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Staring Down the Sights at McDonald v. City of Chicago: Why the Second Amendment Deserves the Kevlar Protection of Strict Scrutiny

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STARING DOWN THE SIGHTS AT *McDONALD v. CITY OF CHICAGO*: WHY THE SECOND AMENDMENT DESERVES THE KEVLAR PROTECTION OF STRICT SCRUTINY

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INTRODUCTION: A CALL TO ARMS

> [T]oday's decision invites an avalanche of litigation that could mire the federal courts in fine-grained determinations about which state and local regulations comport with the *Heller* right—the precise contours of which are far from pellucid—under a standard of review we have not even established.[2]

In June of 2008, the Supreme Court handed down a landmark decision in *District of Columbia v. Heller*,[3] declaring that a District of Columbia law prohibiting the possession of handguns in a private home for personal protection violated the Second Amendment[4] of the Constitution.[5] Justice Scalia, writing for a 5-4 majority, recognized that the protections provided by the Second Amendment apply to individuals—not just "militias"[6]—and emphatically declared that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home."[7] After four years of litigation, the highest court in the nation provided Dick Heller, the named respondent in the case, and the rest of the District of Columbia with a decision that recognized an individual right to bear arms.[8] What the Court failed to

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[2] McDonald v. City of Chicago, 130 S. Ct. 3020, 3115 (2010) (Stevens, J., dissenting) (arguing that the Court's decision does not bring clarity to future Second Amendment challenges and that the Second Amendment right "remains to be worked out" by the Court).

[3] 554 U.S. 570, 634 (2008).

[4] *See* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

[5] *See Heller*, 554 U.S. at 574, 635-36 (affirming the Court of Appeals's holding that the law was unconstitutional while only addressing the limited issue of the handgun ban and its constitutionality with respect to its application to the District of Columbia).

[6] *See id.* at 579-80 (providing analysis of phrase the "Right of the People" in the Second Amendment, including why it suggests a right that belongs to individuals). After a close examination of the "Right of the People" phrase in the operative clause of the Second Amendment, Justice Scalia stated that the Court starts "with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Id.* at 581. Later in the opinion, Justice Scalia suggested that a close reading of United States v. Miller, 307 U.S. 174 (1939), supports his proposition that the Second Amendment confers an individual right. *See Heller*, 554 U.S. at 621-22 (referencing *Miller* to support the argument that the Second Amendment applies to individuals). Justice Scalia also noted that "militia" should be read in the context of who composed such groups, *i.e.* "the people." *See id.* at 581 (explaining the Second Amendment's application to individuals, not militias).

[7] *Id.* at 636 (arguing that once the Second Amendment is recognized as an individual right, certain policy options naturally are no longer available to lawmakers). Justice Scalia made this statement in response to the suggestion raised through numerous *amici curiae* briefs, which argued that handgun prohibition may be a solution to decreasing handgun violence.

[8] *See id.* at 574 (explaining the Heller's procedural history, which initially began as Parker v. District of Columbia, 311 F. Supp. 2d 103 (D.D.C. 2004), *rev'd*, 478 F.3d 370 (D.C. Cir. 2007), *aff'd*, District of Columbia v. Heller, 554 U.S. 570 (2008)). Dick Heller is a special police officer for the District of Columbia who, along with other claimants, brought suit against the District after he was denied authorization to keep a handgun at his home for personal protection. *Id.* at 575. For an interesting discussion of the complete procedural history of *Heller*, *see* Clark Neily, District of Columbia v. Heller*: The Second Amendment is Back, Baby*, 2008 CATO SUP. CT. REV. 127, 134-41 (2008).

provide, however, was a standard of review for lower courts to use in the adjudication of future Second Amendment challenges.[9]

Just two years and two days after the publication of the *Heller* decision, the Court was given another shot at articulating a standard of review for Second Amendment challenges through its decision in *McDonald v. City of Chicago*.[10] Justice Alito, writing for a plurality of the Court, found the Second Amendment to be incorporated against the states through the Due Process Clause of the Fourteenth Amendment.[11] *McDonald*'s holding that the Second Amendment is a fundamental right and applicable to the states led the Court to find a Chicago ordinance essentially prohibiting the ownership of handguns within city limits to be unconstitutional.[12] With a similar result as to that of *Heller*, the Court's decision provided Otis McDonald and several other petitioners with authorization to possess a handgun within the home.[13] The Court declined for a second time, however, to provide a standard of review for lower courts to apply to future Second Amendment cases.[14]

Mr. Neily served as co-counsel for the respondents in *Heller*. *See id.* at 134 (explaining that Mr. Neily served as co-counsel for plaintiffs in *Parker v. District of Columbia*, and continued his service as co-counsel for respondents in *District of Columbia v. Heller*).

[9] *See Heller*, 554 U.S. at 634 ("Justice Breyer moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions."). Justice Scalia continued to attack Justice Breyer's suggestion of using an "interest-balancing inquiry" to address future Second Amendment challenges. *See id.* (arguing interest-balancing approach is inappropriate for adjudication of fundamental rights); see *infra* notes 36-40 and accompanying text for further explanation of Justice Bryer's "interest-balancing inquiry" proposal.

[10] 130 S. Ct. 3020 (2010). The Supreme Court decided *McDonald*, the primary decision upon which this Note focuses, on June 28, 2010. The Supreme Court decided *Heller* on June 26, 2008.

[11] *McDonald*, 130 S. Ct. at 3050 (plurality opinion). Justice Thomas would have incorporated the Second Amendment through the Fourteenth Amendment's Privileges and Immunities Clause. *See id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment) (arguing that incorporation should be found in Privileges and Immunities Clause and, ultimately, that the *Slaughter House Cases*, which effectively foreclosed the use of Privileges and Immunities Clause as a jurisprudential tool, should be overturned). The debate as to how the Second Amendment should be incorporated against the states will undoubtedly continue to receive much-deserved attention in future scholarly works, and, although relevant to a discussion concerning scrutiny under the Due Process Clause versus the standard of review under the Privileges and Immunities clause, it is not addressed in this Note.

[12] *See id.* at 3026 (majority opinion) (explaining that the Chicago ordinance required the registration of firearms within city limits but prohibited the registration of a majority of handguns). Chicago's decision to enact this prohibition against handguns was designed to "protect its residents 'from the loss of property and injury or death from firearms.'" *Id.* (citing Chicago, Ill., Journal of Proceedings of the City Council, p. 10049 (Mar. 19, 1982)). A report by the Chicago Police Department, however, revealed that the handgun murder rate actually increased while this prohibition was in effect. *See McDonald*, 130 S. Ct. at 3026 n.1 (discussing statistics from the Heartland Institute's *amicus curiae* brief).

[13] *McDonald*, 130 S. Ct. at 3026 (holding that Second Amendment is applicable to the states, and, therefore, ruling that the Chicago ordinance essentially prohibiting handguns is unconstitutional). Otis McDonald, the named petitioner in the case, is a Chicago resident in his late seventies who was the victim of violent threats from local drug dealers in his neighborhood. *Id.* at 3026-27.

[14] *See id.* at 3047-50 (plurality opinion) (discussing *Heller*'s rejection of an "interest-balancing" test, but never articulating a new standard of review).

Also remarkably similar to the *Heller* decision, the dissenting justices seized the opportunity to voice their desire for a more malleable level of scrutiny.[15]

This Note argues that in the wake of *Heller* and *McDonald*—which recognized the Second Amendment as an enumerated fundamental right—lower courts should apply strict scrutiny as the standard of review when adjudicating future Second Amendment challenges.[16] The use of strict scrutiny, however, does not come without some well-defined, but limited, exceptions that are "deeply rooted in this Nation's history and traditions"— essentially, fundamental exceptions to the Second Amendment.[17] Part II of this Note will address the background cases leading to the acknowledgement by the Court of this fundamental right, namely *United States v. Miller*[18] and *District of Columbia v. Heller*, along with *McDonald v. City of Chicago*.[19] In Part III, this Note will explain the three-tiered standard of review model for challenging the constitutionality of laws, along with some of the variations that the Court has crafted through precedent.[20] Part IV argues that the plurality's opinion in *McDonald* is a clear step towards a stricter standard of review.[21] Furthermore, Part IV argues that strict scrutiny is the appropriate standard of review for Second Amendment challenges and addresses the limitations that can be expected to accompany that

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[15] *See id.* at 3115 (Stevens, J., dissenting) ("[T]oday's decision invites an avalanche of litigation that could mire the federal courts in fine-grained determinations about which state and local regulations comport with the *Heller* right . . . under a standard of review we have not even established."). Earlier in his dissent, Justice Stevens, after arguing that a rule limiting the right to bear arms would be easier for the courts to administer, expressed his disdain with the majority for its lack of clarity by stating:

> Having unleashed in *Heller* a tsunami of legal uncertainty, and thus litigation, and now on the cusp of imposing a national rule on the States in this area for the first time in United States history, the Court could at least moderate the confusion, upheaval, and burden on the States by adopting a rule that is clearly and tightly bound in scope.

Id. at 3105.

[16] For a discussion of why strict scrutiny should apply to future Second Amendment challenges, see *infra* notes 134-151 and accompanying text. For a discussion supporting the use of strict scrutiny, see Lindsay Goldberg, Note, District of Columbia v. Heller*: Failing to Establish a Standard for the Future,* 68 MD. L. REV. 889 (2009) (arguing that had the Supreme Court used strict scrutiny to decide *Heller*, it would have reached the same outcome and eliminated much of the confusion that surrounded the judgment).

[17] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (stating that the Due Process Clause protects rights that are "fundamental"). For a discussion of the exceptions to the Second Amendment, see *infra* notes 152-66 and accompanying text.

