical authority does not suggest that the Second Amendment protects an individual's right to sell a firearm unconnected to the rights of citizens to "keep and bear" arms.[154] Perhaps more importantly, the Second Amendment gives rights to "the people to keep and

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[144] *Teixeira II*, 873 F.3d at 678 (citing Craig v. Boren, 429 U.S. 190, 195 (1976)).
[145] *Id.* at 687.
[146] U.S. Const. amend. II.
[147] *See id.* at 685.
[148] *See id.*
[149] *Teixeira II*, 873 F.3d at 688.
[150] *See id.* at 688-89 (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 n.6 (1963)).
[151] *See id.* at 689.
[152] *See id.* (citing Whole Woman's Health, 136 S. Ct. at 2312-13, 2316).
[153] *See Teixeira II*, 873 F.3d at 673.
[154] *See Teixeira II*, 873 F.3d at 686-87.

bear arms" and says nothing about their sale.[155] These are all the primary arguments made under the Ancillary Rights approach, which is now the law in the Ninth Circuit.

To conclude, every circuit to opine on the issue has adopted the Ancillary Rights approach.[156] This comes as no surprise. The arguments are stronger in terms of text and history. This approach is also more faithful to *Heller* which spoke of the *individual right* to keep and bear arms as well as the *presumptive lawfulness* of regulations on firearms commerce without insinuating anything about the rights of firearms businesses.

In the end, firearms commerce laws face an arduous path to survival if gun dealers possess Second Amendment rights. Blanket prohibitions on opening new gun stores, firing ranges, or other gun-related establishments would surely be stuck down. Strict licensing or zoning requirements on gun sellers may be seen as burdening protected Second Amendment conduct. Assault weapons bans may survive because of the excessively dangerous nature of the weapons, but it would be a closer call. The answer to this question is critical. It appears as though the Ancillary Rights approach has carried the day in the lower federal courts. How the Supreme Court will answer this question when presented, however, is anyone's guess.

2. When is a regulation "longstanding" (and, thereby, presumptively lawful)?

The Supreme Court appeared to clarify in *McDonald* that only longstanding laws imposing conditions and qualifications on the commercial sale of arms are presumptively valid.[157] This statement created a bit of clarity as well as a few tough questions. It became clear that laws "restricting conduct that can be traced to the founding era and are historically understood to fall outside of the Second Amendment's scope may be upheld without further analysis."[158] However, two related questions emerged: (1) how do lower courts to distinguish between "longstanding" laws and those of a more recent vintage and (2) what must courts do when a "longstanding" law is challenged under the Second Amendment? The lower courts answer these tough questions in the following manner.

First, it seems clear that laws regulating firearms commerce need not have been on the books in 1791 to count as "longstanding . . . presumptively lawful" regulations under *Heller*. The majority view is that "a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue."[159] That has to be the case because *Heller* itself included gun restrictions on felons and the mentally ill as "longstanding" even though these restrictions come from the mid-twentieth century.[160] Some courts even hold that newer regulations "might nevertheless demonstrate a history of longstanding regulation if their historical prevalence and significance is properly developed in the record."[161]

Second, when a law falls under the "longstanding . . . laws imposing conditions and qualifications on the commercial sale of arms" language, courts tend to apply the lowest level of

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[155] *Id.* at 683.

[156] *See e.g.*, *Teixeira II*, 873 F.3d at 678 (stating that "Teixeira, as the would-be operator of a gun store, thus has derivative standing to assert the subsidiary right to acquire arms on behalf of his potential customers.").

[157] *See* McDonald, 561 U.S. 742, at 786.

[158] Peruta v. Cty. of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc).

[159] NRA of Am. v. Bureau of Alcohol, 700 F.3d 185, 196 (5th Cir. 2012).

[160] *See e.g.*, United States v. Skoien, 614 F.3d 638, 640-41 (7th Cir. 2010) (explaining that a federal law forbidding gun possession by someone who has been adjudicated to be mentally ill was enacted in 1968).

[161] Fyock v. Sunnyvale, 779 F.3d 991, 997 (9th Cir. 2015).

scrutiny to uphold the law.[162] The argument is that such laws do not fall under the scope of the Second Amendment. Lacking constitutional protection, a court may apply the lowest level of scrutiny and generally uphold such laws.

The answers to this tough question really matter. All of the laws regulating or banning the sale of military-style weapons and ammunition are of recent vintage. Zoning regulations are less than a century old. Business licenses and background check systems were not around in the late eighteenth century. But, because lower courts interpret the term "longstanding" rather broadly, some of these laws may fall under the presumptively lawful category from *Heller* and stand a much higher chance of being upheld.

3. What level of heightened scrutiny should be used to evaluate the constitutionality of laws governing firearms commerce?

