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## **Let's Not Forget: We Have a State Interest to Promote**

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## LET'S NOT FORGET: WE HAVE A STATE INTEREST TO PROMOTE

### COURT OF APPEALS OF NEW YORK

Osterweil v. Bartlett<sup>1</sup>  
(decided October 15, 2013)

#### I. INTRODUCTION

The State of New York no longer requires a part-time resident to be domiciled in the State to obtain a handgun permit.<sup>2</sup> The Court of Appeals in *Osterweil v. Bartlett* held that a person with a part-time residence in the State of New York was eligible for a handgun permit.<sup>3</sup> The court eliminated the domicile requirement of New York Penal Law § 400.00(3)<sup>4</sup> that had previously been enforced by the State and the courts for decades.<sup>5</sup> In interpreting the statute without a domicile requirement, the court showed a lack of cautiousness and

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<sup>1</sup> 999 N.E.2d 516 (N.Y. 2013).

<sup>2</sup> *Id.* at 519-20.

<sup>3</sup> *Id.*

<sup>4</sup> N.Y. Penal Law § 400.00(3) states that:

Applications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, *to the licensing officer in the city or county, as the case may be, where the applicant resides*, is principally employed . . . . An application shall state the full name, date of birth, residence, present occupation of each person or individual signing the same, whether or not he or she is a citizen of the United States, whether or not he or she complies with each requirement for eligibility specified in subdivision one of this section and such other facts as may be required to show the good character, competency and integrity of each person or individual signing the application. An application shall be signed and verified by the applicant. Each individual signing an application shall submit one photograph of himself or herself and a duplicate for each required copy of the application. Such photographs shall have been taken within thirty days prior to filing the application.

N.Y. PENAL LAW § 400.00(3) (McKinney 2013) (emphasis added).

<sup>5</sup> *Osterweil*, 999 N.E.2d at 519.

rendered a flawed decision.

The decision's flaws lie in the court's failure to define a "part-time residency," and to set a minimum threshold for a part-time resident to establish a connection with the State of New York. The court, consistent with the State's interest in regulating firearms, could have defined a part-time residence and laid out a framework to interpret the residency provision of New York Penal Law § 400.00(3),<sup>6</sup> but it forfeited the opportunity to do so.

The court should have taken the opportunity to establish a residency requirement standard in New York Penal Law § 400.00. The residency standard used by the New York Department of Taxation and Finance that applies to nonresidents and part-year residents for taxation purposes may have been an option for the court.<sup>7</sup> The court could have adopted this standard or a variation of it in order to promote the State's interest in gun control.

This Case Note will demonstrate why the ruling by the New York Court of Appeals in *Osterweil* was contrary to the State's interest in strict gun regulation. This Note will also explore why the court did not establish a comprehensive standard for determining whether a part-time resident is eligible to obtain a handgun permit in New York. Furthermore, the important role *District of Columbia v. Heller*<sup>8</sup> and *McDonald v. City of Chicago*<sup>9</sup> played in this decision will be examined. The decisions of these two monumental Second Amendment cases played a major role in compelling the State of New York to change its historic interpretation of a domicile requirement in New York Penal Law § 400.00.

## II. FACTUAL BACKGROUND

Osterweil was once a domiciliary of the State of New York, but then moved to another state and maintained his New York home as a vacation property.<sup>10</sup> As a resident of Summit, New York, he applied for a pistol/revolver license pursuant to New York Penal Law §

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<sup>6</sup> See *supra* note 4.

<sup>7</sup> N.Y. COMP. CODES R. & REGS. tit. 20, § 105.20 (2009).

<sup>8</sup> 554 U.S. 570 (2008) (holding that the right to keep and bear arms is a fundamental right that may require a high level of constitutional scrutiny when a person is deprived of the right).

<sup>9</sup> 561 U.S. 742 (2010) (holding that the Second Amendment applies to the States).

<sup>10</sup> *Osterweil*, 999 N.E.2d at 516.

400.00.<sup>11</sup> In the midst of Schoharie County Sheriff's background investigation, Osterweil informed the Sheriff of his purchase of a home in Louisiana, which he intended to make his primary residence,<sup>12</sup> and his plan to retain his Schoharie County home as a vacation property.<sup>13</sup> Osterweil then inquired as to whether he would still be eligible for a handgun license.<sup>14</sup>

The Sheriff submitted Osterweil's application to the Schoharie County Court Judge, George R. Bartlett, III, and the county's licensing officer.<sup>15</sup> Along with the application, Osterweil also submitted an affidavit to the County Judge, stating he and his wife continued to play a role in the community, both socially and politically.<sup>16</sup> Moreover, Osterweil cited *District of Columbia v. Heller*, in which the Supreme Court of the United States struck down a District of Columbia ban on handguns in the home.<sup>17</sup>

In May 2009, Judge Bartlett denied Osterweil's application, citing Penal Law § 400.00(3)(a) and *Mahoney v. Lewis*<sup>18</sup> to establish that "residence" in § 400.00(3)(a) was meant to convey domicile.<sup>19</sup> Osterweil then brought suit in the United States District Court for the Northern District of New York against Judge Bartlett, citing violations of the Second Amendment right to keep and bear arms and the Fourteenth Amendment right to equal protection, arguing against the judge's interpretation of Penal Law § 400.00(3)(a).<sup>20</sup>

In the federal case, Osterweil mentioned additional facts that played a role in prolonging the process of his background investiga-

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Osterweil*, 999 N.E.2d at 517.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (citing *Heller*, 554 U.S. at 636).

