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Shots Fired: Second Amendment Jurisprudence and An Evolving Standard of Review

Joseph N Williams, II
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“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” US Const., Amend. II.

As part of the Bill of Rights, the Second Amendment has been a part of American jurisprudence since the writing of the Constitution. What rights this amendment embodies, however, remains unclear. Does it grant an individual right to own firearms? Was it only meant for those in the militia? Were the Framers actually concerned with a disarmed populace, or was the second amendment written with a civic duty in mind, and not an individual right? Until the late 2000s, the Supreme Court, to a greater or lesser extent, held the position that the Second Amendment was written for the states, and not the people. The words conferred the right on states to arm their own militias and a limitation on Congress’ ability to regulate state militias. This began to change in 2008, with the landmark case District of Columbia v. Heller, which struck down a number of gun control laws in the District of Columbia. In 2010, the Supreme Court again came down on the side of individual rights, in McDonald v. City of Chicago, which invalidated a handgun ban within the city limits of Chicago and incorporated the Second Amendment, as an individual right, to the states. These cases will be explored in greater depth below. What neither of these cases makes clear, however, is the level of Constitutional scrutiny that is appropriate for laws seeking to infringe on the right to bear arms. This is a vital question in gun control debates; in fact, the debate over what gun control is permissible has to be put on hold until the question is answered.

Federal courts have a number of tests available to them when weighing statutes under Constitutional challenge, and what level of scrutiny is applied depends on the right infringed. In
challenges under the Fourteenth Amendment, the Supreme Court will engage in what is known as a means-ends test, which is also the most common form of statutory review (Galloway 1988, 449). When the Court engages a statute under these tests, the justices will look to the interest that a state seeks to accomplish by enacting that law, and the means the law uses to accomplish those interests.

Not all laws are scrutinized equally; those which threaten fundamental rights will be reviewed less deferentially than those which seem to only tangentially infringe a right. There are three basic levels of means-ends scrutiny. The first level, rational basis review (RBR) is the most deferential and lowest standard. Under this level of scrutiny, the court must only find that a state enacted the law to achieve a legitimate state interest, and that the law is rationally connected to that interest. The second level, intermediate or heightened scrutiny, is a bit more difficult to define. The state’s interest must be substantial, something more than just a legitimate interest, and the law must be substantially effective at accomplishing that end (1988, 465-6). The final level, strict scrutiny, is afforded to certain Constitutional rights which require the highest levels of protection. A law reviewed with strict scrutiny must have been drafted to meet a compelling, not just legitimate, state interest, and must be strictly necessary to accomplish that compelling interest (Id).

Unfortunately, as stated above, neither Heller nor McDonald makes clear which level of scrutiny is appropriate for laws infringing on the Second Amendment. The answer to this question is vital to understanding the legislation and tailoring of gun control laws. I hypothesize in this paper that the right to bear arms is protected under a level of strict scrutiny, at least as the Court has reinterpreted the Second Amendment following Heller. To understand why this is, I will begin with a brief overview of the historical context that the Amendment was written in, and
then explore prior case law involving infringements on the right to bear arms. Then, I will go through \textit{Heller} and \textit{McDonald} in detail, and show how the language of the majority decision in each case should lay the foundation for lower courts to use strict scrutiny. After that, I will conclude by questioning why lower courts, to this point, have only adopted intermediate scrutiny; I will both explore and critique their justifications in light of the understanding developed about \textit{Heller} and \textit{McDonald}.

\textbf{Colonial Perspective}

The focus of this work is largely the modern case law surrounding the incorporation of the Second Amendment. It is, however, important to frame the right to bear arms in some kind of historical context. This is not meant as an attempt to ferret out the intent of the Framers in including the second amendment in the Bill of Rights. In fact, this would be a useless exercise; one needs only listen to cable news pundits to hear cherry-picked historical quotations that either defend or attack the Second Amendment as an individual right. Despite the ambiguity, I do advance an individualist interpretation of the law from the time of the Constitutional Convention onward; or rather, I do not find the idea of the right as both collective and individual to be so at odds as scholars seem to make it.

As with most of American Law, the right to bear arms has its roots in English law. The earliest source for a “right” to bear arms is the English Bill of Rights of 1689, which states, in pertinent part, “That the subjects which are Protestants, may have Arms for their defence suitable to their condition, and as allowed by law” (Halbrook 2008, 11). While this can be considered the original right to bear arms, it is not clear that it was truly intended as a codification of a universal right (Bogus 2000, 11-2). It did represent an important turning point in English gun law, however. English laws were set up for a long time to prevent the commoners from owning
weapons or knowing how to use them. Laws were designed to restrict ownership to only those who could be trusted with guns; unsurprisingly, this only included those in the military and the elites of English society. King James I, when asked about relaxing game laws and expanding gun ownership, reportedly said, “It is not fit that clowns should have these sports” (Bellesiles 2001, 140-1). The quote may be apocryphal, but it reflects the sentiment behind many of these laws. Gun ownership was a sign of wealth and class, as evidenced by the property requirements to even own a weapon; Parliament even passed laws prohibiting importation of firearms, and on top of that relegated all English firearms production to one government controlled company in London (141-2).