The Supreme Court began to analyze laws burdening fundamental rights using different levels of judicial scrutiny in the 1930s.[163] As the scrutiny level increases, the government is required to more closely tailor the law to its goals. Today, there are three primary levels of scrutiny with some play between the joints:[164]

1. *Rational Basis* – requires only that the law at issue is rationally related to a legitimate governmental interest. This test is generally used "when a local, commercial, or economic right, rather than a fundamental individual constitutional right, is infringed."[165] In other words, this type of review is used in the vast majority of cases not implicating the Bill of Rights or a few other amendments. This is the easiest test for a law to pass. In the firearms commerce domain, laws that neither "implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny."[166] This means that such laws receive rational basis review.
2. *Intermediate Scrutiny* - presents a higher hurdle than rational basis. That test generally requires the government to prove that its law is (1) substantially related to achieve (2) an important government objective.[167] Intermediate scrutiny does not require that the

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[162] *See e.g.*, NRA, 700 F.3d at 196 (stating that "a longstanding, presumptively lawful regulatory measure - whether or not it is specified on *Heller's* illustrative list - would likely fall outside the ambit of the Second Amendment; that is, such a measure would likely be upheld at step one of our framework.").

[163] *See e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (discussing the idea that most laws should be upheld if they have a rational basis and then stating, in a famous footnote, there "may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."). The Second Amendment is included in the first ten amendments and, therefore, courts apply heightened scrutiny levels to such challenges.

[164] In other areas of the law, courts apply something like rational basis plus review. *See e.g.*, Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment). This level is just below intermediate scrutiny but not as deferential as rational basis review. This level is not mentioned in firearms commerce opinions, so it is omitted from this list.

[165] Colo. Outfitters Ass'n v. Hickenlooper, 24 F. Supp. 3d 1050, 1066 (D. Colo 2014) [hereinafter *Hickenlooper*]

[166] Cuomo, 804 F.3d at 260 (internal citations omitted).

[167] *See e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (stating, in a gender discrimination case, "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017) (stating the standard a bit differently: "The less onerous standard of intermediate scrutiny requires the government to show

government choose the least intrusive means of meeting its goals or that the challenger incurs no burden on protected conduct.[168] This is why the fit need only be substantially related and not narrowly tailored. This is the type of review that most courts apply to firearms commerce regulations that fall within the scope of the Second amendment but do not implicate its core protection of self-defense in the home.

3. *Strict Scrutiny* – presents the highest hurdle a law can face. When strict scrutiny applies, the government must prove that its law is (1) narrowly tailored to serve (2) a compelling governmental interest.[169] This is "the most demanding test known to constitutional law"[170] and generally (though not always) leads to the law's demise. This standard is rarely applied in the firearms arena which might explain why most gun-related regulations are upheld.

Recall that *Heller* made clear that the rational basis test is never enough when a constitutional right is at issue.[171] Lower courts, therefore, try to determine which level of heightened scrutiny (intermediate or strict) is appropriate under the circumstances (and will meet with approval by the Supreme Court when it takes its first firearms commerce case). Most courts pick a standard – almost always intermediate scrutiny – and stick to that approach for each case they encounter in this area. Other courts prefer to vary the scrutiny level depending upon (1) "how close the law comes to the core of the Second Amendment right" and (2) "the severity of the law's burden on the right."[172]

Importantly, the level of scrutiny chosen very often dictates the result. For instance, courts applying intermediate scrutiny tend to uphold the law at issue.[173] Recall that governments will always have an important, likely even compelling, interest in decreasing violent crime and increasing public safety. Firearms commerce regulations all claim these interests at their core. With such important interests established, lawmakers merely have to ensure that their laws are "substantially related" to that interest.[174]

In other words, so long as officials "produce evidence that 'fairly support[s]' their rationale, the laws will pass constitutional muster."[175] This is because courts applying intermediate scrutiny "afford substantial deference to the predictive judgments of the legislature."[176] In fact, the government may "rely on a wide range of sources, including legislative history, empirical evidence, case law, and even common sense" in discharging its burden."[177] Plaintiffs are doomed

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that the challenged law "is reasonably adapted to a substantial governmental interest.") (citing United States v. Masciandaro, 638 F.3d 458, 471 (4th Cir. 2011)).

[168] Masciandaro, 638 F.3d at 474.

[169] *See e.g.*, Republican Party v. White, 536 U.S. 765, 774-75 (2002); Abrams v. Johnson, 521 U.S. 74, 82 (1997).

[170] City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

[171] 554 U.S. at 628 n.27.

[172] Heller 554 U.S. at 634-25; New York State Rifle and Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 260 (2nd Cir. 2015) (internal citations omitted) [hereinafter *Cuomo*];

[173] *See e.g.*, Cuomo, 804 F.3d at 261.

[174] *See* Cuomo, 804 F.3d at 261 (stating that it is "beyond cavil that both [Connecticut and New York] have 'substantial, indeed compelling, governmental interests in public safety and crime prevention.' We need only inquire, then, whether the challenged laws are 'substantially related' to the achievement of that governmental interest.").

[175] *Id.* at 261 (citing City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002) (plurality)).

[176] Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 520 U.S. 180, 195 (1997) (internal citation omitted).

