

---

Volume 60  
Issue 3 *Issue 3: Innovations in the Fight Against  
Human Trafficking* & Issue 4: *Select Legal  
Scholarship from the New York Law School Law  
Review*

---

Article 8

January 2016

## Palmer v. District of Columbia

BRIAN NOEL

*New York Law School, 2016*

Follow this and additional works at: [https://digitalcommons.nyls.edu/nyls\\_law\\_review](https://digitalcommons.nyls.edu/nyls_law_review)



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

BRIAN NOEL, *Palmer v. District of Columbia*, 60 N.Y.L. SCH. L. REV. (2015-2016).

This Case Comments is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

BRIAN NOEL

*Palmer v. District of Columbia*

60 N.Y.L. SCH. L. REV. 675 (2015–2016)

ABOUT THE AUTHOR: Brian Noel is a Notes and Comments Editor of the 2015–2016 *New York Law School Law Review*, J.D. candidate, 2016.

## PALMER v. DISTRICT OF COLUMBIA

Each year, on average, over 100,000 Americans are shot in murders, assaults, suicides or suicide attempts, or by police intervention.<sup>1</sup> As a result, gun control remains a hot-button issue, pitting gun-rights activists against proponents of stricter measures of gun control. This issue is not a new phenomenon; throughout the twentieth century, states across the country enacted several gun control measures in an effort to curb the effects of gun violence,<sup>2</sup> as did the federal government.<sup>3</sup> The Supreme Court weighed in on firearms regulations on several occasions during this period,<sup>4</sup> but it was not until the landmark decision of *District of Columbia v. Heller* in 2008 that the Court recognized that the Second Amendment protects an individual right rather than a collective<sup>5</sup> right to keep and bear firearms.<sup>6</sup> The laws at issue in that case were District of Columbia (D.C.) gun regulations that effectively banned

- 
1. *5 Year Average Stat Sheet of Gun Death and Injury*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/sites/default/files/Gun-Death-Injury-Stat-Sheet-5-Year-Average-2013-Updates-Jan-2015.pdf> (last visited Apr. 20, 2016).
  2. In 1911, New York enacted the Sullivan Act, which made it a misdemeanor to possess a firearm without a permit and a felony to carry a firearm without a permit. Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 CRIME & JUST. 137, 168 (2001). In 1923, Arkansas passed a law requiring the registration of all handguns. *Id.* at 169. In 1966, New Jersey enacted a statutory scheme requiring, *inter alia*, a permit issued by the police in order to purchase a firearm, and an additional permit to carry a firearm in public. David T. Hardy, *Legal Restriction of Firearm Ownership as an Answer to Violent Crime: What was the Question?*, 6 HAMLINE L. REV. 391, 395 (1983).
  3. The National Firearms Act of 1934 required “all persons . . . engaged in the business of selling certain types of firearms and all owners of these firearms to register with the collector of internal revenue and pay applicable taxes for the firearm transfer.” James A. Beckman, *National Firearms Act of 1934*, in 2 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW 427, 427 (Gregg Lee Carter ed., 2002). The Gun Control Act of 1968 restricted the sales of guns and ammunition across state lines and the import of firearms. David B. Kopel, *Gun Control Act of 1968*, in 1 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW 237, 237 (Gregg Lee Carter ed., 2002). It also created a “prohibited persons” list of classes of people prohibited from purchasing certain types of guns, as well as a point-of-sale system of gun owner registration. *Id.* Congress then passed the Brady Handgun Violence Prevention Act in 1993. Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended in scattered sections of 18 U.S.C.). This law created a mandatory five-day waiting period between the selection of a firearm and the completion of the sale so that gun purchasers could undergo a background check. *Id.* § 102(a)(1).
  4. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the federal government may not force states to enforce federal law requiring mandatory background checks for prospective gun purchasers); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (holding that the Gun-Free School Zones Act exceeded Congress’s authority under the Commerce Clause); *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that the Second Amendment does not protect the right to keep and bear a shotgun with a barrel of less than eighteen inches).
  5. The collective right interpretation of the Second Amendment provides that the amendment protects only the right to bear arms as a member of a militia organized by Congress. Carl T. Bogus, *What Does the Second Amendment Restrict? A Collective Rights Analysis*, 18 CONST. COMMENT. 485, 485 (2001). The Supreme Court articulated this interpretation when it first addressed the scope of the right to bear arms in *United States v. Miller*, limiting the right to keep and bear arms to types of weapons used in a militia. *See Miller*, 307 U.S. at 178; *see also* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 557 (1991).
  6. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

the use or possession of operable handguns within the homes of D.C. residents.<sup>7</sup> In *Heller*, the Court held that the Second Amendment provides a right to use and possess firearms for self-defense within the home.<sup>8</sup> Following the decision, gun-rights advocates quickly turned their attention to state and local laws that (1) prohibited the carrying of firearms in public or (2) required state-or-municipality issued licenses in order to carry firearms in public.<sup>9</sup> In *Palmer v. District of Columbia*, the plaintiffs set their sights on two D.C. firearms regulations that required everyone in the District to obtain a license in order to own and carry a firearm<sup>10</sup> and prohibited the open and concealed carry of handguns in the District.<sup>11</sup> The power to issue these licenses was vested in the Chief of the Metropolitan Police Department (“Police Chief”), who could issue licenses so long as the applicants demonstrated a legitimate need for carrying a concealed handgun.<sup>12</sup> Following the Supreme Court’s decision in *Heller*, the D.C. Council stripped the Police Chief of this power, thereby terminating the issuance of these licenses.<sup>13</sup>

In *Palmer*, the plaintiffs, wishing to obtain these licenses, and a prominent gun rights organization,<sup>14</sup> filed a lawsuit in the U.S. District Court for the District of Columbia, alleging that the D.C. firearm statutes that required licenses to possess firearms and forbade the carrying of firearms infringed on their Second Amendment

---

7. *Id.* at 573–75.

