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## Militias, Muskets, and Machine Guns? The Third Circuit Furthers Inapplicability of Second Amendment Protection to Machine Gun Possession in *United States v. One Palmetto State Armory*

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## Third Circuit Review

MILITIAS, MUSKETS, AND MACHINE GUNS? THE THIRD CIRCUIT  
FURTHERS INAPPLICABILITY OF SECOND AMENDMENT  
PROTECTION TO MACHINE GUN POSSESSION  
IN *UNITED STATES v. ONE PALMETTO  
STATE ARMORY*

PETER J. ADONIZIO, JR.\*

“[W]e repeat today that the Second Amendment does not protect the possession of machine guns. They are not in common use for lawful purposes.”<sup>1</sup>

### I. BOOT CAMP: AN INTRODUCTION TO THE SECOND AMENDMENT’S TREATMENT OF MACHINE GUNS

The Second Amendment to the Constitution of the United States bestows upon Americans the right to “bear arms.”<sup>2</sup> The purpose and extent of this right has been extensively debated in courts of law since roughly a century after the amendment’s inception.<sup>3</sup> Much of the dispute over the

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1. *See* *United States v. One Palmetto State Armory*, 822 F.3d 136, 142 (3d Cir. 2016) (reiterating Third Circuit and Supreme Court precedent that machine gun possession is not protected by Second Amendment).

2. *See* U.S. CONST. amend. II (“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.”).

3. *See, e.g.*, Michael P. O’Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 350–51 (2009) (listing possible purposes of Second Amendment such as deterring government tyrants, protecting against foreign invasion or internal disorder, promoting military readiness, hunting, shooting sports, and self-defense against criminal violence); *see* *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1032–33 (2016) (asserting that Second Amendment protects possession of bearable arms not in existence at time of enactment); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (holding that Fourteenth

Second Amendment has focused on whether the right to bear arms applies individually, to citizens in everyday life, or collectively and only in the militia context.<sup>4</sup> The Supreme Court settled this question in *District of Columbia v. Heller*<sup>5</sup> when it held that the right to bear arms is bestowed upon all citizens individually, rather than collectively to militias.<sup>6</sup>

In *Heller*, however, the Supreme Court also acknowledged that Second Amendment rights are not unlimited and can be restricted by some state and federal statutes.<sup>7</sup> One such statute is the Gun Control Act of 1968, as amended in 1986, which makes it “unlawful for any person to transfer or possess a machinegun.”<sup>8</sup> The combination of *Heller* and the

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Amendment Due Process Clause incorporates Second Amendment rights against state governments); *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008) (concluding that Second Amendment gives individuals right to bear arms for traditionally lawful purposes other than militia service); *United States v. Miller*, 307 U.S. 174, 178 (1939) (declaring purpose of Second Amendment was to allow Congress to “call forth” militias and holding that Second Amendment must be interpreted in light of that purpose); *Presser v. Illinois*, 116 U.S. 252, 585–86 (1886) (recognizing individual right to bear arms while upholding state law prohibiting privately formed military organizations); *United States v. Cruikshank*, 92 U.S. 542, 556 (1875) (asserting that Second Amendment only limits powers of federal government, not states).

4. See Kyle Hatt, *Gun-Shy Originalism: The Second Amendment’s Original Purpose in District of Columbia v. Heller*, 44 SUFFOLK U. L. REV. 505, 505 (2011) (declaring that Supreme Court had now “settled the long-debated question of whether the Second Amendment applies outside the context of state-organized military institutions”). Compare *Heller*, 554 U.S. at 594 (asserting that right to bear arms is an individual right unrelated to militia service), and *Presser*, 116 U.S. at 265 (declaring that states cannot prohibit individuals from bearing arms), with *Miller*, 307 U.S. at 178 (determining that Second Amendment right was meant to ensure continuation and effectiveness of militias).

5. 554 U.S. 570 (2008).

6. See *id.* at 594 (holding that individual right to bear arms is protected by Second Amendment).

7. See *id.* at 595 (“Of course the [Second Amendment] right was not unlimited, just as the First Amendment’s right of free speech was not.” (citing *United States v. Williams*, 553 U.S. 285 (2008))). The Supreme Court acknowledged traditional limitations of the Second Amendment, such as prohibitions of firearm possession “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.” See *id.* at 626–27 (describing accepted limitations of Second Amendment firearm possession).

8. See 18 U.S.C. § 922(o) (2012) (“(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun. (2) This subsection does not apply with respect to— (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.”). The Gun Control Act of 1968 did not independently define “machine gun,” but cites and uses the IRS definition in its National Firearms Act. See *id.*; see also I.R.C. § 5845(b) (2012) (“The term ‘machinegun’ means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclu-

Gun Control Act creates an issue of whether a citizen's Second Amendment right to bear arms preempts the Act's federal ban on machine gun possession.<sup>9</sup>

The Supreme Court alluded to this issue in *Heller* by reaffirming “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”<sup>10</sup> In 2010, the Third Circuit heard a closely related issue in *United States v. Marzzarella*<sup>11</sup> and held that “weapons not typically possessed by law-abiding citizens for lawful purposes” are not protected by an indi-

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sively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.”). In 1986, the Gun Control Act was amended by the Firearm Owners Protection Act of 1986. See *National Firearms Act*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/rules-and-regulations/national-firearms-act> [<https://perma.cc/D8QM-VUWS>] (last visited Feb. 15, 2017). The 1986 amendment contains the specific machine gun prohibition at issue in the cases in this Casebrief. See *id.* (explaining provisions of Firearm Owners Protection Act of 1986). The amendment bans all machine guns except those possessed by government agencies, or those legally possessed by individuals prior to May 19, 1986. See *id.*

9. See, e.g., *United States v. Fincher*, 538 F.3d 868, 870 (8th Cir. 2008) (considering whether machine gun prohibition under Gun Control Act violated Second Amendment), *cert. denied*, 555 U.S. 1174 (2009); see *Hollis v. Lynch*, 827 F.3d 436, 439 (5th Cir. 2016) (same); *United States v. One Palmetto State Armory*, 822 F.3d 136, 138 (3d Cir. 2016) (same); *United States v. Henry*, 688 F.3d 637, 638 (9th Cir. 2012) (same); *Hamblen v. United States*, 591 F.3d 471, 472 (6th Cir. 2009) (same); see also *Friedman v. City of Highland Park*, 784 F.3d 406, 407–08 (7th Cir. 2015) (considering Second Amendment challenge to local machine gun ban), *cert. denied* 136 S. Ct. 447 (2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1247–48 (D.C. Cir. 2011) (considering Second Amendment challenge to local hand gun ban). This Casebrief adopts the Third Circuit's spelling of “machine gun” as two words, except where “machinegun” is used in a quotation. See *One Palmetto State Armory*, 822 F.3d at 138 n.1 (explaining that “[f]ederal statutes and caselaw alternate between the spellings ‘machinegun’ and ‘machine gun’ [so] [w]e will use ‘machine gun’ except when quoting materials that spell the term otherwise”).

10. See *Heller*, 554 U.S. at 626–27 (citations omitted) (acknowledging traditional and historical limitations on Second Amendment). The Supreme Court expressly recognized an important limitation on the Second Amendment, claiming “that the sorts of weapons protected were those ‘in common use at the time.’” See *id.* (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). The Court based this limitation on “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” See *id.* (first citing 4 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 148–149 (1769); 3 B. WILSON, WORKS OF THE HONOURABLE JAMES WILSON 79 (1804); J. DUNLAP, THE NEW-YORK JUSTICE 8 (1815); C. HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822); 1 W. RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 271–72 (1831); H. STEPHEN, SUMMARY OF THE CRIMINAL LAW 48 (1840); E. LEWIS, AN ABRIDGMENT OF THE CRIMINAL LAW OF THE UNITED STATES 64 (1847); F. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 726 (1852), and then citing *State v. Langford*, 10 N.C. 381, 383–84 (1824); *O’Neill v. State*, 16 Ala. 65, 67 (1849); *English v. State*, 35 Tex. 473, 476 (1871); *State v. Lanier*, 71 N.C. 288, 289 (1874)).