[18] 307 U.S. 174 (1939).

[19] For a discussion of the background cases and the case-in-chief, with an exploration of the majority and dissenting opinions, see *infra* notes 24-56 and accompanying text.

[20] See *infra* notes 57-114 and accompanying text for a discussion of the typical standards of review, along with their variations and a comparison with First Amendment jurisprudence.

[21] For an analysis of the majority opinion in *Heller* and the plurality opinion in *McDonald*, including why each is a step towards strict scrutiny, see *infra* notes 115-133 and accompanying text.

standard.[22] Finally, Part V discusses the obvious forewarning by Justice Stevens found at the beginning of this Note, namely that lower courts will undoubtedly be bombarded with Second Amendment challenges until the Supreme Court clarifies this point of contention.[23]

I. The Progression of Second Amendment Law: How *McDonald* Landed in the Supreme Court's Crosshairs

A. United States v. Miller

In 1939, the Supreme Court heard *United States v. Miller*, which, nearly seven decades later, became the primary case discussed by both the majority and the dissent in the *Heller*.[24] In *Miller*, two men were charged with the unlawful transportation of a double barrel 12-gauge shotgun less than eighteen inches in length from Oklahoma to Arkansas, a violation of the National Firearms Act.[25] The defendants had not registered the firearm, nor did they possess a "stamp-affixed written order" for the firearm, as was required under then-existing federal law.[26] The defendants countered that the National Firearms Act was unconstitutional because it offended federalism in its attempt to "usurp [state] police power" and was in direct conflict with the Second Amendment.[27]

Justice McReynolds, writing for the Court, determined that possession of a shotgun with a barrel of less than eighteen inches in length was not protected by the Second Amendment.[28] Finding no right to

[22] See *infra* notes 134-166 and accompanying text as to why strict scrutiny is the appropriate level of scrutiny for use in Second Amendment adjudication and the limited restrictions that will accompany strict scrutiny.

[23] For a discussion of the impact to be felt in lower courts due to an unclear standard of review, see *infra* notes 167-169 and accompanying text.

[24] *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008) (discussing the importance of the *Miller* holding). Both the majority and the dissenting opinions invoked *Miller* to explain their positions. Justice Scalia, writing for the majority, argued that *Miller* is to be read as limiting the scope of the Second Amendment as to what weapons are protected. *See id.* at 621–28. Justice Stevens, in contrast, argued that *Miller* protected "the right to keep and bear arms for military purposes . . . not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons." *Id.* at 637-38 (Stevens, J., dissenting). Justice Breyer, in his dissent, concurred with this reading of *Miller*. *See id.* at 681-82 (Breyer, J., dissenting).

[25] *Miller*, 307 U.S. at 175. At that time, the National Firearms Act made it a federal crime to transport a firearm in interstate commerce without appropriate authorization.

[26] 26 U.S.C. § 1132(c)-(d), *amended by* 26 U.S.C. ch. 53 (2006) (requiring both registration and written order to be in compliance with statute).

[27] *See id.* at 176 (summarizing the defendants' contention that the creation of law under the guise of the Interstate Commerce Clause is proxy for the unconstitutional usurpation of police power and, thus, directly offensive to Second Amendment).

[28] *See id.* at 178 ("[W]e cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."). The majority and dissenting justices in *Heller* argued as to whether this language applied to the type of weapon the Second Amendment protected or the class of people who were protected by the Amendment. *Compare Heller*, 554 U.S. at 622-23 ("*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons."), *with id.* at 637-38 (Stevens, J., dissenting) ("The view of the Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes . . . is both the most natural reading of the Amendment's text and the interpretation

possess a shotgun with a barrel of less than eighteen inches, the case was reversed and remanded to the lower court, and further inquiry by the Court into the Second Amendment ceased for nearly seventy years.[29]

B. District of Columbia v. Heller

Almost seven decades after the *Miller* decision, the Court was confronted with the issue of whether the District of Columbia could lawfully prohibit the possession of handguns in a private home in *District of Columbia v. Heller*.[30] The 5-4 majority opinion, which was accompanied by a virulent dissent, held that the D.C. law was unconstitutional because it infringed upon the Second Amendment.[31] Justice Scalia, writing for the Court, read *Miller* as only holding that certain types of weapons, like short-barreled shotguns, were outside the protection of the Second Amendment because they were not weapons "in common use [by the militia] at the time" of the framing of the Second Amendment[32] Through a thorough dissection of the Second Amendment's language and its original understanding, the Court held that the right to keep and bear arms applied to individuals at the federal level.[33] Before closing the opinion, and in what is now at the center of controversy, Justice Scalia acknowledged that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited," which begs the question: What are its limitations?[34]

In his dissent Justice Breyer, addressed the standard of review issue directly.[35] First, he made the argument that the respondent's plea for

most faithful to the history of its adoption."). For an interesting discussion and analysis of Justice McReynold's opinion in *Miller*, see Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 166-171 (1999) (arguing that the *Miller* holding should be read narrowly).

[29] *Miller*, 307 U.S. at 183; *see* Kenneth A. Klukowski, Note, *Armed by Right: The Emerging Jurisprudence of the Second Amendment*, 18 GEO. MASON U. CIV. RTS. L.J. 167, 171-72 (2008) (discussing the doctrine of avoidance as why the Supreme Court may not have addressed Second Amendment issues for nearly seven decades following *Miller*).

[30] 554 U.S. 570 (2008).

[31] *See id.* at 635 (affirming judgment of District of Columbia Court of Appeals that gun-control statutes violated the Second Amendment).

[32] *Id.* at 621-24. Justice Scalia added that "*Miller*'s 'ordinary military equipment' language must be read in tandem with what comes after: '[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.'" *Id.* at 624 (quoting *Miller*, 307 U.S. at 179).

[33] *See Heller*, 554 U.S. at 618-22. In coming to the determination that the Second Amendment is an individual right, Justice Scalia plainly stated that "*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons." *Id.* at 621-22.

[34] *See id.* at 625-27 (acknowledging that even constitutional enumerated rights are not absolute and listing examples of "presumptively lawful regulatory measures," including firearm prohibitions directed towards felons and the mentally ill, laws restricting the carrying of firearms in schools and government buildings, and the placement of conditions on the commercial sale of firearms).

[35] *See id.* at 687 (Breyer, J., dissenting) ("I therefore begin by asking a process-based question: How is a court to determine whether a particular firearm regulation . . . is consistent with the

the adoption of a strict scrutiny standard would be impossible because nearly all gun laws would meet the requirement of a compelling government interest.[36] Next, Justice Breyer argued that the Court should adopt an "interest-balancing inquiry," which would allow lower courts to take into account a "statute's effects upon competing interests and the existence of any clearly superior less restrictive alternative."[37] Despite Justice Breyer's argument that the Court has taken such an approach in other constitutional contexts,[38] the majority rejected Justice Breyer's suggestion, stating "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."[39]

C. *McDonald v. City of Chicago*

On the last day of the 2009-2010 term, the Supreme Court announced its decision in *McDonald v. City of Chicago*,[40] which was the second opinion in just two years concerning Second Amendment protections. Justice Alito, writing for a plurality of the Court, wrote that the Second Amendment is fully incorporated against the States through the Due Process Clause of the Fourteenth Amendment.[41] Although the Court acknowledged the standard of review issue in several portions of the opinion, it did not seize the opportunity to articulate a standard which lower courts could follow.[42]

Second Amendment? What kind of constitutional standard should the court use?").

[36] *See id.* at 687-88 (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)) (arguing that the adoption of a strict scrutiny standard is not feasible because nearly all gun-control regulation will attempt to further a "primary concern of every government—a concern for the safety and indeed lives of its citizens"). For further discussion of the strict scrutiny standard of review, see *infra* notes 69-74 and accompanying text.

[37] *Heller*, 554 U.S. at 689-90. Justice Breyer stated that in the review of gun-control legislation, courts should not presume a law to be unconstitutional by applying strict scrutiny or constitutional by applying a rational-basis standard of review. *Id.* Furthermore, Justice Breyer argued that a more lenient standard of review should be adopted, as opposed to strict scrutiny, because state supreme courts, which have adjudicated far more gun-control cases than the Supreme Court, have adopted a standard that is more deferential to state legislatures. *Id.* at 691.

[38] *See id.* at 690 (stating that such a standard has been used on election law cases, speech cases, and due process cases). To support this assertion, Justice Breyer cited *Burdick v. Takushi*, 504 U.S. 428 (1992) (election regulation); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (commercial speech); and *Mathews v. Eldridge*, 424 U.S. 319 (1976) (procedural due process).

[39] *See Heller*, 554 U.S. at 634 (rejecting Justice Breyer's proposal Court to adopt an "interest-balancing inquiry" and suggesting a stricter review standard in its statement that "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon").

[40] *McDonald v. Chicago*, 130 S. Ct. 3020 (2010).

