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## Analyzing Second Amendment Challenges: Getting Strict with Judges

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## ANALYZING SECOND AMENDMENT CHALLENGES: GETTING STRICT WITH JUDGES

### COURT OF APPEALS OF NEW YORK

People v. Hughes<sup>1</sup>  
(decided November 19, 2013)

#### I. INTRODUCTION

When it comes to Second Amendment jurisprudence, the Supreme Court has left many stones unturned.<sup>2</sup> In its landmark decision, *District of Columbia v. Heller*,<sup>3</sup> the Court acknowledged that Second Amendment rights, although fundamental, were in no way unlimited.<sup>4</sup> In reviewing the challenged law, the *Heller* Court did not apply a specific level of scrutiny but indicated that it would be unconstitutional on any level.<sup>5</sup> On the other hand, the Court explicitly rejected rational basis scrutiny and Justice Stephen Breyer's "interest-balancing" test.<sup>6</sup> This, at the very least, implied that the Court would apply either intermediate scrutiny or strict scrutiny when faced with Second Amendment challenges. The Court's failure to analyze whether the challenged law should be reviewed under intermediate or strict scrutiny has led to inconsistencies in the lower courts.

Many courts have skipped this analysis completely and applied a particular standard following the approach of previous courts.<sup>7</sup> Other courts have conducted an analysis but their rationale for applying intermediate or strict scrutiny has also been inconsistent.<sup>8</sup> Many

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<sup>1</sup> People v. Hughes, 1 N.E.3d 298 (N.Y. 2013).

<sup>2</sup> U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to bear Arms, shall not be infringed.").

<sup>3</sup> 554 U.S. 570 (2008).

<sup>4</sup> *Id.* at 626.

<sup>5</sup> *Id.* at 628-29.

<sup>6</sup> *Id.* at 628 n.27.

<sup>7</sup> See, e.g., *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); *People v. Nivar*, 915 N.Y.S.2d 801 (Sup. Ct. Bronx County 2011).

<sup>8</sup> See, e.g., *United States v. Marzarella*, 614 F.3d 85 (3d Cir. 2010); *United States v. Eng-*

courts assume that intermediate scrutiny should be applied to Second Amendment challenges unless the statute contains a blanket prohibition, which would then trigger strict scrutiny.<sup>9</sup> This approach runs the risk of judges justifying regulations with their personal policy preferences because under intermediate scrutiny almost any law can be upheld. Under *Heller*, the scope of judicial discretion to decide the appropriate level of scrutiny is too broad and allows for too much subjectivity in evaluating the constitutionality of a statute.

Recently, the New York Court of Appeals, in *People v. Hughes*,<sup>10</sup> applied intermediate scrutiny to a statute making it a class C felony for anyone previously convicted of a crime to possess an unlicensed, loaded handgun and found it constitutional.<sup>11</sup> The New York Court of Appeals failed to analyze whether defendant Frank Hughes's Second Amendment right to keep and bear arms for the purpose of self-defense was substantially burdened triggering strict scrutiny.<sup>12</sup> Instead, the Court of Appeals followed other courts in applying intermediate scrutiny. This Case Note addresses the levels of scrutiny which both federal and New York courts have applied when analyzing laws and regulations that burden Second Amendment rights, and more specifically, whether the New York Court of Appeals analyzed Penal Law section 265.01 accurately when upholding it under intermediate scrutiny.

## II. *PEOPLE V. HUGHES*

### A. Factual and Procedural Background

The defendant frequently stayed at his ex-girlfriend's apartment in Hempstead, Long Island.<sup>13</sup> One day, while at the apartment, he heard shooting outside and thought that he should bring a gun with him the next day for protection.<sup>14</sup> The defendant returned the following day with an unlicensed, loaded handgun.<sup>15</sup> While standing outside the apartment, the defendant was approached by two men, one of

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strum, 609 F. Supp. 2d 1227 (D. Utah 2009).

<sup>9</sup> See, e.g., *People v. Foster*, 915 N.Y.S.2d 449 (Crim. Ct. Kings County 2010).

<sup>10</sup> 1 N.E.3d 298 (N.Y. 2013).

<sup>11</sup> *Id.* at 302.

<sup>12</sup> *Id.* at 299.