11. 614 F.3d 85 (3d Cir. 2010) (holding that Gun Control Act's ban on firearms with altered or destroyed serial numbers does not violate Second Amendment), *cert. denied*, 562 U.S. 1158 (2011).

vidual's constitutional right to bear arms.<sup>12</sup> Then, in 2016, the Third Circuit directly considered whether the right to bear arms includes machine guns in *United States v. One Palmetto State Armory*.<sup>13</sup> The court held that the Second Amendment does not protect possession of machine guns because they are not commonly used for lawful purposes.<sup>14</sup>

The Third Circuit's decision in *One Palmetto State Armory* followed Supreme Court jurisprudence and agreed with other circuits by concluding that the Second Amendment does not protect a right to possess a machine gun.<sup>15</sup> Part II of this Casebrief outlines the background of Second Amendment jurisprudence and federal gun control laws, along with other circuit court decisions on this issue.<sup>16</sup> Part III explains and analyzes the facts, procedural history, and holding of *One Palmetto State Armory*.<sup>17</sup> Finally, Part IV concludes with a critical analysis of *One Palmetto State Armory* and its impact for practitioners in the Third Circuit, including possible arguments to defend or argue against the decision and the machine gun ban.<sup>18</sup>

## II. BASIC TRAINING: A BACKGROUND OF SECOND AMENDMENT JURISPRUDENCE, FEDERAL GUN CONTROL LAWS, AND OTHER CIRCUIT DECISIONS

The judicial debate over the Second Amendment's purpose and reach was confined to few major Supreme Court cases prior to the 1970s.<sup>19</sup> After Congress passed the Gun Control Act of 1968, Americans on both sides of the gun control debate became more intrigued with gun control policy.<sup>20</sup> Most recently, the Supreme Court added to the ongoing

12. See *id.* at 90–91 (“Accordingly, the right to bear arms, as codified in the Second Amendment, affords no protection to ‘weapons not typically possessed by law-abiding citizens for lawful purposes.’” (quoting *Heller*, 554 U.S. at 624–25)).

13. 822 F.3d 136, 138 (3d Cir. 2016).

14. See *id.* at 142 (“[W]e repeat today that the Second Amendment does not protect the possession of machine guns. They are not in common use for lawful purposes.” (citations omitted)).

15. For a further discussion of the facts, procedure, and narrative analysis of *One Palmetto State Armory*, see *infra* notes 65–123 and accompanying text.

16. For a further discussion of the background of the machine gun ban and constitutional right to bear arms, see *infra* notes 19–64 and accompanying text.

17. For a further discussion of the facts, procedure, and narrative analysis of *One Palmetto State Armory*, see *infra* notes 65–123 and accompanying text.

18. For a further discussion of a critical analysis and future impact of *One Palmetto State Armory*, see *infra* notes 124–44 and accompanying text.

19. See *supra* note 3 and accompanying text (outlining few Second Amendment cases prior to 1970s).

20. See 18 U.S.C. § 922(o) (2012); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 207 (2008) (explaining how political climate of 1970s led to “the birth of a libertarian movement for Second Amendment rights, which grew out of conservative ‘law and order’ challenges to the Great Society” (internal citation omitted)); Azmat Khan, *How Conservatives “Reinvented” the Second Amendment*, PBS: FRONTLINE, (Dec. 18, 2012, 3:42 PM), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/how->

Second Amendment debate by declaring constitutional protection of an individual, rather than collective, right to bear arms in *Heller*.<sup>21</sup> Because the machine gun is a relatively modern development, the constitutional quandary that its possession presents was not considered by courts until relatively recently.<sup>22</sup> Understanding the new issues presented by machine gun possession requires a primer on previous Second Amendment jurisprudence, the Gun Control Act of 1968, other relevant circuit court decisions, and related Third Circuit precedent.<sup>23</sup>

A. *An Army of One? An Overview of Early and Influential Supreme Court Second Amendment Decisions*

In 1875, the Supreme Court decided *United States v. Cruikshank*,<sup>24</sup> one of the first cases concerning the Second Amendment.<sup>25</sup> The Court declared that the Second Amendment does no more than prevent the federal government from infringing someone's inherent right to bear arms for a lawful purpose.<sup>26</sup> In 1886, the Court again heard a Second Amendment issue in *Presser v. Illinois*.<sup>27</sup> In *Presser*, the Court held that an Illinois law prohibiting citizens from forming their own militias was constitutional.<sup>28</sup> In doing so, however, the Court asserted that "states cannot . . .

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conservatives-reinvented-the-second-amendment/ [https://perma.cc/X7GT-WWB G] (arguing that "rise of the modern conservative movement in the '70s and '80s" and National Rifle Association lobbying led to increasing popular opinion that Second Amendment gives individuals right to bear arms unrelated to militia service).

21. See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

22. See *supra* note 9 and accompanying text that outlines circuit court decisions regarding the inapplicability of Second Amendment protection to machine gun possession.

23. For a further discussion of Second Amendment jurisprudence, the Gun Control Act of 1968, and other circuit court cases, see *infra* notes 24–64 and accompanying text.

24. 92 U.S. 542 (1875).

25. See *id.* at 544 (explaining that defendants in *Cruikshank* were charged with infringing rights of newly freed African-Americans, including their right to bear arms).

26. See *id.* at 553 ("[The right to bear arms] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment[sic] declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress."). The Court in *Cruikshank* implied that some amendments, including the Second, protect individuals from having the federal government infringe upon their rights, but do not protect against other citizens who may infringe their rights. See *id.* ("This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes . . .").

27. 116 U.S. 252 (1886).

28. See *id.* at 264–65 ("We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or

[generally] prohibit the people from keeping and bearing arms” because doing so would prevent the deployment of *state* militias.<sup>29</sup>

Notwithstanding these early cases, the Supreme Court did not issue an influential decision on what types of firearms were protected under the Second Amendment until 1939 in *United States v. Miller*.<sup>30</sup> *Miller* involved two men who were charged with transporting a sawed-off shotgun across state lines, in violation of the National Firearms Act.<sup>31</sup> The *Miller* court ultimately held that the National Firearms Act does not violate the Second Amendment.<sup>32</sup> In reaching its decision, the *Miller* court determined that the Second Amendment’s purpose was to “assure the continuation and render possible the effectiveness of [militias]” and thus, the Second Amendment “must be interpreted and applied with that end in view.”<sup>33</sup> In effect, the Supreme Court announced that the Constitution only protected a collective right to bear arms in connection with militia service, rather than in an independent individual capacity.<sup>34</sup>

*Miller* stood as the definitive precedent on the Second Amendment until 2008 when the Supreme Court heard *Heller*.<sup>35</sup> In *Heller*, a plaintiff sought to enjoin Washington, D.C. from enforcing its gun control statute,

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to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms.”).

29. *See id.* at 265 (arguing that banning individual firearm possession would “deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government”).

30. 307 U.S. 174 (1939).

31. *See id.* at 175 (explaining facts of *Miller* case); *see also* I.R.C. §§ 5841–49 (2012) (“The National Firearms Act”).