<sup>18</sup> 605 N.Y.S.2d 168, 168 (App. Div. 3d Dep't 1993). The court stated:

While Penal Law § 400.00 does not contain a residency requirement per se, it follows a fortiori from the Penal Law § 400.00(3) mandate that applications for the type of permit sought here be filed in the city or county of residence that residency is indeed a prerequisite to its issuance. Moreover, based upon well-established rules of construction, we conclude that as used in this statute the term residence is equivalent to domicile and requires something more than mere ownership of land.

*Id.*

<sup>19</sup> *Osterweil*, 999 N.E.2d at 517.

<sup>20</sup> *Id.*

tion and the resultant denial of his handgun permit.<sup>21</sup> Before the suit was filed, Judge Bartlett gave Osterweil an opportunity to provide precedent supporting his position on the residency requirement.<sup>22</sup>

In a letter, Osterweil informed Judge Bartlett about “special steps” that could have been taken by the Sheriff regarding worn fingerprints, but none of those “special steps” were, in fact, used.<sup>23</sup> Following this dialogue, both parties exchanged several letters until the judge denied Osterweil’s application.<sup>24</sup> In denying the application, Judge Bartlett rejected Osterweil’s argument that the application should be granted because the licensing process exceeded six months.<sup>25</sup> Judge Bartlett insisted there was good cause for the delay.<sup>26</sup> Because the application was considered incomplete with regard to the fingerprinting issue, Osterweil requested that the federal court only address the issue of the residency requirement.<sup>27</sup>

Osterweil then appealed to the United States Second Circuit Court of Appeals, where the State of New York “oddly” insisted that New York Penal Law § 400.00(3)(a) did not require a resident to be a domiciliary in order to obtain a handgun permit in New York,<sup>28</sup> despite the State’s historical interpretation that this Section contained a domicile requirement.<sup>29</sup> The Second Circuit Court of Appeals then certified the following question to the New York Court of Appeals:

Is an applicant who owns a part-time residence in New York, but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?<sup>30</sup>

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<sup>21</sup> *Osterweil v. Bartlett*, 819 F. Supp. 2d 72, 76 (N.D.N.Y. 2011), *vacated*, 738 F.3d 520 (2d Cir. 2013).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (“[Osterweil] informed defendant of special steps that could be taken with respect to persons with ‘worn’ fingerprints and further indicated that none of these ‘special steps’ were used by the Sheriff in his case.”).

<sup>24</sup> *Osterweil*, 819 F. Supp. 2d at 76.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Osterweil v. Bartlett*, 738 F.3d 520 (2d Cir. 2013). The State changed its position on the domicile requirement once the case reached the Second Circuit Court of Appeals. The State relaxed its position on § 400.00(3)(a) because the interpretation of the domicile requirement could have come into question, as a result of the *Heller* and *McDonald* rulings. See Gregory, *infra* note 70.

<sup>29</sup> See *infra* Section V.

<sup>30</sup> *Osterweil*, 738 F.3d at 521.

This question permitted the New York Court of Appeals to resolve whether the New York statute required domicile for a handgun permit.<sup>31</sup>

### III. PROCEDURAL HISTORY

Historically, New York Penal Law § 400.00(3)(a) was interpreted as barring a non-domiciliary from obtaining a handgun permit in New York.<sup>32</sup> Osterweil challenged this interpretation in the United States District Court, Northern District of New York.<sup>33</sup> A number of constitutional claims were brought against the State of New York in the federal suit.<sup>34</sup> The all-encompassing claim was that the statute violated his Second Amendment right to bear arms.<sup>35</sup> In addition, he asserted a Fourteenth Amendment Equal Protection Clause claim because the statute discriminated against the class of non-domiciliaries of New York.<sup>36</sup> Similarly, an Article IV Privileges and Immunities<sup>37</sup> claim was made because the statute discriminated against out-of-state domiciliaries who had a part-time residency in New York.<sup>38</sup> Fourteenth Amendment substantive and procedural Due Process claims were also brought because the Second Amendment right to keep and bear arms was applied to the states by the Supreme Court in *McDonald*.<sup>39</sup> Lastly, state law claims were brought referencing the New York State Constitution and New York Civil Rights Law.<sup>40</sup>

The Second Amendment claim consisted of three causes of action.<sup>41</sup> The first cause of action alleged that Osterweil was denied his right to bear arms “in violation of the Second Amendment of the United States Constitution, as made applicable to the states through

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<sup>31</sup> *Id.*

<sup>32</sup> See *Bach v. Pataki*, 408 F.3d 75, 78 (2d Cir. 2005) (explaining the statute’s residency standard); see also *Gregory*, *infra* note 70 (stating that the State changed its position and now part-time residents do not need to be domiciled to obtain a handgun permit).

<sup>33</sup> *Osterweil*, 819 F. Supp. 2d at 74-75 (denying Osterweil’s motion for summary judgment in its entirety).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 79.

<sup>36</sup> *Id.* at 86.

<sup>37</sup> U.S. CONST. art. IV, § 2, cl. 1.

<sup>38</sup> *Osterweil*, 819 F. Supp. 2d at 87.

<sup>39</sup> *Id.* at 88-89.

<sup>40</sup> *Id.* at 89.

<sup>41</sup> *Id.* at 79.

