November 4, 2010

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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I. 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.  

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1 The author would like to thank Professor Tuan Samahon of the Villanova University School of Law for his advice, counsel, criticism, and encouragement throughout the writing of this note. The author would also like to acknowledge the Honorable Paul D. Clement, former Solicitor General of the United States, whose address to The Federalist Society of Philadelphia in July of 2010 inspired the selection of this topic for this note. This note would not have been possible without the support of the author’s amazing wife and daughter.

2 *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3115 (2010) (Stevens, J., dissenting) (arguing that Court’s decision does
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 not bring clarity to future Second Amendment challenges). Justice Stevens continues his argument by making the prediction that the Second Amendment right “remains to be worked out by this Court over many, many years.” \(\text{Id.}\) (same).

\(^3\) 128 S. Ct. 2783 (2008).

\(^4\) 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 \(\text{id.}\) at 2822 (stating that judgment of Court of Appeals, which declared the law unconstitutional, was affirmed). The Court only addressed the handgun ban and its constitutionality with respect to its application to the District of Columbia, a federal enclave. See \(\text{id.}\) at 2788 (discussing challenge of law only to District of Columbia law).
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

⁶ See id. at 2790-91 (providing analysis of phrase “Right of the People” in Second Amendment, and why it suggests 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 2791 (arguing Second Amendment is individual right). 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 id. at 2814 (referencing Miller to support argument that Second Amendment applies to individuals). Justice Scalia also noted that “militia” should be read in the context of who composed such groups: “the people.” See id. at 2791 (explaining Second Amendment application to individuals, not militias).
for self defense in the home." After four years of litigation, the highest court in the nation provided Dick Heller--the named petitioner in the case’s style--and the rest of the District of Columbia with a decision that recognized an individual right to bear arms. What the Court failed to provide, however, was a

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7 Id. at 2822 (arguing that once Second Amendment is recognized as an individual right, naturally certain policy options are no longer available to lawmakers). Justice Scalia makes this statement in response to the suggestion raised through numerous Amici Curiae briefs that handgun prohibition may be a solution to decreasing handgun violence. See id. (suggesting that some gun restrictions will no longer be viable options for lawmakers).

8 See id. at 2788 (explaining procedural history of District of Columbia v. Heller). Dick Heller, respondent, is a special police officer for the District of Columbia who brought suit against the District, along with other claimants, after he was denied authorization to keep a handgun at his home for personal protection. For an interesting discussion of the complete procedural history of Heller, see Clark Neilty, District of Columbia v. Heller: The Second Amendment is Back, Baby, 2008 Cato Sup. Ct. Rev. 127, 134-41 (2007-2008) (explaining procedural
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

history of Heller leading up to grant of certiorari from Supreme Court). Mr. Neilty was co-counsel for the plaintiffs in District of Columbia v. Heller.

⁹ See id. at 2821 ("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 an “interest-balancing inquiry” by which to address future Second Amendment challenges. See id. (arguing interest-balancing approach is inappropriate for adjudication of fundamental rights). For further discussion of this suggestion see infra at notes 36-40 and accompanying text.

¹⁰ 130 S. Ct. 3020 (2010). McDonald, the primary Supreme Court decision upon which this note focuses, was handed down by the Court on June 28, 2010. Heller was decided on June 26, 2008.
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.\footnote{See McDonald, 130 S. Ct. at 3050 (plurality opinion) ("We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in Heller.").} McDonald’s holding that the Second Amendment is a fundamental right and applicable to the States allowed the Court to find a Chicago

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 standard of review under the Privileges and Immunities clause, is not addressed in this note.
ordinance essentially prohibiting the ownership of handguns within city limits unconstitutional.\textsuperscript{12} With a similar result as to that of \textit{Heller}, the Court’s decision provided Otis McDonald and several other petitioners with authorization to possess a handgun within a home.\textsuperscript{13} The Court declined for a second time, \begin{quote}
\textit{See id. at 3026 (majority opinion)} (explaining that Chicago ordinance required the registration of firearms within city limits, but prohibited the registration of majority of handguns). Chicago’s decision to enact this prohibition against handguns to “protect its residents ‘from the loss of property and injury or death from firearms.’” \textit{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 city prohibition was in effect. \textit{See McDonald}, 130 S. Ct. at 3026 n.1 (majority opinion) (discussing statistics from Brief for Heartland Institute as Amicus Curiae).
\end{quote}

\textsuperscript{13} \textit{McDonald}, 130 S. Ct. at 3026 (majority opinion) (holding that Second Amendment is applicable to States; therefore, ruling that Chicago ordinance essentially prohibiting handguns is unconstitutional). Otis McDonald, the named petitioner in the case’s style, is a Chicago resident in his late seventies who
however, to provide a standard of review for lower courts to apply to future Second Amendment cases.\textsuperscript{14} Also remarkably similar to the \textit{Heller} decision, the dissenting justices seized the opportunity to voice their desire for a more malleable level of scrutiny.\textsuperscript{15}

was the victim of violent threats from local drug dealers in his neighborhood. See \textit{id.} at 3026-27 (majority opinion) (discussing background of case). Mr. Otis, along with several other petitioners, brought suit against the City of Chicago because they wished to keep handguns inside the confines of their house for personal protection. See \textit{id.} (majority opinion) (same). The Chicago handgun ban effectively prohibited Mr. Otis and the other petitioners from doing so.

\textsuperscript{14} See \textit{id.} at 3047-50 (plurality opinion) (discussing \textit{Heller}’s rejection of “interest-balancing” test, but never articulating a new standard of review).

\textsuperscript{15} See \textit{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 \textit{Heller} right . . . under a standard of review we have not even established.”). Earlier in
This note argues that in the wake of Heller, and now McDonald—which recognizes 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. The use of strict scrutiny, however, does not come

his dissent, Justice Stevens, after arguing that a rule limiting the right to bear arms would be easier for the courts to administer, expresses his disdain with the majority for their 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 (Stevens, J., dissenting).

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 Supreme Court used strict scrutiny to decide Heller, it would have
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. 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 and District of Columbia v. Heller, along with the case-in-chief, McDonald v. City of

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reached the same outcome and eliminated much of the confusion that surrounded the judgment).

17 Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (stating that Due Process Clause protects rights found as such because they are “fundamental”). For a discussion of the exceptions to the Second Amendment, see infra notes 152-166 and accompanying text.

18 307 U.S. 174 (1939) (holding that possession of shotgun with barrel less than eighteen inches in length not protected by Second Amendment).
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 Court has crafted through precedent. Part IV argues that the plurality’s opinion in McDonald is a clear step towards a stricter standard of review. 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 standard. Finally, Part V discusses the

19 For a discussion of the background cases and 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, and why each is a step towards strict scrutiny, see infra notes 115-133 and accompanying text.

