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A Snowball's Chance in *Heller*: Why *Decastro's* Substantial Burden Standard is Unlikely to Survive

Andrew Peace
Boston College Law School, andrew.peace@bc.edu

A SNOWBALL'S CHANCE IN *HELLER*: WHY *DECASTRO*'S SUBSTANTIAL BURDEN STANDARD IS UNLIKELY TO SURVIVE

Abstract: On June 1, 2012, the U.S. Court of Appeals for the Second Circuit in *United States v. Decastro* analyzed a Second Amendment challenge to a firearm regulation using a substantial burden standard. In so doing, the Second Circuit ignored much of the Supreme Court's guidance in its 2008 decision in *District of Columbia v. Heller*. This Comment argues that the *Decastro* substantial burden standard offers insufficient protection for Second Amendment rights, and is therefore unlikely to survive.

Introduction

The U.S. Supreme Court has recognized an individual right to keep and bear arms under the Second Amendment, but it has not articulated what standard should be used to evaluate the constitutionality of laws that restrict that right.[1] Nonetheless, the Court has provided some guidance for how to treat Second Amendment challenges.[2] Lower courts have tried to apply standards consistent with this guidance.[3]

In 2012, in *United States v. Decastro*, the U.S. Court of Appeals for the Second Circuit analyzed the constitutionality of a statute that the appellant claimed infringed on his Second Amendment right to possess a gun for self-defense.[4] The statute, 18 U.S.C. § 922(a)(3), prohibits transporting into one's state of residence any firearm acquired outside that state.[5]

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[1] *See* Dist. of Columbia v. Heller, 554 U.S. 570, 635 (2008). The Second Amendment states: "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.

[2] *See Heller*, 554 U.S. at 626–27 (providing a list of presumptively lawful regulations under the Second Amendment); *see also infra* notes 38–50 (discussing *Heller*'s guidance).

[3] *See, e.g.*, Nordyke v. King (*Nordyke I*), 644 F.3d 776, 784 (9th Cir. 2011) (applying the substantial burden standard), *vacated as moot*, 681 F.3d 1041 (9th Cir. 2012) (en banc); United States v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny); United States v. Engstrum, 609 F. Supp. 2d 1227, 1231 (D. Utah 2009) (applying strict scrutiny); *see also* Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to Do Post-*Mcdonald*?*, 21 Cornell J.L. & Pub. Pol'y 489, 492–93 (2012) (discussing the different standards of review lower courts have applied to Second Amendment challenges); *infra* notes 51–87 (explaining the different standards of review applied by lower courts).

[4] United States v. Decastro, 682 F.3d 160, 164–69 (2d Cir. 2012); *see* U.S. Const. amend II.

[5] 18 U.S.C. § 922(a)(3) (2006) ("It shall be unlawful . . . for any person . . . to transport into or receive in the State where he resides . . . any firearm purchased or otherwise obtained by such person outside that State . . . .").

Although the trend among other courts has been to apply some form of intermediate scrutiny to statutes burdening Second Amendment rights, the Second Circuit applied a more deferential standard.[6]

Part I of this Comment traces Decastro's case from his purchase of a handgun to his conviction under § 922(a)(3) and finally to his subsequent appeal to the Second Circuit.[7] Part II examines the standards of review courts traditionally use to evaluate constitutional challenges and discusses the Supreme Court's guidance for evaluating Second Amendment claims.[8] Part II then compares the Second Amendment standard applied in *Decastro* with those applied by other courts.[9] Finally, Part III argues that *Decastro*'s substantial burden standard is inconsistent with the Supreme Court's guidance and that some form of intermediate scrutiny is more appropriate.[10]

I. Decastro's Conviction and Second Amendment Challenge

In February 2005, Angel Decastro, a New York resident, purchased two firearms from a gun dealer in Florida.[11] He left one of the purchased handguns in Florida, but transported the other to New York, where he kept the pistol at his family's dry-cleaning business for self-defense.[12] Decastro moved back to Florida in February 2006, but he gave the pistol to a relative before he left New York.[13] In July 2006, police discovered Decastro's pistol while investigating a tip about contra-

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[6] *Decastro*, 682 F.3d at 165; *see* Stephen Kiehl, Comment, *In Search of a Standard: Gun Regulations After* Heller *and* McDonald, 70 Md. L. Rev. 1131, 1141 (2011). Although most courts have applied intermediate scrutiny, at least one court has employed a two-tiered approach. *See* United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010). Under this approach, courts apply strict scrutiny to laws infringing on the Second Amendment's core right of law-abiding citizens to keep and bear arms for self-defense and intermediate scrutiny to restrictions that do not infringe on this core right. *See Chester*, 628 F.3d at 683.

