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October, 2018

# Data Indicate Second Amendment Underenforcement

David B Kopel



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## DATA INDICATE SECOND AMENDMENT UNDERENFORCEMENT

DAVID B. KOPEL<sup>†</sup>

Eric Ruben and Joseph Blocher's empirical investigation makes a major contribution to scholarship by providing a wealth of data about post-*District of Columbia v. Heller*<sup>1</sup> Second Amendment litigation.<sup>2</sup> The article's many tables of interesting data deserve praise. The article's only major weakness, in my view, is a repeated assertion that is not supported by and is in fact inconsistent with the data.

Ruben and Blocher contend that the Second Amendment is not being underenforced by lower courts.<sup>3</sup> They even defend the federal circuits that are most commonly charged with underenforcement: the Second, Fourth, and Ninth.<sup>4</sup> The data in the article are inadequate to support a conclusion that the Second Amendment is being fully enforced. Indeed, looking at the actual, final results of major cases reveals a serious problem of underenforcement in some jurisdictions. For example, in some circuits, the right to bear arms is not merely underenforced; the right is nullified.

### I. USEFUL AND SOMETIMES SURPRISING DATA

Before examining underenforcement, let's acknowledge some of the important findings of Ruben and Blocher's research. For example, pro se litigants have a much lower success rate than do parties with counsel.<sup>5</sup> The result might seem intuitively obvious, but pro se representation is not always inferior in all legal contexts; one study found that outcomes for pro se defendants in felony criminal cases was as good or better than outcomes for represented defendants.<sup>6</sup> In the

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<sup>†</sup> Research Director at the Independent Institute and adjunct Professor of Advance Constitutional Law at University of Denver, Sturm College of Law.

1. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

2. See Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after Heller*, 67 DUKE L.J. 1433 (2018).

3. *Id.* at 1507 ("The low success rate of Second Amendment claims does not show that the right is being underenforced.").

4. *Id.* at 1475.

5. *Id.* at 1478–79.

6. See generally Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423 (2007).

Second Amendment context, the data against pro se representation is particularly important, because idealistic but hopeless pro se Second Amendment plaintiffs have never been in short supply.<sup>7</sup>

Ruben and Blocher find that civil cases have a greater chance of success than criminal ones.<sup>8</sup> In the context of arms, the data are no surprise. Civil plaintiffs are often persons with impeccable records.<sup>9</sup> Many different civil plaintiffs can show how their particular arms possession contributes to society: training in safety and proper use, responsible defense of self and others, sports, conservation, and the outdoors.<sup>10</sup> In contrast, many criminal defendants are persons whose gun possession and use may be especially dangerous to others.<sup>11</sup>

Surprisingly, cases with organizational plaintiffs have a higher success rate at the trial level, but not at the appellate level.<sup>12</sup> Intuitively, one would expect organizational plaintiffs to be relatively well-organized and to be more likely to be provided with sufficient resources to present strong evidence and argument at all levels.

A question for further research is what type of organizational plaintiff is involved. Some organizations have well-established

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7. See, e.g., *Schulz v. State of N.Y. Executive*, 19 N.Y.S.3d 19 (N.Y. App. Div. 2015) (failing to overturn enactment of gun control bill); *Eckert v. City of Philadelphia*, 329 F. Supp. 845 (E.D. Pa. 1971) (arguing unsuccessfully that the city's gun transfer laws violate "absolute" Second Amendment right).

8. Ruben & Blocher, *supra* note 2, at 1478.

9. See, e.g., *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537 (10th Cir. 2016) (including most of the elected county sheriffs, the Colorado Farm Bureau, Colorado Youth Outdoors [which encourages families to participate in outdoor sports], Outdoor Buddies [helping people with disabilities participate in hunting], individuals with disabilities, and other individuals and businesses of good character as plaintiffs).

10. For example, in the case cited in the previous footnote, the Colorado Outfitters Association, Colorado Youth Outdoors, and Outdoor Buddies all mentor people in safe and responsible hunting. Another plaintiff in the case, the National Shooting Sports Foundation, gives away free gun locks to consumers, and teaches best practices for safety and security at shooting ranges, firearms stores, and other firearms businesses. The sheriffs and their offices, of course, use firearms for lawful defense of self and others, and sometimes offer classes to law-abiding citizens in defensive skills and gun safety.

11. See, e.g., *United States v. Moore*, 666 F.3d 313, 315 n.1 and accompanying text (4th Cir. 2012) ("Prior to Moore's arrest in this case, he had prior felony convictions for selling or delivering cocaine, three common law robberies, and two assaults with a deadly weapon on a government official. In the case at bar, Charlotte, North Carolina police arrested Moore on the street based on an outstanding warrant for assault with a deadly weapon. . . . In addition to his felony convictions, he has numerous additional non-felony convictions as an adult including assault, assault and battery, assault on a government official, second-degree trespass, carrying a concealed gun, and various drug and driving-related offenses. In total, he has been convicted of more than twenty offenses and arrested more than twenty other times for charges that did not lead to convictions, generally because they were dismissed.").

12. Ruben & Blocher, *supra* note 2, at 1479–80.

litigation programs, very experienced attorneys, and records of success.<sup>13</sup> On the other hand, a local gun club may be able to add its name to a case, but not do much more.