22 See infra notes 134-166 and accompanying text as to why strict scrutiny is the appropriate level of scrutiny for use in Second
obvious forewarning by Justice Stevens found at the beginning of this note: that lower courts will undoubtedly be bombarded with Second Amendment challenges until the Supreme Court clarifies this point of contention.\(^{23}\)

II. 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, would become the primary case discussed by both the majority and dissent in the *Heller* opinion.\(^ {24}\) In *Miller*, two men were charged with the unlawful 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.

transportation of a double barrel 12-gauge shotgun less than eighteen inches in length, from Oklahoma to Arkansas.\textsuperscript{25} The defendants had not registered the firearm, nor did they possess a “stamp-affixed written order” for the firearm, as required

and the dissenting opinions invoke \textit{Miller} to explain their position. Justice Scalia, writing for the majority, argues that \textit{Miller} is to be read as limiting the scope of the Second Amendment as to what weapons are protected. \textit{See id.} at 2814-17 (discussing scope of \textit{Miller}). Justice Stevens, in contrast, argues that \textit{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.” \textit{Id.} at 2823 (Stevens, J., dissenting) (arguing Second Amendment only protects militia). Justice Breyer, in his dissent, concurred with this reading of \textit{Miller}. \textit{See id.} at 2848 (Breyer, J., dissenting) (agreeing with Justice Steven’s proposition).

\textsuperscript{25} \textit{See Miller}, 307 U.S. at 175 (describing nature of charge). At that time, the National Firearms Act made it a federal crime to transport a firearm in interstate commerce without appropriate authorization. \textit{See id.} (discussing National Firearms Act).
under 26 U.S.C.A. §§ 1132d and 1132c, respectively. The defendants countered that the National Firearms Act, federal law that required such authorization to transport firearms across state lines, was unconstitutional because it offended federalism in its attempt to “usurp [state] police power” and was in direct conflict with the Second Amendment.

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. In language that would later receive much debate from the Heller Court, Justice McReynolds stated, “[W]e cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”

26 Id. (requiring both registration and written order to be in compliance with statute).

27 Id. at 176 (arguing that creation of law under interstate commerce is proxy for unconstitutional usurpation of police power, and directly offensive to Second Amendment).

28 See id. at 178 ("...we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.").
instrument.” 29 Finding no right to possess a shotgun with a barrel of less than eighteen inches, the case was reversed and

29 Id. (holding defendants’ shotgun was not protected under Second Amendment). 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 right. Cf. Heller, 128 S. Ct. at 2814 (“Miller stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.”), with id. at 2823 (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 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 (Fall 1999) (examining Miller holding should be read narrowly).
remanded to the lower court, and further inquiry by the Court into the Second Amendment ceased for nearly seventy years.\textsuperscript{30}

B. District of Columbia v. Heller

Almost seven decades after the \textit{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 \textit{District of Columbia v. Heller}.\textsuperscript{31} The 5-4 majority opinion--accompanied by a virulent dissent--held that the D.C. law was unconstitutional because it infringed upon the

\textsuperscript{30} See \textit{Miller}, 307 U.S. at 183 (remanding case to lower court). For an interesting discussion as to why the Court did not address Second Amendment issues for nearly three quarters of a century, \textit{see} Kenneth A. Klukowski, \textit{Note, Armed by Right: The Emerging Jurisprudence of the Second Amendment}, 18 \textit{Geo. Mason U. Civ. Rts. L. J.} 167, 171-72 (Spring 2008) (discussing doctrine of avoidance as to why Supreme Court may not have addressed Second Amendment issues).

\textsuperscript{31} 128 S. Ct. 2783 (2008) (holding that District of Columbia’s prohibition of handguns violated Second Amendment).
Second Amendment. 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.” Through a thorough dissection of Second Amendment language and original understanding, the Court held that the right to keep and bear arms applied to

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32 See *id.* at 2822 (affirming judgment of District of Columbia Court of Appeals that gun-control statute violated Second Amendment).

33 *Id.* at 2814-15 (stating that *Miller* only applied to specific weapons, not all firearms). Justice Scalia’s explanation of the Miller holding is particularly noteworthy. He wrote: “We think 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 2815 (quoting *Miller*, 307 U.S. at 179).
individuals at the federal level. Before closing the opinion, and in what is now at the center of controversy, Justice Scalia acknowledged that, “Like most rights, the right secured by the Second Amendment is not unlimited.”

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34 See Heller, 128 S. Ct. at 2812-14 (holding that Second Amendment right is an individual right). In coming to this determination, 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 2814 (asserting narrow interpretation of Miller).

35 Id. at 2816 (acknowledging that even constitutional enumerated rights are not absolute). In the text that follows, Justice Scalia provided a list of “presumptively lawful regulatory measures”: to include 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. See id. at 2816-17 n.26 and accompanying text (listing gun regulations that remain presumptively lawful).
Justice Breyer, in Part III of his dissent, addressed the standard-of-review issue directly.\(^{36}\) First, Justice Breyer made the argument that the respondent’s plea for the adoption of a strict scrutiny standard would be impossible because nearly all gun laws would meet the requirement of a compelling government interest.\(^{37}\) Next, Justice Breyer argued that the Court should

\(^{36}\) See id. at 2850-51 (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 Second Amendment? What kind of constitutional standard should the court use?”). Justice Stevens also issued a dissenting opinion, which is not addressed in this note. See id. at 2822-47 (Stevens, J., dissenting).

\(^{37}\) See id. at 2851 (Breyer, J., dissenting) (arguing that adoption of 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.”) (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)). For further discussion of the strict scrutiny standard of review, see infra notes 69-74 and accompanying text.
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.” \(^{38}\) Despite Justice Breyer’s argument that the Court has taken such an approach in other constitutional contexts, \(^{39}\) the majority rejected Justice Breyer’s

\(^{38}\) See *Heller*, 128 S. Ct. at 2852 (Breyer, J., dissenting) (discussing why an “interest-balancing” approach is appropriate standard of review for Second Amendment challenges). 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. \(^{39}\) See id. (Breyer, J., dissenting) (same). 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. \(^{39}\) See id. at 2853 (arguing for standard of review deferential to legislatures).

\(^{39}\) See id. at 2852 (stating such a standard has been used on election-law cases, speech cases, and due process cases). To
suggestion, stating “We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”

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; the support this assertion, Justice Breyer cited Burdick v. Takushi, 504 U.S. 428 (1992) (election regulation), Thompson v. Western States Medical Center, 535 U.S. 357 (2002) (commercial speech), and Mathews v. Eldridge, 424 U.S. 319 (1976) (procedural due process), amongst others. See id. (same).

Id. at 2821 (rejecting Justice Breyer’s proposal that the Court adopt an “interest-balancing inquiry”). The majority then provided text that suggested a stricter standard of review through the following statement: “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.” Id. (advocating for less deferential standard of review).
second opinion in just two years concerning Second Amendment protections. As mentioned supra note 31, 
Heller was decided just two years and two days prior to the McDonald decision.