[7] *See infra* notes 11–24 and accompanying text.

[8] *See infra* notes 25–50 and accompanying text.

[9] *See infra* notes 51–87 and accompanying text.

[10] *See infra* notes 88–108 and accompanying text.

[11] *Decastro*, 682 F.3d at 161–62. Prior to 2002, Decastro lived in Florida, where he was licensed to own a handgun. *Id.* To purchase a handgun, Decastro was required to complete and sign Form 4473 of the Bureau of Alcohol, Tobacco, Firearms, and Explosives. *Id.* Form 4473 gathers information on the purchaser and it must be filled out for each sale of a firearm by a licensed importer, manufacturer, or dealer. 27 C.F.R. § 478.124(a) (2012). In February 2005, Decastro falsely reported Florida as his state of residence. *Decastro*, 682 F.3d at 162.

[12] *Decastro*, 682 F.3d at 162. Decastro claimed to be involved in confrontation with gang members in July 2004. *Id.* at 161. He claimed he purchased the gun for self-defense because he feared retaliation at work. *Id.*

[13] *Id.*

band in a Bronx home.[14] Because Decastro, a New York resident, had knowingly transported a pistol purchased in Florida to New York, he was indicted for violating § 922(a)(3).[15]

Decastro moved to dismiss the indictment, claiming that the statute violated his Second Amendment right to possess a gun for self-defense.[16] In his motion, he argued that § 922(a)(3) was unconstitutional, both facially and as applied to him.[17] The U.S. District Court for the Southern District of New York declined to dismiss the indictment.[18] Following a bench trial, the court found Decastro guilty on the sole count of the indictment.[19] Decastro appealed to the Second Circuit, asserting the same arguments he used to challenge his indictment.[20]

The Second Circuit dismissed Decastro's as-applied challenge for lack of standing.[21] To support his as-applied challenge, Decastro had asserted that New York's licensing scheme for firearms was so restrictive that it was tantamount to a ban.[22] But because he had never applied for a handgun license in New York, he lacked standing to challenge the regulation.[23] The court did, however, analyze Decastro's facial challenge to § 922(a)(3) on the merits.[24]

II. Determining the Appropriate Standard of Review for Second Amendment Challenges

To analyze the constitutionality of 18 U.S.C. § 922(a)(3), the Second Circuit selected a standard of review to apply to Second Amendment challenges to gun regulations.[25] Section A of this Part summarizes the standards of review traditionally applied to constitutional challenges and examines the Supreme Court's guidance for Second Amendment

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[14] *Id.* at 162.

[15] *Id.*; *see* 18 U.S.C. § 922(a)(3) (2006) (prohibiting anyone other than a licensed importer, manufacturer, dealer, or collector from transporting into his state of residence a firearm purchased or obtained outside of that state).

[16] *Decastro*, 682 F.3d at 162; *see* U.S. Const. amend II.

[17] *Decastro*, 682 F.3d at 162; *see* U.S. Const. amend II.

[18] *Decastro*, 682 F.3d at 162. In declining to dismiss the indictment, the court rejected Decastro's as-applied challenge and did not address his facial challenge. *Id.*

[19] *Id.* at 162–63. Decastro was sentenced to two years of probation and fined $100. *Id.* at 163.

[20] *Id.*

[21] *Id.* at 164.

[22] *Id.*

[23] *Id.*

[24] *Decastro*, 682 F.3d at 164–69.

[25] *See* United States v. Decastro, 682 F.3d 160, 164–65 (2d Cir. 2012).

challenges.[26] Section B explores the approaches other lower courts have taken when faced with Second Amendment challenges to gun regulations.[27] Finally, Section C discusses the Second Circuit's approach in *Decastro*.[28]

A. *Traditional Standards of Review and the Supreme Court's Guidance in* District of Columbia v. Heller

Courts traditionally have applied one of three standards of review when analyzing challenges based on constitutional rights.[29] Rational basis review requires that a government action is rationally related to a legitimate government interest.[30] Rational basis is the most deferential standard, and its application only rarely leads to the invalidation of laws.[31] Conversely, strict scrutiny is the most stringent standard of review.[32] Strict scrutiny requires that a regulation is supported by a compelling government interest and is narrowly tailored to achieve that interest.[33] In other words, strict scrutiny requires the government to utilize the least restrictive means to achieve its objectives.[34] In between these standards lies the intermediate scrutiny standard of review.[35] Intermediate scrutiny requires the government to demonstrate that an objective is important and that the connection between the challenged

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[26] *See infra* notes 29–50 and accompanying text.