‘selective incorporation’ by the Fourteenth Amendment. . . .”<sup>42</sup> Similarly, the second cause of action alleged a violation of New York Civil Rights Law, which uses similar language to that of the Second Amendment of the United States Constitution.<sup>43</sup> The third cause of action alleged that Judge Bartlett denied Osterweil his right to bear arms by applying a domicile definition and requirement as a prerequisite to a firearms license.<sup>44</sup> The district court denied Osterweil’s motion for summary judgment on this claim.<sup>45</sup>

Osterweil argued that the district court should apply a strict scrutiny standard to evaluate his Second Amendment claim because there was a fundamental constitutional right at stake.<sup>46</sup> The district court rejected this contention,<sup>47</sup> and “[d]rawing on First Amendment jurisprudence,” the court applied intermediate scrutiny to the Second Amendment—as other courts have done.<sup>48</sup>

Osterweil’s motion for summary judgment regarding the Equal Protection Clause was also denied.<sup>49</sup> The court reasoned that residents and nonresidents were not similarly situated with regard to the ability of the State to monitor a licensee’s eligibility for purposes of obtaining a firearms license.<sup>50</sup> Therefore, there was no equal protection violation.<sup>51</sup>

The court also rejected Osterweil’s Privileges and Immunities claim because “New York has a substantial interest in limiting firearm possession to those with the most significant contacts with the State and . . . New York Penal Law § 400.00 [was] substantially related to that purpose.”<sup>52</sup> Thus, there was no valid Privileges and Immunities claim.<sup>53</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Osterweil*, 819 F. Supp. 2d at 79.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 86.

<sup>46</sup> *Id.* at 79.

<sup>47</sup> *Id.* at 84-85.

<sup>48</sup> *Osterweil*, 819 F. Supp. 2d at 82 (stating that “fundamental constitutional rights are not invariably subject to strict scrutiny”). The court drew similarities to First Amendment content-neutral restrictions, which are subject to intermediate scrutiny. *Id.* (using *United States v. O’Brien*, 391 U.S. 367 (1968), as an example of content neutral restrictions that are subject to intermediate scrutiny).

<sup>49</sup> *Id.* at 87.

<sup>50</sup> *Id.* at 86-87.

<sup>51</sup> *Id.* at 87.

<sup>52</sup> *Osterweil*, 819 F. Supp. 2d at 88.

<sup>53</sup> *Id.*

With respect to the substantive due process claim, the district court found there were no “ ‘arbitrary,’ ‘conscience-shocking,’ or ‘oppressive in a constitutional sense,’ ” actions by the New York Government.<sup>54</sup> Judge Bartlett was only interpreting the law of the state with reasonable justification.<sup>55</sup>

The procedural due process claim, which was based on the six month statutory requirement, also did not survive because “[a]t most any violation of state procedural requirements would create liability under state law.”<sup>56</sup> There was no showing by Osterweil that he had a protected liberty or property interest of which he was deprived without due process.<sup>57</sup> However, an Article 78 proceeding could have been used to challenge the denial of his firearms permit denial under New York State law.<sup>58</sup>

Finally, the state law claims were never even heard by the district court.<sup>59</sup> The court exercised its discretion and did not apply supplemental jurisdiction.<sup>60</sup> Thus, the New York State constitutional claim and the New York Civil Rights Law claim were both dismissed without prejudice.<sup>61</sup>

The decision of the court was appealed to the Second Circuit Court of Appeals.<sup>62</sup> The Second Circuit certified the domicile question of whether a part-time resident can obtain a handgun permit to the New York Court of Appeals.<sup>63</sup> The Court of Appeals relied on the language of New York Penal Law § 400.00(7)<sup>64</sup> and interpreted

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<sup>54</sup> *Id.* (quoting *Lowrance v. Achtyl*, 20 F.3d 529, 537 (2d Cir.1994)).

<sup>55</sup> *Id.* (“[D]efendant’s conduct in denying plaintiff’s license application cannot be said to have been without any reasonable justification, as he was merely implementing the law as defined by the courts.”) (internal quotations omitted).

<sup>56</sup> *Id.* at 89 (citing *Bolden v. Alston*, 810 F.2d 353, 358 (2d Cir. 1987)).

<sup>57</sup> *Osterweil*, 819 F. Supp. 2d at 89.

<sup>58</sup> *Id.* (implying that Osterweil did not file an Article 78 proceeding). An Article 78 proceeding allows a plaintiff to appeal the decision of a state action in a proceeding. N.Y. C.P.L.R. § 7801 (McKinney 1962).

<sup>59</sup> *Osterweil*, 819 F. Supp. 2d at 89.

<sup>60</sup> *Id.* at 89-90.

<sup>61</sup> *Id.* at 90.

<sup>62</sup> *Osterweil*, 738 F.3d at 520 (certifying the domicile question for the New York Court of Appeals).

<sup>63</sup> *Osterweil*, 999 N.E.2d at 516 (declining to address the constitutional issue of domicile).

<sup>64</sup> N.Y. Penal Law § 400.00(7) states that:

Any license issued pursuant to this section shall . . . be approved as to form by the superintendent of state police. A license to carry or possess a pistol or revolver shall have attached the licensee’s photograph, and a coupon which shall be removed and retained by any person disposing of



the statutory intent behind the definition of “resident.”<sup>65</sup> The court noted that the question raised by *Osterweil* of whether the domicile requirement was constitutional did not need to be answered because of language in Penal Law § 400.00(7).<sup>66</sup> Therefore, the statute was interpreted in a manner that excluded the domicile requirement for obtaining a handgun permit.<sup>67</sup>

#### IV. MAKING SENSE OF THE COURT’S DECISION

An understanding of why the Court of Appeals’ decision did not promote the State’s interest requires an analysis of the *Osterweil* matter. The case dates back to the year 2008 when Osterweil first applied for his firearm permit.<sup>68</sup> Osterweil’s permit was denied by the Schoharie County Court Judge and the federal district court—both interpreting the residency provision of New York Penal Law § 400.00—with a domicile requirement to obtain a firearms permit.<sup>69</sup> The Court of Appeals’ ruling in *Osterweil* implies that the court and the State had to take into account several concerns.