32. *See Miller*, 307 U.S. at 183 (stating that Supreme Court is reserving and remanding district court decision). The Court heard the case on direct appeal from the district court and reversed the district court’s finding that the Act violated the Constitution. *See id.* at 177, 183 (reversing district court decision that section 11 of Act violated Second Amendment and remanding case).

33. *See id.* at 178 (asserting Second Amendment’s purpose of allowing Congress to maintain effective militia). The Court also explained that a sawed-off shotgun is not reasonably related to maintenance of a well regulated militia nor part of ordinary military equipment. *See id.* (arguing that sawed-off shotguns are not related to militia service).

34. *See supra* notes 30–33 and accompanying text that details the effect of the *Miller* court’s holding; *see also* O’Shea, *supra* note 3 (“Despite its deficiencies, however, *Miller* did reach two significant conclusions about the Second Amendment. First, it declared that the right to [bear] arms recognized in the Second Amendment’s operative clause should be ‘interpreted and applied’ in a way that acknowledges the civic purposes suggested by the prefatory clause’s reference to the militia. . . . Second, in conformity with this conception of the Second Amendment, *Miller* held that an individual’s possession of a particular kind of firearm is not constitutionally protected, unless that possession has ‘some reasonable relationship to the preservation or efficiency of a well regulated militia.’”).

35. *See* District of Columbia v. *Heller*, 554 U.S. 570, 622 (2008) (finding Second Amendment individual right to bear arms unrelated to militia service, in contravention to *Miller*).

which effectively banned handgun possession.<sup>36</sup> The Supreme Court ultimately accepted the plaintiff's argument that the statute violated the Second Amendment and held that D.C.'s gun control law was unconstitutional.<sup>37</sup> In reaching its decision, the *Heller* Court found that the Second Amendment bestowed a right to bear arms on *individuals*, independent of militia service.<sup>38</sup> The Court determined that the Second Amendment protects possession of any firearms which "have some reasonable relationship to the preservation or efficiency of a well regulated militia."<sup>39</sup> Thus, the Court distinguished *Heller* from *Miller* by declaring that the sawed-off shotgun at issue in *Miller* was not a type of weapon reasonably related to militia service.<sup>40</sup> Through its decision in *Heller*, the Supreme Court adopted a new view of the Second Amendment that protected an individual's possession of weapons reasonably related to militia service.<sup>41</sup>

#### B. *Taking Aim at Gun Violence: The Gun Control Act of 1968*

Prior to *Heller*, Congress passed the Gun Control Act of 1968.<sup>42</sup> The Gun Control Act contains many gun control measures aimed at curbing gun violence.<sup>43</sup> Section 922(o) of the Gun Control Act, as amended by the Firearm Owners Protection Act of 1986, is paramount to this discussion and states that "it shall be unlawful for any person to transfer or possess a machinegun."<sup>44</sup> Rather than providing its own definition of

36. *See id.* at 574–76 (explaining facts and procedure of *Heller*). The D.C. gun control statute at issue "generally prohibit[ed] the possession of handguns." *Id.* at 574–75 (detailing how statute effectively banned handgun possession in D.C.).

37. *See id.* at 635 ("In sum, we hold 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."). *But see* Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 *IND. L.J.* 1587, 1646 (2014) (refuting Supreme Court's claim that historically, militia members used types of weapons citizens used at home for self-defense).

38. *See Heller*, 554 U.S. at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

39. *See id.* at 622 (explaining that Second Amendment "confers an individual right to keep and bear arms," but only arms reasonably related to "preservation or efficiency of a well regulated militia").

40. *See id.* at 621–22 (distinguishing *Miller* by explaining that type of weapon at issue in *Miller* was not eligible for Second Amendment protection).

41. *See supra* notes 35–41 and accompanying text for explanation of the Supreme Court's interpretation of the Second Amendment expressed in *Heller*.

42. *See* 18 U.S.C. §§ 921–31 (2012) (Gun Control Act of 1968).

43. *See id.* at § 922 (listing statutory measures to curb gun violence); *see also* *Gun Control Act*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/rules-and-regulations/gun-control-act> [https://perma.cc/3YDH-YPES] (last visited Feb. 15, 2017) (describing how Gun Control Act was enacted particularly in response to "assassinations of President John F. Kennedy, Attorney General Robert Kennedy and Dr. Martin Luther King, Jr." and imposed stricter licensing and regulation of firearms).

44. *See* 18 U.S.C. § 922(o) (2012); *see also* *National Firearms Act*, *supra* note 8 (explaining how Firearm Owners Protection Act of 1986 amended Gun Control



“machinegun,” the Gun Control Act uses the Internal Revenue Service’s (IRS) definition from the previously enacted National Firearms Act.<sup>45</sup> The National Firearms Act defined machine guns as “any weapon which shoots . . . automatically more than one shot.”<sup>46</sup> Based on this definition, machine guns are presumably related to the preservation and efficiency of militias because militarized forces use weapons capable of automatically firing ammunition; therefore, the Gun Control Act appears to be in direct conflict with the Supreme Court’s interpretation of the Second Amendment described in *Heller*.<sup>47</sup>

C. *Scoping In and Out: An Examination of Other Circuit Court Decisions Regarding Machine Gun Possession*

Several circuit courts have considered whether machine gun possession is protected by the Second Amendment.<sup>48</sup> Even though the Supreme Court has not directly addressed this issue, every circuit to hear this issue has held that the Gun Control Act’s machine gun ban does not violate the Second Amendment.<sup>49</sup> A brief analysis of post-*Heller* decisions from other circuits is beneficial to this Casebrief’s discussion of the Third Circuit’s opinion in *One Palmetto State Armory*.<sup>50</sup>

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Act of 1968 to prohibit transfer/possession of machine guns); *supra* note 8 and accompanying text that describes the Gun Control Act’s ban on machine guns through Firearm Owners Protection Act of 1986. See generally *History of Gun-Control Legislation*, WASH. POST (Dec. 22, 2012), [https://www.washingtonpost.com/national/history-of-gun-control-legislation/2012/12/22/80c8d624-4ad3-11e2-9a42-d1ce6d0ed278\\_story.html?utm\\_term=.eec167f57884](https://www.washingtonpost.com/national/history-of-gun-control-legislation/2012/12/22/80c8d624-4ad3-11e2-9a42-d1ce6d0ed278_story.html?utm_term=.eec167f57884) [<https://perma.cc/NCV6-XLWF>] (discussing history of gun control legislation).

45. See *supra* note 8 (explaining how Gun Control Act uses National Firearms Act’s definition of “machine gun” in its machine gun ban).

46. See *supra* note 8 (explaining National Firearms Act’s definition of “machine guns”).

47. See *United States v. One Palmetto State Armory*, 822 F.3d 136, 138 (3d Cir. 2016) (explaining plaintiff’s contention that section 922(o) of Gun Control Act violates his Second Amendment right to bear arms). See generally Peter Suci, *The Long Guns: History of US Military Rifles*, FOX NEWS (Dec. 22, 2016), <http://www.foxnews.com/tech/2016/12/22/long-guns-history-us-military-rifles.html> [<https://perma.cc/ZFR4-SHKU>] (explaining machine gun’s use in military); *How The Machine Gun Changed Combat During World War I*, NORWICH UNIV. ONLINE, <http://graduate.norwich.edu/resources-mmh/infographics-mmh/how-the-machine-gun-changed-combat-during-world-war-1/> [<https://perma.cc/E7CT-LLLL>] (last visited Feb. 15, 2017) (explaining importance of machine gun to military, particularly since World War I).

48. See *supra* note 9 (describing other circuit cases with Second Amendment challenge to machine gun prohibition).

49. See *supra* note 9 (explaining that every circuit to hear issue of constitutionality of machine gun ban has held that Second Amendment does not protect right to possess machine guns).