Although he never announced a standard

41 See McDonald, 130 S. Ct. 3050 (plurality opinion) (“We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in Heller.”) (Alito, J., plurality). Justice Thomas, concurring in part and concurring in the judgment, believes 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) (arguing incorporation is through Privileges and Immunities Clause). However, a majority of the court agreed that, regardless of how the right is incorporated, the Second Amendment is applicable to the states. See id. at 3026 (majority opinion) (“Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.”).
of review to be used by lower courts in future adjudication of
Second Amendment issues, Justice Alito acknowledged the issue in
several portions of his opinion.43

In Part IV of the opinion, Justice Alito replied to an
argument by the respondents that incorporation of the Second
Amendment would limit state and local experimentation with gun
control laws.44 In a response that speaks—if not directly—at

43 See id. at 3046, 3047, 3050 (plurality opinion) (addressing
arguments by respondents and dissenting justices that
incorporation of Second Amendment will limits States’ ability to
experiment with gun control).

44 See id. at 3045-46 (plurality opinion) (addressing 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 [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 (plurality
opinion) (acknowledging respondent plea for deference to state
laws when addressing gun regulations, to which plurality
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.”

Only three paragraphs later, Justice Alito reassured the respondents of the proposition that was stated in *Heller*, that certain firearms regulations will be upheld, and that “incorporation does not imperil every law regulating firearms.”

The plurality was sure to point out, however, that it responds that incorporations does not offend federalism concerns).

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45 *Id.* at 3046 (plurality opinion) (admitting that States will have ability, even after incorporation of Second Amendment, to impose at least some limits on that right).

46 *Id.* at 3047 (plurality opinion) (noting that Second Amendment right is not absolute). Here, Justice Alito repeats the list from *Heller* of presumptively lawful regulations: i.e., prohibitions against the mentally ill and felons, bans from carrying in sensitive places, etc. See *id.* (acknowledging presumptively lawful gun regulations).
definitively rejected, for a second time, the "interest-balancing" suggestion proposed in *Heller*.\(^{47}\)

Justice Stevens, in his dissent, expressed his dissatisfaction with the plurality for failing, again, to identify a standard of review.\(^{48}\) Because of the plurality’s refusal to identify a level of scrutiny, Justice Stevens opined, “The practical significance of the proposition that ‘the Second Amendment right is fully applicable to the States’ remains to be

\(^{47}\) See id. 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…”).

\(^{48}\) See id. at 3115 (Stevens, J., dissenting) (chastising the plurality for their lack of clarity with respect to standard of review). Justice Stevens stated that the plurality’s opinion “…did not bring any clarity to this enormously complex area of law.” Id. (Stevens, J., dissenting) (same). The quote at the beginning of this note is the manner in which Justice Stevens essentially stated that the plurality created more confusion than clarity for lower courts. See *supra* note 2 and accompanying text.
worked out by this Court over many, many years.” 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.”

Despite Justice Stevens’ chiding, the plurality was not willing, or not interested, in taking the opinion down the road of defining the scope of the right and standard of review.

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49 McDonald, 130 S. Ct. at 3115 (Stevens, J., dissenting) (illustrating level of confusion plurality has created) (citation omitted).

50 Id. at 3105 (Stevens, J., dissenting) (criticizing the plurality, again, for confusion that Heller, and now McDonald, decisions have created). 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 (same).

51 See id. at 3048 (plurality opinion) (rejecting 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 take the next
Justice Breyer, also dissenting, picked up from *Heller* where he left off, and again needled the plurality for failing to provide clarity to the standard of review issue.\(^{52}\) 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.\(^{53}\) In Justice Breyer’s view, the plurality step and define what the scope of the right actually encompasses.

\(^{52}\) See id. at 3127-27 (Breyer, J., dissenting) (posing numerous questions that lower courts will now have to answer without a standard by which to follow). Justice Breyer stated that with the competing interests between regulation and right, lower courts will now need to ask countless questions to determine what regulation to allow and what to strike down as being offensive to the Second Amendment. See id. (Breyer, J., dissenting) (discussing possible problems lower courts face in wake of decision).

\(^{53}\) See id. at 3127 (Breyer, J., dissenting) (noting majority’s rejection of the “interest balancing” approach in *Heller*).
“haphazardly created a few simple rules...that sound sensible without being able to explain why or how Chicago’s handgun ban is different.”  

Finally, in his review of 20th and 21st century Second Amendment jurisprudence as practiced by the States, Justice Breyer argued that States only protected against unreasonable gun regulation.  

The State courts determined reasonableness, Justice Breyer noted, by adopting a “highly deferential attitude towards legislative determinations”, and in Justice Breyer’s opinion, so should the Court.

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54 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).

55 Id. at 3135 (Breyer, J., dissenting) (arguing that regulation by States has been allowed so long as it was deemed reasonable).

56 Id. (Breyer, J., dissenting) (supporting a deferential approach to state legislatures in 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 50 years in which a state court has struck down as unconstitutional a law banning a particular class
III. 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.\(^\text{57}\) The most arduous level of scrutiny for the government to overcome,

\[\text{of firearms.}^\text{Id. at 3136 (citing Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443, 1458 (2009)) (internal citation omitted).}\]

\(^{57}\text{See Erwin Chemerinsky, Constitutional Law: Principles and Policies 539 (3d ed. 2006) (introducing concept behind levels of scrutiny). 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. On the other hand, where a fundamental right is not involved, the Court has often been deferent to the legislature, and the burden is somewhat low. See id. (explaining burden-shifting between fundamental and non-fundamental rights).}\]
“strict scrutiny,” is often employed where the government is infringing upon a fundamental right.58 On the opposite 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.”59 Between those two levels of scrutiny lie a myriad of other tests used by the Court to determine whether a law unconstitutionally limits an individual right.60

58 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 fundamental rights...”).

59 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.” Id. (same).

60 See id. (explaining concept of “intermediate scrutiny”); see also Planned Parenthood v. Casey, 505 U.S. 833 (1992) (implementing “undue burden test” for determining whether restrictions on abortion are lawful); Ivan E. Bodensteiner, Scope of the Second Amendment Right—Post-Heller Standard of
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.” Because the presumption is on the side of

Review, 41 U. Tol. L. Rev. 43, 45 (Fall 2009) (explaining “heightened rational basis scrutiny”)

61 Chemerinsky, supra note 57, at 540; see also, e.g., Pennell v. City of San Jose, 485 U.S. 1, 14 (1988) (stating that a city rent control ordinance did not violate the Equal Protection Clause because appellants only needed to show that classification scheme at issue in the ordinance is “rationally related to a legitimate state interest.”) (quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976)); U.S. Railroad Retirement Board 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.”).
a law being constitutionally permissible, the rational basis standard is extremely deferential to the government.\textsuperscript{62} The Court most often employs the 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.\textsuperscript{63} Despite this presumption of constitutionality, the Court has declared that the rational basis standard “is not a toothless one,”\textsuperscript{64} and has, on occasion, 

\textsuperscript{62} See Vance v. Bradley, 440 U.S. 93, 99 (1979) (noting that the Court would not overturn a statute unless it could “only conclude that the legislature’s actions were irrational.”)