The State and the courts wanted to avoid litigating the constitutionality of New York Penal Law § 400(3)(a).<sup>70</sup> New York Penal

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a firearm to the licensee. Such license shall specify the weapon covered by calibre, make, model, manufacturer's name and serial number, or if none, by any other distinguishing number or identification mark, and shall indicate whether issued to carry on the person or possess on the premises, and if on the premises shall also specify the place where the licensee shall possess the same. *If such license is issued to an alien, or to a person not a citizen of and usually a resident in the state*, the licensing officer shall state in the license the particular reason for the issuance and the names of the persons certifying to the good character of the applicant.

N.Y. PENAL LAW 400.00(7) (emphasis added).

<sup>65</sup> *Osterweil*, 999 N.E.2d at 519-20.

<sup>66</sup> *Id.* at 520.

<sup>67</sup> *Id.* at 519-20.

<sup>68</sup> *Id.* at 516.

<sup>69</sup> *Osterweil*, 819 F. Supp. 2d at 89.

<sup>70</sup> See *Osterweil*, 999 N.E.2d at 520. Since there is no domicile requirement, the constitutionality of the statute did not have to be analyzed. *Id.* The National Rifle Association was pleased with the victory in *Osterweil*, but the constitutional question concerning the domicile requirement was never answered. Mr. Daniel L. Schmutter of Greenbaum, Rowe, Smith & Davis of Woodbridge, New Jersey, attorney for Mr. Osterweil, discussed why the constitutionality of the statute was never litigated in the *United States Law Week*:

[W]hen we got to the Court of Appeals for the Second Circuit, [counsel for the State of New York] started to soften their position, they took sort of an intermediate position, they basically said, ‘Well, it looks like this

Law § 400(3)(a) provides that:

[A]pplications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant *resides*, is principally employed or has his principal place of business as merchant or storekeeper.<sup>71</sup>

The court only bound itself to interpret what the firearm licensing statute meant by “resides.”<sup>72</sup> In only defining “resides,” the court avoided determining whether the State’s longstanding practice of interpreting a domicile requirement was unconstitutional.<sup>73</sup> The court avoided the issue of domicile because the statute would then be in direct violation of the *Heller* and *McDonald* rulings.<sup>74</sup>

The recent rulings in *District of Columbia v. Heller*<sup>75</sup> and *McDonald v. City of Chicago*<sup>76</sup> played a major role in the court’s decision.<sup>77</sup> The court seemed obliged to hold that a person who was a part-time resident has the right to possess a handgun in New York because a contrary holding would have required litigation of a constitutional issue.<sup>78</sup> If the court had adhered to its domicile requirement interpretation from previous cases, the constitutionality of a domicile

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interpretation of this law could be in question as a result of the Supreme Court’s Second Amendment rulings in *Heller* and *McDonald*[.]’

Patrick L. Gregory, *Part-time Residency is Sufficient to Obtain Handgun License in New York*, U.S. LAW WEEKLY, Jan. 7, 2014.

<sup>71</sup> N.Y. PENAL LAW § 400.00(3)(a) (emphasis added).

<sup>72</sup> *Osterweil*, 999 N.E.2d at 518.

<sup>73</sup> *Id.* at 520.

<sup>74</sup> See Gregory, *supra* note 70 (explaining that the statute is in direct violation of the Second Amendment and the *Heller* and *McDonald* decisions).

<sup>75</sup> 554 U.S. 570 (2008). In *Heller*, the District of Columbia enacted a statute that prohibited the possession of handguns within the home. *Id.* at 574-75. The statute also required residents who lawfully owned firearms to keep their long guns unloaded and disassembled, or with a trigger lock in their homes. *Id.* at 575. *Heller*, a resident of the District of Columbia, applied for a handgun he intended to keep at his home; however, the District refused his application. *Id.* The Court held that the Second Amendment safeguards an individual’s right to possess a firearm and use it for lawful purposes for self-defense in the home. *Id.* at 636. Therefore, the Court found that the right to keep and bear arms is a fundamental right, and deprivation of such right may require a high level of constitutional scrutiny.

<sup>76</sup> 561 U.S. 742 (2010) (holding that the Second Amendment applies to the States). Chicago and Oak Park banned the possession of handguns by private residents. *Id.* at 750. *McDonald* and others sued to have these laws declared unconstitutional as they were fearful of becoming the targets of violence from drug dealers in the city. *Id.* at 751.

<sup>77</sup> *Osterweil*, 999 N.E.2d at 517.

<sup>78</sup> *Id.* at 520.

requirement for a handgun permit might have been challenged in the Supreme Court of the United States.<sup>79</sup>

To safeguard the constitutionality of New York Penal Law § 400.00(3)(a), the New York Court of Appeals cited § 400.00(7) of the statute which states:

If such license is issued to an alien, or to a person not a citizen of and usually a resident in the state, the licensing officer shall state in the license the particular reason for the issuance and the names of the persons certifying to the good character of the applicant.<sup>80</sup>

As reasoned by the court, § 400.00(7) allows a jurisdiction to issue a handgun permit to a person who is not “usually a resident in the state.”<sup>81</sup> Therefore, the statute avoided constitutional scrutiny because the State of New York and the Court of Appeals changed their position on the domicile requirement,<sup>82</sup> carelessly disregarding the State’s interest.