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

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

<sup>15</sup> *Hughes*, 1 N.E.3d at 299.

whom was nicknamed “Maniac Guns.”<sup>16</sup> After an altercation, the defendant drew the handgun and killed one of the men.<sup>17</sup> The defendant was charged with murder and criminal possession of a weapon in the second degree.<sup>18</sup> He was acquitted of the murder charge, but convicted of the weapon possession charge, a class C felony.<sup>19</sup> Because the defendant had a previous misdemeanor conviction for resisting arrest, he was also convicted of criminal possession of a weapon in the third degree—possession of a firearm by one previously convicted of a crime, a class D felony.<sup>20</sup> Without the prior misdemeanor conviction, the defendant would have served a maximum sentence of one year in jail, but was instead sentenced to three and one-half years in prison.<sup>21</sup>

At trial, the defendant moved to set aside his conviction for weapon possession, but the court denied his motion.<sup>22</sup> The Appellate Division, Second Department affirmed the conviction.<sup>23</sup> The defendant appealed to the New York Court of Appeals, arguing that Penal Law section 265 violated his Second Amendment right to bear arms, and was therefore unconstitutional.<sup>24</sup>

### B. Court of Appeals Analysis

The issue before the New York Court of Appeals was whether the statute violated the defendant’s Second Amendment right to keep and bear arms. Pursuant to Penal Law section 265.03, an individual who “possesses any loaded firearm” is guilty of criminal possession of a weapon in the second degree, unless “such possession takes place in such person’s home or place of business.”<sup>25</sup> However, this “home or business exception” does not apply if the person “has been previously convicted of any crime.”<sup>26</sup> The defendant argued that, in taking him out of the exception and elevating his weapon possession conviction to a class C felony based upon a prior misdemeanor con-

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

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Hughes*, 1 N.E.3d at 299.

<sup>21</sup> *Id.*

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

<sup>23</sup> *Id.* (citing *People v. Hughes*, 921 N.Y.S.2d 300 (App. Div. 2d Dep’t 2011)).

<sup>24</sup> *Id.* at 299-300.

<sup>25</sup> *Hughes*, 1 N.E.3d at 300.

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

viction, the statute impermissibly infringed on his Second Amendment right to keep and bear arms.<sup>27</sup> The defendant's prior misdemeanor precluded his invoking the home or business exception to Penal Law section 265.03, which would have otherwise applied.<sup>28</sup> Thus, without a previous conviction, the defendant would only have been found guilty of a class A misdemeanor, rather than a class C felony.<sup>29</sup> The defendant further argued that the court was required to apply strict scrutiny because the challenged statute interfered with a fundamental right, and any state law that infringes on a fundamental right must be strictly scrutinized to determine if it is narrowly tailored to serve "a compelling state interest."<sup>30</sup>

Although the Second Amendment confers on citizens the right to keep and bear arms, this right is not absolute.<sup>31</sup> States are free to pass laws and regulations which promote public safety, as long as those laws do not unconstitutionally burden a citizen's Second Amendment rights.<sup>32</sup> Thus, in order to determine whether Penal Law section 265.03 violated the Second Amendment, the court first had to determine which level of scrutiny applied to Second Amendment challenges in New York.<sup>33</sup> Similar to many other courts, the Court of Appeals adopted an intermediate standard of scrutiny.<sup>34</sup>

Under intermediate scrutiny, the court analyzed whether New York's penal law bears a substantial relationship to achieving an im-

<sup>27</sup> *Id.* at 299-300.

<sup>28</sup> *Id.* at 299.

<sup>29</sup> *Id.*

<sup>30</sup> Brief of Defendant-Appellant, *People v. Hughes*, 921 N.Y.S.2d 300 (App. Div. 2d Dep't 2011) (No. 2009-07374), 2010 WL 9586094, at \*32.

<sup>31</sup> *Heller*, 554 U.S. at 595.

<sup>32</sup> *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>33</sup> *Hughes*, 1 N.E.3d at 302.

<sup>34</sup> *Id.* *See also* *United States v. Booker*, 644 F.3d 458 (1st Cir. 2011) (holding that a "law prohibiting persons who have been convicted of a misdemeanor crime of domestic violence survives Second Amendment scrutiny"); *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010) (holding that "although the Second Amendment protects the individual right to possess firearms for defense of hearth and home . . . a felony conviction disqualifies an individual from asserting that interest"); *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011) (stating that although the Court in *Heller* did not specifically define the limits of Second Amendment rights, it did highlight that the right was not unlimited); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (finding that the focus should be on an individual who was law-abiding when shaping the individual's right to possess firearms for self-defense); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010) (focusing on *Heller* and its belief that the core purpose of the Second Amendment was to allow "law-abiding, responsible citizens to use arms in defense of hearth and home[,]” which would not include those who were convicted felons).

portant governmental objective.<sup>35</sup> The court found that preventing criminal possession of firearms is a very significant objective, and keeping firearms away from people who have previously broken the law is substantially related to that goal.<sup>36</sup> It also noted that the defendant would have been able to obtain a gun permit, but nevertheless chose not to, thereby breaking the law for a second time by possessing an unlicensed firearm.<sup>37</sup> The court emphasized that New York's criminal possession laws prohibit the unlicensed possession of handguns because under Penal Law section 265.20(a)(3), "a person who has a valid, applicable license for his or her handgun commits no crime."<sup>38</sup> Furthermore, a premise-residence license for the home is not difficult to obtain because under Penal Law section 400.00(2)(a), "[s]ubject to some qualifications, a 'householder' is entitled to a license to 'have and possess in his dwelling' a pistol or revolver."<sup>39</sup> Thus, the court concluded that under intermediate scrutiny, Penal Law section 265 did not violate the defendant's right to keep and bear arms.<sup>40</sup>