50. For a further discussion of other circuit court cases on Second Amendment challenges to the machine gun ban, see *infra* notes 51–58 and accompanying text.

The Eighth Circuit first considered this issue in 2008 when a defendant argued that section 922(o) of the Gun Control Act was unconstitutional in *United States v. Fincher*.<sup>51</sup> The *Fincher* court applied *Miller* and *Heller* and held that “[m]achine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.”<sup>52</sup> In 2009, the Sixth Circuit quashed a similar challenge to the Gun Control Act in *Hamblen v. United States*.<sup>53</sup> The *Hamblen* court discussed *Miller* and *Heller* and held that the right to bear arms does not include the possession of machine guns.<sup>54</sup>

In 2012, the Ninth Circuit heard the same Second Amendment challenge in *United States v. Henry*.<sup>55</sup> The *Henry* court stated that the Second Amendment only protects possession of certain firearms.<sup>56</sup> Citing *Heller*, the Ninth Circuit declared that machine guns were “dangerous and unusual” and not commonly used for lawful purposes.<sup>57</sup> *Fincher*, *Hamblen*, and *Henry* were the only major circuit decisions on Second Amendment challenges to the federal machine gun ban prior to *One Palmetto State Armory*.<sup>58</sup>

51. 538 F.3d 868, 870 (8th Cir. 2008) (stating that defendant is appealing conviction based on argument that he has right to possess machine guns under Second Amendment), *cert. denied*, 555 U.S. 1174 (2009).

52. *See id.* at 874 (holding that defendant’s possession of machine gun is not protected under Second Amendment because they are dangerous and unusual).

53. 591 F.3d 471, 474 (6th Cir. 2009) (explaining that, while Second Amendment right is not clearly defined, it does not include possession of machine guns for personal use).

54. *See id.* (explaining that Supreme Court foreclosed Second Amendment challenge to machine gun act). The *Hamblen* court cited the Supreme Court in *Heller* which asserted “that it would be a ‘startling’ interpretation of precedent to suggest that restrictions on machine guns, set forth in the National Firearms Act, might be unconstitutional.” *See id.* (citing *District of Columbia v. Heller*, 554 U.S. 570, 623 (2008)).

55. 688 F.3d 637, 639 (9th Cir. 2012) (describing how defendant argued that § 922(o) of Gun Control Act violated Second Amendment right to bear arms).

56. *See id.* at 640 (explaining that Second Amendment “does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns” (citing *Heller*, 554 U.S. at 640)).

57. *See id.* (“In short, machine guns are highly ‘dangerous and unusual weapons’ that are not ‘typically possessed by law-abiding citizens for lawful purposes.’” (quoting *Heller*, 554 U.S. at 625, 627)). The *Henry* court further explained that A machine gun is “unusual” because private possession of all new machine guns, as well as all existing machine guns that were not lawfully possessed before the enactment of § 922(o), has been unlawful since 1986. Outside of a few government-related uses, machine guns largely exist on the black market.

*Id.* (asserting that machine guns are not commonly used for lawful purposes).

58. *See United States v. One Palmetto State Armory*, 822 F.3d 136, 143 (3d Cir. 2016) (explaining that other circuits that have heard Second Amendment challenges to federal machine gun prohibition have all held that machine gun possession is not protected under Second Amendment right to bear arms). The court in *One Palmetto State Armory* cited *Fincher* (Eighth Circuit), *Henry* (Ninth Circuit), and *Hamblen* (Sixth Circuit) in reaching its holding. *See id.* (“Our sister circuits have consistently come to similar conclusions.”). Just months after *One Palmetto State*

D. *Reloading: Post Heller, The Third Circuit Hears Second Amendment Challenge to Gun Control Act*

The Third Circuit used the *Heller* Court's analytical framework to decide a Second Amendment challenge in *Marzzarella*—a precursor to *One Palmetto State Armory*.<sup>59</sup> In *Marzzarella*, a defendant was convicted under the Gun Control Act “for possession of a handgun with an obliterated serial number.”<sup>60</sup> The Third Circuit applied a two-pronged approach, ascertained from *Heller*, to the Second Amendment challenge.<sup>61</sup> First, although the Third Circuit did not reach a conclusion on whether possession of handguns with “obliterated serial number[s]” was protected under the Second Amendment, the court found it dispositive that the Gun Control Act passed constitutional muster under intermediate and strict scrutiny.<sup>62</sup> In part one of the *Heller* framework, the *Marzzarella* court analyzed whether handguns without serial numbers were “dangerous or unusual weapons,” the likes of which are not protected by the Second Amendment.<sup>63</sup> Thus, *Marzzarella* is important to this Casebrief's discussion be-

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*Armory*, the Fifth Circuit followed circuit precedent in *Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016) (holding that “machineguns are not protected arms under the Second Amendment”). The Fifth Circuit explained that machine guns do not receive Second Amendment protection because they are “dangerous and unusual and therefore not in common use.” *See id.* (“Machineguns are dangerous and unusual and therefore not in common use. They do not receive Second Amendment protection, so we uphold Section 922(o) at step one of our framework.”).

59. *See* United States v. *Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (citing *Heller* to explain court's reasoning).

60. *See id.* at 87–88 (explaining how defendant was indicted for possession of firearm with obliterated serial number and subsequently plead guilty).

61. *See id.* at 89 (“As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.” (internal citations omitted)).

62. *See id.* at 101 (“Second Amendment doctrine remains in its nascency, and lower courts must proceed deliberately when addressing regulations unmentioned by *Heller*. Accordingly, we hesitate to say *Marzzarella*'s possession of an unmarked firearm in his home is unprotected conduct. But because § 922(k) would pass muster under either intermediate scrutiny or strict scrutiny, *Marzzarella*'s conviction must stand.”).

63. *See id.* at 92 (explaining that Second Amendment does not protect possession of dangerous and unusual weapons (citing *District of Columbia v. Heller*, 554 U.S. 570, 625–27 (2008))). The *Marzzarella* court also proclaimed that “[i]t is arguably possible to extend the exception for dangerous and unusual weapons to cover unmarked firearms.” *See id.* at 95. Further, the *Marzzarella* court rejected the argument that the Gun Control Act was unconstitutional merely because it regulated possession of certain firearms in an individual's home—the type of firearm possession the Supreme Court claimed was the originalist purpose of the Second Amendment in *Heller*. *See id.* at 94 (arguing that possession of firearm at home for self-defense is not protected in all circumstances). *See generally Heller*, 554 U.S. at 599, 603 (implying that self-defense is one of framer's purposes for including right to bear arms in Constitution).

cause it represents the Third Circuit's first major consideration of a Second Amendment challenge to the Gun Control Act and it laid the framework through which the court would now analyze the prohibition of "dangerous and unusual weapon[s]," as it did in *One Palmetto State Armory*.<sup>64</sup>

### III. LOCKED AND LOADED: AN ANALYSIS OF *ONE PALMETTO STATE ARMORY*

The Third Circuit directly considered the constitutionality of the Gun Control Act's machine gun prohibition in *One Palmetto State Armory*.<sup>65</sup> The court ultimately held that the Second Amendment does not protect the possession of machine guns.<sup>66</sup> In reaching its decision, the Third Circuit considered the Supreme Court's Second Amendment jurisprudence and the specific applicability of the machine gun ban to gun trusts.<sup>67</sup> This section outlines the facts and procedural history of *One Palmetto State Armory* and provides a narrative analysis of the Third Circuit's reasoning.<sup>68</sup>

#### A. *A New Target: Facts and Procedural History of One Palmetto State Armory*

Ryan S. Watson (Watson) filed a suit against the United States government for declaratory and injunctive relief after the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) denied his family trust's application to make and possess a machine gun.<sup>69</sup> A gun trust "is simply a trust created to receive (or purchase) and manage certain federally restricted, but legal-to-own, firearms."<sup>70</sup> The National Firearms Act requires a gun manu-

64. See *supra* notes 59–63 and accompanying text for discussion of *Marzzarella*.

65. See *United States v. One Palmetto State Armory*, 822 F.3d 136, 138 (3d Cir. 2016) (asserting that claim is based on issue of whether Second Amendment is violated by Gun Control Act's machine gun ban).