8. *Id.* at 628–29. Less than three years later, that decision was applied to the states through the Fourteenth Amendment in *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

9. *See, e.g.*, *Drake v. Filko*, 724 F.3d 426, 428 (3d Cir. 2013) (challenging a New Jersey law that required permits to carry handguns in public); *Woollard v. Gallagher*, 712 F.3d 865, 868 (4th Cir. 2013) (challenging a Maryland law that required permits to carry handguns in public); *Kachalsky v. County of Westchester*, 701 F.3d 81, 83 (2d Cir. 2012) (challenging New York’s licensing scheme for full-carry handgun permits).

10. D.C. CODE § 7-2502.02(a)(4) (2012), *invalidated by* *Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014), *amended by* License to Carry a Pistol Amendment Act of 2014, § 2(b), 62 D.C. Reg. 1944 (June 16, 2015).

11. D.C. CODE § 22-4504(a), *invalidated by* *Palmer*, 59 F. Supp. 3d 173 (D.D.C.), *amended by* License to Carry a Pistol Amendment Act § 3(a); *Palmer*, 59 F. Supp. 3d at 175.

12. D.C. CODE § 22-4506, *repealed by* Inoperable Pistol Amendment Act of 2008, § 2(f), 56 D.C. Reg. 1162 (May 20, 2009), *revived and amended by* License to Carry a Pistol Amendment Act § 3(b); *Palmer*, 59 F. Supp. 3d at 176.

13. *Palmer*, 59 F. Supp. 3d at 176.

14. The Second Amendment Foundation (SAF) was a plaintiff to the lawsuit against D.C. *Id.* at 177. The SAF was founded in 1974 by Alan Merrill Gottlieb. Marcia L. Godwin, *Second Amendment Foundation (SAF)*, in 2 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW, *supra* note 3, at 527, 527. The SAF is comprised of approximately 550,000 members, has an annual operating budget of \$3.4 million dollars, and is staffed by sixteen people. *Id.* at 528. The SAF states that its mission is to promote “a better understanding about our Constitutional heritage to privately own and possess firearms.” *Mission Statement*, SECOND AMEND. FOUND., <https://www.saf.org/mission/> (last visited Apr. 20, 2016). The SAF is a tax exempt organization that does not engage in lobbying efforts, and works primarily in the areas of legal and educational research on the meaning of the Second Amendment. EARL R. KRUSCHKE, GUN CONTROL: A REFERENCE HANDBOOK 215 (1995).

rights.<sup>15</sup> On July 24, 2014, the court granted summary judgment to the plaintiffs.<sup>16</sup> In granting summary judgment, the court held that the Second Amendment protects the right to carry firearms outside the home for purposes of self-defense and that the statutes forbidding the carrying of handguns outside the home infringed on that right.<sup>17</sup> This case comment contends that the court in *Palmer* misinterpreted the Supreme Court's reasoning in *Heller*, that the court relied on faulty reasoning from the Seventh Circuit case of *Moore v. Madigan*, and that the court should have conducted a scrutiny analysis to determine the constitutionality of the challenged statutes.

In 1932, amidst a nationwide concern over gun violence,<sup>18</sup> Congress enacted D.C. Code section 22-4504,<sup>19</sup> which prohibited any person from carrying a concealed firearm or dangerous weapon in Washington, D.C.<sup>20</sup> While citizens of Washington had already been prohibited from carrying concealed weapons since 1892, the new law imposed additional penalties for crimes committed with a firearm.<sup>21</sup> The law was then amended in 1943 to ban the open carry of firearms.<sup>22</sup>

In 1975, the D.C. Council enacted the Firearms Control Regulations Act.<sup>23</sup> The law's purpose was "[t]o protect the citizens of the District from loss of property, death, and injury, by controlling the availability of firearms in the community."<sup>24</sup> The law

---

15. *Palmer*, 59 F. Supp. 3d at 175.

16. *Id.* at 184.

17. *Id.* at 182–83.

18. See Joseph Michael Newhard, *'Bootleggers' and Gun Control*, REGULATION, Fall 2015, at 10. America experienced a wave of gun violence during the Prohibition Era. See Stephen P. Halbrook, *Guns and Prohibition*, in *Al Capone's Day and Now*, WALL ST. J., Apr. 11, 1989, at A22. In response to this violence, Congress enacted the first federal firearms regulation in 1927, which in turn banned all mail-order handguns. *Id.* Just two years after D.C. Code section 22-4504 was passed, Congress enacted the National Firearms Act, a comprehensive law that regulated machine guns, sawed-off shotguns, pistols, and revolvers. National Firearms Act of 1934, 48 Stat. 1236, ch. 757 (codified as amended in scattered sections of 26 U.S.C.); Act of July 8, 1932, 47 Stat. 651, ch. 465, § 4 (codified as amended at D.C. CODE § 22-4504 (2012)).