### III. THE FEDERAL APPROACH TO SECOND AMENDMENT CHALLENGES

The Second Amendment states "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to bear Arms, shall not be infringed."<sup>41</sup> Although the Second Amendment protects instances of lawful weapons possession, not all conduct is protected. In 1938, over a century after the states ratified the Second Amendment, Congress enacted a statute prohibiting convicted felons and misdemeanants who had been convicted of violent offenses from possessing firearms.<sup>42</sup> At that time, the crime was labeled "receipt of a gun that crossed state lines" and possession of a firearm was evidence of "receipt."<sup>43</sup> This statute initially covered only a few

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<sup>35</sup> *Hughes*, 1 N.E.3d at 302.

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

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 301.

<sup>39</sup> *Id.*

<sup>40</sup> *Hughes*, 1 N.E.3d at 302.

<sup>41</sup> U.S. CONST. amend. II.

<sup>42</sup> *Skoien*, 614 F.3d at 640 (citing Federal Firearms Act, c. 850, § 2(f), 52 Stat. 1250, 1251).

<sup>43</sup> *Id.*

violent offenses, but in 1961, Congress enacted a ban on possession by all felons.<sup>44</sup> In 1968, Congress revised the statute, and the term “receipt” was amended to mean “possession.”<sup>45</sup>

The current confusion started with the Supreme Court’s decision in *District of Columbia v. Heller*,<sup>46</sup> and its failure to decide the appropriate standard for reviewing cases challenging gun control laws. In *Heller*, the Supreme Court held that the “Second Amendment confers an individual right to keep and bear arms.”<sup>47</sup> Heller was a law enforcement officer who was permitted to carry a handgun while on duty, but was not allowed to register a handgun to keep in his home.<sup>48</sup> The District of Columbia essentially prohibited the possession of handguns because the statute criminalized carrying an unregistered firearm and prohibited the registration of firearms.<sup>49</sup> The Court found these prohibitions unconstitutional, holding that a complete ban on the possession of usable handguns in an individual’s home violated the Second Amendment.<sup>50</sup> When determining whether the challenged law passed constitutional muster, the Court implied that it was not necessary to decide which level of scrutiny to apply because prohibiting usable firearms in the home for protection would be unconstitutional under any of the three standards of scrutiny.<sup>51</sup> The Court did state that the rational basis test was definitely inapplicable when evaluating Second Amendment challenges to federal laws because under such a low standard, almost all laws would pass this test and “the Second Amendment would be redundant . . . and would have no effect.”<sup>52</sup> However, the Court made it clear that although the Second Amendment protected an individual’s right to keep firearms in the home for self-defense, this right is not unlimited.<sup>53</sup> For exam-

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<sup>44</sup> *Id.* (citing Pub. L. 87-342, 75 Stat. 757 (extending the scope of disqualified persons to include any individual convicted of a “crime punishable by imprisonment for a term exceeding one year,” which is the current definition of a “felony”).

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

<sup>46</sup> 554 U.S. 570 (2008).

<sup>47</sup> *Id.* at 622.

<sup>48</sup> *Id.* at 575.

<sup>49</sup> *Id.* at 574-75.

<sup>50</sup> *Id.* at 635.

<sup>51</sup> *Heller*, 554 U.S. at 628-29.

<sup>52</sup> *Id.* at 628 n.27 (“[O]bviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.”).

<sup>53</sup> *Id.* at 626 (“Like most rights, the right secured by the Second Amendment is not unlim-

ple, the possession of firearms by felons would still be prohibited, just as it has been for many years.<sup>54</sup>

Two years later, in *McDonald v. City of Chicago*,<sup>55</sup> the Supreme Court held that the Second Amendment right to keep and bear arms is fully applicable to the States through the Fourteenth Amendment.<sup>56</sup> In *McDonald*, the City of Chicago argued that its laws banning almost all private citizens from possessing a handgun were constitutional because the Second Amendment rights established by *Heller* did not apply to the States.<sup>57</sup> However, the Court stated that, “a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States.”<sup>58</sup> *McDonald* and *Heller* made it clear that the Second Amendment applies to the States and its citizens. On the other hand, the Court neglected to provide sufficient guidance on how these rights should be interpreted and regulated. Moreover, the Court failed to discuss limitations on the Second Amendment and how far the legislature could go before infringing that right.

#### IV. CONFUSION AMONG THE CIRCUIT COURTS

The Supreme Court’s failure to articulate the appropriate level of scrutiny, if any, to be used when a law is challenged under the Second Amendment left lower courts with little guidance. This lack of guidance is illustrated in inconsistent analyses and outcomes. The lower courts’ justifications for adopting a particular standard are just as inconsistent and, at times, arbitrary based upon a court’s individual preference for a specific policy. All of these inconsistencies demonstrate the enormous amount of discretion afforded to judges when reviewing these challenges.