[27] *See infra* notes 51–69 and accompanying text.

[28] *See infra* notes 70–87 and accompanying text.

[29] Dist. of Columbia v. Heller, 554 U.S. 570, 634 (2008).

[30] Sobel, *supra* note 3, at 495.

[31] *Id.*; *see, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442–46 (1985) (applying rational basis to ordinance challenged as discriminatory for the mentally retarded); N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 591–92 (1979) (concluding that the New York City Transit Authority's no drugs employment policy, which postponed eligibility for employment until the job applicant completed a drug treatment program, was rational and supported by legitimate inferences). Moreover, unlike the other standards of review, under rational basis review the burden of proof remains with the party challenging a government action to show that there is no rational basis to believe that the law has any connection to a legitimate government interest. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 320–21 (1993).

[32] Sobel, *supra* note 3, at 494.

[33] *Id.* at 494–95; *see, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (applying strict scrutiny to race-based criteria in school admissions); Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny").

[34] Sobel, *supra* note 3, at 494–95.

[35] *Id.* at 495; *see, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996) (applying intermediate scrutiny to gender regulation classifications); Craig v. Boren, 429 U.S. 190, 197–98 (1976) (same).

regulation and the objective is reasonable or substantial.[36] Intermediate scrutiny, which is also considered a heightened standard, is not as difficult to overcome as strict scrutiny.[37]

In 2008, in *District of Columbia v. Heller*, the Supreme Court recognized for the first time an individual's right to keep and bear arms, but it failed to articulate a standard of review.[38] The Court noted that *Heller* was the Court's first in-depth examination of the Second Amendment and that it did not expect to clarify the entire body of law with one decision.[39]

Although the Court did not prescribe a standard of review for Second Amendment challenges, it did give some guidance to lower courts.[40] Specifically, the Court dismissed rational basis as a standard for Second Amendment challenges, given the Second Amendment's status as a specific, enumerated right.[41] The Court reasoned that if a rational basis were all that was necessary to overcome the right to bear arms, then the right would be meaningless.[42] Additionally, the Court did not rule out strict scrutiny as a standard of review for challenges to firearm regulations.[43] It did, however, list a number of presumptively lawful firearm regulations.[44] The list included prohibitions on possession of firearms by felons and the mentally ill, laws forbidding carrying firearms in sensitive places such as schools and government buildings, and laws imposing conditions and qualifications on the commercial sale of

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[36] United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010). The test for intermediate scrutiny has been described in a number of ways, but its basis is consistent—a standard less stringent than strict scrutiny, but where the burden of proof remains with the government. *See id.*; Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1470 (2009) (discussing how intermediate scrutiny should be applied to gun restrictions under the Second Amendment).

[37] *See* Sobel, *supra* note 3, at 513.

[38] 554 U.S. 570, 635 (2008); *see also* Robert A. Creamer, Note, *History Is Not Enough: Using Contemporary Justifications for the Right to Keep and Bear Arms in Interpreting the Second Amendment*, 45 B.C. L. Rev. 905, 942 (2004) ("Interpreting the Second Amendment to protect [an] individual right to bear arms should not create a fear of totally unrestricted firearm possession and use.").

[39] *Id.*

[40] *See id.* at 626–27.

[41] *Id.* at 628 n.27.

[42] *Id.*

[43] *See id.* at 635.