[41] *See id.* at 3050 (plurality opinion) ("We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."). Justice Thomas believed the Second Amendment is applicable to the States through the Fourteenth Amendment's Privileges and Immunities Clause. *See id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

[42] *See id.* at 3046-47, 3050 (plurality opinion) (addressing arguments by the respondents and dissenting justices that incorporation of the Second Amendment will limit the States' ability to

Justice Alito also addressed an argument by the respondents that incorporation of the Second Amendment would limit state and local experimentation with gun control laws.[43] In a response that spoke at least indirectly to the standard of review, Justice Alito wrote that the "[Second Amendment] is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values."[44] Only three paragraphs later, Justice Alito reassured the respondents of the proposition that was stated in *Heller*: certain firearms regulations will be upheld, and "incorporation does not imperil every law regulating firearms."[45] The plurality was sure to point out, however, that it definitively rejected, for a second time, the "interest-balancing" suggestion proposed in *Heller*.[46]

Justice Stevens, in his dissent, expressed his dissatisfaction with the plurality for failing, again, to identify a standard of review.[47] Because of the plurality's refusal to identify a level of scrutiny, Justice Stevens opined that "[t]he practical significance of the proposition that 'the Second Amendment right is fully applicable to the States' remains to be worked out by this Court over many, many years."[48] Voicing his support for a narrow reading of Second Amendment protections, Justice Stevens persisted that "the Court could at least moderate the confusion, upheaval, and burden on the States by adopting a rule that is clearly and tightly bound in scope."[49] Despite Justice Stevens' chiding, the plu-

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experiment with gun control). Justice Alito reiterates that the Court rejected the argument that the Second Amendment should be addressed through judicial balancing. *See id*. at 3047. Though never announcing a standard of review, like Justice Scalia in *Heller*, Justice Alito was clear that the Second Amendment applies with equal force to the states as it does to the federal government. *See id*. at 3050.

[43] *See id.* at 3045-46 (addressing the municipal respondents' argument that Second Amendment incorporation will stifle local governments from responding to local problems through gun control). After making this argument, the plurality noted that the respondents "urge[d] [the Court] to allow state and local governments to enact any gun control law that they deem to be reasonable, including a complete ban on the possession of handguns in the home for self-defense." *Id.* at 3046.

[44] *Id.* at 3046.

[45] *Id.* at 3047; *see* District of Columbia v. Heller 554 U.S. 570, 625-27 (2008) (suggesting lawful gun regulations that would survive the Second Amendment holding just announced by the Court).

[46] *See McDonald*, 130 S. Ct. at 3047 (plurality opinion) ("In *Heller*, however, we expressly rejected the argument that the scope of the scope of the Second Amendment should be determined by judicial interest balancing . . . .").

[47] *See id.* at 3115 (Stevens, J., dissenting) (stating that the plurality's opinion did not "bring any clarity to this enormously complex area of law"). The quotation at the beginning of this Note also reflects Justice Stevens's argument that the plurality created more confusion than clarity for lower courts. See *supra* note 2 and accompanying text (arguing that Court's recent Second Amendment jurisprudence invites future litigation due to lack of clarity through Court's precedent).

[48] *McDonald*, 130 S. Ct. at 3115.

[49] *Id.* at 3105. To support this criticism, Justice Stevens cited *amici* briefs providing statistical data as to how many Second Amendment challenges were filed in the months following the *Heller* decision. *See id.* at 3105 n.30 (finding that over 190 Second Amendment challenges were filed within 18 months of *Heller* decision).

rality was not willing, or not interested, in taking the opinion down the road of defining the scope of the right and standard of review.[50]

Justice Breyer, also dissenting, picked up where he left off in *Heller*, and again, he needled the plurality for failing to provide clarity to the standard of review issue.[51] Justice Breyer suggested the Court would have been better off had it adopted an approach similar to that of states who recognize a right to bear arms, an approach very similar to interest-balancing.[52] In Justice Breyer's view, the plurality "haphazardly created a few simple rules . . . that sound sensible without being able to explain why or how Chicago's handgun ban is different."[53] Finally, in his review of Twentieth and Twenty-first Century Second Amendment jurisprudence practiced by the states, Justice Breyer argued that state courts only protected an infringement upon an individual right to bear arms from unreasonable gun regulation.[54] The state courts determined reasonableness, Justice Breyer noted, by adopting a "highly deferential attitude towards legislative determinations," and in this respect, Justice Breyer added, the Court should follow the states' example.[55]

II. From Iron Sights to Red Dot Scopes: The Range of Scrutiny-from Deferential to Exacting-for Constitutional Rights

Throughout the course of the Supreme Court's jurisprudence, it has created different tests, or "levels of scrutiny," to apply to laws that may restrict an individual right.[56] The most arduous level of scrutiny for the government to overcome, "strict scrutiny," is often employed where the government is infringing upon a fundamental right.[57] On the oppo-

[50] *See id.* at 3048 (plurality opinion) (rejecting the argument that "the scope of the Second Amendment right is defined by the immediate threat that led to the inclusion of that right in the Bill of Rights"). The opinion, however, did not define the scope of the right.

[51] *See id.* at 3126-27 (Breyer, J., dissenting) (posing numerous questions that lower courts will now have to answer, without a standard by which to follow, to ascertain what regulations to allow and what to strike down as being offensive to the Second Amendment).

[52] *See id.* at 3127 (noting the majority's rejection of the "interest balancing" approach in *Heller*).

[53] *Id.* at 3127 (Breyer, J., dissenting) (criticizing the Court's holding because it does not explain why some rules are preferable, and presumptively lawful, than others).

[54] *Id.* at 3135 (arguing that state regulations, if deemed reasonable, have been allowed).

[55] *Id.* (supporting a deferential approach to state legislatures in the area of gun-control regulation). While Justice Breyer acknowledged that "state courts are less willing to permit total gun prohibitions," in support of his position towards rational basis review he stated he was "aware of no instances in the past [fifty] years in which a state court has struck down as unconstitutional a law banning a particular class of firearms." *Id.* at 3136 (internal citation omitted) (citing Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1458 (2009)).

[56] *See* Erwin Chemerinsky, Constitutional Law: Principles and Policies 539 (3d ed. 2006). Professor Chemerinsky explains that where a fundamental right is involved, the government is required to meet a heavy burden to surpass the level of scrutiny. *Id.* On the other hand, where a fundamental right is not involved, the Court has often been deferential to the legislature, and the burden is somewhat low. *See id.* (explaining burden-shifting between fundamental and non-fundamental rights).

[57] *See id.* at 542 ("Strict scrutiny is used when the Court evaluates discrimination based on race or national origin, generally for discrimination against aliens . . . and for interference with

site side of the spectrum is the "rational basis test," which allows the government to restrict an individual right as long as the law is "rationally related to a legitimate government purpose."[58] Between those two levels of scrutiny lie myriad tests used by the Court to determine whether a law unconstitutionally limits an individual right.[59]

A. Three-Tiered Standard of Review Model

1. Rational Basis Review

Under a rational basis standard of review, the party challenging the constitutionality of the law has the burden of proving that the law is not "rationally related to a legitimate government purpose."[60] Because the presumption is on the side of a law being constitutionally permissible, the rational basis standard is extremely deferential to the government.[61] The Court most often employs rational basis review when a party challenges a law that does not involve a suspect class under the Equal Protection Clause or when the law is regulating commercial activity.[62] Despite this presumption of constitutionality, the Court has declared that the rational basis standard "is not a toothless one,"[63] and it has, on occasion, struck down a law as unconstitutional for not being rationally related to a legitimate government purpose.[64]

fundamental rights . . . .").

[58] *Id.* at 540 (explaining standard government needs to meet to defeat rational basis review). Professor Chemerinsky notes that the government's objective need only be something that is "legitimate for the government to pursue."

[59] *See id.* (explaining, for example, concept of "intermediate scrutiny," which has been applied to gender-based rights challenges); *see also* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (implementing the "undue burden test" for determining whether restrictions on abortion are lawful); Ivan E. Bodensteiner, *Scope of the Second Amendment Right—Post-*Heller *Standard of Review*, 41 U. Tol. L. Rev. 43, 45 (2009) (explaining "heightened rational basis scrutiny").

[60] Chemerinsky, *supra* note 57 at 540; *see also, e.g.*, United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 184 (1980) ("When faced with a challenge to a legislative classification under the rational basis test, the court should ask, first, what the purposes of the statute are, and, second, whether the classification is rationally related to achievement of those purposes."); Pennell v. City of San Jose, 485 U.S. 1, 14 (1988) (quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976)) (stating that a city rent control ordinance did not violate the Equal Protection Clause because the appellants only needed to show that the classification scheme at issue in the ordinance was "rationally related to a legitimate state interest").

[61] *See* Vance v. Bradley, 440 U.S. 93, 97 (1979) (refusing to overturn a state statute unless the Court could "only conclude that the legislature's actions were irrational")

[62] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985) ("We conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation.").

[63] *See Fritz*, 449 U.S. at 184 (citing Matthews v. Lucas, 427 U.S. 495, 510 (1976)) (noting that not every law that may be reviewed under rational basis standard will automatically be deemed constitutional). Justice Stevens, delivering the opinion, explained that the Court will "not be satisfied by flimsy or implausible justifications . . . ." *Id.*

[64] *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (holding that a state constitutional amendment prohibiting the creation of a law to outlaw discrimination against homosexuals is unconstitutional, even though the law was not directed towards a protected class, and thus should fall under rational basis scrutiny); Zobel v. Williams, 457 U.S. 55 (1982) (noting that Alaska's mineral dividend distribution laws did not meet the requirements for constitutionality under the rational

2. Intermediate Scrutiny

The middle ground between rational basis review and strict scrutiny is the appropriately-named "intermediate scrutiny" standard.[65] Intermediate scrutiny is used in cases involving discrimination of certain classifications of people or speech, such as gender discrimination, discrimination against certain classes of children, and regulation of commercial speech or speech in public forums.[66] For a law or regulation to pass intermediate scrutiny, the challenged law must be "substantially related to an important government purpose."[67] Unlike rational basis review, the burden is shifted to the government to prove that there is a *substantial* (as opposed to rational) relationship between the proposed law and the *important* government objective.[68]

3. Strict Scrutiny

The most demanding level of scrutiny that the Court employs is "strict scrutiny."[69] When evaluating a law under the strict scrutiny standard, the Court demands that the law be "narrowly tailored to

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basis standard); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (holding that because a Food Stamp Act amendment was not rationally related to the stated purposes of Act, or to a legitimate government interest of limiting fraud, it was unconstitutional).