## V. IDENTIFYING THE STATE INTEREST

Over the past 100 years, the State of New York has expressed its concerns about gun control.<sup>83</sup> The State’s interest in regulating firearms dates to the inception of New York Penal Law § 400.00—the benchmark for all other gun control legislation throughout the nation.<sup>84</sup> Most notably, the State has had its share of governors in the twentieth and twenty-first centuries from both sides of the aisle who

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<sup>79</sup> See Gregory, *supra* note 70 (stating that a contrary ruling may have put in question the constitutionality of New York Penal Law § 400.00(3)(a)).

<sup>80</sup> N.Y. PENAL LAW § 400.00(7).

<sup>81</sup> *Osterweil*, 999 N.E.2d at 520-21.

<sup>82</sup> See Gregory, *supra* note 70.

<sup>83</sup> See Peter Duffy, *100 Years Ago, The Shot that Spurred New York’s Gun-Control Law*, CITY ROOM (Jan. 23, 2011, 11:00 AM), [http://cityroom.blogs.nytimes.com/2011/01/23/100-years-ago-the-shot-that-spurred-new-yorks-gun-control-law/?\\_php=true&\\_type=blogs&\\_r=0](http://cityroom.blogs.nytimes.com/2011/01/23/100-years-ago-the-shot-that-spurred-new-yorks-gun-control-law/?_php=true&_type=blogs&_r=0) (discussing how New York Penal Law § 400.00 came about); *Bar Hidden Weapons on Sullivan’s Plea*, N.Y. TIMES, May 11, 1911, at 3 (discussing how Senator Tim Sullivan was able to gain support for the gun control law); Richard Perez-Pena, *Pataki Signs Nation’s Strictest Gun Controls*, N.Y. TIMES (Aug. 10, 2000), <http://www.nytimes.com/2000/08/10/ny-region/pataki-signs-nation-s-strictest-gun-controls.html> (illustrating a Republican Governor signing a strict gun control law); Shushannah Walshe, *New York Passes Nation’s Toughest Gun Control Law*, ABC NEWS (Jan. 15, 2013), <http://abcnews.go.com/Politics/york-state-passes-toughest-gun-control-law-nation/story?id=18224091> (reporting on Governor Cuomo’s enactment of the New York Safe Act).

<sup>84</sup> Duffy, *supra* note 83.

have supported the State's interest in highly regulating firearms.<sup>85</sup>

The Sullivan Law, now known as New York Penal Law § 400.00, was enacted over 100 years ago.<sup>86</sup> The law was a response to the “brazen murder” of a novelist that had occurred near a park.<sup>87</sup> Then New York State Senator, Tim Sullivan, who already had intentions of placing restrictions on firearms, took an interest in the situation.<sup>88</sup> The Sullivan Bill had very little opposition and was enacted on August 31, 1911.<sup>89</sup> At the time, the Sullivan Law required individuals to obtain police issued licenses for concealable firearms.<sup>90</sup> Furthermore, the law made it a felony to carry an unlicensed concealed weapon.<sup>91</sup>

Governor Franklin D. Roosevelt played a role in the evolution of New York Penal Law § 400.00.<sup>92</sup> Governor Roosevelt expressed his concern to the Legislature about the issuance of permits and stated, “[i]t is a fact that the present issuing of revolver permits by judges anywhere in the State is working badly, and permits must be more carefully guarded.”<sup>93</sup> Governor Roosevelt's statement is evidence that gun control measures were taken by the New York Legislature in the 1930s.

High-profile New York governors have signed into law legislation that at the time was said to be the strictest in the nation.<sup>94</sup> In 1980, Governor Hugh Carey signed a law that imposed a one-year prison sentence for anyone carrying an unlicensed handgun.<sup>95</sup> This law was enacted after United States Representative for New York, Allard K. Lowenstein, was killed by a handgun, and four policemen

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<sup>85</sup> See *infra* note 94.

<sup>86</sup> Duffy, *supra* note 83.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Duffy, *supra* note 83.

<sup>92</sup> See *Osterweil*, 999 N.E.2d at 519 (illustrating Governor Franklin D. Roosevelt's role in shaping New York Penal Law § 400.00).

<sup>93</sup> *Id.*

<sup>94</sup> See Ward Morehouse III, *New York Has Tough Gun Law*, THE CHRISTIAN SCI. MONITOR (June 19, 1980), available at <http://www.csmonitor.com/1980/0619/061943.html> (showing that Governor Carey signed the law in response to gun violence that was taking place); Perez-Pena, *supra* note 83 (stating that Governor Pataki is one of the many New York governors to sign a strict gun law); Walshe, *supra* note 83 (discussing Governor Andrew Cuomo's signing of the New York Safe Act).

<sup>95</sup> Morehouse III, *supra* note 94.

were shot to death earlier that year.<sup>96</sup> Governor Pataki, a Republican, was also touted as having signed the “strictest” gun laws in the nation.<sup>97</sup> This enactment was particularly symbolic because Governor Pataki signed the law at the location of the fatal shooting of six people riding on a Long Island Rail Train seven years earlier.<sup>98</sup>

Most recently, the State of New York passed the Nation’s toughest gun control law.<sup>99</sup> On January 15, 2013, Governor Andrew Cuomo signed the New York Safe Act.<sup>100</sup> The Act was partly in reaction to the Sandy Hook Elementary School shooting in Connecticut one month prior to its enactment.<sup>101</sup> Pursuant to this legislation, assault weapons have been broadly defined; magazine capacity has been limited to seven bullets; background checks for ammunition and gun buyers are required in private sales; and a one-state check on all firearm purchases was imposed.<sup>102</sup> The enactment of such rigorous legislation indicates the State’s seriousness about gun control.