Some courts have held that laws burdening the Second Amendment should be analyzed under intermediate scrutiny.<sup>59</sup> For

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ited. . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms . . .”).

<sup>54</sup> *Id.*

<sup>55</sup> 561 U.S. 742 (2010).

<sup>56</sup> *Id.* at 750.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 791.

<sup>59</sup> See *Marzarella*, 614 F.3d at 97; 16B AM. JUR. 2D *Constitutional Law* § 861 (2015) (stating that under intermediate scrutiny, a law that infringes on the Second Amendment “must serve important governmental objectives and must be substantially related to the achievement of those objectives”).



example, in *United States v. Marzzarella*,<sup>60</sup> the Third Circuit evaluated a Second Amendment challenge to a federal firearm law.<sup>61</sup> The defendant was indicted for possessing a firearm with an obliterated serial number.<sup>62</sup> The court concluded that depending on the law in question, different standards of scrutiny could be applicable under the Second Amendment.<sup>63</sup> The court further held that a statute prohibiting the possession of firearms with obliterated serial numbers should be reviewed under intermediate scrutiny because “[t]he burden imposed by the law [did] not severely limit the possession of firearms.”<sup>64</sup>

The *Marzzarella* court interpreted *Heller* as implying that a two-pronged approach be used when Second Amendment challenges are made.<sup>65</sup> Under this approach, the court first “ask[s] whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”<sup>66</sup> If not, then the conduct is not protected and the court’s inquiry is complete.<sup>67</sup> However, if the conduct does fall within the Second Amendment’s protections, then the court must apply a form of “means-end scrutiny” to determine the statute’s constitutionality.<sup>68</sup>

In *Marzzarella*, the Third Circuit referred to analogous First

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<sup>60</sup> 614 F.3d 85 (3d Cir. 2010).

<sup>61</sup> *Id.* at 89.

<sup>62</sup> *Id.* at 88; *accord id.* (citing 18 U.S.C. § 922(k)), which provides:

It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer’s or manufacturer’s serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer’s or manufacturer’s serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

*Id.*

<sup>63</sup> *Marzzarella*, 614 F.3d at 97.

<sup>64</sup> *Id.* at 97 (comparing the severe restriction of the District’s handgun ban in *Heller*, which was not just a regulation but a blanket prohibition on the right to protect one’s “hearth and home,” with 18 U.S.C. § 922(k), which was in no way similar to that level of infringement because “it leaves a person free to possess any otherwise lawful firearm he chooses—so long as it bears its original serial number”).

<sup>65</sup> *Id.* at 89.

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

<sup>67</sup> *Id.*

<sup>68</sup> *Marzzarella*, 614 F.3d at 89; *accord Heller*, 670 F.3d at 1257 (“[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify.”).

Amendment cases when formulating its intermediate scrutiny inquiry.<sup>69</sup> In the First Amendment context, intermediate scrutiny is sometimes applied to laws limiting free speech and requires that “the regulation serve ‘an important or substantial’ interest and not ‘burden substantially more speech than is necessary’ to further that interest.”<sup>70</sup> The court found intermediate scrutiny to be appropriate because the challenged law regulated the manner in which Second Amendment rights were carried out, not the actual exercise of the right.<sup>71</sup> The court stated that the appropriate inquiry is whether the challenged law serves a “significant,” “substantial,” or “important” governmental interest and, if so, whether the “fit between the challenged [law] and the asserted objective is reasonable.”<sup>72</sup> The *Marzzarella* court found that the challenged statute survived intermediate scrutiny because the statute’s goal of allowing law enforcement to trace firearms was a substantial interest.<sup>73</sup> Although the court found intermediate scrutiny to be appropriate, it also concluded that the statute was constitutional under strict scrutiny because it was narrowly tailored to the Government’s interest in tracing firearms.<sup>74</sup> Therefore, a statute prohibiting possession of a firearm with obliterated serial numbers comports with that objective.<sup>75</sup>

Some courts went as far as stating that all laws burdening Second Amendment rights should be reviewed under intermediate scrutiny. In *United States v. Skoien*,<sup>76</sup> the Seventh Circuit determined that some categorical prohibitions on gun possession are permissible, and established that “[C]ongress is not limited to case-by-case exclusions of persons who have been shown to be trustworthy with weapons, nor need these limits be established by evidence presented in court.”<sup>77</sup> In *Skoien*, the defendant had two prior convictions for domestic violence and as a result was forbidden to carry firearms under 18 U.S.C. section 922(g)(9).<sup>78</sup> While on probation for one of his domestic violence convictions, the defendant was found in possession

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<sup>69</sup> *Marzzarella*, 614 F.3d at 99.

<sup>70</sup> *Id.* (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994)).

<sup>71</sup> *Id.* at 97.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 98.