[65] *See generally* Chemerinsky, *supra* note 56, at 540 (describing middle tier of scrutiny, between rational basis and strict scrutiny, as "intermediate scrutiny").

[66] *See, e.g.*, Lorrilard Tobacco v. Reilly, 533 U.S. 525, 554-55 (2001) (rejecting a request to use the strict scrutiny standard in adjudication of restrictions on commercial speech, and hence resorting to intermediate scrutiny analysis); United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)) (internal quotations omitted) (noting that Virginia, in arguing for its exclusion of women from a state-sponsored military college, must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (holding that a city's regulation of sound amplification was permissible under a variant of the intermediate scrutiny standard); Lehr v. Robertson, 463 U.S. 248, 265-66 (1983) (holding that with respect to adoption laws, a state may not "subject men and women to disparate treatment when there is no substantial relationship between the disparity and an important state purpose"); Plyler v. Doe, 457 U.S. 202 (1982) (holding that intermediate scrutiny applied to a Texas statute prohibiting undocumented children from attending public schools).

[67] *See Lehr*, 463 U.S. at 266 (stating that in order for the state adoption law to be upheld, the Court must find a "substantial relationship" between the law's effects and the "important state purpose" that the law is intended to serve); *see also* Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

[68] *See Loving*, 518 U.S. at 533 ("The burden of justification is demanding and rests entirely on the State."). Although *Loving* was specifically a gender discrimination case, prior and subsequent case law has demonstrated that the burden of justification when intermediate scrutiny is used rests entirely on the government. *See* Chemerinsky, *supra* note 57, at 541 nn. 12-13 and accompanying text (explaining the burden for intermediate scrutiny).

[69] *See* Chemerinsky, *supra* note 57, at 541 ("[T]he most intensive type of judicial review is strict scrutiny.").

achieve a compelling government interest."[70] The law must be crafted in such a manner that is the least restrictive way in which the government may achieve its overall purpose,[71] and the government always bears the burden of proof.[72] Strict scrutiny is employed when a law discriminates based on race or national origin or infringes upon a fundamental right.[73] As one scholar noted nearly forty years ago, due to the incredibly strong presumption of unconstitutionality that accompanies the strict scrutiny standard, it is "strict in theory, fatal in fact."[74]

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[70] Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 U.S. 2971, 2984 n. 11 (2010) (quoting Pleasant Grove City v. Summum, 129 U.S. 1125, 1132 (2009) (stating the standard required to overcome strict scrutiny, applied here to a First Amendment challenge); *see also* Citizens United v. Fed. Election Comm'n, 130 U.S. 876, 898 (2010) (quoting Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 464 (2007) ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'").

[71] *See* Randall v. Sorrell, 548 U.S. 230, 261 (2006) (holding that Vermont Act limiting political speech was unconstitutional because, *inter alia*, it was not narrowly tailored); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986), (discussing the term "narrowly tailored"). Justice Powell, writing for a plurality, expounded on the meaning of "narrowly tailored" in a footnote by stating:

> The term "narrowly tailored," so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used. Or, as Professor Ely has noted, the classification at issue must "fit" with greater precision than any alternative means. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U.CHI.L.REV. 723, 727 n.26 (1974). "[Courts] should give particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense." Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM.L.REV. 559, 578-579 (1975).

Id.

[72] *See Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("To satisfy strict scrutiny, the State must demonstrate that its [legislation] is narrowly tailored to achieve a compelling government interest."); *see also Wisconsin Right to Life, Inc.*, 551 U.S. at 450-51 (noting that the government, not the challenging party, has the burden of demonstrating that the law is narrowly tailored and serves a compelling government interest because strict scrutiny is applied).

[73] *See* CHEMERINSKY, *supra* note 57, at 542 (identifying such fundamental rights as the right to vote, the right to travel, the right to freedom of speech, and the right to privacy, which would all receive strict scrutiny); *see also* Klukowski, *supra* note 30, at 185 ("Laws burdening fundamental rights are generally subject to strict scrutiny, and only upheld if narrowly tailored to achieve a compelling interest, often resulting in the law being struck down."). Penning the article two years before the *McDonald* decision, Klukowski immediately followed this statement by proposing that many gun control laws would be struck down if the Supreme Court held that the Second Amendment entailed such a right. *See id.* (proposing that fundamental rights should receive strict scrutiny review).

[74] Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (discussing, in the context of the Warren Courts equal protection decisions, the high presumption of unconstitutionality when strict scrutiny is applied). In contrast to the incredibly difficult standard the government had to overcome under the "new" equal protection, where "strict scrutiny" was applied, Professor Gunther noted that when the Warren Court employed the "old" equal protection standard of scrutiny, what resulted was "minimal scrutiny in theory and virtually none in fact." *Id.*

B. Variations and Suggestions

1. Undue Burden Test

Although the Court usually chooses one of the three tests from the aforementioned model in the adjudication of individual rights, the Court and legal scholars have recognized or suggested some variations on these standards.[75] One good example is the "undue burden test."[76] In *Roe v. Wade*,[77] the Court recognized a woman's right to an abortion,[78] and determined that strict scrutiny should be applied in determining whether a law infringed upon that right.[79] Nearly twenty years later, in *Planned Parenthood v. Casey*,[80] the Court relaxed its standard of review and held that the government could regulate abortion up to the point of viability, as long as the regulations did not place an "undue burden" on the mother.[81] In disposing with strict scrutiny, the joint opinion in *Casey* held that "the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."[82] The Court in *Casey* did not use any of the tools it previously had crafted when deciding the constitutionality of a law,

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[75] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (creating the undue burden test to determine whether state regulations on abortion are constitutional); Bodensteiner, *supra* note 60 (arguing that the Supreme Court should use "heightened rational basis review" when adjudicating future Second Amendment challenges); Jason Racine, Note, *What the Hell[er]? The Fine Print Standard of Review Under* Heller, 29 N. Ill. U. L. Rev. 605, 608 (2009) (proposing a "three-step test, including categorical rules, a locality scheme, and burden-based/burden-neutral factors").

[76] *See Casey*, 505 U.S. at 876-77 (discussing Court's development of "undue burden" test as a better standard, as opposed to strict scrutiny, for abortion law adjudication because it acknowledges a state's *substantial* interest in potential life).

[77] 410 U.S. 113 (1973)

[78] *See id.* at 154.

[79] *See id.* at 155 (determining that the appropriate level of scrutiny for future abortion law challenges was strict scrutiny). The Court held that the reason strict scrutiny was appropriate was because "fundamental rights were involved, . . . regulation limiting these rights may be justified only by a compelling state interest and . . . legislative enactments must be narrowly drawn to express only legitimate state interest at stake." *Id.* For an interesting discussion of why the *Heller* decision is in many ways like the decision in *Roe*, see J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253, 254 (2009) (arguing that the decisions have two major points in common: the "rejection of neutral principles that counseled restraint and deference to others regardless of the issues involved," and each was an "act of judicial aggrandizement"). In Judge Wilkinson's opinion, both opinions had four major flaws: "an absence of a commitment to textualism; a willingness to embark on a complex endeavor that will require fine-tuning over many years of litigation; a failure to respect legislative judgments; and a rejection of the principles of federalism." *Id.*

[80] 505 U.S. 833 (1992).

[81] *Id.* at 873-79 (replacing the strict scrutiny standard of review for state law abortion challenges with the undue burden test).

[82] *Id.* at 876 (discussing the appropriateness of the undue burden test and by what standard states can regulate abortions). In further explaining how a state may act with respect to legislating in light of the undue burden test, the joint opinion explained, "[T]he State may take measures [to promote the interest in potential life] . . . [but] [t]hese measures must not be an undue burden on the right." *Id.* at 878.

but instead it created a new test by which the Court could weigh State interests against individual rights.[83]

2. Heightened Rational Basis

Some scholars and justices have suggested that there are standards of review that exist outside of the traditional three-tiered model and standards previously announced by the Court.[84] In the aftermath of *Heller*, one scholar proffered that Second Amendment challenges should be decided under "heightened rational basis scrutiny."[85] Because this suggested standard of review would improve the legislative process by requiring the government to "establish an evidentiary record . . . showing an actual connection between its goals and the restrictions imposed on guns."[86] This suggested standard would give "substantial deference to the legislative assessment of the fit between goals and restrictions."[87] Essentially, the suggestion is for lower courts to apply a standard very similar to Justice Breyer's "interest-balancing" approach, with the added requirement that a legislative record supporting the government's objectives be established, from which courts could evaluate the lawmakers' schemes.[88]

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[83] *See* Chemerinsky, *supra* note 57, at 829-30 (discussing why undue burden test is problematic, notably because it is extremely unclear as to what exactly constitutes an undue burden.).

[84] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring) ("I believe the facts of these cases demonstrate the wisdom of rejecting a rigidified approach to equal protection analysis, and of employing an approach that allows for varying levels of scrutiny . . . ."); Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) (stating that the Equal Protection Clause "does not direct the courts to apply one standard of review in some cases and a different standard in other cases"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting) (advocating for variable standards of review). *See also* Chemerinsky, *supra* note 57, at 543 (acknowledging criticism that the Court should adopt a "sliding scale" approach to standard of review).

[85] *See* Bodensteiner, *supra* note 60, at 45 (proposing "heightened rational basis scrutiny" as appropriate standard of review for Second Amendment challenges). .