The New York Safe Act and prior gun control measures illustrate the State of New York’s commitment to strict gun control—and concern with “persons of unsavory reputation” obtaining pistol permits.<sup>103</sup> Throughout the past 100 years, the actions of high-profile New York politicians have promoted strict gun control laws.<sup>104</sup> By neglecting to establish a residency standard for part-time resident firearm permit applicants, the Court of Appeals did not promote and enforce the State’s clear interest in gun control.

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<sup>96</sup> *Id.*

<sup>97</sup> Perez-Pena, *supra* note 83.

<sup>98</sup> *Id.*

<sup>99</sup> Walshe, *supra* note 83.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* As the Governor signed the law he said:

I’m proud to be a New Yorker, because New York is doing something, because we are fighting back, because, yes, we’ve had tragedies, and yes, we’ve had too many innocent people lose their lives, and yes, it’s unfortunate that it took those tragedies to get us to this point, but let’s at least learn from what’s happened, let’s at least be able to say to people, yes, we went through terrible situations, but we saw, we learned, we responded, and we acted, and we are doing something about it . . . . We are not victims.

*Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See *Osterweil*, 999 N.E.2d at 519.

<sup>104</sup> See *supra* notes 83 and 94.

## VI. THE RESIDENCY STANDARD THAT COULD HAVE BEEN APPLIED

The State of New York and the district court were in agreement that New York Penal Law § 400.00(3) had a domicile requirement up until the Second Circuit decision, when the State changed its position.<sup>105</sup> Nonetheless, Osterweil, a part-time resident of New York, would not have been entitled to a handgun permit, even if the State did not change its position because he may not have been residing in the State for over 183 days.<sup>106</sup> After the Second Circuit Court of Appeals sent the certified question to the New York Court of Appeals, the Court of Appeals held that § 400.00(3) did not have a domicile requirement, and a part-time resident can obtain a handgun permit, despite previously interpreting the statute to have a domicile requirement.<sup>107</sup> The court should have expanded on this ruling. Unfortunately, the one-dimensional ruling stands with no clarification of what constitutes a part-time resident.

The New York Court of Appeals would not have had to labor to find a standard to determine what constitutes a part-time resident. The standard that should have been applied was readily available in the New York State Department of Taxation and Finance<sup>108</sup> which had already established residency requirements for New York State nonresidents and part-year residents.<sup>109</sup> The requirements for nonresidents paying taxes in New York could be applied to a part-time resident interested in obtaining a firearm permit.

According to the Department of Taxation and Finance, nonresidents are subject to taxation in the State when certain conditions are met.<sup>110</sup> When one is not domiciled in New York, certain conditions will apply to determine whether a person is subject to taxation.<sup>111</sup> One must maintain a permanent place of abode in the State “for substantially all of the taxable year.”<sup>112</sup> Within that year, one

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<sup>105</sup> *Osterweil*, 999 N.E.2d at 517; *Osterweil*, 819 F. Supp. 2d at 85.

<sup>106</sup> *Osterweil*, 819 F. Supp. 2d at 75.

<sup>107</sup> *Osterweil*, 999 N.E.2d at 520.

<sup>108</sup> N.Y. COMP. CODES R. & REGS. tit. 20, § 105.20.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

must spend in the aggregate more than 183 days in the State.<sup>113</sup> When these conditions are met, a nonresident is considered a resident of New York for taxation purposes.<sup>114</sup>

This would be an appropriate standard because it outlines the connection a nonresident must have with the State in order to pay taxes.<sup>115</sup> The residency standard from the Department of Taxation and Finance is suitable because the lives of people are closely tied to economics. Furthermore, if these requirements were applied to a part-time resident seeking a handgun permit, cities, counties, the State, and the courts would benefit from the predictability of the standard.

## VII. DUE PROCESS AND INTERMEDIATE SCRUTINY

The Due Process Clause of the Fourteenth Amendment provides that, “no state shall deprive any person of life, liberty, or property, without due process of the law.”<sup>116</sup> In order to determine whether there is a due process violation, the specific right that may have been violated needs to be identified. In *Osterweil*, that specific right was Osterweil’s right to keep and bear arms.<sup>117</sup> The Second Amendment’s right to keep and bear arms is a fundamental right that was applied to the States by the *McDonald* Court in 2010.<sup>118</sup> After determining the specific right, a court can apply a substantive due process analysis to determine whether the proposed standard violates a person’s fundamental right.<sup>119</sup>

Since the right to bear arms was found to be a fundamental right by the *Heller* Court,<sup>120</sup> one would assume that a strict scrutiny analysis would apply to a deprivation of a Second Amendment right. However, the district court in *Osterweil* was reluctant to deem this right worthy of a strict scrutiny analysis.<sup>121</sup> Because the *Heller* Court never “announce[d] the appropriate level of constitutional scrutiny”

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<sup>113</sup> N.Y. COMP. CODES R. & REGS. tit. 20, § 105.20.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> U.S. CONST. amend. XIV, § 1.

<sup>117</sup> *Osterweil*, 999 N.E.2d at 517.

<sup>118</sup> *McDonald*, 561 U.S. at 806 (Thomas, J., concurring) (stating that the Second Amendment applies to the States).

<sup>119</sup> *Osterweil*, 819 F. Supp. 2d at 79.

<sup>120</sup> *See supra* note 75.

<sup>121</sup> *Osterweil*, 819 F. Supp. 2d at 84.

for the right to bear arms<sup>122</sup> and cautioned the lower courts on broadly interpreting its holding as to invalidate current firearms regulation—the district court “[was] unpersuaded that strict scrutiny [was] warranted.”<sup>123</sup> Thus, the district court applied intermediate scrutiny to analyze Osterweil’s Second Amendment violation claim.<sup>124</sup> With an intermediate scrutiny standard, the proposed residency standard used by the Department of Taxation and Finance would pass constitutional muster when applied to New York’s handgun permit process.