[177] Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 694 (internal citations omitted).

unless they show that the evidence does not support the government's interest or produce evidence that contradicts the government's evidence.[178]

b. The Firearms Commerce Test

Despite answering the tough questions differently, the vast majority of federal circuits apply a standardized test to evaluate laws challenged under the Second Amendment.[179] Beginning with the 2010 case of *Marzzarella v. United States* in the Third Circuit[180] through the 2015 case of *New York State Rifle and Pistol Association v. Cuomo* in the Second Circuit,[181] this near-uniform approach has coalesced. Derived from the precious little guidance in *Heller*, the test asks two questions:

1. Does the law at issue burden conduct protected by the Second Amendment?

   - If yes . . . proceed to step two.

   - If no . . . stop. The Second Amendment is not implicated and the law at issue is constitutional as long as it passes (the very lenient) rational basis review.

2. Does the law withstand heightened scrutiny? The scrutiny applied ranges from Intermediate Scrutiny to Strict Scrutiny depending upon how close the law comes to interfering with the core Second Amendment right of self-defense in the home.

   - If the regulation withstands heightened scrutiny, it is constitutional.

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[178] *See* Turner, 520 U.S. at 195.

[179] *See, e.g.,* Kolbe v. Hogan, 849 F.3d 114, 132 (4th Cir. 2017) (en banc); Cuomo, 804 F.3d at 254 (2nd Cir. 2015); GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs, 788 F.3d 1318, 1322 (11th Cir. 2015); Binderup v. AG of United States, 836 F.3d 336, 339 (3rd Cir. 2016) (en banc); Tyler v. Hillsdale County Sheriff's Dep't, 775 F.3d 308, 319 (6th Cir. 2014) (cautioning that there "may be a number of reasons to question the soundness of this two-step approach" as *Heller* was very negative on the interest-based analyses this test undertakes); Jackson v. City and Cty. of San Francisco, 746 F.3d 953, 962-63 (9th Cir. 2014); United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013); Drake v. Filko, 724 F.3d 426, 429 (3rd Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 874-75 (4th Cir. 2013); National Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194 (5th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Heller v. District of Columbia, 670 F.3d 1244, 1252 (D.C. Cir. 2011); Ezell v. City of Chicago, 651 F.3d 684, 701-04 (7th Cir. 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800-01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3rd Cir. 2010). The First Circuit did not explicitly adopt the test even when it had an opportunity to do so. *See e.g.*, Powell v. Tompkins, 783 F.3d 332, 347 n.9 (1st Cir. 2015). The court in *Powell* rather opaquely discussed a better approach in these terms - "We thus far have entered the discourse on few occasions, mostly in direct appeals of federal firearms convictions, and have hewed closely and cautiously to *Heller's* circumscribed analysis and holding."). Out of all the circuits to adopt the test, the Sixth Circuit seems the most skeptical. *See* Tyler v. Hillsdale County Sheriff's Dep't, 775 F.3d 308, 319 (6th Cir. 2014). Perhaps lacking a proper test case, it appears that the test has not been considered / adopted by the Eighth Circuit Court of Appeals. However, a few District Courts in the Eighth Circuit have waded into the issue. *See e.g.*, United States v. Johnson, 2016 U.S. Dist. LEXIS 18233, at 20-23 (N.D. Iowa 2016) (titling a section of the opinion "Application of the two-step test," claiming that the defendant's Second Amendment rights were burdened by a lifetime ban on gun possession, and then avoiding the rest of the test by stating that he need not wade "into the 'levels of scrutiny' quagmire" because the law at issue "passes constitutional muster even under strict scrutiny.") (citing United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010).

[180] 614 F.3d at 89 (3rd Cir. 2010).

[181] 804 F.3d at 260.

- If the regulation fails heightened scrutiny, it is unconstitutional.[182]

The test is concise, straightforward, and workable. It adds much-needed clarity and clout to rulings in this highly contested domain. There is real power underlying an approach uniformly applied by most of the nation's federal judges. For example, in evaluating Connecticut and New York bans on assault weapons and high-capacity magazines, the Second Circuit wrote that it was guided by "the teachings of the Supreme Court, our own jurisprudence, and the *examples provided by our sister circuits*."[183] This led to the official adoption of this test in the Second Circuit[184] and surely allowed the panel to feel more constitutionally comfortable upholding this controversial legislation.[185] In a separate case dealing with lifetime gun-possession bans for criminal convictions, Third Circuit judge Thomas Ambro praised this test and exclaimed: "Indeed, it has escaped disparagement by any circuit court."[186] That is a rare feat for any judicially created analysis designed to safeguard a constitutional guarantee.

It is critical to keep in mind that this test is applied to most challenges arising under the Second Amendment, not just firearms commerce regulations.[187] As we have seen, very few cases to date revolve around the business of guns. That said, judges who hear firearms commerce cases consistently apply this test in its current form.[188] This article thus predicts that the other circuits will follow, just as they have when evaluating Second Amendment challenges unrelated to firearms commerce.