[86] *Id.* at 68. According to Professor Bodensteiner, the proposed standard of review is: 1) not presumption-based, 2) accounts for the government's interest in public safety, 3) accounts for the right of self-defense discovered in *Heller*, 4) establishes the requirement of an evidentiary record, and 5) is deferential to the legislature in its balancing of goals and restrictions. *See id.*

[87] *See id.* at 68 (noting that when legislative assessment is based on empirical data, which is reflected in legislative record, courts should be deferential to the legislature). *But see* United States v. Morrison, 529 U.S. 598, 614 (2000) (noting that just because a legislative record reflects congressional findings, legislation is not necessarily constitutional). In *Morrison*, Congress passed the Violence Against Women Act based on the finding that gender–motivated violence seriously impacted interstate commerce. *Id.* at 614. The Court found, however, that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of the Commerce Clause legislation." *Id.* The Court went on to quote from its decision in *United States v. Lopez* that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* (quoting United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)).

[88] *See* Bodensteiner, *supra* note 60, at 69 ("In most, if not all, Second Amendment cases, this approach will lead to the same result as Justice Breyer's interest-balancing inquiry and will allow government considerable room to impose gun controls.").

C. Scrutiny Applied to Enumerated Rights

1. *Carolene Products* and Footnote Four

In 1938, the Supreme Court advanced the idea that different levels of scrutiny would apply to particular classes of constitutional challenges.[89] In *United States v. Carolene Products*,[90] the Filled Milk Act of 1923 was challenged as unconstitutional on the basis that Congress exceeded its power under the Commerce Clause.[91] In holding that the Filled Milk Act met the standards imposed by rational basis review— the standard under which Commerce Clause challenges are tested—Justice Stone inserted a footnote that would become the basis for the present tiered scrutiny structure.[92] In famous footnote four, Justice Stone wrote that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[93] Although the term "strict scrutiny" is not specifically used in the footnote, the Supreme Court has often turned to footnote four to suggest that enumerated rights are to be adjudicated under the strict scrutiny standard of review.[94]

2. The First Amendment Comparison

Some scholars and jurists have argued for First Amendment[95] jurisprudence to serve as a guidepost for anticipated Second Amendment

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[89] *See* Chemerinsky, *supra* note 57, at 539 (discussing the impact of Footnote Four on standard of review).

[90] 304 U.S. 144 (1938).

[91] *See id.* at 145-46. The Filled Milk Act prohibited the interstate shipment of skimmed milk mixed with "any fat or oil other than milk, so as to resemble milk or cream." *See id.* at 146 n.1 (explaining that Congress enacted the law because filled milk was deemed harmful to human health).

[92] *See id.* at 152 ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

[93] *Id.* at 152 n.4.

[94] *See* Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. Tex. L. Rev. 163, 203 (2004) (arguing that Justice Stone further clarified his position in footnote four by requiring strict scrutiny when fundamental rights were affected). *But see*, Aviam Soifer, *On Being Overly Discrete and Insular, Involuntary Groups and the Anglo-American Judicial Tradition*, 48 Wash. & Lee L. Rev. 381, 390 n.33 (1991) ("[T]he Court neither immediately nor fully adopted the activist, strict scrutiny approach suggested by footnote four."). Even so, the Court has since taken the approach that fundamental enumerated rights are to receive strict scrutiny. *See* John W. Whittlesey, Comment, *Second-Amendment Scrutiny: Firearm Enthusiasts May Win the Battle but Ultimately Lose the War in* District of Columbia v. Heller, 58 Case W. Res. L. Rev. 1423, 1446 (citing instances where the Supreme Court has stated that strict scrutiny should apply to fundamental rights).

[95] *See* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

challenges.[96] Under current First Amendment jurisprudence, the government may restrict that right in certain situations because of the content of the particular speech and its impact on other government interests.[97] The theory also posits that these limited restrictions are analogous to restrictions that the government should be allowed to impose on the Second Amendment right to keep and bear arms because the government's interests are equally as important.[98]

The Supreme Court's opinions in *Heller* and *McDonald*, both of which recognized that the Second Amendment is not an *absolute* right, are in many ways similar to First Amendment precedent, which has limited the enumerated right of free speech.[99] For example, in 1961, the Supreme Court explicitly rejected the view that "freedom of speech and association, as protected by the First and Fourteenth Amendments, are 'absolutes.'"[100] In *Konigsberg v. State Bar of California*,[101] the California Committee of Bar Examiners refused to certify Raphael Konigsberg's application for admittance to the state bar on the grounds that he did not

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[96] *See, e.g.*, United States v. Marzzarella, 614 F.3d 85, 89 n.4 (3d Cir. 2010) ("Because *Heller* is the first Supreme Court case addressing the scope of the individual right to bear arms, we look to other constitutional areas for guidance in evaluating Second Amendment challenges. We think the First Amendment is the natural choice."); *see also, e.g.*, Jason T. Anderson, Note, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in* District of Columbia v. Heller, 82 S. Cal L. Rev. 547 (2009) (suggesting that Second Amendment challenges should receive the same treatment as current First Amendment challenges); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 Colum. L. Rev. 1278 (2009) (stating that the Court should treat Second Amendment rights as it treats the right to own and view obscenity under the First Amendment); Eugene Volokh, *The First and Second Amendments*, 109 Colum. L. Rev. 97 (2009) (noting that First and Second Amendment comparisons have been made for over 200 years). For an interesting discussion on how law professors use the Second Amendment to aide in teaching students about the complexities of the First Amendment, see Eugene Volokh *et al.*, *The Second Amendment as Teaching Tool in Constitutional Law Classes*, 48 J. Legal Educ. 591, 595 (1998) (discussing the introduction of the Second Amendment in a First Amendment class to urge students to think more critically about rights).

[97] *See* Chemerinsky, *supra* note 57, at 925 (discussing the Supreme Court's role in determining what speech is worthy of protection, and when government may lawfully impose restrictions).

[98] *See* Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 Notre Dame L. Rev. 131, 134-35 (2008) (arguing that in order to determine which standard of review is appropriate, the exact interests the Second Amendment protects must first be determined). Professor Green makes the point that in First Amendment challenges involving free speech, the level of scrutiny chosen (either strict or intermediate) depends upon the identified interest at issue. *Id.* at 134.

[99] *See Heller*, 554 U.S. at 624 ("Like most rights, the right secured by the Second Amendment is not unlimited."); *see also McDonald*, 130 S. Ct. at 3047 (quoting *Heller*, 554 U.S. at 624) ("[T]he right to keep and bear arms is not a right to 'keep and carry any weapon whatsoever and for whatever purpose.'").

[100] *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961) (internal citations omitted) (holding that speech is not absolutely protected in every circumstance). Justice Harlan, writing for the Court in a 5-4 decision, stated that the Court has long recognized that speech can be limited in two circumstances: when "certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection," or when "general regulatory statutes, not intending to control the content of speech but incidentally limiting its unfettered exercise . . . have been found justified by subordinating valid government interests . . .". *Id.* at 50.

[101] 366 U.S. 36 (1961).

meet that statutory requirements of "good moral character" and "non-advocacy of violent overthrow [of the federal or state government]."[102] The Committee came to this conclusion after Mr. Konigsberg refused to answer questions about his alleged association with the Communist party.[103] Mr. Konigsberg believed such inquiries violated his First Amendment protections.[104] The Supreme Court, however, did not agree, and it held that California's interest in "having lawyers who are devoted to the law in its broadest sense . . . [is] clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented."[105]

The Supreme Court, through a litany of First Amendment cases, has drawn a line between content-based speech and content-neutral speech, permitting greater regulation of the latter.[106] In *Turner Broadcasting System v. Federal Communications Commission*,[107] the Supreme Court acknowledged that content-neutral speech is subject to a more governmentally deferential standard of review.[108] In *Turner Broadcasting System*, several cable television providers claimed that a federal law requiring cable companies to reserve a portion of their channels for local broadcasting networks infringed upon the First Amendment because the government was attempting to regulate content-based speech.[109] The Supreme Court disagreed.[110] Writing for the Court, Justice Kennedy held that the speech the government sought to regulate was content-neutral and, therefore, it was only subject to intermediate scrutiny.[111] Because laws that "confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral," the Court found the federal regulation to fit comfortably within this definition and, accordingly, was lawful.[112]

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[102] *Id.* at 37-38.

[103] *Id.* at 38.

[104] *See id.* at 38 n.1 (noting that Mr. Konigsberg's refusal was based "on the grounds that such inquiries were beyond the purview of the Committee's authority, and infringed rights of free thought, association, and expression assured him under the State and Federal Constitutions").

[105] *Id.* at 52.

[106] *See generally* Chemerinsky, *supra* note 57, at 932-33 (discussing the Supreme Court's distinction between content-based and content-neutral speech adjudication and varying levels of government regulation for each).

[107] 512 U.S. 622 (1994).

[108] *See id.* at 642 ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . ."). In the preceding sentences, the Supreme Court noted that regulations that "suppress[ed], disadvantage[ed], or impos[ed] deferential burdens upon speech because of its content" were subject to "the most exacting scrutiny." *Id.*

[109] *See id.* at 634-35.

[110] *See id.* at 652 ("In short, the must-carry provisions are not designed to favor or disadvantage speech of any particular content.").

[111] *See id.* at 661 ("We agree with the District Court that the appropriate standard by which to evaluate the constitutionality is the intermediate level of scrutiny to content-neutral restrictions that impose an incidental burden on speech.").

[112] *Id.* at 643.