The English Bill of Rights provision, then, could be perceived as a giant leap forward in gun rights scholarship. It would certainly be difficult to argue the law had no effect on gun ownership; it is also far from the truth, however, to insist that this established firearm ownership as a fundamental part of liberty. The language of the provision specifically limited gun ownership to Protestants “…as allowed by law” (2008, 11; 2001, 142). That last part is crucial. The law surrounding firearms did not actually change at all; Parliament was still free to create property requirements and other restrictions on gun ownership, and it did (2001, 143). This legal precedent extended to the American colonies as well; legislation was passed in almost all the colonies restricting who could own firearms (144). Now, these same laws restricting who could own weapons also required that select class to own them (2008, 12). But these laws did not necessarily imply an individual’s right to own guns. Under one interpretation, these guns were under the “right of the sovereign”, meaning they were owned so that their owners could be called up to militia service; gun ownership was a collective right, not an individual right (2001, 147; Cornell and Denino 2004, 487).
The historical record up to the end of the American colonies, then, was subject to interpretation at best. The record becomes easier to interpret in favor of an individual right in the period during and immediately following the Constitutional Convention. It does not, however, become unambiguous. Significant evidence still supported the amendment as an “obviously military”, and not individual, right (Shalhope 1999, 279). But the evidence surrounding the ratification debates suggest that there was also substantial evidence that the right was individual, including some of James Madison’s writings directly suggesting that the rights codified by the amendment were, first and foremost, individual (277-8).

**Second Amendment Case Law Pre-2008**

There is not much more to be gained from the historical record until it is readdressed in *Heller*. It is enough to point out that the insistence of modern scholars on both sides that the historical context is cut and dry is a weak claim at best. What can be relied on, however, is the Court’s interpretation of that history, if for no other reason than that the Court’s rulings create binding law. In its cases, the Supreme Court did have to choose a way to interpret the Second Amendment, and much of that was based on the history of the Amendment. Part of the court’s interpretation was also based on the interpretation of the Second Amendment by the states. Importantly, most state legislatures saw the “right to bear arms” as a right in the state to create the militia, passing generally restrictive laws regarding the carrying and owning of firearms (2008, 159). These laws seemed to follow the general logic of a ruling by the Tennessee Supreme Court, namely that the reason to keep and bear arms was for the common defense, and the legislature, therefore, had a “right to prohibit the wearing or keeping…” of certain weapons. *Aymette v. Tennessee*, 21 Tenn. 154 (1840). The collectivist viewpoint dominated legislatures
and legislation through the antebellum period and into the post-Civil War period of American history.

Importantly for “collectivists”, the Supreme Court generally accepted the idea that the Second Amendment was a state’s right, and not a right inherent to individual people. It consistently upheld a state’s right to heavily regulate the right to bear arms, and its decisions made reference to the fact that the Second Amendment did not confer an individual right to keep and bear arms. One of the first cases to tackle the issue of the Second Amendment head-on was United States v. Cruikshank. In that case, a number of Ku Klux Klan members were brought up on charges of murder following the Colfax Massacre in Louisiana in 1875, wherein roughly 135 freedmen of color died. The majority, in dismissing the indictment as being improperly vague, had this to say of the right to bear arms:

“The second and tenth counts are equally defective. The right there specified is that of ‘bearing arms for a lawful purpose.’ This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government. . .”. United States v. Cruikshank, 92 U.S. 542, 553 (1875).

The right to bear arms, by this interpretation, is a restriction on Congress only, and a somewhat dubious one at that. While this passage does not define the right specifically, it dismisses it as having any power over a state’s legislature. A state could disarm its people; the Amendment only prevents Congress from doing so.

This interpretation was reinforced in Presser v. Illinois. The Court in that case considered the case of Presser, an Illinois man charged with violating a state statute forbidding private citizens to march under arms (while carrying firearms) in a military fashion. In his suit, Presser argued, among other legal arguments, that the statute was a violation of his right to bear arms as
written in the Second Amendment. The Court summarily rejected this argument, and clarified what it believed the right to bear arms meant. 116 US 252, 253-6, 265 (1886). The majority, citing *Cruikshank*, reinforced the idea that the limitation was one of Congress, and not of the states. But it went a step farther than the previous court, and specifically stated that the right to bear arms was written so as to keep militia members armed and ready should they be called upon by their government. *Id* at 265-6. While not explicitly rejecting the right of individual self-defense, it explicitly ties the right to bear arms to the militia, and thus implicitly rejects any individual interpretation of the Second Amendment. This was the status quo for gun law for years following these two decisions. State legislatures continued to heavily restrict gun ownership, specifically of pistols and concealed carry permits (2001, 168).

The high watermark for this interpretation came in 1939, with the case *US v. Miller*; this case was controlling in terms of Second Amendment interpretation until *Heller*, and so is worth exploring in some detail. The defendants in *Miller* were two men accused of shipping firearms of a certain type through the mail in violation of the National Firearms Act: specifically, the indictment charged they shipped “a double barrel Stevens’ 12-gauge shotgun, having a barrel less than 18 inches in length…” without proper registration or paperwork. 307 US 174, 175 (1939). To argue their case, the defendants contended that The National Firearms Act, which regulated the shipping of certain firearms through the US Postal Service, was a usurpation of the states’ tenth amendment police power, and beyond that was a restriction of the Second Amendment. *Id* at 176. While the District Court for Arkansas (W.D. Arkansas) held for the defendants, the Supreme Court disagreed. The majority summarily dismissed the argument regarding the police powers without much comment. *Id* at 178. Then the majority addressed the
Second Amendment arguments. First, they ruled that the specific weapon alleged in the indictment was unrelated to the Second Amendment right.