66. See *id.* at 144 (holding that under *Heller* and *Marzzarella*, machine gun possession is not protected by Second Amendment).

67. See *id.* at 141 (stating that Third Circuit's analysis of Second Amendment challenge to Gun Control Ban must begin with *Heller*). Further, the Third Circuit explained that the Gun Control Act applies to trusts because the individuals representing a trust are the persons who actually possess any firearms belonging to the trust. See *id.* at 140 (declaring that Watson is natural person who acts on Trust's behalf and thus is subject to prohibitions of Gun Control Act). Additionally, the court held that Congress did not intend for the Gun Control Act to exempt trusts from its purview. See *id.* at 140–41 (rejecting idea that Congress intended to effectively "destroy" Gun Control Act through use of trust).

68. For a further discussion of the facts, procedural history, and narrative analysis of *One Palmetto State Armory*, see *infra* notes 69–123 and accompanying text.

69. See *One Palmetto State Armory*, 822 F.3d at 138–39 (describing how ATF ultimately denied Watson's application to manufacture and possess M-16 style machine gun).

70. See Lee-ford Tritt, *Dispatches from the Trenches of America's Great Gun Trust Wars*, 108 NW. U. L. REV. 743, 745 (2014) ("From a trust law perspective, a gun trust is conceptually no different from other trusts. The trustee of a gun trust holds the trust property as a fiduciary for one or more beneficiaries, the trustee

facturer to obtain permission from the ATF before manufacturing a firearm.<sup>71</sup> The ATF can deny permission if “making or possessing the firearm” would be illegal—precisely what happened to the Watson’s application.<sup>72</sup> Watson brought the action “individually and on behalf of the Watson Family Gun Trust” (the Trust) claiming that the Gun Control Act’s machine gun ban violates the Second Amendment.<sup>73</sup> This section discusses the facts and procedural history of Watson’s case.<sup>74</sup>

### 1. *Hired Gun: Facts of One Palmetto State Armory*

In May and June 2014, Watson, as the sole trustee of the Trust, “submitted applications on behalf of the Trust to make and register an M-16-style machine gun.”<sup>75</sup> On August 5, 2014, an ATF agent accidentally approved Watson’s application and Watson promptly “had a machine gun manufactured.”<sup>76</sup> Nevertheless, on September 10, 2014, the ATF informed Watson that his approval was a mistake and his application was denied because machine gun possession is prohibited by the Gun Control Act.<sup>77</sup> Watson argued that he was exempt from the machine gun ban because he was acting on behalf of the Trust and therefore, he did not fall under the statutory definition of a “person” to which the Gun Control Act

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takes legal title of the trust property, and beneficiaries enjoy the equitable title to the trust property.”).

71. See *One Palmetto State Armory*, 822 F.3d at 138 (explaining that National Firearms Act requires permission from ATF to manufacture firearms); see also I.R.C. § 5822 (2012) (“No person shall make a firearm unless he has (a) filed with the Secretary a written application, in duplicate, to make and register the firearm on the form prescribed by the Secretary; (b) paid any tax payable on the making and such payment is evidenced by the proper stamp affixed to the original application form; (c) identified the firearm to be made in the application form in such manner as the Secretary may by regulations prescribe; (d) identified himself in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; and (e) obtained the approval of the Secretary to make and register the firearm and the application form shows such approval.”).

72. See *One Palmetto State Armory*, 822 F.3d at 138 (describing how ATF denies applications if manufacture or possession would be unlawful); see also I.R.C. § 5822 (“Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law.”).

73. See *One Palmetto State Armory*, 822 F.3d at 138 (describing how Watson filed suit on behalf of Trust and himself for violation of Second Amendment right to bear arms).

74. For a further discussion of the facts and procedural history of *One Palmetto State Armory*, see *infra* notes 75–97 and accompanying text.

75. See *One Palmetto State Armory*, 822 F.3d at 138 (describing how Watson sent application to ATF “for permission to make and register an M-16-style machine gun”).

76. See *id.* at 138–39 (stating that “ATF examiner mistakenly approved one of Watson’s applications [and] Watson had a machine gun manufactured pursuant to that approval”).

77. See *id.* at 139 (discussing how ATF informed Watson that his application was mistakenly approved and was actually “denied because he was prohibited by law from possessing a machine gun”).

applies.<sup>78</sup> The ATF rejected this rationale and notified Watson that he had to surrender his machine gun to the ATF.<sup>79</sup>

Under protest, Watson turned his machine gun over to an ATF agent on November 14, 2014.<sup>80</sup> On the same day, Watson filed suit against the United States Attorney General and ATF Director seeking declaratory and injunctive relief from the Gun Control Act and National Firearms Act's de facto machine gun ban.<sup>81</sup> Watson argued that an outright ban on machine gun possession violates the Constitution's Commerce Clause,<sup>82</sup> as well as its Second,<sup>83</sup> Ninth,<sup>84</sup> and Tenth<sup>85</sup> Amendments.<sup>86</sup> Further, Watson claimed a violation of his Fifth Amendment<sup>87</sup> due process rights and

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78. *See id.* (recounting how Watson claimed to be exempt from Gun Control Act's machine gun ban because he was acting on behalf of Trust). Watson argued that a trust is "not a 'person' covered by the Gun Control Act." *See id.*

79. *See id.* at 139, 141–42 (summarizing that Watson is not exempt from machine gun prohibition by acting through Trust). "ATF explained that although a trust is not a 'person' under the Act, a trust cannot legally make or hold property. Therefore, ATF considers the individual acting on behalf of the trust to be the proposed maker and possessor of the machine gun." *Id.* at 139. On October 10, 2014, an ATF agent called Watson to ask whether a machine gun had been manufactured after his initial application was approved and to notify Watson that if a gun was made, it must be surrendered to the ATF. *See id.* (stating that ATF contacted Watson to inquire about machine gun manufacture and surrender of already made machine gun).

80. *See id.* (recalling that Watson turned machine gun over to ATF "under protest" on November 14, 2014).

81. *See id.* (detailing how Watson filed suit against federal government seeking declarative and injunctive relief from Gun Control Act and National Firearms Act). Watson claimed that the two Acts and their implementing regulations "act as a de facto ban on an entire class of arms" in violation of the Constitution. *See id.*; *see also* 18 U.S.C. § 922(o) (2012) (codifying Gun Control Act's machine gun ban); I.R.C. §§ 5801–5822 (2012) (describing National Firearms Act); 27 C.F.R. § 479.105 (2012) (detailing regulations that implement machine gun ban).

82. *See* U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

83. *See supra* note 2 and accompanying text for of description Second Amendment to United States Constitution.

84. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

85. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

86. *See One Palmetto State Armory*, 822 F.3d at 139 (acknowledging Watson's argument that machine gun ban violates his constitutional right to bear arms).

87. *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . .").