\textsuperscript{63} See City of Cleburne v. Cleburne Living Center, 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.").

\textsuperscript{64} 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
struck down a law as unconstitutional for not being rationally related to a legitimate government purpose.\textsuperscript{65}

\textsuperscript{65} See, e.g., Romer v. Evans, 517 U.S. 620 (1996) (holding that a state constitutional amendment prohibiting creation of law that would prohibit homosexual discrimination is unconstitutional, even though 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 basis standard); United States Dep’t of Agric. v. Moreno, 413 U.S. 528 (1973) (holding that amendment to the Food Stamp Act was not rationally related to the stated purposes of Act, or to legitimate government interest of limiting fraud, thus making it unconstitutional).
2. Intermediate Scrutiny

The middle ground between rational basis review and strict scrutiny is the appropriately named intermediate scrutiny standard. 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. For a law or regulation to pass

66 See, e.g., Lorrilard Tobacco v. Riley, 533 U.S. 525, 554-55 (2001) (rejecting a request to use 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) (noting that Virginia, in arguing that 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’.”) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)) (internal quotations omitted); Ward v. Rock Against Racism, 491 U.S. 781 (holding that a city’s regulation of sound amplification was permissible under a variant of the
intermediate scrutiny, the challenged law must be "substantially related to an important government purpose."\textsuperscript{67} Unlike rational basis review, the burden is shifted to the government to prove that there is a substantial (as opposed to rational)

\textsuperscript{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" to the "important state purpose"); 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.").
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 achieve a compelling government interest.” 70 The law

68 See Virginia, 518 U.S. at 533 (“The burden of justification is demanding and rests entirely on the State.”). Although Virginia 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 burden for intermediate scrutiny).

69 See Chemerinsky, supra note 57, at 541 (“...the most intensive type of judicial review is strict scrutiny.”).

70 Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez, 130 S. Ct. 2971, 2984 n. 11 (2010)
must be crafted in such a manner that it 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

(stating the standard that must be met in order to overcome strict scrutiny, in this case, as applied to a First Amendment challenge) (quoting Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132 (2009); see also Citizens United v. Federal Election Commission, 130 S. Ct. 876, 898 (2010) (“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.’") (quoting Federal Election Comm’n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 464 (2007) (hereinafter WRTL)).

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
Strict scrutiny is employed when a law discriminates based on race or national origin, or infringes upon a fundamental right.  

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. (discussing standards of review).

See Miller v. Johnson, 515 U.S. 900, 919-921 (1995) (“To satisfy strict scrutiny, the State must demonstrate that its [legislation] is narrowly tailored to achieve a compelling government interest.”); see also WRTL, 551 U.S. at 450-51 (noting that the government, not challenging party, has the burden of demonstrating that law is narrowly tailored and serves a compelling government interest because strict scrutiny is applied).

See Chemerinsky, supra note 57, at 542 (identifying such fundamental rights as right to vote, right to travel, freedom of speech, and right to privacy, which would receive strict
As one scholar noted nearly forty years ago, due to the incredibly strong presumption of unconstitutionality that accompanies the strict scrutiny standard, strict scrutiny is “strict in theory, fatal in fact.”

scrutiny); see also Klukowski, supra note 29, 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 in 2008, two years before the McDonald decision, Mr. 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 (November 1972) (discussing high presumption of unconstitutionality when strict scrutiny is applied). Professor Gunther, when he wrote this now-famous statement, was discussing the standards of review employed by the Warren Court in equal protection settings. In contrast to the incredibly difficult standard the government had to overcome under the “new” equal
B. Variations

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 members of the scholarly community have recognized or suggested some variations on these standards.\textsuperscript{75}

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\textsuperscript{75} See, e.g., Planned Parenthood v. Casey, 505 U.S. 833 (1992) (creating undue burden test by which to determine whether State regulations on abortion are constitutional); Bodensteiner, supra note 60 (arguing that 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 (Summer 2009) (proposing “three-step test, including
\end{flushright}
One good example is the “undue burden test.” After Roe v. Wade, which recognized a woman’s right to an abortion, the Court employed strict scrutiny in determining whether a law infringed upon that right. Nearly twenty years later, in categorical rules, a locality scheme, and burden-based/burden-neutral factors.

See Casey, 505 U.S. at 876-77 (discussing the reasoning behind Court’s development of “undue burden” test).

410 U.S. 113 (1973) (holding that women have right to abortion).

See Roe, 410 U.S. at 155 (determining 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. (same). 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
Planned Parenthood v. Casey, 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. In disposing with strict Rule of Law, 95 Va. L. Rev. 253, 254 (April 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. (discussing short-comings of Roe and Heller).


See Casey, 505 U.S. at 873 (rejecting the trimester framework developed in Roe). In Roe, the Court held that a woman had the right to terminate a pregnancy by abortion up until the end of
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.”[^81] The Court, in *Casey*, did not use any of the tools it previously had crafted when deciding the constitutionality of a law, but

The first trimester, after which point the State could begin to place regulations on abortions, with some exceptions. See *Roe*, 420 U.S. 163-65. In *Casey*, however, the Court eschewed the trimester framework, and held that the government could regulate a woman’s right to an abortion at the point of viability. See *Casey*, 505 U.S. at 878-79.

[^81]: *Casey*, 505 U.S. at 876 (discussing appropriateness of undue burden test, and by what standard the State can regulate abortions). In further explanation of how a state may act with respect to law drafting 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 (same).
instead created a new test by which the Court could weigh State interests against individual rights.\textsuperscript{82}

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 ones previously announced by the Court.\textsuperscript{83} In

\textsuperscript{82} See Chemerinsky, \textit{supra} note 57, at 829-30 (discussing why undue burden test is problematic). Professor Chemerinsky explains that one of the major problems with the undue burden test is that it is extremely unclear as to what exactly constitutes an undue burden. \textit{See id.} (discussing unpredictability of undue burden test).