In evaluating the proposed residency standard, the fundamental right should be identified as the right to keep and bear arms, or as the district court noted, “the right of a law abiding individual to keep and carry a firearm for the purpose of self defense in the home.”<sup>125</sup> To satisfy an intermediate level of scrutiny, a law must serve a state interest and there has to be “a reasonable fit between the objective and the law.”<sup>126</sup> It is clear that the State has a public safety interest at hand.<sup>127</sup> The State and its governmental subsidiaries must conduct background checks on eligible licensees.<sup>128</sup> The State, including its governmental subsidiaries, will expend substantial resources in conducting background checks on part-time residents.<sup>129</sup> There is a reasonable fit between the objective and the standard because a permanent place of abode and the 183 day living requirement will give the State and its subsidiaries a narrower field of applicants for whom to conduct background checks. With the 183 day living requirement, the State and its subsidiaries will have at least six months of a person’s history as a basis for a background check.

Assuming the court applied the proposed residency standard, Osterweil might not have been successful in obtaining his handgun permit. First, he may have been considered a nonresident because he was domiciled in the State of Louisiana.<sup>130</sup> Although he maintained a permanent place of abode in New York, which was once his domi-

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<sup>122</sup> *Id.* at 81.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 84-86.

<sup>125</sup> *Osterweil*, 819 F. Supp. 2d at 84 (explaining that the burden imposed by New York Penal Law § 400.00(3)(a) falls one level below the core right described in *Heller*).

<sup>126</sup> *Id.* at 83.

<sup>127</sup> *Id.* at 85.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 84.

<sup>130</sup> *Osterweil*, 999 N.E.2d at 516.



cile,<sup>131</sup> it is unclear whether he would have met the 183-day requirement because he only used his New York property as a vacation home.<sup>132</sup> Therefore, he would have been denied a handgun permit, unless he could have shown that he was in New York, at his part-time residence, for at least 183 days. Even though the application of this residency standard yields a contrary result to that of the court's decision, the standard would pass constitutional muster under the intermediate scrutiny standard. This would not violate the Second Amendment because a person is being given proper due process.

### VIII. SUBSTANTIVE DUE PROCESS

When government action is “arbitrary,” “conscience shocking,” or “oppressive in a constitutional sense,” the government runs the risk of violating a person’s substantive due process rights.<sup>133</sup> One must then show that the government “exercised power without any reasonable justification in pursuit of a legitimate governmental objective.”<sup>134</sup> New York Penal Law § 400.00(3) deprives an individual of a fundamental right, and the proposed residency standard creates a hurdle for a person seeking a firearm permit. However, there is a legitimate governmental objective, which is public safety, but is the proposed residency standard a “gross abuse of governmental power?”<sup>135</sup>

There is no “gross abuse of government power” because there exists reasonable justification to apply the proposed residency standard—because it helps state officials implement New York Penal Law § 400.00. Since § 400.00 requires a thorough background check and sufficient ties to the State, governmental officials are able to execute these processes appropriately to fulfill the legitimate governmental objective.<sup>136</sup> Furthermore, acquiring a permanent place of abode and residing in the State for 183 days or more can be a viable option for a nonresident,<sup>137</sup> as opposed to some states that completely ban nonres-

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Osterweil*, 819 F. Supp. 2d at 88 (quoting *Lowrance v. Achtyl*, 20 F.3d 529, 537 (2d Cir. 1994)).

<sup>134</sup> *Id.* (quoting *SeaAir NY, Inc. v. City of New York*, 250 F.3d 183, 187 (2d Cir. 2001)) (internal quotations omitted).

<sup>135</sup> *Id.* at 88 (quoting *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999)).

<sup>136</sup> See generally *infra* notes 146-47 and accompanying text.

<sup>137</sup> N.Y. COMP. CODES R. & REGS. tit. 20, § 105.20.

idents from obtaining a handgun permit.<sup>138</sup> Thus, there is nothing conscience shocking about restricting the right to bear arms to a part-time resident because the proposed residency standard assists state officials in enforcing § 400.00, which is reasonably justified to fulfill a legitimate governmental objective.

## **IX. PROCEDURAL DUE PROCESS**

A procedural due process violation occurs when one is deprived of a protected liberty or property interest without notice or opportunity to be heard.<sup>139</sup> Clearly, Osterweil had a liberty interest in obtaining a handgun permit. When applying the proposed residency standard, the State would not be violating procedural due process because in New York, a person can contest the denial of his or her handgun permit in an Article 78 proceeding.<sup>140</sup> The Article 78 proceeding provides an adequate avenue for a person to contest the denial of his or her handgun permit.<sup>141</sup> Therefore, it is unlikely that the application of the proposed residency standard would violate due process.

## **X. HOW THE PROPOSED RESIDENCY STANDARD HELPS NEW YORK**

New York has a public safety interest in monitoring those it gives handgun licenses to, as noted by the Second Circuit Court of Appeals in *Bach v. Pataki*.<sup>142</sup> In *Bach*, the plaintiff was a resident and domiciliary of Virginia who wanted to carry his pistol while visiting his parents in upstate New York.<sup>143</sup> The plaintiff wanted to carry his pistol because he would have to travel through dimly lit roads in areas with high rates of violent crime.<sup>144</sup> The court recognized “that New York’s interest in monitoring gun licensees is substantial and that New York’s restriction of licenses to residents and persons working primarily within the State is sufficiently related to this

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<sup>138</sup> *Osterweil*, 819 F. Supp. 2d at 88.