[44] *Heller*, 554 U.S. at 626–27.

firearms.[45] At least two scholars have argued that many of these presumptively lawful restrictions would not survive strict scrutiny.[46]

Justice Stephen Breyer, in his dissent, criticized the Court's failure to establish a standard of review for evaluating restrictions on the right to bear arms.[47] Justice Breyer called for an interest-balancing approach that would permit judges to weigh the rights of individuals against the government interest.[48] The Court rejected the interest-balancing approach because it threatened to weaken the Second Amendment by giving too much power to judges to weigh a core constitutional right against the government's policy concerns.[49] Additionally, writing for the majority, Justice Antonin Scalia criticized the interest-balancing approach as a departure from the traditionally expressed levels of scrutiny.[50]

B. *The Approaches of Other Courts*

Since the Supreme Court handed down *Heller*, courts have struggled with what standard to use when evaluating Second Amendment challenges.[51] Many courts have avoided using a standard of review by trying to fit cases into the presumptively lawful restrictions listed in *Heller*.[52] Other courts have decided cases while ignoring the standard of

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[45] *Id.*

[46] *See* Lawrence Rosenthal & Joyce Lee Malcolm, McDonald v. Chicago: *Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 Nw. U. L. Rev. 437, 438–39 (2011).

[47] *See Heller*, 554 U.S. at 687 (Breyer, J., dissenting).

[48] *Id.* at 689.

[49] *Id.* at 634–35 (majority opinion).

[50] *Id.* at 634.

[51] Sobel, *supra* note 3, at 492–93; *see, e.g.*, United States v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny); United States v. Engstrum, 609 F. Supp. 2d 1227, 1231 (D. Utah 2009) (applying strict scrutiny). The Supreme Court has decided one other challenge to gun regulations under the Second Amendment since it decided *District of Columbia v. Heller* in 2008. *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3026 (2010); Rosenthal & Malcolm, *supra* note 46, at 438. In 2010, in *McDonald v. City of Chicago*, the Supreme Court incorporated the Second Amendment right to keep and bear arms to the states. 130 S. Ct. at 3026. Once again, the Court did not articulate what standard of review courts should use to evaluate Second Amendment challenges to gun regulations. Rosenthal & Malcolm, *supra* note 46, at 439; *see McDonald*, 130 S. Ct. at 3050.

[52] Brannon P. Denning & Glenn H. Reynolds, Heller, *High Water(Mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 Hastings L.J. 1245, 1248 (2009); Sobel, *supra* note 3, at 509; *see also, e.g.*, United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009) (relying on *Heller*'s list of presumptively lawful regulations to uphold a statute banning firearm possession by felons); United States v. Brunson, 292 Fed. App'x 259, 261 (4th Cir. 2008) (per curiam) (citing *Heller*'s approval of laws prohibiting the possession of firearms by felons in dismissing petitioner's challenge).

review question entirely.[53] The courts that have addressed what standard to use have not yet come to a consensus.[54]

Despite this lack of consensus, the trend has been toward applying intermediate scrutiny in Second Amendment cases.[55] In 2010, in *United States v. Marzzarella*, the U.S. Court of Appeals for the Third Circuit applied intermediate scrutiny in upholding a statute criminalizing the possession of handguns with obliterated serial numbers.[56] The court reasoned that the statute reasonably fit the government's important goal of tracking handguns.[57] Similarly, in 2010, in *United States v. Chester*, the U.S. Court of Appeals for the Fourth Circuit applied intermediate scrutiny when evaluating whether a federal statute banning firearm possession by domestic violence misdemeanants violated the Second Amendment.[58] The court remanded the case after concluding that the government had not demonstrated a reasonable connection between preventing domestic gun violence and the permanent disarmament of all domestic violence misdemeanants.[59]

At least one court has applied intermediate scrutiny after stating that it would not select a particular standard of review.[60] In 2010, in *United States v. Skoien*, the U.S. Court of Appeals for the Seventh Circuit vacated an earlier panel ruling applying intermediate scrutiny to a stat-

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[53] *See, e.g.*, Moore v. Madigan, 702 F.3d 933, 941 (7th Cir. 2012) ("[O]ur analysis is not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states."); United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010) (en banc) ("[W]e need not get more deeply into the 'levels of scrutiny' quagmire, for no one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective.").

[54] Sobel, *supra* note 3, at 492–93. *Compare Marzzarella*, 614 F.3d at 97 (applying intermediate scrutiny), *with Engstrum*, 609 F. Supp. 2d at 1231 (applying strict scrutiny).

[55] Kiehl, *supra* note 6, at 1141; *see Chester*, 628 F.3d at 683; *Marzzarella*, 614 F.3d at 97; *see also* Powell v. Tompkins, 2013 WL 765339, *16 (D. Mass. Feb. 28, 2013) ("The First Circuit has set out its own standard and, in line with the majority of its sister circuits, views challenged firearms regulations through the lens of intermediate scrutiny.").

