AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Guns

**Silvester v. Beccera, \_\_\_ U.S. \_\_\_** (2018)

 *Jeff Silvester was a lawful gun owner and California resident who wished to purchase additional firearms. Before that transaction could be completed, however, California law required Silvester and any seller to wait ten days. California claimed the ten-day waiting period was necessary to conduct background checks and to give persons thinking of buying firearms for illegal reasons the chance to cool off. Silvester filed a lawsuit against Xavier Beccera, the attorney general of California that claimed the waiting period violated the Second Amendment as incorporated by the due process clause of the Fourteenth Amendment, particularly when applied to persons who already owned firearms. The federal district court ruled that the waiting period was unconstitutional, but that decision was reversed by the Court of Appeals for the Ninth Circuit. Silvester appealed to the Supreme Court of the United States.*

 *The Supreme Court refused to grant a writ of certorari. Justice Thomas dissent from this denial of certorari claimed that the Court of Appeals had misapplied intermediately scrutiny and that the Supreme Court needed to give lower courts more guidance on Second Amendment issues. How does Justice Thomas apply intermediate scrutiny? Would his standards necessarily result in reversing the Ninth’s Circuit’s decision. Justice Thomas correct observes that the justices have not taken a Second Amendment case in over a decade, even though consider differences exist among the circuit on the proper application of the right to bear arms. Why might the justices be avoiding Second Amendment issues? Are these reasons consistent with the best understanding of the judicial function?*

JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I9ee8a97a163711e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)), dissenting from the denial of certiorari.

The Second Amendment protects “the right of the people to keep and bear Arms,” and the Fourteenth Amendment requires the States to respect that right. Because the right to keep and bear arms is enumerated in the Constitution, courts cannot subject laws that burden it to mere rational-basis review.

But the decision below did just that. Purporting to apply intermediate scrutiny, the Court of Appeals upheld California's 10–day waiting period for firearms based solely on its own “common sense.” It did so without requiring California to submit relevant evidence, without addressing petitioners' arguments to the contrary, and without acknowledging the District Court's factual findings. This deferential analysis was indistinguishable from rational-basis review. And it is symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right.

If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene. But as evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this Court. Because I do not believe we should be in the business of choosing which constitutional rights are “*really worth* insisting upon,” I would have granted certiorari in this case.

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The Second Amendment guarantees “a personal right to keep and bear arms for lawful purposes.”  This Court has not definitively resolved the standard for evaluating Second Amendment claims. *District of Columbia v. Heller* (2008) did not need to resolve it because the law there failed “any of the standards of scrutiny that we have applied to enumerated constitutional rights.”  After *Heller,* the Courts of Appeals generally evaluate Second Amendment claims under intermediate scrutiny. Several jurists disagree with this approach, suggesting that courts should instead ask whether the challenged law complies with the text, history, and tradition of the Second Amendment.

Although *Heller* did not definitively resolve the standard for evaluating Second Amendment claims, it rejected two proposed standards. The Court first rejected a “freestanding ‘interest-balancing’ approach,” which would have weighed a law's burdens on Second Amendment rights against the governmental interests it promotes.  “The very enumeration of the [Second Amendment] right,” *Heller* explained, eliminates courts' power “to decide on a case-by-case basis whether the right is *really worth* insisting upon.” The Court also rejected “rational-basis scrutiny.”  *Heller* found it “[o]bviou[s]” that rational-basis review “could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right.”  Otherwise, the Second Amendment “would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”

Rational-basis review is meaningfully different from other standards for evaluating constitutional rights, including the intermediate-scrutiny standard that the Ninth Circuit invoked here. While rational-basis review allows the government to justify a law with “rational speculation unsupported by evidence or empirical data,” intermediate scrutiny requires the government to “demonstrate that the harms it recites are real” beyond “mere speculation or conjecture,”  And while rational-basis review requires only that a law be “rational ... at a class-based level,” intermediate scrutiny requires a “ ‘reasonable fit’ ” between the law's ends and means,

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The Ninth Circuit allowed California to justify its waiting period with mere “rational speculation unsupported by evidence or empirical data,”  The court rejected petitioners' as-applied challenge based solely on its “common sense understanding” that the studies about cooling-off periods apply to subsequent purchasers.  To be sure, a law can satisfy heightened scrutiny based on “[a] long history, a substantial consensus, and simple common sense.”  But not one of those bases was present here. The District Court found that waiting periods do not have a long historical pedigree.  It found no consensus among States that waiting periods are needed and no consensus among experts that they deter gun violence.  And even assuming the effectiveness of cooling-off periods is a question of “common sense,” instead of statistics, the Ninth Circuit's reasoning was the opposite of common sense. Common sense suggests that subsequent purchasers contemplating violence or self-harm would use the gun they already own, instead of taking all the steps to legally buy a new one in California.