In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. \textit{Id} at 178.

The majority then clarified why the Second Amendment was enacted: to enable Article I, §8 of the Constitution, giving Congress the power to call up the militia. Since the militia consisted of the people, the Court reasons that they could not be called up unless they owned their own arms, and this was the only logical purpose for the Amendment. \textit{Id} at 178-9. They supported their position by interpreting the historical record similarly to the collectivist scholars noted above. Further, contemporary state legislation to the drafting of the Second Amendment couched the right to bear arms in terms of its bearing on the ability of those in the militia to report to service. The Court, with this reasoning, ruled against the defendants, reversed the District Court and sustained the indictment. \textit{Id} at 183.

“Militia rights” doctrine held sway over the courts for the next seventy years. For example, \textit{US v. Warin}, an Ohio District Court case, specifically iterated the right as a collective right of the States to assemble their militias; it implied no individual right outside this scope. 530 F.2d 103, 106 (6\textsuperscript{th} Circ, 1976). A case twenty years later reinforced \textit{Miller} doctrine, adding that because the statute at issue had no impact on the state militia, and the Second Amendment only protects the state’s militia rights, the statute did not violate the constitution. \textit{US v. Nelson}, 859 F.2d 1318 (8\textsuperscript{th} Cir., 1988). The Supreme Court refused to rethink the “militia rights” or \textit{Miller} doctrine until a further two decades later.
Modern Jurisprudence

In Heller and McDonald, the Court faced two cases which, based on a strict interpretation of stare decisis, should have been easy to dispose of. However, the Court instead chose to revisit and reassess what was understood by the historical context of the Second Amendment and its own precedence to this point. The two cases fit neatly together. Heller, in detail below, establishes that the right to bear arms is, in fact, an individual and not merely a collective right or states’ right. Once the Court establishes this, it is able to follow up by incorporating it under the Due Process clause of the Fourteenth Amendment. These two cases drive my hypothesis here: that, under the modern Court’s interpretation, statutes infringing the right to bear arms must be evaluated under strict scrutiny. First, I will establish the standard the court uses to determine if a right is evaluated under strict scrutiny. With that standard in mind, I will be able to review the cases and find evidence of why this standard is met and why lower federal courts must comply with it.

Strict Scrutiny Analysis

To review, the Supreme Court will typically engage in a means-ends test when evaluating statutes which infringe Constitutional rights. There are three levels of means-ends tests: rational basis review (the most deferential to the legislature), intermediate or heightened scrutiny, and strict scrutiny (the least deferential). A rational basis is found in statutes that were rationally written to accomplish a legitimate state interest; intermediate review is a fairly narrowly constructed law to achieve an important state interest; and a law under strict scrutiny must be necessary to accomplish a compelling state interest. For a right to be protected by strict scrutiny, the Supreme Court must determine that the right is a fundamental one. If a right is deemed fundamental, then heightened [strict] scrutiny will be applied; otherwise, the court will defer to
the legislature. **US v. Carolene Products**, 304 US 144, 152 (1938). But the question from this remains what exactly defines a fundamental right. A number of factors will influence the Court’s decision in this regard.

First, the Court will look to the text of the Constitution to determine where the right in question is couched. For instance, the right to the free exercise of religion is a part of the text of the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…” (US Const, Amend. I). While lawyers still manage to argue about some of the finer points of the right, the base for right to free exercise of religion is fairly explicit. On the other hand, the right to privacy is one which the Court has read into the text of the Constitution. **See Griswold v. Connecticut**, 381 U.S. 479 (1965).

Next, the Court will engage in a discussion of the right and justify its decision on whether or not the right should be deemed a fundamental one. There is not one test the Court will apply to any right. The rubric changes from case to case and Court to Court: some justices stay closer to an originalist model, arguing only for rights in the plain text of the Constitution, some justices take a more interpretive approach, and yet other justices try to find a middle ground of analysis (Chemerinsky 2009, 946-7). Regardless of the scholarly background of the justices, a number of themes are used repeatedly. The most important for our purposes here is that the Court will typically deem a right fundamental when that right is “…deeply rooted in this Nation’s history and tradition”. **Moore v. City of East Cleveland**, 431 US 494, 503 (1977). As Chemerinsky points out, this standard raises a number of questions on the proper level of abstraction when reading rights into the Constitution; here, however, the debate is over the text of the Constitution and not over a “read-in” right such as privacy, so the concern is slightly alleviated and the Justices can more easily justify relying on a historical analysis (2009, 947).
Finally, it is important to emphasize, for the purposes of our discussion, that if the above test is satisfied and the language of the Court indicates that it finds a right to be fundamental, then typically strict scrutiny must be applied to that right. There are always exceptions; the First Amendment, for instance, protects the idea of free speech, but does not cover things like harassment, fighting words, or obscenity. However, the important thing to remember in the analysis is that the Court first determined that the right was fundamental, and then carved out exceptions.