Since this article focuses on firearms commerce, however, this test is referred to in these cases as the *Firearms Commerce Test*.[189] The name is simple and accurately describes what the test evaluates. The remainder of this section briefly breaks down each of the test's two parts. Through this analysis, the weakness in each becomes more obvious. Improving the test is the subject of Part IV to follow.

1. Question One: Is the Conduct at Issue Protected by the Second Amendment?

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[182] *See e.g.*, Binderup, 836 F.3d at 346.
[183] Cuomo, 804 F.3d at 252-53 (emphasis added).
[184] Two cases foreshadowed this adoption. *See* Kachalsky v. Cty. of Westchester, 701 F.3d 81, 94 (2nd Cir. 2012) and United States v. Decastro, 682 F.3d 160, 167 (2nd Cir. 2012).
[185] *See e.g.*, Joe Mahoney, *Cuomo Ramps Up Pressure Against Gun Makers*, ONEONTA DAILY STAR (May 2, 2018), http://www.thedailystar.com/news/local_news/cuomo-ramps-up-pressure-against-gun-makers/article_6d24ca1d-726c-50b3-abc0-5c16bb060b29.html (discussing the New York law at issue in the case and stating the Governor Andrew Cuomo defended "one of his legislative centerpieces - the New York Secure Ammunition and Firearms Enforcement (SAFE) Act - signed into law in January 2013, just weeks after 20 children and six adults were shot to death by a mentally ill man at a Connecticut school. While that controversial law has been 'politically hurtful to me,' Cuomo said, it has not infringed on the rights of gun owners. The law requires pistol owners to get recertified every five years, bans arms the state defines as assault weapons, sets up a mental-health database and imposes limits on magazine capacity.").
[186] Binderup, 836 F.3d. at 346.
[187] *See e.g.*, Binderup, 836 F.3d at 339-41 (applying the test to challenges on lifetime gun possession bans based on criminal convictions).
[188] *See e.g.*, *Teixeira II*, 873 F.3d at 682; Kolbe, 849 F.3d at 132-33.
[189] However, this evaluation could more generically be called the *Second Amendment Burden Test* or the *Firearms Regulation Test*.

Heller made clear that the individual right to keep and bear arms is "not unlimited."[190] That statement indicates that it is constitutional for some laws to burden conduct within the scope of the Second Amendment. As demonstrated in Part II, *Heller* went as far as to include a "non-exhaustive" list of "presumptively lawful regulatory measures" that have historically limited the individual right to keep and bear arms.[191] These include at least some conditions and qualifications on the commercial sale of arms. However, the "non-exhaustive" nature of Justice Scalia's list means that there are surely other ways to navigate the Second Amendment from a regulatory standpoint.

Therefore, this first question determines whether the law has a place on *Heller's* non-exclusive list. To make this call, courts "consider whether the challenged law impacts firearms or firearm use, whether the affected firearms are currently in 'common use,' whether the affected firearms are used for self-defense inside or outside of the home, and whether the restriction is akin to restrictions that were historically imposed and customarily accepted."[192] The closer the regulation comes to restricting use of a gun in the home for self-defense, the more likely it is to fall into the scope of the Second Amendment and satisfy this first question.

Perhaps unsurprisingly, the way courts answer the tough questions above dictates how they answer this first question. Courts adhering to the Commercial Rights approach are more likely to find protected conduct burdened and move to question two. On the other hand, jurisdictions adhering to the Ancillary Rights approach tend to find that the Second Amendment is not implicated and uphold the law at issue.

For example, in *Teixeira v. County of Alameda*, a local government prohibited new firearms dealers within 500 feet of a neighborhood. After an in-depth historical analysis, a Ninth Circuit panel took the Commercial Rights approach and found that the law burdened protected conduct.[193] The Ninth Circuit sitting *en banc*, however, adopted the Ancillary Rights approach and found that the law did not burden protected conduct.[194] That much different approach to who possesses the right to keep and bear arms resolved the case under the Firearms Commerce Test at its first step. There was no need to proceed to question two and wade into the levels of scrutiny.

In the end, the analysis under this prong is very subjective. Much depends on how the particular court reads history and answers the tough questions detailed above. Part IV provides a more efficient and effective way to handle this first question.

2. Prong Two: Apply Some Form of Heightened Scrutiny to the Regulation

Once protected Second Amendment conduct is burdened, courts move to this second question in the Firearms Commerce Test. Because *Heller* outlawed rational basis but otherwise left open the scrutiny question, courts are free to elect some form of heightened scrutiny.[195] The problem with this freedom is that the "appropriate level of scrutiny that courts should apply in Second Amendment cases . . . remains a difficult, highly contested question."[196]

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[190] Heller 554 U.S. at 626.
[191] *See* Binderup, 836 F.3d at 343 (citing Heller 554 U.S. at 626-27 & n. 26).
[192] Hickenlooper, 24 F. Supp. 3d at 1065.
[193] *See* Teixeira I, 822 F.3d at 1056.
[194] *Teixeira II*, 873 F.3d at 683.
[195] *See* 554 U.S. at 682.
[196] Tyler v. Hillsdale County Sheriff's Dep't, 775 F.3d 308, 326 (6th Cir. 2014).