Another surprising finding is relatively low judicial use of historical sources, which were so central to *Heller*<sup>14</sup> and *McDonald v. City of Chicago*.<sup>15</sup> These cases carefully examined background sources of the Second Amendment (before 1791), plus sources on early interpretation of the Second Amendment and the original meaning of the Fourteenth Amendment (1791–1868).<sup>16</sup> Yet of the 1,153 cases examined by Ruben and Blocher, only 29 cite any source from before 1791, and only 42 any source from 1791–1868.<sup>17</sup> Of course there are many cases where direct and recent precedent may provide the answer, so reliance on history is unnecessary.<sup>18</sup> Nevertheless, the paucity of historical citation seems strange, given the strong example the Court set in deriving Second Amendment law from original meaning and application.

Nationwide, Second Amendment success rates are about the same in state appellate courts, federal district courts, and federal circuit courts of appeal.<sup>19</sup> Success rates, as measured by Ruben and Blocher, were highest in the federal courts of appeal. Federal district courts and state appellate courts were about equal; however, Ruben and Blocher explain that the state rates are skewed by a large volume of cases in Illinois involving post-conviction challenges to a state law that had prohibited the bearing of arms and that was held unconstitutional years after the convictions.<sup>20</sup>

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13. These include the Second Amendment Foundation, the National Rifle Association, the National Shooting Sports Foundation (the trade association for the industry), and the California Rifle & Pistol Association.

14. See *District of Columbia v. Heller*, 554 U.S. 570, 576–619, 628–29 (2008) (holding that the government may not ban handgun ownership or defensive gun use).

15. See 561 U.S. 742, 767–81, 791 (2010) (holding the Fourteenth Amendment makes the Second Amendment enforceable against state and local governments, like most of the Bill of Rights).

16. *Heller*, 554 U.S. at 581–619; *McDonald*, 561 U.S. at 767–80; *id.* at 813–58 (Thomas, J., concurring).

17. Ruben & Blocher, *supra* note 2, at 1492.

18. See *id.* at 1494 (reporting that 21 percent of challenges were governed by controlling opinions).

19. See *id.* at 1473 (indicating a federal trial court success rate of 8%, state appellate court success rate of 9% and a federal appellate court success rate of 13%).

20. *Id.* at 1476.

## II. THE BROAD DEFINITION OF “SUCCESS” IS A WEAK MEASURE FOR SECOND AMENDMENT ENFORCEMENT

Ruben and Blocher’s dataset about “successes” cannot answer the question of Second Amendment underenforcement because the dataset does not distinguish final judgments from interlocutory decisions.<sup>21</sup>

For example: a government prohibits a certain arm. A local gun rights group brings a suit in district court. After cross-motions for summary judgment, the district judge rejects the government’s claim that the arms ban does not implicate plaintiff’s Second Amendment rights. Instead, the district court grants the government’s motion for summary judgment on alternative grounds: the evidence in the case is mixed, and so therefore the government is entitled to victory on the merits. Later, the circuit court of appeals affirms both prongs of the district court’s judgment. The appellate court announces a new Second Amendment standard of review: as long as the government offers some evidence, the government automatically wins. The arms ban is upheld.

This is obviously a defeat for Second Amendment litigants. Yet Ruben and Blocher’s system codes the case as two Second Amendment victories, one in the district court and another in the appeals court. The courts ruled in favor of the plaintiff on one prong of the summary judgment motion.<sup>22</sup>

The cases do contain a partial success for Second Amendment litigation. Yet the cases are a much larger loss, because the plaintiff was defeated on the merits. The arms ban was upheld and sets a precedent for further bans. Moreover, the appellate court’s rationale was highly destructive to the Second Amendment, for the new circuit standard of review imposes a very low burden of proof on the government. As long as the government offers some evidence, the government automatically wins—even if the plaintiff’s evidence is much stronger.

The cases were a disaster for the Second Amendment: a loss on the merits, a loss involving a ban and not mere regulation, and a

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21. *See id.* at 1462–63 (describing inclusion of “successes” that do not involve success in the final decision on the merits).

22. *See id.* at 1446–47 n. 66 (“counting as a ‘success’ any challenge that is not rejected, including those that simply survive a motion for summary judgment or motion to dismiss. Such claims might ultimately fail in a later opinion. In that case, the earlier case outcome (say, surviving a motion to dismiss) would be coded as a success and the later outcome would be coded as a failure.”), 1462 (“This choice results in a larger number of ‘successes’ than if we only counted final rulings. . .”), 1463 (“But this choice meant that our dataset includes opinions where the Second Amendment claim prevailed in a given opinion, but did not ultimately succeed at the conclusion of the litigation.”).

catastrophic new standard of review in the circuit. The very big net loss is coded by Ruben and Blocher as a +2 for Second Amendment litigants.<sup>23</sup>

Ruben and Blocher assert that the Second, Fourth, and Ninth Circuits do *not* underenforce the Second Amendment.<sup>24</sup> The authors report two Second Amendment successes in the Second Circuit, four in the Fourth Circuit, and four in the Ninth Circuit.<sup>25</sup> Yet from this list, only a single case ultimately produced any sort of success on the merits.