Fourteenth Amendment<sup>88</sup> equal protection rights.<sup>89</sup> Lastly, Watson brought “a claim for detrimental reliance based on the ATF’s initial approval of his application.”<sup>90</sup>

## 2. *Gun Shy: Procedural History of One Palmetto State Armory*

“On January 16, 2015, the government moved to dismiss Watson’s action for lack of standing and failure to state a claim.”<sup>91</sup> The district court held that Watson had standing, “but that he failed to state a claim upon which relief can be granted.”<sup>92</sup> Notably, the court ruled “that Watson failed to state a claim under the Second Amendment because the Second Amendment does not protect the possession of machine guns.”<sup>93</sup> Additionally, the district court held “that a trust is incapable of owning a machine gun under § 922(o).”<sup>94</sup>

Watson appealed both of these district court holdings to the Third Circuit.<sup>95</sup> The Third Circuit was initially unsure if it had jurisdiction over the case because the government’s forfeiture claim was still pending.<sup>96</sup> Nevertheless, on “August 13, 2015, the District Court issued a certification of entry of final judgment,” which put the case within the Third Circuit’s jurisdiction, and the Third Circuit reviewed the case *de novo*.<sup>97</sup>

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88. See U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

89. See *One Palmetto State Armory*, 822 F.3d at 139 (reciting how “Watson alleged violations of his” equal protection and due process rights under Fourteenth and Fifth Amendments).

90. See *id.* (stating how Watson also claimed “detrimental reliance based on the ATF’s initial approval of his application”). In response, the government filed “a forfeiture action for Watson’s machine gun,” which was consolidated into one claim. See *id.*

91. *Id.* (commenting that government moved to dismiss Watson’s action).

92. See *id.*

93. See *id.* (noting district court’s holding that Watson failed to state Second Amendment claim because machine gun possession is not protected under right to bear arms).

94. See *id.* (stating that district court held that trusts are also subject to machine gun ban).

95. See *id.* (explaining that Watson only appealed motion to dismiss and holding that trust was subject to Gun Control Act’s machine gun ban).

96. See *id.* (recalling Third Circuit’s apprehension to hear case because district court decision was not yet final order).

97. See *id.* at 139 (detailing how “the District Court issued a certification of entry of final judgment,” which gave Third Circuit jurisdiction to review case *de novo*); see also 28 U.S.C. § 1291 (2012) (“The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.”).

B. *Pulling the Trigger: Narrative Analysis of One Palmetto State Armory*

The Third Circuit's analysis in *One Palmetto State Armory* focused on the Second Amendment, the Gun Control Act, and the Supreme Court's *Heller* opinion.<sup>98</sup> As an initial issue, the court first considered Watson's claim that the machine gun ban does not apply to trusts.<sup>99</sup> The court explained that, although a trust is not statutorily defined as a person under the Act, a trust is not a distinct entity that can act on its own.<sup>100</sup> Thus, a trust needs to act through an individual—a trustee—who does fall under the Act's definition of a person and is prohibited from possessing a machine gun.<sup>101</sup> Further, the court stated that this finding was necessary to the enforcement of the Gun Control Act because accepting Watson's trust argument would allow any individual to circumvent the machine gun ban through the use of a trust.<sup>102</sup> The court "refuse[d] to conclude that with one hand Congress intended to enact a statutory rule that would restrict the transfer or possession of certain firearms, but with the other hand it created an exception that would destroy that very rule."<sup>103</sup>

98. For a further discussion of the narrative analysis of *One Palmetto State Armory*, see *infra* notes 99–123 and accompanying text.

99. See *One Palmetto State Armory*, 822 F.3d at 140 (noting that court will first consider Watson's argument that trusts are exempt from machine gun ban). The court considered this claim first because it was an issue of constitutional avoidance. See *id.* ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))). Watson claimed that section 922(o) does not include "trust" in its definition of a "person" to which the law applies. See *id.*

100. See *id.* at 140–141 (asserting that Watson himself is subject to machine gun ban even when acting as trustee of trust); see also 18 U.S.C. § 921(a)(1) (2012) (defining person as "any individual, company, association, firm, partnership, society, or joint stock company").

101. See *id.* (stating that trust must act through trustee, who is subject to machine gun ban). The court explained that a trust is not an entity "capable of legal action on its own," and only acts through a trustee. See *id.* at 140. Even acting as a trustee, Watson himself was prohibited from possessing a machine gun under the Gun Control Act. See *id.* (stating that ATF cannot grant Watson's machine gun application because he is prohibited from possessing it). Watson is an individual and thus considered a "person" under § 922(a)(1). See *id.* (defining "person").

102. See *id.* at 140 ("Moreover, this holding is necessarily correct because to interpret the Gun Control Act as Watson suggests would allow any party—including convicted felons, who are expressly prohibited from possessing firearms under 18 U.S.C. § 922(g)(1)—to avoid liability under this section simply by placing a machine gun 'in trust.'"). The court notes that if it accepted Watson's argument and exempted trusts from the machine gun ban, then "[a]ny 'individual, company, association, firm, partnership, society, or joint stock company'" could lawfully possess a machine gun using this method." See *id.* (quoting 18 U.S.C. § 921(a)(1)).

103. See *id.* at 140 ("Interpreting the statute so as to include this exception would thereby swallow the rule."); see also Andrew Blake, *Machine Gun Ban Upheld by Federal Appeals Court*, WASH. TIMES (May 19, 2016), <http://www.washingtontimes.com/news/2016/may/19/machine-gun-ban-upheld-by-federal-appeals-court/> [<https://perma.cc/4WD9-DE4Q>] (explaining court's rejection of Watson's trust argument).



Next, the court considered Watson's facial constitutional challenge to the machine gun ban.<sup>104</sup> The Third Circuit first cited *Heller* and discussed the Supreme Court's interpretation of the Second Amendment right to bear arms.<sup>105</sup> The Third Circuit reiterated the Supreme Court's declaration that Second Amendment protection "extends only to certain types of weapons, [specifically] those weapons 'in common use' and not 'those weapons not typically possessed by law-abiding citizens for lawful purposes.'"<sup>106</sup> Further, the Third Circuit cited *Marzzarella* and described its "two-pronged approach to Second Amendment challenges."<sup>107</sup>

"First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." If it does not, the inquiry ends. If it does, we move on to the second step: "[W]e evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid."<sup>108</sup>

Under the first prong of analysis, the Third Circuit found that the machine gun ban does not burden conduct protected by the Second Amendment.<sup>109</sup> The court noted that *Heller* explicitly discussed machine guns and implied that their possession may be banned without infringing on the Second Amendment.<sup>110</sup> In addition, the Third Circuit discussed its

104. See *One Palmetto State Armory*, 822 F.3d at 141 (acknowledging Watson's facial Second Amendment challenge to machine gun ban).

105. See *id.* (analyzing *Heller* and explaining that Supreme Court held that Second Amendment guarantees individual right to possess firearms).

106. See *id.* (describing how *Heller* recognized that individual right to bear arms is not unlimited right to possess any firearm anywhere for any purpose (quoting *District of Columbia v. Heller*, 554 U.S. 570, 623, 625, 627 (2008))). The Third Circuit further explains that in *Heller*, the Supreme Court overturned a handgun ban because it constituted a categorical ban of a particular type of firearm—the handgun—which is "'overwhelmingly chosen by American society' for the 'lawful purpose' of self-defense in the home, 'where the need for defense of self, family, and property is most acute.'" *Id.* (quoting *Heller*, 554 U.S. at 628).

107. See *id.* (outlining Third Circuit's two-pronged approach to analyzing Second Amendment challenges). For a further discussion of the Third Circuit's two-pronged approach to Second Amendment challenges first articulated in *Marzzarella*, see *supra* note 61 and accompanying text.