That said, most circuits tend to apply intermediate scrutiny to firearms commerce cases.[197] But, they implement the standard a bit differently. As the Sixth Circuit put it, the "strongest argument in favor of intermediate scrutiny is that other circuits have adopted it as their test of choice . . . A closer look, however, reveals that the circuits' actual approaches are less neat - and far less consistent - than that."[198] The following chart shows the nuances among the circuits adopting intermediate scrutiny.

Figure -1- | DIFFERENT APPROACHES TO SECOND AMENDMENT INTERMEDIATE SCRUTINY (BY CIRCUIT)

CIRCUIT	WHEN CIRCUIT APPLIES INTERMEDIATE SCRUTINY	STANDARD
FIRST	Categorial ban on gun ownership by a class of individuals	Law must be supported by some form of "strong showing," necessitating a substantial relationship between the restriction and an important governmental objective.[199]
SECOND	Laws regulating outside of the Second Amendment's core	Law must be substantially related to an important governmental interest.[200]
THIRD	Laws that do not severely limit the possession of firearms	Must be a reasonable fit between the law and a "significant," "substantial," or "important" governmental end; law need not be the least restrictive means to that end.[201]
FOURTH	Laws burdening Second Amendment rights outside the home	Law must be reasonably adapted to a substantial governmental interest.[202]
FIFTH	Look to the nature of the conduct regulated and the degree to which the law burdens the Second Amendment	Government must demonstrate a "reasonable fit" between the challenged regulation and an important government objective.[203]
SIXTH	Look to how closely the law comes to the core of the Second Amendment and how severe a burden it creates	The government must state a "significant, substantial, or important objective" and establish "a reasonable

[197] Tyler, 775 F.3d at 326.
[198] *Id.* at 324.
[199] United States v. Booker, 644 F.3d 12, 25 (1st Cir. 2011). Interestingly, this court did not use the words, "intermediate scrutiny" to describe this standard and, in a later case, said, "[a]s an initial matter, this court has not adopted intermediate scrutiny as the appropriate type of review for a challenge such as [plaintiff's]." United States v. Armstrong, 706 F.3d 1, 8 (1st Cir. 2013).
[200] *See* Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2nd Cir. 2012).
[201] Marzzarella, 614 F.3d at 90.
[202] *See* United States v. Masciandaro, 638 F.3d 460, 471 (4th Cir. 2011).
[203] NRA of Am. v. Bureau of Alcohol, 700 F.3d 185, 195 (5th Cir. 2012).

		fit" between the challenged restriction and that objective.[204]
SEVENTH	Laws closer to the margins of the Second Amendment, that regulate rather than restrict, and that present modest burdens	Must be a substantial relation between the law and an "important government objective."[205]
EIGHTH	Unclear at the circuit level	No circuit case, but at least one district court case, on this issue.[206]
NINTH	Laws that implicate but do not place a substantial burden on conduct protected by the core of the Second Amendment	Requires a significant, substantial, or important governmental objective and a "reasonable fit between the challenged regulation and the asserted objective."[207]
TENTH	Laws applying to a narrow class of people, not the public at large	Must be an important governmental objective that is "advanced by means substantially related to that objective."[208]
ELEVENTH	Unclear at the circuit level	No circuit case, but at least one district court case, on this issue.[209]
D.C.	Laws imposing less substantial burdens on the core of the Second Amendment	The law must be "substantially related to an important governmental objective."[210] The government must establish a tight "fit" that "employs not necessarily the

[204] Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 693 (6th Cir. 2016). This was a substituted opinion from a prior case that ruled strict scrutiny was the standard for Second Amendment challenges in part because violation of an enumerated constitutional right is at stake. *See* Tyler v. Hillsdale County Sheriff's Dep't, 775 F.3d 308, 328-29 (6th Cir. 2014). Prior to the substituted opinion, the first Tyler case created a circuit split on the issue of intermediate versus strict scrutiny.

[205] United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010).

[206] However, a District Court looked to classes of people excluded from the Second Amendment in *Heller*, adopted intermediate scrutiny and stated that the government "bears the burden of demonstrating that the [subject] classification serves important governmental objectives and that the use of [the] classification is substantially related to the achievement of that objective." United States v. Adams, 2015 U.S. Dist. LEXIS 139749, at 6 n.1 (W.D. Mo. 2015) (internal citations omitted).

[207] Jackson v. City & County of San Francisco, 746 F.3d 953, (9th Cir. 2014) (citing Chovan, 735 F.3d at 1139).

[208] Reese, 627 F.3d at 802.

[209] GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs, 788 F.3d 1318, 1326-27 (11th Cir. 2015) (stating that "we are not called upon to engage in a full constitutional scrutiny analysis - nor should we do so on the basis of so limited a factual record and narrow argumentation"); GeorgiaCarry.Org, Inc v. Georgia, 687 F.3d 1244, 1260 n.34 (11th Cir 2012) (stating that, "[i]n this case, we need only reach the first step [of the Firearms Commerce Test]. In reaching this conclusion, we obviously need not, and do not, decide what level of scrutiny should be applied"). However, a District Court looked to laws that do not substantially burden the core Second Amendment right and reiterated that the government's stated objective must be "significant, substantial or important," and there must be a "reasonable fit between the challenged regulation and the asserted objective." United States v. Focia, 2015 U.S. Dist. LEXIS 79715, at 12-13 (M.D. Al. 2015).