In response to a request from me, Ruben and Blocher listed the cases from the three circuits that they had coded as Second Amendment successes. For the Fourth Circuit, the list was four cases involving challenges to various categories of prohibited persons: unlawful users of drugs, domestic violence misdemeanants, and illegal aliens. The fount of these is *United States v. Chester*,<sup>26</sup> which held that the government had to produce some evidence—and not mere assertions—to justify the domestic violence ban.<sup>27</sup> The *Chester* rule was applied in another domestic violence case, and for other prohibitions.<sup>28</sup> The cases were remanded to the district courts, where federal prosecutors could provide evidence supporting the bans. The outcomes were as follows:

Chester's conviction was later upheld by the Fourth Circuit, in a short unpublished opinion.<sup>29</sup> The new *Chester* panel relied on a published Fourth Circuit opinion, *United States v. Staten*,<sup>30</sup> that had

23. *See id.*

24. They write:

A common refrain has been that certain federal appellate courts—especially the Second, Fourth, and Ninth Circuits—are particularly opposed to enforcing the Second Amendment right, suggesting a higher failure rate for challenges to gun laws there than in other places. This characterization is often accompanied by emphasis on the political makeup of the court under discussion.

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As we note below, it is true that the vast majority of Second Amendment claims fail, but it is also true that the Second, Fourth, and Ninth Circuits—those typically criticized as being hostile to gun rights—upheld Second Amendment claims at a *higher* rate than the overall average.

*Id.* at 1446–47.

25. *Id.* at 1475.

26. 628 F.3d 673 (4th Cir. 2010).

27. *See id.* at 683.

28. *See United States v. Carter*, 669 F.3d 411 (4th Cir. 2012) (addressing a ban on possession by users of unlawful substances); *United States v. Glisson*, 460 F. App'x 259 (4th Cir. 2012) (considering arguments by a domestic violence misdemeanant); *United States v. Guerrero-Leco*, 446 F. App'x 610 (4th Cir. 2011) (reviewing a ban on possession by illegal aliens).

29. *See generally United States v. Chester*, 514 F. App'x 393 (4th Cir. 2013).

30. *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011).

surveyed the overwhelming and uncontradicted evidence that persons convicted of domestic violence misdemeanors are much more likely than the general population to perpetrate firearms homicides.<sup>31</sup> My own survey of federal appellate court cases on the Second Amendment praises *Staten* as a model application of heightened scrutiny.<sup>32</sup>

Another remanded case, *United States v. Carter*,<sup>33</sup> involved an illegal user of marijuana.<sup>34</sup> On remand and then on further appeal to the Fourth Circuit, the government provided sufficient evidence (in the judges' view), and so Carter's conviction was upheld.<sup>35</sup> Ruben and Blocher also coded as a "successes" the Fourth Circuit's unpublished *United States v. Glisson*,<sup>36</sup> a domestic violence case that was remanded pursuant to the published opinion in *Chester*. What happened next is unclear, but Glisson had a variety of other, even more serious convictions, and only those convictions were further litigated.<sup>37</sup> Glisson remained in prison for those other convictions, and the Fourth Circuit denied his motion for post-conviction relief.<sup>38</sup>

The *Chester* remand principle was also applied to an illegal alien, Guerrero-Leco.<sup>39</sup> His remand did not lead to any further proceedings, since he had apparently already been deported.<sup>40</sup>

Thus, not one of the four Fourth Circuit "successes" led to any of the criminal defendants spending one day less in federal prison. Guerrero-Leco and Glisson did, through procedural happenstance, end up with one less federal conviction on their records. Had their Second Amendment issues been litigated post-remand, both would have lost. As noted above, the Fourth Circuit has, following submission of sufficient evidence, upheld the domestic violence ban, which was

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31. See *Chester*, 514 App'x at 395 (citing *United States v. Staten*, 666 F.3d 154, 167 (4th Cir. 2011)).

32. David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 305 (2017).

33. *United States v. Carter*, 669 F.3d 411 (4th Cir. 2012).

34. *Id.* at 413.

35. See *United States v. Carter*, No. 2:09-00055, 2012 WL 5935710 at \*4-7 (S.D. W. Va. 2012) (discussing evidence presented by the parties, as well as other social science research, and upholding gun ban for illegal drug users), *aff'd*, *United States v. Carter*, 750 F.3d 462, 470 (4th Cir. 2014).

36. *Glisson*, 460 F. App'x 259.

37. See *United States v. Glisson*, No. 3:08-405, 2015 WL 13344075 (D.S.C. 2015).

38. See *United States v. Glisson*, 607 F. App'x 300 (4th Cir. 2015).

39. See *Guerrero-Leco*, 446 F. App'x 610 (4th Cir. 2011).

40. See *id.* at 611 (Davis, J., concurring).

Glisson's issue.<sup>41</sup> The Fourth Circuit also later upheld the gun ban for illegal aliens, which was Guerrero-Leco's issue.<sup>42</sup>

In the Ninth Circuit, one of the four “successes” was a coding error, which Ruben and Blocher discovered when they responded to my request.<sup>43</sup> They have corrected their dataset accordingly.