[56] 614 F.3d at 97.

[57] *Id.* at 98.

[58] 628 F.3d at 683. Although in *Chester* the Fourth Circuit applied an intermediate scrutiny standard to the statute at issue, the opinion articulated a two-tiered approach wherein statutes that infringe on a core Second Amendment right would receive strict scrutiny and regulations that did not infringe on a core right would receive intermediate scrutiny. *See id.* The court characterized the core Second Amendment right as the right of responsible, law-abiding citizens to possess and carry a weapon for self-defense. *Id.* A restriction on domestic violence misdemeanants fell outside of this core right, however, because misdemeanants are by definition not law-abiding citizens. *Id.* As such, the court applied intermediate scrutiny. *Id.*

[59] *Id.*

[60] *See Skoien*, 614 F.3d at 642; *Marzzarella*, 614 F.3d at 101 (affirming the denial of appellant's motion to dismiss the indictment under an intermediate scrutiny analysis).

ute prohibiting domestic violence misdemeanants from possessing firearms.[61] On rehearing en banc, the court refused to address what standard should be used for Second Amendment challenges to gun regulations.[62] Nonetheless, the court upheld the statute after concluding that there was a substantial relation between the challenged statute and the important government objective of preventing armed mayhem.[63] Thus, the court implicitly applied intermediate scrutiny.[64]

Despite this trend toward intermediate scrutiny, other standards have been applied to Second Amendment restrictions.[65] For example, in 2009, in *United States v. Engstrum*, the U.S. District Court for the District of Utah applied strict scrutiny to a statute criminalizing firearm possession by domestic violence misdemeanants.[66] In 2011, in *Nordyke v. King*, the U.S. Court of Appeals for the Ninth Circuit, in a now-vacated opinion, applied a substantial burden standard in evaluating a Second Amendment challenge to an ordinance prohibiting gun shows on county property.[67] Under this standard, only regulations that place a substantial burden on the right to keep and bear arms receive heightened scrutiny.[68] Although the court later reheard the case en banc, it ultimately dismissed the challenge due to changes to the ordinance and therefore did not determine which standard should be applied in Second Amendment cases.[69]

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[61] *Skoien*, 614 F.3d at 642; *see* United States v. Skoien, 587 F.3d 803, 805 (7th Cir. 2009), *vacated*, 2010 WL 1267262 (7th Cir. 2010); Frank Zonars, Comment, *Shooting* Heller *In The Foot?: Applying and Misapplying* District of Columbia v. Heller*'s "Presumptively Lawful" Dicta in* United States v. Skoien, 52 B.C. L. Rev. E. Supp. 83, 89 (2011), http://lawdigitalcommons.bc.edu/bclr/vol52/iss6/8.

[62] *Skoien*, 614 F.3d at 642.

[63] *See id.*

[64] *See id.*

[65] *See* Nordyke v. King (*Nordyke I*), 644 F.3d 776, 784 (9th Cir. 2011) (applying the substantial burden standard), *vacated as moot*, 681 F.3d 1041 (9th Cir. 2012) (en banc); *Engstrum*, 609 F. Supp. 2d at 1231 (applying strict scrutiny).

[66] *Engstrum*, 609 F. Supp. 2d at 1232.

[67] *Nordyke I*, 644 F.3d at 784. Although the substantial burden standard is not a traditional level of scrutiny, the Supreme Court has applied it to other constitutional rights. Sobel, *supra* note 3, at 519 n.213; *see* Volokh, *supra* note 36, at 1454–55. Most notably, the substantial burden standard has been used in abortion cases. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (applying the substantial burden standard to evaluate whether restrictions on access to abortions are constitutional). Some argue that this standard has also been applied, although not explicitly, to marriage, freedom of religion, and expressive association. Sobel, *supra* note 3, at 519 n.213; *see* Volokh, *supra* note 37, at 1454–55.

[68] *See Nordyke I*, 644 F.3d at 784–86.

[69] *See* Nordyke v. King (*Nordyke II*), 681 F.3d 1041, 1044 (9th Cir. 2012) (en banc).