**Heller: The Right to Bear Arms as Fundamental**

The 2008 *Heller* case was a landmark gun rights case. Heller was a police officer in the District of Columbia who attempted to register for a personal handgun permit, and this suit resulted from his denial. *DC v. Heller*, 554 US 570 (2008). He specifically challenged four parts of the District’s Criminal Code on Second Amendment grounds: 1) a provision which criminalized the carrying of unregistered handguns, 2) a provision prohibiting handgun registration, 3) a provision allowing the Chief of Police to issue 1-year licenses to carry a handgun (beyond the prohibition stated before), and 4) a provision of the code requiring legally owned firearms, such as “registered long rifles” to be unloaded and trigger-locked while in the home. *Id* at 574 (2008) (citing D.C. Code §§7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4), 22-4504(a), & 22-4506). The Court granted *certiorari* after the District Court of Appeals ruled for Heller, determining the Second Amendment was an individual right and that the DC total ban unnecessarily infringed that right. *Id* at 575; see also *Parker v. District of Columbia*, 478 F.3d. 370, 401 (DC Circ. 2007).

In an opinion authored by Justice Scalia, the Court revisited the history and meaning of the Second Amendment. The first part of the decision is devoted to the sentence structure of the
Second Amendment. Scalia determines, first, that the right must have been written so as to be understood by the voters of the Founding generation; therefore, any technical or secret meanings to the document must be discarded. Id at 577-8. Second, he separates the Amendment into a prefatory clause (“A well-regulated militia being necessary to the security of a free state…”) and an operative clause (“…the right of the people to keep and bear arms shall not be infringed”). This second part of the interpretation is critical to determining whether or not the right is an individual one. Specifically, Scalia writes that the prefatory clause is not a limiting clause on the operative clause; rather, it was a statement of purpose, supposedly common to other individual rights documents of the era. Id (citing J. Tiffany, A Treatise on Government and Constitutional Law §585, p. 394 (1867)). While this means that the prefatory clause may clarify ambiguities in the operative clause, it does not act as a limitation on the operative clause.

To that end, Scalia next looks in-depth at the language of the operative clause. The first phrase, “the right of the people”, is placed into context with the rest of the Constitution. This phrase is used in other places, and in no other place in the Constitution is it construed to ever imply a collective, and not individual right (the right to free speech, for example, is a right individual to each citizen, and not something that can only be exercised by the whole body of citizens together). Id at 579-80. Therefore, the similar construction to other references to “the people” must mean a similar definition, and not a limited subset.

However, this clashes with the prefatory clause. As noted above, the “militia” typically consisted of those citizens deemed fit for military service (healthy males between certain prescribed ages). But, “the people”, as understood and defined by Scalia, is a phrase that doesn’t connote a subset. It includes all citizens, not just those eligible for militia service. This would seem to provide a logical problem to work through; Scalia dances around the issue a bit later in
the opinion. He essentially dismisses the argument of the prefatory clause as limiting by returning to the history of the Amendment. *Id* at 595-8 (citing *US v. Miller*, 307 US at 179 (1939)). Scalia notes two interesting parts of the context. First, it was historic practice for tyrants to eliminate “the militia” of “the people” by disarming individuals, and not by banning the concept of the militia. In Scalia’s interpretation, this is negative reinforcement of an idea of individual rights; if the idea of keeping and bearing arms was collective, tyrants would have simply banned the militia. *Id* at 599.

Next, Scalia observes that in the ratification debates, the right to bear arms as an abstract concept was never debated; the debate was over whether that right had to be codified or not. This is the crux of how Scalia dismantles the opposition. The right to bear arms was codified to protect the citizen militia, but it was not limited to the right to bear arms in the common defense. Rather, it was understood that personal arms would be used for self-defense and hunting as well, but those inherent rights did not have to be codified to be protected from government interference. *Id* at 599-600. He bolstered this argument by raising a number of contemporaneous state amendments concerning the right to bear arms; these states clearly, to Scalia, based these rights on an individual, and not a collective, scheme.

Scalia spends a number of pages and much ink on his historical reinterpretation; in summary, he sides with those who view the historical record as supporting an individual right, emphasizing its inclusion in the English Bill of Rights, the frontier spirit of early America, and the William Blackstone idea of “ancient rights”. *Id* at 600-19. What is perhaps most interesting and powerful about this case is that the majority does not overturn any of the precedence we discussed earlier. Even though these were undoubtedly unfavorable to his opinion, Scalia manages to make them work for his case here. *US v. Cruikshank*, the case where Ku Kluxers
disarmed blacks, must have been about an individual right: “There was no claim in Cruikshank that the victims had been deprived of their right to carry arms in a militia; indeed, the Governor had disbanded the local militia...that discussion makes little sense if it is only a right to bear arms in a state militia.” Id at 620. He similarly dismisses any negative value in Presser v. Illinois and US v. Miller, with the latter case merely standing for the provision that certain weapons, like certain types of speech are excepted from the First Amendment, are excepted from Second Amendment protection. Id at 622-3. Scalia spends the rest of the opinion dismantling the arguments in the dissent. This is not important to our understanding of the case. What is relevant here is that the Court affirmed, on precedent, the individual rights interpretation, the Court of Appeals decision, and struck down both the handgun ban and the law requiring firearms in the house be kept inoperable.