Another Ninth Circuit case involved a plaintiff with a domestic violence misdemeanor conviction, whom the California Department of Justice had denied permission to purchase a firearm.<sup>44</sup> The panel ruled that the district court had improperly granted a motion to dismiss, because the plaintiff had raised a plausible Second Amendment issue.<sup>45</sup> On remand, the government again prevailed on a motion to dismiss.<sup>46</sup> The dismissal was affirmed by a Ninth Circuit panel;<sup>47</sup> in the intervening time, the Ninth Circuit had upheld the domestic violence misdemeanor ban.<sup>48</sup>

Two other Ninth Circuit cases cited by Ruben and Blocher were true Second Amendment successes.<sup>49</sup> These cases ruled against the policies of two California counties that refused to issue concealed handgun carry permits to law-abiding applicants who had passed fingerprint background checks and safety training.<sup>50</sup> However, the decisions were later reversed *en banc*.<sup>51</sup> The *en banc* opinion was issued in June 2016, several months after the February 1, 2016 endtime for

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41. See generally *Staten*, 666 F.3d 154.

42. See *United States v. Carpio-Leon*, 701 F.3d 974, 979 (4th Cir. 2012).

43. See *United States v. McCartney*, 357 F. App'x 73, 76 (9th Cir. 2009) (holding that the weapons implicated in this case were not protected by the Second Amendment).

44. *Baker v. Holder*, 475 F. App'x 156, 157 (9th Cir. 2012).

45. *Id.*

46. *Baker v. Holder*, No. 2:10-cv-3996-SVW-AJW, 2013 WL 12122412, at \*6 (C.D. Cal. July 31, 2013).

47. *Baker v. Lynch*, 669 F. App'x 835, 836 (9th Cir. 2016).

48. See *id.* at 835 (citing *United States v. Chovan*, 735 F.3d 1127, 1139–42 (9th Cir. 2013)).

49. *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014); *Richards v. Prieto*, 560 F. App'x 681 (9th Cir. 2014).

50. *Peruta*, 742 F.3d at 1199; *Prieto*, 560 F. App'x at 682. The plaintiffs challenged only the application of California's concealed carry licensing statute by some officials. Plaintiffs did not challenge the statutory requirements that a sheriff or chief of police may only issue a license “Upon proof [that] . . . The applicant is of good moral character” and has completed safety training course lasting at least four hours. CAL. PENAL CODE § 26165 (West 2018) (detailing training course); *id.* § 26170(a)(1)–(3) (listing items that must be proven for issuance). Nor did plaintiffs challenge the requirement that applicants be fingerprinted. *Id.* § 26185. Nor the provision that the issuing authority may require applicants to undergo a psychological examination at their own expense. *Id.* § 26190(f).

51. *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (*en banc*).



Ruben and Blocher's dataset but well before the publication of their article.<sup>52</sup>

Thus, from the Fourth and Ninth Circuits, exactly zero cases have had a different final result than if the Second Amendment had never been written.

What about the Second Circuit, where Ruben and Blocher identify two Second Amendment successes? The "two" successes are double-counting of a Second Circuit opinion, *New York State Rifle & Pistol Association v. Cuomo*.<sup>53</sup> The case consolidated appeals from federal district courts in New York and Connecticut, both cases involving anti-gun laws that had been enacted in 2013.<sup>54</sup> The Second Circuit ruled unconstitutional one item in the New York law, and one item in the Connecticut law, so perhaps Ruben and Blocher's double-counting of the case is defensible.<sup>55</sup>

Connecticut had banned numerous firearms by labeling them "assault weapons."<sup>56</sup> Connecticut's entire rationale was the alleged special dangers of certain semi-automatic firearms.<sup>57</sup> Yet included on the Connecticut list of banned guns was the Remington 7615, which is not a semiautomatic.<sup>58</sup> It is a pump action rifle.<sup>59</sup> As the Second Circuit noted, Connecticut had not presented a scintilla of evidence about why the Remington 7615 should be banned.<sup>60</sup> Accordingly, the ban was void.<sup>61</sup>

New York had said that citizens could own magazines with a capacity of up to ten rounds but could load no more than seven rounds into such magazines, except at target ranges.<sup>62</sup> This did nothing to advance any state interest, said the Second Circuit, because "New York has failed to present evidence that the mere existence of this load limit

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52. Blocher & Ruben's article was published in the spring of 2018.

53. *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015).

54. *Shew v. Malloy*, 994 F. Supp. 2d 234 (D. Conn. 2014); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349 (W.D.N.Y. 2013).

55. See *Cuomo*, 804 F.3d at 247–48.

56. See 2013 Conn. Acts 47 (Reg. Sess.), as amended by 2013 Conn. Acts 1049 (Reg. Sess.).

57. "Focused as it was on the rationale for banning semiautomatic weapons, Connecticut fails to set forth the requisite 'substantial evidence' with respect to the pump-action Remington 7615." *Cuomo*, 804 F.3d at 262 n.112.

58. *Id.*

59. *Id.*

60. *Id.* at 257 n.73 ("We emphasize that our holding with respect to the Remington 7615 . . . reflects the State's failure to present any argument at all regarding this weapon or others like it.").

61. *Id.* at 262 n.112 ("Accordingly, we hold that this singular provision of Connecticut's legislation is unconstitutional.").