\textsuperscript{83} See, \textit{e.g.}, Plyler \textit{v.} Doe, 457 U.S. 202, 231 (1982) ("Furthermore, 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") (Marshall, J., concurring); Craig \textit{v.} Boren, 429 U.S. 190, 211-12 (1976) (stating that Equal Protection Clause "...does not direct the courts to apply one standard of review in some cases and a different standard in
the aftermath of Heller, one scholar proffered the idea that Second Amendment challenges should be decided under “heightened rational basis scrutiny.” The argument is that this suggested standard of review will “improve the legislative process,” because it will require the government to “establish an evidentiary record...showing an actual connection between its goals and the restrictions imposed on guns.” This suggested

other cases.”) (Stevens, J., concurring); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 109 (1973) (advocating for variable standard of review) (Marshall, J., dissenting). See also, Chemerinsky, supra note 57, at 543 (acknowledging criticism that Court should adopt “sliding scale” approach to standard of review).

See Bodensteiner, supra note 60, at 45 (proposing “heightened rational basis scrutiny” as appropriate standard of review for Second Amendment challenges). Professor Ivan Bodensteiner is a law professor at Valparaiso University School of Law.

Id. at 68 (describing characteristics of heightened rational basis scrutiny). According to Professor Bodensteiner, the proposed standard of review is: presumption less, accounts for the government’s interest in public safety, accounts for the
standard would give “substantial deference to the legislative assessment of the fit between goals and restrictions.”

right of self-defense, as discovered in Heller, establishes the requirement of an evidentiary record, and is deferential to the legislature in its balancing of goals and restrictions. See id. (same).

See id. (noting that when legislative assessment is based on empirical data, which is reflected in legislative record, courts should be deferential to legislature). But see, U.S. v. Morrison, 529 U.S. 598, 614 (2000) (noting that just because legislative record reflects congressional findings does not necessarily make legislation constitutional). In Morrison, Congress passed the Violence Against Women Act, based on the finding that gender-motivated violence seriously impacted interstate commerce. See Morrison, 529 U.S. 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 U.S. v. Lopez, that “Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” 514 U.S. 549, 557 (1995) (quoting Hodel v. Virginia Surface Min.
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’ scheme.\textsuperscript{87}

\textsuperscript{87} See Bodensteiner, \textit{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.”). The Supreme Court, both in \textit{Heller}, and now \textit{McDonald}, has emphatically rejected the interest-balancing approach. See \textit{Heller}, 128 S. Ct. at 2818 n.27, 2821; see also \textit{McDonald}, 130 S. Ct. at 3047. It is highly doubtful the Court would employ a standard that yields the same result in “most, if not all” cases as would be reached by interest-balancing.
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. In United States v. Carolene Products, the Filled Milk Act of 1923 was challenged as unconstitutional on the basis that Congress exceeded its power under the Commerce Clause. In holding that the Filled Milk Act

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88 See Chemerinsky, supra note 57, at 539 (discussing impact of Footnote Four on standard of review).

89 United States v. Carolene Products, 304 U.S. 144 (1938).

90 Carolene Products, 304 U.S. at 145-46 (describing the challenge to Filled Milk Act). The Filled Milk Act prohibited the interstate shipment of any skimmed milk mixed with “any fat or oil other than milk, so as to resemble milk or cream.” Id. at 146. Congress enacted this law because filled milk was deemed harmful to the health of the consumer. See id. at 146 n.1 (explaining reason behind Filled Milk Act).
met the standards imposed by rational basis review—under which Commerce Clause challenges are tested—Justice Stone inserted a footnote that would become the basis for the tiered scrutiny structure.91 In the famous footnote four, Justice Stone writes: “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 the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”92 Although the term “strict scrutiny” is not specifically stated in the footnote, the Supreme Court has often turned to footnote four to suggest

91 See id. at 152 (“...regulatory 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.”).

92 Id. at 152 n.4 (stating that deference should be given to the legislatures, except when laws infringe upon certain areas, like fundamental rights).
that enumerated rights are to be adjudicated under a strict scrutiny standard of review.\(^3\)

2. The First Amendment Comparison

\(^3\)See Felix Gilman, The Famous Footnote Four: A History of the Carolene Products Footnote, 46 \textit{S. Tex. L. Rev.} 163, 203 (Fall 2004) (discussing that Justice Stone further clarified his position in Footnote Four, 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 \textit{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 \textit{Case W. Res. L. Rev.} 1423, 1446 (citing instances where Supreme Court has stated strict scrutiny should apply to fundamental rights).
Many scholars have argued for First Amendment jurisprudence to serve as a guidepost for anticipated Second Amendment challenges. Under current First Amendment

94 “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 to peaceably assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.

95 See, e.g., U.S. v. Marzzarella, 614 F.3d 85, 89 n.4 (3d Cir. 2010) (enlisting First Amendment jurisprudence in Second Amendment adjudication after Heller decision). In his decision, U.S. Circuit Judge Anthony J. Scirica wrote, “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.” Id. (same).

See also, e.g., Eugene Volokh, The First and Second Amendments, 109 Colum. L. Rev. Sidebar 97 (October 2009) (noting that First and Second Amendment comparisons have been made for over 200 years); Darrell A.H. Miller, Guns as Smut: Defending the Home-Bound Second Amendment, 109 Colum. L. Rev. 1278 (October 2009) (stating that Second Amendment right should be treated like
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. The theory continues that these limited restrictions are analogous to restrictions that the government should be allowed to impose on the Second right to own and view obscenity under First Amendment); 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 (March 2009) (suggesting Second Amendment challenges should receive same treatment as current First Amendment challenges). For an interesting discussion on how the Second Amendment has been used in law schools 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 (December 1998) (discussing introduction of Second Amendment in First Amendment, Con Law II class, to make students think more critically about rights in general).

96 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).
Amendment right to keep and bear arms because the government’s interests are equally as important.⁹⁷

The Supreme Court’s opinions in Heller and McDonald, both of which recognized that the Second Amendment is not an absolute right, are similar to First Amendment precedent, which has recognized the same.⁹⁸ For example, in 1961, the Supreme Court

⁹⁷ See Michael Steven Green, Why Protect Private Arms Possession? Nine Theories of the Second Amendment, 84 Notre Dame L. Rev. 131, 134-35 (November 2008) (arguing that in order to determine which standard of review is appropriate, 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. See id. at 134 (discussing standards of review in relation to First Amendment).

⁹⁸ See Heller, 128 S. Ct. at 2816 (“Like most rights, the right secured by the Second Amendment is not unlimited.”); see also McDonald, 130 S. Ct. at 3047 (“...the right to keep and bear arms is not a right to ‘keep and carry any weapon whatsoever and for whatever purpose.’”) (quoting Heller, 128 S. Ct. at 2816).
explicitly rejected the view that “freedom of speech and association, as protected by the First and Fourteenth Amendments, are ‘absolutes’...” In *Konigsberg v. State Bar of California*, 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 meet that statutory requirements of “good moral character” and “non-advocacy of

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99 *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961) (holding that speech is not absolutely protected in every circumstance) (internal citations omitted). 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 (describing reasons by which certain speech may be limited).