19. At that time, D.C. legislation still had to be passed by Congress. In 1973, Congress delegated to the District certain specific legislative powers. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973). Although the law created an elected legislature for the District, Congress still had the ability to exercise final approval over the District's annual budget and retained the power to prevent local legislation from going into effect. *Id.* §§ 401, 602(c) (codified as amended at D.C. CODE §§ 1-204.01, 1-206.02). See generally Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311, 312–13 (1990).

20. Act of July 8, 1932 § 4. The statute prohibited the carrying of a concealed pistol, and defined pistol as "any firearm with a barrel less than twelve inches in length." *Id.*

21. Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEO. MASON U. CIV. RTS. L.J. 105, 112 (1995).

22. *Id.* at 113.

23. 23 D.C. Reg. 2464 (July 23, 1976) (codified as amended in scattered sections of 7 D.C. CODE).

24. Edward D. Jones, III, *The District of Columbia's "Firearms Control Regulations Act of 1975": The Toughest Handgun Control Law in the United States—Or Is It?*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 139 (1981).

effectively banned the purchase, sale, transfer, and possession of handguns in D.C.<sup>25</sup> The law required that gun owners re-register their firearms within sixty days of the enactment, after which handguns would be un-registerable.<sup>26</sup> Additionally, the law granted the Police Chief the authority to issue licenses for rifles and shotguns.<sup>27</sup>

The law was amended in 1992 to grant more discretion to the Police Chief for the issuance of licenses, particularly for applications from retired police officers.<sup>28</sup> The law survived several challenges<sup>29</sup> until 2008, when the Supreme Court struck down the law as an unconstitutional ban on operable handguns in *Heller*.<sup>30</sup> In response to the Court's decision in *Heller*, the D.C. Council amended the law by enacting the Firearms Registration Emergency Amendment Act of 2008 (FREAA).<sup>31</sup> This amended version of the law provided that prohibitions on the registering of handguns shall not apply to "[a]ny person who seeks to register a pistol for use in self-defense within that person's home."<sup>32</sup> However, D.C. Code section 22-4504, the law banning the carrying of handguns, remained in effect.

On August 6, 2009, just one year after *Heller*, several plaintiffs filed suit against the District of Columbia and Police Chief Cathy Lanier,<sup>33</sup> in *Palmer v. District of Columbia*.<sup>34</sup> Plaintiff Tom G. Palmer, a D.C. resident, sought to register his handgun.<sup>35</sup> His application was denied by Lanier, on the grounds that his stated purpose, to carry his firearm loaded and in public for self-defense, was unacceptable under the FREAA.<sup>36</sup> Plaintiff George Lyon, a D.C. resident, sought to register his firearm to be carried in public, and applied to register the firearm.<sup>37</sup> Although Lyon

---

25. Firearms Control Regulations Act of 1975, § 201(a) (codified as amended at D.C. CODE § 7-2502.01). The law provided an exception for law enforcement officers and members of the military. *Id.* § 201(b)(1).

26. Jones, *supra* note 24, at 139.

27. *Id.*

28. Handgun Possession Amendment Act of 1992, § 2(b), 39 D.C. Reg. 5676 (May 7, 1993) (codified as amended at D.C. Code § 7-2502.01). The amendment provided discretion to the Police Chief regarding licenses for retired police officers. The amendment stated that the registration certificate expires at the time the retired police officer ceases to be a resident of D.C., and the Police Chief was not mandated to provide licenses if the person is a retired police officer. The amendment required the Police Chief to list, in writing, the reasons for the denial. *Id.*

29. See, e.g., Fesjian v. Jefferson, 399 A.2d 861, 864–65 (D.C. Cir. 1979) (holding that the law was a valid police power of the D.C. Council); McIntosh v. Washington, 395 A.2d 744, 757–58 (D.C. Cir. 1978) (holding that the law is not unconstitutionally vague and that the Council had the power to enact such law).

30. District of Columbia v. Heller, 554 U.S. 570, 628–36 (2008).

31. 56 D.C. Reg. 1365 (Mar. 31, 2009) (codified as amended in scattered sections of 7 D.C. CODE).

32. *Id.* § 3(c)(1)(B) (codified as amended at D.C. CODE § 7-2502.02(a)(4)(C)).

33. Complaint at 1–3, *Palmer v. District of Columbia*, No. 1:09-cv-01482 (D.D.C. Aug. 6, 2009), 59 F. Supp. 3d 173 [hereinafter Complaint].

34. See 59 F. Supp. 3d 173 (D.D.C. 2014).

35. *Id.* at 176.

36. *Id.* at 176–77.