62. *Id.* at 250.

will convince any would-be malefactors to load magazines capable of holding ten rounds with only the permissible seven.”<sup>63</sup>

In the same opinion, the Second Circuit upheld the prohibition of large numbers of common firearms because they had features that improved accuracy and comfort.<sup>64</sup> For example, an adjustable stock makes the gun a better fit for a person who is shorter or taller than the average user.<sup>65</sup> As with many tools, a better ergonomic fit typically

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63. *Id.* at 264.

64. *Id.* at 262.

65. *See, e.g.*, Brief and Special Appendix for Plaintiffs-Appellants at 19–20, *Shew v. Malloy*, 994 F. Supp. 2d 234 (D. Conn. 2014) (citations omitted):

To the extent the features singled out by Connecticut’s “assault weapons” ban make any functional difference, they tend to *improve* a firearm’s utility and safety for self-defense and other lawful purposes. *See* JA290-91. For example:

- A telescoping stock promotes accuracy by allowing the stock to be adjusted to fit the individual user’s physique, thickness of clothing, and shooting position.
- A pistol grip makes it easier to hold and stabilize a rifle when fired from the shoulder and therefore promotes accuracy. JA240; *see also* [David B. Kopel, *Rational Basis Analysis of “Assault Weapon” Prohibition*, 20 J. Contemp. L. 381, 396 (1994)] (“The defensive application is obvious, as is the public safety advantage in preventing stray shots.”). A pistol grip can also assist with retention, making it more difficult for an assailant to wrest a firearm away from a law-abiding citizen. JA240; JA2593. . . .
- A thumbhole stock is a hole carved into the stock of a firearm through which a user inserts his or her thumb. . . . It promotes accuracy by improving comfort and stability in handling a firearm. . . . It also promotes self-defense by making it more difficult for an assailant to snatch away the victim’s weapon.
- A flash suppressor is a “common accessory” that “reduces the flash of light” from a firearm shot and thus “decreases shooter’s blindness—the momentary blindness caused by the sudden flash of light from the explosion of gunpowder.” Kopel, *Rational Basis Analysis*, 20 J. Contemp. L. at 397. *See also* JA2595.

These are all legitimate safety-improving features that law-abiding citizens may prefer to have incorporated in their semiautomatic firearms. But under *Heller*, of course, the key point is that millions of law-abiding citizens choose to possess firearms with those features.

improves accuracy.<sup>66</sup> The Second Circuit held that a more accurate gun is easier to use for murder, and therefore it may be banned.<sup>67</sup>

The Second Circuit's standard of review merely required the Attorney General to produce evidence to "fairly support" the prohibition of common arms.<sup>68</sup> Under this unusual standard, the plaintiffs' evidence rebutting the Attorney General was irrelevant.<sup>69</sup>

The above are the *only* "successes" for the Second Amendment in the Second Circuit. In a different case, the Circuit even upheld a New York City ordinance forbidding lawful, registered handgun owners from taking their handgun out of the city.<sup>70</sup> No bringing it to a second home in the Catskills.<sup>71</sup> No taking the gun to a target range in New Jersey, Connecticut, or Nassau County.<sup>72</sup>

That is not just underenforcement of the Second Amendment; it is contempt for the Second Amendment. So too is the Ninth Circuit's *en banc* holding that a county ban on gun stores *does not even raise a Second Amendment issue*.<sup>73</sup>

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66. See, e.g., Katerina Sekulovaa, Marek Buresa, Ondrej Kurkinb & Michal Simona, *Ergonomic Analysis of a Firearm According to the Anthropometric Dimension*, 100 *Procedia Engineering* 609 (2015), [https://ac.els-cdn.com/S1877705815004385/1-s2.0-S1877705815004385-main.pdf?\\_tid=c2ba5ef3-6051-43f1-bc73-a4194b3a426b&acdnt=1539628331\\_7e002c59f7f9cbe2d1d5078d7db08f48](https://ac.els-cdn.com/S1877705815004385/1-s2.0-S1877705815004385-main.pdf?_tid=c2ba5ef3-6051-43f1-bc73-a4194b3a426b&acdnt=1539628331_7e002c59f7f9cbe2d1d5078d7db08f48) [<https://perma.cc/HFP4-DRM6>]; Richard T. Stone, Brandon F. Moeller, Robert R. Mayer, Bryce Rosenquist, Darin Van Ryswyk, Drew Eichorn, *Biomechanical and Performance Implications of Weapon Design: Comparison of Bullpup and Conventional Configurations*, 56 *HUMAN FACTORS: THE JOURNAL OF THE HUMAN FACTORS AND ERGONOMICS SOCIETY* (2014) (finding long guns in the bullpup configuration, which put the magazine and action behind the trigger, and thus closer to the user "provide a significant advantage in accuracy and shooter stability"), <http://journals.sagepub.com/doi/abs/10.1177/0018720813509107> [<https://perma.cc/2SDX-QXDF>]; Fabrice Czarnecki & Ira Janowitz, *Ergonomics and safety in law enforcement*, 3. *CLIN. OCCUP. ENVIRON. MED.* 399, 406 (2003) (benefits of shorter stocks), [http://www.academia.edu/5041911/Ergonomics\\_and\\_safety\\_in\\_law\\_enforcement](http://www.academia.edu/5041911/Ergonomics_and_safety_in_law_enforcement) [<https://perma.cc/N5VC-Y9XD>]; David B. Kopel, *Rational Basis of "Assault Weapon" Prohibition*, 20 *J. CONTEMP. L.* 381 (1994); V. Atkins, *Importance of Ergonomics in Semiautomatic Weapons Selection*, *POLICE CHIEF*, (Dec. 1992), 21–24, NCJ 140255.