[210] Heller v. District of Columbia, 670 F.3d 1244, 1258 (D.C. Cir. 2011).

		least restrictive means but . . . a means narrowly tailored to achieve the desired objective."[211]

For example, courts apply their version of intermediate scrutiny to uphold firearms commerce-related regulations prohibiting/restricting:

- gun purchasing or possession by those convicted of misdemeanor domestic violence crimes;[212]
- sales of military-style assault weapons and large capacity magazines;[213]
- possession of a gun with an obliterated serial number;[214]
- purchasing, possession, or transporting of a gun for people convicted of violent felonies;[215]

Courts tend to avoid strict scrutiny under this test as that is usually fatal to the law. But that does not mean that intermediate scrutiny is as tough as it gets for the government. The Seventh Circuit struck down a ban of firing ranges in Chicago using a test that it referred to as "not quite 'strict scrutiny.'"[216] That test requires the government to "establish a close fit between the [law at issue] and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights"[217]

A few other courts, however, avoid any scrutiny analysis and still strike down laws that touch upon the core of the Second Amendment (possession of guns in the home for self-defense) and create a total ban outside of the Firearms Commerce Test. For example, the Seventh Circuit case of *Moore v. Madigan*[218] involved a Chicago law imposing a blanket prohibition on carrying a gun in public. A Seventh Circuit panel, via an opinion by Judge Posner, found the law unconstitutional without resorting to any level of scrutiny. In *Puerta v. City of San Diego*[219], a Ninth Circuit panel stuck down a San Diego law requiring good cause to receive a concealed carry permit.[220] The panel refused to apply any level of scrutiny which it compared to the type of interest-balancing prohibited by *Heller*. This opinion was revered by the Ninth Circuit *en banc*.

The intermediate scrutiny standard applied in question two of the test is rarely fatal to the law. This is because the government always has at least an "important" interest in reducing crime and protecting the public. Additionally, courts grant some leeway for the government to show the substantial relationship between its laws and the important interests. At the end of the day, the Firearms Commerce Test is certainly a workable solution. But, it is far from perfect. Part IV discusses optimizing the Firearms Commerce Test.

C. IMPROVING THE FIREARMS COMMERCE TEST

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[211] *Id.*
[212] *See e.g.*, U.S. v. Chovan, 735 F.3d 1127, 1130 & 1141-42 (9th Cir. 2013); United States v. Chester, 628 F.3d 673, 682-83 (4th Cir. 2010).
[213] *See e.g.*, Cuomo, 804 F.3d at 260-61.
[214] *See e.g.*, Marzzarella, 614 F.3d at 97-101.
[215] *See e.g.*, United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010).
[216] *See* Ezell I, 651 F.3d at 708.
[217] *Id.* at 708-09.
[218] 702 F.3d 933 (7th Cir. 2012).
[219] 742 F.3d 1144 (9th Cir. 2014).
[220] *See id.* at 1179.

The Firearms Commerce Test is widely accepted. It is simple to understand. The results are consistent, fair enough, and useful. The Supreme Court will surely be asked to adopt the test as a national standard when it hears its next Second Amendment case. Even after recognizing these qualities, however, the test could and should function more optimally. This Part details a few substantive suggestions to morph the Firearms Commerce Test into something more effective, efficient, and faithful to *Heller*.

Both of the test's two steps are sub-optimal. The problem with step one is structural and asks judges to do too much. The problem with step two is in its application and allows the government too much deference in cases where an, often-unpopular, constitutional guarantee is at stake. Neither of these problems is exceedingly difficult to correct. This final Part proposes one set of low-risk, high-reward solutions.

Recall that step one requires judges to determine whether the challenged law impacts conduct protected under the Second Amendment. Part III demonstrated that courts make this call by either: (1) determining whether the law should be on *Heller's* "presumptively lawful" list, or (2) rehashing centuries-old laws, statements, commentaries, and other historical evidence to determine whether early Americans believed that their right to keep and bear arms was burdened by similar regulations. Then, if the court finds protected conduct burdened, some form of heightened scrutiny is applied to review the fit between the law's goals and its impact. Here are two major shortcomings:

1. The Structural Problem: Courts unsympathetic to *Heller* can easily shape step one to find no Second Amendment burden. This means that the law is upheld without being tested by heightened scrutiny. Allowing judges (who are rarely trained historians) to answer a question based mostly on history in a legally binding manner is problematic. Why? The history of firearms commerce laws in early America is voluminous, inconsistent, opaque, and scattered at best. Relying on a court's gathering and interpretation of this history alone to uphold laws without measuring their effectiveness is a disservice to *Heller* and its guidance that the "very enumeration of the right takes out of the hands of government - even the Third Branch of Government - the power to decide on a case-by-case basis whether the right is really worth insisting upon."[221] These complications are why many courts just assume that protected conduct is burdened and move to the second step.