37. *Id.* at 177.

held licenses to carry handguns in the states of Virginia, Utah, and Florida, and had undergone approximately 240 hours of firearms training with at least 140 hours devoted to handguns, Lanier denied his application because his stated purpose, to keep a firearm in the home *or* office for protection, was unacceptable under the FREAA.<sup>38</sup> Two other plaintiffs, Edward Raymond and Amy McVey, both non-residents of D.C., were also denied licenses to carry firearms in public for the same reason.<sup>39</sup> The final plaintiff in this action, the Second Amendment Foundation, Inc. (SAF), has over 650,000 members and supporters nationwide, and became involved in the action because the issues raised were of great interest to the SAF's constituency.<sup>40</sup>

The plaintiffs alleged, *inter alia*, that the D.C. statutes infringed on their Second Amendment rights to keep and bear arms, because the laws required a license to carry handguns without providing any licensing mechanism.<sup>41</sup> The plaintiffs further argued that the statutes were functionally no different from those that were struck down in *Heller* in that it was a complete prohibition on the right to keep and bear arms.<sup>42</sup> The defendants argued that the Supreme Court's decision in *Heller* did not guarantee a fundamental right to keep and bear arms and that the statutes should be analyzed under a reasonableness standard because they did not infringe upon the core right recognized in *Heller*.<sup>43</sup> After extensive motion practice, the court granted summary judgment to the plaintiffs on July 24, 2014.<sup>44</sup>

In its decision, the court held that the Second Amendment protects the right to carry firearms outside the home for the purpose of self-defense and that the law forbidding the carrying of handguns outside the home infringed upon that right.<sup>45</sup> In granting summary judgment, the court erred by misinterpreting the reasoning in *Heller*, by relying on the Seventh Circuit's faulty reasoning in *Moore v. Madigan*, and by failing to conduct a scrutiny analysis to determine whether the challenged statutes passed constitutional muster.

In *Heller*, the Supreme Court held that any law that acts as a total prohibition on the use and possession of handguns inside the home would fail to pass constitutional muster under any level of scrutiny.<sup>46</sup> In *Heller*, the appellee, Richard Heller, was a

---

38. *Id.* However, his application to register the handgun for self-protection in the home was subsequently approved. *Id.*

39. *Id.*

40. *Id.* See generally Godwin, *supra* note 14, at 527–28 (providing background on the SAF).

41. Complaint, *supra* note 33, at 8.

42. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 13, No. 1:09-cv-1482, Palmer v. District of Columbia (D.D.C. Aug. 26, 2009), 59 F. Supp. 3d 173.

43. Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 10–11, No. 1:09-cv-1482, Palmer v. District of Columbia (D.D.C. Sept. 9, 2009), 59 F. Supp. 3d 173.

44. *Palmer*, 59 F. Supp. 3d at 184.

45. *Id.* at 182–83.

46. District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008).

D.C. special police officer<sup>47</sup> authorized to carry a handgun while on duty.<sup>48</sup> Heller applied for a registration certificate so that he could lawfully possess a handgun inside his home.<sup>49</sup> However, at the time of his application, D.C. Code section 7-2502.01 required that residents obtain a registration certificate to possess a firearm, and D.C. Code section 7-2502.02 banned the registration of handguns.<sup>50</sup> Furthermore, D.C. Code section 7-2507.02 required that all firearms within the home be “unloaded and disassembled or bound by a trigger lock or similar device.”<sup>51</sup> Heller’s application for a license was denied by the Police Chief.<sup>52</sup>

Heller then filed a lawsuit in the U.S. District Court for the District of Columbia.<sup>53</sup> The District Court dismissed Heller’s complaint, but the U.S. Court of Appeals, D.C. Circuit later reversed on the grounds that the Second Amendment protects an individual right to possess firearms and that the city’s total ban on handguns and its trigger lock requirement violated that right.<sup>54</sup> The Supreme Court granted certiorari to hear the case.<sup>55</sup>

Justice Antonin Scalia, writing for the Court, analyzed both the prefatory and operative clauses<sup>56</sup> to conclude that the Second Amendment guarantees the right to possess firearms for self-defense in case of confrontation.<sup>57</sup> Specifically, the Court stated that “the District’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.”<sup>58</sup> The Court stressed that the District’s ban on handgun possession inside the home created a prohibition on weapons that a significant number of Americans regularly use and possess for the

---

47. Heller was assigned to the Thurgood Marshall Judiciary Building. *Id.* at 575.

48. *Id.*

49. *Id.*

50. *Id.* at 574–75.

51. *Id.* at 575. D.C. residents who wished to carry a handgun could apply for a license from the Police Chief under D.C. Code section 22-4506. *Id.*

52. *Id.*

53. Heller alleged that his Second Amendment rights were infringed upon and sought to enjoin the city from enforcing the ban on handgun registration, the license requirement, and the trigger lock requirement. *Id.* at 575–76.

54. *Id.* at 576.

55. *District of Columbia v. Heller*, 552 U.S. 1035 (2007).

56. The prefatory clause of the Second Amendment reads, “A well-regulated Militia, being necessary to the security of a free State.” *Heller*, 554 U.S. at 595 (quoting U.S. CONST. amend. II). The prefatory clause is the lead-in to the operative clause and essentially provides the purpose for the operative clause. *Id.* at 577. The operative clause of the Second Amendment reads, “[T]he right of the people to keep and bear Arms shall not be infringed.” *Id.* (quoting U.S. CONST. amend. II). The operative clause serves as the working component of the Second Amendment. *Id.*

57. *Id.* at 628 (“As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right.”).