<sup>74</sup> *Marzzarella*, 614 F.3d at 99.

<sup>75</sup> *Id.*

<sup>76</sup> 614 F.3d 638 (7th Cir. 2010).

<sup>77</sup> *Id.* at 641.

<sup>78</sup> *Id.* at 639.

of three firearms in violation of the statute.<sup>79</sup> The Seventh Circuit determined that intermediate scrutiny applied to laws restricting firearm possession, deciding that there was no need to delve deeper into the “levels of scrutiny” issue.<sup>80</sup> Under intermediate scrutiny, the court questioned whether the challenged statute was “substantially related to an important governmental objective,” and concluded that the goal of the statute was to prevent “armed mayhem,” which was clearly an important government objective.<sup>81</sup>

The Second Circuit also applied intermediate scrutiny when posed with a Second Amendment challenge. In *Kachalsky v. County of Westchester*,<sup>82</sup> the plaintiffs argued that New York City’s “proper cause” requirement for obtaining a permit to carry a concealed weapon was unconstitutional because it burdened Second Amendment rights set forth by *Heller*.<sup>83</sup> The Second Circuit determined that intermediate scrutiny was the appropriate standard to review the challenge under the often-used interest-balancing test.<sup>84</sup> The conduct clearly came within the scope of the Second Amendment and the court continued its inquiry as to whether it outweighed the governmental objective.<sup>85</sup> The Second Circuit concluded that regulating firearm possession and limiting it to individuals who show they have a special need for self-defense serve the best interests of public safety and are greater than the individual’s need for protection in an unexpected confrontation.<sup>86</sup>

On the other hand, some courts have rejected any type of balance-inquiry analysis. For instance, the Ninth Circuit, in *Peruta v. County of San Diego*,<sup>87</sup> stated that the interest-balancing test being used under intermediate scrutiny was almost identical to the “interest-balancing inquiry” that Justice Breyer proposed and the majority clearly rejected in *Heller*.<sup>88</sup> The statute at issue in *Peruta* prohibited

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

<sup>80</sup> *Id.* 641-42.

<sup>81</sup> *Skoien*, 614 F.3d at 641-42.

<sup>82</sup> 701 F.3d 81 (2d Cir. 2012).

<sup>83</sup> *Id.* at 88.

<sup>84</sup> *Id.* at 96.

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

<sup>86</sup> *Id.* at 100.

<sup>87</sup> 742 F.3d 1144 (9th Cir. 2014).

<sup>88</sup> *Id.* at 1176 (citing *Heller*, 554 U.S. at 689-90 (Breyer, J., dissenting) (suggesting that for Second Amendment challenges, a court should inquire “whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests”); see also *id.* at 634-35 (majority opin-

the open or concealed carrying of firearms in public, whether they were loaded or unloaded, absent “good cause.”<sup>89</sup> The court in *Peruta* rejected both intermediate and strict scrutiny.<sup>90</sup> It found that weighing the government’s interest and objectives against an individual’s interest in his Second Amendment right ignores *Heller*.<sup>91</sup> The *Peruta* court reasoned that in *Heller*, the Supreme Court insisted that by enumerating this right, the government is no longer allowed to decide whether the right is extended to some and not to others because it is a fundamental right.<sup>92</sup> The court in *Peruta* found that when any law destroys a fundamental right then there is no need to apply any standard of scrutiny; the law must simply be “struck down.”<sup>93</sup> It should be noted that the Ninth Circuit focused its Second Amendment analysis on “law-abiding” citizens, thus excluding its application to convicted felons.<sup>94</sup>

Other courts have held that strict scrutiny is the correct standard to apply when analyzing laws that burden a citizen’s Second Amendment rights. For example, in *United States v. Engstrum*,<sup>95</sup> the district court of Utah found strict scrutiny to be the appropriate level when analyzing 18 U.S.C. section 922(g)(9), which made it “unlawful to possess a firearm if the individual ‘has been convicted in any court of a misdemeanor crime of domestic violence.’”<sup>96</sup> After an altercation with his girlfriend, the defendant was found to be in possession of an unlicensed gun in his home.<sup>97</sup> The defendant claimed that his father gave him a gun prior to his death, but was advised that he could not have a gun because of a prior misdemeanor domestic violence conviction.<sup>98</sup> The defendant was found guilty in violation of

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ion) (rejecting a “judge empowering ‘interest-balancing inquiry’ ” as a test for constitutionality of Second Amendment laws)).

<sup>89</sup> *Id.* at 1147.

<sup>90</sup> *Id.* at 1197.

<sup>91</sup> *Id.* at 1177.

<sup>92</sup> *Peruta*, 742 F.3d at 1167 (citing *Heller*, 554 U.S. at 634) (“The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”).

<sup>93</sup> *Id.* (citing *Heller*, 554 U.S. at 628-29) (stating that “a l[a]w that ‘under the pretence of regulating, amounts to a destruction of the right’ would not pass constitutional muster ‘[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights’ ”).