This case is vital to understanding McDonald. Scalia’s opinion here represents a fundamental reinterpretation of the Second Amendment. While his understanding of the relevant history can be debated, it is important to note that the decision carries the weight of precedence. The Court demolishes and dismisses arguments that the Second Amendment connotes a collective right, or the right of a state to form a militia. Since it is individual, it can now be incorporated as a right against the states.

**McDonald: Incorporation of the Right to Bear Arms**

This case arose after Heller when Chicago, Illinois, residents filed suit in Federal court seeking to overturn a handgun ban and firearm ownership ban in the City of Chicago as a violation of the individual right to bear arms. The suit was filed in the District Court for the Northern District of Illinois. The plaintiffs, including Otis McDonald, wanted to own weapons for personal protection in their homes. McDonald et al v. City of Chicago, 130 S.Ct. 3020, 3027
That court rejected the plaintiff’s arguments that the laws in question were unconstitutional, relying on a case which upheld a handgun ban twenty five years prior and the fact the *Heller* court had expressly not addressed the question of incorporation as it related to the Second Amendment. *Id* at 3028 (2010). The Seventh Circuit Court of Appeals affirmed the lower ruling, based on the reasoning in *Cruikshank*, *Presser*, and *Miller*; it noted that without Supreme Court guidance on the matter, it could not rule on the incorporation of the right to bear arms under the Fourteenth Amendment, only that precedent required them to uphold the statutes.

The Supreme Court opinion, authored by Justice Alito, determined a number of issues in the case. This is where I begin my analysis of whether the right to bear arms is a fundamental one for purposes of determining if strict scrutiny should be applied.

The McDonald plaintiffs raised two points in their pleading: 1) the right to bear arms was a Privilege and Immunity of US citizenship and so was applicable to the states under that provision of the Fourteenth Amendment, or in the alternative 2) the Due Process clause “incorporated” the Second Amendment to the states. The City of Chicago and Oak Park, the co-defendants, argued that a right in the Bill of Rights could be applied to a state only if that right was indispensable to “any” ordered society; since there are many legitimate ordered societies with strict gun laws or outright bans, the right to bear arms cannot be considered fundamental to “any” ordered society. *Id*.

The Court dismisses the assertion of the right to bear arms as a “privilege or immunity” of citizenship. A full description of when a right is a “Privilege or Immunity” is an interesting discussion but is beyond the scope of this paper; it suffices for my purpose that the Court dismissed the privileges and immunities argument.
They begin their analysis of the case at hand under the Due Process clause. First, the Court noted that different cases had different interpretations of what the boundaries of due process incorporation were:

“For example, in Twining, the Court referred to “immutable principles of justice which in here in the very idea of free government which no member of the Union may disregard.” 211 U.S., at 102, 29 S.Ct. 14 (internal quotation marks omitted). In Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934), the Court spoke of rights that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” And in Palko, the Court famously said that due process protects those rights that are “the very essence of a scheme of ordered liberty” and essential to “a fair and enlightened system of justice.” 302 U.S. at 325, 58 S.Ct. 149. Id at 3032 (2010).

The Court’s reasoning was dependent on the right in question; regardless, the Court noted that the modern test was one of “selective incorporation”, which explicitly abandoned the idea of rights only being incorporated if they were fundamental to “any” ordered society. Instead, the Court places emphasis on “our” history of ordered liberty. Id at 3034.

The decision on whether the right, in full measure, is incorporated against the states rests on whether the right to bear arms is considered fundamental to American liberties; as noted above, and recognized here by the Court, Heller answers that question in the affirmative. The right met the previous constructions of due process analysis, particularly being “rooted” in our history and traditions. The Court revisited the early history of the Amendment and affirmed the interpretation of the Heller court. Id at 3038-3041.

It also brought up the debates surrounding the Fourteenth Amendment, noting that the right to bear arms, as an individual right, was intended as part of the writing of that Amendment. The idea in the debates was to give recently freed blacks a way to defend themselves from those who would seek to take their newly acquired freedoms. Id at 3041-2 (quoting 39th Cong. Globe 1182). The Court also noted that a majority of the states, 22 of 37, had amendments in their
constitutions protecting the right to bear arms. Based on this interpretation, the historical record weighs heavily on the side of the right to bear arms as fundamental to “our” system of liberty.

The Court easily dismissed the argument of the City of Chicago, arguing that their stance would require the Court to fly in the face of incorporation precedent. Essentially, every one of the respondents’ arguments would require the Court to treat the Second Amendment as somehow fundamentally different than the other Amendments of the Bill of Rights; the Court refuses to do this on account of the implications for every right to have to undergo a new test. They raise an illustrative point: if, as respondents insist, the only incorporated rights are those that are necessary in any ordered society, then the right to trial by jury and other criminal protections also have to go out the window, since there are ordered societies which exist without these rights. Id at 3045. The argument concerning public safety was similarly dismissed as irrelevant and unconvincing. Id at 3046.

The Court determined that, as a fundamental right “deeply rooted in our nation’s history and tradition”, the right to bear arms was incorporated under the Due Process clause of the Fourteenth Amendment. Id at 3050. While this would seem to settle the issue, Justice Alito’s opinion did not carry a full majority. The decision to incorporate under the Due Process Clause only carried a plurality; Justice Thomas, in his concurring opinion, agreed with incorporation but argued that the Privileges and Immunities doctrine, which Alito declined to revisit, was the appropriate incorporation method. This creates some complications both in terms of establishing a precedent and in terms of determining a standard of review.