2. The Application Problem: The intermediate scrutiny standard as developed in this line of cases has become too deferential. Today, it approximates the interest-balancing that *Heller* prohibited. There is no doubt that the scales tipped towards upholding most firearms regulations. *Heller* spent dozens and dozens of pages reiterating the strength of the individual right to keep and bear arms and only a few paragraphs on its limitations. Because the governmental will always have important, if not compelling, interests in reducing crime and protecting the public, a deferential standard when it comes to fit spells

[221] 554 U.S. 634.

> doom for all but the most egregious violations of the Second Amendment. Constitutional guarantees, particularly those in the Bill of Rights, deserve more protection.

These shortcomings do not mean that the test is rigged or that too many gun regulations are upheld. This article credits neither of those accusations. Instead, the current version is problematic because it doesn't provide enough resistance to ferret out ineffective and, therefore, unconstitutional laws. While the government does have leeway under *Heller* to regulate guns, it must tread lightly and regulate effectively. Any other path leads to public distrust and a discounting of the judicial branch as check on unconstitutional gun regulations. The rest of this Part will address both of the shortcomings above and offer solutions whereby the effective laws are upheld, and the others are appropriately sent back to the drawing board.

1. SHORTCOMING #1: Step one of the test is easily shaped. SOLUTION: Eliminate it!

The first question of the Firearms Commerce Test - does the law at issue burden conduct protected by the Second Amendment - causes more trouble than it is worth. Courts attempt to answer this question by looking to whether the law at issue "harmonizes with the historical traditions associated with the Second Amendment guarantee"[222] – whatever that means. This quest to find the original meaning of the Second Amendment is so tricky, in fact, that many courts just punt and assume protected conduct is burdened.[223] These assumptions, which render the test's first question basically meaningless, generally read like this:

> In the absence of clearer guidance from the Supreme Court or stronger evidence in the record, we follow the approach taken by [other circuits] and *assume for the sake of argument* that these "commonly used" weapons and magazines are also "typically possessed by law-abiding citizens for lawful purposes." In short, we proceed on the assumption that these laws ban weapons protected by the Second Amendment.[224]

or

> Nonetheless, we face institutional challenges [i.e., we are not trained historians] in conducting a definitive review of the relevant historical record. Although we are inclined to uphold the challenged federal laws at step one of our analytical framework, in an abundance of caution, we proceed to step two.[225]

The reasons why courts struggle to identify whether protected conduct is burdened is that history surrounding firearms commerce regulation is all over the map. Lower courts are allowed to rely on "courts, legislators, and scholars from before ratification through the late 19th century to interpret the Second Amendment."[226] Evaluating these voluminous sources cause judges to spill much ink (and likely law clerks much time) on this issue. *Heller* and *McDonald* alone spent many

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[222] NRA, 700 F.3d at 194.

[223] *See e.g.*, Chovan, 735 F.3d at 1137 (stating that because of "the lack of historical evidence in the record before us, we are certainly not able to say that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors. We must assume, therefore, [under step one of the Firearm Commerce Test that Chovan's] Second Amendment rights are intact and that he is entitled to some measure of Second Amendment protection") (internal citations omitted); Cuomo, 804 F.3d at 257; Chester, 628 F.3d at 681; Marzzarella, 614 F.3d at 95 (trying, unsuccessfully, to answer this question and stating: "we cannot be certain that the possession of unmarked firearms in the home is excluded from the right to bear arms.").

[224] Cuomo, 804 F.3d at 257 (emphasis added).

[225] NRA, 700 F.3d at 204.

[226] NRA, 700 F.3d at 194 (citing Heller, 554 U.S. at 600-26).

dozens of pages discussing the history of the Second Amendment as it related to the individual right to keep and bear arms. Those cases, however, spent very little time on the history relating to the right to buy and sell guns commercially. This means that lower courts either have to conduct their own historical expeditions or punt. Attempting the first option and finishing without a definitive answer, many punt.

Instead of wasting time on an issue that is generally indeterminable without more guidance from the Supreme Court or a PhD in American History, the test should assume that the challenged law burdens conduct protected by the Second Amendment. This would move the analysis to step two and a review of the law under heightened scrutiny. As long as the intermediate scrutiny review is conducted faithfully to *Heller*, as suggested in the next section, courts will be able to fairly evaluate whether a law infringes the Second Amendment without the mess of step one. To be fair, that is what many courts implicitly do anyway via their assumptions that the law burdens protected conduct. It is time to make that choice explicit.

2. SHORTCOMING #2: Intermediate scrutiny has become too deferential. SOLUTION: Strengthen intermediate scrutiny review and require the government to show its regulations are effective

Part III demonstrates that the vast majority of circuit courts use some form of intermediate scrutiny to address step two of the Firearms Commerce Test. As mentioned above, this is the proper level of review considering Heller's prohibition on rational basis and carefulness not to require strict scrutiny for all gun regulations.