<sup>94</sup> *Id.* at 1150.

<sup>95</sup> 609 F. Supp. 2d 1227 (D. Utah 2009).

<sup>96</sup> *Id.* at 1232.

<sup>97</sup> *Id.* at 1228-29.

<sup>98</sup> *Id.* at 1229.

the statute and appealed his conviction.<sup>99</sup> He argued that section 922(g)(9) impermissibly burdened his Second Amendment rights by punishing him for keeping a firearm in his residence to defend his home and was therefore unconstitutional.<sup>100</sup>

The *Engstrum* court applied strict scrutiny to determine the constitutionality of section 922(g)(9).<sup>101</sup> According to the court, because *Heller* described the right to keep and bear arms as a fundamental right, strict scrutiny should be applied.<sup>102</sup> Under strict scrutiny, the court found that section 922(g)(9) was narrowly tailored and promoted a compelling state interest because presumably, those who are convicted of crimes of domestic violence pose a possible threat of violence to an intimate partner or child.<sup>103</sup> Therefore, the court held that 18 U.S.C. section 922(g)(9) was constitutional under the Second Amendment.<sup>104</sup>

In sum, the majority of circuit courts mentioned above have applied intermediate scrutiny to Second Amendment challenges for varying reasons.

## V. THE NEW YORK STATE APPROACH

The Supreme Court's ambiguity in both *Heller* and *McDonald* with respect to laws limiting and restricting Second Amendment rights not only led to confusion among the circuit courts regarding which level of scrutiny to apply, but also presented challenges for state courts when interpreting state laws and regulations. New York's Civil Rights Law section 4 states: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed."<sup>105</sup> Although New York adopted its own version of the Second Amendment, the right to keep and bear arms in New York is not unlimited, and there have been

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<sup>99</sup> *Id.* at 1232.

<sup>100</sup> *Engstrum*, 609 F. Supp. 2d at 1230.

<sup>101</sup> *Id.* at 1231.

<sup>102</sup> *Id.* (citing *Seegmiller v. LaVerkin City*, 528 F.3d 762, 771 (10th Cir. 2008) ("If a fundamental right were at stake, only heightened scrutiny would have been appropriate."); and *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002) ("[W]e will . . . apply strict scrutiny if the state's classification burdens the exercise of a fundamental right guaranteed by the U.S. Constitution.")).

<sup>103</sup> *Id.* at 1235.

<sup>104</sup> *Id.*

<sup>105</sup> N.Y. CIV. RIGHTS LAW § 4 (McKinney 1990).

challenges to New York statutes that restrict this right.

The majority of New York State courts have applied intermediate scrutiny when faced with a Second Amendment challenge. In *People v. Perkins*,<sup>106</sup> the defendant was involved in an argument, which escalated to the point where the defendant pulled out a handgun and shot at the victim.<sup>107</sup> Although the victim was not injured, the defendant fled the scene.<sup>108</sup> The defendant was convicted of violating Penal Law section 265 for criminal possession of a weapon because he was previously convicted of a felony.<sup>109</sup> The defendant argued that Penal Law section 265 violated the Second Amendment of the United States Constitution.<sup>110</sup> The Appellate Division, Third Department rejected the defendant's argument because the statute did not implement a blanket prohibition on handguns and, therefore, was not a "severe restriction" improperly infringing upon defendant's Second Amendment rights.<sup>111</sup> The court also acknowledged the Supreme Court's decision in *Heller*, stating that although the Second Amendment protects individual rights to keep and bear arms for self-defense within one's home, it "is not absolute and may be limited by reasonable governmental restrictions."<sup>112</sup>

Despite the lack of sufficient guidance, some New York courts engaged in an appropriate analysis when deciding which standard to apply. In *People v. Nivar*,<sup>113</sup> the defendant was arrested for grabbing a woman by her arm, pushing her against a wall and choking her inside an apartment.<sup>114</sup> Approximately one month later, a police officer allegedly observed that the defendant possessed both a black handgun and an air pistol inside his bedroom.<sup>115</sup> The defendant was then charged with criminal possession of a weapon, pursuant to Penal Law section 265.01.<sup>116</sup> The defendant argued that Penal Law section 265.01 was unconstitutional because it prohibited his

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<sup>106</sup> 880 N.Y.S.2d 209 (App. Div. 3d Dep't 2009).

<sup>107</sup> *Id.* at 210.

<sup>108</sup> *Id.*

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

<sup>110</sup> *Id.*; U.S. CONST. amend. II.

<sup>111</sup> *Perkins*, 880 N.Y.S.2d at 210.

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

<sup>113</sup> 915 N.Y.S.2d 801 (Sup. Ct. Bronx County 2011).