100 366 U.S. 36, 49 (1961) (holding that speech is not absolutely protected in every circumstance).
violent overthrow [of the federal or state government].”\textsuperscript{101} The Committee came to this conclusion after Mr. Konigsberg refused to answer questions about his association, or lack thereof, with the Communist party.\textsuperscript{102} Mr. Konigsberg believed such inquiries violated his First Amendment protections.\textsuperscript{103} The Supreme Court, however, did not agree, and held that California’s interest in “having lawyers devoted to the law in its broadest sense… [is] clearly sufficient to outweigh the minimal effect upon free

\textsuperscript{101} See id. at 37-38 (describing facts of case).

\textsuperscript{102} See id. at 38 (citing Mr. Konigsberg’s refusal to respond to questions regarding affiliation with Communist party as reason for denial of certification).

\textsuperscript{103} See id. at 38 n.1 (providing Mr. Konigsberg’s explanation for refusing to answer questions). 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.” Id. (same).
association occasioned by compulsory disclosure in the circumstances here presented.”

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 than the former. In Turner Broadcasting System v. Federal Communications Commission, the Supreme Court acknowledged that content-neutral speech is subject to a more governmentally deferential standard of review. In Turner,

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104 Id. at 52 (affirming California Supreme Court ruling that denial of certification of Mr. Konigsberg to bar was constitutional).

105 See generally, Chemerinsky, surpa note 57, at 932-33 (discussing Supreme Court’s distinction between content-based and content-neutral speech adjudication).

106 512 U.S. 622 (1994) (acknowledging content-neutral speech is subject to more deferential standard of review).

107 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
several cable television providers claimed that a federal law that 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. The Supreme Court disagreed. Writing for the Court, Justice Kennedy held that the speech the government sought to regulate was content-neutral, and therefore, only subject to intermediate scrutiny. Because

108 See id. at 634-35 (discussing claim against government by cable companies).

109 See id. at 652 (“In short, the must-carry provisions are not designed to favor or disadvantage speech of any particular content.”).

110 See id. at 661 (“We agree with the District Court that the appropriate standard by which to evaluate the constitutionality 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. (noting application of strict scrutiny in other circumstances).
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 was, therefore, lawful.\footnote{\textit{Id.} at 643 (explaining requirements for laws infringing upon free speech to receive lesser level of scrutiny).}

It is not difficult to see how some scholars make the comparison between the two amendments, and suggest that the Second be treated like the First 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—\textit{for example}, individuals not part of a “well-regulated militia.”\footnote{See \textit{Anderson}, \textit{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 also apply the principle of “categorical exclusion,” which would} Another suggestion is

\textit{is the intermediate level of scrutiny to content-neutral restrictions that impose an incidental burden on speech.
}
that the Court could carve out time, place, and manner tests for
gun control regulation, similar to those applied to “adult business speech.” 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. As the next part of

113 See Bodensteiner, supra note 60, at 63 (discussing Supreme Court application of time, place, and manner analysis in City of Renton v. Platime 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 Supreme Court has found certain instances of speech not to receive strict scrutiny).

114 Darrell A.H. Miller, Guns as Smut: Defending the Home-Bound Second Amendment, 109 Colum. L. Rev. 1278, 1278 (October 2009) (stating that the right to keep and bear arms would be “…a robust right in the home, subject to near-plenary restriction by
this note suggests, it does not appear that the Court is willing to take its Second Amendment jurisprudence in that direction.

IV. 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, if not strict scrutiny.115 Through the Court’s rejection

elected government everywhere else.”); but see Eugene Volokh, Response, The First and Second Amendments, 109 Colum. L. Rev. Sidebar 97, 99 (October 2009) (stating in response to Professor Miller’s article that “[N]o 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.”).

115 See District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (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
of the interest-balancing approach, it also appears safe to rule out a seemingly more deferential “rational basis” standard of review, and hedge that the Court is leaning towards strict scrutiny with its recognition of the Second Amendment as a fundamental right.\textsuperscript{116} The Court has been very clear, however, that the Second Amendment is not absolute.\textsuperscript{117} Having already provided a non-exhaustive list of “presumptively lawful regulatory measures” that would penetrate the armor of Second Amendment right should be determined by judicial interest balancing . . . ”).

\textsuperscript{116} See \textit{McDonald}, 130 S. Ct. at 3026 (majority 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.”).

\textsuperscript{117} See \textit{Heller}, 128 S. Ct. at 2816 (“Like most rights, the right secured by the Second Amendment is not unlimited.”); see also \textit{McDonald}, 130 S. Ct. at 3047 (plurality opinion) (acknowledging that Second Amendment right is not without limitations).
Amendment protection, future litigants can only remain hopeful that well-defined exception criteria and a clearly articulated standard of review is forthcoming.\textsuperscript{118}

\textsuperscript{118} See \textit{Heller}, 128 S. Ct. at 2817 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. See \textit{id.} at 2817 (listing presumptively lawful restrictive measures). 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 \textit{id.} at 2821 ("[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. (addressing concerns and criticism raised in dissent). But see Nelson Lund, Symposium, \textit{The Second Amendment},
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. 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

Heller, and Originalist Jurisprudence, 56 UCLA L. Rev. 1343, 1359 (June 2009) (arguing that an “exhaustive analysis [of historical justifications] is more likely to undermine [Justice Scalia’s] conclusion than support it.”).

119 See Heller, 128 S. Ct. at 2812 n.27, 2821 (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).
decide on a case-by-case basis whether the right is really worth insisting upon.” 120 In direct response to Justice Breyer’s dissent, which urged for 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.” 121 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. 122 Prior to the conclusion of the

120 Id. at 2821 (advocating that right to keep and bear arms receives more protection than that which judicial balancing would offer).

121 Id. (refuting idea that judges should limit scope of constitutional right because of belief that it may be too broad).

122 Id. (”A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”).
opinion, Justice Scalia made a telling comparison between the First and Second Amendments, noting that the former often extends its protections to undesirable expression, with limited exceptions.\textsuperscript{123} 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.\textsuperscript{124}

The opinion in \textit{McDonald} follows in closer order to the decision in \textit{Heller}, and supports the notion that the Court is

\textsuperscript{123} \textit{Id.} (comparing First Amendment to Second Amendment). As discussed \textit{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. \textit{See id.} (same).

\textsuperscript{124} \textit{See generally}, Lund, \textit{supra} note 118, at 1376 (suggesting Supreme Court, based on holding in \textit{Heller}, could treat Second Amendment in extremely similar way as it has treated First Amendment).
leaning towards strict (or stricter) scrutiny. 125 First, Justice Alito reiterated the rejection of the interest-balancing approach proposed by Justice Breyer in Heller. 126 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.” 127 He assured, however, that incorporation of


126 See id. (plurality opinion) (“As we have noted, while [Justice Breyer’s] opinion in Heller recommended an interest-balancing test, the Court specifically rejected that suggestion.”).