C. *The Second Circuit's Solution in* Decastro

The Second Circuit in *Decastro* applied a substantial burden standard substantially similar to the one applied by the Ninth Circuit in *Nordyke*.[70] The substantial burden standard requires a court to make a threshold determination.[71] First, a court must determine whether a regulation substantially burdens an individual's Second Amendment rights.[72] Only after determining that the challenged regulation imposes a substantial burden will the court apply a heightened level of scrutiny.[73] Because it concluded that § 922(a)(3) did not impose a substantial burden, the Second Circuit did not address which type of heightened scrutiny should be applied in substantial burden cases.[74] Additionally, although the court indicated that less restrictive laws would not receive heightened scrutiny,[75] the court did not adequately justify the continued application of rational basis review to these less restrictive Second Amendment regulations.[76]

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[70] *Compare Decastro*, 682 F.3d at 161, *with Nordyke I*, 644 F.3d at 784.

[71] *Decastro*, 682 F.3d at 166 ("Rather, heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes).").

[72] *See id.*

[73] *See id.*

[74] *See id.* at 164–65 ("We therefore need not decide the level of scrutiny applicable to laws that do impose such a burden."). In 2012, in *Kachalsky v. County of Westchester*, the U.S. Court of Appeals for the Second Circuit provided a partial answer to this question, while adding even more complexity to the Second Amendment analysis. *See* 701 F.3d 81, 93–101 (2d Cir. 2012). In reviewing the constitutionality of a New York law requiring applicants to demonstrate "proper cause" to obtain a license to carry a concealed handgun in public, the Second Circuit drew a distinction between regulations imposing a substantial burden on core versus non-core Second Amendment rights. *See id.* at 93–95. The Court held that laws that impose a substantial burden on non-core Second Amendment rights are subject to intermediate scrutiny. *See id.* at 96–101. The court, however, declined to decide what level of scrutiny should be applied to laws imposing a substantial burden on a core Second Amendment right. *Id.* at 93. Consequently, the court determined that possession of a concealed weapon in public is not a core Second Amendment right, and held that the proper cause requirement was substantially related to the state's important interest in public safety and crime prevention. *Id.* at 98.

[75] *See Decastro*, 682 F.3d at 168.

[76] *See id.* at 166–67. It seems clear that, under this standard, statutes that do not impose a substantial burden on the Second Amendment would call for a less restrictive standard, such as rational basis. *See id.* at 167 n.5. The court, however, likely did not explicitly apply rational basis review because the Supreme Court rejected its use in *Heller*. *See* 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

In evaluating § 922(a)(3), the Second Circuit held that the law did not place a substantial burden on the Second Amendment, and thus the court did not apply a heightened level of scrutiny.[77] The court reasoned that the law did not place a substantial burden on the right to possess a gun for self-defense because it regulated rather than restricted gun use.[78] To support its conclusion, the court emphasized both the available legal means of acquiring a firearm as well as the statute's purpose of preventing the circumvention of legitimate state gun laws.[79]

After applying the substantial burden standard to the statute, the Second Circuit reasoned that the standard is consistent with *Heller*.[80] The court observed that a complete ban on handguns would impose a substantial burden, calling for a heightened level of scrutiny.[81] On the other hand, less restrictive laws, many of which were explicitly deemed constitutional in *Heller*, would be held to a lesser standard.[82] The court concluded that although *Heller* did not explain why the presumptively lawful regulations it mentioned were constitutional, the natural explanation is that they do not impose a substantial burden on the Second Amendment right to keep and bear arms for self-defense.[83]

Finally, having dismissed Decastro's as-applied challenge for lack of standing, and having concluded that § 922(a)(3) should not be subjected to heightened scrutiny, the court focused on the standard for facial challenges.[84] First, the court noted that facial challenges require proof that the statute lacks a plainly legitimate sweep—a difficult bar to pass.[85] Then, the court dismissed the challenge reasoning that because the law did not substantially burden the Second Amendment and only sought to assist states in enforcing their gun laws, its sweep was plainly legitimate.[86] In using this analysis, however, the court did not provide specific guidance for how to address future as-applied challenges to gun regulations that do not substantially burden the Second Amendment.[87]

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[77] *Decastro*, 682 F.3d at 168; *see* 18 U.S.C. § 922(a)(3) (2006).

[78] *See Decastro*, 682 F.3d at 166.

[79] *Id.* at 168. The court noted that the easiest way for a person to acquire a firearm is to purchase it in their state of residency. *Id.*; *see* 18 U.S.C. § 922(a)(3).