67. *Cuomo*, 804 F.3d at 262–63.

68. *Id.* at 261.

69. See *id.*; see also Kopel & Greenlee, *supra* note 32, at 294–95 (criticizing Second Circuit's reasoning, and noting that a similar standard applied in *Heller* would have led to the handgun ban being upheld).

70. See *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45 (2d Cir. 2018).

71. See *id.* at 52 (noting that one plaintiff is prevented by the law from "transporting the handgun to a second home in upstate New York").

72. See *id.* ("The Plaintiffs sought to remove handguns from the licensed premises for the purposes of going to shooting ranges and engaging in target practice outside New York City . . .").

73. See *Teixeira v. County of Alameda*, 873 F.3d 670, 690 (9th Cir. 2017).

Underenforcement is not universal. In Chicago and its suburbs, federal courts have ruled against municipal attempts to prohibit stores and shooting ranges—reasonable operational regulations for stores and ranges have been upheld, but quasi-prohibitory regulations have been stricken.<sup>74</sup>

### III. UNDERENFORCEMENT OF THE RIGHT TO BEAR ARMS

“Challenges to public carry restrictions had a success rate of 22 percent, which is the highest in our dataset,” Ruben and Blocher report.<sup>75</sup> Underenforcement of the right to bear arms is *not* nationally pervasive. Final successes on the merits for the right to bear arms have come in major cases in Illinois (Seventh Circuit and Illinois Supreme Court) and in the District of Columbia (D.C. Circuit).<sup>76</sup> These cases overturned prohibitions or quasi-prohibitions on bearing arms in public and affirmed the legality of fairly-applied licensing systems.<sup>77</sup> The results accord with *Heller*, which recognized a right to bear arms,

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74. See *Ezell v. City of Chicago*, 846 F.3d 888, 894 (7th Cir. 2017) (striking Chicago zoning regulations that made “only about 2.2% of the city’s total acreage even theoretically available to site a shooting range”); *Kole v. Village of Norridge*, No. 11 C 3871, 2017 WL 5128989, at \*9–14, 19 (N.D. Ill., Nov. 6, 2017) (allowing would-be gun store owner’s suit for damages to proceed because the city’s prior ordinance banning gun ranges violated the Second Amendment); *Illinois Ass’n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928 (N.D. Ill. 2014) (striking ban on gun stores in Chicago); *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (striking Chicago ban on firing ranges that were open to the public).

75. Ruben & Blocher, *supra* note 2, at 1484.

76. See *People v. Chairez*, 2018 IL 121417 (Ill. 2018) (striking ban on carry within 1,000 feet of a park); *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) (striking a D.C. Code provision that was interpreted by the D.C. police to limit gun licenses to persons who could show “a special need”); *People v. Aguilar*, 2 N.E.3d 321 (Ill. 2013) (striking almost complete ban on defensive carry in public); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (striking same statute at *People v. Aguilar*).

77. See *Wrenn*, 864 F.3d at 667 (“At the Second Amendment’s core lies the right of responsible citizens to carry firearms for personal self-defense beyond the home, subject to longstanding restrictions. These traditional limits include, for instance, licensing requirements, but not bans on carrying in urban areas like D.C. or bans on carrying absent a special need for self-defense.”); *Aguilar*, 2 N.E.3d at 327 (citations omitted) (“Of course, in concluding that the second amendment protects the right to possess and use a firearm for self-defense outside the home, we are in no way saying that such a right is unlimited or is not subject to meaningful regulation. . . . That said, we cannot escape the reality that, in this case, we are dealing not with a reasonable regulation but with a comprehensive ban . . . . [The law at issue] amounts to a wholesale statutory ban on the exercise of a personal right that is specifically named in and guaranteed by the United States Constitution, as construed by the United States Supreme Court. In no other context would we permit this, and we will not permit it here either.”); *Madigan*, 702 F.3d at 941 (“[S]ome states sensibly require that an applicant for a handgun permit establish his competence in handling firearms.”).

while allowing for carry bans “in sensitive places such as schools and government buildings.”<sup>78</sup>

However, decisions in the Second, Third, and Fourth Circuits have been the opposite. According to the opinions, whether there is *any* right to bear arms outside the home is an open question.<sup>79</sup> The Second and Ninth Circuits seem to acknowledge some sort of right to bear arms, yet uphold regulatory systems that deny the right to over 99% of law-abiding adults.<sup>80</sup> Because of decisions in some circuits, the right to bear arms is forbidden for almost everyone in New Jersey, Maryland, and Hawaii.<sup>81</sup> In California, New York, Massachusetts, Rhode Island, and Delaware, some localities issue licenses to qualified applicants, but in many localities, almost no one is deemed to be qualified.<sup>82</sup> Thus, the right to bear arms is nullified throughout three states and for tens of millions of people in some localities in five other states.