127 See id. (plurality opinion) (responding to Justice Breyer’s federalism argument that States are now limited in response measures to violence). 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
the Second Amendment would not forbid every legislative solution to gun-related issues. 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

is with respect to all the other limitations on state power found in the Constitution.” Id. (plurality opinion) (comparing Second Amendment to other limiting provisions of Constitution).

\[128\] Id. at 3046 (plurality opinion) (emphasizing that incorporation of Second Amendment does not eliminate States’ ability to craft solutions to local issues). Justice Alito note 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. (same). To buttress this statement, Justice Alito refered to an amici curiae brief, which states that “[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment.” Id. (plurality opinion) (quoting Brief for State of Texas et. al as Amici Curiae 23).
choices off the table,” because they will not meet the more exacting standards of stricter scrutiny.\textsuperscript{129}

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 in an area where they lack expertise.”\textsuperscript{130} Justice Alito retorted that such a concern is unfounded because the Court has mooted that dilemma through its rejection of the interest-balancing test.\textsuperscript{131} The plurality

\textsuperscript{129} Id. at 3050 (plurality opinion) (discussing States’ ability to regulate in wake of fundamental right as being limited) (quoting District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008)).

\textsuperscript{130} McDonald, 130 S. Ct. at 3050 (plurality opinion) (addressing Justice Breyer’s concern that Second Amendment incorporation will lead to judicial involvement in an area where they lack expertise).

\textsuperscript{131} Id. (plurality opinion) (stating that Supreme Court, in Heller, and now McDonald, reject interest-balancing approach).
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.”

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

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 proposition of an interest balancing approach, which requires judges to weigh the interest of the law against the interest of the right. [Id. at 3050 (majority opinion) (noting Justice Breyer’s concerns); see also Heller, 128 S. Ct. at 2852 (Breyer, J., dissenting) (describing interest-balancing approach)].

132 McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (plurality opinion) (emphasizing idea that enumeration of Second Amendment right leaves little room for questions of judicial enforcement).
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). The language does, however, suggest that the justices in the majority have their backs to rational-basis and other similar types of review, and are facing a standard of review with more bite, to which topic this note now turns.

133 Compare id. at 3047 (majority opinion) (repeating 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, 128 S. Ct. 2783, 2816-17 (2008) (acknowledging that some regulatory measures will remain allowable), and id. at 2822 ("The Constitution leaves the District of Columbia a variety of tools for combating [the violence] problem, including some measures regulating handguns.") (internal citation omitted).
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.\(^{134}\) 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.\(^{135}\) Should the Supreme Court adopt such a

\(^{134}\) 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 Amendment.”).

\(^{135}\) Cf. *Chemerinsky*, supra note 57, at 542 (“Strict scrutiny is used...for interference with fundamental rights...”), with Erwin Chemerinsky, Symposium, *Putting the Gun Control Debate on Social Perspective*, 73 *Fordham L. Rev.* 477, 484 (November 2004) (arguing that Second Amendment would not necessarily have to be
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, and lawmakers shall be able to rely on a predictable judicial
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 NRA, in 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." Id. (same). The former, the NRA claims, are subject to strict scrutiny, while the later are subject to other Court created tests. Id. (same). The NRA holds that the Second Amendment belongs to the former category of fundamental rights. Id. (holding Second Amendment fundamental to democratic self-government).
standard that will improve gun control related statute drafting.\textsuperscript{136}

To a large degree the debate surrounding what level of scrutiny should be adopted is complicated because of one reason: guns are dangerous.\textsuperscript{137} Because guns—particularly handguns—are

\textsuperscript{136} See generally Goldberg, supra note 15, 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 note, 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).

\textsuperscript{137} 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 this 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.
involved in the majority of violent crime related fatalities, there exists a strong push throughout the United States to regulate their possession. But other rights also have the

(plainty opinion) (listing exclusionary rule, dismissal of case for speedy trial violation, and Miranda warnings as examples of constitutional rights with public safety implications).

138 See Federal Bureau of Investigation Uniform Crime Reports: Expanded Homicide Table 8 (Murder Victims by Weapon), http://www.fbi.gov/ucr/cius2009/offenses/expanded_information/data/shrtable_08.html (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. (detailing homicides by weapon type). The next leading weapon, besides unstated firearms, was knives or cutting instruments, which were involved in 1,825 homicides. Id. (same). 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
possibility to yield dangerous results, and yet the cry for a ban on exercising those rights is not nearly as loud as cry to restrict arms.\textsuperscript{139}

\begin{itemize}

\textsuperscript{139} 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 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. See id. (addressing public safety argument by respondents).
Theories exist on both sides of the regulation debate as to the overall effect of a complete firearms prohibition.140 Those theories aside, the fact remains that the Second Amendment is a

140 One theory is that if firearms are outlawed, then the overall rate of crime will decrease. See id. at 3026 (majority opinion) (explaining that Chicago implemented ban of firearms to protect citizens “from the loss of property and injury or death from firearms.”). According to statistics provided to the NRA by the District of Columbia Metropolitan Police Department, from 1977, when the D.C. handgun ban went into effect, to the 1990s, the murder rate in the District of Columbia tripled, with most of the murders being committed with handguns. See NRA-ILA: Fables, Myths, and other Tall Tales about Gun Laws, 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, “If guns are outlawed, only outlaws will have guns.” See Eugene Volokh, The Mechanisms of the Slippery Slope, 116 Harv. L. Rev. 1026, 1130 (February 2003) (arguing that the adage, while not necessarily true, is easy for pro-gun advocacy groups use as rally cry).
right designed to protect individual liberties.\textsuperscript{141} As articulated in a brief submitted to the Court in \textit{McDonald}, “the Bill of Rights protects ‘ordered liberty,’ not just order.”\textsuperscript{142}

\textsuperscript{141} See \textit{Chemerinsky}, supra note 58, at 12 (discussing the addition of the Bill of Rights). As Professor Chemerinsky explains, the Bill of Rights were added at the behest of the States because of the lack of enumeration of individual rights contained in the body of the Constitution. See \textit{id.} (same).

\textsuperscript{142} 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) (No. 08-1521), 2010 WL 360206 (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
Should fundamental rights not be afforded exacting scrutiny that provides the utmost of protection, then what would be the point in holding a right fundamental?\footnote{143}{See McDonald, 130 S. Ct. at 3047 (“...this 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.”) (quoting Malloy v. Hogan, 378 U.S. 1, 10-11 (1964)).}

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.”\footnote{144}{Bodensteiner, supra note 60, at 66 (criticizing traditional levels of scrutiny because they lead to lopsided results).} Quite the contrary, strict scrutiny provides

in prison-like conditions. Fortunately, however, the Bill of Rights protects “ordered liberty,” not just order.