The problem with the Second Amendment form of intermediate scrutiny is that courts apply the test differently and with a varying scope. Some circuits look to whether the law burdens conduct very near the individual right to keep and bear arms while others apply the standard only to conduct at the margins of these core rights. Some circuits require a substantial fit between the law and an important governmental objective while others require only a reasonable fit. Some circuits are vert deferential to the challenged law while others are more skeptical. One of the main points of having a standard of review is that it is easy to implement consistently, and it yields consistent results. That has not happened here.

This mish-mash of standards is unnecessarily confusing – especially to firearms businesses operating in many circuits - and should be simplified. The easiest way to do this is for everyone to adopt a uniform intermediate scrutiny review standard like this: The challenged law must be substantially advance important government interests. But, this new standard must require the government to produce evidence that its regulations actually help tackle the problems it legislated to solve.

Heller made clear that the individual right to keep and bear arms is not a subsidiary constitutional right. This means that laws burdening conduct the amendment protects should be scrutinized carefully, just as they are with other guarantees in the Bill of Rights. This is especially true in a nation where many people are desperate to reign in gun violence and it is politically popular to severely ban commerce in firearms. Under these circumstances, it becomes very easy using a relaxed intermediate scrutiny standard to fall in line with the loud voices and turn a blind eye to potential infringements of this constitutional right.

None of this means, however, the gun laws should regularly be struck down. This article argues that just the opposite should be true. In fact, under this new standard, if the government does its

job and produces evidence as it should, the case for upholding the regulation in strong. Remember, the government will always have "important" interests in reducing crime, protecting the public, keeping guns out of the hands of people who will do harm, and so forth. The modified test appropriately adds an additional burden on the government to put its money where its mouth is, so to speak. With the evidence on the table, it will be much harder for people to complain that the system is rigged against the gun industry. And, the government will be incentivized to put a great deal of thought into the means-ends effectiveness of its regulations.

In the end, there are many benefits to this modified test: (1) it treats a constitutional guarantee with the appropriate respect and avoids the temptation to manipulate opaque pieces of history seeking a particular result; (2) it requires the government to offer evidence that its laws are effective; (3) it avoids the interest-balancing that *Heller* rejected; and (4) it inspires public confidence that firearms commerce regulations are being treated fairly which might help moderate the national firestorm over firearms commerce. The hope is that this modified Firearms Commerce Test will yield nearly the same results as the current version but will do so more effectively, efficiently, and faithfully to the *Heller* decision.

D. CONCLUSIONS

Heller and *McDonald* opened the floodgates to tough questions about gun regulation generally and firearms commerce more specifically. There, the Justices had little opportunity to opine on these issues and left the lower courts to mind the gap. The results have been admirable. The fact that the vast majority of the federal circuits agree on the two common denominators from *Heller* as well as a test to adjudicate contemporary gun regulations present rays of hope and clarity in an opaque area of the law. In particular, the Firearms Commerce Test presents a workable approach to deal responsibility with the precious little guidance from the Supreme Court.

This article demonstrates that the Firearms Commerce Test can be made more efficient, effective, and faithful to *Heller* with a few substantive tweaks. There is no need for lower courts to delve into complicated historical matters in order to "discover" whether a particular regulation was acceptable to eighteenth-century Americans. This question does matter . . . to the Supreme Court – the only body that can issue a definitive, uniform, national answer. Leaving this process to the lower courts merely causes confusion and divergent historical discoveries. This is such awkward work for a judge that many opinions just assume that the law at issue burdens protected conduct and move to question two of the test. Instead, the test should make a universal assumption that the firearms commerce regulation at issue burdens protected conduct.

This is the point where the second substantive modification comes into play. Courts should be required to apply a more rigorous form of intermediate scrutiny to all laws challenged under the Second Amendment but not affecting the core right to possess a gun for self-defense. Core invasions of the right, according to *Heller*, will fail any level of scrutiny. However, the intermediate scrutiny standard for these Second Amendment cases should require the government to actually prove that its laws are "substantially related to an important government interest." No longer should judges defer to a legislature's "expertise" or "common sense" in this area protected by a constitutional guarantee. If officials can produce such evidence, then the law at issue should stand.

This modified test: (1) treats a constitutional guarantee with the appropriate respect and avoids the temptation to manipulate opaque pieces of history seeking a particular result; (2)

requires the government to offer evidence that its laws are effective; (3) avoids the interest-balancing that *Heller* rejected; and (4) inspires public confidence that firearms commerce regulations are being treated fairly which might help moderate the national firestorm over firearms commerce.

In the end, this article is unique in its focus on firearms commerce and its adjudication. Hopefully, it can be a foundational piece for deep-dives into the tough questions presented in Part II, other interpretations of the Firearms Commerce Test, or even advice for the Supreme Court for the next Second Amendment case. For now, this article calls for a few substantive tweaks in the Firearms Commerce Test to make it more effective, efficient, and faithful to the decision in *Heller*.