78. See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

79. *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) (“[W]e decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home.”); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (“We hew to a judicious course today, refraining from any assessment of whether Maryland’s good-and-substantial-reason requirement for obtaining a handgun permit implicates Second Amendment protections.”); *Hightower v. City of Boston*, 693 F.3d 61, 74 (1st Cir. 2012) (citations omitted) (“We agree with Judge Wilkinson’s cautionary holding in *United States v. Masciandaro* . . . that we should not engage in answering the question of how *Heller* applies to possession of firearms outside of the home . . . .”); *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (“On the question of *Heller*’s applicability outside the home environment, we think it prudent to await direction from the Court itself.”).

80. *Kopel & Greenlee*, *supra* note 32, at 267–69 (summarizing cases).

81. *Id.* at 263–65.

82. For example, firearms law attorney David Jensen has prepared a map showing that some New York State counties issue carry permits to qualified applicants, some issue licenses restrictively, and a dozen (including New York City and adjacent counties) hardly ever issue to ordinary citizens. See *Revised Permit Map*, NYfirearms.com, <https://nyfirearms.com/forums/pistol-permits/6709-revised-permit-map.html> (last updated Jan. 2011) [<https://perma.cc/87GE-BL4D>]. According to the California State Auditor, in the fiscal year of 2016–2017, Sacramento County issues 2,218 new carry licenses and renewed 3,331; San Diego County issued 153 and renewed 425; and Los Angeles County issued 20 and renewed 68. California State Auditor, *Concealed Carry Weapon Licenses*, Report No. 2017–101, at 14 (Dec. 2017). In Massachusetts, a “Class A” firearms license is necessary to possess a firearm, and the license also functions as a carry permit. In most Massachusetts jurisdictions, the local authority (the police department or sheriff’s office) issues Class A permits without restrictions. But in some jurisdictions, such as Boston and Brookline, the Class A licenses often include restrictions that prohibit defensive carry. For example, a license might specify that the firearm may only be carried outside the home if the owner is transporting her handgun to or from a shooting range. See Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment, 2017 WL 7689264, at 5–7, in *Weng v. Evans*, 291 F. Supp. 3d 155 (D. Mass. 2017).

## IV. THE KOPEL AND GREENLEE STUDY

Ruben and Blocher cite my article, *The Federal Circuits' Second Amendment Doctrines*,<sup>83</sup> as having contributed to the idea that the Second Amendment is pervasively underenforced.<sup>84</sup> Synthesizing all post-*Heller* federal circuit decisions, Joseph Greenlee and I described with approval the generally compatible doctrines and tests that the circuits have created.<sup>85</sup> Necessarily, our synthesis was based on majority opinions, not dissents.

Ruben and Blocher describe the article thus: “Opinions espousing a broad view of the Second Amendment, most often dissents, are used to exemplify sound doctrine.”<sup>86</sup> For the record, our article describes as “sound doctrine” many cases that have upheld gun control laws. For example, the final analytical section of our article is titled “Heightened Scrutiny Applied” and focuses on major cases with detailed opinions.<sup>87</sup> That section praised *United States v. Marzzarella*<sup>88</sup>; *United States v. Staten*<sup>89</sup>; and *United States v. Mahin*.<sup>90</sup>

The final section of our article looked closely at the intermediate scrutiny question of whether there is a “substantially less burdensome alternative.”<sup>91</sup> We presented as sound doctrine the finding that there was *not* a substantially less burdensome alternative in two cases upholding gun control laws,<sup>92</sup> as well as the finding that in two other cases there *was* a substantially less burdensome alternative.<sup>93</sup>

As Ruben and Blocher quote, we did declare “deservedly unpublished” an opinion that violated direct circuit precedent by

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83. Kopel & Greenlee, *supra* note 32.

84. Ruben & Blocher, *supra* note 2, at 1444.

85. *See generally* Kopel & Greenlee, *supra* note 32.

86. Ruben & Blocher, *supra* note 2, at 1444.

87. Kopel & Greenlee, *supra* note 32, at 301–13.

88. *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010) (creating the two-part test used by most federal circuit courts, and upholding a ban on possession of a firearm whose serial number has been obliterated).

89. *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011) (upholding a gun ban for domestic violence misdemeanants).

90. *United States v. Mahin*, 668 F.3d 119 (4th Cir. 2012) (elaborating on *Staten*).

91. *See* Kopel & Greenlee, *supra* note 32, at 312–13.

92. *See id.* (discussing *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015)); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014)).

93. *See id.* at 310–12 (discussing *Heller v. District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015) (declaring unconstitutional some requirements in D.C. gun registration law); *Moore*, 702 F.3d 933 (noting that gun carrying could be licensed instead of prohibited)).

shifting the historical burden of proof from the government to the individual.<sup>94</sup>

We also chided the Ninth Circuit for “willful obliviousness of the facts of case” because the Ninth Circuit asserted that the right of self-defense was not even affected by a law that forbade persons to have an operable handgun nearby when sleeping, bathing, or changing clothes.<sup>95</sup>

And we criticized the Second Circuit for having “created its own eccentric and feeble version of heightened scrutiny for the Second Amendment.”<sup>96</sup> For example, in most circuits, any law that burdens Second Amendment rights receives heightened scrutiny.<sup>97</sup> The greater

94. Ruben & Blocher, *supra* note 2, at 1444 (quoting Kopel & Greenlee, *supra* note 32, at 254 (discussing *United States v. Chafin*, 423 F. App’x 342 (4th Cir. 2011))).