Many scholars draw a familiar comparison between the First and Second Amendments, and argue that the two should be treated alike in adjudicatory matters. One suggestion is that in similar fashion to the First Amendment, more governmentally deferential levels of scrutiny should apply to the use of *particular weapons* or to the use of a weapon by a *particular class* of individuals--for example, individuals not part of a "well-regulated militia."[113] Another suggestion is that the Court could carve out time, place, and manner tests for gun control regulation, similar to those applied to "adult business speech."[114] One scholar has gone so far as to suggest that the Second Amendment should be treated like the right to own and view adult obscenity under the First Amendment: protected only within a private arena.[115] As the next part of this Note suggests, it does not appear that the Court is willing to take its Second Amendment jurisprudence in that direction.

III. Placing the Scope on the Second Amendment: The Supreme Court's Crosshairs are Trained on Strict Scrutiny

The majority opinion in *Heller*, along with the majority and concurring opinions in *McDonald*, suggest a *stricter* standard of review for Second Amendment challenges, even if that Court has not labeled that standard as *per se* strict scrutiny.[116] Through the Court's rejection of the interest-balancing approach, it also appears safe to rule out a seemingly more deferential "rational basis" standard of review and to hedge that the Court is leaning towards strict scrutiny with its recognition of the Second Amendment as a fundamental right.[117] The Court has been very clear, however, that the Second Amendment is not abso-

[113] *See* Anderson, *supra* note 95, at 578 (arguing that intermediate scrutiny may be appropriate to some areas of Second Amendment challenges, similar to First Amendment). The Note also makes the argument that the Second Amendment should apply the principle of "categorical exclusion," which would justify banning convicted felons of from carrying firearms. *See id.* at 578-79 (arguing for a categorical exclusion to apply to Second Amendment).

[114] *See* Bodensteiner, *supra* note 60, at 63 (discussing the Supreme Court's application of time, place, and manner analysis in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 4 (1986)). Professor Bodensteiner uses First Amendment cases as illustrations to bolster his argument that fundamental rights need not be subject to strict scrutiny. *See id.* at 63-65 (noting where the Supreme Court has found certain instances of speech did not receive strict scrutiny).

[115] *See* Miller, *supra* note 101, at 1278 (stating that the right to keep and bear arms would be "a robust right in the home, subject to near-plenary restriction by elected government everywhere else"). *But see* Volokh, *supra* note 101, at 99 (stating in response to Professor Miller's article that "no sensible analogy between the Second and First Amendments can analogize typical privately owned arms to material that the Court has expressly held lacks First Amendment value").

[116] *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."); *see also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010) ("In *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing . . . .").

[117] *See McDonald*, 130 S. Ct. at 3026 (plurality opinion) ("We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.").

lute.[118] Having already provided a non-exhaustive list of "presumptively lawful regulatory measures" that would penetrate the armor of Second Amendment protection, future litigants can only remain hopeful that well-defined exception criteria and a clearly articulated standard of review is forthcoming.[119]

A. Leading the Target: Where the Court is Headed after *Heller* and *McDonald*

Writing for the Court in *Heller*, Justice Scalia rejected both a rational-basis and interest-balancing standard of review.[120] In language that suggests a future Court should adopt a more right-protecting adjudicatory test, Justice Scalia stated that the "very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[121] In direct response to Justice Breyer's dissent, which urged a test that would acknowledge a right whose scope may be too broad for modern society, Justice Scalia reminded his colleague that "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislators or (yes) even future judges think the scope is too broad."[122] Again, this language suggests that the majority in *Heller* favors a standard of review that will limit a judge's role in the adjudication of a Second Amendment challenge.[123] Prior to the conclusion of the opinion, Justice Scalia made a telling compari-

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[118] *See Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited."); *see also McDonald*, 130 S. Ct. at 3047 (plurality opinion) (acknowledging that Second Amendment right is not without limitations).

[119] *See Heller*, 554 U.S. at 627 n.26 ("We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."). In the accompanying text, the majority mentioned firearms prohibitions against convicted felons and the mentally ill, bans on the carrying of guns in sensitive places, and regulatory measures for the commercial sale of arms. *Id.* at 626-27. Justice Scalia, in the next section of the opinion, acknowledged that there are many questions that the Court has left open with regards to the Second Amendment. *See id.* at 635 ("[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . ."). In response to Justice Breyer's criticism that the Court is leaving in the hands of the lower courts an ill-defined area of law, Justice Scalia responded that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." *Id. But see* Nelson Lund, Symposium, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1359 (2009) (arguing that an "exhaustive analysis [of historical justifications] is more likely to undermine [Justice Scalia's] conclusion than support it").

[120] *See Heller*, 554 U.S. at 618 n.27, 634 (rejecting rational-basis scrutiny and interest-balancing approach). In response to the rational-basis suggestion, the majority noted, "If all that was required to overcome the right to keep and bear arms was rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id.* (rejecting rational-basis scrutiny).

[121] *Id.* at 634.

[122] *Id.*

[123] *See id*. ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.").

son between the First and Second Amendments, noting that the former often extends its protections to undesirable expression, with limited exceptions.[124] Although not dispositive of a future level of scrutiny, it is again plausible to read this statement as the Court taking a strict(er) scrutiny approach, much like that applied to the First Amendment, accompanied by limited exceptions.[125]

The opinion in *McDonald* follows closely with the decision in *Heller*, and it supports the notion that the Court is leaning towards strict (or stricter) scrutiny.[126] First, Justice Alito reiterated the rejection of the interest-balancing approach proposed by Justice Breyer in *Heller*.[127] Second, in response to Justice Breyer's criticism that incorporation of the Second Amendment will now limit the ability of State legislatures to craft certain gun control laws, Justice Alito affirmed these concerns by noting that the incorporation of a Bill of Rights provision "always restricts experimentation and local variations."[128] He assured, however, that incorporation of the Second Amendment would not forbid every legislative solution to gun-related issues.[129] Justice Alito's language suggests that the majority is eyeing a standard of review that will, as is the case with other fundamental rights, "[take] certain policy choices off the table," because they will not meet the more exacting standards of stricter scrutiny.[130]

Perhaps *McDonald*'s most telling language appears in the penultimate paragraph of the majority opinion, where Justice Alito disagreed with Justice Breyer that the recognition of the Second Amendment as a fundamental right "will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments

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[124] *See id.* As discussed *supra*, notes 96-114 and accompanying text, even Supreme Court Justices can find it useful to compare the First and Second Amendments. As evident by Justice Scalia's discussion, how scholars, judges, or justices use that comparison can vary greatly. *Id.*

[125] *See generally*, Lund, *supra* note 118, at 1376 (suggesting that the Supreme Court, based on its holding in *Heller*, could treat the Second Amendment in extremely similar way as it has treated the First Amendment).

[126] *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (plurality opinion) (rejecting the dissent's proposal of an interest-balancing approach).

[127] *See id.* ("As we have noted, while [Justice Breyer's] opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion.").

[128] *Id.* Justice Alito noted that the limitation on the states with the incorporation of the Second Amendment "is no more remarkable with respect to the Second Amendment than it is with respect to all the other limitations on state power found in the Constitution." *Id.*

[129] *See id.* at 3046 (emphasizing that incorporation of the Second Amendment does not eliminate states' ability to craft solutions to local issues). Justice Alito noted that the Second Amendment "*limits* (but by no means eliminates) [the] ability to devise solutions to social problems that suit local needs and values." *Id.* To buttress this statement, Justice Alito referred to an *amici curiae* brief, which stated that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *Id.* (quoting Brief for State of Texas *et. al* as *amici curiae* 23).

[130] *See id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635-36 (2008)) (discussing states' limited ability to regulate in the wake of a fundamental right being recognized).

in an area where they lack expertise."[131] Justice Alito retorted that such a concern is unfounded because the Court has mooted that dilemma through its rejection of the interest-balancing test.[132] The plurality reemphasized this idea through the borrowed words of *Heller*: by the Second Amendment's enumeration, judges are now not able to decide "whether the right is *really worth* insisting upon."[133]

It is not possible to draw a definitive conclusion that a majority of justices are focused only on strict scrutiny, for both *Heller* and *McDonald* acknowledge the existence of exceptions to the right, and maybe more importantly, both acknowledge the ability to craft local solutions to gun-related problems (though this could just be a suggestion that other lawful measures that do not involve gun restrictions may be invoked).[134] The language does suggest, however, that the justices in the majority have their backs to rational-basis and other similar types of review, and that they are facing a standard of review with more bite.

B. Strict Scrutiny: The Silver Bullet to Ending Second Amendment Confusion

As the famous footnote four from *Carolene Products* suggests, fundamental enumerated constitutional rights are to receive a heightened standard of scrutiny.[135] It should follow, then, that with the incorporation of the Second Amendment—brought about through the *McDonald* decision—the right to keep and bear arms should now be subject to a heightened standard of scrutiny by the courts.[136] Should the Supreme

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[131] *McDonald*, 130 U.S. at 3050 (addressing Justice Breyer's concern that the Second Amendment incorporation will lead to judicial involvement in an area where the courts lack expertise).

[132] *See id.* (stating that the Supreme Court, in *Heller*, and now *McDonald*, rejected an interest-balancing approach). Interestingly, it appears that what Justice Breyer fears from incorporation—requiring judges to "assess the costs and benefits of firearms restrictions and thus make empirical judgments in an area in which they lack expertise"—he wants to prevent through the imposition of an interest balancing approach, which requires judges to weigh the interest of the law against the interest of the right. *See id.* at 3050 (majority opinion) (noting Justice Breyer's concerns); *see also Heller*, 554 U.S. at 689-90 (Breyer, J., dissenting) (describing the interest-balancing approach).

[133] *McDonald*, 130 S. Ct. at 3050 (plurality opinion) (quoting *Heller*, 554 U.S. at 634-35) (emphasizing the idea that the enumeration of Second Amendment right leaves little room for questions of judicial enforcement).