108. *One Palmetto State Armory*, 822 F.3d at 141 (describing two-pronged approach Third Circuit adopted, in accordance with Supreme Court's analysis in *Heller* (quoting *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010))). For a further discussion of the Third Circuit's two-pronged approach to Second Amendment challenges, in accordance with *Heller*, see *supra* note 61 and accompanying text.

109. See *One Palmetto State Armory*, 822 F.3d at 141 ("*Heller* and subsequent decisions in our Court make clear that the de facto ban on machine guns found in § 922(o) does not impose a burden on conduct falling within the scope of the Second Amendment.>").

110. See *id.* at 141–42 (noting that *Heller* mentions machine guns numerous times and suggests that they may constitutionally be banned).

It may be objected that if weapons that are most useful in military service—M–16 rifles and the like—may be banned, then the Second Amend-

reasoning in *Marzzarella*, a similar Second Amendment challenge.<sup>111</sup> The *Marzzarella* court held that “restrictions on the possession of dangerous and unusual weapons are not constitutionally suspect because these weapons are outside the ambit of the amendment.”<sup>112</sup> The *Marzzarella* opinion also stated that the Supreme Court has made it clear that “dangerous and unusual weapon[s]” do not fall under Second Amendment protection.<sup>113</sup> In relying on *Marzzarella*, the court in *One Palmetto State Armory* held “that the Second Amendment does not protect the possession of machine guns [because t]hey are not in common use for lawful purposes.”<sup>114</sup>

The court in *One Palmetto State Armory* then proceeded to note that its decision was in accordance with all other circuit courts faced with the constitutionality of the machine gun ban.<sup>115</sup> Nonetheless, Watson tried to argue that “dangerous and unusual” referred to the manner in which a weapon is used, not to a particular type of firearm.<sup>116</sup> However, the court rejected this argument, first by noting again that all other circuits were in agreement that “dangerous and unusual” referred to types of weapons, and “not the manner in which a weapon is used.”<sup>117</sup> Next, the court explained that the *Heller* court consistently used “dangerous and unusual”

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ment right is completely detached from the prefatory clause . . . . But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

*Id.* (quoting *Heller*, 554 U.S. at 627–28).

111. *See id.* at 142 (discussing Third Circuit’s opinion in *Marzzarella*). For a further discussion of *Marzzarella*, see *supra* notes 59–64 and accompanying text.

112. *See id.* (quoting *United States v. Marzzarella*, 614 F.3d 85, 91–92 (3d Cir. 2010), *cert. denied*, 562 U.S. 1158 (2011)).

113. *See id.* (explaining that unlawful weapons in home are not afforded Second Amendment protection). “If this were the case, ‘[p]ossession of machine guns or . . . other dangerous and unusual weapon[s]—so long as they were kept in the home, would then fall within the Second Amendment. But the Supreme Court has made clear that the Second Amendment does not protect those types of weapons.’” *Id.* (citing *Marzzarella*, 614 U.S. at 94 (internal citations omitted)).

114. *See id.* (“In case *Marzzarella* left any doubt, we repeat today that the Second Amendment does not protect the possession of machine guns. They are not in common use for lawful purposes.” (citations omitted)).

115. *See id.* at 143 (noting that all other circuit courts to consider issue agree with Third Circuit’s decision). For a further discussion of other circuit court cases that heard Second Amendment challenges to the Gun Control Act’s machine gun ban, see *supra* notes 48–58 and accompanying text.

116. *See One Palmetto State Armory*, 822 F.3d at 143 (citing Watson’s brief, in which appellant asserted that “dangerous and unusual” designation applies to manner in which firearm is possessed, not categories of firearms).

117. *See id.* (citing other circuit decisions which apply “dangerous and unusual” designation to possession of certain types of firearms, namely machine guns). Further, Watson even conceded that “a majority of courts” adopt this analysis. *See id.* (stating that Watson concedes no courts have yet to adopt his proposed analysis).

when referring to types of weapons.<sup>118</sup> Therefore, the Third Circuit rejected Watson's argument.<sup>119</sup>

Watson also argued that *Heller* invalidated categorical bans on certain weapons.<sup>120</sup> In response, the Third Circuit explained that "*Heller* [gave] special consideration to the District of Columbia's categorical ban on handguns because they 'are the most popular weapon chosen by Americans for self-defense in the home.'"<sup>121</sup> Nevertheless, the Supreme Court expressly limited *Heller*'s holding to handguns, and never stated or implied that categorical bans of certain weapons are unconstitutional.<sup>122</sup> As such, the Third Circuit rejected Watson's contention that categorical firearms bans are invalid under the Second Amendment.<sup>123</sup>

#### IV. BRINGING OUT THE BIG GUNS: CRITICAL ANALYSIS AND IMPACT OF ONE PALMETTO STATE ARMORY AND INSIGHT FOR FUTURE LITIGANTS IN THE THIRD CIRCUIT

The Third Circuit's decision in *One Palmetto State Armory* is directly in line with other circuit court decisions on Second Amendment challenges to the machine gun ban, as well as with *Heller*.<sup>124</sup> The Third Circuit concluded that machine guns are "dangerous and unusual," and further found that machine guns are "not in common use for lawful purposes."<sup>125</sup> Therefore, based on *Heller*, machine guns can be regulated, even to the

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118. *See id.* ("And looking at the 'dangerous and unusual' phrase in context, the most logical reading is that 'dangerous and unusual' describes certain categories of weapons, and not the manner in which the weapons are used."). Further, the Third Circuit recognized that the Supreme Court discussed "'dangerous and unusual' weapons immediately after discussing what 'sorts of weapons' [precedent] protects, and just before the Court discusses why certain types of weapons, even those 'that are most useful in military service—M-16 rifles and the like—' may be banned." *Id.*

119. *See id.* (declining to adopt Watson's interpretation of "dangerous and unusual" as used in *Heller*).

120. *See id.* at 143–44 (acknowledging Watson's claim that *Heller* prohibits any categorical bans of particular types of firearms).

121. *See id.* at 144 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008)).

122. *See id.* (explaining that *Heller* holding is limited to ban of handguns used for self-defense in home). The Third Circuit reasoned that *Heller* does not stand for the proposition "that a categorical ban on any particular type of bearable arm is unconstitutional," and even "contains clear statements to the contrary." *See id.* (explaining that *Heller* does not deem categorical bans unconstitutional).

123. *See id.* (holding that machine guns are not protected by the Second Amendment).

124. *See supra* notes 35–41, 48–58 and accompanying text for analysis of *Heller* and numerous circuit court decisions on Second Amendment challenges to the machine gun ban.

125. *See One Palmetto State Armory*, 822 F.3d at 141–44 (holding that machine guns are dangerous, unusual, and not in common usage for lawful purposes (internal citation omitted)).

point of prohibition, without infringing upon the Second Amendment.<sup>126</sup> *One Palmetto State Armory* signals to Third Circuit litigants and attorneys that the court is unwilling, and likely unable, to accept a facial challenge to the Gun Control Act's machine gun ban.<sup>127</sup>

Nevertheless, attorneys hoping to challenge the machine gun ban can argue that in *Heller*, the Supreme Court never expressly declared the machine gun ban constitutional.<sup>128</sup> Further, commentators have questioned whether a machine gun ban comports with *Heller*'s purported originalist interpretation of the Second Amendment.<sup>129</sup> The Supreme Court held that the purpose of the Second Amendment was to confer upon citizens an individual right to bear arms.<sup>130</sup> This right was to ensure citizens could possess arms to serve in a militia, defend themselves, hunt, and in theory, protect the citizenry from a tyrannical government.<sup>131</sup> Therefore, it is difficult to see how a machine gun ban—proscribing the type of weapons that would be needed in a modern militia, or to defend against a tyrant—is not inconsistent with the originalist purpose of the Second Amend-

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126. *See id.* at 144 (“Since the Supreme Court’s opinion in *Heller*, courts nationwide have debated the parameters of that decision, and the extent to which government regulation may be reconciled with the Second Amendment. However, on at least one issue the courts are in agreement: governments may restrict the possession of machine guns.”). For a further analysis of *Heller* and its discussion of machine guns, see *supra* notes 9–10, 35–41 and accompanying text.