58. *Id.* at 635.



purpose of self-defense in the home.<sup>59</sup> To reach its decision, the Court conducted a historical analysis to determine the meaning of the operative and prefatory clauses of the Second Amendment.<sup>60</sup>

In *Palmer*, the court erred by misinterpreting the reasoning of *Heller* to extend the Second Amendment right to bear arms for self-defense outside the home.<sup>61</sup> The court opened its discussion section with the following statement: “The Supreme Court’s decisions in *Dist. of Columbia v. Heller* and *McDonald v. City of Chicago* direct the Court’s analysis of Plaintiffs’ claims.”<sup>62</sup> However, in *Heller*, the laws being challenged prohibited the use and possession of operable handguns within the home and required that all legally owned firearms inside the home be rendered inoperable by trigger locks.<sup>63</sup> Accordingly, prior to the Supreme Court’s decision in *Heller*, D.C. residents were forbidden from owning and operating any handguns within the home for self-defense. The Supreme Court in *Heller* emphasized that the D.C. laws prohibited not only the public carrying of handguns, but also ownership within the home, “where the need for defense of self, family, and property is most acute.”<sup>64</sup> The Court outlined the benefits of the use of handguns in the home as opposed to rifles, specifically that residents may prefer handguns because of their size, the ability to keep them hidden and locked away, and the amount of pressure applied to the body when fired.<sup>65</sup> The Court acknowledged the city’s interest in enacting legislation to combat gun violence and stressed that the Court’s decision still permitted the city to pass gun control regulations.<sup>66</sup> However, the Court noted that its decision could potentially preclude certain gun regulations, namely, the absolute prohibition of firearms to be used in the home for self-defense.<sup>67</sup>

In *Palmer*, the court misinterpreted the holding of *Heller* in concluding that the right to possess firearms extends outside the home,<sup>68</sup> basing its analysis on Scalia’s

---

59. *Id.* at 628–29.

60. *Id.* at 592. The Court cited various sources from the eighteenth century through the twenty-first century, including but not limited to states’ constitutions, statutes, court decisions, and treatises. *Id.* at 592–603.

61. *Palmer v. District of Columbia*, 59 F. Supp. 3d 173, 178–83 (D.D.C. 2014).

62. *Id.* at 178. In *McDonald v. City of Chicago*, the Court applied its decision in *Heller* to the states through the Fourteenth Amendment, holding that the Second Amendment right to keep and bear arms is fully applicable to the states. 561 U.S. 742, 791 (2010).

63. *Heller*, 554 U.S. at 574–76.

64. *Id.* at 628.

65. *Id.* at 629.

66. *Id.* at 636.

67. *Id.* (“[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.”).

68. *See Palmer v. District of Columbia*, 59 F. Supp. 3d 173, 181 (D.D.C. 2014) (“[T]hese passages alone, though short of dispositive, strongly suggest that the Second Amendment secures a right to carry a firearm in some fashion outside the home.” (quoting *Peruta v. County of San Diego*, 742 F.3d 1144, 1153 (9th Cir. 2014))).

review of history in *Heller*.<sup>69</sup> However, this methodology was problematic, in that Scalia gave certain sources greater weight than others and did not consider all relevant sources.<sup>70</sup> Since the Supreme Court's decision in *Heller*, several historical sources have been proffered by legal scholars to demonstrate that throughout this country's history, states have traditionally regulated the right to bear arms outside the home.<sup>71</sup> The historical analysis in *Heller* was further called into question in the dissenting opinion of *Peruta v. County of San Diego*, where Judge Sidney Runyan Thomas analyzed the historical sources cited in *Heller* and interpreted these sources as supporting the claim that throughout our nation's history, states have traditionally regulated the use and possession of firearms in public.<sup>72</sup> Instead of relying on the historical analysis in *Heller*, the court in *Palmer* should have conducted its own historical analysis, reviewing not only the sources discussed by the Supreme Court in *Heller*, but also some of the additional sources that have since been offered to show that laws regulating the use and possession of firearms outside the home have traditionally been imposed and enforced by the states. By utilizing a wider range of historical sources, the court in *Palmer* would have been able to issue a more holistic and comprehensive opinion.<sup>73</sup>

The core holding of *Heller* is that the Second Amendment guarantees the right to possess firearms within the home, and that laws that prohibit the total possession of guns in the home are unconstitutional. The Supreme Court never explicitly stated that the right extends outside the home or that states are forbidden from issuing regulations on the possession of firearms outside the home. The court in *Palmer* construed the self-defense component of the holding in *Heller* as applying to a reasonable prohibition on the carrying of firearms in public in Washington, D.C. However, the right to keep and bear arms for the purpose of self-defense was not implicated, as residents were not prohibited from keeping and bearing arms within their homes for the purpose of self-defense.

---

69. *Id.* at 179–82.

70. Cf. Darrell A.H. Miller, *Peruta, the Home-Bound Second Amendment, and Fractal Originalism*, 127 HARV. L. REV. F. 238, 239–40 (2014) (“With a nod toward George Orwell, the [*Peruta*] majority candidly judged that while all historical cases are ‘equally relevant’ to determine meaning, ‘some cases are more equal than others.’” (quoting *Peruta*, 742 F.3d at 1155)).

71. See, e.g., Darrell A.H. Miller, *Guns As Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1323–50 (2009); Nicholas Moeller, *The Second Amendment Beyond the Doorstep: Concealed Carry Post-Heller*, 2014 U. ILL. L. REV. 1401, 1407–09 (2014).

72. *Peruta*, 742 F.3d at 1182–91 (Thomas, J., dissenting).