The Ninth Circuit's only response to this point was that a subsequent purchaser might want a “larger capacity weapon that will do more damage when fired into a crowd But California presented no evidence to substantiate this concern. According to the District Court, California's expert identified one anecdotal example of a subsequent purchaser who committed an act of gun violence, but then conceded that a waiting period would have done nothing to deter that individual.  And the Ninth Circuit did not even address the District Court's finding that individuals who satisfy the requirements for a concealed-carry license are uniquely unlikely to engage in such behavior. . . .

Even if California had presented more than “speculation or conjecture” to substantiate its concern about high-capacity weapons, the Ninth Circuit did not explain why the 10–day waiting period is “sufficiently tailored to [this] goal,”  And there are many reasons to doubt that it is. . . . The District Court . . . found that California presented no evidence supporting a 10–day waiting period.  For much of its history, California's waiting period was shorter and applied only to handguns.  And the District Court found that a 1–day waiting period is inevitable for most purchasers because their background checks are not autoapproved. . . . Intermediate scrutiny also requires that a law not “burden substantially more [protected activity] than is necessary to further [the government's] interest.”  The Ninth Circuit did not ask this second question—a question that is, of course, irrelevant to a court applying rational-basis review

Lastly, the Ninth Circuit ignored several ordinary principles of appellate review. While rational-basis review “is not subject to courtroom factfinding,” intermediate scrutiny is. And here, the District Court presided over a 3–day trial and made several findings of fact. The Ninth Circuit was supposed to review those findings for clear error. Yet the Ninth Circuit barely mentioned them. And it never explained why it had the “definite and firm conviction” that they were wrong. *United States v. United States Gypsum Co.*  (1948).

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The Ninth Circuit's deviation from ordinary principles of law is unfortunate, though not surprising. Its dismissive treatment of petitioners' challenge is emblematic of a larger trend. As I have previously explained, the lower courts are resisting this Court's decisions in *Heller* and *McDonald v. Chicago* (2010) and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights.

This double standard is apparent from other cases where the Ninth Circuit applies heightened scrutiny. The Ninth Circuit invalidated an Arizona law, for example, partly because it “delayed” women seeking an abortion.  The court found it important there, but not here, that the State “presented no evidence whatsoever that the law furthers [its] interest” and “no evidence that [its alleged danger] exists or has ever [occurred].” . . . In another case, the Ninth Circuit held that laws embracing traditional marriage failed heightened scrutiny because the States presented “no evidence” other than “speculation and conclusory assertions” to support them.  While those laws reflected the wisdom of “thousands of years of human history in every society known to have populated the planet,” they faced a much tougher time in the Ninth Circuit than California's new and unusual waiting period for firearms. In the Ninth Circuit, it seems, rights that have no basis in the Constitution receive greater protection than the Second Amendment, which is enumerated in the text.

Our continued refusal to hear Second Amendment cases only enables this kind of defiance. We have not heard argument in a Second Amendment case for nearly eight years.  And we have not clarified the standard for assessing Second Amendment claims for almost 10. Meanwhile, in this Term alone, we have granted review in at least five cases involving the First Amendment and four cases involving the Fourth Amendment—even though our jurisprudence is much more developed for those rights.

If this case involved one of the Court's more favored rights, I sincerely doubt we would have denied certiorari. I suspect that four Members of this Court would vote to review a 10–day waiting period for abortions, notwithstanding a State's purported interest in creating a “cooling off” period. I also suspect that four Members of this Court would vote to review a 10–day waiting period on the publication of racist speech, notwithstanding a State's purported interest in giving the speaker time to calm down. Similarly, four Members of this Court would vote to review even a 10–*minute*delay of a traffic stop. The Court would take these cases because abortion, speech, and the Fourth Amendment are three of its favored rights. The right to keep and bear arms is apparently this Court's constitutional orphan. And the lower courts seem to have gotten the message.

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