[80] *Decastro*, 682 F.3d at 165–66, 167 n.5; *see Heller*, 554 U.S. at 626–27.

[81] *Decastro*, 682 F.3d at 166; *see Heller*, 554 U.S. at 626–27.

[82] *Decastro*, 682 F.3d at 165; *see Heller* 554 U.S. at 626–27.

[83] *Decastro*, 682 F.3d at 165; *see Heller* 554 U.S. at 626–27.

[84] *Decastro*, 682 F.3d at 168–69.

[85] *See id.*

[86] *Id.*

[87] *See id.*

III. *Decastro*'s Substantial Burden Standard: Not What the Supreme Court Ordered

The Second Circuit's application of the substantial burden standard in *Decastro* is inconsistent with the Supreme Court's 2008 decision in *District of Columbia v. Heller*.[88] Although the Court in *Heller* did not articulate a specific standard, it did provide enough guidance to determine what standards would provide adequate Second Amendment protection.[89]

Despite *Heller*'s rejection of the rational basis standard, the Second Circuit's substantial burden standard permits courts to apply rational basis review so long as a regulation does not impose a substantial burden on Second Amendment rights.[90] After determining that 18 U.S.C. § 922(a)(3) did not impose a substantial burden on the right to bear arms, the court rejected the challenge without further discussion.[91] *Heller*'s rejection of the rational basis standard in Second Amendment jurisprudence makes it unlikely that the Supreme Court intended for courts to apply such a highly deferential standard, even if only in cases in which a court determines that no substantial burden is imposed by the challenged regulation.[92] Thus, the Second Circuit's substantial burden standard unjustifiably restricts the Supreme Court's holding in *Heller*.[93]

Furthermore, the Second Circuit's substantial burden standard too closely resembles the interest-balancing approach rejected in *Heller*.[94] The interest-balancing approach allows judges to evaluate how much a

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[88] *See* Dist. of Columbia v. Heller, 554 U.S. 570, 626–27, 634 (2008); United States v. Decastro, 682 F.3d 160, 168–89 (2d Cir. 2012).

[89] *See Heller*, 554 U.S. at 626–27.

[90] *Id.* at 628 n.27; *see Decastro*, 682 F.3d at 168–69.

[91] *Decastro*, 682 F.3d at 168–69. Earlier in its opinion, the court justified the application of the rational basis standard to gun regulations that do not impose a substantial burden on Second Amendment rights. *See id* at 167 n.5.

[92] *See Heller*, 554 U.S. at 628 n.27. The Second Circuit asserted that the Supreme Court's decision in *Heller* did not consider whether the rational basis standard should apply to laws that do not substantially burden the Second Amendment right. *Decastro*, 682 F.3d at 167 n.5. The Court's language in *Heller*, however, is broad enough to encompass such laws. 554 U.S. at 628 n.27. The Court dismissed the application of rational basis as a mode of analysis for any specific, enumerated right. *Id.*

[93] *See supra* notes 90–92 and accompanying text.

[94] Kiehl, *supra* note 6, at 1156; *see Heller*, 554 U.S. at 634. One federal judge, noting the similarities between the two standards, said "this court strongly doubts that the *Heller* majority envisioned the [substantial] burden standard when it left for another day the determination of the levels of scrutiny to be applied to firearms laws." Heller v. Dist. of Columbia, 698 F. Supp. 2d 179, 187 (D.D.C. 2010) (challenging the District of Columbia's new gun regulations following the Supreme Court's invalidation of the handgun ban).

challenged law is burdening Second Amendment rights and to weigh that burden against the government's interest.[95] Similarly, *Decastro*'s substantial burden standard allows judges to evaluate how much a challenged law is burdening Second Amendment rights, and if the burden is substantial, to apply a heightened form of scrutiny.[96] Both approaches impermissibly empower judges to weigh a core constitutional right against amorphous policy concerns.[97] Thus, given these similarities, the substantial burden standard has been criticized as inconsistent with *Heller*'s guidance.[98]

Moreover, the substantial burden standard, though innovative, does not sufficiently scrutinize laws constraining the Second Amendment—a specific, enumerated right.[99] Although this standard has been applied to other constitutional rights, the Court has not traditionally applied this standard to specific, enumerated rights.[100] Additionally, one of the *Heller* Court's critiques of the interest-balancing approach was that it was not one of the traditionally expressed standards of review.[101] The Court thus implied that these traditional standards better protect constitutional rights.[102] Although an innovative standard could adequately protect a constitutional right, *Heller*'s emphasis on the Second Amendment's status as a specific, enumerated right suggests that the Court envisioned that lower courts would apply a traditional standard of scrutiny to evaluate Second Amendment challenges.[103]

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[95] *See Heller*, 554 U.S. at 689–90 (Breyer, J., dissenting).