First, neither Thomas’ concurrence nor Alito’s plurality opinion lays down a specific standard of review. It was enough for both that the laws in question, on their face, failed to pass the most deferential Constitutional muster; an unconstitutional law cannot survive even rational
basis review. What is key here, though, is what is agreed on by both Thomas and Alito: the right to bear arms is “fundamental” to an American system of ordered liberty. Id at 3024-5. Even though it is not specifically addressed here, it was noted above that rights considered fundamental by the court, specifically those rights deeply rooted in this nation’s history and tradition, are protected by strict scrutiny. Also as noted above, rights receiving strict scrutiny protection are also typically incorporated under either the Equal Protection or the Due Process provision of the Second Amendment.

**Lower Court Disagreement: Judge Skretny and the NY SAFE Act**

However, the above evidence makes relatively little practical difference. Until a standard is articulated by the Supreme Court, lower courts can exercise some level of discretion. This opens the door for a number of potentially unconstitutional infringements by lawmakers and the courts. A particularly interesting case study arises in New York State.

Governor Andrew Cuomo, in response to the tragic shooting at Sandy Hook Elementary School in Connecticut, drafted and passed legislation under the title “New York Secure Ammunition and Firearms Enforcement Act” (NY SAFE Act). The Act was passed in January 2013 and is considered one of the toughest gun laws in the country. Greenberg et al, “New York Practice Series, Criminal Law” 6 NY Prac., Criminal Law §33.1 (3d ed). The legislation included a number of provisions designed to limit the effects of gun violence and the ability of criminals to illegally obtain guns. First, mental health professionals in New York are required to report a patient they believe to be dangerous to himself or others to local mental health agencies; the patient is then checked against an updated gun registration database (also mandated under the SAFE Act), and if the patient possesses a licensed firearm, that license can be suspended and the weapon seized. Id. The SAFE Act also greatly expands the definition of what constitutes an
assault weapon, and bans those weapons. It also, until Judge Skretny’s decision below, prohibited high capacity magazines, defined as magazines fitting more than seven rounds. Assault weapons grandfathered in must be registered with the state police and that registration must be renewed every five years; the same is required for handgun permits. Id. There were a number of issues with the SAFE Act; however the more politicized issues do not concern this paper. The assault weapons ban, however, is a direct infringement on the Second Amendment, and so created an opportunity to test the legal waters and see what courts would consider permissible under the decision in McDonald.

The Opinion

The first such case arose in the Western District of New York. In a suit brought by the New York State Rifle and Pistol Association and its co-plaintiffs, the District Court was asked to consider the SAFE Act and determine its constitutionality. Both sides in the case moved for summary judgment, which is an argument that the law is clear and the opposing side’s argument cannot be sustained. In an opinion authored by Judge Skretny, most of the SAFE Act withstood constitutional scrutiny. New York State Rifle And Pistol Ass’n v. Cuomo, --F.Supp.2d--, 2013 WL 6909955 (WDNY, 2013). The key here is the standard of review. Skretny articulates the standard of review as one which requires a law to be substantially related to an important governmental interest; this combination, as noted above, is known as intermediate scrutiny.

It is important to understand why Judge Skretny arrived at this conclusion. Without guidance from the Supreme Court in Heller, Skretny looked to the Second Circuit jurisprudence on the matter. He found two cases to be enlightening.

First, he read US v. Decastro, a 2011 case; the Second Circuit was ruling on the constitutionality of a law (18 USC §922) which prohibited anyone except licensed firearms
dealers from transporting a weapon to their state of residence if the weapon was purchased outside that state. The Second Circuit, in that case, found that the law was permissible under a Second Amendment analysis. 682 F.3d 160 (2d Cir., 2011). This had to do with how the Second Circuit described the standard of review:

“[W]e do not read [Heller] to mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny. Rather, heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in Heller) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes).” Decastro, 682 F.3d at 166 (2d Cir., 2011).

To Skretny, the above passage, and the case in general, stood for the proposition that heightened scrutiny was reserved only for those laws which substantially burden the Second Amendment right, which he believed to be in line with Heller.

Kachalsky v. County of Westchester challenged a New York provision requiring those applying for a concealed carry permit to demonstrate “proper cause” to obtain a permit. 701 F.3d 81 (2d Cir. 2012). That court ruled that, unless a law burdened the core right of self-defense “within the home”, a standard less than strict scrutiny as appropriate. Since the “proper-cause” requirement only applied to concealed carry permits, and not to ownership of a gun within the home, the Kachalsky court felt that the law did not burden the actual right described by the Heller court. The “proper cause” requirement survived under the intermediate standard exercised by that court.