[134] *Compare id.* at 3047 (majority opinion) (repeating the assurances offered in *Heller* concerning longstanding regulatory measures on guns), *and id.* at 3046 (majority opinion) ("[The Second Amendment] is fully binding on the States and thus limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values."), *with* District of Columbia v. Heller, 554 U.S. 570, 624-628 (2008) (acknowledging that some regulatory measures will remain allowable), *and id.* at 636 (internal citation omitted) ("The Constitution leaves the District of Columbia a variety of tools for combating [the violence] problem, including some measures regulating handguns.").

[135] *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

[136] *Compare* Chemerinsky, *supra* note 57, at 542 ("Strict scrutiny is used . . . for interference with fundamental rights . . . ."), *with* Erwin Chemerinsky, Symposium, *Putting the Gun Control Debate*

Court adopt such a standard in the future, federal and state courts will be left with a clearly defined standard that will remedy most of the present confusion surrounding the right to keep and bear arms. Further, lawmakers would be able to rely on a predictable judicial standard that will improve gun control related statute drafting.[137]

To a large degree, the debate surrounding what level of scrutiny should be adopted is complicated because of one reason: guns are dangerous.[138] Because guns—particularly handguns—are involved in the majority of violent crime related fatalities, there exists a strong push throughout the United States to regulate their possession.[139] But other rights also have the possibility to yield dangerous results — most notably speech, which can insight hate and violence — and yet the cry for a ban on exercising those rights is not nearly as loud as cry to restrict arms.[140]

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on Social Perspective, 73 Fordham L. Rev. 477, 484 (2004) (arguing that Second Amendment would not necessarily have to be given strict scrutiny treatment); *see also* Klukowski, *supra* note 74, at 185 ("Laws burdening fundamental rights are generally subject to strict scrutiny, and only upheld if narrowly tailored to achieve a compelling interest, often resulting in the law being struck down."). *But see* Whittlesey, *supra* note 94, at 1436 (stating the National Rifle Association, in its amicus brief, noted some fundamental rights are not subject to strict scrutiny). The comment explains that the NRA distinguishes between two types of fundamental rights: those that are fundamental to "democratic self government" and those associated with "criminal justice and due process provisions." *See id.* The former, the NRA claims, are subject to strict scrutiny, while the later are subject to other Court created tests. *See id.* The NRA believes that Second Amendment rights are fundamental to "democratic self government" and are subject to strict scrutiny. *See id.*

[137] *See generally* Goldberg, *supra* note 16 at 889 ("Had the Court properly applied a strict scrutiny standard to the statutes at hand, it likely could have reached the same outcome and eliminated much of the uncertainty that resulted from both the majority and dissenting opinions."). The article, written prior to *McDonald*, also finds strict scrutiny to be the appropriate standard of review because, in *Heller*, the Court implied that the right was fundamental. *Id.* at 907 (advocating for strict scrutiny review).

[138] *See McDonald*, 130 S. Ct. at 3045 (plurality opinion) ("Municipal respondents maintain that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and, thus, has implications for public safety."). Justice Alito pointed out, in the text that follows, that there are numerous constitutional rights with public safety concerns, namely all provisions that in some way restrict law enforcement. *Id.* (listing the exclusionary rule, dismissal of cases for speedy trial violations, and *Miranda* warnings as examples of constitutional rights with public safety implications).

[139] *See* Federal Bureau of Investigation Uniform Crime Reports: Expanded Homicide Table 8 (Murder Victims by Weapon) (2009) (providing statistics for violent crime related fatalities by weapon type for 2005-2009). According to the F.B.I.'s Uniform Crime Report, handguns were involved in 6,452 of the 13,636 homicides reported in 2009. *Id.* The next leading weapon, besides unstated firearms, was knives or cutting instruments, which were involved in 1,825 homicides. *Id.*; *but cf.* National Rifle Association Institute for Legislative Action (NRA-ILA), Firearms Safety in 2009, http://www.nraila.org/issues/factsheets/read.aspx?id=120 (2009) (claiming firearms responsible for only 0.5% of accidental deaths, whereas motor vehicles responsible for 37%); *see also* F.B.I. Uniform Crime Report: Estimate Number of Arrests Table 29, (2008) (citing number of driving under the influence (DUI) arrests in 2008 as 1,483,396); Center for Disease Control, Injury Prevention and Control: Impaired Driving, http://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html (2008) (stating that 11,773 people died from alcohol related vehicle fatalities in 2008).

[140] *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3045 (2010) (plurality opinion) ("All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of

Theories exist on both sides of the regulation debate as to the overall effect of a complete firearms prohibition, and whether such a measure would increase or decrease the overall crime rate.[141] Those theories aside, the fact remains that the Second Amendment is a right designed to protect individual liberties.[142] As articulated in a brief submitted to the Court in *McDonald*, "the Bill of Rights protects 'ordered *liberty*,' not just order."[143] Should fundamental rights not be afforded exacting scrutiny that provides the utmost of protection, then what would be the point in holding a right to be fundamental?[144]

One scholar, in a critique of the traditional three-tiered review model, stated that "[t]he current levels-of-scrutiny approach should be abandoned because it offers little assistance in tough cases."[145] Quite to the contrary, strict scrutiny provides a solid framework for lower

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crimes fall into the same category [of having controversial public safety implications]."). Justice Alito noted that the respondents failed to point out a case where the Court did not hold a Bill of Rights provision binding on States because of public safety concerns. *Id.*

[141] One theory is that if firearms were outlawed, then the overall crime rate would decrease. *See id.* at 3026 (majority opinion) (explaining that Chicago implemented its ban on firearms to protect citizens "from the loss of property and injury or death from firearms"). According to 1977 statistics provided by the District of Columbia Metropolitan Police Department to the NRA when the D.C. handgun ban went into effect, to the 1990s, its murder rate tripled, with most murders committed with handguns. *See* NRA-ILA: Fables, Myths, and other Tall Tales about Gun Laws, *available at* http://www.nraila.org/Issues/Articles/Read.aspx?id=209#FABLE IV (2009) (discussing commonly held misconceptions about firearms). A counter argument to the theory that firearms bans will decrease crime, often raised by gun rights organizations is that "[i]f guns are outlawed, only outlaws will have guns." *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026, 1130 (2003) (arguing that this adage, while not necessarily true, is easy for pro-gun advocacy groups to use as a rally cry).

[142] *See* Chemerinsky, *supra* note 58 at 12 (discussing that the Bill of Rights was added at the behest of the states because of the lack of enumeration of individual rights contained in the body of the Constitution).

[143] Reply Brief for Respondents the National Rifle Association of America, Inc. *et al.* in Support of Petitioners at 17, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (arguing that pursuit of ordered liberty does not allow government to sacrifice individual liberty). In defending the position that the Second Amendment right to bear arms requires protection from government infringement based on a pursuit of ordered liberty, the brief states:

> In essence, Respondents define "ordered liberty" as the government's ability to restrict individual liberties in order to ensure a more "orderly" society. Such an unprecedented and unsupported definition, however, perverts the entire purpose of Constitutional rights. Of course, any government would find it easier to control their populations—to create more "order" and less "violence"—if they could eliminate personal liberties. The most orderly society imaginable would be one in which all persons resided in prison-like conditions. Fortunately, however, the Bill of Rights protects "ordered *liberty*," not just order.

Id. at 18.

[144] *See McDonald*, 130 S. Ct. at 3047 (quoting Malloy v. Hogan, 378 U.S. 1, 10-11 (1964)) ("[T]his Court decades ago abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.").

[145] *See* Bodensteiner, *supra* note 60, at 66 (criticizing traditional levels of scrutiny because they lead to lopsided results). Professor Bodensteiner continues, "As a practical matter, deciding to utilize traditional rational basis in a case is another way of saying the challenger loses, while deciding to utilize true strict scrutiny is another way of saying the challenger wins." *Id.*

courts to use when adjudicating Second Amendment challenges: a law infringing upon the right to keep and bear arms must be "narrowly tailored to serve a compelling state interest."[146] This exacting standard removes from the hands of the judiciary the task of having "to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise."[147] It also provides predictability for lawmakers, and safeguards the protections of the Second Amendment by "bind[ing] the legislative and executive branches with the chains of the Constitution."[148]

Opponents of a strict scrutiny standard of review claim that such a level of scrutiny will bind lower courts in their decision-making;[149] courts will be forced to strike down numerous existing gun control laws because of the "fatality" of the strict scrutiny standard.[150] Although strict scrutiny does have the most bite, the claim that no law shall ever be deemed constitutional is not entirely accurate.[151] As courts have already shown through their application of strict scrutiny to other enumerated rights, some exceptions will be found lawful.[152] It is this topic that this Note will now address.

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[146] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993) (describing the requirements for a law to pass strict scrutiny review and explaining that "by establishing a threshold requirement—that a challenged state action implement a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case").

[147] *McDonald*, 130 S. Ct. at 3050 (plurality opinion) (denying that incorporation of the Second Amendment will force judges to make decisions in situations where they are not experts). As Justice Alito noted, "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.*

[148] *See* Robert A. Levy, *Second Amendment Redux: Scrutiny, Incorporation, and the* Heller *Paradox*, 33 HARV. J.L. & PUB. POL'Y 203, 208 (2010) (arguing that judges must protect Second Amendment right with same vigor as other constitutionally enumerated fundamental rights).

[149] *See generally* Volokh, *supra* note 59, at 1467-1470 (discussing likely results of strict scrutiny application); *see also* Bodensteiner, *supra* note 60, at 66 ("[I]n essence, there is not real judicial review at either end of the spectrum-application of traditional rational basis means the law is upheld and application of true strict scrutiny means the law is struck down.").