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

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

<sup>116</sup> *Id.*

right to possess a firearm in his home for self-defense.<sup>117</sup> He also argued that strict scrutiny should apply to this statute because “the restrictions on gun ownership are overbroad, the state’s licensing scheme is arbitrary and capricious and it prevents indigent citizens from legally possessing firearms.”<sup>118</sup> The defendant contended that under a strict scrutiny analysis, the statute would fail.<sup>119</sup>

The New York Supreme Court determined that intermediate scrutiny should apply to this case because “the majority of courts to have considered this issue” have held intermediate scrutiny “is the most appropriate standard of review to apply to” firearms regulations.<sup>120</sup> The court also found intermediate scrutiny more appropriate than strict scrutiny because the challenged statute does not ban all handguns and, therefore, is “not a ‘severe restriction’ improperly infringing upon defendant’s Second Amendment rights.”<sup>121</sup> The *Nivar* court concluded that Penal Law section 265.01 and the state’s licensing scheme are constitutional because the state has a substantial interest in regulating firearms and restricting their use to those who have the character necessary to be trusted with such a dangerous instrument.<sup>122</sup>

Other New York courts attempted to take the necessary steps to determine the appropriate standard but erred in their analysis. For example, in *People v. Foster*,<sup>123</sup> two firearms were found inside the defendant’s home.<sup>124</sup> The defendant was charged with two counts of criminal possession of a firearm pursuant to Penal Law section 265.01 because he failed to apply for a license to legally possess the firearms.<sup>125</sup> The defendant moved to dismiss the charges contending that Penal Law section 265.01 violated the Second Amendment.<sup>126</sup>

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<sup>117</sup> *Id.* at 803.

<sup>118</sup> *Nivar*, 915 N.Y.S.2d at 803.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 808-09.

<sup>121</sup> *Id.* at 806 (citing *People v. Abdullah*, 870 N.Y.S.2d 886, 23 Misc. 3d 232, 234 (Crim. Ct. Kings County 2008)); accord *Perkins*, 880 N.Y.S.2d 209.

<sup>122</sup> *Nivar*, 915 N.Y.S.2d at 809 (citing *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005)) (“The State has a substantial and legitimate interest . . . in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument” (quoting *In re Pelose*, 384 N.Y.S.2d 499, 499 (App. Div. 2d Dep’t 1976))).

<sup>123</sup> 915 N.Y.S.2d 449; 30 Misc. 3d 596 (Crim. Ct. Kings County 2010).

<sup>124</sup> *Id.* at 597.

<sup>125</sup> *Id.*

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

The defendant also argued that New York's licensing scheme, under Penal Law section 400.00(6) and 38 RCNY chapter 5, was "arbitrary and capricious," and violated the Second Amendment.<sup>127</sup>

The Supreme Court of Bronx County rejected the defendant's argument and found the challenged statutes constitutional because "[u]nlike the statute at issue in *Heller*, Penal Law article 265 does not effect a complete ban on handguns and is, therefore, not a 'severe restriction' improperly infringing upon defendant's Second Amendment rights."<sup>128</sup> However, although the *Heller* Court implied that a complete ban is a severe restriction, it did not implicitly limit it to only complete bans; therefore, a severe restriction can be something less. Nonetheless, the court also found that New York's licensing scheme for regulating firearms was not an improper infringement on Second Amendment rights because New York City's licensing scheme is rational with proper court oversight.<sup>129</sup> Furthermore, the court noted that the defendant did not even try to obtain a license legally, and was therefore, "hard-pressed to challenge the rationality of New York's premise residence license laws."<sup>130</sup>

## VI. DISCUSSION

New York has continuously applied intermediate scrutiny to Second Amendment challenges and has also consistently upheld the challenged statutes. It is unfortunate that the Court of Appeals did not engage in a detailed analysis as to whether Penal Law section 265.03 should have been reviewed under strict scrutiny. By assuming that intermediate scrutiny was the appropriate standard, the Court of Appeals did the lower courts of New York a disservice. Intermediate scrutiny is easy to overcome because it only requires the government to demonstrate that an objective is important and a reasonable or substantial connection exists between the challenged regulation and the government's objective. The court uses its broad discretion to determine whether the connection between the law and governmental objective is reasonable which allows it to apply intermediate scrutiny to policies it agrees with and thus uphold the regulation. On the other hand, application of strict scrutiny imposes a more difficult

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

<sup>128</sup> *Foster*, 30 Misc. 3d at 598-99 (citing *Perkins*, 880 N.Y.S.2d 210).

<sup>129</sup> *Id.* at 600.

<sup>130</sup> *Id.*



burden on the government which must demonstrate that the regulation is narrowly tailored to achieve a compelling governmental interest and therefore uses the least restrictive methods to achieve its goals.

## VII. SOLVING THE PROBLEM

The inconsistent outcomes of the decisions discussed make it clear that the current method used to review Second Amendment challenges is problematic. Solving the problem is less clear; however, using the circuit court decisions as a guide provides several options.