The issues in the reliance on these cases will be addressed below. Based on this precedent, Judge Skretny articulates a three part test to determine if a case has standing and how to review it: 1) Is the weapon regulated in common use for lawful purposes, 2) do any provisions of the act in question substantially burden the second amendment right, and 3) if any do, what is the standard of review? In terms of the SAFE Act, Skretny determined that the AR-15 model
rifles and other assault weapons banned satisfy the first two prongs of the test. He notes the
debate between the two sides, but falls on the side of the weapon’s popularity as a target shooting
and hunting weapon in making this determination. NYS Rifle and Pistol Ass’n, 2013 WL at 11.
He comes to the same conclusion on high-capacity magazines. Skretny then, relying on the
Second Circuit opinions above, determines that intermediate scrutiny is appropriate here. In his
own words, under this analysis, the fit need not be perfect; it just has to be substantially related to
achieving the important government interest. Since the goal of public safety is generally a
compelling, not just important, governmental interest, New York met its burden on that half of
the intermediate scrutiny test. Skretny then determined that, based on the New York legislature’s
reliance on relevant evidence, the removal of “assault weapons” from the state was substantially
related to this interest. Id at 17.

Analysis

There are, I feel, a number of glaring issues in this opinion. However, it is not entirely
Judge Skretny’s fault. As a District Court judge, he is bound by the precedent set by the Second
Circuit above him. If one were to assume that the Second Circuit is correct in its interpretation of
Heller, then Judge Skretny’s opinion is absolutely correct. However, this is simply not the case.
Further, Judge Skretny makes some rather interesting leaps in logic to make his point that fail to
hold up. These will be discussed below. First, it is important to address the mistaken reliance on
the second Circuit and its faulty interpretation of Heller. It begins with the assumption that the
Second Circuit makes. The decision to justify intermediate scrutiny is based on what the dissent
in Heller says is implicit in the majority: by admitting certain regulations to stand, the Court
necessarily implied that strict scrutiny would be inappropriate for all gun regulations. NYS Rifle
and Pistol Ass’n. 2013 WL at 12 (WDNY, 2013). This misconstrues strict scrutiny and the Heller majority.

First, it is illogical to assume that the Court intended to only protect the core of a fundamental right with intermediate scrutiny; an allowance for certain regulations is not equivalent to a lesser level of protection. Let us return to the analogy that is popular with courts when defending a lesser heightened scrutiny for the Second Amendment: the varying protection of the First Amendment.

“When considering restrictions that implicate the First Amendment, strict scrutiny is triggered only by content-based restrictions on speech in a public forum. By contrast, content-neutral restrictions that affect only the time, place, and manner of speech trigger a form of intermediate scrutiny. See Hobbs v. Cnty. of Westchester, 397 F.3d 133, 149 (2d Cir. 2005); see also Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 791, 114 S.Ct. 2516, 2537, 129 L.Ed.2d 593 (1994) (Scalia, J.) (concursing in part and dissenting in part) (intermediate scrutiny “applicable to so-called ‘time, place, and manner regulations’ of speech”).” NYS Rifle and Pistol Ass’n, 2013 WL at 13 (WDNY 2013) (parenthetical in original).

The First Amendment distinction is understood and well-settled in case law. Laws may not restrict a person’s speech, but may regulate how, when, or where they exercise that speech; an easy conceptual example is that you cannot ban someone from shouting “fire”, but you may ban them from yelling “fire” in a crowded theater. What Judge Skretny finds is that the assault weapons ban here is similar to a “time, place, and manner” restriction because it leaves open “ample alternate channels” for the exercise of the right to bear arms. Id at 12-3 (WDNY, 2013). Specifically, an assault weapons ban does not also ban handguns, rifles, and shotguns, and thus does not impermissibly burden the core of the Second Amendment. This position is logically inconsistent with both his earlier finding in the case and the analogy.

Judge Skretny, for purposes of the opinion, declared that the “assault weapons” as defined by the SAFE Act are, in fact, “…in common use for lawful purposes” so as to fall under
the description of weapons protected under the Second Amendment. Further, he states that the SAFE Act, by banning these weapons, places a substantial burden on the practice of the Second Amendment right to bear arms. This is the logic he uses to determine that the SAFE Act assault weapons ban satisfies the first two prongs of his test. Id at 9-12 (WDNY, 2013). But then, in beginning the analysis of his third prong, he turns around and says that, despite the fact that these weapons fall squarely under Second Amendment protection as defined in Heller, banning them is permissible.

Judge Skretny believes this follows from the Heller decision which stated that certain permissible regulations on weapons would stand. This is true and fair to the Heller court’s reasoning. Heller, 554 US at 626-7 (2008). Immediately after saying this, however, Judge Skretny jumps from the language of the Heller court (“regulatory measures”) to arguing that this allows outright bans. That is a heroic leap of logic. The kinds of permissible regulatory measures in Heller included bans on weapons not in common use for lawful purposes and handgun registration schemes. But nowhere in that case is there any basis for the idea that a ban of a weapon in common use for lawful purposes is justified, as Skretny says. NYS Rifle and Pistol Ass’n, 2013 WL at 13 (WDNY, 2013). In fact, Scalia specifically rejects the idea that a weapon can be banned because other weapons are available: “It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed.” Heller, 554 US at 629 (2008) (parentheses in the original).

This partly derives from the reasoning in Kachalsky, above. But that reasoning itself was inherently flawed. First, it is a case which is distinguishable from the present case on its face. That case dealt with the concealed carrying of handguns. No part of the suit against Gov. Cuomo alleged that the State of New York was depriving the plaintiffs of their constitutional right to
carry assault weapons concealed. Rather, the suit is about simple possession of these weapons for
the legal purposes enumerated by Judge Skretny: target-shooting, hunting, and home based self-
defense. The SAFE Act, in fact, impinges the “core” right that the law in Kachalsky never
touches.