<sup>139</sup> *Id.* at 89.

<sup>140</sup> *See supra* note 58 (explaining that there is a procedural mechanism in place to appeal the denial of the handgun permit).

<sup>141</sup> *Id.*

<sup>142</sup> 408 F.3d 75, 91 (2d Cir. 2005).

<sup>143</sup> *Id.* at 76-77.

<sup>144</sup> *Id.* at 77.

[State] interest.”<sup>145</sup>

New York has a substantial and legitimate interest in “ensuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament of character which should be present with one entrusted with a dangerous instrument.”<sup>146</sup> In *Bach*, the court noted that New York has an interest in continually monitoring a person to obtain behavioral information with respect to the gun permit.<sup>147</sup>

Without the proposed residency standard the State will have difficulty monitoring the behavioral information relevant to the non-resident handgun permit applicant. This would create a substantial burden on the State because it would have to cross into other jurisdictions to obtain behavioral information about a nonresident applicant.<sup>148</sup> It would be costly and burdensome to run a background check on a nonresident.

In addition, the nonresident does not have the same relationship with the State that a citizen has. When the State has a relationship with its citizens, it is easier for the State to monitor the behavior of its handgun permit holders.<sup>149</sup> Thus, the handgun licensing process is primarily left to cities and counties within the State.<sup>150</sup>

It is evident that New York’s interest in gun control, more specifically its interest in monitoring the behavior of its handgun licensees, warrants the restriction of the right of a person, who is a nonresident, to keep and bear arms in the State. If the State were to apply the residency standard proposed in this Case Note, individuals would be afforded the opportunity to obtain handgun permits in the State, so long as they maintained a permanent place of abode and resided in the State for 183 days. The 183 day requirement gives the State enough time to develop the significant relationship necessary to make the determination of whether a handgun permit should be given to a nonresident.

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<sup>145</sup> *Id.* at 87 (holding that “the Privileges and Immunities Clause cannot preclude New York’s residency requirement in light of the State’s substantial interest in monitoring handgun licensees”).

<sup>146</sup> *Id.* at 90 (quoting *Pelose v. Cnty. Court of Westchester Cnty.*, 384 N.Y.S.2d 499 (App. Div. 2d Dep’t 1976)).

<sup>147</sup> *Bach*, 408 F.3d at 90.

<sup>148</sup> *Id.* at 92.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 79.

## XI. CONCLUSION

The New York Court of Appeals' decision in *Osterweil* was inconsistent with the State's interest in gun control. The decision came exactly ten months after the State enacted the New York Safe Act. This legislation served as an unequivocal statement by the State that it was serious about gun control.<sup>151</sup> However, the court turned a blind eye to the message sent by the Legislature in its enactment of the Safe Act. This is evident by the holding in *Osterweil*, which eliminated the domicile requirement from New York Penal Law § 400.00.<sup>152</sup> It is unclear why the court and the State changed their stance on New York Penal Law § 400.00, when *Osterweil*, a pro se litigant and lawyer, finally obtained the services of Greenbaum, Rowe, Smith & Davis to appeal the district court's decision to the Second Circuit.<sup>153</sup> Regardless of whether there was any pressure, the court could have remained consistent in the interpretation of the State's interest by establishing a residency standard and defining a "part-time resident." If a residency standard had been established, it would have likely survived constitutional scrutiny. It will be up to the State Legislature to establish a residency standard and define a "part-time resident."

*Osterweil* could not have argued that the statute completely banned his right to keep and bear arms if the proposed residency standard would have been adopted. Although the precedents of *Heller* and *McDonald* solidified the Second Amendment as a fundamental right, the court still had some room to apply a residency standard. Absent an absolute ban on a part-time resident's right to keep and bear arms, in applying a residency standard, the court would have established a fair and balanced procedure. By failing to elaborate on a residency standard, the court forfeited the opportunity to enhance the State's interest in gun control.

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<sup>151</sup> See Walshe, *supra* note 83.

<sup>152</sup> See *Osterweil*, 999 N.E.2d at 520.

<sup>153</sup> See Gregory, *supra* note 70. " 'When Mr. Osterweil was pro se—we entered the case at the appellate level, when Mr. Osterweil was pro se—they were perfectly content to deny him his Second Amendment rights aggressively. Once we entered the case, they started to rethink their position[.]' " *Id.* Attorney Schmutter also mentioned that the National Rifle Association supported Osterweil's claim. *Id.*

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\* J.D. Candidate, 2015, Touro College, Jacob D. Fuchsberg Law Center. I would like to extend my gratitude to my mother and father for encouraging me throughout all my endeavors. A special thanks to my brother, Ed Arroyo, for all the unconditional support he has provided since childhood. Furthermore, I am indebted to my love, Dimitra Lambrinos, for being supportive throughout the process of writing this Case Note. Finally, this Case Note would not have been possible without the guidance of Professor Gary Shaw and the encouragement of Professor Rena Seplowitz and Matthew Ingber, the *Touro Law Review's* Issue Editor.

I am a strong supporter of Second Amendment rights. In this Case Note, I simply want to point out that the New York Court of Appeals could have denied a part-time resident a firearm permit—when applying the New York Department of Taxation and Finance's residency standard. The proposed residency standard can survive an intermediate level of constitutional scrutiny, which was the standard that was used by the United States District Court, Northern District, New York in *Osterweil*. Whether or not a strict level of constitutional scrutiny should be applied to evaluate a deprivation of Second Amendment rights is a topic for another piece.