73. See generally Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 38–39 (2012) (explaining how the oft-analyzed Statute of Northampton provided guidance to two states in the nineteenth century to permit regulations on firearms and other dangerous weapons in the public sphere); Paul Finkelman, *The Living Constitution and the Second Amendment: Poor History, False Originalism, and a Very Confused Court*, 37 CARDOZO L. REV. 623, 642–48 (2015) (providing a more thorough description of several sources proffered by Justice Scalia in *Heller*, namely, provisions of the eighteenth century Pennsylvania, Vermont, North Carolina, and Virginia state constitutions).

In *Moore v. Madigan*, the U.S. Court of Appeals for the Seventh Circuit considered a challenge to an Illinois statute that prohibited citizens from carrying a gun in public, either open or concealed.<sup>74</sup> The Seventh Circuit overturned the statute, holding that it violated the Second Amendment right to carry firearms outside the home.<sup>75</sup> In overturning the statute, Judge Richard Posner, writing for the court, stated that *Heller* provides “that ‘the need for defense of self, family, and property is *most* acute in the home’ but that doesn’t mean it is not acute outside the home.”<sup>76</sup> In *Moore*, the court used select excerpts from the historical analysis undertaken by Justice Scalia in *Heller*.<sup>77</sup> The court stated that the terms “to keep” and “to bear” are distinct from each other and would have been understood to apply outside of the home in the eighteenth century, when settlers lived in the western boundaries of the United States.<sup>78</sup> The court continued its historical analysis by analyzing old English terms and legal scholars’ historical interpretations of the right to bear arms.<sup>79</sup> The court acknowledged that its historical analysis was inconclusive, because additional sources of historical evidence could be proffered to arrive at a different conclusion.<sup>80</sup> The court in *Moore* therefore based its opinion on a historical analysis after effectively conceding that this analysis was insufficient.

The court further focused on *Heller*’s use of the term “confrontation” in defining the scope of the Second Amendment.<sup>81</sup> Specifically, the Supreme Court stated that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”<sup>82</sup> The court in *Moore*, pointing to this language in *Heller*, claimed that the Supreme Court’s decision invokes a broader right than to simply possess firearms in one’s home.<sup>83</sup> While noting that, both as a theory and empirically, the relationship between crime rates and public carry is uncertain, the court added to *Heller*’s broad invocation, stating “that knowing that many law-abiding citizens are walking the streets armed may make criminals timid.”<sup>84</sup>

---

74. 702 F.3d 933, 934 (7th Cir. 2012). The law provided exceptions for police and security personnel, as well as hunters. The law also contained exceptions for people to carry guns on their own property, either owned or rented, and in their places of business. Additionally, the law provided an exception permitting people to carry guns on the property belonging to someone who allowed them to do so. *Id.*

75. *Id.* at 942.

76. *Id.* at 935 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008)).

77. *Id.* at 936–37.

78. *Id.* at 936.

79. *Id.* at 936–37.

80. *Id.* at 937 (“All this is debatable of course, but we are bound by the Supreme Court’s historical analysis because it was central to the Court’s holding in *Heller*.”).

81. *Id.* at 935–36.

82. *Id.* at 936 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008)).

83. *Id.* at 935–36 (“[T]he amendment ‘guarantee[s] the individual right to possess and carry weapons in case of confrontation.’” (quoting *Heller*, 554 U.S. at 592)).

84. *Id.* at 937.

In *Heller*, however, the Supreme Court held that citizens have the right to keep and bear arms “in defense of hearth and home.”<sup>85</sup> Furthermore, the Supreme Court, acknowledging that gun violence is a national problem, made clear that states and municipalities are permitted to enact regulations targeting gun violence, so long as those regulations do not prohibit the possession of handguns to be used in defense of the home.<sup>86</sup>

Even though the Supreme Court limited its discussion of the Second Amendment to the home, the court in *Moore* expanded the *Heller* decision beyond that of any other lower court to date. The court in *Moore* essentially culled passages from the language in *Heller* favorable to its conclusion, and then declared that this selected language created a right to bear arms outside the home under the Second Amendment. Lastly, the court ignored the basis for the cause of action in *Heller*, which was an outright ban on operable handguns inside the home. The Supreme Court in *Heller* limited its decision to laws banning the possession of firearms inside the home, and the court in *Moore* took a bold step in declaring that this right extends outside the home.

In *Palmer*, the court erred by relying on the Seventh Circuit’s reasoning in *Moore* to conclude that the Second Amendment extends outside the home.<sup>87</sup> Specifically, the court applied Judge Posner’s self-defense argument extracted from the *Heller* decision, namely that situations requiring a handgun for self-defense are not limited to inside the home.<sup>88</sup> Like the court in *Moore*, the court in *Palmer* extracted favorable language from *Heller*, even when the *Heller* decision confined the right to inside the home, and even when the statute at issue in *Heller* involved a ban on handguns inside the home. The court in *Palmer* concluded that the challenged statutes amounted to “blanket prohibitions” on the right to bear arms for self-defense, thus equating the challenged laws with the “blanket prohibitions” articulated in *Moore*.<sup>89</sup> However, the challenged laws in *Palmer* were not blanket prohibitions, as citizens were still able to possess handguns within their homes. Moreover, the court in *Moore* was the first circuit court post-*Heller* to label a challenged firearm law regulating the possession of firearms outside the home as a “blanket prohibition,” and in doing so, it expanded the Supreme Court’s decision in *Heller*, creating a dangerous precedent whereby any laws regulating the possession and use of firearms outside the home can be struck down.