Second, the emphasis on intermediate scrutiny in Kachalsky flows from the passage
below. This is just after the Second Circuit determined that heightened scrutiny was required, but
that strict scrutiny was too much:

“Thus, our role is only ‘to assure that, in formulating its judgments, [New York] has
drawn reasonable inferences based on substantial evidence’…Unlike strict scrutiny
review, we are not required to ensure that the legislature’s chosen means is “narrowly
tailored” or the least restrictive available means to serve the stated governmental interest.
To survive intermediate scrutiny, the fit between the challenged regulation need only
be substantial, ‘not perfect’…” Kachalsky, 701 F.3d at 97 (2d Cir., 2012) (italics and
underline added).

The Second Circuit has claimed that it has enacted an intermediate scrutiny scheme here, but is
actually enacting a tough rational basis review. Remember that a rational basis review is a level
of scrutiny where the court will not overturn a law that is rationally connected to a legitimate
governmental interest. “Reasonable inferences” based on “substantial evidence” is a nonsense
phrase that means the court will defer to the legislature so long as the court can see how the
legislature would have made the inference it did. This would seem to not be heightened scrutiny
at all, only rational basis review masquerading as intermediate scrutiny. Thus, reliance on this
case by Judge Skretny, in a case where he has articulated the need for heightened scrutiny on a
law substantially burdening the Second Amendment, is a highly questionable decision.

The First Amendment analogy as the courts try to make it further illustrates the
absurdity of the argument. Skretny equates the assault weapons ban to a first amendment “time,
place and manner”, content-neutral ban. But this makes little sense given Judge Skretny’s
argument on the nature of assault weapons in Second Amendment jurisprudence. Assuming they are, as Skretny does, in common use for lawful purposes, and that those are the weapons which Heller determined the Constitution afforded special protection, then a ban of them is not at all similar to a content neutral restriction. By infringing one of the weapons subject to Second Amendment protection, the ban is more similar to a ban on a popular but dangerous opinion. This helps to clarify the argument, and why the courts never finished the analogy. Just like it is no argument to ban an opinion because there are “ample” other opinions to have, it is no argument to ban a whole class of permissible weapons just because there are other weapons available.

**Conclusion**

The arguments presented here are not meant to inflame political passion on either side of the aisle. What I have done is taken as balanced a look as possible at the mechanics of Supreme Court decision making and the reasoning behind the use of varying levels of means-ends analysis to establish where questions surrounding the Second Amendment have to begin. With the evidence above, it becomes fairly clear that strict scrutiny, at least for weapons in common use for lawful purposes, has to be the baseline. The fear behind subjecting gun control laws to strict scrutiny stems from the idea that strict scrutiny is “strict in theory, but fatal in fact”. It is commonly believed that the Supreme Court and Federal courts generally only apply strict scrutiny to laws they want to invalidate. This is due to the high level of tailoring that a law must have to pass; it has to be narrowly tailored and necessary to achieve a compelling state interest. However, this fear is unfounded. State governments are generally assumed to have a compelling interest in public safety. The only thing a state needs to show is that the law is necessary and narrowly tailored to achieve that interest.
Under the decision in *Heller*, the Court essentially “pre-cleared” reasonable permit or registration requirements that do not impede the use of or access to firearms. Further, laws which ban things like submachine guns, mortars, and tanks for civilians are allowable as well, since the controlling language of *Miller* is that the weapons which fall under the strongest protection are those in common use for lawful purposes (self-defense, target shooting, and hunting). *Heller* also makes clear that felony regulation of weapons is allowable as well, meaning that a convicted felon cannot just go out and buy an arsenal of weapons. These are all reasonable and well-tailored restrictions which would pass strict scrutiny. However, outright bans on protected classes of weapons do not meet this threshold. While the government has an interest in public safety, it never has an interest in denying its citizens the legitimate exercise of their rights. The NY SAFE Act, I argue, is an example of an overbroad law that puts too heavy a burden on the right to bear arms.

This paper is only the beginning of an extended discussion on Second Amendment jurisprudence. Further writings will address proper statutory construction, the issues of gun violence in America, and potential solutions which would not infringe the right to bear arms. Further research will also try to narrow and consolidate a list of what weapons are considered “in common use for lawful purposes”. What I have established here is that the courts cannot treat the right to bear arms differently than any other fundamental right. Going back to the First Amendment analogy, there are certain classes of weapons and certain use of those weapons than can be banned without crossing the Constitution, just as there are restrictions that can be placed on speech and conduct. But the Second Amendment has to be respected as a fundamental right first before courts begin to carve it apart; like the First Amendment, the “core” of the Second Amendment must be afforded the highest protection. The problem of gun violence in America is
a real issue, and the recent shooting tragedies show that we as a nation need to do something to fix the problem of violence in this country. But we as a nation also cannot allow ourselves to throw away fundamental liberties out of fear. The Constitution is designed to be amended. If the right to bear arms is “outdated”, as many insist, then we can amend the Constitution and adjust the right. But until then, legislatures and courts cannot be allowed to overstep their bounds in restriction of fundamental rights.
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