One means of dealing with the issue is to continue using the current two-pronged approach. The court would first determine whether the challenged law imposes a burden on conduct that is within the scope of the Second Amendment. If the first prong were satisfied, then the court would determine whether intermediate or strict scrutiny should apply to the particular statute. This would be determined by the degree of the burden placed on the defendant's Second Amendment right. However, the current method of reviewing gun regulation challenges is far from perfect because it gives an enormous amount of discretion to judges in its application. This method allows judges to determine the strength of the Second Amendment burden and then enable them to apply either intermediate or strict scrutiny.

Another option would be to follow the *Peruta* court's approach. According to *Peruta*, when a court reviews a law burdening a fundamental right, such as a Second Amendment right, the law would automatically be struck down. However, Penal Law section 265.01 would be upheld under this approach because, according to *Peruta*, Second Amendment rights are only extended to law-abiding citizens.

Another method is the *Engstrum* court's approach to Second Amendment challenges. Because of the involvement of a fundamental right, application of strict scrutiny will protect the individual's rights as well as the governmental interest if it is compelling and narrowly tailored to meet its objective. This is the best approach because it removes some of the discretion from the judges reviewing the challenged law. Judges will no longer have to decide whether intermediate scrutiny or strict scrutiny applies to a particular challenge. When faced with a challenge to a fundamental right, the court will

automatically apply strict scrutiny.

### VIII. ANALYZING *PEOPLE V. HUGHES* UNDER STRICT SCRUTINY

The New York Court of Appeals should have reviewed Penal Law section 265.01 under strict scrutiny because the law interferes with a fundamental right set forth by *Heller*. Furthermore, the activity at issue in *People v. Hughes* is related to the core Second Amendment right specified in *Heller* because defendant Hughes possessed a gun within his home to defend himself and his home.

If reviewed under strict scrutiny, the court would have had to determine whether Penal Law section 265.01 was narrowly tailored to meet the government's compelling interest. Presumably the government's interest is protecting the public and ensuring that people who previously violated the law will be arrested and punished more severely for breaking the law again by possessing an unlicensed firearm. Section 265.01 is narrowly tailored to meet the government's compelling objective. Furthermore, as reiterated in *Peruta*, the core fundamental rights of the Second Amendment are vested in law-abiding citizens. Therefore, Penal Law section 265.01 would have been upheld under strict scrutiny.

### IX. CONCLUSION

*People v. Hughes* touched on a major issue that has been debated within the United States for decades—the correct standard to apply when analyzing the scope of the Second Amendment. The Supreme Court has remained silent on many issues dealing with restrictions and regulations relating to the Second Amendment and the proper approach for reviewing a challenge to such a fundamental right under the Constitution. The circuit courts have all agreed that the rights codified by *Heller*, which were made applicable to the states by *McDonald*, are not unlimited.<sup>131</sup> Yet, the right to possess a handgun in one's home for self-defense is arguably the most protected right that an individual has under the Second Amendment.

Here, however, not only did Hughes break the law once by resisting arrest, he continued his unlawful habits by purchasing a firearm without first going through the protocols of obtaining a firearm

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<sup>131</sup> See, e.g., *Marzzarella*, 614 F.3d at 89; *Skoien*, 614 F.3d at 639; *Kachalsky*, 701 F.3d at 95; *Peruta*, 742 F.3d at 1151.

permit, which is required by the Rules of the City of New York. As the court in *Hughes* pointed out, had the defendant applied for a firearm permit to protect his home, his application likely would have been granted because his prior conviction of resisting arrest was relatively minor and did not have a significant impact on his ability to possess a firearm. However, by not abiding by the law yet again the defendant was rightfully convicted of a class C felony for possessing an unlicensed, loaded firearm in his home subsequent to being convicted of a crime. Although the court clearly stated that Hughes likely would have been able to obtain a permit, such permission would be inconsistent with applying Penal Law section 265.03 to him. The purpose behind the law is to keep guns away from those who have committed crimes in the past because the presumption is that they are a continuing danger and the court's notion that Hughes would have been allowed to obtain a permit is inconsistent with the application of Penal Law section 265.03. Allowing Hughes to obtain a permit indicates that his previous offense was not serious enough to consider him a threat, but it is significant enough in its applicability to section 265 that it gave him a harsher sentence. The court is in essence saying that the previous crime is not significant in one instance but it is significant in another.

*Hughes* is the first case in which the New York Court of Appeals has taken a stance on what level of scrutiny to apply when deciding a Second Amendment issue. The implications of this decision are important. It can be very dangerous if courts analyze all laws under intermediate scrutiny because almost any law can be justified as serving a substantial governmental interest. This presents a threat because it is easy for fundamental rights, such as the Second Amendment, to be infringed and eroded by laws and regulations. The current method of reviewing Second Amendment issues gives judges too much discretion when determining whether the challenged law should be upheld and applying strict scrutiny to all of these challenges allows for some consistency and gives judges less room to promote their policy preferences.

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*GETTING STRICT WITH JUDGES*

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