In *Palmer*, the court erred by not conducting a scrutiny analysis to determine the constitutionality of the challenged statutes. There are three ascending levels of scrutiny: rational basis review, intermediate scrutiny, and strict scrutiny.<sup>90</sup> Under

---

85. *Heller*, 554 U.S. at 635.

86. *Id.* at 636.

87. *See* *Palmer v. District of Columbia*, 59 F. Supp. 3d 173, 182 (D.D.C. 2014).

88. *Id.* at 180.

89. *Id.* at 182 (“A blanket prohibition on carrying gun[s] in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public *might* benefit on balance from such a curtailment, though there is no proof that it would.” (quoting *Moore*, 702 F.3d at 940)).

90. *E.g.*, *United States v. Laurent*, 861 F. Supp. 2d 71, 98 (E.D.N.Y. 2011).

PALMER v. DISTRICT OF COLUMBIA

rational basis review, legislation is presumed to be valid and will be upheld if the government can show that the legislation is rationally related to a legitimate state interest.<sup>91</sup> Under intermediate scrutiny, the government has the burden of proving that the legislation furthers an important state interest and that the means are substantially related to that important state interest.<sup>92</sup> Strict scrutiny, the highest level of scrutiny and the level often applied in cases involving legislation impinging on fundamental rights,<sup>93</sup> requires that the government prove the legislation is “narrowly tailored to serve a compelling state interest.”<sup>94</sup> Courts have applied these three levels of scrutiny to laws regulating various constitutional rights.<sup>95</sup>

Courts have been provided little guidance regarding the applicable levels of scrutiny to challenges of laws regulating the possession and use of firearms outside the home. In *Heller*, the Court did not suggest the level of scrutiny to be applied in future cases involving Second Amendment challenges.<sup>96</sup>

Since the *Heller* decision, several circuit courts have applied intermediate scrutiny to determine the constitutionality of legislation regulating the scope of the Second Amendment outside the home.<sup>97</sup> One circuit court went so far as to apply a substantial burden standard, in that so long as the challenged statute did not substantially burden the Second Amendment right, no level of heightened scrutiny would be applied.<sup>98</sup>

---

91. *E.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

92. *E.g.*, *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010).

93. *E.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1256 (D.C. Cir. 2011).

94. *United States v. Marzzarella*, 614 F.3d 85, 99 (3d Cir. 2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 465 (2007)).

95. In *Turner Broadcasting System, Inc. v. FCC*, cable television system operators brought a First Amendment challenge against the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. 512 U.S. 622, 622–23 (1994). The Supreme Court applied intermediate scrutiny upon determining that the regulations were content neutral. *Id.* at 662. In *City of Cleburne v. Cleburne Living Center*, the Supreme Court heard a Fifth Amendment challenge to a zoning ordinance that prohibited group homes for the mentally ill in the city of Cleburne. 473 U.S. 432, 436–38 (1985). The Court applied a rational basis test and invalidated the zoning ordinance. *Id.* at 448. For an application of strict scrutiny by the Supreme Court, see *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

96. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). The majority merely concluded that rational basis review should not apply to cases involving specific, enumerated rights. *Id.* at 628 n.27.

97. In *United States v. Marzzarella*, the Third Circuit applied intermediate scrutiny to a case involving the challenge of a federal law prohibiting the possession of a handgun with an obliterated serial number. 614 F.3d at 88. The court reasoned that intermediate scrutiny was the appropriate standard because the burden imposed by the federal statute did not “severely limit the possession of firearms.” *Id.* at 97. Similarly, in *Kachalsky v. County of Westchester*, the Second Circuit applied intermediate scrutiny to a challenge of New York’s handgun licensing scheme. 701 F.3d 81, 96 (2d Cir. 2012). There, the challengers claimed that their Second Amendment rights were infringed when the state required them to show “proper cause” in order to obtain a license to carry a concealed firearm in public. *Id.* at 83–84. In *Woollard v. Gallagher*, the Fourth Circuit applied intermediate scrutiny to a challenge to the Maryland state licensing scheme, which required applicant to demonstrate a “good-and-substantial” reason to obtain a license to carry a concealed weapon. 712 F.3d 865, 876 (4th Cir. 2013).

98. *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012).

In *U.S. v. Marzzarella*, the United States Court of Appeals for the Third Circuit applied intermediate scrutiny to a challenged firearm regulation, finding that the burden imposed by the challenged statute did not “severely limit” the ability to possess firearms.<sup>99</sup> The court upheld the challenged regulation, utilizing a two-pronged test.<sup>100</sup> The test first required an analysis as to whether the challenged regulations regulated conduct that falls within the scope of Second Amendment protection.<sup>101</sup> If the regulation did not, then the inquiry would be complete.<sup>102</sup> If it did, the court would then conduct an analysis under some level of means-end scrutiny.<sup>103</sup>

Like *Marzzarella*, the *Palmer* court should have employed intermediate scrutiny in determining the constitutionality of the challenged statutes. Here, the challenged regulations merely prohibited the carrying of handguns in the public sphere and did not severely limit the ability to possess firearms for self-defense inside the home. However, if this court did conduct a scrutiny analysis, it could be shown that the challenged statutes would satisfy both intermediate and strict scrutiny. In order to withstand strict scrutiny, it would have to be shown that the statutes were “narrowly tailored to serve a compelling state interest.”<sup>104</sup> It is clear that there were compelling state interests in public safety and the prevention of crime in *Palmer* when the disputed regulations were passed.<sup>105</sup> D.C. Code section 22-4504 was enacted in 1932 to prevent people from carrying guns on their person within city limits.