[96] *See* 682 F.3d at 168.

[97] Kiehl, *supra* note 6, 1156; *see Heller*, 554 U.S. 634–35.

[98] Kiehl, *supra* note 6, at 1156; *see Heller*, 554 U.S. at 634; *Decastro*, 682 F.3d at 168.

[99] *See Heller*, 554 U.S. at 628 n.27.

[100] The undue burden standard was criticized by the dissenters in *Planned Parenthood of Southeastern Pennsylvania v. Casey* as lacking any recognized basis in constitutional law. 505 U.S. 833, 964 (1992) (Rehnquist, C.J., dissenting) (arguing that the majority's undue burden standard was "created largely out of whole cloth"); *id.* at 987 (Scalia, J., dissenting) (asserting that the "[undue burden standard] has no principled or coherent legal basis"). For specific, enumerated rights, the Court has traditionally applied strict scrutiny, intermediate scrutiny, or rational basis review. *See Heller*, 554 U.S. at 634.

[101] *See Heller*, 554 U.S. at 634.

[102] *See id.*

[103] *See id.* Although abortion cases originally received strict scrutiny, the Court has since shifted to a substantial burden standard. *Casey*, 505 U.S. at 877; *see* Sobel, *supra* note 3, at 520–21; Volokh, *supra* note 36, at 1471–72. The Court's shift can be explained by the characterization of abortion as an unenumerated constitutional right. *See* Richard A. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. Chi. L. Rev. 433, 441—42 (1992) (arguing that the right to abortion cannot be tied to any enumerated constitutional provision). *But see* Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. Chi. L. Rev. 381, 386 (1992) (dismissing the distinction between enumerated and unenumerated constitutional rights). Given the conten-

Finally, the Second Circuit should have followed the trend among lower courts of applying some form of intermediate scrutiny in Second Amendment cases.[104] Intermediate scrutiny is a heightened standard and therefore likely provides sufficient protection for the Second Amendment given its status as a specific, enumerated right.[105] Further, intermediate scrutiny is consistent with *Heller*'s guidance because it is restrictive enough to strike down a complete ban on handguns, but also permissive enough to justify upholding the presumptively lawful restrictions listed in *Heller*.[106] Other courts have recognized this balance and applied intermediate scrutiny in Second Amendment cases.[107] The Second Circuit should have done the same.[108]

Conclusion

The Second Circuit in *Decastro* was asked to decide whether § 922(a)(3) was constitutional under the Second Amendment. Although the Supreme Court did not establish a standard of review for these challenges in *Heller*, it did provide some guidance for future cases. Yet, the Second Circuit did not follow *Heller*'s guidance. By employing the substantial burden standard to decide whether the statute in *Decastro* should be subject to heightened scrutiny, the Second Circuit employed a standard that was too deferential and too similar to the interest-balancing approach rejected in *Heller*. Instead, the Second Circuit should followed the lead of its sister circuits and applied intermediate scrutiny to assess the validity of § 922(a)(3).

Andrew Peace

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tious nature of abortion, it is possible that the Court in *Heller* emphasized the Second Amendment's status as an enumerated right to specifically contrast it with abortion. *See Heller*, 554 U.S. at 628–29 ("Under any of the standards of scrutiny that we have applied to *enumerated constitutional rights*, banning [handguns] from the home . . . would fail constitutional muster." (emphasis added)).

[104] *See, e.g.*, United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010) (applying intermediate scrutiny to a ban on firearm possession by domestic violence misdemeanants); United States v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny to a law criminalizing possession of guns with obliterated serial numbers).

[105] *Heller*, 554 U.S. at 634; *see* Sobel, *supra* note 3, at 513.

[106] Kiehl, *supra* note 6, at 1145–46; *see Heller*, 554 U.S. at 626–27.

[107] *See Chester*, 628 F.3d at 683; *Marzzarella*, 614 F.3d at 97.

[108] *See Chester*, 628 F.3d at 683; *Marzzarella*, 614 F.3d at 97.