\textit{Id.} (advocating for Second Amendment protections).

\footnote{143}{See McDonald, 130 S. Ct. at 3047 (“...this 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.”) (quoting Malloy v. Hogan, 378 U.S. 1, 10-11 (1964)).}

\footnote{144}{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.” \textit{Id.} (same).
a solid framework for lower 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.” 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.” It also provides predictability for lawmakers,

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145 Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993) (describing requirements for law to pass strict scrutiny review). In its explanation of the benefit of such standards, the Court writes, “[B]y 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.” Id. (discussing benefits to formal standard of review).

146 McDonald, 130 S. Ct. at 3050 (majority opinion) (denying that incorporation of Second Amendment will force judges to make decisions in situations where they are not experts). As Justice
and safeguards the protections of the Second Amendment by “bind[ing] the legislative and executive branches with the chains of the Constitution.”\textsuperscript{147}

Opponents of a strict scrutiny standard of review claim that such a level of scrutiny will bind lower courts in their decision-making;\textsuperscript{148} courts will be forced to strike down numerous 

Alito notes, “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 \underline{really worth insisting upon}.” \textit{Id.} (supporting conclusion that incorporation will lead to less judicial balancing because of fundamentality of Second Amendment right).


existing gun control laws because of the “fatality” of the strict scrutiny.\textsuperscript{149} Although strict scrutiny does have the most bite, the claim that no law shall ever be deemed worthy is not entirely accurate.\textsuperscript{150} As courts have already shown through their application of strict scrutiny to other enumerated rights, some

\textsuperscript{149} See Gunther, \textit{supra} note 75, at 8 (discussing idea that strict scrutiny is “strict” in theory but “fatal in fact.”).

\textsuperscript{150} See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("Finally, we wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’") (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)) (Marshall, J., concurring in judgment).
exceptions will be found lawful. It is this topic that this note will now address.

\[\text{See Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 796-97 (April 2006) (finding that lower federal courts uphold challenged law 30% of the time when strict scrutiny is applied). See also Levy, supra note 147, at 207 (discussing ways in which Court has or could apply strict scrutiny, but still uphold law). Quoting from an amici brief submitted by the Goldwater Institute in Heller, Mr. Levy provides Goldwater’s explanation of restrictions on the Second Amendment in another way: “As with the First Amendment’s free speech right, the Second Amendment’s personal right is subject to a range of reasonable restrictions even though strict scrutiny applies to the core of the protected conduct.” Id. (same).}\]
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.” In *McDonald*, Justice Alito repeated that the right is not absolute, and affirmed that the Court recognizes “longstanding regulatory measures.” This note suggests that allowable gun control regulations are those that restrict weapons falling outside the scope of the Second Amendment, or

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153 McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010) (majority opinion) (“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.’”) (quoting *Heller*, 128 S. Ct. at 2816).
restrictions that are “deeply rooted in this Nation’s history and tradition.”

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.’” Justice Scalia stated that this notion is supported by the “historical

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155 Heller, 128 S. Ct. at 2817 (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 in light of Miller, see Nelson Lund, Symposium, Heller and Second Amendment Precedent, 12 Lewis & Clark L. Rev. 335 (Summer 2009) (analyzing Heller’s treatment of Miller). For a critique of Justice Scalia’s scope analysis, see Lund, supra note 118, at 1362 (arguing that Justice Scalia’s analysis concerning scope of Second Amendment is not completely accurate).
tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”¹⁵⁶ 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.”¹⁵⁷ This interpretation protects the right

¹⁵⁶ Heller, 128 S. Ct. at 2817 (quoting 4 Blackstone 148-149 (1769)) (arguing that “dangerous and unusual weapons” supports the idea that common use weapons gain protection).

¹⁵⁷ Id. (discussing context in which Second Amendment scope must be interpreted). Justice Scalia makes this distinction in light of the argument that if the Second Amendment right is related to the weapons “in common use” of the militia, then there are a whole host of incredibly dangerous weapons that would now be worthy of protection. Id. (same)
as understood at its ratification, without interference from modern weaponry development complications.\textsuperscript{158}

The scope, therefore, is 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 Nation’s history and tradition,” would restrict weapons from protection that have been subject to longstanding legislative bans.\textsuperscript{159} More modern weaponry that is

\textsuperscript{158} \textit{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.”).

\textsuperscript{159} \textbf{Glucksberg}, 521 U.S. at 721 (discussing criteria for fundamental right). As discussed in \textbf{Heller}, singular longstanding legislation restricting certain arms-bearing rights may not remain lawful if they are at odds with the “overwhelming weight of other evidence regarding the right to keep and bear arms.” \textit{See Heller}, 128 S. Ct. at 2819 (responding to Justice Breyer’s argument that restrictions on firearms were just as prevalent in founding era). Indeed, many laws currently in place will need to be assessed anew to ensure they were firmly grounded in our nation’s tradition before being judged valid.
immediately censured by government would also be subject to restriction; the redress to such situations may be gained through the political process, but cannot be found in the Second Amendment. ¹⁶⁰

¹⁶⁰ But cf. Craig S. Lerner and Nelson Lund, Symposium, Heller and Nonlethal Weapons, 60 Hastings L.J. 1387, 1388 (June 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, "Emerging 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 (arguing that legislatures preventing a weapon from becoming one of common use is problem for Second Amendment scope).
2. “Deeply Rooted” Regulations

Regulations “deeply rooted in this Nation’s history” would also be permissible under a strict scrutiny approach.\textsuperscript{161} 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 late-17th century.\textsuperscript{162} Prohibitions may also be placed on the right to bear arms in a specific place if, as in accordance with early-19th 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.”\textsuperscript{163} As acknowledged by

\textsuperscript{161} \textit{Glucksberg}, 521 U.S. at 721 (discussing criteria for fundamental right).


\textsuperscript{163} \textit{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 \textit{William Rawle},
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*.\(^\text{164}\)

Some current regulations may not be in harmony with the original understanding of early gun-control laws, which would force the

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**A View of the Second Constitution** (1829) (discussing early limitations on right to keep and bear arms).

government to return some fundamentally protected rights, often times leading only to slight concessions in the current law.\footnote{Lund, supra note 118, at 1357 (discussing early laws that only restricted convicted criminals from possession a gun outside of home).} 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.\footnote{Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("Finally, we wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’") (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)) (Marshall, J., concurring in judgment).}
V. 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.\footnote{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.”).}

The predictability of clearly articulated standards and exceptions encourages better law drafting, and discourages frivolous litigation.\footnote{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
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 of 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.169

Modern Supreme Court Practice, 4 U. Pa. J. Const. L. 225, 236 (Jan. 2002) (arguing that Supreme Court goal 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 (Winter 1983) (arguing that ideals of standards of review should be “simplicity and predictability in constitutional decisionmaking.”).