Then, prior to the enactment of D.C. Code section 7-2502, the city experienced a threefold increase in homicides from 1960 to 1969.<sup>106</sup> Although the homicide rate

---

99. *Marzzarella*, 614 F.3d at 96.

100. *Id.* at 89, 99.

101. *Id.* at 89.

102. *Id.*

103. *Id.*

104. *Id.* at 99 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 465 (2007)).

105. *See, e.g.*, *Schenk v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997) (holding that public safety is a significant governmental interest); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (noting that the government has a compelling interest in preventing crime). In 1932, the entire nation, and particularly the District of Columbia, was concerned with an uptick in gun violence throughout the country. Gun violence in Washington, D.C. attracted nationwide attention when a senator was seriously wounded in a gun battle between police officers and bootleggers in downtown D.C. ALEXANDER DECONDE, *GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL* 133 (2001). Citizens across the country grew more concerned with an increase in gun violence and demanded action from the federal government. The issue of gun control even played a role in the 1932 presidential election between Herbert Hoover and Franklin D. Roosevelt. *Id.* at 134.

106. Paul Duggan, *Crime Data Underscore Limits of D.C. Gun Ban's Effectiveness*, WASH. POST (Nov. 13, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/12/AR2007111201818.html>.

in D.C. has dropped considerably since this period,<sup>107</sup> it remains high.<sup>108</sup> In addition, the city's dangerously close proximity to the epicenter of the U.S. government makes that interest even more compelling. It would be unwise and unsafe to forbid these reasonable gun restrictions in a city that houses the President, Congress, and the Supreme Court. Furthermore, gun violence is a problem that has plagued the city of Washington, D.C. for some time. These statutes were narrowly tailored to satisfy the compelling interests of public safety and preventing crime. As the majority of homicides in D.C. are committed with a firearm,<sup>109</sup> these statutes merely seek to keep handguns off the streets of the District.

The *Palmer* court misinterpreted the Supreme Court's decision in *Heller*. Furthermore, the court relied on the Seventh Circuit's decision in *Moore* and misapplied that court's reasoning, thereby extending the Second Amendment to include the right to carry weapons outside the home. Lastly, the court in *Palmer* should have conducted a scrutiny analysis, specifically an analysis under intermediate scrutiny. In deeming the challenged statutes unconstitutional, the court has not only extended the Supreme Court's decision in *Heller* beyond its original scope, but has also set the stage for courts across the country to strike down reasonable gun restrictions. Additionally, permitting residents of D.C. to carry a handgun at all times in public is a serious security threat. Given the recent security breaches at the White House,<sup>110</sup> it would be unwise to permit residents to carry handguns in public. On a wider scale, by declaring that common sense laws targeting the carrying of handguns in public may be struck down under the guise of self-defense, this decision will establish a dangerous precedent, making it increasingly difficult for states and localities to enact common-sense firearms regulations.

---

107. Allison Klein, *Homicides Decrease in Washington Region*, WASH. POST (Dec. 31, 2012), [https://www.washingtonpost.com/local/crime/homicide-rate-decreases-in-washington-region/2012/12/31/0d626dec-4d3c-11e2-950a-7863a013264b\\_story.html](https://www.washingtonpost.com/local/crime/homicide-rate-decreases-in-washington-region/2012/12/31/0d626dec-4d3c-11e2-950a-7863a013264b_story.html).

108. In 2014, there were 105 homicides committed in the District of Columbia. WASHINGTON, D.C. METRO. POLICE DEP'T, ANNUAL REPORT 2014, at 22 (2014), [http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Annual%20Report%202014\\_lowres\\_0.pdf](http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Annual%20Report%202014_lowres_0.pdf). That total represented a rate of sixteen homicides per 100,000 residents. In 2010, there were 132 homicides in the District of Columbia, and that total represented a rate of twenty-two homicides per 100,000 residents. *Id.* According to Federal Bureau of Investigation statistics, the national rate of murder and non-negligent manslaughter for 2010 was 4.8 per 100,000 citizens. *Crime in the United States by Volume and Rate per 100,000 Inhabitants, 1991–2010*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl01.xls> (last visited Apr. 20, 2016).

109. In 2014, seventy-two out of the 105 homicides in the District of Columbia were committed with a firearm. WASHINGTON, D.C. METRO. POLICE DEP'T, *supra* note 108, at 23.

110. On September 19, 2014, Omar Gonzalez jumped over the black iron fence surrounding the White House and entered through the main entrance, just minutes after the President and his family had left the White House. He was tackled right away, and Secret Service officers found a knife in his possession. This breach followed another incident that occurred on September 11, 2014, when a man was apprehended after jumping the fence. Michael D. Shear & Steve Kenny, *Review Ordered of White House Security*, N.Y. TIMES, Sept. 21, 2014, at A20. These incidents led to the resignation of the Director of the Secret Service. Then on October 22, 2014, a man was apprehended after jumping over the fence onto the North Lawn of the White House. Michael S. Schmidt, *Fence Jumper Caught at White House*, N.Y. TIMES, Oct. 23, 2014, at A19.