127. *See id.* (declaring that facial constitutional challenges to machine gun ban fail under existing case law and the “plain language provided by the Supreme Court”). In *One Palmetto State Armory*, the Third Circuit “declined to depart from this standard.” *See id.* (stating that Third Circuit would not break from precedent on machine gun ban validity).

128. *See* *District of Columbia v. Heller*, 554 U.S. 570, 626–28 (2008) (discussing constitutionally valid limitations on Second Amendment). The *Heller* Court never recognized the constitutionality of a machine gun ban, but did discuss and affirm the historical and “longstanding prohibitions” on certain types of firearms possession. *See id.* at 626 (“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.”). Additionally, the *Heller* court only alluded to machine guns in its discussion of the common usage test for weapons protected by the Second Amendment. *See id.* at 626–27 (recognizing historical tradition of prohibiting possession of dangerous and unusual firearms).

129. *See, e.g.*, Hatt, *supra* note 4 at 517 (“The Second Amendment’s original purpose, as read by the *Heller* Court, was to enable Americans, if needed, to resist the tyranny of the federal government by armed force.”). Hatt further remarks that “[t]hrough the Court’s reasoning recognizes this historical purpose of the Second Amendment, its holding does not, for *Heller*’s Second Amendment is a right primarily about self-defense, not resisting tyranny.” *See id.* at 518; *see also* Leider, *supra* note 37 at 1646 (refuting Supreme Court’s claim that historically, militia members used types of weapons citizens used at home for self-defense).

130. *See Heller*, 554 U.S. at 595 (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”).

131. *See supra* notes 3–4 for a further discussion of the proposed purposes for the Second Amendment.

ment.<sup>132</sup> As such, a Third Circuit practitioner hoping to bring a Second Amendment challenge to the machine gun ban can make an argument that the ban directly contradicts the purpose of the right to bear arms by only protecting firearms in common use at the time.<sup>133</sup>

Relatedly, a Third Circuit practitioner can argue that machine guns are no longer “dangerous and unusual weapons” because of their long-established use as a military weapon.<sup>134</sup> Pursuant to the purpose of the Second Amendment, machine guns are necessary to militia service in modern times and would also be the type of weapon needed to defend against government tyranny.<sup>135</sup> Machine guns certainly “ha[ve] some reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>136</sup>

However, even if the Third Circuit accepted that machine guns are no longer considered “dangerous and unusual” and are related to militia service, a practitioner must still overcome the hurdle that machine guns are not “in common use.”<sup>137</sup> A possible rebuttal is that the only reason machine guns are not commonly used is because they are statutorily barred

132. See Siegel, *supra* note 20 at 193 (“*Heller* holds that government cannot deprive citizens of traditional weapons of self-defense, but may ban civilian use of military weapons, even if this means that the right to bear arms may no longer be effectively exercised for the republican purpose of resisting tyranny that the ‘prefatory clause’ discusses. It is, to say the least, striking that an originalist interpretation of the Second Amendment would treat civic republican understandings of the amendment as antiquated, and refuse to protect the arms a militia needs to defend against tyranny.”); see also Lieder, *supra* note 37 at 1649 (“By using the common-law rule to justify prohibitions against ‘M-16 rifles and the like,’ Justice Scalia completely inverted the Second Amendment from its nineteenth-century understanding: army rifles to resist tyranny are out; handguns in the home for private purposes are in. How could an originalist interpretation of the Second Amendment exclude from its protection the kinds of weapons necessary to resist tyranny? An originalist interpretation cannot. Justice Scalia is not engaged in originalism; he is engaged in Ackermanian-style intergenerational synthesis.” (footnotes omitted)).

133. See *supra* notes 128–32 and accompanying text for argument that the machine gun ban contradicts the originalist purpose of the Second Amendment.

134. See Suci, *supra* note 47 (explaining how machine guns have long been used in military); *How The Machine Gun Changed Combat During World War I*, *supra* note 47 (explaining how machine guns gained military popularity during World War I).

135. See *supra* notes 129–32 and accompanying text for a description of how proclaimed purpose of Second Amendment does not comport with the machine gun ban because machine guns are commonly used in a military context.

136. See *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008) (declaring that Second Amendment protects individual right to keep and bear only arms that are reasonably related to “preservation or efficiency of a well regulated militia”). For a further discussion of the requirement that firearms bear a relationship to militia service, see *supra* note 39 and accompanying text.

137. See *supra* notes 51–58, 106 and accompanying text for a discussion of how only firearms in lawful, common usage are protected under the Second Amendment.

from common use.<sup>138</sup> Thus, the only reason machine guns are not commonly used for lawful purposes is because the government has banned machine guns for lawful purposes.<sup>139</sup> This directly contravenes the Second Amendment's purpose of combatting government tyranny because a federal statute expressly prevents machine guns from being commonly used; the federal government could forever stymie the citizenry's ability to resist tyranny by prohibiting possession of the most modern firearms.<sup>140</sup>

Attorneys arguing to uphold the machine gun ban can rely on precedent that holds that the machine gun ban does not violate the Second Amendment, specifically *Heller* and *One Palmetto State Armory*.<sup>141</sup> Because the Third Circuit is bound by this precedent, any facial Second Amendment challenge to the machine gun ban will likely fail.<sup>142</sup> Practitioners can further argue that nothing has changed since these cases were decided such that machine guns should now be considered commonly used for lawful purposes.<sup>143</sup> Thus, absent congressional action, it appears that the machine gun ban will continue to be upheld in the Third Circuit, in light of *One Palmetto State Armory*.<sup>144</sup>

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138. See Hatt, *supra* note 4 at 519 (“The *Heller* Court supported its presumptive restriction on the types of firearms that the Second Amendment protects with a circular argument. As explained above, the Court held that the Second Amendment protects only a certain range of firearms, namely those in ‘common use at the [present] time’—a standard that military weapons like machine guns do not meet. The problem with this conclusion is that firearms like machine guns are not in ‘common use’ because their possession is currently banned by federal law.” (footnotes omitted)).

139. See *id.* (“In other words, the Court reaches the strange result of excluding machine guns, among other types of firearms, from the Second Amendment’s protection because Congress, the very body whose power the Amendment seeks to restrain, has outlawed them.”).

140. See *supra* notes 129–39 and accompanying text for an explanation of how bans on machine guns do not comport with original purpose of Second Amendment and machine guns are not in common usage only because they are federally prohibited from common use.

141. For a further discussion of *Heller* and *One Palmetto State Armory*, see *supra* notes 35–41, 65–123 and accompanying text.

142. For a further discussion of the Third Circuit’s analysis in *One Palmetto State Armory*, see *supra* notes 98–123 and accompanying text.

143. For a further discussion of circuit court cases that discuss the fact that machine guns are not commonly used for lawful purposes, see *supra* notes 51–58, 106 and accompanying text.

144. See *supra* notes 125–27 and accompanying text for a discussion of the Third Circuit’s desire to not break precedent on Second Amendment challenges to Gun Control Act’s machine gun ban. For a further discussion of Third Circuit’s analysis in *One Palmetto State Armory*, see *supra* notes 98–123 and accompanying text.