95. Ruben & Blocher, *supra* note 2, at 1444 (quoting Kopel & Greenlee, *supra* note 32, at 298–99 (discussing *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014))).

96. Kopel & Greenlee, *supra* note 32, at 268.

97. See, e.g., *Hollis v. Lynch*, 827 F.3d 436, 446–47 (5th Cir. 2016) (“[I]f a law impinges upon a right protected by the Second Amendment . . . we proceed to the second step, which is to determine whether to apply intermediate or strict scrutiny to the law.”) (internal quotations and brackets omitted); *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 (7th Cir. 2015) (“The Supreme Court has steered away from prescribing a particular level of scrutiny that courts should apply to categorical bans on the possession of firearms by specified groups of people, though it has said that rational-basis review would be too lenient.”); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1141 (10th Cir. 2015) (Tymkovich, J., concurring in part and dissenting in part) (“[W]hile the government’s justifications might suffice to uphold this regulation on rational-basis review, *Heller* demands more.”); *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) (“All legislation requires a rational basis; if the Second Amendment imposed only a rational basis requirement, it wouldn’t do anything.”); *Van Der Hule v. Holder*, 759 F.3d 1043, 1051 (9th Cir. 2014) (“Second Amendment questions are reviewed under heightened scrutiny . . .”); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (“While *Heller* did not specify the appropriate level of scrutiny for Second Amendment claims, it nevertheless confirmed that rational basis review is not appropriate.”); *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) (“In *Heller*, the Supreme Court did not specify what level of scrutiny courts must apply to a statute challenged under the Second Amendment. The *Heller* Court did, however, indicate that rational basis review is not appropriate.”); *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013) (“*Heller* makes clear that we may not apply rational basis review to a law that burdens protected Second Amendment conduct.”); *Moore v. Madigan*, 702 F.3d 933, 939 (7th Cir. 2012) (“[A] ban as broad as Illinois’s can’t be upheld merely on the ground that it’s not irrational.”); *NRA v. BATFE*, 700 F.3d 185, 194 (5th Cir. 2012) (holding that if the law falls within the scope of the Second Amendment’s guarantee, “the second step is to determine whether to apply intermediate or strict scrutiny to the law . . .”); *NRA v. BATFE*, 700 F.3d 185, 195 (5th Cir. 2012) (“[R]ational basis review, which *Heller* held ‘could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right’ such as ‘the right to keep and bear arms.’”); *United States v. Carter (Carter I)*, 669 F.3d 411, 415 (4th Cir. 2012) (“The Court did not say which form of scrutiny should apply, but it did rule out rational basis scrutiny . . .”); *United States v. Chapman*, 666 F.3d 220, 225 n.2 (4th Cir. 2012) (“Rational-basis review, which is the most lenient level of means-end scrutiny, is inapplicable to review a law that burdens conduct protected under the Second Amendment.”); *United States v. Huet*, 665 F.3d 588, 600 (3d Cir. 2012) (“Although the Court did not decide on a level of scrutiny to be applied in cases involving Second Amendment

the burden, the more intense the scrutiny. But in the Second Circuit, only laws that “substantially burden” Second Amendment rights receive heightened scrutiny. A genuine burden that is less than a “substantial burden” merely receives rational basis review.<sup>98</sup> As explained in Part II, the Second Circuit’s version of Second Amendment intermediate scrutiny excludes judicial consideration of citizens’ evidence that rebuts the government’s evidence.

Underenforcement indeed.

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challenges, it rejected rational basis review.”); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1256 (D.C. Cir. 2011) (“*Heller* clearly does reject any kind of ‘rational basis’ or reasonableness test . . .”); *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011) (“For our purposes, however, we know that *Heller*’s reference to ‘any standard of scrutiny’ means any heightened standard of scrutiny; the Court specifically excluded rational-basis review.”) (emphasis in original); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (“The Court made plain in *Heller* that a rational basis alone would be insufficient to justify laws burdening the Second Amendment.”); *United States v. Masciandaro*, 638 F.3d 458, 469 (4th Cir. 2011) (“The Court did, however, rule out a rational basis review, because that level of review ‘would be redundant with the separate constitutional prohibitions on irrational laws.’”) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008)); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (“*Heller* left open the issue of the standard of review, rejecting only rational-basis review.”); *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010) (“But though Congress may exclude certain categories of persons from firearm possession, the exclusion must be more than merely ‘rational,’ and must withstand ‘some form of strong showing.’”) (citations omitted); *United States v. Marzzarella*, 614 F.3d 85, 95–96 (3d Cir. 2010) (“The Government argues a rational basis test should apply to § 922(k), but *Heller* rejects that standard for laws burdening Second Amendment rights.”); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (“If a rational basis were enough, the Second Amendment would not do anything— because a rational basis is essential for legislation in general.”) (citations omitted).

98. Kopel & Greenlee, *supra* note 32, at 288.