[150] *See* Gunther, *supra* note 74, at 8 (discussing idea that strict scrutiny is "'strict' in theory but fatal in fact").

[151] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)) ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'").

[152] *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796-97 (2006) (finding that lower federal courts uphold challenged laws thirty percent of the time when strict scrutiny is applied). *See also* Levy, *supra* note 147 at 207 (discussing ways in which the Court has or could apply strict scrutiny, but still uphold law). Quoting from an *amici* brief submitted by the Goldwater Institute in *Heller*, Mr. Levy provides Goldwater's explanation of restrictions on the Second Amendment in another way: "As with the First Amendment's free speech right, the Second Amendment's personal right is subject to a range of reasonable restrictions even though strict scrutiny applies to the core of the protected conduct." *Id.*

C. Adjusting for Windage: Acknowledging Exceptions to the Second Amendment

As Justice Scalia noted in *Heller*, "the right secured by the Second Amendment is not unlimited."[153] In *McDonald*, Justice Alito repeated that the right is not absolute and affirmed that the Court recognizes "longstanding regulatory measures."[154] This Note suggests that constitutionally permissible gun control regulations are those that only restrict weapons falling outside the scope of the Second Amendment and restrictions that are "deeply rooted in this Nation's history and tradition."[155]

1. Fitting the Second Amendment with a Scope

In *Heller*, Justice Scalia began to define the scope of the Second Amendment by stating that "the sorts of weapons protected were those 'in common use at the time.'"[156] Justice Scalia stated that this notion is supported by the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[157] These limiting principles begin to give shape to the Second Amendment right. The next step is to accept the idea that "common usage" is defined by the understanding at the time of the Second Amendment's ratification that "the militia . . . was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty."[158] This interpretation protects the right as understood at its ratification, without interference from modern weaponry development complications.[159]

The scope, therefore, should be restricted to common weaponry in the late 1700s, or weaponry that has become common as this country has aged. The last mentioned qualifier, finding its roots in the notion that fundamentality is found in ideas that are "deeply rooted in this

[153] District of Columbia v. Heller, 554 U.S. 570, 625-26 (2008).

[154] McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010) (majority opinion) (quoting *Heller*, 554 U.S. at 625). ("It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'").

[155] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[156] *Heller*, 554 U.S. at 627 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)) (acknowledging that Second Amendment is not unlimited in scope). For an interesting discussion of the *Heller* decision and its treatment of *Miller*, *see* Nelson Lund, Symposium, Heller *and Second Amendment Precedent*, 12 Lewis & Clark L. Rev. 335 (2009). For a critique of Justice Scalia's scope analysis, *see* Lund, *supra* note 118, at 1362 (arguing that Justice Scalia's analysis concerning the scope of the Second Amendment is not completely accurate).

[157] *Heller*, 554 U.S. at 627 (quoting 4 Blackstone 148-49 (1769)).

[158] *Id.* Justice Scalia makes this distinction in light of the argument that if the Second Amendment right is related to the weapons "in common use," then there is a host of incredibly dangerous weapons that would now be worthy of protection. *Id.*

[159] *See id.* ("But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.").

Nation's history and tradition," would restrict weapons from protection that have been subject to longstanding legislative bans.[160] More modern weaponry that is immediately censured by the government would also be subject to restrictions; the redress to such situations may be gained through the political process, but cannot be found in the Second Amendment.[161]

2. "Deeply Rooted" Regulations

Regulations "deeply rooted in this Nation's history" would also be permissible under a strict scrutiny approach.[162] For instance, a restriction on where a firearm may permissibly be shot (for reasons other than self-defense), may be upheld by courts because such restrictions have been in place since the late-Seventeenth Century.[163] Prohibitions may also be placed on the right to bear arms in a specific place if, as in accordance with early-Nineteenth Century law, the "carrying of arms abroad by a single individual . . . [would give] just reason to fear that he purposes to make an unlawful use of them."[164] As acknowledged by the Court in both *Heller* and *McDonald*, there are current prohibitions on firearms that may remain lawful because they satisfy the Court's undefined definition of longstanding.[165] Some current regulations may not be in harmony with the original understanding of early gun-control laws, which would force the government to return some fundamentally protected rights, often leading only to slight concessions in the

[160] *Glucksberg*, 521 U.S. at 721. As discussed in *Heller*, singular longstanding legislation restricting certain arms-bearing rights may not remain lawful if it is at odds with the "overwhelming weight of other evidence regarding the right to keep and bear arms." *See Heller*, 554 U.S. at 631-32 (responding to Justice Breyer's argument that restrictions on firearms were just as prevalent in the founding era).

[161] *But cf.* Craig S. Lerner and Nelson Lund, Symposium, Heller *and Nonlethal Weapons*, 60 Hastings L.J. 1387, 1388 (2009) ("*Heller* used a mechanical and insupportable version of *Kyllo*'s reasoning to justify legislative bans on weapons that are not currently in common civilian use."). The article continues by stating that "[e]merging technologies, however, may lead legislatures to ban certain kinds of nonlethal weapons that would be substantially superior to firearms for personal self-defense, and to do so before those weapons come into common use." *Id.* at 1389.

[162] *Glucksberg*, 521 U.S. at 721.

[163] *See* Earl R. Kruschke, The Right to Keep and Bear Arms: A Continuing American Dilemma 15 (1985) (describing early colonial gun laws restricting places where firearms could be discharged for injury prevention purposes).

[164] Clayton E. Cramer, For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right to Keep and Bear Arms 69-70 (1994) (quoting William Rawle, A View of the Second Constitution (1829)) (discussing early limitations on the right to keep and bear arms).

[165] *See* District of Columbia v. Heller, 554 U.S. 570, 625-28 (2008) (listing examples of prohibitions that remain "presumptively lawful"); *cf.* Lund, *supra* note 118, at 1356-59 (criticizing Justice Scalia's analysis in *Heller* concerning "longstanding" regulations, arguing that some regulations should not qualify as "longstanding," such as ban of possession of firearms by felons, enacted in 1968). Professor Lund then mentions a study on early weapons restrictions for convicts, conducted by C. Kevin Marshall, which noted that felons were often restricted from possessing guns outside of their home. *Id. But cf.* Jonathan Zimmer, Comment, *Regulation Reloaded: The Administrative Law of Firearms After* District of Columbia v. Heller, 62 Admin. L. Rev. 189, 201-02 (2010) (arguing that the ban on felons and the mentally ill would pass strict scrutiny treatment).

current law.[166] Finally, nothing should rule out the idea that regulations that are narrowly tailored and serve a compelling government interest will be found by the Court to survive strict scrutiny.[167]

IV. Reload: Future Litigants Take Aim at Second Amendment Ambiguities

Although the standard of review for future Second Amendment challenges remains unclear, one thing is certain: lower courts will continue to be bombarded with litigation from proponents and opponents of gun control until the Supreme Court lays down a clear standard of review, along with rules for exceptions.[168] The predictability of clearly articulated standards and exceptions encourages better law drafting and discourages frivolous litigation.[169] Unfortunately, after *McDonald*, lawmakers and litigants are without left and right limits as they look down range and become familiar with the newly incorporated Second Amendment. As this Note suggests, a fundamental enumerated constitutional right deserves the utmost protection, which the right to keep and bear arms will certainly need as litigants take aim at the Second Amendment during this fog of uncertainty.[170]

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[166] *See* Lund, *supra* note 118, at 1357 (discussing early laws that only restricted convicted criminals from possessing a gun *outside* of the home). To be true to the proposition that exceptions to the Second Amendment must be deeply rooted in our nation's history, current laws restricting felons from gun possession outright would have to be struck down. A complete analysis of a law would require a court to determine if a law is valid under the strict scrutiny test, not solely if it is "deeply rooted." A complete ban on felons from possessing a firearm may very well pass such scrutiny; such decision would be left to the courts. *See generally*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)) ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'").

[167] *See id.*

[168] *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3115 (2010) (Stevens, J., dissenting) ("[T]oday's decision invites and avalanche of litigation that could mire the federal courts in fine-grained determinations about which state and local regulations comport with the *Heller* right—the precise contours of which are far from pellucid—under a standard of review we have not even established.").

[169] *See* R. Randall Kelso, Symposium, *Standards of Review Under The Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. Pa. J. Const. L. 225, 236 (2002) (arguing that the Supreme Court's goals in developing standards of review should be flexibility and predictability in the law); *see also* Michal J. Perry, Symposium, *Equal Protection, Judicial Activism, and the Intellectual Agenda Of Constitutional Theory: Reflections on, and Beyond,* Plyler v. Doe, 44 U. Pitt. L. Rev. 329, 339 (1983) (arguing that the ideals of standards of review should be "simplicity and predictability in constitutional decision making").

[170] *See, e.g.*, *Maryland High Court Hears State Gun Law Arguments*, Associated Press, Oct. 7, 2010, http://www.wtop.com/?nid=25&sid=2073003 (reporting that a Maryland resident challenged Maryland's gun-control law restricting the right to carry gun in public); Logan G. Carver, *Lubbock Teen Challenges Federal Gun Law*, Lubbockonline.com, Sep. 14, 2010, available at http://lubbockonline.com/local-news/2010-09-14/lubbock-teen-challenges-federal-gun-law (reporting on James A. D'Cruz's challenge to a federal gun law that prohibits sale of firearms to persons under twenty years of age); Duaa Eldieb and Dahleen Glanton, *Plaintiffs Aim to Shoot Down Gun Ordinance*, Chi. Trib., July 7, 2010, http://articles.chicagotribune.com/2010-07-07/news/ct-met-chicago-gun-lawsuit-0708-20100707_1_gun-ordinance-chicago-mercantile-exchange-teaching-